

## ESSAY

# NOTICE, CONSENT, AND NONCONSENT: EMPLOYEE PRIVACY IN THE RESTATEMENT

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Privacy claims necessarily entail two determinations. First, the domains protected by privacy must be identified. What spaces, thoughts, or data are legally protected as “private?” Second, what does it mean when something is within a domain protected as private? What limitations does that impose on others (in our case, principally on employers)? To what extent can the privacy holder consent to waive his or her privacy protections?

Both of these determinations are especially fraught when the issue is *employee* privacy. In the employment setting, the employer exercises a lot of control over the domains that might be protected by privacy and much of that control is entirely justifiable. The employer might have security reasons for searching employees as they enter or leave the workplace, productivity reasons for eavesdropping on employees as they work, and so on. On the other hand, employees should not have to give up all expectations of privacy when they enter the workplace. Similarly, when a domain is identified as private, employers often have a lot of authority to influence employees to waive their protections. An employer that says “consent to this drug test or find another job” can be quite persuasive.<sup>1</sup> Traditionally, consent has been a complete defense to a privacy claim,<sup>2</sup> but consent in the workplace is very problematic.

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<sup>1</sup> See, e.g., *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App. 1989) (holding that an employer’s drug-testing program that required employees to consent to a drug test or lose their job was legal and enforceable).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 652F cmt. a (1977) (describing defenses to privacy claims and stating that the absolute defense of consent applicable in defamation actions applies to privacy claims); *id.* § 583 (stating that consent is an absolute defense to a defamation claim and incorporating general rules of consent as a defense to tort claims); *id.* §§ 892–892D (stating general rules of consent as a defense to tort claims). See also the classic article on privacy by the principal author of the Restatement (Second) of Torts, William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 419 (1960) (“Chief among the available defenses is that of the plaintiff’s consent to the [privacy] invasion, which will bar his recovery as in the case of any other tort.”).

The Restatement of Employment Law had to address these difficult problems, and it had to do it in the face of a jurisprudence that is vague, uncertain, and muddled.<sup>3</sup> That type of jurisprudential landscape is fertile ground for a Restatement which, if convincing, can shape the debate and guide development of the law.<sup>4</sup> One of the American Law Institute's self-stated goals is to provide "clearer and more coherent" statements of the law than currently exist "while subtly transforming it in the process."<sup>5</sup> At the same time, however, the landscape is treacherous, firm footholds are hard to find, and missteps can cause avalanches that are difficult to predict or control.

In this Essay, I focus on three dimensions of employee privacy in the Restatement.<sup>6</sup> First, I will discuss the role of notice in identifying the domains protected by privacy. Notice is a concept that is taken seriously in the Restatement, both in the privacy section and elsewhere.<sup>7</sup> The defining feature of notice is that it does not require any employee recognition or acquiescence (and certainly not consent in any real sense).<sup>8</sup> Thus, it is a particularly powerful tool for employers. Second, I will discuss the Restatement's treatment of employee consent. Traditionally, consent is treated as a complete defense to an alleged privacy intrusion,<sup>9</sup> but that is not how it is treated in the Restatement. Instead, consent is only one of many factors used in a balancing test to determine whether a privacy invasion is highly offensive. Third, I will discuss the Restatement's treatment of an employee's refusal to consent to a privacy intrusion. A perplexing problem in employee privacy arises when an employer honors an employee's nonconsent and does not invade the employee's privacy,

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<sup>3</sup> Privacy jurisprudence has undoubtedly progressed since 1956, when Chief Judge Biggs famously described it as similar to "a haystack in a hurricane." *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956). But the wind is still pretty stiff.

<sup>4</sup> See AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 5 (revised in part 2015) [hereinafter HANDBOOK] ("A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.").

<sup>5</sup> *Id.* at 4.

<sup>6</sup> Chapter 7 of the Restatement is divided into two topics: privacy and autonomy. This article considers only the privacy sections of Chapter 7.

<sup>7</sup> See RESTATEMENT OF EMP'T LAW §§ 2.05, 2.05 cmt. b, 2.06, 2.06 cmt. e, 7.06 cmt. g (2015). Note that while the black-letter language of section 2.05 is limited to notice that provides limits on the employer's power to terminate employees, other sections and the comments speak more broadly of the power of notice. See, e.g., *id.* § 2.05 cmt. b (stating that notice can bind employers regarding "operational personnel decisions"); *id.* § 2.05 Reporters' Notes to cmt. a (stating that notice can establish binding employer obligations); *id.* § 2.06 (stating that notice rules apply to "binding policy statements"); *id.* § 2.06 cmt. e (stating that notice applies to "personnel policy" statements).

<sup>8</sup> See *infra* note 50 and accompanying text.

<sup>9</sup> This is the rule under the Restatement (Second) of Torts, see *supra* note 2, and under the major privacy statutes. See *infra* note 45.

but instead fires the employee for failing to consent. On the one hand, this cannot be a privacy invasion because none has occurred. On the other hand, something serious seems amiss. The Restatement addresses this issue explicitly by making it illegal for an employer to discharge an employee for failing to consent to a wrongful privacy intrusion.<sup>10</sup>

In Part I, I begin by discussing the general structure of privacy protection in the Restatement. The structure unpacks and repacks the relevant issues in innovative and interesting ways. Then in Parts II, III, and IV, I discuss notice, consent, and nonconsent, respectively.

## I

### THE STRUCTURE OF PRIVACY PROTECTION IN THE RESTATEMENT

The Restatement proposes a three-step analytical structure for considering employee-privacy claims. In general terms, the analysis begins by articulating a set of employee-privacy interests,<sup>11</sup> and then the next two steps progressively narrow the set to a much smaller subset that is legally protected. Under the second step, not all employer infringements on employee-privacy interests constitute “intrusions”;<sup>12</sup> under the third step, only those intrusions that are highly offensive are legally cognizable.<sup>13</sup>

The Restatement sets out four categories where employees have protected privacy interests:

- 1) The employee’s physical person, bodily functions, and personal possessions.<sup>14</sup>
- 2) Physical and electronic locations in which the employee has a reasonable expectation of privacy.<sup>15</sup>
- 3) Information of a personal nature which the employee has made reasonable efforts to keep private.<sup>16</sup>
- 4) Information about the employee provided to the employer in confidence.<sup>17</sup>

It is interesting that the first of these does not require any showing of an expectation of privacy, which is traditionally required.<sup>18</sup> section 7.03(a)(1) says that an employee has a protected privacy interest in his or her “physical person, bodily functions, and personal posses-

<sup>10</sup> RESTATEMENT OF EMP’T LAW § 7.07 (2015).

<sup>11</sup> See *infra* notes 14–17 and accompanying text.

<sup>12</sup> See *infra* notes 30–39 and accompanying text.

<sup>13</sup> See *infra* notes 40–41 and accompanying text.

<sup>14</sup> RESTATEMENT OF EMP’T LAW §§ 7.02(a), 7.03(a)(1) (2015).

<sup>15</sup> *Id.* §§ 7.02(a), 7.03(a)(2), 7.03(b).

<sup>16</sup> *Id.* §§ 7.02(b), 7.04(a).

<sup>17</sup> *Id.* §§ 7.02(c), 7.05(a).

<sup>18</sup> *Id.* §§ 7.02(a), 7.03(a)(1); see *infra* note 57.

sions,” period (or at least semicolon).<sup>19</sup> This conspicuously contrasts with section 7.03(a)(2), which by its terms protects physical and electronic locations only when the employee has a reasonable expectation of privacy, and with categories three and four above, which each contain a close analogue to the “reasonable expectation of privacy” requirement.<sup>20</sup>

The list of protected privacy interests does not include the most modern—and perhaps most threatening—challenges to privacy: data mining and aggregation.<sup>21</sup> The possibilities of employer use and misuse of “big data” are enormous. For example, employers may be able to use publicly available information (consumer-marketing data, credit reports, etc.) to predict drug use,<sup>22</sup> health status or risk of injury,<sup>23</sup> pregnancy,<sup>24</sup> and a host of other things. The possibilities are growing and scary.<sup>25</sup> The Restatement rejects consideration of this type of interest in a single sentence: “[D]ata mining may be less of a concern in the employment context, as the employer already has access to a wealth of information about its employees due to the nature of the relationship.”<sup>26</sup> But, of course, the information from data min-

<sup>19</sup> RESTATEMENT OF EMP’T LAW § 7.03(a)(1) (2015). For discussion of this point, see *infra* note 57.

<sup>20</sup> RESTATEMENT OF EMP’T LAW § 7.03(a)(2) (2015). Section 7.04 protects personal information only if the employee has taken reasonable efforts to keep it private, while section 7.05 only protects information that has been provided to the employer in confidence. See *infra* notes 55–56. Both imply that the employee would have a reasonable expectation of privacy.

<sup>21</sup> See, e.g., VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 150–52 (2013) (discussing the dangers of aggregating “big data”).

<sup>22</sup> See, e.g., Sean D. Young et al., *Methods of Using Real-Time Social Media Technologies for Detection and Remote Monitoring of HIV Outcomes*, 63 PREVENTIVE MED. 112, 114 (2014) (describing how social-media analysis can be used to detect drug use leading to HIV).

<sup>23</sup> See Leslie Scism & Mark Maremont, *Insurers Test Data Profiles to Identify Risky Clients*, WALL ST. J. (Nov. 19, 2010, 12:01 AM), <http://www.wsj.com/articles/SB100001424052748704648604575620750998072986> (discussing an insurer that uses consumer-marketing data such as financial indicators and website usage to predict the risk of illnesses such as high blood pressure, diabetes, and depression).

<sup>24</sup> See CHARLES DUHIGG, *THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS* 182–97 (2012) (discussing how Target developed pregnancy predictions, including due dates, based on consumer behavior, and recounting a story of the father of a teenage girl who was surprised to learn from Target marketing that his daughter was pregnant).

<sup>25</sup> The distinguished sociologist Edward Shils called the last quarter of the nineteenth century the “golden age of privacy,” not because privacy was well protected legally or by custom, but rather because the technology for intrusive threats to privacy—like polygraphy, psychological screenings, and Facebook—had not yet been developed. Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281, 292–93 (1966); see also Matthew W. Finkin, *Privacy: Its Constitution and Vicissitudes—A Half Century On*, 18 CANADIAN LAB. & EMP. L.J. 349, 356–60 (forthcoming 2015). Although no one will look back at today and think of this as a golden age of privacy, big data portends the same quantum leap in privacy threats as earlier waves of technological development.

<sup>26</sup> RESTATEMENT OF EMP’T LAW § 7.04 Reporters’ Notes to cmt. d (2015).

ing and aggregation may be used to sort through applicants as well as employees, and the presence of other data seems unrelated to this particular privacy concern. For example, an employer who worries about privacy claims over a drug test may instead seek the same information through data aggregation. The privacy concerns may be the same, but an employee could challenge only the drug test as a privacy violation under the Restatement. Despite that, however, consideration of data mining and aggregation as a potential privacy claim would have opened up a Pandora's box of difficult issues: how to define the protected interest when the data is public (how much aggregation needs to occur before a privacy interest arises), how to provide notice (or consent) when even the employer may not know all the possible uses for a data set, and more.<sup>27</sup> Although the Restatement did not state it this way, this may be a situation where the reporters were following Justice Kennedy's admonition to move cautiously when thinking about the "implications of emerging technology before its role in society has become clear."<sup>28</sup> If that was the case, however, it probably would have been better to leave a bigger crack in the door for later consideration and development of this important set of privacy interests.<sup>29</sup>

The second step of the analysis specifies when employers "intrude" on these privacy expectations. The intrusion requirement operates differently across the different privacy interests. For the first two categories of privacy interests, the employee's physical person and the employee's location, the intrusion requirement imposes no limit on the scope of the privacy interest.<sup>30</sup> Some specific types of employer activities are listed as intrusions, but their scope is broad and they are not exclusive.<sup>31</sup> On the other hand, an employee's privacy interests in personal and confidential information are significantly constrained by the intrusion requirement.<sup>32</sup> An employer would not intrude on an

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<sup>27</sup> Mayer-Schönberger and Cukier discuss several problems that big data presents to the predominant consent regime in privacy law: (1) collectors do not always know the uses for the data being collected, so informed consent at the time of collection is difficult; (2) failing to give consent may leave a problematic trace (e.g., opting out of Google mapping will leave a blank or blur on the map); and (3) anonymizing data does not work very well because multiple data points facilitate identification. MAYER-SCHÖNBERGER & CUKIER, *supra* note 21, at 152–57.

<sup>28</sup> City of Ontario v. Quon, 560 U.S. 746, 759 (2010).

<sup>29</sup> One option for leaving a bigger crack in the door would have been to say nothing about it one way or the other, rather than to reject it so summarily. Another option would have been to note that data mining and aggregation may present privacy concerns but, channeling Justice Kennedy, that it is too early in the technology's development to address them in the Restatement.

<sup>30</sup> RESTATEMENT OF EMP'T LAW § 7.03(c) (2015).

<sup>31</sup> See, e.g., *id.* ("An employer intrudes upon an employee's protected privacy interest under this Section by such means as an examination, search, or surveillance . . . .")

<sup>32</sup> *Id.* §§ 7.04(c), 7.05(c).

employee's privacy interest in personal information if the employee voluntarily gave the personal information to the employer,<sup>33</sup> the employer's disclosure was legally required,<sup>34</sup> or the information was relevant to the employer's business needs<sup>35</sup> and customarily required by such employers.<sup>36</sup> Since there would be no intrusion in those circumstances, the Section would permit an employer to gather (and presumably use and disseminate) the personal information freely.<sup>37</sup> Similarly, for confidential information, no intrusion would occur if the information is disclosed with the employee's consent<sup>38</sup> or if the employer is compelled by law to disclose it to a third party.<sup>39</sup>

The third step of the analysis identifies the subset of employer intrusions that is legally cognizable. Only highly offensive intrusions fall into this category, and "highly offensive" is defined as intrusions where the "nature, manner, and scope"<sup>40</sup> of the intrusion are clearly

<sup>33</sup> This is true both because voluntary relinquishment would mean that the employee had not taken reasonable efforts to keep it private, as required by section 7.04(a), and because the employer intrudes only if it gets the information through an employer requirement. *Id.* §§ 7.04(a), (c).

<sup>34</sup> *Id.* §§ 7.04(c) (i), 7.05(c).

<sup>35</sup> *Id.* §§ 7.04(c) (ii), 7.05(c). For information of a personal nature, an employer's business interests would be relevant at two points in a privacy analysis: (1) in determining whether there is an intrusion, *id.* § 7.04(c) (ii), and (2) in determining whether the intrusion was highly offensive, *id.* § 7.06(b). Thus, an employer has an opportunity to double-dip on its business justification by claiming, first, that the justification means there is no intrusion at all and, second, even if there is an intrusion, the justification means that it is not highly offensive. But there are subtle and interesting differences between the two. For example, section 7.04(c) (ii) refers to an employer's "business needs," while section 7.06(b) refers to an employer's "legitimate business interests." Are "needs" different than "interests?" Can "business needs" exist under section 7.04(c) (ii) even if they are not "legitimate?" Or does "need" imply that legitimacy is required? Is "customarily required by employers" in section 7.04(c) (ii) intended to do the same work as "legitimate" in section 7.06(b), or are the words intended to suggest different analyses? Could an employer prove a business justification under section 7.06(b) after failing to prove one under section 7.04(c) (ii), or vice versa? Unfortunately, the Restatement does not explore the relationship between these two closely related inquiries or explain why these differences exist.

<sup>36</sup> *Id.* § 7.04(c) (ii).

<sup>37</sup> This would not be the case if the information falls into the narrower category of personal information provided in confidence. *See id.* § 7.05. That narrower category might encompass legally required personal information but would not seem to include voluntarily provided personal information or personal information relevant to business needs and customarily required.

<sup>38</sup> *See infra* notes 106–13 and accompanying text.

<sup>39</sup> RESTATEMENT OF EMP'T LAW §§ 7.04(c) (i), 7.05(c) (2015).

<sup>40</sup> *Id.* § 7.06(b). Presumably, the "and" in this sentence should be an "or"; the comments indicate that an "or" is intended. *Id.* § 7.06 cmt. e ("An employer's intrusion upon an employee's privacy interests can vary by the nature of intrusion itself, or its manner or scope, or both."). *Id.* § 7.06 cmt. f ("If the scope of an intrusion extends beyond the purpose of the intrusion in terms of the employer's legitimate business interest, the intrusion is unjustified."). "Or" was also used in prior drafts. RESTATEMENT (THIRD) OF EMP'T LAW § 7.06(c) (Preliminary Draft No. 8, 2011).

unreasonable when judged against the public interest or the employer's legitimate business interests.<sup>41</sup>

This general structure is unusual in two respects. First, in identifying what employee-privacy interests are protected, the structure separates into three distinct steps what is often mushed together as one step. Consider, for example, the way in which the Restatement of Torts defines intrusion upon seclusion: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his [or her] private affairs or concerns, is subject to liability to the other for invasion of his [or her] privacy, if the intrusion would be highly offensive to a reasonable person."<sup>42</sup>

The Restatement explicitly disaggregates this into three separate analyses: (1) does a privacy interest exist, (2) did the employer intrude on it, and (3) was the employer's intrusion highly offensive? A significant benefit of this disaggregation is that, in contrast to the Restatement of Torts, it emphasizes that there are privacy interests that ought to be respected and require attention, even if they do not rise to a level currently meriting legal protection.<sup>43</sup> Over time, it may be that these "lesser" privacy interests will mature into legally protected ones as employers develop practices and customs that protect them and, as a result, nudge intrusions toward unreasonableness.

A second notable feature of the Restatement's overall structure is its treatment of consent. The Restatement treats consent as only one of many factors that are weighed to determine offensiveness, rather than as an important and separate step of the analysis. Consider again the Restatement of Torts, which recognizes that consent is a complete defense to a privacy claim.<sup>44</sup> The major privacy statutes also recognize that disclosures of otherwise private information can be made with consent.<sup>45</sup> In sharp contrast, the Restatement recognizes consent in its black-letter language in only one narrow circumstance: section 7.05(b) says that an employer does not intrude on an employee's pri-

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<sup>41</sup> RESTATEMENT OF EMP'T LAW § 7.06(b) (2015).

<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>43</sup> See, e.g., Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1932-38 (1996) (arguing that some workplace rules are better treated as unenforceable norms than as legally enforceable requirements).

<sup>44</sup> See *supra* note 2.

<sup>45</sup> See, e.g., Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(2)(B) (2012) (stating that disclosure of personally identifiable information regarding video rentals is permitted with consumer consent); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §§ 1232g(b)(1), (b)(2)(A), (d) (2012) (stating parents or students may consent to release of educational records); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-5(b)(1) (2012) (stating that genetic information can be disclosed with employee or labor union member consent); U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 9 (2003) (stating that protected health information can be disclosed with patient consent).

vacancy interest in confidential information if the employee has consented to disclosure.<sup>46</sup> For everything else, consent is not explicitly mentioned as a defense at all. Instead, it is mentioned only in the comments as one consideration in determining whether a privacy intrusion would be highly offensive.<sup>47</sup>

This unusual treatment of consent is one of the central concerns of this Essay.<sup>48</sup> But I am going to consider the issue of notice first.

## II NOTICE

Notice is a particularly powerful tool for employers, and it is given a big role in the Restatement.<sup>49</sup> Notice is particularly powerful because it is one sided; the employer provides notice, and employee agreement or even acquiescence is not required.<sup>50</sup> To the extent notice is readily available as a tool to narrow privacy interests, employers have great latitude. At the same time, notice plays an important role in privacy analysis. Employment privacy is, of course, highly contextual and varied. Security checks make sense before and after work

<sup>46</sup> RESTATEMENT OF EMP'T LAW § 7.05(b) (2015).

<sup>47</sup> *Id.* § 7.06 cmt. h.

<sup>48</sup> *See infra* Part III.

<sup>49</sup> *See, e.g.*, RESTATEMENT OF EMP'T LAW § 2.06(a) (2015) (stating that giving notice allows the employer to modify or revoke prior binding employer policy statements); *id.* § 3.04(a) (stating that giving notice allows the employer to modify or revoke prior promises or policy statements on compensation).

<sup>50</sup> Assuming or continuing employment after notice is sometimes treated as acquiescence or even as implied consent. *See id.* § 7.06 cmt. h (“By taking a type of employment with notice of the lowered expectations as to privacy, the employee effectively consents to the reasonable requirements of the position, which may entail a reduced expectation of privacy.”); *see also* Roberto Fragale Filho & Mark Jeffrey, *Information Technology and Workers’ Privacy: Notice and Consent*, 23 COMP. LAB. L. & POL’Y J. 551, 551 (2002) (stating that notice is sometimes treated as implied consent but arguing that is an improper conflation of the two concepts). I set that argument aside. The test of whether employee consent or acquiescence plays any role in a notice scheme would be whether an employee could avoid the effect of the notice by expressly disclaiming consent or acquiescence to the notice in any way other than refusing the job or quitting. For example, could the employee avoid an employer’s no-privacy notice by issuing his or her own notice saying he or she does not accept or acquiesce to it? The Restatement is clear that this would not be possible. RESTATEMENT OF EMP'T LAW § 2.06(b) cmts. d–e (Proposed Final Draft 2015) (stating that notice merely needs to “alert” employees to any change; employees who continue to work “are deemed to have ‘accepted’ the change”). The notice power is for employers to exercise unilaterally; employee acceptance or nonacceptance is irrelevant. To be sure, the rule that quitting is the only way to withdraw consent to a privacy-limiting notice is odd: the privacy intrusion can be avoided (albeit at a high cost) but the employee privacy right cannot be protected. The rule also seems in some tension with section 7.07, which tries to protect employees from just such an impossible choice between protecting a privacy right and unemployment. *Id.* § 7.07. For a particularly devastating critique of presumed employee consent to employer-privacy intrusions, see Matthew W. Finkin, *Employee Privacy and the “Theory of the Firm,”* 26 J. LAB. RES. 711, 714–15 (2005). For an insightful but more general critique of treating notice as consent, see MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 93 (2013).



at prisons but less so at law schools. Close monitoring of physical conditioning makes sense for fitness trainers at a health club but less so for clerical workers.<sup>51</sup> Notice permits employers to tailor privacy policies for their particular workplace and provides warning to applicants and employees about what to expect. Thus, some deference to notice seems proper and necessary.

The Restatement approach to notice has two dimensions. First, the ability to calibrate privacy through notice is limited to three categories where a reasonable expectation of privacy is in play: an employer can use notice to limit privacy with respect to physical and electronic locations<sup>52</sup> and with respect to confidential information not protected by law,<sup>53</sup> categories where there might or might not be reasonable expectations of privacy.<sup>54</sup> On the other hand, an employer cannot use notice to limit privacy with respect to information of a personal nature<sup>55</sup> or information required by law to be confidential.<sup>56</sup> Similarly, the structure of the Restatement suggests that an employer cannot use notice to limit privacy with respect to an employee's physical person, bodily functions, and personal possessions.<sup>57</sup> For these

<sup>51</sup> See Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 707 (1996).

<sup>52</sup> RESTATEMENT OF EMP'T LAW § 7.03(a)(2) (2015) (noting that employees have a privacy interest in locations only if there is a reasonable expectation of privacy).

<sup>53</sup> *Id.* §§ 7.05, 7.05 cmt. b (stating that an employee has a privacy interest in information if the employer has promised to maintain confidentiality or law requires confidentiality).

<sup>54</sup> I discuss the role of notice in these categories below. See *infra* notes 63–70 and accompanying text.

<sup>55</sup> See RESTATEMENT OF EMP'T LAW § 7.04 (2015) (stating that a privacy interest exists if the information is of a personal nature and the employee has taken reasonable steps to keep it private). Interestingly, the expectation of privacy here is created through the employee's actions in keeping the information private, rather than through any employer actions or promises.

<sup>56</sup> See *id.* § 7.05 cmt. b (stating that there is a privacy interest in information if the employer has promised to maintain confidentiality or law requires confidentiality). Here, the expectation of privacy is created by law, which eliminates the employer's ability to override it by notice.

<sup>57</sup> Section 7.03(a)(1) says flatly that employees have protected privacy interests in these three categories without any mention of reasonable expectations, and that statement contrasts sharply with the very next subsection, where privacy interests exist in locations only if employees have reasonable expectations of privacy. *Id.* §§ 7.03(a)(1)–(2). Although section 7.03(a)(1) seems clear on this, the issue is muddled by section 7.02 and comment *a* to section 7.03. *Id.* §§ 7.02, 7.03 cmt. a. Section 7.02 introduces these three interests with language that is less straightforward: it provides that protected privacy interests include “the privacy of the employee's person (including *aspects* of his physical person, bodily functions, and personal possessions).” *Id.* § 7.02(a) (emphasis added). The penultimate and earlier drafts of the Restatement did not include this “aspects” qualifier. See RESTATEMENT (THIRD) OF EMP'T LAW § 7.03(a)(2) (Proposed Final Draft, Apr. 8, 2014). This new language implies that some “aspects” of an employee's person, bodily functions, and personal possessions are not protected privacy interests, but the Restatement provides no guidance on what aspects might or might not be protected. Perhaps the reporters are suggesting that “aspects” are protected only if the employee has a reasonable expectation

categories, expectations of privacy are conclusively presumed, so an employer cannot use notice to limit them.

Limiting the ability of employers to constrict privacy through notice in these categories makes sense, with one exception. For information of a personal nature, the privacy expectation is created through the employee's efforts to keep the information private, rather than through any employer actions or promises;<sup>58</sup> employer notice is irrelevant. For information that is required by law to be confidential, it would be odd to permit employers to override the law through notice.<sup>59</sup> And an employee's interest in the privacy of his or her physical person and bodily functions accords with widely shared social norms in our society;<sup>60</sup> thus, it seems reasonable to assume, even conclusively, an expectation of privacy. But the assumption is questionable when the Restatement applies it to personal possessions. Under this assumption, any employer that conducts a standard security check would intrude on its employees' privacy interests, regardless of factors such as the employer's reason for the check, the notice provided to employees, or the regularity of the practice. On the one hand, this probably does not matter since the employer would ordinarily be able to prove that it was acting reasonably (or at least not "clearly unreasonably").<sup>61</sup> On the other hand, as I mentioned above, one of the

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of privacy with respect to them, but then one would have expected that language to be used, especially since it is used in the same section to limit employee privacy interests in physical and electronic locations. As drafted, there is no guidance on how the reporters intend the "aspects" limitation to apply. Similarly, section 7.03 comment *a* says that "[i]f the employee has a reasonable expectation of privacy as to her person, physical functions, personal possessions, or particular locations," then an employer search would constitute an intrusion. RESTATEMENT OF EMP'T LAW § 7.03 cmt. *a* (2015). Note that the reporters probably meant "physical person" and "bodily functions," since those were the terms used in the black-letter statements. Thus, this comment is in tension with the language of the black-letter statements that do not contain such a "reasonable expectation" qualifier. Despite this muddiness, my best guess is that the Restatement intends a mandatory presumption of privacy expectations for these three categories; otherwise one would be required to read the more specific and direct statement of the privacy interest in section 7.03(a)(1) to mean something other than what it says. If this interpretation is correct, employer notice would be insufficient to defeat privacy interests in an employee's physical person, bodily functions, and personal possessions.

<sup>58</sup> See *supra* notes 16, 55 and accompanying text.

<sup>59</sup> See *supra* note 56 and accompanying text.

<sup>60</sup> See, e.g., Anita Allen, *Privacy and Medicine*, STAN. ENCYCLOPEDIA PHIL. (last revised Feb. 28, 2011), <http://plato.stanford.edu/entries/privacy-medicine/> (discussing norms of physical privacy in the medical context).

<sup>61</sup> Although recognizing this as a privacy interest may not cause problems under privacy law, it may have knock-on effects elsewhere. For example, under the Portal-to-Portal Act of 1947, activities preliminary and postliminary to commencing work must be compensated if they are for the employer's benefit. 29 U.S.C. § 254(a)(2) (2012); 29 C.F.R. §§ 785.24–25 (2014). Thus, to avoid a Fair Labor Standards Act claim, employers often claim that security checks are not for their benefit. But if the security checks intrude on a privacy interest, then employers must prove a business justification to avoid privacy liability. See RESTATEMENT OF EMP'T LAW § 7.06 cmt. *h*, illus. 15 (Proposed Final Draft 2015). So

benefits of the Restatement's recognition of a set of privacy interests broader than those that are legally protected is to enhance and support developing privacy norms.<sup>62</sup> When the broader set is off base, as this one seems to be, it undermines that possibility. Thus, permitting an appropriate form of employer notice to limit employee privacy interests in personal possessions probably would have made sense.

The other dimension of the Restatement's treatment of notice is the set of rules that applies when notice *is* available to constrict employee privacy interests—most importantly, to narrow employee expectations of privacy in physical and electronic locations.<sup>63</sup> The privacy section of the Restatement has one reference to notice in its black-letter provisions: section 7.03(b)(1) says that employees have a privacy interest when an employer provides “notice that the location or aspects of the location are private for employees.”<sup>64</sup> Fair enough.<sup>65</sup> But what happens when the opposite occurs; when the employer provides express notice that a location is *not* private? Similarly, what happens when an employer revokes a prior express notice of privacy protection?

The Restatement's black-letter language is silent on these issues. But the comments say that a no-privacy notice will “generally” mean that there is no expectation of privacy.<sup>66</sup> The only exception mentioned is when the employer's actual practices contradict the no-privacy notice.<sup>67</sup> Other than that limitation, neither the black-letter law nor the comments hint at any limit on the employer's freedom to create no-privacy zones through unilateral notice. The privacy sec-

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under the Restatement's conceptualization of this type of privacy interest, employers will be put to the choice of admitting a privacy violation or paying up. *See* Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 518–20 (2014) (holding that prework security checks are not compensable because they were not integral and indispensable to the employee's principal work activities).

<sup>62</sup> *See supra* note 43 and accompanying text.

<sup>63</sup> *See* RESTATEMENT OF EMP'T LAW § 7.03 Reporters' Notes to cmt. a (2015) (“[T]he intrusion into physical or electronic locations is the most prototypical privacy invasion. When we think of privacy, we tend to think of private areas such as one's home, a bathroom, or a closed office.”).

<sup>64</sup> *Id.* § 7.03(b)(1).

<sup>65</sup> One wonders if symmetry would require a privacy notice to be disregarded if the employer's actual practices were in conflict with the notice. For example, would there be a privacy expectation if the employer had a privacy notice in its handbook but openly and regularly monitored the telephone conversations of its customer service representatives? The Restatement says that no-privacy notices should be disregarded in the face of conflicting practices. *Id.* § 7.03 cmt. j. The Restatement does not address whether this rule is symmetrical.

<sup>66</sup> *See id.* § 7.03 cmts. f, j (stating that a no-privacy notice generally means no expectation of privacy); § 7.03 cmt. h, illus. 8, cmt. j, illus. 11–12 (giving illustrations where a no-privacy notice means no expectation of privacy).

<sup>67</sup> *See id.* § 7.03 cmts. j–k, cmt. k, illus. 13 (stating that a no-privacy notice means no expectation of privacy unless contrary practices occur).

tion of the Restatement is also silent on what should happen when an employer revokes a prior notice of privacy protection. But the Restatement's prior treatment of notice says that employer promises provided through unilateral notice can be withdrawn unilaterally if adequate notice is provided.<sup>68</sup> Restatements strive to be internally consistent,<sup>69</sup> so these general rules would also seem to apply to privacy. In sum, the Restatement permits employers to narrow employee privacy interests through no-privacy notices so long as they do not contradict their own practices, and it permits employers to withdraw notices of privacy protection if they provide adequate warning about the withdrawal.<sup>70</sup>

These rules afford employers great discretion to expand or restrict employee privacy through notice. There is little doubt that employers will use this discretion mostly to limit employee-privacy expectations.<sup>71</sup> An open question, however, is whether the rules will also encourage employers to enforce privacy-narrowing notices more vigorously. Under the Restatement, the only limit on the effect of no-privacy notices is conflict with actual practice.<sup>72</sup> Thus, the Restatement reinforces the incentives employers have to issue no-privacy notices and then to make sure that employees enjoy little privacy in practice.<sup>73</sup>

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<sup>68</sup> See *id.* § 2.06 (stating that otherwise binding policy statements can be modified or revoked through reasonable advance notice). Section 2.06(c) lists exceptions to unilateral withdrawal, but they would not apply to a privacy notice. *Id.* § 2.06(c).

<sup>69</sup> See HANDBOOK, *supra* note 4, at 2 (stating that ALI projects should be “not only internally consistent but consistent with each other”).

<sup>70</sup> The autonomy section is a bit vague, but it also seems to adopt this version of notice. RESTATEMENT OF EMP'T LAW § 7.08(b) (2015). The comments to that section say that the parties “impliedly agree” to the autonomy protections in the section, but they can be altered by express agreement of the parties. *Id.* § 7.08 cmt. f. It seems likely that employers would also be able to announce antiautonomy policies through unilateral notice, as contemplated by section 2.06, although the reference to “express agreement” leaves this somewhat uncertain. *Id.* § 2.06. The condition for no-privacy notices that the employer's actual practices conform to the notice is not mentioned in the comment about antiautonomy notices. *Id.* § 7.08 cmt. f.

<sup>71</sup> AM. MGMT. ASS'N, 2007 ELECTRONIC MONITORING & SURVEILLANCE SURVEY 2 (2007) (noting that 84% of employers inform employees that they review computer activity; 71% inform employees that they monitor e-mails). The worry that notice will be overused to limit privacy rights is a traditional one that extends well beyond employee privacy. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (noting that if notice could be used to mold expectations of privacy, the government could diminish Fourth Amendment rights “merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance”).

<sup>72</sup> See *supra* note 67 and accompanying text.

<sup>73</sup> The incentive to issue no-privacy notices is especially strong because notice can also play a role later in the analysis in determining whether an employer's intrusion is highly offensive. RESTATEMENT OF EMP'T LAW § 7.06 cmt. g (2015) (stating that employer notice “helps inform the employee's reasonable expectations as well as the reasonableness of the employer's actions”). The interaction between the roles of notice in these two separate

This treatment of notice is quite ironic. The rest of the privacy section is very worried about employers abusing their authority, and rightly so. As I discuss later, consent is largely excised from the Restatement because of this worry.<sup>74</sup> And yet, one gets to consent only if there is a privacy interest in the first place, and the rules about notice mean that employers have considerable discretion to narrow and even eliminate those interests. Close monitoring of consent to ensure that employees can protect their privacy interests matters only when employees have privacy interests worth protecting in the first place.

But what were the alternatives to this generous treatment of notice? One alternative would be to go as far as some to say that an employee's privacy interests should not be defined or limited at all by an employer's notices, or even its practices. As one court put it:

[A]n employer may not, simply by announcing in advance that all employees will be subject to periodic strip searches, thereby defeat the employees' otherwise reasonable expectation that such searches will not occur. *Governing social norms, not the specific practices of an individual [employer], define whether a plaintiff has a reasonable expectation of privacy.*<sup>75</sup>

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issues (whether there is a reasonable expectation of privacy versus whether an intrusion is highly offensive) is an interesting one, but it is not explored in the Restatement. All of the illustrations in the Restatement where this might have been explored are ones in which the answers on the two questions (the existence of an expectation of privacy and offensiveness) are the same. *Id.* § 7.06 cmt. g, illus. 10–13. The interesting cases would be ones where there are different answers at the two stages. Consider Illustration 12, which gets closest to considering the interesting issues:

E works as a security guard in an office building in which X is located. E often works on the night shift. M, a night manager at X, discovers that the locked file drawer on M's desk has been tampered with. M arranges with other X employees to conduct a video surveillance of M's desk at night. The video shows E tampering with M's desk. X had a substantial business-related justification for secret videotaping of M's office.

*Id.* § 7.06 cmt. g, illus. 12. This is in the section on offensiveness so, although the Illustration does not tell us this, it must be hinting that this intrusion is not highly offensive. But it does not address the interesting questions because it is possible that in this no-notice situation, E did not have an expectation of privacy in the office in the first place. But what would be the result if instead the employer provided a notice of privacy protection (thus creating an expectation of privacy), then violates it for this strong business reason (thus muddying the issue of whether the intrusion was highly offensive)? Would the notice then be effective in creating an expectation of privacy but not sufficient to defeat the claim that the intrusion was justified for business reasons and, hence, reasonable? Or maybe violation of the notice itself is sufficient to render the intrusion highly offensive? The Restatement does not tell us how to think about this kind of situation. Or consider a situation in which there is an explicit no-privacy notice which nevertheless did not undermine an employee's expectation of privacy (say, because of inconsistent practices). Would the notice nevertheless have the effect of rendering an employer's intrusion less than highly offensive? Again, the Restatement does not explore this or any of the other possible interesting interactions between the roles of notice in these two distinct issues.

<sup>74</sup> See *infra* notes 120-39 and accompanying text.

<sup>75</sup> *Hill v. NCAA*, 865 P.2d 633, 671 (Cal. 1994) (Kennard, J., concurring in part and dissenting in part) (emphasis added).

There is also academic support for this position; Pauline Kim, for one, believes that “[e]mployee claims to privacy . . . are not defined or limited by idiosyncratic practices in the particular workplace. Rather, the legitimacy of employee expectations of privacy depends upon broadly recognized social norms regarding privacy.”<sup>76</sup> Interestingly, early iterations of the privacy sections of the Restatement seemed to be headed in this direction. They were very explicit that reasonable employee expectations of privacy flowed from “background social norms.”<sup>77</sup> They did not permit employer notice to limit these background social norms at all; employee *agreement* might limit some (but not all) of them, but not unilateral employer action.<sup>78</sup> However, this approach was rejected early on,<sup>79</sup> and probably rightly so—it fails to recognize at all the valuable role of notice in privacy analysis.<sup>80</sup>

A narrower approach would have been to permit notice to play a role in shaping privacy expectations, but to provide constraints. Something like, “an employer cannot limit employee privacy through notice in ways that are not reasonably necessary to the workplace or that violate broadly held social norms.”<sup>81</sup> Currently, the Restatement recognizes an employer’s business interests as relevant to privacy analysis, but uses them as a one-way ratchet in favor of employers. Business interests permit employers to infringe on what would otherwise be privacy interests of employees.<sup>82</sup> Business interests could also have been used as a ratchet in the other direction—to limit otherwise unconstrained employer discretion to shape privacy expectations

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<sup>76</sup> Kim, *supra* note 51, at 709.

<sup>77</sup> RESTATEMENT (THIRD) OF EMP’T LAW § 5.03 cmt. h (Preliminary Draft No. 2, 2004) (stating that, with some exceptions, “whether an employee has a reasonable expectation of privacy will typically turn on background social norms”); RESTATEMENT (THIRD) OF EMP’T LAW § 5.03 cmt. i (Preliminary Draft No. 3, 2005) (same).

<sup>78</sup> RESTATEMENT (THIRD) OF EMP’T LAW § 5.04 (Preliminary Draft No. 2, 2004) (stating that some privacy interests cannot be abrogated by notice or agreement; other types may be abrogated only by agreement); RESTATEMENT (THIRD) OF EMP’T LAW § 5.03 cmt. i (Preliminary Draft No. 3, 2005) (stating the same).

<sup>79</sup> RESTATEMENT (THIRD) OF EMP’T LAW § 7.04 cmt. d (Preliminary Draft No. 6, 2009) (stating that general community standards about expectations of privacy “are relevant in close cases but do not ordinarily override the actual understandings of the individual employees and employers”).

<sup>80</sup> See *supra* notes 49–51 and accompanying text; cf. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 109 (2008) (discussing societal norms in the Fourth Amendment context and noting that “[t]he virtue of the ‘social expectations’ approach is that it avoids circularity. The vice is that it yields no answers”).

<sup>81</sup> Finkin proposes a similar limiting principle to restrict employers’ ability to strip away employee autonomy interests. Finkin, *supra* note 25, at 376 (an employer may not restrict employee autonomy unless the restriction “is justified by the nature of the work and is proportionate to that purpose”).

<sup>82</sup> Section 7.04 says that requiring disclosure of personal information is not an intrusion if it is “relevant to the employer’s business needs.” RESTATEMENT OF EMP’T LAW § 7.04(c) (2015). Section 7.06 allows an employer’s “legitimate business interests” to be weighed as a factor in determining offensiveness. *Id.* § 7.06(b).

through notice. Similarly, the ability of employers to narrow privacy expectations through notice could have been constrained by imposing limits on what qualifies as appropriate notice. For example, the Restatement could have indicated that notice is effective in limiting privacy only if it meets certain form and timing requirements or only if it applies clearly and specifically to the claimed privacy intrusion.<sup>83</sup> The Restatement did not explore these possibilities for limiting employer notice.<sup>84</sup>

In sum, the Restatement establishes two notice categories. In one category, employer notices to narrow privacy expectations are disregarded.<sup>85</sup> For the most part, the Restatement correctly identifies those areas: information of a personal nature, information required by law to be confidential, and matters relating to an employee's physical person and bodily functions.<sup>86</sup> The Restatement also includes an employee's personal possessions in this category; disregarding notice there is a more questionable call.<sup>87</sup> For the other category—which includes the most common privacy situations—the Restatement is less than clear but appears to provide employers with largely unconstrained discretion to limit employee-privacy expectations through notice.<sup>88</sup> Courts and commentators generally recognize that there should be limits, so these rules were not required by current case law, and I expect courts will, when necessary and appropriate, continue to develop and apply limits.<sup>89</sup> But the Restatement's opaqueness represents a lost opportunity. The Restatement could have provided much better guidance to the courts (and employers) about the appropriate

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<sup>83</sup> For examples of cases where notice was held insufficient because it was not specific enough, see *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1077–78 (Cal. 2009), *National Economic Research Associates, Inc. v. Evans*, 21 Mass. L. Rptr. 337, 339 (Super. Ct. 2006), and *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010).

<sup>84</sup> Some limitations could be constructed by analogy to the limits on revocation or modification of binding employer policy statements in section 2.06, but those limits do not apply cleanly to employer privacy notices. RESTATEMENT OF EMP'T LAW § 2.06 (2015). Late in the process, the reporters took a small step in this direction: in February 2015, they added a sentence after a comment that says employer notice will generally defeat reasonable expectations of privacy. The new sentence says “[h]owever, expectations are not as sharply formed by notice that is not clear, definite, or explicit, or not close in time to the intrusion.” RESTATEMENT OF EMP'T LAW § 7.03 cmt. f (2015). This is probably a step in the right direction, but it is only a small step. For example, it does not say that notice must be clear, definite, explicit, and contemporaneous to be effective; so presumably, notice that fails one or more of those criteria may still defeat an expectation of privacy. Indeed, the sentence could be interpreted to cut in the wrong direction since it implies that only “sharply formed” privacy expectations are entitled to protection.

<sup>85</sup> See *supra* notes 55–57 and accompanying text.

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 57 and accompanying text.

<sup>88</sup> See *supra* notes 63–65 and accompanying text.

<sup>89</sup> See, e.g., *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 660–65 (N.J. 2010) (recognizing that employers may have the right to monitor workplace computers, although reasonable expectations of privacy may fluctuate based on circumstances).

role for notice in this class of privacy claims. Now the courts will mostly have to muddle through on their own.

### III CONSENT

A privacy regime would be incoherent if it did not provide an adequate account of the role of consent.<sup>90</sup> Within the domain protected by privacy, the thing protected is the individual's authority to consent or to withhold consent.<sup>91</sup> Permitting consent recognizes the individual's right to express intimacy and offer invitations into protected spaces.<sup>92</sup> In authorizing the individual to withhold consent, privacy expresses society's respect for an individual's control over central aspects of his or her existence.<sup>93</sup> Many—perhaps most—discussions of privacy include a statement like this about what Heidi Hurd calls “the moral magic of consent”<sup>94</sup>: If there is consent, a rape is no longer a rape, but lovemaking; a theft is no longer a theft, but a gift; a battery is no longer a battery, but surgery, or sports, or massage.<sup>95</sup>

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<sup>90</sup> See 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW, OFFENSE TO OTHERS* 24 (1985) (“The root idea . . . of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. Within this area, the individual person is—pick your metaphor—boss, sovereign, owner.” (citation omitted)).

<sup>91</sup> See, e.g., *id.*; ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (5th ed. 1968) (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”); Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY* 56, 56–70 (J. Roland Pennock & John W. Chapman eds., 1971) (describing violations of autonomy as violations of privacy); Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968) (privacy . . . is the *control* we have over information about ourselves.”); Richard B. Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275, 281 (1974) (defining privacy as “control over when and by whom the various parts of us can be sensed by others” (emphasis omitted)).

<sup>92</sup> See Fried, *supra* note 91, at 482–85.

<sup>93</sup> See, e.g., Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 *GEO. WASH. L. REV.* 165, 169 (2007) (“The ability to consent is recognized in moral philosophy as a central manifestation of personhood and individual autonomy.”); Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 *BROOK. L. REV.* 781, 781 (2009) (“The role of consent within tort law derives from the value of individual autonomy or self-determination.”).

<sup>94</sup> Heidi M. Hurd, *The Moral Magic of Consent*, in 2 *LEGAL THEORY* 121, 121 (1996).

<sup>95</sup> Leo Katz, *Choice, Consent, and Cycling: The Hidden Limitations of Consent*, 104 *MICH. L. REV.* 627, 628 (2006); see also Hurd, *supra* note 94, at 123 (“[C]onsent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.”).



Consent, of course, is ubiquitous in employment law<sup>96</sup> and in the law generally.<sup>97</sup> But consent is especially important within a privacy regime because consent is the good produced and protected by privacy.<sup>98</sup> The law may deprive employees of the right to consent to especially low wages or dangerous workplaces,<sup>99</sup> but those infringements on consent are different than limits on the ability of employees to consent in privacy cases. In those other cases, even if an employee would consent, other interests are being protected, such as decent wages or safety.<sup>100</sup> With privacy, in contrast, the only good being protected is the employee's ability to consent or not to consent. Failing to respect true employee consent in privacy cases undermines the very interest privacy is intended to protect.<sup>101</sup>

This is not to suggest at all that consent within a privacy regime is an easy issue. Sometimes respecting an employee's interest in consent may conflict with important dignity interests,<sup>102</sup> sometimes it may im-

<sup>96</sup> See RICHARD CARLSON & SCOTT A. MOSS, *EMPLOYMENT LAW* 13 (3d ed. 2013) (“[C]ontract remains the primary basis for determining the terms and conditions of employment . . . .”); Steven L. Willborn, *Consenting Employees: Workplace Privacy and the Role of Consent*, 66 LA. L. REV. 975, 992 (2006) (“Employees consent to receive certain wages, to changes in their health care packages, to their hours and working conditions, to everything.”).

<sup>97</sup> See, e.g., PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 293–94 (2004) (noting that “‘consent’ is a major concept by which we organize and express our normative judgments of the world” and, as such, it ranks in importance with concepts such as justice, equality, freedom, property, and responsibility).

<sup>98</sup> Privacy is a broad concept and its precise parameters are hotly contested; for a good exploration, see generally DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008). Under some definitions of privacy, consent is more problematic and less central. See MAYER-SCHÖNBERGER & CUKIER, *supra* note 21, at 152–57 (discussing how consent is problematic as applied to data mining and aggregation). But the Restatement limits its consideration to the common-law tort of privacy and, in that area, consent plays a central role. As the text indicates, the good produced and protected by the common-law tort of privacy is the authority of the rightsholder to consent or not to consent. See *supra* note 93. This is confirmed in the Restatement of Torts, which recognizes consent as an absolute defense. See *supra* note 2. For a similar approach to the concept of privacy as applied to employment, see Kim, *supra* note 51, at 698–709.

<sup>99</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (holding that the Constitution permits limitations to freedom of contract when such contracts affect the community, health, and safety).

<sup>100</sup> *Lochner v. New York*, 198 U.S. 45 (1905), can be viewed through this lens. See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) (suggesting that *Lochner* was wrong not because it recognized the important value of employee freedom of contract—ability to consent—but because it failed to recognize the complexities of balancing that right against other important interests).

<sup>101</sup> For more discussion of this point, see Willborn, *supra* note 96, at 994–96.

<sup>102</sup> In a much-discussed example, the Conseil d'État in France and the U.N. Human Rights Committee upheld on dignitarian grounds a ban on “dwarf-tossing” (a competition in which men competed to see how far they could throw small people wearing a harness with a handle on the back) even though the dwarves consented to the practice. See Human Rights Committee, *Manuel Wackenheim v. France*, Comm. No. 854/1999, para. 7.4, U.N. Doc. CCPR/C/75/D/854/1999 (2002). For discussions of dignitary interests, see gener-

pose harm on third parties,<sup>103</sup> and sometimes Congress may have determined that other interests outweigh the employee's privacy interest.<sup>104</sup> Perhaps most importantly, monitoring the voluntariness of consent within an employment relationship is very difficult. Employers have many options for influencing or even coercing employee consent.<sup>105</sup> For all these reasons, dealing with consent in the employment setting is difficult and challenging.

Despite the central importance of consent, the Restatement's approach to it is mostly one of benign neglect. Certainly, it fails to grapple with the difficult issues consent presents. As with notice, the Restatement's black-letter principles make only one reference to consent. Section 7.05(b) suggests that an employer does not intrude upon an employee's privacy interest in confidential information if it makes a disclosure with the employee's consent.<sup>106</sup> But even this explicit reference to consent is coated in vagueness. The only reference to consent in the comments to section 7.05 says that "[t]he employee's consent to the disclosure is *ordinarily* a sufficient reason to render the [intrusion] *reasonable*. However, consent obtained by threat of discharge or other discipline does not constitute consent to the employer's intrusion."<sup>107</sup>

Several aspects of this are odd. First, the black-letter language suggests that obtaining the employee's consent would mean there is no intrusion at all.<sup>108</sup> So one would think the first sentence should say consent ordinarily means there is no intrusion, not that there was an intrusion that was reasonable. Reasonableness only enters the equation later, after an intrusion.<sup>109</sup> Second, consent will only "ordinarily"

ally Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2011), and Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). See also Kent Greenawalt, *Dignity and Victimhood*, 88 CAL. L. REV. 779, 781 (2000) (stating that "slavery is a wrong even if it is not experienced as negative by the slave and even if the slave maintains a substantial amount of de facto autonomy" because it infringes on dignity).

<sup>103</sup> See *infra* notes 160–65 and accompanying text. But see Willborn, *supra* note 96, at 998–1001 (arguing that the harm to third parties constitutes an interest outside the privacy regime).

<sup>104</sup> See Willborn, *supra* note 96, at 1000–01.

<sup>105</sup> See Kim, *supra* note 51, at 717–20 (noting that because of the potential for employer coercion, consent is especially problematic when applied to employee-privacy claims); cf. Beth Hawkins & Andrew Harris, *Honeywell Blocks EEOC Move to Halt Wellness Penalties for Now*, INS. J. (Nov. 4, 2014), <http://www.insurancejournal.com/news/national/2014/11/04/345837.htm> (discussing an employer-wellness program that requires employees to consent to health tests, including blood tests, or be assessed a \$500 surcharge for their medical plan, lose up to \$1,500 in employer contributions to health savings accounts, and be charged up to \$2,000 in tobacco surcharges).

<sup>106</sup> RESTATEMENT OF EMP'T LAW § 7.05(b) (2015).

<sup>107</sup> *Id.* § 7.05 cmt. d (emphasis added).

<sup>108</sup> *Id.* § 7.05(b).

<sup>109</sup> Whether the consent negates an intrusion or constitutes unreasonableness is important, as the former seems to be a single-factor toggle switch while the latter involves a

be a defense. What are the conditions under which it wouldn't be? Obviously, coerced consent would not justify a disclosure, but that means there is no consent at all. The "ordinarily" language seems to signal circumstances in which real consent still wouldn't be sufficient. But the Restatement gives no hint of what those circumstances might be.<sup>110</sup> Third, assuming that the black-letter language means what it says and an employer can disclose confidential information with the employee's consent,<sup>111</sup> why is consent a defense only here and not elsewhere? Is privacy with respect to confidential information less important than privacy with respect to personal information<sup>112</sup> or locations? Is consent likely to be more reliable here? The Restatement makes no attempt to explain or justify this differential treatment of consent.

Section 7.05's black-letter treatment of consent covers only confidential information. For everything else, comment *h* to section 7.06 specifies the role for consent in privacy analysis: it is one of the factors for determining whether an intrusion is highly offensive.<sup>113</sup>

Three aspects of this treatment of consent are noteworthy. First, comment *h* meshes awkwardly with the black-letter rule it is describing. Section 7.06(b) says an intrusion is highly offensive if it is "clearly unreasonable when judged against the employer's legitimate business interests or public interests."<sup>114</sup> As described in the comments,

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balancing process in which consent could be overridden by other factors. *See supra* note 10 and accompanying text. But as I have noted, the Restatement is vague on which it intends. If consent is really intended to apply to intrusions, then the defense would seem to eliminate the need for section 7.06 for confidential information. RESTATEMENT OF EMP'T LAW § 7.06 (2015). If there is consent, there would be no intrusion and, hence, one would not reach section 7.06. On the other hand, if there is no consent and the employer discloses confidential information, it is hard to imagine the circumstance in which that would not be highly offensive.

<sup>110</sup> As noted below, there is no "ordinarily" in the consent defense to a privacy claim in the Restatement of Torts. *See infra* note 122 and accompanying text.

<sup>111</sup> The Restatement is not clear that an employee's true consent will be a defense. For example, it says that consent will "ordinarily" justify an intrusion. RESTATEMENT OF EMP'T LAW § 7.05 cmt. d (2015). This implies that there may be certain undefined circumstances in which true consent will not justify an intrusion. Similarly, as noted above, the comment hints that consent may go to whether the intrusion was reasonable rather than to whether there is an intrusion. Consent would clearly be a defense if it went to whether there was an intrusion, but it may not be if it goes to whether an intrusion is reasonable. *See supra* note 109.

<sup>112</sup> For nonconfidential personal information under section 7.04, the employee has a privacy interest only in information he or she takes "reasonable efforts to keep private." RESTATEMENT OF EMP'T LAW § 7.04(a) (2015). One could speculate that that requirement would not be met if the employee consented to the release of the information. On the other hand, consent is mentioned explicitly in section 7.05 with respect to confidential information and pointedly is not mentioned in section 7.04. *Id.* §§ 7.04, 7.05(b). Unfortunately, neither the black-letter language, the comments, nor the Reporters' Notes provide any guidance on this issue.

<sup>113</sup> RESTATEMENT OF EMP'T LAW § 7.06 cmt. h (2015).

<sup>114</sup> *Id.* § 7.06.

neither the employer's business interests nor the public interest cover employee consent.<sup>115</sup> As a result, while comment *h* clearly signals that consent is relevant to offensiveness, it is only loosely tethered to the black-letter rule of section 7.06.<sup>116</sup>

Second, as indicated earlier, the Restatement treats consent not as an independent and especially important factor in the privacy analysis but as one of many considerations to determine whether an intrusion is unreasonable.<sup>117</sup> This is in contrast to the Restatement of Torts<sup>118</sup> and much (maybe most) of the case law,<sup>119</sup> which treat consent as a stand-alone defense separate from the unreasonableness inquiry.

Third, consent is treated grudgingly even within the limited role it is accorded in the Restatement. Here is the complete comment to section 7.06 (not including the illustrations)<sup>120</sup> on the role of employee consent in determining whether an employer's privacy intrusion is highly offensive:

Consent is generally an absolute defense to intentional-tort claims. Restatement Second, Torts § 892A(1) ("One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting

<sup>115</sup> An employer's business interests are described as "genuine concerns that affect the employer's ability to conduct its business effectively." *Id.* § 7.06 cmt. c. The public interest is not described to capture any public interest in an employee's personhood or dignity (which might have encompassed consent), but rather as a category that captures interests in "reliable, safe delivery of services" that are similar to the employer's interests but somewhat broader. *Id.* § 7.06 cmt. d.

<sup>116</sup> Until relatively late in the drafting process, consent was in the black-letter rule as one of the explicit factors to consider to determine whether an intrusion was unreasonable. RESTATEMENT (THIRD) OF EMP'T LAW § 7.06(b)(4) (Preliminary Draft No. 8, 2011). But it was eventually dropped from that status. In the final version, consent was relegated to the comments and Reporters' Notes and, as indicated, only loosely tethered to the black-letter rule.

<sup>117</sup> RESTATEMENT OF EMP'T LAW § 7.06 cmt. h (2015).

<sup>118</sup> See *supra* note 2.

<sup>119</sup> See, e.g., *Lewis v. LeGrow*, 670 N.W.2d 675, 688 (Mich. Ct. App. 2003) ("Like other torts, there can be no invasion of privacy . . . if plaintiffs consented to defendant's intrusion . . ."); *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 160 n.5 (Cal. Ct. App. 2002) (noting that an employee's "consent [is] a complete defense to his invasion of privacy claim"); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 500 (Tex. App. 1989) (noting that an employee's consent "amounts to an absolute defense in any tort action").

<sup>120</sup> The illustrations are also not very helpful in addressing the hard issues presented by consent. Illustration 14 presents a situation of possible consent through an employee's acquiescence. RESTATEMENT OF EMP'T LAW § 7.06 cmt. h, illus. 14 (2015). That Illustration is modestly helpful in pointing out the limits of constructive consent, but it tells us nothing about the effect of true consent. Illustration 15 is about unilateral employer notice. *Id.* § 7.06 cmt. h, illus. 15. The illustration says that the notice "bolsters the reasonableness" of the employer's position, which it may. *Id.* § 7.06 cmt. h, illus. 15. But the illustration does not present a situation of true consent and, consequently, it also tells us nothing about that.

from it.”). However, in the employment context, employee consent obtained as a condition of obtaining or retaining employment is not effective consent to an employer intrusion and not in itself sufficient to provide a defense to wrongful intrusion under this Section.

Some types of employment involve reduced expectations of privacy, whether for reasons of safety, efficiency, or societal norms. By taking a type of employment with notice of the lowered expectations as to privacy, the employee effectively consents to the reasonable requirements of the position, which may entail a reduced expectation of privacy.<sup>121</sup>

The first sentence of this comment recognizes only grudgingly that consent is a defense to a privacy intrusion. It is worth noting that there is no “ordinarily” in the Restatement of Torts defense.<sup>122</sup> There, if there is consent, there is no tort. On the other hand, if there is no consent, then there is no defense. The Restatement of Torts provides guidance at some length on what constitutes effective consent.<sup>123</sup> The second sentence of the comment says nothing about the consequences of true consent. Instead, it says correctly that when consent is coerced by threat of discharge, it is not consent at all. In that situation there is no true consent so, of course, consent cannot be a defense. The Restatement of Torts says as much, while recognizing true consent as a defense.<sup>124</sup> The third and fourth sentences are not about consent at all, but rather about unilateral employer notice, which the Restatement makes clear does not require consent.<sup>125</sup> Those sentences are about whether there is an expectation of privacy when there is such notice, not about whether an employee consents to an intrusion of a privacy interest after one is recognized.<sup>126</sup> The most notable thing about the comment, however, is that it provides no guidance on the role of consent when an employee provides valid con-

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<sup>121</sup> *Id.* § 7.06 cmt. h.

<sup>122</sup> RESTATEMENT (SECOND) OF TORTS § 583 (1977) (stating that “consent . . . is a complete defense”). Section 583 states that consent is a complete defense to a defamation action; section 652F applies the same rules to privacy claims. *Id.* § 652F (“The rules on absolute privileges . . . stated in §§ 583 to 592A apply to the publication of any matter that is an invasion of privacy.”).

<sup>123</sup> *Id.* § 892 (defining consent); *id.* § 892A (discussing the effect of consent); *id.* § 892B (discussing the effect of mistake, misrepresentation, or duress on consent); *id.* § 892C (discussing the effect of consent to crime).

<sup>124</sup> *Id.* §§ 892B(3), 892B cmt. j.

<sup>125</sup> *See supra* notes 49–50 and accompanying text.

<sup>126</sup> Logically, an expectation of privacy must precede any consent to an intrusion. If there is no expectation of privacy, then there is no need for employee consent. The Restatement recognizes this elsewhere. RESTATEMENT OF EMP’T LAW § 7.03 cmt. f (2015) (“The employee either has reasonable expectations of privacy, and the analysis proceeds forward (to [section] 7.06), or the employee does not and the inquiry ends there.”). This type of confusion about notice versus consent is common. *See Filho & Jeffrey, supra* note 50, at 551–52 (saying that notice and consent are often conflated, especially in the context of accepting new employment).

sent to an intrusion of a protected privacy interest.<sup>127</sup> In that circumstance, is the consent a defense to the privacy claim or not? The Restatement of Torts thinks it should be.<sup>128</sup> Many courts think it should be.<sup>129</sup> I think it should be, because the nature of privacy necessarily entails control by the privacy holder.<sup>130</sup> But the Restatement does not provide a clear answer.

So what should one make of this grudging treatment of consent in the Restatement? Frankly, as a practical matter, it will probably not matter very much. I doubt the courts will care much that the lone comment on consent is only loosely tethered to the black-letter language of section 7.06, and I expect they will continue to treat consent as an especially important factor despite the Restatement's attempt to relegate it into a general balancing test.

But there is a minor practical loss and a more major philosophical one. The practical loss is one of lost opportunity. The Restatement could have provided guidance to the courts on how to evaluate consent. The Restatement of Torts provides a nice guideline; it recognizes that consent is a defense to a privacy tort but then provides considerable detail on when consent should be treated as valid.<sup>131</sup> This Restatement could have expanded on that approach and tailored it for application in the workplace. Christine Jolls, for example, has argued that both the case law and behavioral economics suggest that different weight should be placed on consent given contemporaneously with the privacy intrusion versus consent given in advance.<sup>132</sup>

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<sup>127</sup> This mushiness on consent is curious since the Restatement presents a toggle-switch approach to the issue of whether there are protected privacy interests. With respect to them, the Restatement says there are no shades of gray—either there is such a privacy interest or there is not. See *RESTATEMENT OF EMP'T LAW* § 7.03 cmt. f (2015). Such a toggle-switch approach would have been possible with consent. Indeed, since the Restatement is highly suspicious of consent, it could have made the toggle sticky on the nonconsent side. But recognizing that there are two possibilities (consent or nonconsent), and then stating the consequences of both, would have been preferable to fudging both in describing when consent is valid and what the consequences are if so.

<sup>128</sup> See *supra* notes 122–26 and accompanying text.

<sup>129</sup> Many cases recognize consent as a defense to a privacy claim. See, e.g., *Hill v. NCAA*, 865 P.2d 633, 637 (Cal. 1994) (holding that consent to drug-testing outweighs the student's expectation of privacy); *Doe v. Dyer-Goode*, 566 A.2d 889, 891 (Pa. Super. Ct. 1989) (holding that consent to a blood test and relinquishment of a blood sample invalidates a later claim of invasion of privacy when that sample is tested for HIV). There are also many cases which recognize that consent is a defense but find that no consent existed because of coercion, lack of clarity, or other reasons. See, e.g., *Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 648 (Ark. 2002) (finding coercion where the search went beyond the scope of the consent); *Pearson v. Kancilia*, 70 P.3d 594, 599 (Colo. App. 2003) (finding coercion where an employer demanded sex from an employee). I know of no cases which hold that valid consent does not constitute a valid defense to a privacy claim.

<sup>130</sup> See *supra* note 91; Willborn, *supra* note 96, at 992–1001.

<sup>131</sup> See *supra* notes 122–26.

<sup>132</sup> See Christine Jolls, *Rationality and Consent in Privacy Law* 40–48 (Dec. 10, 2010) (unpublished manuscript) (on file with author); see also Christine M. Reilly, *Achieving*

Alex Long has explored (and criticized) the special consent rules that apply to defamation claims.<sup>133</sup> I have suggested that consent in employee-privacy cases should be evaluated based on factors such as the invasiveness of the privacy intrusion, the level of employer pressure, and the employer's business interests.<sup>134</sup> The point here is not that any of these approaches are the proper one, but rather that this Restatement failed to grapple with consent and, in so doing, missed an opportunity to provide guidance to the courts on this important issue.<sup>135</sup>

More philosophically, the Restatement's treatment of consent diminishes the role of privacy in supporting and enhancing employee dignity. In the Restatement's formulation, the wrongfulness of a privacy intrusion depends mostly on the *employer's* actions. An employee's consent is relevant in a tangential way, but the focus is on the employer's interests and actions.<sup>136</sup> In contrast, if employee consent were treated more seriously, the focus would be on the *employee's* control over his or her own privacy interests. That control is important philosophically on one level because it is the very good that is produced and protected by privacy law.<sup>137</sup> It is an important part of the general structure of privacy protection. On a deeper level, employee consent is important because safeguarding the control of employees over important aspects of their lives requires respect for their choices and enhances their dignity. In a world where the threats to employee dignity and autonomy are real and ever present,<sup>138</sup> the need to affirm

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*Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1245–51 (2002) (discussing how notice is less meaningful at the outset of an employment contract). For a particularly fascinating exploration of the need in some circumstances for contemporaneous consent, see Katz, *supra* note 95, at 652–56.

<sup>133</sup> See Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 733–41 (2014).

<sup>134</sup> Willborn, *supra* note 96, at 1001–08.

<sup>135</sup> The Restatement's position may be that true consent is (almost) never possible in the workplace. If so, then it should have announced and defended that position. The position would be difficult to reconcile with the nature of a privacy regime, but there are certainly respectable starting points for such an argument. See, e.g., Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 506 (1908) (noting that someday it may be recognized "that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will . . . become recognized as giving no social benefit corresponding to the evils which result"). But the Restatement does not articulate such a position or attempt to defend it.

<sup>136</sup> See *supra* notes 114–19 and accompanying text.

<sup>137</sup> See *supra* notes 90–101 and accompanying text.

<sup>138</sup> See, e.g., MAYER-SCHÖNBERGER & CUKIER, *supra* note 21, at 150–52 (discussing the dangers of aggregating "big data"); Kim, *supra* note 51, at 673 (discussing some of the activities in the workplace that create privacy issues, such as "[p]ersonal property searches, intrusive questionnaires, mandatory polygraph testing and pre-employment psychological screening").

them wherever possible is increasingly important. By downgrading consent, the Restatement cuts in the opposite direction.

#### IV NONCONSENT

The Restatement also has a provision explicitly protecting an employee's right to refuse consent to a privacy violation: "An employer who discharges an employee for refusing to consent to a wrongful employer intrusion upon a protected employee privacy interest under this Chapter is subject to liability for wrongful discharge in violation of well-established public policy under Chapter 5."<sup>139</sup>

This is a necessary and salutary adjunct to privacy protections.<sup>140</sup> In its absence, an employee would be put to an unacceptable choice between consenting to a privacy intrusion and suing for damages later or refusing to consent and losing his or her job.<sup>141</sup> At the same time, the provision seems odd given the Restatement's general treatment of consent. The strongest employer option for restricting employee privacy under the Restatement is through notice, which does not require employee consent.<sup>142</sup> This provision provides no protection there. Consent itself under the Restatement is determinative in only one narrow circumstance.<sup>143</sup> Elsewhere, the effect of consent is nondeterminative.<sup>144</sup> But, of course, protecting the right to refuse consent will be powerful and necessary only to the extent that consent is powerful. Thus, the provision is in tension with the general treatment of consent in the Restatement.

Section 7.07's nonconsent protection relies specifically on the public-policy protections of Chapter 5 of the Restatement,<sup>145</sup> but the relationship between the two is awkward. Consider the second illustration in comment *c* to section 7.07:

<sup>139</sup> RESTATEMENT OF EMP'T LAW § 7.07 (2015).

<sup>140</sup> For perhaps the best explication of the argument that any meaningful protection of employee privacy requires limits on employment at will, see Kim, *supra* note 51, at 677–82.

<sup>141</sup> The trade off is especially harsh because some courts have held that voluntary submission to the privacy intrusion suffices as consent, so there would be no privacy claim under the first option. See, e.g., *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1041 (D. Kan. 1998) (holding that "consent to a drug test may be inferred when an employee provides a urine sample upon request and, further, that the inference of consent is not negated by the mere fact that refusal to consent may result in termination"); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253–54 (Tex. App. 1993) (finding no violation of the right to privacy where an employee voluntarily submitted to drug test—fraud and threat of job loss did not invalidate the consent).

<sup>142</sup> See *supra* note 50 and accompanying text.

<sup>143</sup> See *supra* note 106 and accompanying text.

<sup>144</sup> See *supra* note 113 and accompanying text.

<sup>145</sup> RESTATEMENT OF EMP'T LAW § 7.07 (2015).



X requires its employees to be randomly tested for use of illegal drugs. The employees in question drive large trucks on major highways. X's implementation of the testing program would not be a wrongful invasion of the employees' privacy. However, E believes in good faith that the test is a wrongful invasion of his privacy rights. E refuses to take the test, and X fires E. X has not committed a violation under this Section.<sup>146</sup>

This Illustration is designed to show the principle of comment *c* that, for section 7.07 to apply, the employer must demand consent for something that would constitute an actual privacy violation; the employee's good-faith and reasonable belief that the employer's demand might constitute a privacy violation would not be sufficient.<sup>147</sup> As support for this, comment *c* points to section 5.02(d), which requires that the demand for consent must be for something that would actually violate public policy.<sup>148</sup> But the problem is that section 5.02(d), by its terms, protects only refusals to waive nonnegotiable or nonwaivable rights, while privacy rights almost by definition are negotiable and waivable.<sup>149</sup>

This nonnegotiable/nonwaivable issue could have been avoided if the reference had been to section 5.02(a) of the public-policy provision instead of to section 5.02(d).<sup>150</sup> Section 5.02(a) seems to apply more straightforwardly to the Illustration; it protects an employee who refuses to commit an act (for example, submit to a drug test) that the employee reasonably and in good faith believes violates a well-established public policy.<sup>151</sup> The problem, however, is that section 5.02(a) (and all the subsections except (d)), protect reasonable, good-faith beliefs about public-policy violations as well as actual violations.<sup>152</sup> As a result, section 7.07 comment *c* implicitly disclaims reliance on section 5.02(a) even though it would seem to apply on its

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<sup>146</sup> *Id.* § 7.07 cmt. c, illus. 2.

<sup>147</sup> *Id.* § 7.07 cmt. c.

<sup>148</sup> *Id.* § 5.02(d) cmt. c.

<sup>149</sup> *Id.* § 5.02(d). As discussed earlier, the good protected by privacy law is precisely the ability of the rightsholder to consent or refuse to consent to disclosure, which is close to the definition of negotiable and waivable. *See supra* notes 90–101 and accompanying text. Comment *e* to section 5.02 fudges on the nonnegotiability requirement a bit. RESTATEMENT OF EMP'T LAW § 5.02 cmt. e (2015). Even though the black-letter language does not support it, the comment says that a particularly strong and broadly recognized public interest (such as the right to choose one's own counsel) may support a claim against an employer for insisting on a waiver, even if the underlying right is negotiable. *Id.* Although the comment lists several examples of negotiable rights that might be protected, privacy is not one of them.

<sup>150</sup> RESTATEMENT OF EMP'T LAW §§ 5.02(a), (d) (2015).

<sup>151</sup> *Id.* § 5.02(a).

<sup>152</sup> *Id.* § 5.02.

face, presumably because it provides too much protection to reasonable but mistaken privacy-sensitive employees.<sup>153</sup>

Section 7.07 also has an awkward relationship with the public-policy protections of Chapter 5 because the underlying rationale for the privacy protection is shakier. Chapter 5 makes clear that the primary rationale for public-policy protection is avoiding harm to third parties.<sup>154</sup> For example, one comment to section 5.02 says that to be protected “an employee must be discharged for performing a public legal obligation and not merely a personal [one].”<sup>155</sup> In contrast, section 7.07 comment *b* says it aims to “empower[ ] [an employee] to protect her personal interests.”<sup>156</sup>

But in a way, this awkward fit with the public-policy provision is beside the point. One might have hoped that the two sections could have been brought into better alignment to provide clearer guidance. But to the extent consent is central to employee privacy,<sup>157</sup> protecting it is a necessary and salutary aspect of privacy protection. Stretching the public-policy tort of Chapter 5 seems like a reasonable move to provide that protection.<sup>158</sup>

Having said that, however, there is a more subtle problem with section 7.07. When it does provide protection, section 7.07 has two consequences, one good and another more problematic. First, the provision has its intended effect: it protects the freedom of employees to consent or not consent. In that way, it aligns directly with the principal goals and purposes of privacy protection: to protect an individual by ensuring his or her domain over private information.<sup>159</sup> But

<sup>153</sup> *Id.* §§ 7.07 cmt. c, 502(a).

<sup>154</sup> *Id.* § 5.01 cmt. a. The reporter for that section wrote a persuasive article articulating protection of third parties as the principal rationale for the tort of wrongful discharge in violation of public policy. See generally Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

<sup>155</sup> RESTATEMENT OF EMP'T LAW § 5.02 cmt. c (2015).

<sup>156</sup> *Id.* § 7.07 cmt. b. The same sentence continues to say that, at the same time, the employer policy is likely to affect other employees adversely and impair the public interest. *Id.* But the first and primary rationale—the personal interest—is the one in some tension with the primary rationale for Chapter 5: the protection of third-party interests.

<sup>157</sup> Again, I think consent is central to privacy, but the other sections of the Restatement degrade its importance. One interpretation of section 7.07 could be that consent really is viewed as central under the Restatement. But if so, it is a backhanded way of emphasizing consent's centrality.

<sup>158</sup> By its terms, section 7.07 protects only against discharges. RESTATEMENT OF EMP'T LAW § 7.07 (2015). Comment *c* makes it clear that constructive discharge is also prohibited. *Id.* section 7.07 cmt. c. It is unclear, however, whether the prohibition would apply to other, lesser forms of retaliation such as a pay reduction, demotion, or reassignment. In Chapter 5, which is the basis for section 7.07's protections, the reporters expressly note that the Restatement takes no position on whether public-policy tort claims extend to employer retaliation short of constructive discharge. *Id.* § 5.01 cmt. c. Presumably, that approach would also apply to the protections of section 7.07.

<sup>159</sup> *Id.* § 7.01 cmt. a.

the provision also has the effect of allocating the costs of protecting employee privacy away from that individual and toward the employer. Sometimes that is not problematic at all—for example, when there is little to no cost to the employer (as in the first illustration above). But sometimes there is a cost, and perhaps it should be part of the equation. Consider this real-life example:

Trevis Smith, a former University of Alabama linebacker, plays for the Saskatchewan Roughriders in the Canadian Football League. With his consent, the team administers an HIV test and discovers that he has the virus. But he does not consent to the release of the information. Can the Roughriders release him from the team for his refusal to consent?<sup>160</sup>

If releasing the information would be a privacy violation,<sup>161</sup> then section 7.07 would make it illegal for the Roughriders to discharge Smith from the team.<sup>162</sup> The problem here is that this would expose other players to the risk of HIV infection.<sup>163</sup> As a result, some of the cost of protecting Smith's right to refuse consent is borne by third parties (or by the employer if it were eventually held liable for infections of other players). Ironically, the Roughriders are in much the same position as *employees* who seek public-policy tort protection: both want to be able to release information to protect third-party interests. Sections 5.01 and 5.02 safeguard an employee in that situation, but section 7.07 penalizes employers who act to protect third-party interests.<sup>164</sup>

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<sup>160</sup> This example is taken from Willborn, *supra* note 96, at 987. See Canwest News Service, *The secret life of Trevis Smith*, CANADA.COM (Dec. 3, 2005), <http://www.canada.com/theprovince/story.html?id=dced6e21-bee4-4183-95d3-da83cf3a9ab2>.

<sup>161</sup> The Restatement is clear that release of Smith's HIV status would constitute an intrusion on a protected privacy interest. RESTATEMENT OF EMP'T LAW § 7.05 (2015). Smith has a protected privacy interest in the information, as it was provided to the employer in confidence. *Id.* § 7.05(a). The employer intrudes on that interest if it releases it without Smith's permission. *Id.* § 7.05(b). The issue would be whether the release was highly offensive. *Id.* § 7.06. The Roughriders do have good business and public reasons to release the information. If those interests outweighed the intrusion on Smith's privacy interest, then the Roughriders could release the information without his permission or, alternatively, discharge him for refusing to consent to its release. The Restatement provides no guidance on how to analyze this type of situation—that is, one where there is no consent to release confidential information but a strong business interest to do so. But I set that issue aside to permit me to explore the distributional consequences of protecting Smith's right to refuse consent.

<sup>162</sup> *Id.* § 7.07.

<sup>163</sup> Alternatively, the employer could continue to employ him but not let him play. This option would force the employer to continue to pay a worker even though he cannot perform the job for which he was hired.

<sup>164</sup> RESTATEMENT OF EMP'T LAW §§ 5.01, 5.02 (2015). Note that section 7.07 comment *c* seems to permit balancing, but that concept is not present in the black-letter language of either Chapter 5 or section 7.07. *Id.* § 7.07 cmt. *c*.

In sum, section 7.07 is a necessary adjunct to employee-privacy protections. Perhaps the relationship between it and the public-policy tort protections on which it is based could have been better explained. Perhaps the section could have more clearly protected against more than discharge. Perhaps some attention might have been paid to the possible costs of nonconsent. But this type of protection for nonconsent is proper and necessary and, indirectly, the section signals that consent is central to the protection of employee privacy. The courts may need to refine the protection, but section 7.07 is a good beginning.

## V

### CONCLUSION

Employee privacy provided fertile ground for a Restatement. Restatements present an opportunity to step back from “the episodic occasions for judicial formulations presented by particular cases”<sup>165</sup> and to scan the entire field to make an area “clearer and more coherent while subtly transforming it in the process.”<sup>166</sup> Given the muddled and confused state of the common law applying to employee privacy, there is much to step back from, much to make clearer and more coherent, and much to subtly transform.<sup>167</sup>

In important respects, the privacy section of the Restatement is successful in this process of clarification and subtle transformation. For example, the Restatement’s disaggregation of the analysis into three steps—is there an employee-privacy interest, did the employer intrude on it, and was the intrusion highly offensive—makes the analysis clearer and more coherent.<sup>168</sup> Even more importantly, the disaggregation encourages identification and consideration of employee-privacy interests that are present and important even though not currently legally protected.<sup>169</sup> By focusing attention on this class of non-legally protected employee-privacy interests, the Restatement could facilitate their eventual maturation into legally protected rights.<sup>170</sup> Thus, this aspect of the Restatement aligns well with the American Law Institute’s goal of embracing—and even encourag-

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<sup>165</sup> HANDBOOK, *supra* note 4, at 5.

<sup>166</sup> *Id.* at 4.

<sup>167</sup> Pauline Kim has argued that employee privacy rights are particularly well suited to common-law development because of their fact-specific nature and because emerging technologies and social norms are constantly evolving. Kim, *supra* note 51, at 727. If true, this also enhances the promise of the Restatement project. *But see* Matthew W. Finkin, *Preface to the Third Edition*, PRIVACY IN EMPLOYMENT LAW xx (3d ed. 2009) (suggesting that tort law is ill suited for the development of privacy law because it is backward looking, expensive, and time consuming).

<sup>168</sup> *See supra* notes 12–13 and accompanying text.

<sup>169</sup> *See supra* note 43 and accompanying text.

<sup>170</sup> *See supra* note 43 and accompanying text.

ing—the common law’s “flexibility and capacity for development and growth.”<sup>171</sup>

Similarly, the Restatement empowers employees to protect their privacy interests by refusing consent. This filled a lacuna in employee-privacy law which put employees to a Hobson’s choice between their privacy and their job. The Restatement may not have done this smoothly—it may not have been possible to do it smoothly—but it addresses this problem and may (at least should) encourage courts to follow its lead.<sup>172</sup> In this respect again, the Restatement is rightly calling on the common law’s flexibility and capacity for development and growth.

But in other respects, the Restatement fails to meet the ALI’s goals of clarity and coherence. On employer notices about privacy, the Restatement hints of unrestrained employer discretion, mostly by failing to discuss whether limits exist.<sup>173</sup> On consent, the Restatement suggests that perhaps courts should disregard even true consent, while providing almost no guidelines to evaluate voluntariness.<sup>174</sup> On refusals to consent, the Restatement makes progress, but does not consider the possibility of third-party harm.<sup>175</sup>

The damage from these limitations is likely to be limited. Courts *will* constrain the ability of employers to limit privacy through unilateral notice. They *will* evaluate consent rigorously. They *will* attempt to limit third-party harm from nonconsent. The loss is not that the Restatement will affirmatively mislead the courts on these issues, but rather one of missed opportunity. The Restatement could have, but does not, help courts address issues they are certain to face and that are central to employee privacy.

A final worry about the Restatement is that the privacy interests it protects are closely tethered to those recognized in the Restatement of Torts. The privacy provisions are presented as applications of the “intrusion upon seclusion” and “public disclosure of private facts” prongs of the Torts Restatement.<sup>176</sup> On the one hand, this makes perfect sense; Restatements are intended to describe “the law as it presently exists,”<sup>177</sup> and the Restatement of Torts is the canonical description of privacy that has shaped current law for decades.<sup>178</sup> On

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171 HANDBOOK, *supra* note 4, at 5.

172 *See supra* notes 139–44 and accompanying text.

173 *See supra* notes 63–70 and accompanying text.

174 *See supra* notes 123–33 and accompanying text.

175 *See supra* notes 154–67 and accompanying text.

176 RESTATEMENT OF EMP’T LAW § 7.01 cmt. a (2015).

177 HANDBOOK, *supra* note 4, at 4.

178 *See, e.g.*, Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1890 (2010) (“Even today, most courts look to the *Restatement’s* formulation of the privacy torts as the primary authority.”).

the other hand, much has happened in those decades to pose new threats to employee privacy, and much more is on the way.<sup>179</sup> Everyday life—and life as an employee—is monitored in many ways today that would have been unimaginable when the Restatement of Torts was last revised.<sup>180</sup> The Restatement does not attend to these new threats at all and, as a result, shies away from “subtly transforming”<sup>181</sup> the law to address new circumstances. Perhaps it is still too early to attend to these new types of threats. Perhaps the “subtle transformation” that would have been required to attend to these developments would have been too great.<sup>182</sup> But these rationales for limiting the scope of privacy protection, good as they may be, do not ease the worry that this Restatement may become, like the Restatement of Torts,<sup>183</sup> the limit of the reach of privacy protection, rather than a framework for addressing new challenges.

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<sup>179</sup> RESTATEMENT OF EMP'T LAW § 7.07 (2015).

<sup>180</sup> For example, the authors of the Restatement of Torts would not have imagined that millions of us would be wearing technology that records our every breath and step or that our actions would be monitored so that advertisements can be personalized to our preferences. See *supra* note 139; Felix Salmon, *The Uncanny Valley of Advertising*, WIRED (Apr. 28, 2011), <http://www.wired.com/2011/04/uncanny-valley-of-ads/>.

<sup>181</sup> HANDBOOK, *supra* note 4, at 4.

<sup>182</sup> For a good discussion of the ways in which big data requires a broad rethinking of privacy, see Frank Pasquale, *Redescribing Health Privacy: The Importance of Information Policy*, 14 HOUS. J. HEALTH L. & POL'Y 95, 117–24 (2014).

<sup>183</sup> Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LAB. LAW. 405, 416 n.23 (2003) (“When the four [privacy] torts were codified forty years ago, the [Restatement of Torts] stated that that codification was without prejudice to additional categories of privacy yet to achieve legal recognition. But in the decades since, despite the explosion in privacy invasive technology and its deployment, not a single new tort has been recognized. The *Restatement's* quadripartite taxonomy has become canonical: In case after case, the courts recite the fact that ‘privacy’ is covered by one of four torts and if it is not covered, it is not privacy.”).