

# That's None of Your Business!

## On the Limits of Employer Control of Employee Behavior Outside of Working Hours

Matthew Lister 

Deakin University Faculty of Law, Victoria, Australia

### Abstract

Employers seeking to control employee behavior outside of working hours is nothing new. However, recent developments have extended efforts to control employee behavior into new areas, with new significance. Employers seek to control legal behavior by employees outside of working hours, to have significant influence over employees' health-related behavior, and to monitor and control employees' social media, even when this behavior has nothing to do with the workplace. In this article, I draw on the work of political theorists Jon Elster, Gerald Gaus, and Michael Walzer, and privacy scholars Daniel Solove and Anita Allen, to show what is wrong with this extension of employer control of employees' outside of work behavior. I argue that there are ethical limits on the controls that employers may put on their employees' behavior outside of work, and that many of these limits should be enshrined into legal protections which would prevent employers from conditioning employment on the regulations criticized.

---

### I. Introduction

Employers seeking—and being able—to control employee behavior outside of working hours is nothing new. Pre-employment and on-going drug tests have been common since the 1980s, for example, and in earlier days, employers such as Henry Ford sought to control many aspects of their employees' lives. However, several recent developments have extended efforts to control employee behavior into new areas, and with new significance. Employers have imposed not just requirements against using illegal drugs, but have imposed 'no smoking' requirements even outside of working hours. Employees have been fired for engaging in political speech outside of the workplace, and for posting pictures of themselves engaged in otherwise unremarkable acts such as drinking at a Halloween party on social media sites. Mandates to improve diet, Body Mass Index (BMI) and other aspects of employee health and nutrition suggest an ability to control employees' eating and exercise habits. And, employers monitor social media accounts for any potentially 'embarrassing' posts, even when they are not connected to the workplace or identified with it. Additionally, as more and more workers have started 'working from home' during the Covid pandemic, we may have additional reasons to worry about employer intrusion into the private lives

of employees.<sup>1</sup> In this article, I will argue that there are ethical or moral limits on the controls that employers may put on their employees' behavior outside of work, and that many, although not necessarily all, of these limits should be enshrined into legal protections which would prevent employers from conditioning employment on the regulations criticized.

Employers' attempts to control employee off-hours behavior vary as to whether the behavior in question is itself legal or illegal, and whether the means of control involve rules or regulations, or merely incentives. My argument applies most strongly to the case of employer attempts to control legal behavior outside of the workplace with regulations or rules, and statutory prohibition of these sorts of attempts at behavior control are most clearly called for. However, I will also show that my argument applies to at least some attempts to control illegal behavior by employers by means of rules or regulations, and at least some attempts by employers to control legal behavior by means of incentives or inducements. Statutory prohibition of these sorts of control may also be called for, though the case is less strong. Finally, I do not claim that the arguments against employer control over employee outside of work behavior that I present are the only possible ones. In each case I examine, there may be other good arguments against granting employers the power to regulate outside of work behavior of employees. When this is the case, the situation is over-determined, but, I contend, the arguments I will provide are particularly important ones.

After a discussion of the general theoretical framework that I will apply to this problem, I will consider the following cases. First, I look at bans on smoking at any time by employees, and regulations on postings on social media that are not related to or able to be directly connected to work activities (both examples of regulating legal activity outside of working hours by means of rules). Next, I will consider the use of incentive programs to encourage employees to lower their BMI, to provide health information to insurance companies, or to engage in other health screening or maintenance programs (all examples of using incentives to encourage changes in outside of working hours behavior). Finally, I will look at employee drug testing, both pre-employment and on-going (an example of using rules to regulate illegal outside of work behavior). In each case, the incentives or justification for the rules on behalf of the employer will be fully considered.

## II. Perspectives on Propriety of Employer Control

In arguing that employers ought not try to, and in many cases ought not be allowed to, regulate employee behavior outside of working hours, I will make use of two distinct, if sometimes overlapping, types of arguments. First, drawing

---

1. As helpfully noted by an anonymous reviewer, even before the increased shift to 'working from home,' many jobs did not have clear boundaries between working and non-working hours. This is perhaps clearest in the cases of salaried white-collar employees, but will apply in many cases. I return to this point briefly below.

on ideas from Jon Elster, Michael Walzer, and Gerald Gaus, I will argue that when employers seek to control the outside of work behavior of their employees, they are attempting to exercise power that, while arguably legitimate within its proper bounds or sphere of application,<sup>2</sup> is illegitimate when applied to different spheres of life. Secondly, drawing on work by Anita Allen and Daniel Solove, I will argue that many of these attempts to control worker behavior during non-working hours involve unreasonable and unjust invasions of the privacy of the employee by the employers. Both of these arguments provide grounds for an ethical argument against employers attempting to control the behavior in question, and also may sometimes provide a justification for legal protections for employees.

Drawing on ideas from Jon Elster and Michael Walzer, we can understand my project in this paper as an attempt to draw out some principles for or limits on 'local justice.' In different ways, both Walzer and Elster have investigated how different principles of distributive justice apply in different spheres of life. Walzer tends to see each 'sphere' as significantly autonomous in relation to the goods it distributes,<sup>3</sup> while Elster is more open to the possibility of a nested hierarchy of values.<sup>4</sup> My purpose here is not to adjudicate between these two approaches. (When there is conflict between them, I am largely sympathetic to Elster's criticisms of Walzer.)<sup>5</sup> Rather, in this paper I will make use of the basic idea to move in a different direction from either author. While both Elster and Walzer are most interested in questions of distributive justice, understood broadly, I am primarily interested in questions about rights and duties. Drawing an analogy with Rawls, we might see Elster and Walzer as focusing on questions that are connected to Rawls's second principle of justice, while I am here focusing on questions that are closer to those covered by Rawls's first principle.<sup>6</sup>

- 
2. This is not to imply that just any control over behavior while *at work* is legitimate. Readily accepted rules against discrimination, sexual harassment, and bullying show this. Beyond these widely accepted limits, the legitimate bounds of control on at-work behavior are contested. For useful discussion, see Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017) at 37-71 (providing an account of employers as 'private governments'). For a relevant case from Australia, see *Woolworths Ltd (t/as Safeway) v Cameron Brown*, [2005] AIRC 830, a case involving the dismissal of an employee in the butcher department of a grocery store for the refusal to remove a (permanent) eyebrow ring, despite the fact that the employer could articulate no clear justification for the policy as applied in the particular case. My contention is not that employers ought to have unlimited discretion or power, controlled only by widely accepted rules on harassment or discrimination, in the workplace, only that a large degree of control over within-workplace behavior is unproblematic and arguably necessary.
  3. See generally Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983). The basic argument for Walzer's notion of 'complex equality' is set out in *ibid* at ch 1.
  4. See generally Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Russell Sage Foundation, 1992).
  5. *Ibid* at 11-14.
  6. See John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Harvard University Press, 2001). Rawls's two principles of justice are: "a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions

This paper is not an attempt to apply Rawls's own theory to the workplace. As Rawls himself notes, different types of institutions and associations will have different principles that apply to them, both internally and for their general regulation.<sup>7</sup> The principles that apply to the basic structure of a society place general limits on the rules of local justice, but do not fully specify them. My project can be seen as trying to work out some of the equivalents of Rawls's first principle in relation to employment or the workplace. Rawls notes that it would normally be a mistake to attempt to apply either his two principles or the full 'veil of ignorance' approach directly to 'lower level' institutions.<sup>8</sup> I do not attempt to do this, but rather look specifically at the nature of workplaces, as they currently exist, and attempt to see if the authority to control the outside of work behavior of employees by employers can be justified in particular cases. These cases may in turn provide grounds for extrapolation or extension of the morals I draw.

An idea with some significant similarity to Walzer's has been developed more rigorously by Gerald Gaus.<sup>9</sup> Gaus does not focus on the workplace to any degree, but does argue that, while certain actions, those which he claims address issues of "morality" (in his technical and, I think, somewhat idiosyncratic sense) are "everyone's" business, there is also a "sphere of privacy," where what one does is no one's business but one's own, and that within this sphere, "we are free to act on our own evaluative standards."<sup>10</sup> Gaus's idea is based on a notion of rights that serve to protect against demands by others that we do or not do particular things.<sup>11</sup> To attempt to impose obligations on others within this sphere where they ought to be free to follow only their own evaluative standards is to violate the rights of others. While Gaus is primarily concerned with societal or governmental imposition on this sphere of personal autonomy, I will argue that attempts by employers to control out of workplace behavior also violates this sphere. (After all, if actions in this sphere are "no one's business" except the person who does them, then they are also not the business of employers.)<sup>12</sup>

A related but distinct approach to limiting employer control of employee behavior outside of working hours comes from an analysis of privacy law. Drawing on the work of Daniel Solove and Anita Allen, I will argue that the principles that underlie many of our current privacy practices justify granting employees freedom from employer supervision and regulation outside of working hours. Following Solove, I do not take privacy to be a unified notion, but rather a "set of protections against a related cluster of problems."<sup>13</sup> Different

---

of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)." *Ibid* at 42-43.

7. *Ibid* at 11-12, where Rawls explicitly invokes Elster's notion of 'local justice' in this regard.

8. *Ibid*.

9. See generally Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press, 2011).

10. *Ibid* at 382.

11. *Ibid* at 370.

12. This point again has resonance with Anderson's idea of employers acting as 'private governments.' See Anderson, *supra* note 2.

13. Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2008) at 40.

types of attempts to control behavior of employees outside of working hours lead to different types of problems, but the lens of privacy can help us understand what is problematic with many of these. As Solove notes, privacy norms depend on social practices to a large degree,<sup>14</sup> and “reasonable expectations” help courts, and others, determine what privacy rights exist.<sup>15</sup> This gives us more reason to critically evaluate the growing attempts by employers to control more and more aspects of employee non-working behavior before norms are settled on without reflection and popular consent. This is perhaps especially so with the rapid increase of ‘working from home’ during the Covid pandemic, a time when new norms and standards are and will be developing quickly. If we do not reflect on these norms and critically evaluate them, there is good reason to think they will primarily reflect the interests of more powerful parties—here, employers. Privacy norms are particularly important when considering how far employers ought to be able to monitor employee outside of work behavior through such means as insisting on being granted access to social media content by the employee, or through testing for legal or illegal drug use.

Before going on, it may be helpful to briefly discuss why I here make a distinction between employer control during working hours and outside of working hours, given that this distinction is often blurred for many workers, and given that we may expect the distinction to become even less clear if ‘working from home’ continues on a larger scale after the end of the Covid pandemic. I claim this distinction is worth using for two reasons, one descriptive and one prospective and normative. First, on a descriptive level, the distinction is still more applicable and salient for workers who are also typically more vulnerable. Noticeably, this includes employees who could not ‘work from home’ during the pandemic such as shop assistants, restaurant staff, transportation workers, and so on. So, for these workers, the distinction remains a basic one. From the prospective and normative perspective, I hope that the arguments in this paper can help form the foundation for the justification of limits on working life, even when these limits are less obviously entailed by the nature of the work itself. White collar workers, university professors, and others also need a sphere of autonomy and a realm of privacy free from the control of their employers. If my arguments here are sound, we will have a basis for thinking about how to meet this need and make it operational in law and policy.

### **III. The Importance of Work, and the Power This Gives Employers**

In most countries in the world, the majority of adults must work, and people who do not work most often depend heavily on those who do. Work, of course, is important for earning money to pay for the necessities of life, but is also an important source of social value. Furthermore, especially in the US, but also in other countries, many important but necessary features of life are tied closely

---

14. *Ibid* at 50.

15. *Ibid* at 71.

to work, such as access to adequate health insurance,<sup>16</sup> contributions to retirement plans, and so on. The relative stinginess of unemployment benefits—in value, possibility of access, and duration—in many countries further make the specter of loss of work even more daunting. Work is furthermore often an important element of a person's sense of self-respect. Not being able to work, becoming dependent, and the stress that comes from economic and social precariousness are significant causes for concern for many people.

If labor markets were such that it was typically easy for people to find new work of similar quality were they to lose or leave a job, and if social insurance and safety nets were such that people did not need to fear that short-term loss of work could leave them unable to satisfy their basic needs and provide for themselves and their families, then many of the problems discussed in this paper would have significantly less social importance. Because I will argue that there are strong moral reasons for employers not to act in the ways discussed in this article, even a much better environment for workers would not make the sorts of actions discussed here acceptable, but might make legal restrictions on them inappropriate and unnecessary. In such situations we might have to balance out the importance of the public and official affirmation of these rights via a system of enforcement with the efficiency costs that would likely come with such an approach. However, given the factors discussed above—the importance of access to work and the difficulties that come when it is lost—at least in many cases, legal restrictions on these types of actions may be justified. When this is so will be explained below, in relation to particular cases.

#### IV. Applications

With our brief methodological discussion out of the way, I will now turn to a series of test cases and applications. I will start by considering 'no smoking' policies and regulation of social media by employers. Both of these examples present instances of employers attempting to use rules or regulations to ban, monitor, or closely control legal employee behavior outside of working hours. Next, I will discuss the use of 'incentive' programs of various sorts, aimed, at least ostensibly, at promoting 'healthier' behavior on the part of employees. Unlike the policies in the previous section, those discussed here do not involve strict rules or regulations. They, at least arguably, involve the use of 'carrots' and not 'sticks' in trying to shape employee behavior. Despite this difference, I will argue that many of these programs are problematic for much the same reason as stricter, rule-based regulations, and must be carefully limited if they are not to be illegitimate invasions of the rights of workers. Finally, I will discuss employee drug testing. Here

---

16. With the introduction of the *Patient Protection and Affordable Care Act*, 42 USC § 18001 (2010) [*Affordable Care Act*] this claim is somewhat less true in the US than in the past, but it remains the case that the majority of US citizens get their health insurance through an employer-sponsored plan, and that losing access to this insurance is at best stressful, highly disruptive, and potentially expensive, making it still the case that the fear of loss of employer-sponsored health care is a major concern for many workers.

the behavior regulated is typically illegal, making it less clear that the employee has a right to engage in the behavior. Yet, I will show that even when the behavior in question is illegal, there are often good reasons to prevent employers from regulating this behavior outside of working hours.

In each case, after setting out the limits of the employee behavior I wish to consider here, I will show how our 'local justice/spheres of authority' and our 'privacy' lenses each suggest strong limits on employer control of the behavior in question. These limits are not, however, themselves limitless, so I shall also consider the extent to which employers may have legitimate interest in modest limits on the behavior, even when it takes place outside of working hours. When these interests are properly accounted for and balanced, we can see where the limits of employer control should lie.

### *a. No smoking—ever*

Bans on smoking inside buildings are now ubiquitous, and many workplaces (including universities and hospitals) prohibit smoking anywhere on their grounds. Recently, however, a number of businesses—mostly in health care but also some others—have extended no smoking policies to all areas of the employee's life, insisting that all people who work for the business do not smoke, ever.<sup>17</sup> As smoking becomes less common, and more associated with other sorts of anti-social behavior,<sup>18</sup> it is easy to imagine such bans spreading. Justifications for bans on smoking in buildings are easy to provide, given potential health concerns from second-hand smoke, potential fire dangers, and the desire of non-smokers to not be exposed to unpleasant smells. Bans on smoking anywhere on the territory of a large organization, such as a major hospital or university, are harder to justify, but may still have some legitimate work-related grounds, including a desire for increased productivity, an improved image (being seen by patients, visitors, or clients as a 'healthy' atmosphere), and reducing litter.<sup>19</sup> Even the broadest of these territorial bans, however, let employees decide whether or not to smoke at home or elsewhere when not working.

Total smoking bans violate both local justice and privacy concerns. Whatever legitimate goals may be furthered by extending no smoking policies to non-working hours may be addressed, insofar as they are legitimate, in other ways, ones that respect the decisional authority of employees in their non-working hours, and that do not subject them to intrusive surveillance or monitoring regimes. While smoking is unquestionably unhealthy, employers have many

---

17. Wendy Koch, "Workplaces ban not only smoking, but smokers themselves", *USA Today* (5 January 2012), online: <https://abcnews.go.com/Business/workplaces-ban-smoking-smokers/story?id=15300981>.

18. "Cigarette Smoking and Tobacco Use Among People of Low Socioeconomic Status" (last reviewed 25 November 2019), online: *Centers for Disease Control and Prevention* <http://www.cdc.gov/tobacco/disparities/low-ses/index.htm>.

19. I suspect that paternalistic grounds are actually more common for these territory-wide no smoking policies, but my point here is only that arguably reasonable justifications for them can be found.

tools available to them to address concerns that arise in this area without attempting to control the personal decisions made by employees outside of working hours. That this is shown suggests that such total bans extend beyond the bounds of employers' legitimate interests. For example, health concerns may be addressed by providing voluntary programs to help employees who wish to quit smoking to do so. Similarly, potential complaints about smoke smells from customers may be addressed by neutral dress and grooming standards. These approaches would leave employees free to decide what legal activities—even ones that are less than fully rational or ideal—to pursue in their own time, while respecting legitimate employer interests. Making use of these less intrusive polices would allow employers to protect whatever legitimate interests they may have in these areas without extending their decisional control into the non-working hours of their employees. Because the legitimate interests of the employer can be addressed without extending the employer's sphere of control into non-working hours, we have good reason to think that allowing such an extension would be a violation of principles of local justice, in that the employer would illegitimately be attempting to substitute its evaluative standards for those of the employee.

No smoking policies, if they were to be made effective, would also likely require some sort of surveillance or monitoring program, similar in some ways to drug testing or other forms of employee monitoring. Allowing the extension of such monitoring for legal activity would set a dangerous precedent. Many legal activities done by employees could potentially have as negative of an impact on productivity or other employer interests as does smoking. For example, not sleeping enough at night (perhaps because the employee stays up late watching TV or looking at social media), eating an unhealthy diet, or engaging in extreme sports might all reduce productivity, raise health care costs, or lead to greater absenteeism. But we are, and should be, reluctant to allow employers to monitor whether employees are engaged in any of these activities, let alone condition employment on them. As Daniel Solove has argued, sometimes it is in society's interest to imperfectly enforce even positive norms, such as the norm against smoking, so as to help avoid suffocating surveillance and control by those with power, whether they be the state or one's employer.<sup>20</sup> We may see granting a privacy right to employees to not be monitored in relation to smoking outside of the workplace as an important step in preventing the spread of suffocating surveillance.<sup>21</sup>

### ***b. Reacting to and monitoring social media***

As the use of social media sites such as Facebook, Twitter, Instagram, and others has spread through society, employers have taken an increasing interest in the

---

20. See Solove, *supra* note 13 at 94.

21. I briefly discuss how the above discussion relates to the use of marijuana in US states which have made such use legal under state law below, in the section on drug testing (section III.d).

activities of their employees on these platforms. In this article, I am particularly interested in two forms of attempts to control behavior of employees during non-working hours on social media by employers. First, I will consider cases where employers have disciplined or fired employees for postings or other activity on social media, done outside of working hours, that did not have any direct connection to the employee's place of employment, work responsibilities, or other clearly work-related elements. Secondly, I will consider more general monitoring of social media by employers, such as demanding access to a Facebook or Instagram account as a term of employment. In both instances, I will argue that there are good moral grounds to oppose such activities by employers, and that, at least in the case of monitoring of social media, regulation to prevent such requirements is called for.<sup>22</sup>

In May 2006, Stacey Snyder, a student teacher finishing her degree in education from Millersville University in Pennsylvania, who had been working as a student teacher in Conestoga Valley High School, was prohibited from graduating with a degree in education in part because of a photo she had posted on her social media MySpace<sup>23</sup> page showing her at a costume party, wearing a pirate hat and drinking from a plastic cup. The picture was entitled "drunken pirate."<sup>24</sup> When Snyder brought suit against the school, the district court ruled that because she was in a training program, Snyder was essentially an employee, and that the university, and indirectly the school district, as her employer, could

- 
22. I will argue that firing someone because of the sort of social media postings I will consider here should, ideally, also be regulated, but this would require much stronger changes to the at-will employment schemes that currently dominate US employment law. While general changes in this area seem reasonable to me, I will focus on specific changes to this sort of case. I will briefly return to this point below, but it may be worth noting that Australia has extended at least some degree of protection to employee postings on social media even when the postings contained derogatory and sexist comments about the worker's manager. See *Linfox Australia Pty Ltd v Fair Work Commission*, [2013] FCAFC 157. The worker in this case was "older" and it was claimed that he did not understand that anyone outside of his close acquaintances could see the posting, both facts taken to be relevant by the Federal Court in its decision upholding the Fair Work Commission. *Ibid*. In other cases, Australian administrative tribunals have held that "[a]nything which erodes the trust and honesty between work colleagues is destructive of harmony and cohesion and has the potential to affect the work environment significantly," and so is potentially a ground for dismissal, even if it takes place outside of working hours. See *Cunningham v Australian Bureau of Statistics* (2005), 148 IR 20. Postings on social media could obviously fit in this category. Furthermore, as the case of Peter Ridd shows, even in a country such as Australia, where there are in general strong statutory protections for workers, employers may be able to get around these by putting overly strong rules into employee handbooks that are then taken to be incorporated into an employment contract. When this is allowed, it provides the possibility to gut the sort of protections argued for in this paper. See *James Cook University v Ridd (No 2)*, [2020] FCAFC 132.
23. A commenter on an earlier version of this paper wondered if this case is still relevant and indicative, given the demise of MySpace. The answer is yes, in that all of the factors and morals can be easily applied to Facebook or Instagram postings, and the particular case has the benefit of well-established facts.
24. The photos, which are otherwise completely unremarkable, may be seen here: "College Sued Over 'Drunken Pirate' Sanctions: Woman claims teaching degree was denied because of single MySpace photo", *the smoking gun* (26 April 2007), online: <http://www.thesmokinggun.com/documents/crime/college-sued-over-drunken-pirate-sanctions>.

use the posting as a ground to fire her, and that her posting was not protected by the US First Amendment.<sup>25</sup>

Before arguing that firings in cases like Snyder's are inappropriate on both local justice and privacy grounds, it is important to note the limits of my argument. I am here considering postings on social media that do not directly or clearly disparage or slander an employee's workplace, co-workers, supervisors, or customers, and which do not show or indicate that the employee was engaged in activities while at work which would cause similar harms to the employer.<sup>26</sup> Furthermore, I am not here considering sanctioning employees who spend time on social media during working hours. While it may be, at this point, essentially impossible to prevent most employees from engaging with social media during work hours, such rules would fall under regulations about how employees act while at work, a subject that is outside the scope of this article. Finally, I am not arguing that somehow social media postings ought to be granted First Amendment or similar protection against employers. As the large majority of employers considered here are private actors, such protection would not be possible in any case, but even in the case of state actors, the argument I present does not depend on a claim grounded in the US First Amendment or similar protections.

When employers discipline or fire employees for postings on social media of which they do not approve, even though the post does not have any direct relation to work activities, it interferes with the employee's rightful sphere of decisional autonomy. We see this when we note that all that is different in the sort of cases we are discussing from cases where employers would clearly be wrong to fire or discipline the employee, is that social media makes it more likely that the employer (and perhaps others—a point I will return to) will know of the behavior. But, if the behavior in question is not something that itself would justify being disciplined, such as drinking alcohol while wearing a pirate hat, or complaining about one's supervisors in a non-slandering way to one's friends, then the fact that employers come to know of it via social media cannot itself change things. Given that the behavior we are considering here is all legal, non-tortious (that is, it does not involve slander or libel, among other things), and otherwise largely

---

25. The District Court opinion, *Snyder v Millersville University et al*, 2008 WL 5093140 (Dist Ct Pa) may be found here: <http://voices.washingtonpost.com/securityfix/Decision%202008.12.03.pdf>. While it is clear that Snyder had other difficulties with her teaching program beyond the 'drunken pirate' picture, it also appears clear the reaction of school administrators to her social media postings—which did not name specific officials and which were not directed to her students—were the motivating factor in her removal from the program.

26. For example, employees at Taco Bell and KFC who were fired from their jobs after posting pictures of themselves licking food before it was given to customers would not be protected under this policy, as their actions involved at-work activities that clearly would disturb customers, violate health and safety standards, and bring disrepute to the business. See e.g. "FIRED: Taco Bell employee pictured licking taco shells on Facebook comes forward to admit he has lost his job", *Daily Mail Reporter* (4 June 2013), online: <http://www.dailymail.co.uk/news/article-2335947/FIRED-Taco-Bell-employee-pictured-licking-taco-shells-Facebook-comes-forward-admit-lost-job.html>; "KFC fires worker photographed licking mashed potatoes plate on Facebook", *New York Daily News* (21 February 2013), online: <http://www.nydailynews.com/news/national/kfc-fires-worker-photographed-licking-food-article-1.1269940>.

unremarkable (it is behavior that is very common in society), to allow employers to sanction employees for engaging in this behavior would be to make them little sovereigns in the lives of their employees. Given the facts about the necessity of work in the lives of most people discussed above, this would be an unacceptable intrusion into the sphere of autonomy rightly retained by individuals.

A case that might fall between that of employees posting instances of violations of health or safety standards at work, and Snyder's posting of an unremarkable picture of herself having an adult beverage at a party, is the recent case of University of Tennessee law professor and well-known blogger Glen Reynolds' posting on twitter that people stuck in traffic due to protests against police violence in Charlotte North Carolina should "run [the protesters] down," a claim that many took to be an incitement to violence.<sup>27</sup> Unfortunately, similar intemperate and disreputable statements have been common in recent months in relation to political protests against police violence in many countries, but here I will focus on the case of Reynolds. Reynolds was not disciplined by his university employers, but he was suspended for thirty days from his position as an opinion columnist by the newspaper USA Today.<sup>28</sup> Is such a sanction justified on the account I have presented? I think this is a somewhat close case, but arguably acceptable. Reynolds was assumedly hired by USA Today because of his ability to attract readers and present a particular point of view. If his public expression, even via social media, greatly hampers his ability to do that, then sanctions on the part of the employer may be justified, at least in clear cases. In cases such as this one, Reynolds' position as a sort of public face for his employer is relevant. Even if sanctions such as this were appropriate for someone in Reynolds' position, or who was otherwise a public face of a company, they would not be appropriate for a lower-level worker who could not be taken to be a representative of company values by a reasonable person.<sup>29</sup>

---

27. See Eric Wemple, "'Instapundit' Glenn Reynolds defends 'Run them down' tweet during Charlotte unrest", *The Washington Post*, (22 September 2016), online: <https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/09/22/instapundit-glenn-reynolds-defends-run-them-down-tweet-during-charlotte-unrest/>. The twitter post would clearly not meet a legal standard as 'incitement.' See e.g. *Brandenburg v Ohio*, 395 US 444 (1969), explaining that, to be illegal as an incitement to violence, the advocacy must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action." Even though Reynolds apparently has several thousand Twitter 'followers,' it is extremely unlikely that this tweet would meet the standards that have developed after *Brandenburg*. Since I started working on this paper, similar calls for violence against protesters have been made by many Republican elected officials in the US. See Alex Pareene, "The Right to Crash Cars Into People", *The New Republic* (24 April 2021), online: <https://newrepublic.com/article/162163/republicans-anti-riot-laws-cars>. It is at least possible that these recent developments would make a call like Reynolds' much closer to incitement in the legal sense, but I must leave this important issue aside for now.

28. See Kelsey Sutton, "USA Today suspends columnist Glenn Reynolds for one month", *Politico* (22 September 2016), online: <http://www.politico.com/media/story/2016/09/usa-today-columnist-glenn-reynolds-004780>.

29. I discuss the question of when someone can reasonably be considered a 'face' of a company, and therefore be held to higher standards of behaviour, in an as-yet unpublished paper, "Who is the face of a business?" The answer to the question is not always completely straight-forward, as I attempt to show in that paper. However, as the majority of employees, I will show, are not plausibly thought to be 'faces' of a company, even if they interact with the public and are known to it in some ways, I leave this difficult issue aside for the present time.

The fact that the information about employee behavior in these cases was obtained by means of social media does raise one additional consideration that must be dealt with to make this argument secure. Actions or statements noted on social media may have a much wider audience than the same action in the past. While before social media no one outside of the party attended by Snyder would have known that she had been so bold as to drink alcohol from a plastic cup while wearing a cheap pirate hat at a costume party, her posting of this picture to a social media site made the potential audience much larger. Similarly, if she had merely complained about her supervisors (without naming them) and used poor grammar while doing so, verbally to friends, her supervisors would have had little chance of knowing. By posting these items on a social media site, Snyder greatly increased the potential audience. Does this alone potentially justify sanctioning or firing her or someone similar to her in a case like this? Students in my introductory business ethics classes have sometimes suggested that this larger audience does potentially justify sanctions, suggesting that Snyder's actions, or ones like them, could somehow bring disrepute to her employers—in this case the school and the university. I find this idea slightly far-fetched,<sup>30</sup> but even if it were true, we would need an argument to show that the possibly bad feelings (without any actual harm) felt by an employer, or perhaps a customer, at knowing that people behave in ways that they do not approve of, should be sufficient to allow the employer to control otherwise legal activity outside of working hours, when the activity itself does not harm job performance. Allowing this would be similar to allowing a strong form of a heckler's veto in free speech cases, and would be a significant intrusion into the rightful sphere of decisional autonomy held by individuals.<sup>31</sup>

Employers do not only seek to sanction employees for social media posts made outside of working hours and not related to work, but also increasingly demand access to employee social media accounts, so that the employer may have direct access to these accounts, even if they would otherwise be 'private'—reserved only for 'friends.' While several US states have passed laws limiting employers' ability to demand access to otherwise private social media,

---

30. It is clearly the case that Snyder's social media postings annoyed and even angered her school supervisors, but unless we want to swallow an extremely strong version of the idea that supervisors should, both legally and morally, be able to exercise near dictatorial power over their employee's lives, this is surely not sufficient.

31. I here ignore the quasi-vigilante attempts by people to have others fired, typically by sending harassing demands to this end to the employers of the person in question. Such so-called 'twitter trials' lie outside of the main scope of my investigation in this article insofar as they involve responding to the demands of others, whether rightly or wrongly. I briefly discuss the matter in my yet unpublished paper "Who is the face of a business?" The topic is treated in depth by Vikram Bhargava in his important paper, "Firm Responses to Mass Outrage: Technology, Blame, and Employment" (2020) 163:3 *J Business Ethics* 379. This topic is obviously closely related to so-called 'cancel culture.' However, the cases that I am most interested in in this paper are at least somewhat distinct from this trendy topic, so I hope to leave this discussion aside here, with the recommendation of Bhargava's paper to those interested in the topic.

many US states do not have such bans, and there is no federal ban in the US.<sup>32</sup> In many other countries such practices are disfavored, but not strictly illegal.

If the argument presented above against employers firing or sanctioning employees for postings on social media that do not directly implicate the company in dangerous, illegal, or anti-social behavior—and which are not relevantly tortious—are sound, then there is already a good reason to oppose allowing employers to demand access to employee's social media sites. However, there is an additional reason grounded in privacy concerns as well. Surveillance of social media is a paradigmatic privacy invasion in Solove's sense in that it is likely to change the (otherwise legal) behavior of those watched, encouraging them to engage in self-censorship, even of behavior and speech that has no plausible relevance to the workplace.<sup>33</sup> These worries are perhaps even more significant for female employees, given that, as Anita Allen has documented, women's lack of privacy in work matters is often strongly associated with being subjected to sexual harassment and discrimination.<sup>34</sup> This problem is made worse by the fact that giving an employer access to one's social media account grants the employer a large degree of access to the accounts and activities of one's 'friends' as well, access that is unlikely to have been voluntarily granted. In this way, demands for social media passwords or other forms of access risks not only the invasion of the workers' own privacy, but also the involuntary exposure of the actions of many others, a potentially greater harm.<sup>35</sup>

The need to prevent these harms justifies a legal norm preventing employers from demanding access to employees' social media sites as a condition of employment. Significant, but justified, changes to US employment law, limiting at least some aspects of the default at-will employment standard, would be required to make the changes suggested here in relation to social media posting legally effective in the US. That many countries have a default of for-cause dismissal for most workers shows this to be possible.<sup>36</sup> These rules do not currently always provide sufficient protection, but the needed protections could be made explicit in relevant laws. Furthermore, collective bargaining units and others would be well advised to ensure that good-cause firing grounds evolve so as to clearly protect social media posts.

### *c. Monitor and improve your health, or else*

A growing number of companies<sup>37</sup> have 'wellness' programs, often run in coordination with insurance providers who contract with the employer. The primary

---

32. See Jonathan Dame, "Will employers still ask for Facebook passwords in 2014?", *USA Today* (5 January 2014), online: <http://www.usatoday.com/story/money/business/2014/01/10/facebook-passwords-employers/4327739/>.

33. See Solove, *supra* note 13 at 108.

34. See Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988) at 142-44.

35. See Solove, *supra* note 13 at 148.

36. For one example, see *Fair Work Act 2009* (Austl), 2009/29, s 385.

37. Including universities where I have taught in the US.

goal of these programs is to reduce insurance costs by measuring, monitoring, and ideally improving the health of employees. If this can be done, employers may pay significantly less for their contributions to health insurance, and in some cases some of these benefits are passed on to the employees. The programs also have secondary benefit to the employer insofar as they increase productivity and decrease absenteeism and turn-over caused by poor employee health.<sup>38</sup> The large majority of these programs are at least nominally voluntary, and may sometimes provide non-trivial incentives to employees who take part in them, ranging from additional employee discounts, reductions in health care premiums, subsidies for gym or health club memberships, and sometimes cash.

At first glance, it is hard to see why voluntary programs—based on incentives, and ostensibly aimed at employee health—could be problematic from the point of view considered in this article. But, I will argue, several problems arise from such programs. First, and most immediately, the supposedly voluntary and incentive-based aspect of many such programs is often more apparent than actual, making them more coercive than we might at first think. Secondly, even beyond the coercive nature, the programs sometimes require workers to provide private personal information that is no business of the employers. Finally, some programs would, to achieve their goal, require quite significant changes in an employee's lifestyle. Even if these changes were for the best, most attempts to bring them about, even by means of incentives, involve an unreasonable intrusion into a sphere of personal autonomy best left to employees. I start by discussing the first problem.

It is easy to see how an employee wellness program could be truly voluntary, or based on incentives that did not become coercive. (Other problems, discussed below, might well remain, even with a truly voluntary program.) We can imagine a company that provided discounts on gym memberships to employees, with no requirement to take part, or that simply made exercise facilities easily available at the workplace. A company might make free consultations with nutritionists available to its employees, or make flu shots available for free at work. Other ideas are also plausible. However, more and more companies make participation in often intrusive wellness programs essentially mandatory. For example, employers in the US have required employees to fill out extensive health information forms as a requirement for taking part in employer sponsored health-care programs.<sup>39</sup> For many employees in the US, this makes participation essentially mandatory. In another case, Honeywell International fined employees who did not agree to biometric tests \$4,000.<sup>40</sup> Attempts to limit this action by the US Equal Employment Opportunity Commission were denied by a federal court.<sup>41</sup> In cases

---

38. There is, however, good reason to doubt whether most wellness programs provide significant health benefits or savings to employers. See Adrianna McIntyre et al, "The Dubious Empirical and Legal Foundations of Wellness Programs" (2017) 27:1 Health Matrix 59.

39. Reed Abelson, "Employee Wellness Programs Use Carrots and, Increasingly, Sticks", *The New York Times* (24 January 2016), online: <https://www.nytimes.com/2016/01/25/business/employee-wellness-programs-use-carrots-and-increasingly-sticks.html>.

40. *Ibid.*

41. *Ibid.*

such as this, given the facts about the US labor system and in particular, the way that health care is still, despite the *Affordable Care Act*, largely tied to employment, it is difficult to see such programs as voluntary. Mandatory rules about providing private health information and demands to undergo non-work related testing already run afoul of much of the discussion above about privacy, surveillance, and decisional autonomy, but I will show that, even when such programs are more properly voluntary, significant moral problems remain, and legal restrictions on such programs are plausible and feasible.

Even truly voluntary programs—ones where the incentives involved are not coercive, even in our current context, where employers have the large majority of bargaining power in relation to employees—may be problematic if they involve an unacceptable invasion of privacy. Consider here Whole Foods' recent initiative to tie employee discounts to achieving a desired BMI and cholesterol level.<sup>42</sup> While Whole Foods employees typically receive a 20% discount, those who do especially well on these measures may qualify for a 30% discount.<sup>43</sup> Setting aside for a moment worries about whether the use of BMI in this sort of individual (as opposed to population-level) situation makes sense, and the fact that genetics is likely to contribute significantly to both BMI and cholesterol levels, programs such as this require employees to make significant information about their health and their physical body—information that is not in any way directly related to their work performance—available to their employer. Information about one's body and one's medical records and practices have traditionally been considered private, requiring some good reason for demanding access to them.<sup>44</sup> Because access to one's medical and health information and non-visible information about one's body is reasonably seen as private, there is good reason to legally restrict employers' access to it, absent a bona fide work-related justification, even if the programs involved are not inherently coercive. (I will consider questions about whether restrictions such as those argued for here are themselves unreasonable infringements on the liberty of employees, who would like to receive the benefits in question, below, in a section devoted to objections to my proposal.)

Finally, there are strong moral reasons why we should be wary of employers using incentives to attempt to modify the behavior of employees, even beyond the concerns addressed above. Even when the incentive programs are well-crafted and reasonably designed to promote employee health, the use of such incentive programs by employers is an intrusion into the proper sphere of decisional autonomy of the employees. Even when it is arguably for the employee's own good, it is simply not the place of the employer to use such methods to shape

---

42. See Stephanie Volkoff Green, "Whole Foods to Employees: Lose Weight", *Mother Jones* (28 January 2010), online: <http://www.motherjones.com/blue-marble/2010/01/whole-foods-employees-lose-weight>.

43. *Ibid.* As of the time of the cited article, there was no indication that Whole Foods had plans to reduce the discount of—thereby essentially giving a pay cut to—employees who did not meet the targets, though of course the possibility of such measures is worrisome and would move this sort of incentive program into the coercive category.

44. See Solove, *supra* note 13 at 52, 141. See also Allen, *supra* note 34 at 110-13, noting the particular importance for women in this area.

employee behavior. Consider an analogy. Within a family, it may be reasonable to use incentives to encourage healthy behavior. If parents have a rule that children may only watch TV if they get an hour of exercise first, or that they will receive a larger allowance if they regularly eat fresh fruits and vegetables while refraining from spending money on candy, most people would see this as an acceptable use of parental wisdom and prerogatives. However, if these same parents attempted to use similar incentives to improve the health of their neighbor's children—offering them money to eat healthy foods or inviting them to watch TV if they got exercise first—such acts would rightfully be seen as an invasion into the familial sphere of the neighbor.

In the example above, even if such incentives would be welfare-enhancing, we typically think it is not the place of a neighbor to offer them to the children in another family. I contend that when employers offer incentives like those discussed above to employees, the employer is engaged in a similar transgression of spheres of autonomy. Even when the incentives do not rise to the level of coercion, their use in areas such as this is unreasonable, treating those 'incentivized' as if they were children whom the employer may rightly try to shape to its own standards. This does not mean that employers may not make benefits such as fitness equipment or membership to fitness clubs, help in quitting smoking, or help in making healthy food choices available to employees. Just as it is not an unacceptable sphere-crossing for one family to make fruit available as a snack, or to let a neighbor child play on a trampoline, merely making more resources available to another person does not result in a crossing of the boundary of a sphere of control. But, as in the case of a parent trying to 'incentivize' the behavior of a neighbor's children, when incentives are used by employers in this area, there is a problematic intrusion into the employee's rightful area of personal decision making.

#### *d. Drug testing*

Starting with increasing regularity in the 1980's, employee drug testing is now common in many areas of the economy. Drug testing differs from the examples considered earlier in this article in that it addresses a practice which is currently illegal.<sup>45</sup> In this section I will consider three different scenarios of drug testing practices and apply the 'local justice/spheres of autonomy' and privacy lenses to them. First, I will consider pre-employment testing of potential employees when it is at best unclear how, and typically implausible that, using drugs outside of working hours would be a potential problem for the employer. Examples of this sort of work include working at most service positions, most white-collar

---

45. In this article I will ignore complications that come up in the increasingly large number of US states where marijuana has been legalized under state law but not federal law. Such complications are likely to increase in the future, but for now I will ignore them. Insofar as drugs like marijuana are legalized, they should be treated essentially the same as alcohol and tobacco on my analysis. That is, employers should only care about them insofar as their use directly impacts on-the-job performance.

employment, and a significant amount of manual labor.<sup>46</sup> Second, I will consider pre-employment testing of potential employees where the use of drugs is arguably relevant for the safe performance of the job. Examples here might include heavy machinery operators, some types of construction work, certain sorts of drivers (perhaps especially long-distance drivers), pilots, and others. Finally, I will consider random testing of employees who are currently working.

Before continuing with my analysis, let me note the limits of the discussion here. I will here assume that employers have at least as much right to regulate at-work drug use as they do at-work alcohol use. I will therefore not, for the most part, discuss regulations prohibiting employees from using drugs while on the job. Furthermore, I will assume that, in any case where recent (even if not during working hours) drug use actually impairs employee performance, the employee may be disciplined for the poor performance, no matter what the cause.

In the case of many service jobs, a significant number of white-collar positions, and a large number of manual labor positions, pre-employment drug testing is not obviously justified. These are positions where there is no clear reason to think that employee drug use is likely to cause any significant issues, especially if it is done outside of working hours. To take a clear case, it is not at all obvious why it would matter if the person who puts shirts and pants on the shelf at a GAP store sometimes smokes marijuana, or does other drugs, in their free time. While it is true that drug use is illegal, testing for it involves a penetration into a sphere of decisional autonomy and a release of personal information—often gathered by means of a physical imposition—by the employer, and therefore needs a justification. The mere fact of the illegality of the action can no more automatically justify employer intervention than could the illegality of stealing cable television or internet service justify employer monitoring of media consumption habits at home.

In cases like this, it is at best unclear that there is a significant justification. By stipulation, we are at this point considering work where, even if outside of work drug use had some effect on the worker, it is unclear that it would significantly impair the employee's performance at work, and where safety is unlikely to be a concern. Especially in such cases, it is unlikely to be the case that drug testing is even cost-benefit justified.<sup>47</sup> Even in cases where the initial costs of drug testing is passed on to the employee, or, as is common in some fields, essentially covered by related Federal subsidies, the costs are just passed on to others, and may have significant further costs, such as making it difficult to hire otherwise suitable employees.<sup>48</sup>

---

46. Barbara Ehrenreich, in her classic account of working a variety of low-paying jobs in the US, has documented the difficulty that pre-employment drug testing poses for workers in the service economy. See Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (Owl Books, 2001) at 125-30.

47. For discussion of this point, see Adam D Moore, *Privacy Rights: Moral and Legal Foundations* (Penn State University Press, 2010) at 160-64, and studies cited therein.

48. See Jackie Calmes, "Hiring Hurdle: Finding Workers Who Can Pass a Drug Test", *The New York Times* (17 May 2016), online: <https://www.nytimes.com/2016/05/18/business/hiring-hurdle-finding-workers-who-can-pass-a-drug-test.html>.

Employees, on the other hand, have significant interests in having a realm of decisional autonomy free from employer control. This realm may be used to engage in activities that are not legal, but do not, at least in the particular moment, harm or wrong others. Given that, on the above analysis, employers do not have significant non-moralistic grounds for regulating this behavior,<sup>49</sup> this space ought to be left to employees, even if they might use it in ways that are disfavored by the law, so long as it does not directly impact workplace behavior or performance. There is also some precedent for a privacy argument here. While some, such as Richard Posner, have argued against privacy protection, on the grounds that it allows people to keep “discreditable” facts about themselves secret,<sup>50</sup> the US Supreme Court has recognized a privacy right to engage in even arguably illegal behavior when that behavior is not done in public.<sup>51</sup>

Certain jobs, unlike those considered above, are such that use of drugs by those who hold them is at least more problematic and potentially dangerous. This can be because of the nature of the work (such as pilots, long-haul drivers, or other operators of heavy machinery), the potential for abuse of access to drugs (pharmacists, some police officers) or a mixture of the two (many doctors, some nurses, etc.) In these cases, pre-employment drug screening is not as inherently implausible as in the first case. Even in these more plausible cases, however, there are trade-offs. While there may be significant safety or public trust gains from having pre-employment drug testing in these cases, employers are nonetheless still breaching a sphere of autonomy that would otherwise be the would-be employee’s own. This suggests that for such tests to be justified, employers should have to provide positive evidence that they are justified, citing actual evidence of harms or dangers, and not rely on mere speculation. If these standards are met, then testing in these cases may be justified. Recall Gaus’s argument that the “sphere of privacy” is one where what one does is no one’s business.<sup>52</sup> When actions of would-be employees raise real risks of danger to others (such as when a long-haul trucker is under the influence of drugs) or serious damages to public

---

49. What about the idea that, if an employee is willing to break the law to use drugs, he or she might be more willing to break the law to do things such as steal from the employer? That would be a non-moralistic ground, but it has very little, if any, support. Furthermore, such a ground is significantly too broad, as it would seem to suggest that employers should be able to monitor, for example, how fast employees drive outside of working hours (unsafe driving most likely causes more harm to others than smoking marijuana, after all, and so arguably shows more disregard for the welfare of others), or to examine the employees tax returns, to make sure they are properly filing them. Few people, if any, would find such an argument plausible. We ought to draw a similar moral in the case of drug testing.

50. Richard A Posner, *The Economics of Justice* (Harvard University Press, 1983) at 234.

51. See *Stanley v Georgia*, 394 US 557 (1969) [*Stanley*], overturning a conviction for knowingly possessing obscene material, holding that there is a fundamental right to be free from governmental intrusion on one’s own property, absent specific governmental need. (In *Stanley*, the person in question had been arrested for possession of obscene material found by police when they entered via a search warrant issued for other purposes.) My extension of *Stanley* is not orthodox, to say the least, but given the lesser interest that employers have, compared to the government, in the out-of-work behavior of employees, I would argue that the analogy is plausible.

52. Gaus, *supra* note 9 at 382.

trust (such as when a police officer uses illegal drugs), then the actions become of public concern, and especially the concern of the employer, who may face significant legal and reputational costs. Therefore, if a well-established risk can be shown, such pre-employment drug tests may be acceptable. However, it is worth noting that this is a high standard.<sup>53</sup> More than mere speculation is needed, and the relevance of pre-employment testing may be particularly difficult to establish in the case of tests not well suited to showing actual danger, such as tests for marijuana use, given the long time that marijuana remains in one's system.

Drug testing does not only take place pre-employment, but also sometimes during employment. This may take the form of 'random' testing, or post-accident testing in some fields, such as train or truck drivers. Such tests have an advantage over pre-employment testing in that they might, at least in some cases, 'catch' behavior that is directly relevant to work activities. However, in relation to the first set of jobs described above, it is still unclear why such tests are needed, and how it can be justified in piercing the sphere of personal autonomy held by the employee. This is due to the fact that such tests, as standardly given, will not only find immediate drug use, which might be currently affecting employee behavior, but also drug use on 'one's own time' which has no such effect. Given that, by stipulation, in these positions, there is little danger that drug use will cause harm to the public, such tests are difficult to justify. This does not mean that employers must accept impaired behavior at work. But, because the cause of such behavior is rarely relevant to its harm, any punishment that is warranted may be given directly for the poor behavior, with no need to test for drugs, thereby risking infringing the employee's sphere of personal control.

In the case of our second set of jobs, ones where there is a plausible safety concern or public trust issue, random or post-accident drug testing is more plausible, but even here, 'agility' testing—a test somewhat like that applied to drivers stopped under suspicion of drunk driving—is likely to be more accurate in measuring relevant impairment.<sup>54</sup> Such tests can more accurately tell when an employee is physically incapable of performing their job without needing to establish the cause of the impairment (be it drugs, alcohol, or sleep deprivation), and thereby can avoid unnecessary intrusion into the employee's personal behavior.

## V. Possible Objections

I have argued that, in a large number of cases, employers ought not to be able to control the outside the workplace behavior of employees. However, there will

---

53. As Adam Moore notes, there is little concrete evidence that drug users are more likely to be involved in workplace accidents. See Moore, *supra* note 47 at 162-63 and the studies cited therein.

54. Moore suggests that this "agility testing" is also less intrusive and embarrassing than providing a urine sample. *Ibid* at 159. This is not obvious to me, as depending on the context, performing an 'agility test' might be both embarrassing and stressful. I leave this issue aside, though it is worth further consideration.

sometimes be cases where a current or would-be employee might find it to their advantage to allow the employer the control argued against here. Looked at from the privacy perspective, we can see that the protections argued for in this article may constitute instances of what Anita Allen has called ‘unpopular privacy.’<sup>55</sup> This is a situation that arises when a privacy mandate is “unpopular with intended beneficiaries, and that therefore raises questions about choice, freedom, and government paternalism.”<sup>56</sup> I claim that even unpopular privacies and spheres of autonomy ought to be protected in at least two cases: first, when collective action problems are faced, and secondly, when not providing this protection would predictably lead to invidious discrimination against some workers.

Workers who are especially healthy, who do not engage in at least potentially unhealthy and socially disfavored activities such as smoking or using drugs, or who have only the most tame (or non-existent) social media presence, may find the above protections unnecessary, and even burdensome. The especially healthy worker, for example, may resent being unable to get reduced health insurance premiums if the sorts of limits on health information gathering argued for above is disallowed. Similarly, an employee who does not smoke and has no interest in doing so may not only not oppose universal ‘no smoking’ policies, but might even be willing to submit to them, if it brought them some other benefits, such as not having to notice cigarette smells on co-workers. Is there any reason to prevent employees who willingly submit to such regulations from doing so? The potential for collective action problems provides one classic argument against allowing even such voluntary submissions.

Collective action problems are situations where most people, or in some cases all people, will receive a benefit if they all act in one way, but some people will receive an even greater benefit if they act in a contrary way.<sup>57</sup> Applied to our situations, we can expect that, in many cases, all or most people will benefit<sup>58</sup> if they all go along with and support the protections argued for above, but some employees or would-be employees may gain even more if they ‘defect’ and voluntarily submit to the schemes in question. However, if this is done, then there will soon be very significant pressure on all employees to submit to the schemes of regulation, leaving us back where we started. Given this, we can see that there may be good reason to use the law to prohibit the policies discussed, even if some people would voluntarily submit to them. To not do so would be to allow the minority to impose its will on the majority of workers who would benefit from the proposed restrictions, but who cannot achieve that benefit without the help of an outside regulation.

---

55. See Anita L. Allen, *Unpopular Privacy: What Must We Hide?* (Oxford University Press, 2011).

56. *Ibid.* at 6.

57. For useful discussion, see Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge University Press, 1989) at 124-34.

58. ‘Benefit’ need not here be defined in purely consequentialist terms. Preserving a desirable freedom or liberty may be a relevant benefit, even if this is difficult to measure in terms of welfare.

Furthermore, allowing 'voluntary' opt-outs of the privacy and autonomy protection discussed above would run the risk of allowing discrimination against those with 'unpopular' opinions or life-styles by employers. An analogy can help make the case. Currently, most employers are prohibited from enquiring about the marital or parental status of would-be employees.<sup>59</sup> However, it may be personally beneficial for some would-be employees to 'signal' that they are either married or unmarried, or have or do not have children, as would be most personally beneficial for them. If such signaling is allowed, this can provide the opportunity to discriminate against those who do not so signal. The cases I have discussed above are not typically ones currently protected by anti-discrimination laws, but a similar dynamic may arise in other areas. If a would-be employee is willing to 'signal' that they do not have anything potentially upsetting to an employer on their social media accounts by voluntarily offering their account passwords, then employers will have the ability to discriminate against employees who may have material that would be upsetting to the employers, such as information about political activity, lifestyle choices, and so on, even when these do not directly impact workplace performance. Similarly, if 'voluntary' pre-hiring or periodic drug testing is allowed, it is plausible that those who object to these programs will be discriminated against. By making a general rule against requiring such information, one that can be enforced in court, this sort of discrimination may be limited.

## VI. Morals and Conclusion

In this article I have considered a number of cases where employers wish to control employee (or would-be employee) behavior outside of working hours, and I have argued that such control ought not be allowed. These are only examples, and not meant to be an exhaustive list. Other cases may well fit into this analysis as well. However, from the cases set out above, we may start to draw some general morals. In many cases, legal prohibition on the attempted controls is both plausible and justifiable. For example, rules against requiring employees to provide employers with social media passwords are easy to put in place, not intrinsically difficult to enforce, not in conflict with other basic principles of employment law in the US and other countries, and would provide an important protection to employees. In other cases, legal prohibitions are more difficult to implement without wide-ranging changes to the general employment-at-will system currently found in the US, or with other aspects of the employment law of different countries, but even in such cases, a strong moral argument against the regulation is possible and appropriate, and we can see broader legal reform as a goal worth working towards. As an immediate first step, governments ought to

---

59. Such questions potentially violate Title VII of the Civil Rights Act, in the US, at least in many cases. See "Pre-Employment Inquiries and Marital Status or Number of Children", online: *U.S. Equal Employment Opportunity Commission* [https://www.eeoc.gov/laws/practices/inquiries\\_marital\\_status.cfm](https://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm).

stop subsidizing, or in some cases requiring, violations of worker privacy and autonomy by either requiring drug testing as a condition of receiving government contracts, or by reducing worker compensation premiums.<sup>60</sup>

Nothing that I have argued for here prevents employers from providing help to employees who wish to improve their health, to providing guidelines about what sorts of social media activity could be a legitimate ground for dismissal (as discussed above), or from encouraging, in non-coercive and non-invasive ways, better behavior and lifestyles on the part of employees. This type of thing may all be done without any violation of the rights of employees. However, when employers attempt to control the out-of-workplace behavior of current or potential employees, they violate the privacy and rightful sphere of decisional autonomy of the employee, and should be prevented from doing so, whether by legislation or moral suasion.

---

**Acknowledgments:** This paper benefited from audience feedback at a workshop in the Department of Philosophy at the University of Melbourne. Holly Lawford-Smith, Tony Coady, and several graduate students in particular provided insightful comments. I also benefited from discussion with Anita Allen and Daniel Solove in early stages of working on this project, and from the comments from an anonymous referee.

**Matthew Lister** is a Senior Lecturer in the Faculty of Law at Deakin University, where he regularly teaches workplace/employment law and migration and refugee law. His research interests include legal and philosophical topics in immigration and refugee law, criminal law, international law, and labour and employment law, as well as legal and political philosophy more generally. Email: [m.lister@deakin.edu.au](mailto:m.lister@deakin.edu.au)

---

<sup>60</sup>. These actions are done in the US by the Federal *Drug-Free Workplace Act of 1988*, 41 USC 81 (1988) and other similar state laws.