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That's No Beep, That's My Boss: Congress Seeks to Disconnect the Secrecy of Telephone Monitoring in the Workplace, 21 J. Marshall L. Rev. 881 (1988)

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“THAT’S NO ‘BEEP’, THAT’S MY BOSS:” CONGRESS SEEKS TO DISCONNECT THE SECRECY OF TELEPHONE MONITORING IN THE WORKPLACE

I¹ worked as a reservation agent² on the night shift for two years. During that time, I received many incentive prizes and awards. Naturally, I was alarmed when my supervisors started harassing me for little things: time spent in the bathroom, saying “OK” instead of “all right” to customers, and even my posture at the terminal became unacceptable. For these minor problems, the supervisors were taking major points from my productivity index.³ After investigating, I discovered that my supervisors secretly listened to personal conversations that were picked up by the mouthpiece⁴ on my headset. I knew we had spoken of getting day jobs and had talked about the Communication Workers of America.⁵ I was shocked to think that the super-

1. The speaker is a hypothetical person with a composite personality based on interviews with reservation agents employed by The Holiday Corporation.

2. In order for the reader to understand and empathize with the plight of the workers addressed in this comment, it is helpful to become familiar with industry jargon and the mechanics of the work. A “reservation agent” is a computer operator who enters reservations for tickets, hotel rooms, etc., for telephone customers. He typically wears a headset consisting of an earphone and a straw-like mouthpiece. A cord connects the headset to a phone console that can be plugged in and, when the employer permits it, unplugged.

The reservation agent cannot dial out, but calls come to him via a computerized routing system that distributes phone customers more or less equally among “available” agents. An “available” agent is one who is plugged in but not serving a customer at the time. Consequently, an agent has no control over the amount of calls he receives, although he can take himself “off available” by simply pressing a button.

Employers in this telephone service field generally do not allow an employee to go “off available” or unplug during unspecified times because it throws off computerized “work monitoring.” “Work monitoring” is the collection of work performance information. U.S. CONGRESS, OFF. OF TECH. ASSESSMENT, *THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS* 27 n.2, (1987) [hereinafter “OTA REPORT”]. To keep productivity data accurate, a supervisor, alerted by an electronic signal that an agent is “off available” will reprimand the employee through the employee’s headset. Nichols, *When Measurement Goes Too Far*, *INCENTIVE MARKETING* 27, 30 (Dec. 1987).

See also *infra* note 85 for a discussion of the Office of Technology Assessment, a valuable source of information that directly coincides with current legislation on technology-related topics.

3. A “productivity index” is a computer-generated measurement that analyzes an employee’s performance using several factors. These factors include the time an agent is on and off “available,” the number of calls the agent takes per minute, the sales per minute, and the value of those sales. Bonuses, raises, and promotions are almost completely based on the worker’s productivity index.

4. The mouthpiece picks up everything a worker says on a customer call with amazing clarity, but it also allows a supervisor to listen to an agent when the agent is off “available” yet still plugged into the console.

5. The Communication Workers of America (“CWA”) is a labor union for work-

visors could use my personal conversations to hurt my performance record. Soon, I felt I was being watched all the time. My feelings of anger, frustration, and paranoia were so strong that I finally quit my job to save my sanity. It is hard to believe that this "spying" is allowed to happen.

I. INTRODUCTION

Secret telephone monitoring⁶ is a common practice. Most Americans, however, are unaware of its existence.⁷ Approximately 14,000 employers⁸ secretly eavesdrop⁹ on their employees' telephone calls. This practice affects 15 million American workers¹⁰ and over 400 million telephone calls annually.¹¹ The surreptitious nature of telephone monitoring brings managerial rights into conflict with employee privacy rights.¹² Nevertheless, employer monitoring is legal through a loophole¹³ in the federal wiretapping laws.¹⁴ The laws allow employers to secretly intercept¹⁵ their employees' wire communication¹⁶ so long as the interception occurs within the ordinary

ers such as telephone operators, reservation agents, customer service representatives and others who work almost entirely on telecommunication equipment. Although there are many branch offices, the legislative department at 1925 K. Street, NW, Washington, D.C. 20006, is most heavily involved in federal legislative matters concerning these workers.

6. Telephone monitoring is the systematic act of telephone service observation which involves the "intercep[tion of] the content of employee telephone calls by listening in on them. This is often done by a supervisor or quality control specialist to evaluate courtesy, accuracy, or compliance with company guidelines." OTA REPORT *supra* note 2, at 105.

7. 133 CONG. REC. H3065 (daily ed. May 5, 1987) (statement of Rep. Edwards).

8. 133 CONG. REC. S5833 (daily ed. May 1, 1987) (statement of Sen. Simon).

9. For the purposes of this comment, the terms "eavesdrop" and "listen in on" are included in the definition of "intercept" as used in Title 18 of the U.S. Code. 18 U.S.C. § 2510(4) (1982).

10. 133 CONG. REC. S5833 (daily ed. May 1, 1987) (statement of Sen. Simon).

11. *Id.*

12. OTA REPORT *supra* note 2, at 117. Generally, an employer has the right to collect an infinite amount of employee information. *Id.* Under some circumstances, however, the employer may be required to allow employees to view and correct the information collected about them. *Id.*

13. 133 CONG. REC. H3065 (daily ed. May 5, 1987) (statement of Rep. Edwards).

14. 18 U.S.C. §§ 2510-2520 (1982). These sections are collectively called The Federal Omnibus Crime Control and Safe Streets Act of 1968, Title III. *Id.* [hereinafter "the Act"].

15. *Id.* § 2510(4).

16. *Id.* § 2510(1). The Act states:

"[W]ire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit

course of the employer's business.¹⁷

To plug the loophole, Representative Don Edwards of California and Senator Paul Simon of Illinois introduced House Bill 1950¹⁸ and Senate Bill 1124¹⁹, respectively, in May of 1987, to regulate telephone monitoring in the workplace. The legislation requires a repeating audible signal to sound (a "beep," hence the nickname, "beep bill")²⁰ whenever an employer is monitoring an employee's telephone conversation.²¹ Consequently, the passage of the bill will simply eliminate the secrecy of telephone monitoring, while still allowing employers to evaluate²² their employees.

To illustrate the benefits of the "beep bill," this comment will first address the issues of privacy in the workplace. Second, this comment will present a background on telephone monitoring, defining it and setting forth the current legislative proposals. Next, this comment will analyze the elements of the "beep bill" and discuss arguments for and against its enactment. Finally, this comment recommends passage of the bill.

II. PRIVACY IN THE WORKPLACE

The general right to privacy, recognized since the late 1800s²³ as the "right to be left alone,"²⁴ emanates from different sources. These

Id.

17. *Id.* § 2510(5)(a)(i). This section states:

"[E]lectronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than . . . any telephone or telegraph instrument, equipment or facility, or any component thereof . . . furnished to the subscriber in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business

Id. Not surprisingly, courts have found it difficult to interpret this statute. See *infra* notes 67-69 and accompanying text for one court's interpretation of this section in a telephone monitoring case.

18. H.R. 1950, 100th Cong., 1st Sess. (1987). The bill was introduced to amend Title 18 of the United States Code and requires that telephone monitoring by employers be accompanied by a regular audible warning tone. *Id.*

19. S. 1124, 100th Cong., 1st Sess. (1987). The purpose and language of S. 1124 is identical to H.R. 1950.

20. Blodgett, *Employer Eavesdropping Spurs Federal "Beep" Bill*, A.B.A. J., Nov. 1, 1987 at 24.

21. *Id.* at 25.

22. The type of evaluation referred to throughout this comment is electronic monitoring. Electronic monitoring is "the computerized collection, storage, analysis, and reporting of information about employees' productive activities." OTA REPORT, *supra* note 2, at 27. This type of monitoring is done through the use of computers and telecommunication equipment. *Id.* The office conditions that are most favorable to the electronic monitoring technique feature a large volume of work that is routine and continuous and an ample, low-skilled labor supply in an industry with a high tolerance for turnover. *Id.* (Table 2).

23. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

24. *Id.* at 389. Justice Brandeis called the right to privacy "the right to be left

sources include the United States Constitution, the common law, and state and federal statutes.²⁵ Because the concept depends on how much privacy an employee can reasonably expect,²⁶ the definition of privacy in the workplace is vague, at best.²⁷ Each source, as

alone—the most comprehensive of rights, the right most valued by a civilized society. . . ." 133 CONG. REC. at S5833 (statement of Sen. Simon, quoting *Olmstead v. United States*, 277 U.S. 438 (1927) *overruled*, *Katz v. United States*, 389 U.S. 347 (1967)). See also *Gallella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973) (a photographer's constant surveillance of Jackie Onassis and her family constituted invasion of her privacy). But see *Shorter v. Retail Credit*, 251 F. Supp. 329 (D.S.C. 1966) (single polite inquiry concerning plaintiff's insurance policies did not amount to privacy invasion).

25. W. CONNOLLY & M. CONNOLLY, *A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY* 475-505 (1979) [hereinafter "EEO"].

26. Barnes & Palmer, *Private Matters in Private Employment*, 3 DET. C.L. REV. 825, 829 (1986) [hereinafter Barnes & Palmer]. For a general discussion of what constitutes a reasonable expectation of privacy, see *Katz v. United States*, 389 U.S. 347 (1967); Note, *Oliver v. United States: Open Fields and Reasonable Expectations of Privacy*, 2 UTAH L. REV. 463 (1985); Comment, *What Is a Reasonable Expectation of Privacy?*, 12 W. ST. U.L. REV. 849 (1985).

27. OTA REPORT, *supra* note 2, at 18-20. Although, according to the OTA Report, employees are beginning to feel a right to privacy, there are some members of Congress that still do not see privacy as a significant issue in the workplace. For example, Representative Harris Fawell (13th District, Illinois) recently wrote:

[P]roponents of [H.R. 1950] state that employees have a right to privacy and should know when telephone conversations are being monitored. Privacy, however, has not historically been a significant legal issue in the work relationship between employee and employer for several reasons. First, work is generally done on the employer's premises. Second, activities are often done in the open in group or semi-private situations. Finally, supervision is a normal part of the employee/employer relationship.

Letter from U.S. Representative Harris Fawell to Connie Barba (February 1, 1988) (discussing Rep. Fawell's views on the federal "beep bill") [hereinafter "Fawell letter"].

For a detailed discussion of the evolution of workplace privacy, see OTA REPORT, *supra* note 2, at 18-19; EEO, *supra* note 25, at 475-505; Barnes & Palmer, *supra* note 26, at 829-33. See also Kirby, *Access to Information and Privacy: The Ten Information Commandments*, 55 CINCINNATI L. REV. 745 (1987) (discussion of privacy problems related to new information technology); Menard & Morrill, *The Employer and the Law of Privacy in the Workplace—The U.S. Model to Date*, 9 N.C.J. INT'L L. & COM. REG. 93 (1983) (overview of state and federal statutes concerning privacy in the workplace, especially the Federal Fair Credit and Reporting Act); Committee on Individual Rights and Responsibilities in the Workplace, *Individual Rights and Responsibilities in the Workplace*, 2 LAB. LAW. 351, 358-63 (1986) (reports on current information privacy laws); Solomon, *Personal Privacy and the "1984" Syndrome*, 7 W. NEW ENG. 753 (1985) (focuses of invasion of privacy caused by the new technology).

Recently, the issue of workplace privacy has surfaced in the area of drug testing. See, e.g., Bishop, *Drug Testing Comes to Work*, CAL. LAW. 29 (April 1986) (privacy arguments for and against drug testing in the workplace); Hartstein, *Drug-Testing in the Workplace: A Primer for Employers*, 12 EMPLOYEE REL. L.J. 577 (1986-87) (informs employers about the types of drugs that are abused, what tests are available, and guidelines on what to do with test results); McGovern, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453 (1987) (detailed look at current state law on drug tests in the workplace); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 237 (1986) (discusses differences in privacy protections for public and private employ-

well as an employee's status,²⁸ has a different effect on the amount

ees); Ogborn, *Substance Abuse Testing in the Public Sector*, 32 S.D.L. REV. 252 (1987) (sets out possible causes of action for government employees subject to drug testing); Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J. 51 (Nov. 1, 1986) (presents the debate on drug test accuracies and workplace standards); Stern, *Government Drug Testing and Individual Privacy Rights; Crying Wolf in the Workplace*, 5 YALE L. & POL'Y REV. 235 (1986) (examines the constitutionality of subjecting government employees to suspicionless drug tests); Comment, *Unrestricted Private Employee Drug Testing Programs: An Invasion of the Worker's Right to Privacy*, 23 CAL. W.L. REV. 75 (1986) (medical and polygraph tests for employee drug abuse); Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1012 (1986) (detailed look at types of drug tests and a proposal that legislators act to limit some of the tests); Comment, *Should Employers Be Legally Permitted to Require Drug Testing of Employees? A Qualified Affirmative*, 14 W. ST. U.L. REV. 603 (1987) (proposes balance between state and employer interest and employee privacy rights); Recent Development, *Constitutional Law: The Fourth Amendment and Drug Testing in the Workplace*, 10 HARV. J.L. & PUB. POL'Y 762 (1987) (discusses concept of drug testing as "search" under the fourth amendment). See also 11 NOVA L.J. 291-823 (Winter 1987) (large multi-author, multi-article study of worker drug use and abuse, common tests, and the privacy issues involved).

Similarly, privacy rights have also been discussed in the area of polygraph testing. See, e.g., Hartsfield, *Polygraphs*, 36 LAB. L.J. 817 (1985) (discusses causes of action for invasion of employee privacy rights due to polygraph testing); Zafran & Stickle, *Polygraphs in Employment: A State Survey*, 33 CLEV. ST. L. REV. 751 (1984-85) (historic overview of polygraph use and current law); Comment, *Employer-Employee Relations — The Employee Polygraph Protection Act: Eliminating Polygraph Testing in Private Employment is Not the Answer*, 11 S. ILL. U.L.J. 355 (1987) (discusses Congress' role in polygraph test regulation).

Also, because of the recent concern over the acquired immune deficiency syndrome ("AIDS") epidemic, employers' testing for AIDS and other conditions have also brought up privacy issues. See generally, Rothstein, *Medical Screening of Workers: Genetics, AIDS and Beyond*, 2 LAB. LAW. 675 (1982).

28. OTA REPORT, *supra* note 2, at 101. Workplace privacy issues apply to public (government) employees and private employees differently. *Id.* at 102. The United States Constitution and the civil service system protect the public employee against privacy invasions and other unjust practices at the workplace. W. OUTTEN, *THE RIGHTS OF EMPLOYEES* 27 (1983) [hereinafter OUTTEN]. In addition, sometimes union contracts protect government employees. *Id.* Generally, before the government can terminate an employee, the government must show "just cause." *Id.*

On the other hand, unless a union contract specifically protects them, most private employees have little defense against unfair employer practices. *Id.* at 28. This is because the employment at will doctrine assumes that the worker is on equal footing with his boss. *Id.* Under this doctrine, the employee is presumed to be free to contract with the employer of his choice and employers are free to hire or fire whomever they please. *Id.* at 29. Recently, however, it has become obvious that an employee suffers financial and emotional loss when he is forced to change jobs. *Id.* Outten suggests that the few possible protections for the private employee fall under the following categories:

- anti-discrimination laws (federal and state prohibitions on discipline of discharge based on race, sex, religion, age, etc.);
- anti-retaliation laws (federal and state prohibitions on retaliation against employees for certain protected activities, such as union activity and reporting job safety violations) [also known as "whistle-blowing statutes"];
- collective bargaining agreements (union contracts containing good cause and due process provisions — applicable to only about 25 percent of American workers);
- individual employment contracts (relatively rare, except for high-level employees);

of privacy an employee can legally expect.

Although not expressed in the Constitution, the United States Supreme Court has construed the document to include the right to privacy.²⁹ Essentially, this construction protects an individual against a governmental invasion of privacy.³⁰ Thus, in a workplace setting, an employee can only bring a constitutional claim of privacy invasion against his employer if the employer is the government, or at least a "state actor."³¹

Unlike the public employee, however, an employee in the private sector has to rely on statutes or the common law of torts, to bring an invasion of privacy claim. Tortious invasion of privacy applies narrowly in the employer-employee relationship.³² Because the right to privacy in the workplace is not firmly established,³³ these

- company policies (personnel manuals describing good cause or due process policies — occasionally unenforceable);
- wrongful discharge cases (recent case law restraining employer actions that violate public policy).

Id. at 28. Basically, if the private employee does meet one of the above classifications, he cannot challenge any disciplinary action taken by his employer. *Id.* See also *Herbster v. North American Company For Life and Health Insurance: Attorney's Retaliatory Discharge Action Unjustly Dismissed*, 21 J. MARSHALL L. REV. 215 (1987) for a discussion of retaliatory discharge of an employee at will.

29. EEO, *supra* note 25, at 475. See e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (fourteenth amendment); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (fourteenth amendment); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (first amendment); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (fourth and fifth amendments); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (Goldberg, J., concurring) (ninth amendment).

See also *Watson, The Ninth Amendment: Source of a Substantive Right to Privacy*, 19 J. MARSHALL L. REV. 959 (1986) (thorough discussion of the ninth amendment as it applies to the fundamental right to privacy). For an overview of how state constitutions protect privacy rights, see *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1430-443 (1982).

30. EEO, *supra* note 25, at 475-77; OTA REPORT *supra* note 2 at 102, 113.

31. EEO, *supra* note 25, at 475. To determine whether a private defendant is a state actor, courts look at whether there is "sufficient entanglement" between the defendant and the government entity, whether the defendant was private but performed a public function, or whether the government "fostered and encouraged" the defendant's action. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (state encouragement of private discrimination); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (privately managed restaurant in public building sufficiently entangled with the state); *Marsh v. Alabama*, 326 U.S. 501 (1946) (private party performing a public function). See also *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978) (warehouseman holding plaintiff's property according to state statute not a state actor); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (utility company not state actor); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private club with state-issued liquor license not state actor). *But see Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (privately managed courthouse cafeteria was state actor).

32. See *infra* notes 43-47 and accompanying text for examples of a plaintiff's recovery for intentional infliction of emotional distress for an invasion of privacy in the workplace.

33. OTA REPORT, *supra* note 2, at 19. The report states:

Workplace privacy is a new right . . . and probably a tenuous one. It will be

suits are often unsuccessful.³⁴

Typically, a lawsuit for invasion of privacy in the workplace involves two separate actions. The first is based on the tort of "intrusion into seclusion"³⁵ ("intrusion"). In the workplace context, the tort of intrusion pertains to the method an employer uses to collect employee information.³⁶ The second is based on the tort of "public disclosure of private facts"³⁷ ("disclosure"). The tort of disclosure refers to employer dissemination of information once he collects it. Both torts take into consideration an employee's expectation of privacy in the workplace.

One such expectation is that employees presume that their personal information will remain private.³⁸ In recent years, legislatures have regulated how employers use and disclose employee data.³⁹ For

tested on two fronts: by the drive toward higher productivity, which encourages employers to use electronic monitoring, and current social concerns, such as drug abuse, that encourage employers to gather more and better information about the people they hire. Although employees are now beginning to feel a right to privacy in the workplace, these pressures to gather information, along with availability of the technological means to collect that information, may weaken the development of this emerging right.

Id.

34. See *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir. 1980) (employer not liable for invasion of privacy after using extension phone to eavesdrop on employee suspected of talking with competitor because employer's action fell within "ordinary course of business" clause of the federal wiretapping laws); *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979) (employer not liable for invasion of privacy because employee knew that the office telephone system was equipped with monitoring system); *Jandak v. Village of Brookfield*, 520 F. Supp. 815 (N.D. Ill. 1981) (employer not liable for invasion of privacy even though employee mistakenly thought he was using phone not connected to office monitoring system); *United States v. Christman*, 375 F. Supp. 1354 (N.D. Cal. 1974) (employer not guilty of unlawful interception of employee telephone calls when employee was suspected of using shoe department's phone for solicitation of prostitution and other misbehavior).

35. RESTATEMENT (SECOND) OF TORTS § 652(b) (1977). According to the RESTATEMENT, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

36. OTA REPORT, *supra* note 2, at 7. One of the findings of the OTA Report is as follows:

Computer technology makes possible the continuous collection and analysis of management information about work performance and equipment use. This information is useful to managers in managing resources, planning workloads, and reducing costs. When it is applied to individual employees, however, the intensity and continuousness of computer-based monitoring raises questions about privacy, fairness, and quality of worklife.

Id.

37. RESTATEMENT (SECOND) OF TORTS § 652(d) (1977). According to the RESTATEMENT, "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.*

38. Barnes, *supra* note 26, at 839.

39. EEO, *supra* note 25, at 498-501. See also *Hudson v. S.D. Warren Co.*, 608 F.

the most part, this legislation has been an effective protection against the tort of disclosure. Since monitoring is a method of collecting employee data, however, it usually spawns intrusion rather than disclosure questions. Thus, in each case, one must ascertain whether an employer's monitoring of his employee's telephone calls constitutes an intrusion into the employee's privacy.

In the past, an employer committed the tort of intrusion if he conducted an unreasonable surveillance of the employee or pried unnecessarily into an employee's private affairs,⁴⁰ so as to cause the employee "mental suffering, shame or humiliation to a person of ordinary sensibilities."⁴¹ On this premise, an employee could recover damages for invasion of privacy but on an "emotional distress" theory.⁴² Because courts have not clearly defined a remedy, or even a cause of action for a private employer's invasion of his employee's privacy rights, courts use the reasonable person/outrageous conduct standard similar to that used in emotional distress cases.⁴³ Thus, in order for an employee to recover in an intrusion case, the employer's action must be outrageous⁴⁴ and the employee's distress must be severe. All the while, the outrageousness and severity must conform to the reasonable person standard.⁴⁵

Supp. 477 (D. Me. 1985); Comment, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139 (1983).

For a discussion of the statutory limits on employer disclosure of employee information in Illinois, see Leech, *The Illinois Personnel Records Statute: New Rights for Employees, New Risks for Employers*, 73 ILL. B.J. 386 (March 1985).

40. EEO, *supra* note 25, at 479 (citing RESTATEMENT (SECOND) OF TORTS §528 (1977)).

41. *Id.*

42. W. PROSSER, LAW OF TORTS 49-62 (1971) [hereinafter PROSSER]. Prosser refers to the tort as the "infliction of mental distress." *Id.*

43. *Bodewig v. K-Mart Inc.*, 54 Or. App. 480, 635 P.2d 657 (1981). See also *Patton v. J.C. Penney Co.*, 75 Or. App. 638, 707 P.2d 1256 (1985) (employer liable for outrageous conduct after forbidding employee to see his fiancée). But see *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (Judge Bork ruled that Navy's policy of discharging homosexuals did not violate privacy rights).

44. *Bodewig*, 54 Or. App. at 485, 635 P.2d at 661. In *Bodewig*, the Oregon Court of Appeals found that the plaintiff, the defendant's employee, could recover for her emotional distress after her manager subjected her to a strip search in the employee lounge to recover a customer's missing money. The manager also offered the customer the chance to view the search. *Id.* Although the customer declined the opportunity, the court called the conduct of the manager "beyond the limits of social toleration and reckless of the conduct's predictable effects on plaintiff." *Id.* For further discussion of what constitutes outrageous conduct, see PROSSER, *supra* note 42, at 55-60.

45. *Bodewig*, 54 Or. App. at 486, 635 P.2d at 662. Although the defendant's conduct in *Bodewig* may have lacked a wrongful purpose, the *Bodewig* court explained that there is a special relationship between an employer and an employee. *Id.* at 485, 635 P.2d at 662. The court stated that the employer has a position of authority over the employee and has a duty not to abuse that authority. *Id.* Accordingly, the court ruled that the manager's intrusion into the plaintiff's privacy was outrageous enough to be humiliating to any reasonable person and thus provided the plaintiff with a basis of recovery for the invasion of her privacy. *Id.* at 486, 635 P.2d at 662.

Although the tort of intrusion has been extended to some instances of wiretapping⁴⁶ and interception of written communications,⁴⁷ courts have been reluctant to allow a plaintiff recovery for workplace privacy invasions arising out of polygraph,⁴⁸ drug,⁴⁹ and medical testing.⁵⁰ Nevertheless, because of rapidly advancing technology and the trend toward total office automation,⁵¹ it is the concept of intrusion that presents the newest challenges to privacy in the workplace today.

III. THE LEGALITY OF TELEPHONE MONITORING IN THE WORKPLACE

There are many ways of accumulating employee data. Collectively, the methods come under the heading of "work measurement."⁵² "Work measurement" refers to "the whole process of developing procedures and standards for job performance, collecting data on actual performance and comparing actual performance to standards."⁵³ One part of work measurement is work monitoring. "Work monitoring" refers only "to collection of information about actual performance,"⁵⁴ and encompasses the new field of electronic monitoring achieved through the use of computers and telecommunica-

46. PROSSER, *supra* note 42, at 807. See, e.g., *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979); *Awbrey v. Great Atl. & Pac. Tea Co.*, 505 F. Supp. 604 (N.D. Ga. 1980).

47. See, e.g., *Vernars v. Young*, 539 F.2d 966 (3rd Cir. 1976).

48. See, e.g., *United States v. Oliver*, 525 F.2d 731 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976); *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

49. See e.g., *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986); *Division 241 Amalgamated Transit Union (AFL-CIO) v. Sусy*, 538 F.2d 1264 (7th Cir. 1976); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

50. See generally Rothstein, *Medical Screening of Workers: Genetics, AIDS, and Beyond*, 2 LAB. LAW 675 (1985).

51. The trend toward total automation is changing our society into a post-industrial, information economy. Lautsch, *Computers, Communications and the Wealth of Nations: Some Theoretical and Policy Considerations About an Information Economy*, 4 COMPUTER L. J. 101 (1983). Computerization of office work is the main reason electronic monitoring has become a significant issue in the law today. OTA REPORT, *supra* note 2, at 86. For further information on the trend toward office automation, see OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *AUTOMATION OF AMERICA'S OFFICES* (1985).

52. OTA REPORT, *supra* note 2, at 27 n.2.

53. *Id.* The report further states:

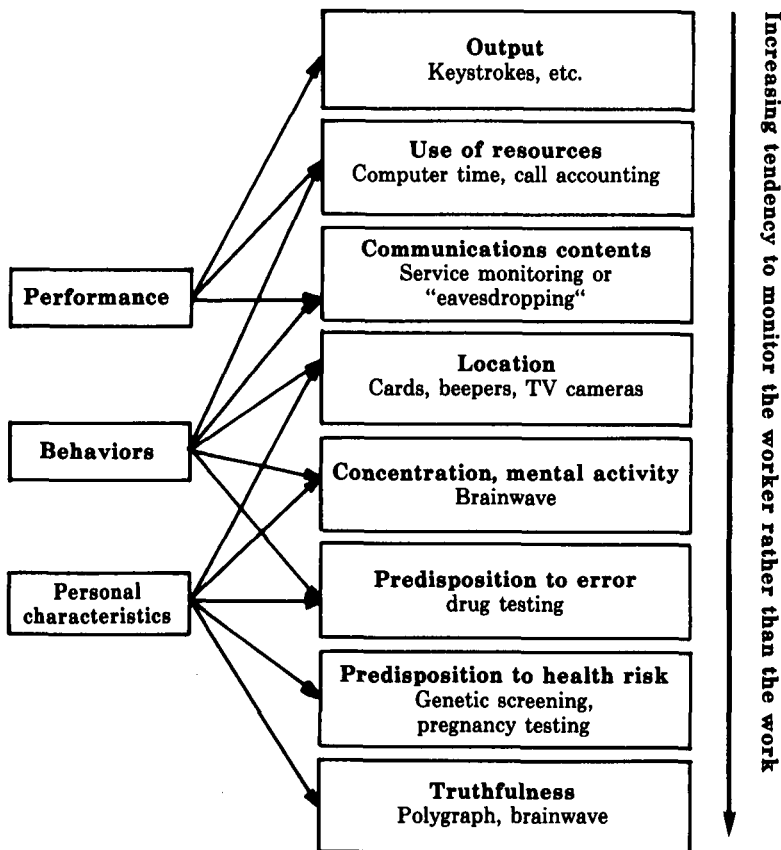
Work measurement systems usually do four things. First, they set standards for the time it should take to produce certain units of work. Second, they monitor the actual time it takes to produce each unit of work. Third, they analyze the variance of the actual time from the standard. And finally, they provide data for use in planning, cost estimates, and productivity improvement.

Id. at 27.

54. *Id.* Some types of monitoring, however, seem to monitor the worker rather than the work. *Id.* at 13. The OTA prepared the following chart to illustrate the range of monitoring techniques that raise privacy and civil liberty issues in the workplace:

tion equipment.

Through work monitoring, an employer can collect two types of information. The first type, substantive information, consists of the "content[s] or meaning[s] of the communications" themselves.⁵⁵ The second type, transactional information, "reveals facts about [the] communications."⁵⁶ Both types of information, if misused by the monitoring employer, can result in an invasion of an employee's privacy.



Source: Office of Technology Assessment, 1987.

Id.

55. *Id.* at 23 n.24.

56. *Id.* Transactional information counts such things as an employee's number of keystrokes per transaction, time spent in the bathroom, length of breaks, etc. *Id.* at 22. The legislature has never addressed transactional privacy. *Id.* The OTA suggests that Congress may want to act on this subject because it is becoming a matter of increasing concern. *Id.*

Typically, a monitored employee is unaware that an employer is listening in on the telephone call. Due to advanced technology, the employee will not notice a change in volume or background noise, nor will he even hear a "click" when the employer intrudes into the call.⁵⁷ Although the employee is aware of office monitoring capabilities, he does not know when or even if he will be monitored that day. Thus, an employee subject to secret telephone monitoring is constantly nervous, insecure and anxious.⁵⁸ In spite of this, employees currently have no legal recourse against these privacy invasions and case law is sparse due to lack of legislation.⁵⁹

Nevertheless, Congress has yet to address the important issue of monitoring as it relates to privacy and quality of work life. Unlike the United States, other countries⁶⁰ have enacted legislation concerning electronic monitoring, privacy and quality of life in the workplace. Their laws emphasize employee participation in using, implementing and devising new technology for work measurement procedures. Pursuant to foreign legislation, the United States should enact guidelines to insure the "rights to health, safety, privacy,

57. The monitored employee never knows when a supervisor is listening. The operator will only know, for example, that the day before on call #432 she displayed poor "voice impression." Testimony of Morton Bahr, President of the Communication Workers of America Before the House Judiciary Subcommittee on Courts, Civil Liberties and Administration of Justice, July 15, 1987, at 2 [hereinafter "Bahr testimony"].

58. OTA REPORT, *supra* note 2, at 53. One telephone repair service agent (who wished anonymity) stated:

They use monitoring to see if they can find something to charge against you. I find it to be dehumanizing, demeaning, unhealthy and disgusting

All in our department feel as though we are in prison and we are regarded as nothing more than criminals that must be guarded and monitored on constantly as though we could not function on our own. We are all adults, but we are made to feel like naughty little children

[A]ll I long for is the day I can retire

Letter from a Louisiana Repair Service Attendant to the Communications Workers of America (no date available) (from an unpublished compilation of similar letters entitled, "Additional Comments from CWA Members").

59. OTA REPORT, *supra* note 2, at 22. One of the OTA's conclusions is that there should be federal legislation aimed at the gaps in the current laws. *Id.* The OTA suggests that the reason Congress has not acted so far is because they are waiting to take their cue from the judiciary. *Id.* The problem is that there just have not been that many cases on invasion of workplace privacy through telephone monitoring. *Id.* The reason there have not been any cases is because there is no legal basis for a plaintiff's claim because Congress has not yet acted. *Id.* Congress should pass the "beep bill" to break this impasse between the legislature and the judiciary.

Although it does not address electronic monitoring, Congress did, however, pass the Electronic Communications Privacy Act of 1986. Like the "beep bill," it also amends Title 18 of the U.S. Code. While it extends some privacy rights, it is not without problems. Corn, *Danger at the Gates*, 15 STUDENT LAW. at 10 (Mar. 1987).

60. OTA REPORT, *supra* note 2, at 123. West Germany, Norway, Sweden, Canada, and Japan have enacted legislation to regulate monitoring. *Id.* at 123-25. The following table shows at a glance some European countries that have enacted such legislation:

[and] constitutional protections . . . that employees can expect to enjoy in the workplace."⁶¹ Historically, however, legislation in this specific area has been unsuccessful and short-lived.⁶²

For example, in the early 1980's, West Virginia had a law similar to the "beep bill." The telephone company threatened not to locate a major manufacturing facility there unless the law was repealed.⁶³ Due to a poor economic climate and a high unemployment

Country	Information provision	Work representation
Federal Republic of Germany	Works Constitution Act of 1972 ^a	Works Constitution Act of 1972
The Netherlands	Works Council Act of 1979 ^a	Works Council Act of 1979
United Kingdom	Employment Protection Act of 1975 ^b	Employment Protection Act of 1975
France	Act No. 82-915 of 28 October 1982	Act No. 82-689 of 4 August 1982
Sweden	Act Representing Co-Determination of Work of 1976 ^b	Act Representing Co-Determination of Work of 1976

^aInformation is provided to a Work Council which can be a cross-section of all interested parties including government, industry, and labor.

^bInformation is provided to the worker or worker representative.

SOURCE: International Labour Organization, *Automation: Work Organization and Occupational Stress* (Geneva, Switzerland: 1984).

Id. at 122. In addition, West German, Norwegian, and Canadian labor contracts often include clauses against the use of secret electronic monitoring. *Id.* at 123-24.

Furthermore, individual work monitoring is not an issue in Japan. *Id.* at 124. The goal of the Japanese workplace is to strengthen production as a team. *Id.* at 125. Contrary to American office workers, individual workers in Japan are not pressured to compete against a group. *Id.* at 124-125. Employers monitor Japanese worker however, to make sure they do not harm themselves by working too hard. *Id.* at 125. As a result of finding repetitive strain injuries among groups of keypunch operators, the Japanese Ministry of Labor issued keystroke maximum guidelines. *Id.* Workers were then monitored to enforce these standards. *Id.* For examples of foreign privacy legislation in general, see SOMA, *COMPUTER TECHNOLOGY AND THE LAW* § 6.11 (1983) (1987 Supplement).

61. OTA REPORT, *supra* note 2, at 22.

62. Blodgett, *supra* note 20, at 25. Both West Virginia and California passed legislation similar to the "beep bill." *Id.* West Virginia's statute was later repealed and California's law was vetoed by the Governor. OTA REPORT, *supra* note 2, at 47. Although New York has attempted to pass similar legislation, it also has been unsuccessful. Telephone interview with Leslie Lobel, Legislative Representative of the Communication Workers of America (January 28, 1988). A similar bill was also defeated in New Hampshire. Daily Lab. Rep., February 3, 1988, at A-7.

63. The West Virginia Statute reads:

§ 61-3-24c. Intercepting or monitoring customer telephone calls; penalty.

(a) It is unlawful for any person, firm or corporation to intercept or monitor, the transmission of a message, signal or other communication by telephone between an employee or similar agent of such person, firm or corporation and a customer of such person, firm, or corporation unless such person, firm or corporation does all of the following:

(1) Clearly marks each telephone instrument . . . from which any such communication may be intercepted or in any way monitor[ed]

rate, West Virginia was forced to abandon the statute in order to create jobs for its citizens.⁶⁴ Consequently, at the state level, workers remain unprotected against secret telephone monitoring and continue to work under adverse conditions.

Similarly, monitored workers have no remedy at the federal level as of yet. Although some laws have been passed to protect workers from disclosure,⁶⁵ no laws have been enacted to prevent a private employee from intrusion. Because there is no legal protection for a claim against unfair monitoring practices, most employees' suits against their employers have been fruitless.⁶⁶ In *Briggs v. American Air Filter*,⁶⁷ the United States Court of Appeals for the fifth Circuit found for the defendant, who secretly monitored the plaintiff's telephone conversations on the job. The court ruled that the defendant was allowed to do so because the defendant's act of monitoring was done "in the ordinary course of business."⁶⁸ The court stated that the defendant's act was in the ordinary course of business for two reasons. First, the court found that defendant's

(2) Throughout the period of each such interception or monitoring . . . utilizes an automated tone warning device that produces a distinct warning signal or beep tone, which signal or tone is clearly audible to each party to the communication or by other audible means clearly indicates that such message, signal or other communication is being monitored or intercepted.

Any person . . . violating the provisions of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than two hundred dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.

W. VA. CODE § 61-3-24c (1981).

64. Bahr testimony, *supra* note 57, at 6.

65. Barnes & Palmer, *supra* note 26, at 839-41. In addition, the Federal Privacy Act of 1974 was enacted to protect employees against invasions of information privacy by the government. EEO, *supra* note 25, at 498. The declining proportion of the labor force represented by unions is one factor influencing the move toward legislative solutions to worker and workplace problems. OTA REPORT, *supra* note 2, at 20.

66. See *supra* note 34 and accompanying text for examples of cases where courts found no privacy rights in employee telephone conversations.

67. 630 F.2d 414 (5th Cir. 1980).

68. *Id.* at 417. Until this time, courts had not clearly interpreted the "ordinary course of business" (business extension exemption) *Id.* at 415. The court stated in *Briggs*:

We might wish we had planted a powerful electronic bug in a Congressional antechamber to garner every clue concerning Title III, for we are once again faced with the troublesome task of an interstitial interpretation of an amorphous Congressional enactment. Even a clear bright beam of statutory language can be obscured by the mirror of Congressional intent. Here, we must divine the will of Congress when all recorded signs point to less than full reflection. But, alas, we lack any sophisticated sensor of Congressional whispers, and are remitted to our more primitive tools. With them, we can only hope to measure Congress' general climate. So we engage our wind vane and barometer and seek to measure the direction of the Congressional vapors and the pressures fomenting them. Our search for lightning bolts of comprehension traverses a fog of inclusions and exclusions which obscures both the parties' burdens and the ultimate goal.

Id.

manager, who monitored the plaintiff, was authorized to use the company's telephone for such purposes. Second, since the manager had reason to believe that the plaintiff may have been giving away confidential business information, the manager's decision to monitor the plaintiff was justified.⁶⁹

The phrase "in the ordinary course of business" comes from The Federal Omnibus Crime Control and Safe Streets Act of 1968, Title III⁷⁰ (the "Act"), which deals with the criminal acts of wiretapping and eavesdropping. The Act states that anyone who intercepts a wire communication will be fined, imprisoned, or both.⁷¹ The Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."⁷² A telephone conversation is a wire communication under the Act.⁷³ Thus, after reading the statute, one would expect an employer's interception of employee telephone calls to be a crime under the Act.

Nevertheless, it is not a crime under the Act for an employer to randomly and secretly monitor an employee's telephone conversation "in the ordinary course of business" for the purpose of mechanical or service quality checks.⁷⁴ "In the ordinary course of business" ("the business extension exemption"),⁷⁵ is a powerful species of the defense of "privilege."⁷⁶ Even though the Act was designed to prevent invasions of privacy and to provide remedies for privacy invasions when they do occur,⁷⁷ courts have ruled that the business extension exemption also allows an employer to listen in on an employee's personal telephone calls.⁷⁸ The business extension ex-

69. *Id.* at 420.

70. 18 U.S.C.A. §§ 2510-2520 (West 1987).

71. *Id.* § 2511. The Act states in part that "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be fined not more than \$10,000 or imprisoned not more than five years or both." *Id.*

72. *Id.* § 2510(4).

73. See *supra* notes 16-17 for the language of the Act.

74. 18 U.S.C.A. § 2510(5)(a)(i). For example, telephone companies are allowed to secretly monitor calls to protect themselves from fraud or to ensure that their equipment is working properly. See *Simmons v. South West Bell Tel. Co.*, 452 F. Supp. 392 (D.C. Okla. 1978); *Sistok v. North West Tel. Sys., Inc.*, 189 Mont. 82, 615 P.2d 176 (1980).

75. 18 U.S.C.A. § 2510(5)(a)(i).

76. Prosser, *supra* note 42, at 817-33. Other defenses to invasions of privacy are "consent" and "law enforcement." *Id.* at 818. See *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986); *Jeffers v. Seattle*, 23 Wash. App. 301, 597 P.2d 899 (1979).

77. *Zweibon v. Mitchell*, 606 F.2d 1172 (1979); *United States v. Clemente*, 482 F. Supp. 102 (D.C.N.Y. 1979). In *Zweibon*, the court stated that the Act has two purposes. The first purpose is to "prevent or deter improper invasions of privacy." The second purpose is to "provide compensation when such invasions occur." *Zweibon*, 606 F.2d at 1182.

78. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983). In this tele-

emption, then, is the loophole that allows unscrupulous employers to circumvent the purpose of the Act and invade an employee's privacy. Passage of the "beep bill" would abolish this loophole because it would eliminate the secrecy of telephone monitoring, along with the employer's unfair advantage over his employees.

IV. THE "BEEP BILL"

The "beep bill"⁷⁹ was introduced to amend section 2511 of the Act. Under the bill, any employer who secretly listens in on an employee's phone conversation will be liable to that employee for damages.⁸⁰ The damages provision serves the purpose of the Act as an effective deterrent to privacy invasion in the workplace. When the "beep bill" is passed, employers will be reluctant to secretly intrude upon an employee's telephone privacy under threat of heavy fine.

phone monitoring case, the defendant company monitored the plaintiff's personal telephone call, discovered that she was going to interview for a job with another company and, based on that information, fired her. *Id.* at 579. After the district court granted summary judgment in favor of the defendant, the plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit. *Id.* On appeal, the court held that the plaintiff's supervisor could monitor the plaintiff's phone call only long enough to determine whether it was business or personal in nature. *Id.* at 582-84. The court also found that the district court failed to address many fact questions which precluded a finding of summary judgment. *Id.* at 585. Some questions for the trial court to consider were:

- What was the monitoring policy to which [the plaintiff] consented?
- Did [the supervisor] know that [the plaintiff] had received the call and if so did that necessarily indicate a personal call?
- How long was the call?
- When was the interview discussed?
- Were other subjects discussed?
- For how long did [the supervisor] listen?
- How long does it take to discover that a call is personal, for example, is there an immediately recognizable pattern to a sales call?

Id.

79. H.R. 1950, 100th Cong., 1st Sess. (1987); S. 1124, 100th Cong., 1st Sess. (1987). The language of the bill is as follows:

- (4) Notwithstanding any other provision of this chapter, it shall be unlawful for an employer (or an agent of an employer) to listen in on an employee's work phone call unless a repeating audible tone is utilized to warn parties to the call. Any person whose call is listened in on in violation of this subsection may recover civil damages as provided in section 2520 for an interception of communications in violation of this chapter.

Id.

80. The Act states that:

[A]ppropriate relief includes such preliminary and other equitable or declaratory relief as may be appropriate, . . . damages . . . and punitive damages in appropriate cases . . . and . . . a reasonable attorney's fee and other litigation costs reasonably incurred

[T]he court may assess as damages whichever is the greater of . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation . . . or . . . statutory damages of which ever is the greater of \$100 a day for each day of violation or \$10,000.

18 U.S.C.A. § 2520(b), (c)(2).

Consequently, the bill and its provisions for damages gives the bill's proponents a legal basis for a workplace privacy claim. They maintain that the "beep" amendment is necessary for two reasons. First, the constant threat that someone may be listening "erodes workers' dignity,"⁸¹ causing them severe stress and stress-related illnesses.⁸² This contributes to the further erosion of the quality of work life.⁸³ Second, the bill's passage will ensure the recognition and protection of employees' rights to privacy.⁸⁴

With the advent of total office automation, the quality of work life is a growing major concern of experts who study employment trends.⁸⁵ It is a complex issue comprised of many factors which

81. 133 CONG. REC. H3065 (daily ed. May 5, 1987) (statement of Rep. Edwards).

82. OTA REPORT, *supra* note 2, at 27. When a person's job is electronically monitored, there is no time for social interaction with fellow workers, job satisfaction is low and the stress-related illnesses are the inevitable result. *Id.* Recently, in California, a judge awarded an airline reservation agent disability payments. The judge found that her stress-related jaw spasms, headaches, chronic fatigue, and insomnia were the result of secret employer monitoring. Nichols, *supra* note 2, at 30 (statement of Kathy Skrabut, legislative representative for the Service Employees International Union).

83. OTA REPORT, *supra* note 2, at 27. Monitored offices have been referred to as "electronic sweatshops" . . . that combine the worst features of both the factory and office: boring, repetitive, fast-paced work that requires constant alertness . . . done under pressure of constant supervision and demands for faster work." *Id.* Because of this, electronic monitoring has been referred to as the "whip of the Information Age." Bahr testimony, *supra* note 57, at 2.

84. Senator Paul Simon of Illinois, when introducing the "beep bill," remarked that the bill was a "simple but critical step" toward protecting privacy rights in the workplace. 133 CONG. REC. at S5833. Secret telephone monitoring, like urine and polygraph testing, has serious privacy problems. According to Representative Don Edwards of California, who introduced the "beep bill" in the House, a person should not have to give up all of their privacy rights simply because they have a job. Statement of Rep. Don Edwards, chairman of Subcommittee on Civil and Constitutional Rights before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice on H.R. 1950, July 15, 1987, at 4.

85. One such group, the Office of Technology Assessment ("OTA"), studies these trends for the United States Congress. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WHAT OTA IS, WHAT OTA DOES, HOW OTA WORKS 5 (1987) [hereinafter "WHAT OTA IS"]. The Office was created by the Technology Assessment Act of 1972. Pub. L. No. 92-484, 86 STAT. 797 (1972). The Act states:

As technology continues to change and expand rapidly, its applications . . . large and growing in scale, and . . . increasingly intensive, pervasive, and critical in their impact, beneficial and adverse, on the natural and social environment, . . . it is essential that, to the fullest extent possible, the consequences of technological applications be anticipated, understood, and considered in determination of public policy on existing and emerging national problems."

Id. § 2. The OTA is nonpartisan, expert, objective and anticipatory. WHAT OTA IS, *supra*, at 6. A congressional board, consisting of six senators and six representatives, governs the OTA. The chairman of any congressional committee or the OTA board may request the OTA to embark on a new report, called an "assessment." *Id.* at 7. Assessments can take up to two years to complete. *Id.* During this time, the OTA will provide analyses to congressional committee members and staff, present testimony at congressional hearings, and conduct workshops. *Id.*

There are nine working "teams" which make up the nine functional areas studied by the OTA. They are (1) energy and materials; (2) international security and com-

make up the emotional atmosphere of a workplace.⁸⁶ Secret telephone monitoring degrades the office environment by adding an element of distrust between employer and employee.⁸⁷ Studies have shown that the distrust creates added stress and the increased stress may lead to mental and physical illnesses.⁸⁸

merce; (3) industry, technology, and employment; (4) food and renewable resources; (5) health; (6) biological applications; (7) communication and information technologies; (8) oceans and environment; and (9) science, education, and transportation. *Id.* at 8. Each team oversees the entire project from beginning to end. *Id.* The team also appoints panels consisting of scientists, engineers, labor representatives, industry representatives, academic community, public interest groups, and state and local governments. *Id.* The OTA also relies heavily on feedback from United States citizens in the private sector for views and criticisms of assessments in progress. *Id.* After an assessment is completed, it is released to the requesting committee for approval, sent to the Government Printing Office for publication, and released to the public. *Id.* at 9.

The OTA works closely with other information agencies to avoid project duplication. *Id.* Because of this interaction, the OTA also can frequently obtain valuable unpublished information. *Id.* Some related OTA assessments in progress as of April 1987 are entitled New Communications Technology: Implications for Privacy and Security; Technology, Public Policy, and the Changing Nature of Federal Information Dissemination; Communications Systems for an Information Age; and Science, Technology, and the Constitution in the Information Age. *Id.* at 17.

86. OTA REPORT, *supra* note 2, at 8.

87. *Id.* The OTA found that electronic monitoring raises worker opposition when it is imposed without worker participation, when standards are perceived as unfair, or when performance records are used punitively. *Id.* at 9. Opponents of the "beep bill" maintain that results of electronic monitoring are never used punitively. Nichols, *supra* note 2, at 30 (quoting Jane Moss, executive director of the American Car Rental Association in Washington, D.C.). Nevertheless, many monitored workers would disagree.

For example, Mary Williams, a reservations agent for United Airlines, was fired for an epithet she muttered under her breath after a rude customer had hung up. Mary's supervisor, who had been monitoring the previous call, overheard Mary's private words and the incident was used against her later in a termination proceeding. Because monitoring is legal through the business extension exemption, Mary cannot sue for invasion of privacy. She can try to sue United for wrongful discharge, but because United's monitoring was within its managerial rights, she will probably be unsuccessful. Blodgett, *supra* note 20, at 24.

See OUTTEN, *supra* note 28, at 31-34, for a general explanation of wrongful discharge. See also Ogborn, *supra* note 27, at 260 for a discussion of wrongful discharge based on drug test data. For an interesting discussion of swearing and freedom of expression in the workplace, see Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationship*, 34 BUFFALO L. REV. 693 (1985); Rabin, *Some Comments on Obscenities, Health and Safety, and Workplace Values*, 34 BUFFALO L. REV. 725 (1985); Staff & Foster, *Current Issues Affecting the Private Employee's Right to Freedom of Expression*, 23 AM. BUS. L.J. 257 (1985).

88. OTA REPORT, *supra* note 2, at 50-55. Many cases of employee illnesses due to monitoring-related stress were recorded in a survey of members of the Service Employees International Union. CAMPAIGN FOR VDT SAFETY, 9 TO 5 NAT'L ASS'N OF WORKING WOMEN & SERV. EMPLOYEES INT'L UNION, VDT SYNDROME: THE PHYSICAL AND MENTAL TRAUMA OF COMPUTER WORK (1987). Workers who suffer from occupational illnesses can collect workers' compensation if they prove that the disease is causally connected to work-related factors. Felter, *Workers' Compensation Claims for Heart Attack and Mental Illness*, MED. TRIAL TECH. Q. 308 (1986). Recently, courts have allowed workers to recover for mental and physical illnesses caused by stress factors at the workplace if they prove a causal connection. See *Mulcahey v. New England Newspapers, Inc.*, 488 A.2d 681 (R.I. 1985) (court awarded workers'

One such study, conducted by 9to5, The National Association of Working Women,⁸⁹ in 1984, showed that workers subject to secret monitoring⁹⁰ experienced a higher incidence of stress and stress-related problems than non-monitored workers.⁹¹ The results of this survey were consistent with other studies that linked stress-related diseases to workers subject to monitoring. For example, the Framingham heart study⁹² revealed that these workers suffered a higher incidence of heart disease because of rapid, monotonous, and repetitive work, and lack of discretionary control.⁹³ The "beep bill" would install an element of control into the job because the monitored employee would know when monitoring is occurring and could better master his own job performance. Because the bill would enable the employee to control his job, passage of the bill would reduce stress and improve the employee's work life.

The reduction of stress and the improvement of work life depends mainly on two factors. These factors include job involvement

compensation to widow of man who died of a heart attack caused by a stressful job). *ACCORD* *Rose v. Bostitch*, 523 A.2d 1221 (R.I. 1987) (because there was no evidence of a causal connection between the plaintiff's job duties and her mental disorders, the plaintiff could not collect workers' compensation).

For discussions of necessary criteria for workers' compensation claims for stress-related mental and physical diseases, see Sersland, *Mental Disability Caused by Mental Stress: Standards of Proof in Worker's Compensation Cases*, 33 *DRAKE L. REV.* 75 (1983-84); Troost, *Worker's Compensation and Gradual Stress in the Workplace*, 133 *U. PA. L. REV.* 847 (1985); Comment, *Workers' Compensation for Mental Stress Arising From Personnel Decisions*, 56 *CINCINNATI L. REV.* 587 (1987); Comment, *Eligibility for Worker's Compensation in Cases of Non-Traumatic Mental Injury: The Development of the Unusual Stress Test in Wisconsin*, 1987 *WIS. L. REV.* 363 (1987).

89. *OTA REPORT*, *supra* note 2, at 51. The 9to5 National Association of Working Women is just one of the groups supporting the "beep bill." Others include Consumer Federation of America; National Consumers League; National Organization of Women; Public Citizen's Congress Watch; Women's Legal Defense Fund; Amalgamated Clothing and Textile Workers Union; American Federation of Government Employees; American Federation of State, County and Municipal Employees; American Federation of Teachers; American Postal Workers Union; Association of Flight Attendants; Communication Workers of America; Department for Professional Employees, AFL-CIO; Industrial Union Department, AFL-CIO; International Association of Machinists; International Brotherhood of Electrical Workers; International Ladies Garment Workers Union; International Union of Operating Engineers; Service Employees International Union; The Newspaper Guild; United Auto Workers; United Food and Commercial Workers. Letter from these organizations to various Congressmen, June 29, 1987 ("Don't Bug Me-Protect Our Privacy" campaign).

90. Some workers subject to secret monitoring are word processors, data-entry clerks, telephone operators, customer service workers, telemarketers, insurance claim clerks, mail clerks, and bank proof clerks. *OTA REPORT*, *supra* note 2, at 29 (Table 1).

91. *Id.* at 51.

92. *Id.* at 51-55. The 1985 Framingham study found that women clerical workers developed heart disease at twice the rate of other women workers. *Id.* at 53.

93. *Id.* at 54. For further sources discussing how lack of employee participation relates to stress, see *id.* n.57. For further sources discussing how lack of organizational support causes worker stress, see *id.* n.58.

and organizational support.⁹⁴ The combination of a low level of employee participation in planning, plus a closely hovering manager, increases job stress and stress-related illnesses.⁹⁵ Hence, the constant threat that a manager may be watching, coupled with the employee inability to control the surveillance, leads to higher stress levels and poor worker health.

When West Virginia had a "beep" law, the telephone company was forced to eliminate secret telephone monitoring.⁹⁶ The following year, the company's employee magazine reported that customer compliments had actually increased and that efficiency was at an all-time high.⁹⁷ In other states, employees of Northwestern Bell are subject to "on-position" monitoring only. Under these conditions, the employee always knows when she is being monitored because the supervisor sits beside the employee during the monitoring session.⁹⁸ The service ratings of these employees remain consistently high.⁹⁹ Consequently, after the federal "beep bill" is passed, worker morale and work life quality should also improve.

Another reason for the passage of the "beep bill" is that it will serve to recognize and protect privacy in the workplace. Legislation is badly needed in this area because, although human intuition tells us that invasion of privacy in the workplace is wrong, right now there is no legal relief for an employee whose has suffered a privacy invasion at work.¹⁰⁰ This is especially a problem for the private employee at will.¹⁰¹ A public employee (one who is employed by a gov-

94. *Id.* Fast-paced computer work leaves little time for coworker socialization. *Id.* The reduced interaction also is a stress factor. *Id.*

95. COMMUNICATIONS WORKERS OF AMERICA, LEGISLATIVE FACT SHEET 3, (1987).

96. Bahr testimony, *supra* note 57, at 6. For the language of the West Virginia statute, see *supra* note 63.

97. *Id.* The C & P Mountain Lines reported that the West Virginia offices had an overall customer satisfaction rating of 95.7% and the company moved some of its Washington, D.C. workers into the West Virginia offices as a result. *Id.*

98. *Id.*

99. *Id.* For offices with on-position monitoring, the 1986 service ratings were 93%.

100. OTA REPORT, *supra* note 2, at 113. Currently, workers have no legal right to be treated with dignity or as an autonomous person. *Id.* An employer's secret surveillance of an employee is not prohibited by law unless it is outrageously intrusive. *Id.* See *Gibson v. Hummel*, 688 S.W.2d 4 (Mo. App. 1985); *Hall v. May Department Stores*, 637 P.2d 126 (Or. 1981); *Trout v. Umatilla County School District*, 77 Or. App. 104, 712 P.2d 814 (1985).

See also *supra* note 28 and accompanying text for a discussion of the limits on employees at will to bring actions against their employers.

101. OTA REPORT, *supra* note 2, at 113. The Report arrived at several other conclusions concerning electronic monitoring:

- [P]ublic employees are better protected against "unfair" monitoring practices than private sector employees
- [N]o law compels an employer to implement monitoring with fairness
- Electronically monitoring formerly unmonitored tasks may change the very nature of that task, by accommodating the task to the system of measurement.

ernment) can claim a constitutional right to privacy and a union employee may have certain contractual privacy rights. On the other hand, a private at-will employee currently has no recognized legal right to privacy in the workplace. The federal "beep bill" will ensure that an employee's privacy, on the phone at least, will be protected against an employer's intrusion.

Opponents are resistant to the "beep bill" for two reasons. First, employers feel that they will lose the right to evaluate their employees if the "beep bill" is passed. Second, the opponents feel that the "repeating audible signal" will confuse customers. Both reasons, however, are unfounded.

Basically, the "beep bill" would still allow employers to monitor their employees. The only difference is that employers would no longer be able to monitor secretly. Employers who currently do not use secret monitoring report better worker/supervisor relationships, higher efficiency levels, and increased customer satisfaction. At a hearing for the House "beep bill", Professor Charles Hecksher of the Harvard Business School stated that effective managers have no real use for secret monitoring.¹⁰² Thus, employers do not need to monitor secretly and there is even evidence that they do not need to monitor at all. The "beep bill," then, really does not take any rights away from employers, and may even result in increased employee productivity in the long run. Consequently, both employers and employees will benefit from the proposed legislation.¹⁰³

- No privacy protections exist against the collection of transactional information on employees' activities while at work
- With some exceptions, no law prevents an employer from using the monitoring systems . . . in a secret low visibility manner
- [T]here is no legal right to be treated with dignity or as an autonomous person [in the workplace]
- [N]o law currently protects workers against stressful environments
- In some cases, stress may be a compensable injury under Worker Compensation statutes, but stress-related health effects are difficult to prove, and are not accepted in a majority of State courts.

Id. at 113-14.

102. Bahr testimony, *supra* note 57, at 7. Professor Hecksher stated: Monitoring is a tool for bad managers. It's a crutch that allows bad managers to get away with a style that we know doesn't work. The best way to get effective work out of people is to tell them what needs to be done and then get out of their way and let them do it.

Id.

103. Barnes & Palmer, *supra* note 26, at 844. The "beep bill" will give employees an active role in the evaluation process. If employees know when the employer is collecting information on them, the employees will pay closer attention to the details and may even be able to correct false information in the employer's records. Employers should welcome this because employees have successfully brought negligence claims against employers for disseminating inaccurate information. See Moessner v. U.S., 579 F. Supp. 1030 (E.D. Mo. 1984), *aff'd.*, 760 F.2d 236 (8th Cir. 1985); Bulkin v. W. Craft E., Inc., 422 F. Supp. 437 (E.D. Pa. 1976).

The second reason employers are opposed to the "beep bill" is that they are concerned about possible customer confusion caused by the "beep."¹⁰⁴ A repeating signal may lead the customer to think that the company he has called is recording his voice for a prosecution in the future.¹⁰⁵ Opponents of the bill are also concerned that the signal will skew important information such as credit card numbers, order and catalogue item numbers, etc.¹⁰⁶ Companies that depend on phone sales claim that customers would be put off by the "beep" and that this would hurt revenues.¹⁰⁷

Nevertheless, the benefit the customer receives in the way of privacy protection vastly outweighs any confusion the customer experiences. Whenever an employee is being secretly monitored, the customer is being secretly overheard also. Consequently, the customer's privacy is also being violated. For example, secret monitoring is rampant in an insurance claims office. A customer who calls a claims office may want to discuss such sensitive information as a claim for an acquired immune deficiency syndrome ("AIDS") test or psychiatric treatment. The customer has a right to know, and may well want to know, who else is listening to his call.¹⁰⁸ The "beep bill" will function to preserve the customer's right of privacy by requiring notice to both parties that their telephone conversation is no longer private. Maintaining customer privacy is so important that the slight inconvenience of the "beep" will be virtually ignored as the public becomes accustomed to the practice.

104. Testimony of Laura Dale of Spiegel, Inc., on behalf of Direct Marketing Association and the American Telemarketing Association Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, July 15, 1987, at 3 [hereinafter "Spiegel testimony"].

105. Nichols, *supra* note 2, at 28.

106. Spiegel testimony, *supra* note 104, at 3.

107. *Id.* Some groups that oppose the "beep bill" are the Air Transport Association, the American Car Rental Association, Direct Marketing Association, National Association of Manufacturers and the National Retail Merchants Association. *Id.*

108. Blodgett, *supra* note 20, at 25. Harley Shaiken, professor of workplace - and technology-related courses at University of California in San Diego, stated:

When I call an airline to make a reservation, I don't assume someone is listening in on the conversation. As a consumer, my privacy is being violated.

What if I were to call the local medical clinic to be tested for AIDS and the receptionist was being listened in on by a supervisor who was my neighbor?

This kind of thing could become commonplace."

Id. For a perspective on privacy of children with AIDS, see Comment, *The Constitutional Right of Information Privacy: Does It Protect Children With AIDS?*, 14 *FORDHAM URB. L.J.* 927 (1986).

V. CONCLUSION

I'm just an average man
I want to be left alone
But why do I always feel
like I'm in the Twilight Zone?
I always feel like somebody's watching me,
and I have no privacy.
I always feel like somebody's watching me.
Who's playing tricks on me?¹⁰⁹

Because workplace surveillance techniques have increased rapidly in recent years, employers have access to a greater amount of employee information. The employee considers some of this information private. A line has to be drawn between how far an employer can intrude into an employee's privacy and how far into the workplace an employee's privacy can reasonably extend. Eliminating the secrecy aspect of telephone monitoring through the "beep bill" is a modest proposal, but an important step toward drawing that line.

Congress should pass the "beep bill" to protect the privacy of customers and workers. While it is true that employers need to evaluate employee performance, they do not have to infringe on their employees' privacy rights. The bill allows an employer to maintain the right to evaluate employees and, at the same time, protect the individual employee's right to privacy.

Similarly, customers do not know that there is a third party to their telephone conversations. Customers have a right to know if someone is listening in on their telephone calls. The "beep bill" lets both parties to the call know that someone else is on the line and thus protects the rights of the public as well as those of the employee.

Connie Barba

109. Rockwell, *Somebody's Watching Me*, (Motown Records 1983).