Defining Privacy in Employee Health Screening Cases: Ethical Ramifications Concerning the Employee/Employer Relationship

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ABSTRACT. Issues of privacy and employee health screening rank as two of the most important ethical concerns organizations will face in the next five years. Despite the increasing numbers of social scientists researching personal privacy and the current focus on workplace privacy rights as one of the most dynamic areas of employment law, the concept of privacy remains relatively abstract. Understanding how the courts define privacy and use the expectation of privacy standards is paramount given the strategic importance of the law as a legal socializing agent. This article reports on two federal court decisions involving employer drug and HIV testing whose determinations relied on assumptions about the psychological dimensions of privacy. How the courts define privacy, the outcome of this definition and the ethical ramifications as it affects the employee/employer relationship are discussed.

Introduction

Each year American companies require employees to submit to millions of blood and urine tests, x-rays, and other medical and laboratory procedures. "In fact, with the exception of typing and similar skills tests for office and clerical employees, medical screening is the most widely used pre-employment test in all major employment categories" (BNA, 1987). It is predicted that in the next five years testing will become a standard requirement when applying for employment and/or health and life insurance (Rothstein, 1989).

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One factor contributing to the increase in employee health screening is the development of drug abuse and AIDS as socially compelling public health concerns (Falco and Cikins, 1989) that are costly to employers, thus leading to an increase and/or initiation of drug and HIV testing in both private and public sector employment. One concern associated with health screening is the issue of privacy and the parallel communication activity of self-disclosure that is used to express and maintain privacy states.

The issues of privacy and testing involve the fundamental conflict of ethical principles between individual rights and public safety needs and are the subject today of increasing legislative and judicial activity. A peripheral ethical concern that has not been addressed but of equal importance is whether the psychological dimensions of privacy are acknowledged in court decisions involving employer health screening practices. Traditionally lawyers and judges litigate and decide cases based upon principles of legal positivism. By invoking this standard, court decisions often rest on an a priori judgment informed by the court's view of constitutional history rather than a concept of human behavior. When a court applies principles of legal positivism, "the specific and unique, the dichotomous or normative, and the application of the past to the present" are emphasized (Levin and Askin, 1977, p. 144). Consequently, prior opinions are often applied in unrelated contexts on the basis of precedent. As a result "many decisions are based upon myths about human behavior instead of empirical fact" (Levin and Askin, 1977, p. 139). Therefore, understanding how the courts define privacy and use the "expectation of privacy" standard is preeminent given "the strategic importance of the law as a legal socializing agent" (Tapp, 1977, p. 5).

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Health screening, privacy and self-disclosure

Employee health screening has become an established practice in several industries (Rothstein, 1989). It involves using medical criteria for the selection and maintenance of a workforce. Since the turn of the century, large industrial companies employed diagnostic medical screening techniques to determine applicant/employee state of health and physical ability related to job performance. Currently, technological advancements, OSHA requirements, collective bargaining agreements, employer cost-containment needs and the public health concerns of AIDS and drug abuse has led to an increase in employee health screening.

Though AIDS and drug abuse differ in many ways, it is likely that the most risky information individuals might communicate to others is disclosure of their illegal drug use and/or a positive HIV test. For individuals who test positive for either drug use or HIV, the economic, social, legal and emotional consequences are immense (Seeger and Simms, 1989). Consequently, AIDS and drug abuse are currently the subject of widespread debate about testing and on-the-job rights to privacy.

Privacy, unlike most other legal rights, is not outlined in the Constitution. It is generally seen as developing as a legal principle in response to modern technologies including mass media, electronic surveillance, and blood and urine testing. The legal basis of privacy is usually traced to the Constitution's guarantees regarding the pursuit of happiness along with natural rights. Broadly stated, privacy is seen as a natural right of free choice regarding interaction and communication. Breckenridge (1970), for example, defines privacy as "the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others" (p. 1). Westin (1968) defines privacy as "the claim of individuals or groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated" (p. 1). Burgoon (1982) identifies five factors which determine if an individual perceives a threat to privacy: (1) the degree of control the individual exerts over the release and subsequent use of information, (2) the amount of information in the hands of others, (3) the number of people with access, (4) the content of information and (5) the nature of the relationship with those possessing the information. Accordingly, privacy is fundamentally linked to the individual's sense of self, disclosure of self to others, and his or her right to exert some level of control over that process. Privacy then becomes a basic variable to all social interaction (Altman, 1976).

Werhane (1985) argues that the natural right of privacy guarantees four activities in the workplace: (1) the employee has the right to limit dissemination of information he or she communicates to the organization, (2) an employee has certain rights of choice regarding activities outside the workplace, (3) organizations have the right to maintain the confidentiality of business information as long as it does not threaten the public good, and (4) an employee has rights of free thought. These activities may help to ensure that the employee maintains some control over the release and use of personal information, the amount of personal information available to others, the number of people with access to the information, the content of the information released to others, and the nature of the relationship between the employee and those possessing the information.

To best guarantee these activities will protect the natural right to privacy requires acknowledging the four interdependent dimensions of privacy. Physical privacy is the degree to which one is physically inaccessible to others (Altman, 1975; Conklin, 1976; Chaikin and Derlega, 1977; Warren and Laslett, 1977). It involves freedom from intrusion on an individual's self-defined personal space. Social privacy is the ability to withdraw from social intercourse and is both an individual and social state (Rappoport, 1975; Westin, 1968; Proshansky *et al.*, 1970; Altman, 1976). As a social phenomenon, it includes "the freedom to communicate differently with different individuals and groups . . . the need for privacy is the need to maximize free choice" (Proshansky *et al.*, 1970: p. 178). Informational privacy is closely allied with psychological privacy

and is "the right of an individual to determine how, when and to what extent data about oneself are released to another person" (Carroll, 1975, p. 277). Due to its legalistic and technological implications, the significance of informational privacy goes beyond the individual to society as a whole (Shils, 1966; Westin, 1968; Carroll, 1975). In this regard, informational privacy is distinguished from the self-disclosing aspects of psychological privacy.

Psychological privacy involves an individual's ability to control affective and cognitive inputs and outputs (Burgoon, 1983). Cognitive inputs involve the ability to think, to formulate attitudes, beliefs, and values, to develop an individual identity, to assimilate personal experiences about the world and its problems, and to engage in emotional catharsis free from outside interference. Cognitive outputs involve determining with whom and under what circumstances an individual will share their thoughts and feelings, reveal intimate information and secrets, extend emotional support, and seek advice.

Therefore, the psychological dimensions of privacy functions to promote the development of self-identity and relational definitions with others, to aid in self-evaluation and observation, to provide self-protection through control over inputs and outputs and to help develop personal autonomy and growth. The conceptual dimensions of psychological privacy closely relate to the communication construct of self-disclosure.

Theorists concerned with self-disclosure offer several useful observations about how individuals choose to present themselves to others. Culbert (1967) distinguishes self-presentation, communication of self-data an individual might reveal to most any other person, from self-disclosure, explicit communication of self-data another would otherwise not have access to. Miller and Steinberg (1975) distinguish between apparent disclosure, sharing information which is not considered private, and genuine disclosure which is a private act that strengthens a relational bond. Self-disclosure is associated with a process of subjective choices influenced by the discloser, target and setting; as an individual choice used to develop, maintain or enhance a relationship; as an act that follows trust; and as a transaction characterized as an open and honest form of reciprocal communication when one voluntarily shares personal information the other is unlikely to know from other sources.

Thus, self-disclosure serves to promote relational development, social validation of one's self-concept, expression of emotional experiences, clarification of personal beliefs and opinions and maintenance of social control and privacy. Accordingly, the functions of privacy and self-disclosure parallel across four categories: (1) personal autonomy parallels relational development/social validation of self; (2) emotional release parallels expression of emotional experiences; (3) self-evaluation parallels clarification of personal beliefs and opinions; and (4) limited and protected communication parallels maintaining social control and privacy.

Self-disclosure and privacy are fundamental to natural processes of relational development. It is a uniquely humanistic element of communication such that control over self-disclosure must be considered a natural right. Controlling the depth, breadth, and intimacy level of sensitive information communicated about oneself, such as is required in drug and/or HIV testing, is key to maintaining privacy in the organizational setting. Organizational

TABLE I
Parallels between privacy and self-disclosure

Privacy		Self-disclosure
Personal autonomy	⟷	Relational development/social validation of self
Emotional release	⟷	Expression of emotional experiences
Self-evaluation	⟷	Clarification of personal beliefs and opinions
Limited & protected communication	⟷	Maintaining social control and privacy

Sources: Westin, 1968 and Derlega and Grzelak, 1976.

acknowledgement and accommodation of psychological privacy dimensions allows the employee to maintain an identity separate and distinct from the organization. This is accomplished through one's personal control over self-disclosing behavior.

However, analysis of ten Supreme Court decisions whose determinations rested on assumptions about the psychological dimensions of privacy failed to appropriately define privacy and utilize social science theory and data (Levin and Askin, 1977). Specifically, the Justices of the Supreme Court have no special background regarding the meaning and/or significance of personal privacy as a behavioral phenomenon. Consequently, the social fact issue of privacy which recognizes the social and psychological aspects of privacy (i.e., human dignity) as well as the privacy factors of efficiency, science, and technology (Schein, 1977) are ignored. This finding becomes significant when considering that individual, societal, and corporate rights in this century rest largely on Supreme Court interpretation (Rosen, 1974).

With this appreciation of how testing challenges the basic right to privacy as a "natural right of free choice regarding interaction and communication" (Seeger and Simms, 1990), the next section looks at how the Court's defined privacy in two cases involving employer drug and HIV testing.

Court case analysis

To date, there have been no court cases brought against employer health screening practices except in the areas of drug and HIV testing. This section provides the synopsis of two decisions as researched as part of a larger study on testing, privacy and individual/organizational concerns in the 1990s (Simms, 1991). A five-step analysis incorporating the five principles of privacy and self-disclosure were used to address whether the courts acknowledged the psychological dimensions of privacy when applying the "expectation of privacy" standard in making their decision. The principles guiding the critical analysis of the two full court records presented in this article included asking whether court opinion accommodated and/or acknowledged: (1) context, social setting, cultural and social norms; (2) issues of appropriateness related to self-disclosure and privacy; (3) individual choice and control; (4) the interpersonal boundary process associated with self-concept and individual autonomy; and (5) psychological health dimensions.

In *Glover v Eastern Nebraska Community Office of Retardation (1988)* Glover, an employee of ENCOR, brought charges against her employer charging violation of her Fourth Amendment rights due to ENCOR's mandatory HIV testing policy. This case was brought before the U.S. District Court, Nebraska and decided March 29, 1988 under District Court Chief Strom. The case concerned the validity of a Nebraska administrative agency's personnel policy requiring employees in certain identified positions to submit to mandatory HIV (i.e., the virus causing AIDS), HBV (hepatitis B) and TB (Tuberculosis) testing or "be subjected to discipline for refusal to test" (p. 245). The testing requirement was annual; the agency reserved the right to require employees who test positive to submit to more frequent testing. In addition to testing, the policy required employees to inform a personnel officer when they knew or suspected they had an infectious disease and to disclose medical records relating to treatment they received for those diseases. The plaintiffs did not challenge the policy as it related to tuberculosis.

In this case, the Court upheld the societal expectation of privacy in ruling ENCOR's mandatory policy was an unreasonable search and seizure that infringed upon the expectation of privacy: "individuals have a reasonable expectation of privacy in the personal information their body fluids contain" (p. 250). The Court acknowledged the current state of medical knowledge about HIV and recognized the public fear associated with AIDS. However, the Court did not react to the public hysteria but saw its role as preserving the societal expectation of privacy: "It is in such circumstances that governmental units, the public, and most importantly the courts, do not over-react and permit unreasonable invasions into a carefully formulated and preserved constitutional right as a response to this concern" (p. 250).

The Court challenged the instrumental effectiveness of testing as a solution to ENCOR's concern and cited involuntary disclosure through mandatory testing as an ineffective means to control the spread of HIV. Accordingly, the Court acknowledged the tests themselves as innocuous but their ramifications as potentially serious stating a positive test is a "very

foreboding kind of message. The reaction of patients . . . is devastation. If not handled properly, it can lead to disastrous results, including suicide" (p. 248). The Court, in finding the mandatory testing policy an unreasonable search and seizure, upheld the employee's right to choose and control information that would not otherwise be known to ENCOR. Thus, ENCOR employees were able to maintain their self-identity of defining their limits, separating themselves from the organization and controlling information flow. The Court ruled one's personal right to the "personal information their body fluid contains" (p. 250). In so ruling, the Court concluded the theoretical risk of contracting HIV did not justify a policy which interfered with the constitutional rights of staff members.

In summary, this Court decision recognized and accommodated the limited and protected communication aspects of privacy (Westin, 1968) and the self-disclosure aspects of maintaining social control and privacy (Derlega and Grzelak, 1976). However, the expectation of privacy standard was defined from a legal positivistic approach rather than from a behavioral definition which would have "root[ed] the expectation of privacy in empirical data and balanc[ed] this expectation with the evidence of personality damage suffered when privacy is invaded" (Levin and Askin, 1977, p. 148). For example, individual autonomy and freedom are alluded to but not expanded upon by the Court. Specifically, the Court acknowledged the lack of choice with mandated testing and having to receive results from the affirmative action director or personnel officer. A behavioral definition of privacy would have recognized the transactional relationship between the discloser and the disclosee as important. The Court failed, however, to expand on this relationship. In doing so, the Court could have more overtly approached the personal autonomy aspects of privacy and the accompanying self-disclosure aspects of relational development and social validation of self particularly with a disease that has incurred a negative social stigma. More importantly, the Court forfeited an opportunity to integrate a behavioral definition of privacy in a case where legal socialization dynamics are critical to fostering social acceptance of this disease.

Thus, the Court decision appears to serve the common good consistent with social and medical realities of this disease and accommodates the psychological principles of privacy and the communication activity of self-disclosure albeit using a legal positivistic definition of privacy. Specifically, the physical and involuntary intrusion into the body by the state was the focus and became the grounds for ruling ENCOR's policy as an unreasonable search and seizure that subsequently violated one's expectation of privacy. Social data was presented to the Court by the plaintiffs in terms of questioning the social need for the testing procedure but the impact on personal/psychological privacy was not explicitly addressed. The "devastating ramifications" of testing were acknowledged but never directly as it related to employee privacy concerns.

In *Samuel K. Skinner v Railway Labor Executives' Association (1989)*, the labor organization filed suit to enjoin regulations governing drug and alcohol testing of railroad employees by the Federal Railroad Administration (FRA). This case was first brought before the U.S. District Court for the Northern District of California. The Court ruled in favor of Secretary of Transportation Skinner holding that the "railroad employees had a valid interest in the integrity of their own bodies that deserved protection under the Federal Constitution's Fourth Amendment but that the governmental interest in promoting safety for railroad employees and for the general public . . . outweighed the employee's interest" (p. 639). On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's judgment ruling the regulations were invalid because the regulations did not require showing individualized suspicion. The Supreme Court granted the Department of Transportation's request for a writ of certiorari. The case was reviewed by the Court and decided on March 21, 1989 under Supreme Court Justice Kennedy. This case concerned whether the FRA drug testing regulations violated individual Fourth Amendment rights. The regulations included mandated blood and urine testing of employees involved in certain train accidents and authorization to administer breath and urine tests to employees who violated certain safety rules. Employee refusal to submit to testing would result in "withdrawal from covered service" (p. 658).

In this case, the Court, in ruling testing was a search, acknowledged the societal expectations to privacy and the reasonableness requirement of the Fourth Amendment. Blood and breathalyzer tests

along with urinalysis were identified as physical intrusions yielding physiological data that implicated Fourth Amendment concerns. Accordingly, the Court addressed the potential intrusiveness of urinalysis (i.e., "there are few activities more personal or private"), thus acknowledging the cultural expectations of privacy (p. 645). Although testing was defined as a search, a warrant or probable cause were not required. "The Federal Government's interest in helping to insure the safety of the traveling public and of railroad employees from using alcohol or drugs while they are on duty or subject to being called for duty presents special needs beyond normal law enforcement that justify departures from the usual Fourth Amendment warrant and probable cause requirements" (p. 643). The Court acknowledged that although some of the privacy interests implicated by the regulations "might be viewed as significant in other contexts" (p. 667), logic and history "show a diminished expectation of privacy attaches to information relating to the physical condition" (p. 667) of railroad employees and are diminished by an industry that is "dependent, in substantial part, on the health and fitness of covered employees" (p. 666). Consequently, the special needs argument was used to defend the government's interest in regulating employee conduct to ensure public safety and to justify privacy intrusions.

In applying the special needs argument, the Court ruled the intrusion was minimal as defined in physical terms only. For example, tests were referred to as biological samples (p. 650). The Court focuses on the procedure of testing (i.e., "experience . . . teaches that the quantity of the blood extracted is minimal") and thus concluded since tests are "commonplace and routine in everyday life", the tests posed "no pain, trauma or risk" (p. 665). Regarding breathalyzers for alcohol content determination, such procedures were found less intrusive than blood tests because they did not require the piercing of the skin and could be conducted safely in an outside environment with "little embarrassment or inconvenience" to the employee (p. 665). Regarding urinalysis, the Court upheld regulations stating sample procurement did not require observation, although the practice of observation was desired. (Parenthetically, the FRA Field Manual required direct observation by the physician/technician obtaining the sample). In all, the special needs argument was used to defend departures from the usual warrant and probable clause requirements, thus further distancing the psychological dimensions from the physical dimensions of privacy.

Additionally, privacy was defined in terms of "freedom of movement" and "transportation and the like", as it related only to the actual procurement of the testing sample. For example, the limitation on an employee's freedom of movement necessary to obtain blood, urine or breath samples was found to constitute minimal intrusions on privacy under the Fourth Amendment: "ordinarily an employee consents to significant restrictions in his freedom of movement where necessary for his employment and few employees are free to come and go as they please during their working hours" (p. 647). Further, the Court ruled the "time" it would take to obtain a blood, urine or breath sample cannot, "by itself infringe significant privacy interests" (p. 647). The "taking of blood or urine samples may be viewed as meaningful interference with a person's possessory interest in his body fluids" (p. 645). However, the Court did not expand on the 'why' of the possessory interest and related psychological ramifications of such disclosure particularly as it pertained to suspicionless testing. Consequently, Court reference to "bodily security" and "bodily integrity" refers not to psychological dimensions but the physical environment under which an employee would be tested (pp. 667, 645).

In utilizing these standards and definitions, the Court did not find the regulations an "unduly extensive imposition on an individual's privacy" (p. 651). Subsequently, the Court did not accommodate the psychological dimensions of privacy and the parallel communication activity of self-disclosure. The Court defined privacy from a legal positivistic approach thus ignoring the behavioral dimension. The "personality damage suffered when privacy is invaded" was not acknowledged by this Court. This variable appears particularly salient given the Court's ruling that testing was a search and seizure requiring Fourth Amendment protections; however, special needs displaced the constitutional requirement of a warrant or individualized suspicion prior to any intrusion. By upholding the FRA regulations to test employees, the employer was given the choice to

monitor and control information flow of its employees without warrant or probable cause. Thus, the cognitive aspects of psychological privacy were not accommodated in that employee ability to think and develop an individual identity and to determine with whom and under what circumstances an individual can reveal intimate information and seek advice were denied. The mandated testing policy precluded voluntary self-disclosure and therefore employees were not able to maintain social control and privacy.

Thus, the arguments generated to support the Supreme Court decision upholding the FRA testing regulations appear not to serve the common good consistent with societal realities that suggest protecting the public good at the expense of individual constitutional rights is questionable. Further, the psychological principles of privacy and the communication activity of self-disclosure were not accommodated given the narrow definition of privacy. Social data was presented to the Court by the petitioners, in the form of evidence indicating a significant worksite drug problem exists, and by the respondents, in the form of introducing alternative methods to drug and alcohol detection. The Court's response to this data was to "decline to second guess" whether less intrusive and alternative methods of detection were available. "The logic of elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure power under the Fourth Amendment" (p. 649). In finding the tests were accurate in the majority of cases, the Court ruled the testing could be conducted. However, the ramifications of testing vis-a-vis personal privacy were not addressed except as part of the dissenting opinion.[1]

Implications

Privacy is a fundamental factor which defines the individual in relation to society, and, therefore, plays a significant role in defining the employee/employer relationship. Privacy, as a "precondition of other goods" (Gunderson *et al.*, 1989, p. 219), promotes individual tolerance and autonomy (Gunderson *et al.*, 1989) and control and choice (Laufer and Wolfe, 1977). Consequently, the natural right to privacy is viewed as an entitlement both by the individual as citizen and the individual as employee. Within the employment setting, however, a conflict exists between the individual's right to decide what personal information should be communicated and under what conditions (Westin, 1968) and the employer's need for information in order to operate an effective organization. When the right to privacy is compromised in the organizational setting, it is often the employee's independence, integrity and dignity that are violated (Bloustein, 1964). Therefore, organizational concerns must be redirected to enhance employee independence and dignity in the employment setting.

One way this is accomplished is in recognizing that privacy is not unidimensional but, rather, has psychological, social, as well as, legal components. Further, the psychological components of privacy contribute to an individual's sense of autonomy and self-worth (Altman, 1976; Westin, 1968) and encourages a sense of personal control and independence (Derlega and Chaikin, 1977). The communication activity of self-disclosure becomes the mechanism by which the psychological dimensions of privacy are realized. Specifically, adjustment in self-disclosure inputs and outputs is a form of boundary regulation. The extent to which an individual has choice and control over this informational boundary contributes to the amount of privacy one has in a social relationship which includes the work setting.

Thus, privacy not only contributes to individual development and socialization but also becomes the interface that defines the relationship between the individual and society. Accordingly, privacy defines the relationship between the employee and the organization. For example, privacy protections are needed as a check on abuse of authority; to avoid invasions that undermine individual integrity; and to ensure free and frank communication in the workplace. Ensuring that privacy and its psychological dimensions are accommodated in this relationship are critical today given the increasing use of employer testing as a predictive and diagnostic tool in employment decision-making.

The two decisions reported on in this study find the Courts applying a purely legal positivistic definition of privacy in cases where determinations relied on assumptions about the psychological dimensions of privacy. In both decisions, the expectations of

privacy standard was the premise in determining individual rights to privacy and societal rights to safety and security. However, in using this standard, privacy rests on publicly accepted custom and law rather than on individual needs and desires.

This was particularly manifest in the Skinner decision where the psychological dimensions of privacy were not acknowledged even covertly. Testing was ruled as a search and seizure; however, the search was found a reasonable intrusion based on physical not psychological determinations of intrusion. Intrusion was defined as meaningful interference, freedom of movement, and transportation and the like as related to the physical aspects of taking the sample. Given this definition, intrusion was thus considered minimal. Further, the Court cited "emergencies," "compelling interests," "special needs" and "operational realities" as grounds for employer testing without probable cause. Using this definition, a diminished expectation of privacy and the waiving of Fourth Amendment protections were justified.

Therefore, the use of a legalistic definition of privacy, particularly as it related to the testing process, presented privacy as a 'sterile' concept. It did not present an accurate indication of employee/employer tensions. Utilizing such a definition masked the psychological dimensions of the intrusion because it treated privacy as unidimensional and only focuses on the intrusion into the body. It did not address the ramifications based on the psychological intrusiveness that results from the knowledge gleaned from the tests and/or the psychological ramifications of testing without probable cause. Accordingly, the Court did not distinguish between self-presentation, communication of self-data an individual might reveal to most any other person, from self-disclosure, explicit communication of self-data another would otherwise not have access to (Culbert, 1967).

Conversely, the District Court decision on employer HIV testing recognized the psychological dimensions of privacy even in using the expectation of privacy standard. The special fact issues were accommodated with evidence introduced into the Court that identified the medical, psychological and social ramifications of testing and receiving test results. Consequently, the District Court ruling struck a balance by acknowledging and accommodating individual rights without compromising organizational effectiveness. By integrating the social data into its decision-making, the Court was able to merge employee/employer rights and responsibilities in the organization. The Supreme Court definition of privacy in the Skinner decision, however, contributed to fostering an adversarial employee/employer relationship where individual rights were expected to be forfeited for the higher cause of controlling a pervasive social problem.

Thus, although workers today have statutory rights to a safe workplace, equal employment opportunity, unions of their choice and claim rights to employer misconduct, these rights appear to remain relatively fragile. "Without Constitutional protection, they remain objects of negotiation in the political marketplace subject to swings in public opinion, economic fluctuations, changes in administration, and so on" (Keeley, 1988, p. 135). By not recognizing the psychological dimensions of privacy, and therefore choice and control over the self-disclosing process, individual rights stand to be forfeited.

What type of choice-making is most consistent with ethical decision-making? Nilsen (1974) provides five guidelines to the ethical touchstone of significant choice. These include: (1) choice-making that is voluntary, free from mental or physical coercion; (2) choice based on the best information available for decision-making; (3) knowledge of alternatives and their short- and-long-term consequences; (4) awareness of the motivations of those in an influential position; and (5) awareness of one's own motivations. These guidelines subsume the psychological dimensions of privacy. For example, choice based on the best information possible would include using social data in cases whose determinations relied on assumptions about the psychological dimensions of privacy. More importantly, these principles should act as guidelines whether it is a court ruling on a privacy issue or a business writing its company policy.

Discussion

In all, the more compelling questions remain regarding the outcomes of using a legal positivistic definition of privacy. Does such a definition serve to create

a further division in the employee/employer relationship by ignoring the psychological dimensions of privacy, particularly with regard to health screening and the self-disclosure activities of choice and control? How does this affect the psychological contract between the employee/employer? Employee/employer relationships are reciprocal and dynamic. Utilizing a purely legal premise in defining this relationship reduces a processual interaction to a linear interaction. In so doing, the needs of both employee and employer are not fully addressed. Does the legalistic definition exacerbate employee alienation that may already be occurring in larger, complex organizations where employee choice and control are limited? Does the legalistic definition serve to enhance the depersonalizing and dehumanizing characteristics that accompany the technology of testing? Social fact issues including the changing nature of organizational life and the affect of technology on individual/organizational relationships impact privacy concerns. Yet, the social fact issues of privacy often are litigated without reference to such knowledge which helps illuminate legal issues. Finally, will the courts utilize the same reasoning and conclude the right to test by private sector employers on the basis of special needs, emergencies, compelling interests, and operational realities of the workplace? What limits, if any, are placed in defining employer emergencies, special needs, compelling interests, and operational realities if a legalistic definition alone is used to define privacy and intrusion? Individual rights in modern organizations remain fragile (Keeley, 1988). Further, despite legislative/public policy trends supporting employee workrights (Simms, 1991), this analysis suggests the courts are defining privacy in more narrow ways. How the courts address these issues will shape future employee/employer relationships.

Parenthetically, several countries have enacted privacy protection legislation. The Canadian Human Rights Act of 1977 places privacy protection requirements on agencies of the federal government. Canada is unique in that the private sector supports a pragmatic approach to privacy akin to the United States; the government approach to privacy focuses on transborder data flow restrictions (Walker, 1982). Western countries with privacy protections include Sweden, Germany, France, Norway, Austria, Denmark, Luxembourg, Italy, Spain, Portugal, Holland, Belgium, Switzerland and the Eastern European country of Hungary. The *Council of European Data Protection Convention* (the Convention), introduced in 1981 and ratified in 1985, is an international agreement that safeguards "the right to the respect for privacy" and "a guarantee of informational freedom" (Frosini, 1987, p. 85). The *Organization for European Cooperation and Development* (OECD), adopted in 1981, provides guidelines governing the protection of privacy vis-a-vis transborder data flows of personal information. The OECD has approval by 23 of the 24 OECD countries including the United States but carries no binding power on the parties.

Accordingly, the European concept of privacy focuses on the protection of information once gathered through automated data processing technology. Thus, the international concept of privacy focuses on the protection of information once collected; the American concept of privacy stresses individual privacy protection. Despite the focus of what appears an "informational privacy" standard in other western countries, "data protection continues to emerge in Europe as an internationally recognized human right" (Walker, 1982, p. 41). Specifically, Article 6 of the Convention has a "Special Categories of Data" (those considered "sensitive" or "delicate") which identifies personal data concerning health and sexual life as requiring "appropriate safeguards" given a "modern society where health regulation is ever-increasing" (Frosini, 1987, p. 88). It appears, however,the privacy protection is limited to safeguarding information flow and collection by medical data banks.

Despite some of the differences between North American and European concepts of privacy, the privacy laws tend to be similar. As such, they warrant further analysis "as the international community becomes more interdependent (and) nations are becoming more dependent on recorded personal information for organizational decisions affecting the rights, privileges, and benefits of millions of people" (Boyle, 1989: p. 302).

Conclusion

Health screening practices in general and drug and HIV testing in particular present new "factual situations in which courts will analyze both well estab-

lished and newly developing areas of law" (Greenfield, 1989, p. 24). Yet, the concept of privacy remains relatively abstract despite the increasing numbers of social scientists researching personal privacy and the current focus on workplace privacy rights as one of the most dynamic and important areas of employment law. That testing is a search and seizure is clear, and, therefore, constitutional protections apply. Other issues will be resolved as additional cases based upon the Constitution and federal, state, and local law are argued in the court. Through these court decisions the nature of employee and employer rights and responsibilities in relation to testing will emerge, and, subsequently, influence the employee/employer relationship.

The issue of rights, responsibilities and ethics associated with testing will only become increasingly complex. Testing will most likely become a standard requirement when applying for employment and/or health and life insurance in the next five years (Rothstein, 1989; Consumer Reports, 1990). Currently, employers are increasingly using testing as a predictive and diagnostic tool in employment decision-making. The technology and environmental conditions today ushers in an "age of testing" that provides one means to address the salient employer concerns of drugs and HIV (Simms, 1991; Seeger and Simms, 1990). Moreover, the legal system tends to address new social questions by virtue of case law and precedent. The principles established in employee testing as related to the psychological dimensions of privacy and the communication practice of self-disclosure will likely be applied to other questions of employee and employer rights and responsibilities (Seeger and Simms, 1990). This perhaps provides the strongest justification for the need to incorporate the psychological dimensions of privacy in legal and business decision-making: it promotes an ethical standard of decision-making between the employee and employer.

Note

[1] Justices Marshall and Blackman, in their dissenting opinion, acknowledged the psychological dimensions of privacy. Privacy issues were coupled with concepts of "personal dignity", "personal privacy" and "private life". For example, the Judges noted the extraction of blood "significantly intrudes on the personal privacy and dignity against unwarranted state intrusion" (p. 677). The opinion referred to intrusions as a blatant disregard to personal privacy where tests were described as "a periscope through which the (government) can peer into an individual's private life" (p. 680). The testing policy was found to implicate "strong privacy interests apart from those intruded upon by the collection of bodily fluids" (p. 679). This, perhaps, was the key distinction between the majority and the dissenting opinions in defining privacy: "technological advances have made it possible to uncover . . . in these fluids . . . medical disorders such as epilepsy, diabetes, and clinical depression" (p. 679), namely the type of information an employee may not want to disclose to an employer due to the potential risk. The majority opinion did not acknowledge this aspect of privacy as related to testing. Finally, the dissenting opinion distinguished between "tests of eyesight, skill and intelligence", those tests considered 'commonplace' and analogous to drug/alcohol testing by the majority opinion, and those tests administered through the FRA regulations. "Tests of eyesight, skill and intelligence hardly prepares them for Government demands to submit to the extraction of blood, to excrete under supervision, or to have these bodily fluids tested for the physiological and psychological secrets they may contain" (p. 681).

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