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## ARTICLES

### Employees' Privacy in the Internet Age

Towards a New Procedural Approach

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*The internet age created a crisis in the notion of employees' privacy. New surveillance technologies, the increased phenomenon of online shaming, and the sharing of vast amounts of information on social-media sites are all challenging the very idea of privacy, raising theoretical and practical dilemmas in general and in the context of employment in particular. In order to explain and analyze this privacy dilemma, the article brings to the fore the sociological literature on internet and society, which is then used to shed new light on the legal discourse. A gap between privacy on the books and privacy on the ground is exposed, pointing attention especially to the paradox of people willingly sharing more and more information with others while at the same time wanting to keep it private, at least to some extent.*

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*Attempts in the literature to deal with this crisis have so far focused on creating flexible and contextual understandings of privacy. This is indeed helpful to broaden the scope of privacy and include new phenomena. But in practice, at least in the context of the workplace, such legal structures are outdated and in particular cannot provide a necessary degree of determinacy and predictability to employers and employees. Given the power imbalance in employment relations, such indeterminacy is likely to prove detrimental especially to employees, thus making it difficult to protect them against infringements of privacy.*

*The article argues that this gap can be addressed by adding a procedural protection to the right to privacy, which is easier to implement. Three concrete proposals are advanced along these lines: mandating anonymous CVs before the interview stage to prevent the screening of candidates at this preliminary stage based on Googling, creating incentives for developing workplace-specific privacy rules in cooperation with employee representatives, and mandating a cooling-off period of one month before dismissals that are based on employees' private behavior.*

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## I. INTRODUCTION

“What if your employer made you wear a wristband that tracked your every move, and that even nudged you via vibrations when it judged that you were doing something wrong? What if your supervisor could identify every time you paused to scratch or fidget, and for how long you took a bathroom break?”<sup>1</sup>

This dramatic introduction opened a recent *New York Times* article on Amazon's employees. The article describes two patents for such a wristband that Amazon has secured, that can enable the company to conduct constant supervision of its warehouse employees. This extreme reality seems like a far and unimaginable scenario for many of us; however, with the constant use of smart devices alongside social media platforms in today's world, the ability to monitor employees has dramatically increased to become an integral part of life for many employees around the world. Employers already monitor their employees in various ways that range from “ordinary” monitoring, such as reading employees' private e-mails without giving them notice,<sup>2</sup> to more sophisticated ones, such as installing an application on their cellphones that can track their locations twenty-four

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1. Ceylan Yeginsu, *If Workers Slack Off, the Wristband Will Know. (And Amazon Has a Patent for It.)*, N.Y. TIMES, February. 1, 2018, at B3.

2. Last September, the Grand Chamber of the European Court of Human Rights (ECtHR), made a precedent decision in a high-profile case which went through five different tribunals until the final decision of the Grand Chamber (the final tribunal). *Bărbulescu v. Romania*, App. No. 61496/08, Eur. Ct. H.R. (2017). The case dealt with the decision of a private company to dismiss an employee after monitoring his electronic communications and accessing the contents. The company monitored the employee's work e-mail account that had been created exclusively for professional purposes, yet the employee had used it for private purposes. Ultimately, the Grand Chamber decided that there had been a privacy violation.

hours a day<sup>3</sup> or even capturing photographs of employees every couple of minutes via an application in their laptop in order to ensure that they are actually working.<sup>4</sup>

Furthermore, in today's world the monitoring of employees does not take place only through smart monitoring devices. In the internet age,<sup>5</sup> employees can be monitored by society in general—including their employers—on social media as more and more people are revealing themselves to the world on these websites without fully understanding the potential consequences of this conduct for their work life. Thus, there have been numerous incidents of workers who have been fired because of posts or comments that they shared on social media sites, despite irrelevance to their workplace.<sup>6</sup>

As this article demonstrates, the current internet age and the vast use of smart devices have created a crisis in the concept of employee privacy in both its theoretical scope and its actual implications. This crisis requires that we unpack the question of employee privacy and search for original, creative solutions to confront the modern privacy dilemma. As a result of the immanent features of the internet, employers, society, and employees are constantly blurring the meaning of privacy. The sociological literature has described how the internet age has led to a privacy paradox: people share much of their private information on social network sites, yet they consider this information private as long as they do not disclose it outside of the network in which they initially published the information. Given this behavior, it has become difficult to determine when employees should enjoy the legal protection of their right to privacy—or, in other words, to determine when a privacy violation has occurred.

The modern discourse on privacy approaches these dilemmas by basing the notion of privacy on flexible foundations. Flexible approaches to privacy can supposedly enable people to cope with new and endless forms of privacy infringement and to flexibly determine whether privacy violations have occurred. This article argues that such flexible approaches

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3. See Complaint at 17, *Arias v. Intermex Wire Transfer, L.L.C.*, No 1:15-cv-01101 JLT (E.D. Cal. 2015); see also Ifeoma Ajunwa, et al., *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 743 (2017).

4. See Olivia Solon, *Big Brother Isn't Just Watching*, THE GUARDIAN, November 6, 2017, <https://www.theguardian.com/world/2017/nov/06/workplace-surveillance-big-brother-technology>. [<https://perma.cc/ML5Y-VRU3>].

5. The term "internet age" was already in use at the beginning of the 21st century. See, e.g., Edward E. Leamer & Michael Storper, *The Economic Geography of the Internet Age*, 32 J. INT'L. BUS. STUD. 641 (2001); Alejandro R. Jadad, *Promoting Partnerships: Challenges for the Internet Age*, 319 BRIT. MED. J. 761 (1999); Ursula Huws, *Working Online, Living Offline: Labor in the Internet Age*, 7 WORK ORG., LABOUR & GLOBALIZATION 1 (2013) (using the term in the labor context).

6. See *Kirby v. Wash. State Dep't of Emp't Security*, 185 Wash. App. 706, 719 (Wash. Ct. App. 2014); *infra* Part III.

to privacy are useful but insufficient. Rather, the legal system requires a degree of predictability and consistency that these approaches do not facilitate. This is particularly true in the context of the workplace in view of the employee-employer power dynamic and the concern that the stronger party (i.e., the employer) will take advantage of this ambiguity.

This article accordingly calls for the creation of an *additional procedural layer to the right to privacy*. This can be achieved by developing applicable procedural rules regarding the concept of privacy in the labor field at the beginning, end, and throughout the employment period. These rules could include the use of an anonymous curriculum vitae in the initial stage of application to a workplace, an obligation to create clear rules for every workplace together with employee representatives, and a mandatory cooling-off period before a dismissal that is based on online information, and online shaming in particular. Unlike the current flexible models of privacy, the proposed procedural layer can ensure the necessary flexible interpretation of privacy in the internet age without abandoning legal stability and clarity, which seem to be necessary specifically in the context of the chaotic internet age and the unique power dynamic of the workplace.

This article contributes to the existing literature in three ways. First, it integrates the existing legal scholarship on privacy with the literature on labor rights and the sociological literature on the internet and society. Second, based on this theoretical integration, the article explores contemporary interpretations of privacy in fields such as philosophy, cultural studies, and law, and it examines their relevance and deficiencies in the internet age and the context of the workplace. Finally, and most importantly, after the article identifies the apparent gap in the current literature, it calls for addressing it by adding a procedural protection to the right to privacy and offers concrete procedural rules for the full employment cycle.

To accomplish these aims, the article proceeds as follows. Part II briefly explores the classical, well-known justifications and meanings of the right to privacy. Then, Part III incorporates the sociological literature on internet and society and elaborates on current challenges to the classical concepts of privacy that employers, society at large, and employees themselves generate. Part IV then explores current interpretations of the right to privacy, which appear to address some of these new challenges. At the same time, this part exposes the deficiencies of the current paradigms, consisting mainly of the indeterminate implications that result from their flexible foundations. In view of the current paradoxes and difficulties that surround the modern notion of employee privacy, Part V argues for an additional procedural approach to the concept of privacy that can ensure the protection of employees' rights in the unique internet age. To this end, it

provides three concrete and easy-to-follow procedural rules that are more suited to solving the modern privacy dilemma. Part VI concludes.

## II. THE RIGHT TO PRIVACY – CLASSICAL JUSTIFICATIONS AND UNDERSTANDINGS

Much has been written on the right to privacy over the years from diverse perspectives, but the right to privacy remains vague and elusive.<sup>7</sup> From a broad perspective that is detached from a specific period or location, there are three dominant theses for what constitutes privacy and why it is important.<sup>8</sup> The first is the thesis of privacy as the right to be let alone, which is associated mostly with Warren and Brandies.<sup>9</sup> The main objective of this is to protect the privacy of private life, or in other words, to sustain a “personal space” of the individual that is free from interference by others.<sup>10</sup> Further to this, the right to privacy “ceases upon the publication of the facts by the individual, or with his consent.”<sup>11</sup> The second notion of privacy envisages it as access to the individual or as a state of privacy.<sup>12</sup> In this way, the desire of the individual to live in a state of privacy<sup>13</sup> or in a realm of her own<sup>14</sup> is located somewhere on a continuum between absolute privacy to no privacy at all, changing in accordance with individual behavior.<sup>15</sup> Lastly, the third concept of privacy perceives it as control over one’s life and, in

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7. See, e.g., Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 L. & CONTEMP. PROBS. 281 (1966); Michael Birnhack, *Domination and Consent: The Theoretical Basis of the Right to Privacy*, 11 LAW AND GOV'T 9, 13–14 (2008) (Hebrew); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088–89, 1125 (2002); Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247 (2011); Julie E. Cohen, *What Privacy is for*, 126 HARV. L. REV. 1904, 1904–05 (2013).

8. Needless to say, there are other definitions of the concept of privacy. Yet, these seem to be the most basic and cited ones. See, e.g., Janis L. Goldie, *Virtual Communities and the Social Dimension of Privacy*, 3 OTTAWA LAW AND TECH. J. 133, 136 (2006).

9. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890).

10. Roger Clarke, *Internet Privacy Concerns Confirm the Case for Intervention*, 42 COMM. OF THE ACM 60, 61 (1999).

11. Warren & Brandeis, *supra* note 9, at 218.

12. Ruth Gavison, *The Right to Privacy and Dignity*, in A COLLECTION OF ARTICLES FOR THE MEMORY OF HAMAN SHALACH 61 (Ruth Gavison ed., 1989) (Hebrew); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

13. Michael A. Weinstein, *The Uses of Privacy in the Good Life*, in *PRIVACY: NOMOS XIII* 88, 88–103 (Roland Pennock & John W. Chapman eds., 1971).

14. Van Der Haag, *On Privacy*, in *PRIVACY: NOMOS XIII* 147 (Roland Pennock & John W. Chapman eds., 1971).

15. H. J. Smith et al., *Information Privacy Research: An Interdisciplinary Review*, 35 MIS Q. 989, 995 (2011); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421, 422–23, 428–29 (1980).

particular, the control over the information on an individual.<sup>16</sup> This concept of privacy connects it together with the notions of the autonomy and dignity of the individual to determine for herself when, how, and to what extent information about her will be communicated to others.<sup>17</sup> Following this, once the individual has published information in a public or semi-public sphere (such as Facebook, WhatsApp, etc.),<sup>18</sup> the logical assumption is that she does not care that the information will be forwarded on.<sup>19</sup> Or at least, according to the “privacy calculus model,” she cares more that her friends will be exposed to the information than desiring that others not be exposed to it; otherwise, she would not have published it in a semi-public sphere.<sup>20</sup>

Each of these three classical notions of privacy appears to consider privacy as a right that can be relinquished by its holder. Hence, when a person has given up on her privacy by actions or statements, she cannot rely on it anymore.

Over the years the right to privacy has gained many other interpretations and justifications.<sup>21</sup> It was understood and justified as related to other human rights, derived from the right to dignity<sup>22</sup> and autonomy.<sup>23</sup> Privacy is also understood as necessary for the well-being of the individual and for her needs to flourish,<sup>24</sup> as part of the right to property<sup>25</sup> or in

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16. WESTIN, *supra* note 12, at 13; Birnhack, *supra* note 7, at 41–44; H. J. Smith et al., *supra* note 15, at 995; James Rachels, *Why Privacy is Important*, in PHILOSOPHICAL DIMENSION OF PRIVACY: AN ANTHOLOGY 290, 296–97 (Ferdinand D. Shoeman ed., 1984).

17. WESTIN, *supra* note 12, at 7; Birnhack, *supra* note 7, at 13–14; Hyman Gross, *Privacy and Autonomy*, in PRIVACY: NOMOS XIII 169, 169–71 (Roland Pennock & John W. Chapman eds., 1971).

18. For more elaboration on semi-public spheres, see generally YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM at 366–69 (2006); Zizi Papacharissi, *The Virtual Sphere 2.0: the Internet, the Public Sphere, and Beyond*, in ROUTLEDGE HANDBOOK OF INTERNET POLITICS 230, 244 (Andrew Chadwick & Philip N. Howard eds., 2009); Christian Fuchs, *Social Media and the Public Sphere*, 12 TRIPLEC: COMMUNICATION, CAPITALISM & CRITIQUE 57 (2014); MANUEL CASTELLS, COMMUNICATION POWER 125 (2009); MARLEEN POTGIETER, SOCIAL MEDIA AND EMPLOYMENT LAW 72–73 (2014).

19. W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 273 (1983).

20. Tamara Dinev & Paul Hart, *An Extended Privacy Calculus Model for E-Commerce Transactions*, 17 INFO. SYS. RES. 61, 61–66 (2006).

21. For other definitions of privacy, see LAWRENCE LESSIG, CODE: VERSION 2.0, at 210–13 (2d ed. 2006); Solove, *supra* note 7, at 1099–1123.

22. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

23. Warren & Brandeis, *supra* note 9, at 198; Shils, *supra* note 7, at 281–306; see also Matthew Finkin’s discussion of the American Restatement of Employment Law, which connects the privacy and autonomy of the employee, *Privacy and Autonomy*, 21 EMP. RTS. & EMP. POL’Y J. 589, 615 (2017).

24. Birnhack, *supra* note 7, at 9.

25. On the connection between the right to privacy and other basic rights, see generally Frederick Davis, *What Do We Mean by “Right to Privacy”?*, 4 S.D. L. REV. 1 (1959); Gerald Dickler, *The Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435 (1936); Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

association with political freedom of speech and beliefs.<sup>26</sup> It was also linked with the right to equality,<sup>27</sup> especially in the context of the workplace. The correlation of privacy and equality emphasizes the technological ability of the State, the employer, or other entities to collect data on the individual in a manner which may violate her right to privacy.<sup>28</sup> On the basis of this data-collection, the employer may conduct a discriminatory decision against the individual, in a way which may violate her right to equality and her right to be protected from discrimination<sup>29</sup> (alongside her right to employment opportunities).<sup>30</sup> Finally, the right to privacy can be viewed from a post-liberal perspective, which emphasizes its importance to the entire society as a common collective value.<sup>31</sup> In this way, privacy is important in order to “enable[] individuals both to maintain relational ties and to develop critical perspectives on the world around them.”<sup>32</sup>

Alongside these numerous understandings of privacy, the right to privacy has an important role and justification in the concrete context of the workplace. Thus, Regan argues from a post-liberal perspective that employees’ privacy is important from a collectivist perspective due to the power dynamic in the workplace between the employer and the employees.<sup>33</sup> The collectivist view of privacy is also present in the notion of group-privacy, which emphasizes the meaning of privacy for a concrete

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26. Alexander Hertel-Fernandez & Paul Secunda, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation* Post-Citizens United, 64 UCLA L. REV. 2, 5–9 (2016) (focusing on the connection between privacy, data collection, freedom of speech, and employee beliefs in the digital-virtual environment); see also Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1676 (2017).

27. Richard Bruyer, *Privacy: A Review and Critique of the Literature*, 43 ALBERTA L. REV. 533, 553, 587–88 (2006); Lisa Austin, *Privacy and the Question of Technology*, 22 LAW & PHIL. 119, 144–45 (2003) (clarifying that the right to privacy must stand on its own).

28. Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 1005–06, 1014 (2016); LESSIG, *supra* note 21, at 220–22; Ajunwa et al., *supra* note 3, at 739–40; Shlomit Yanisky-Ravid, *To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to a Virtual “Private Zone,” and the Balloon Theory*, 64 AM. U. L. REV. 53, 71–73 (2014); Jeffrey L. Johnson, *Privacy and the Judgment of Others*, 23 J. OF VALUE INQUIRY 157, 160–61 (1989). See also FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 15–16 (2016). But see Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1024–25 (2017).

29. Bodie et al., *supra* note 28, at 1007–08.

30. Kim T. Pauline, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860–65 (2017).

31. See Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 148 (2004); PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 42–44 (1995); MARTA OTTO, *THE RIGHT TO PRIVACY IN EMPLOYMENT* 185–87 (2016). For a similar analysis of freedom of speech, particularly in the information society, see generally Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1 (2012).

32. Cohen, *supra* note 7, at 1906–07.

33. Priscilla M. Regan, *Genetic Testing and Workplace Surveillance: Implications for Privacy*, in *COMPUTERS, SURVEILLANCE, AND PRIVACY* 21, 21–22 (David Lyon & Elia Zureik eds., 1996).

group of people, beyond the individual.<sup>34</sup> Here again, the basic assumption is that due to the power dynamic in the workplace, the employees' group—as a distinct group—needs the protection of the right to privacy against the employer. Following this, the right to privacy of employees can best be protected by the employees' representatives (mainly, the trade union) who have more power, compared to individual employees, to stand up to an employer and balance the power imbalance within the workplace.<sup>35</sup> Another labor rights' perspective of the right of privacy is the one that is based on the notion of distributive justice.<sup>36</sup> Redistribution between the employer and the employees, as part of the notion of distributive justice, is considered to be one of the main goals of labor law.<sup>37</sup> Following this, alluding to Rawls' theory of justice, Introna argues that we need to fairly balance, or “distribute”, between the employee's right to privacy and the employer's right to transparency and information.<sup>38</sup> In other words, the notion of distributive justice means that the employee is able to resist inappropriate surveillance at the workplace, unless it is explicitly justified.<sup>39</sup>

### III. PUTTING THE NOTION OF PRIVACY WITHIN THE FRAMEWORK OF INTERNET AND SOCIETY

In many ways, the classical understandings of the right to privacy seem anachronistic in today's world.<sup>40</sup> It will be argued in this part that virtual

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34. Linnet Taylor et al., *Introduction: A New Perspective on Privacy*, in 126 GROUP PRIVACY: NEW CHALLENGES OF DATA TECHNOLOGY 15–20 (Linnet Taylor, Luciano Floridi & Bart van der Sloot, eds., 2017).

35. Ugo Pagallo, *The Group, the Private, and the Individual: A New Level of Data Protection?*, in GROUP PRIVACY: NEW CHALLENGES OF DATA TECHNOLOGY 159, 184 (Linnet Taylor, Luciano Floridi & Bart van der Sloot, eds. 2017). Guy Mundlak similarly expresses hesitations regarding the authentic willingness of trade unions to represent the employees' right to privacy in *Human Rights and Labor Rights: Why Don't the Two Tracks Meet?*, 34 COMP. LAB. L. & POL'Y J. 217, 217–21 (2012).

36. Lucas D. Introna, *Workplace Surveillance, Privacy, and Distributive Justice*, 30 COMPUTERS & SOC'Y 33, 34 (2000).

37. Guy Davidov, *Distributive Justice and Labour Law*, Lecture at the University College of London's Philosophical Foundations of Labour Law Conference, (June 2016) (on file with author); Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1120, 1128–36 (2006); Guy Mundlak, *The Third Function of Labor Law: Distributing Labor Market Opportunities Among Workers*, in THE IDEA OF LABOUR LAW 315, 316–17 (Guy Davidov & Brian Langille, eds., 2011).

38. Introna, *supra* note 36, at 36–38.

39. *Id.*

40. Clearly, technological development has always outstripped the legal world, requiring the creation of new regulations aimed at dealing with new and unfamiliar scenarios. See Niva Elkin-Koren & Michael Birnhack (eds); LEGAL NETWORK: LAW AND INFORMATION TECHNOLOGY (2011) (Hebrew); Kenneth G. Dau Schmidt, *Labor Law 2.0: The Impact of the New Information Technology on the Employment Relationship and the Relevance of the NLR4*, 64 EMORY L. J. 1583, 1603–08 (2015); Jack M. Balkin, *How Rights Change: Freedom of Speech in the Digital Era*, 26 SYDNEY L. REV. 5, 6 (2004);

technology, the creation of the internet platform, and the frequent use of social media sites jointly influenced the meaning of the right to privacy in general and in the context of the workplace in particular.

The current threat to the notion of privacy exists on three different levels: (1) employer, (2) society, and (3) the employee herself. This part will elaborate on each level.

### *A. The Employer's Ability to Supervise*

Technology—in particular virtual technology—has made the mission of collecting and forwarding information easier than ever.<sup>41</sup> Consequently, supervising employees has become a simple and common routine in numerous workplaces.<sup>42</sup> To be sure, an employer's wish to supervise and control an employee's actions, both in her private time and all the more during her working hours, is not something new.<sup>43</sup> Marx has most famously examined the notion of supervision as part of the capitalist employer's means of controlling employees' production and output processes.<sup>44</sup> However, while the will to monitor employees' actions has always existed among employers, technology, and in particular virtual technology, has led to a dramatic extension of the employer's ability to do so. As will be shown in the following lines, many times it is due to the intrinsic characteristics of the internet and in particular social media sites.<sup>45</sup>

In this way, based on virtual technology, employers can supervise and monitor employees beyond the classic time and space boundaries of the workplace.<sup>47</sup> Similarly, virtual technology enables the employer to both monitor the employee in real time<sup>48</sup> as well as search previously published information on the employee since the information on her is always available on the "net."<sup>49</sup> Virtual technology has facilitated the trend from

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Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1353, 1356–57 (2001).

41. BENKLER, *supra* note 18, at 32; Goldie, *supra* note 8, at 142–45.

42. MICHAEL BIRNHACK, PRIVATE SPHERE: THE RIGHT TO PRIVACY BETWEEN LAW AND TECHNOLOGY 418–20 (2011) (Hebrew). See also Bart Custers & Helena Ursic, *Worker Privacy in a Digitalized World Under European Law*, 39 COMP. LAB. L. & POL'Y J. 323, 323–30 (2018).

43. BIRNHACK, *supra* note 42, at 411–12, 416–17.

44. Karl Marx, *Capital*, chs. 10, 13–15, 17, 25 (1867).

45. DAVID LYON, THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY, 22–33 (1994); Ajunwa et al., *supra* note 3, at 737–40; Pauline, *supra* note 30, at 860–61; Sue Shellenbarger, *Work at Home? Your Employer May Be Watching*, WALL ST. J. (July 30, 2008), <http://www.wsj.com/articles/SB121737022605394845>; [<https://perma.cc/FU9R-VQL5>]; OTTO, *supra* note 31, at intro.

46. CHRISTIAN FUCHS, CRITICAL THEORY OF COMMUNICATION 133 (2016).

47. Ajunwa et al., *supra* note 3, at 737–41; Shellenbarger, *supra* note 45.

48. See, e.g., Ajunwa et al., *supra* note 3, at 737–41.

49. LESSIG, *supra* note 21, at 200–04; Birnhack, *supra* note 7, at 42.

monitoring work to monitoring the worker herself—her performance, behavior, and even her personal characteristics.<sup>50</sup>

Furthermore, virtual technology enables the employer to follow and control various agents in the workplace beyond the employee, such as independent contractors and candidates for employment.<sup>51</sup>

Finally, virtual technology makes the process of supervising easier to manage. It enables the employer to supervise an employee even without the employee's awareness,<sup>52</sup> often at a relatively low cost.<sup>53</sup> Alongside that, virtual technology enables the employer not only to collect information on the employee in various ways but also to automatically process and analyze big data and to draw conclusions from it about the behavior and character of the employee.<sup>54</sup>

All in all, virtual technology and the internet platform enable the employer to view, collect, process, analyze, and preserve professional and private information on the employee, from the stage of being a candidate and ever after.<sup>55</sup> As a result, the average workplace in the internet age is inundated with more information on its employees than ever.<sup>56</sup>

There are almost endless new ways for employers to use virtual technology in order to supervise employees. They can install a tracking app on the employee's cellphone that records movements of the employee at all times, even when the employee is off duty, in order to assure her productivity, loyalty, and safety.<sup>57</sup> Thanks to virtual technology, the employer can collect data on the employee's movements, determine when employees are interacting, analyze the tones of employees' voices—and then, based on all that data, analyze and determine the duration and quality of the employee's interaction, and hence, her professionalism and social integration within the workplace.<sup>58</sup> The employer can install plastic

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50. Regan, *supra* note 33, at 21–23; OTTO, *supra* note 31, at intro.

51. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) 98–101; Ajunwa et al., *supra* note 3, at 746–47; Lior Strahilevitz, “How’s My Driving?” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1661, 1798–1809 (2006); Pauline, *supra* note 30, at 860–64; Yanisky-Ravid, *supra* note 28, at 63–71.

52. Goldie, *supra* note 8, at 142–45; BIRNHACK, *supra* note 42, at 419–420; Shellenbarger, *supra* note 45.

53. LESSIG, *supra* note 21, at 200.

54. Bodie et al., *supra* note 28, at 1019; Bart Custers, *Data Dilemmas in the Information Society: Introduction and Overview*, in DISCRIMINATION AND PRIVACY IN THE INFORMATION SOCIETY 3, 7 (Bart Custers et al., eds., 2013).

55. Bodie et al., *supra* note 28, at 973–78, 1014–18.

56. Ajunwa et al., *supra* note 3, at 763–72.

57. See Complaint at 3–4, *Arias v. Intermex Wire Transfer, L.L.C.*, No 1:15-cv-01101 JLT (E.D. Cal. 2015).

58. Bodie et al., *supra* note 28, at 968–973; BEN WABER, *PEOPLE ANALYTICS: HOW SOCIAL SENSING TECHNOLOGY WILL TRANSFORM BUSINESS AND WHAT IT TELLS US ABOUT THE FUTURE OF WORK* 179–81 (2013).

monitoring boxes on employees' desks with small sensors that are triggered by both motion and heat in order to know whether the employee is at her desk or not.<sup>59</sup> The employer can access unregulated proxies and metadata on the employee, such as medical information, search queries, the use of computer games, etc., and create a new database concerning the employee's behavior, habits, and health in the workplace and outside of it.<sup>60</sup> The employer can take photos of the employee's computer screens at random.<sup>61</sup> The employer can also monitor every e-mail, text message, web-site visit, or other activity that takes place on a company-owned device and track the employee's behavior on social media websites.<sup>62</sup>

The ability of employers to supervise their employees is extreme not only in its nature, scope, and duration, but also in its frequency as a social phenomenon. As technology becomes more sophisticated, supervising employees by digital means is becoming increasingly common in workplaces in the U.S. and all around the world.<sup>63</sup>

The numbers speak for themselves. In 1987, 6-8 million employees in the U.S. were subject to electronic surveillance at work, while by 1993 that number grew to 20 million, and three years later, in 1996, to 40 million.<sup>64</sup> Similarly, according to the American Management Association (AMA), in 1993, managers routinely read employees' e-mails or examined their

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59. See, e.g., Jim Waterson, *Daily Telegraph Installs Workplace Monitors on Journalists' Desks*, BUZZFEED NEWS (Jan. 11, 2016), <https://www.buzzfeed.com/jimwaterson/telegraph-workplace-sensors>. [<https://perma.cc/8QYU-NF87>].

60. Ajunwa et al., *supra* note 3, at 737–38; Kate Crawford & Jason Schultz, *Big Data and Due Process: toward a Framework to redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 93–95 (2014); Bodie et al., *supra* note 28, at 961–62; Pauline, *supra* note 30, at 860–62.

61. Ajunwa et al., *supra* note 3, at 746.

62. Lewis Maltby, *Employment Privacy: Is There Anything Left?*, Human Rights Magazine (2013), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2013\\_vol\\_39/may\\_2013\\_n2\\_privacy/employment\\_privacy/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/may_2013_n2_privacy/employment_privacy/) [<https://perma.cc/6DFV-4CMH>]; Søren Louv-Jansen, *How you can use Facebook to track your friends' sleeping habits*, Medium (Feb. 21, 2016), <https://medium.com/@sqrendk/how-you-can-use-facebook-to-track-your-friends-sleeping-habits-505ace7fffb6#.wsgw0bu4y>; Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 Am. Bus. L.J. 63, 69–71 (2012); Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337, 375 (2013). An interesting example is Google, which apparently has several confidentiality agreements and employee communication policies that prevent employees from disclosing violations online, both internally and externally. See Samantha Masunaga, *Google's policies deter whistle-blowing, employee alleges in lawsuit*, L.A. Times (Dec. 22, 2016), <http://www.latimes.com/business/technology/la-fi-tt-google-lawsuit-20161222-story.html> [<https://perma.cc/6HNK-ALMD>].

63. Lawrence E. Rothstein, *Privacy or dignity: Electronic monitoring in the workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 379–81 (1999).

64. These figures “do not include the large number of employees subjected to electronic monitoring of their telephone usage and conversations in such fields as telemarketing, financial and communication services etc.” *Id.* at 379–80.

personal computer files in more than 30% of the U.S. firms.<sup>65</sup> By 2001, that figure rose to 77.7%.<sup>66</sup> Surprisingly, in 2005 the number decreased to 38%,<sup>67</sup> and in 2014 the number rose to 43%.<sup>68</sup> However, around this period, in 2013, 74% of companies surveyed said that they had used social media to vet employees.<sup>69</sup> Equivalently, in 2015, 52% of 2,000 human resource managers admitted that they use social media to screen candidates.<sup>70</sup> Two years later, in 2017, 70% of approximately 2,300 hiring managers and human resource professionals admitted that they use social media to screen candidates.<sup>71</sup>

A possible explanation for these numbers is that the forms of supervision have gone through a transformation. Thus, in order to track an employee's conduct, employers no longer have to rely mainly on the employee's e-mails (which are often considered to be part of an employee's right to privacy, and it is thus questionable whether it is legal to expose them).<sup>72</sup> Rather, they can simply examine the employee's behavior on social media sites or any other "public" behavior of the employee.

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65. Rothstein, *supra* note 63, at 379–82.

66. Am. Mgmt. Ass'n, ePolicy Institute Survey Electronic Policies and Practices Summary of Key Findings (2001), <http://www.epolicyinstitute.com/docs/ePolicyInstitute-AMA-2001Survey-SummaryFinal.pdf> [<https://perma.cc/R5PT-DGPY>].

67. Am. Mgmt. Ass'n, 2005 Electronic Monitoring & Surveillance Survey (2005), <http://www.epolicyinstitute.com/2005-electronic-monitoring-surveillance-survey-results> [<https://perma.cc/7PG3-9M85>]. This dramatic decrease can be explained by the following statistic mentioned in the article: that around this period, 74% of companies surveyed said that they had used social media to vet employees. This may imply employees are moving from vetting the e-mails' activity of employees, which may be unlawful, to vetting their activity on social media sites, which is still considered legal, and many times the employee is not aware at all to the fact that her activity online was monitored by the employer.

68. Am. Mgmt. Ass'n, The Latest on Workplace Monitoring and Surveillance, AMA Articles and White Papers (2014), <http://www.amanet.org/training/articles/The-Latest-on-Workplace-Monitoring-and-Surveillance.aspx> [<https://perma.cc/L6NE-GQBL>].

69. POTGIETER, *supra* note 18, at 38.

70. According to a national survey that was conducted on behalf of CareerBuilder by Harris Poll between Feb. 11, 2015 and Mar. 6, 2015, and included a representative sample of more than 2,000 full-time, U.S. hiring and human resources managers across industries and company sizes. See CAREER BUILDER, *35 Percent of Employers Less Likely to Interview Applicants They Can't Find Online, According to Annual CareerBuilder Social Media Recruitment Survey* (2015), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=5%2F14%2F2015&id=pr893&ed=12%2F31%2F2015> [<https://perma.cc/3W2U-G3WV>].

71. CAREER BUILDER, *Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study* (June 15, 2017), <http://press.careerbuilder.com/2017-06-15-Number-of-Employers-Using-Social-Media-to-Screen-Candidates-at-All-Time-High-Finds-Latest-CareerBuilder-Study> [<https://perma.cc/K7MN-8L93>].

72. See Rothstein, *supra* note 63; see also Bărbulescu v. Romania, App. No. 61496/08, Eur. Ct. H.R. (2017).

Similar arguments and anecdotal evidence suggest that similar developments are taking place in other countries.<sup>73</sup> It is also interesting to note how, in parallel, surveys among employees reveal that they mostly approve of these employer supervision practices—perhaps an indicator of their prevalence and acceptability.<sup>74</sup>

Following these constant, multi-source and almost limitless means of employee surveillance, it would not be exaggerated to say that de facto, the employee's privacy is becoming almost meaningless. As demonstrated thus far, there are numerous algorithms and programs that enable an employer to track employees' actions in so many diverse ways, and technology is constantly becoming more sophisticated in this regard. The supervision cost is low, both in the financial and consequential meaning—monitoring software and apps are becoming more popular and can be obtained at low prices, not to mention the free-of-charge ones such as Google and Facebook. Alongside that, in many cases the employee does not even know that she is being supervised so comprehensively and hence cannot really complain or oppose it.

As a result, unless some meaningful changes occur in technology and society, it seems the internet age will lead us further to a “non-privacy” direction in the workplace, so the whole notion of employee's privacy may become outdated. As I will show in the following parts, when we explore the conduct of society as a whole, it appears that additional actors are leading to unstable and even paradoxical notions of privacy as well.

### *B. The Ability of Additional Actors to Monitor and Supervise Employees*

In the internet age, the ability to monitor and supervise the employee is no longer limited to the employer. As the examples in this part will demonstrate, the internet platform has dramatically expanded this pattern of monitoring and supervision by third parties in a way that constantly blurs the distinctions between an employee's private life and professional life. This is because the internet platform in general and social media in particular have the ability to easily expose, share, and distribute information

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73. See for instance an empirical study in Israel from 2008, which shows how 63% of the companies that were examined reported that they were supervising their employees' behavior on the internet during working hours; 23% of the employers reported that they monitor their employees' company cellphones. “The Yearly Survey of the Center for the Study of Organizations & Human Resources Management, University of Haifa- Survey num. 2: Supervision in Organizations,” 4-6, <http://organizations3.haifa.ac.il/images/Monitoring-article.pdf> [https://perma.cc/N44E-EX59] (Hebrew). See also Rothstein, *supra* note 63; POTGIETER, *supra* note 18, at 38, 85–88 (regarding South Africa and France).

74. Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 J. OF SOCIAL ISSUES 431, 449 (2003).

about others.<sup>75</sup> Thus, within a couple of hours, thousands and perhaps millions of people can participate in “collective supervision,” transferring information about the employee from the private to the professional context.<sup>76</sup>

It is not only the innovative material infrastructure that enables the public to participate in employees' monitoring. It is much more than that. Virtual networks are characterized by the way the power within them is becoming more polarized and fragmented.<sup>77</sup> In the past, there were concrete focal points, such as the State or the employer, that held the power and applied it over others. The “*network society*,” in Castells' words, enables new actors to wield power and control or supervise, at least in some concrete context, the behavior of others.<sup>78</sup> Consequently, the internet platform has enabled other parties to participate in the collective monitoring and supervision of employees, even if they are not familiar with the employee at all or even located in different countries.

One of the social implications of this virtual polarized power is the well-known phenomenon of “online shaming”, as part of the wider phenomenon of informal social control.<sup>79</sup> In this respect, cyber-space has increased the desire as well as the practical ability of individual actors to participate in different forms of informal social control on the internet<sup>80</sup> in a way that also has punitive implications.<sup>81</sup> There are numerous new practices and virtual spheres in which online-shaming can occur; more people can be involved in the process of shaming; the shaming becomes more explicit and direct, and it can easily reach new audiences.<sup>82</sup> Needless to say, online shaming has various consequences for society, including raising questions of self-esteem of youth, informal social regulation of crimes, and more.<sup>83</sup>

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75. Karine Nahon, *Where there is Social Media there is Politics*, in THE ROUTLEDGE COMPANION TO SOCIAL MEDIA AND POLITICS, 39, 43–44 (Yannis Tzioumakis & Claire Molloy eds., 2016).

76. See generally BENKLER, *supra* note 18, at 32; Goldie, *supra* note 8, at 143–44.

77. Karine Nahon, *Network Fuzziness of Inclusion–Exclusion*, 5 INT'L J. OF COMM. 756, 768 (2011).

78. Manuel Castells, *A Network Theory of Power*, 5 INT'L J. OF COMM. 773 (2011); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (Wiley-Blackwell 2d ed. 2010) (1996).

79. For a general elaboration on the social phenomenon of shaming, see the article: Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, (1997).

80. See Scott R. Stroud, *The Jaina Rhetoric of Nonviolence and the Culture of Online Shaming*, in ANCIENT RHETORIC AND DIGITAL NETWORKS, 252, 315–318, 332 (Michele Kenner & Damien Smith Pfister eds., 2018).

81. Massaro, *supra* note 79, at 682; MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW*, 230–33 (2004).

82. Tamar Berenblum, *The Internet as a Sphere for Social Control*, 88–123 (2016) (unpublished Ph. D. thesis, The Hebrew University of Jerusalem) (on file with author).

83. In the context of crimes, see generally; e.g., John Braithwaite, *Shame and criminal justice*, 42 CAN. J. OF CRIMINOLOGY 281 (2000) (“societies have lower crime rates if they communicate shame

Online shaming can also be used by employees to publicly “supervise” their employers and publish their inappropriate or illegal behavior, or by clients or activists who wish to “shame” and “supervise” law-breaking employers.<sup>84</sup> However, in the current context, I want to show how online shaming can be perceived as another mode of employee supervision and in particular supervision of the employee’s private behavior.

In this regard, one of the meaningful implications of control in social media is the way these sites are activating the “real” supervisor, meaning the employer, to act immediately. A common reaction to public supervision and online shaming is immediate dismissal of the employee<sup>85</sup> after members of the public exert pressure on the employer to fire the “intractable” employee. The public eagerness to fire the employee and discipline her for her private behavior becomes the economic interest of employers who fear for their company’s reputation, the prospect of consumer boycotts, and so forth.<sup>86</sup> As a result, the employer often hastens to satisfy the mass’s demands and immediately and publicly dismisses the employee.

#### *A Short Illustration*

Consider the following example: Adria Richards, a high-tech company’s employee, is responsible for the company’s advertising and promotion via social media sites, including Twitter and Facebook. One day, Richards attended a conference organized by another high-tech company. During the event, Richards heard several sexist remarks from her colleagues who sat behind her. As both a feminist and a blogger, Richards chose to publish a short “tweet” on her colleagues’ remarks (“shaming”) and included their photos. The virtual community was buzzing around the case, and ultimately, Richards’s employer decided to dismiss one of the employees who made the sexist comments. Soon afterwards, the high-tech company received many complaints regarding the way it handled the case

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about crime effectively”); Berenblum, *supra* note 82, at 92 (“The basis of the linkage between shame and crime and deviance is the same as that of general social control theories: by effectively communicating shame about crime, a social control mechanism will reduce crime rates.”); Steven A. Kohm, *Naming, shaming and criminal justice: Mass-mediated humiliation as entertainment and punishment*, 5 CRIME MEDIA CULTURE 188 (2009) (discussing the role of humiliation, mass media, and entertainment play in crime control). For youth shaming, see SAMUEL C. MCQUADE III, JAMES P. COLT, AND NANCY B. B. MEYER, CYBER BULLYING: PROTECTING KIDS AND ADULTS FROM ONLINE BULLIES (2009).

84. See, e.g., GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 28–30 (2007) (referring to employers’ shaming and boycott as a way to promote labor rights, even before the internet age).

85. David S. Wall & Matthew Williams, *Policing Diversity in the Digital Age*, 7 CRIMINOLOGY & CRIM. JUSTICE 391, 404 (2007).

86. JON RONSON, SO YOU’VE BEEN PUBLICLY SHAMED, 121–31, 201–04, 210–25, 264–76 (2015).

and regarding Richards's behavior. As a result, due to public pressure, the company decided to fire Richards as well. The company argued that Richards behaved contrary to the purpose of her position, i.e., to positively advertise the company on social media sites.<sup>87</sup> In this case, it appears that the power to supervise the activity of the employees was polarized and distributed, and the decision to fire them was made firstly by others. Only later on, as a result of the others' supervision, was the decision made by the employer. In this way, Richards supervised her colleague by shaming him on her blog in a way that eventually led to his dismissal; and the relevant community supervised Richards's behavior by putting pressure on the high-tech company to dismiss her.<sup>88</sup>

Richards's and her colleague's cases may seem related to the employee's behavior during working hours. However, public supervision goes beyond working time and space. An example of dismissals based on private conduct or opinions of the employee can be found on the website *Racists Getting Fired*<sup>89</sup> (which gained a lot of public attention including in the last white nationalist rally).<sup>90</sup> On this website, racist behavior, many times, online racist behavior, is exposed and online-shamed in the specific context of employment. Through this platform, members of the public expose private, prima-facie racist behavior of a person, locate her work, and thereafter press the employer to fire the employee due to her private behavior, which is not necessarily related to her workplace. Most of the employers are "positively" reacting to this website by rapidly dismissing the supposedly racist employee.<sup>91</sup>

More sensational stories that demonstrate the phenomenon of multi-supervisors and its dramatic implications, can be found in Ronson's book *So You've been Publicly Shamed*.<sup>92</sup> The book presents several cases in which the modern phenomenon of online shaming can lead to the dismissal of a person and affect her future ability to find a new workplace after the dismissal. Among these cases, we find that of Justin Sacco, who used to run the PR department of IAC (an American media and internet company). In December 2013, Sacco tweeted to her 170 followers during her holiday

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87. See Liz Gannes, *Fired SendGrid Developer Evangelist Adria Richards Speaks Out*, ALL THINGS D (Mar. 27, 2013), <http://allthingsd.com/20130327/fired-sendgrid-developer-evangelist-adria-richards-speaks-out/> [<https://perma.cc/F557-WHLB>]; Jim Franklin, *A Difficult Situation*, SENDGRID (Mar. 21, 2013), <http://sendgrid.com/blog/a-difficult-situation/> [<https://perma.cc/HJR9-NEKT>].

88. RONSON, *supra* note 86, at 111–35.

89. Stroud, *supra* note 80, at 255–59.

90. Racists Getting Fired, FACEBOOK <https://www.facebook.com/pg/RGF101/posts/>, [<https://perma.cc/R74P-HNS3>] (see the Facebook page of this group in which several posts were written on the Charlottesville white nationalist rally from August 2017).

91. Stroud, *supra* note 80, at 322.

92. RONSON, *supra* note 86.

travels the following provocative joke: “going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!” Eleven hours later, the tweet was spread all over, and eventually Sacco was dismissed from her workplace. Moreover, for a very long period, Sacco struggled to find a new job, presumably because every potential employer could easily access the story by Googling her name. The collective supervision thus effectively prevented Sacco from starting over again and finding a new workplace.<sup>93</sup> Another interesting case is that of Lindsey Stone, who took provocative parodic pictures in Arlington National Cemetery. Stone visited the cemetery with her colleague Jamie during a trip from her workplace LIFE (Living Independently Forever, which assists people with learning difficulties) while they were off-duty.<sup>94</sup> Later on, Jamie jokingly published the pictures on Facebook. The pictures gained a lot of criticism on social media sites and were widely distributed. Ultimately, due to public pressure, Stone was dismissed from her workplace and found it hard to gain new employment for an extended period. Here as well, this was probably due to the fact that just by Googling Stone’s name, potential employers could have easily been exposed to the story and the massive public “supervision” it generated.<sup>95</sup>

The virtual environment provides numerous other similar stories that exemplify how, in the internet age, there are almost endless new supervisors who can determine an individual’s current and future employment opportunities and, as a result, her economic conditions for a long period.<sup>96</sup> As the above examples show, public supervision blurs the distinctions between private space and behavior of the employee and her public/professional space and behavior. The new supervisors bring both the private and professional life and behavior of an employee into the context of the workplace and demand that an employer discipline an employee, sometimes based on her entirely private behavior. Furthermore, there is often no need to explicitly demand an employer dismiss an employee, since the public online shaming automatically leads employers to do so immediately and even recklessly in order to please potential clients and to protect their reputation.

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93. *Id.* at ch. 4; pp. 201–04 (exploring whether she found a new job or not).

94. *Id.* at 206–07.

95. *Id.* at ch. 11.

96. See, e.g., POTGIETER, *supra* note 18, at 39–61; O’Brien, *supra* note 62, at 375; Yanisky-Ravid, *supra* note 28, at 69–71; 10 *INSANE Social Media Posts That Got People FIRED* THE TALKO (Mar. 19, 2016), <https://www.youtube.com/watch?v=DBRZ-IF3t6s>; [<https://perma.cc/Q69C-VGCV>]; JACOB SILVERMAN: TERMS OF SERVICE: SOCIAL MEDIA AND THE PRICE OF CONSTANT CONNECTION 169–75 (2015).

### *C. The Employee's Need to Live in Public and the Privacy Paradox*

With the expansion of monitoring by employers and society, the internet age has also changed employee behavior in private life, influencing the very notion of employees' right to privacy. In an era of constant use of the internet, and in particular social media, the common perception of what is private has changed and become difficult to define. Yet, as I will argue below, the protection of private life is still needed, especially in the context of the workplace.

#### *1. We Live in Public and on Social Media Sites*

As we have seen in Part II, the notion of privacy has always been conceptually ambiguous. It appears as if, by definition, the term "privacy" is tremendously complex and contains various layers and meanings.<sup>97</sup> One of the reasons for this ambiguity is the complexity of our lives as social creatures.<sup>98</sup> People are both private and public, and many times we perceive with the same importance our private and public realms.<sup>99</sup> Moreover, daily human existence takes place mostly in public—in school, work, on the streets, in meeting halls, etc.—and is surrounded by constant observation, disclosure, and sharing of information with others.<sup>100</sup> Society is built upon kinship and conversation.<sup>101</sup> Thus, it is hard to know how much privacy people actually desire, compared to how much information they want to share with others, as part of the desire to be members of society.<sup>102</sup> As Shils perfectly described it already in 1966, people "want to extend themselves by sharing with others what they know of themselves."<sup>103</sup> Yet at the same time, they want to share this information in privacy.<sup>104</sup>

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97. This is the main idea in many contemporary writings, *see, e.g.*, JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY 1, 9 (1997) ("[T]he concept of privacy has played a fundamental role in political and religious writings as well as in biological, anthropological, and sociological studies from antiquity to today."); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE, Introduction and Conclusion (notes), 237–38 (2010); Solove, *supra* note 7, at 1088–89 ("[P]rivacy is a sweeping concept, encompassing . . . freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations.")

98. *See* Shils, *supra* note 7, at 286–88 (stating that there is no complete privacy in human life because of the wide range of human interactions).

99. *See* Regan, *supra* note 33, at 32; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–52 (1981–1982).

100. Kennedy, *supra* note 99, at 1350–51.

101. *See* Shils, *supra* note 7, at 286–87.

102. *See id.*

103. *Id.* at 304.

104. *Id.*

This social phenomenon, which is in constant conflict with the desire for privacy, has become significantly more pronounced in the internet era due to the creation of the internet platform, and in particular, the profusion of social network sites.<sup>105</sup> The core idea of Web 2.0 (the second generation of the World Wide Web starting from around 2004)<sup>106</sup> was precisely to create a collaborative virtual medium, a place in which people interact, write, and read with one another—and constantly share information with one another.<sup>107</sup> Similarly, the notions of “sharing, communication, collaboration, and community” were the core concepts in the creation of social media sites.<sup>108</sup> The term “social media sites” refers to various virtual platforms of sharing information, such as “blogs (e.g., Blogspot, WordPress, Tumblr), social networking sites (e.g., Facebook, LinkedIn, VK, Renren), user-generated content sharing sites (e.g., YouTube, Vimeo, Youku), microblogs (e.g., Twitter, Weibo) and wikis (e.g., Wikipedia).”<sup>109</sup> As I will show in the coming lines, these sites build on the human need to share and “live in public”<sup>110</sup> and constantly encourage it.

## 2. More People Participate on Social Media Sites and Share Private Information

Before continuing, it is important to clarify that using social media sites is not a marginal phenomenon; rather it has become extremely common to participate in diverse social media websites on a daily basis. According to research of the December 2008 Pew Internet & American Life Project, 35% of American adult internet users had a profile on an online social network site, and 65% of online American teenagers used social networks sites.<sup>111</sup> A similar 2016 survey from the Pew Research Center

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105. Zizi Papacharissi & Paige L. Gibson, *Fifteen Minutes of Privacy: Privacy, Sociality, and Publicity on Social Network Sites*, in *PRIVACY ONLINE* 75, 75 (Sabine Trepte & Leonard Reinecke eds., 2011).

106. Eric Knorr, *The Year of Web Services*, CIO MAG., Dec. 15, 2003, <https://www.cio.com/article/2439869/2004--the-year-of-web-services.html>; [<https://perma.cc/ABZ9-SVMV>]; Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 60–62 (2010).

107. WILL RICHARDSON, *BLOGS, WIKIS, PODCASTS, AND OTHER POWERFUL WEB TOOLS FOR CLASSROOMS*, 1 (2nd ed. 2009).

108. FUCHS, *supra* note 46, at 122, 134–35.

109. FUCHS, *supra* note 46, at 113. *See also* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210, 211 (2007); Kaplan & Haenlein, *supra* note 106, at 62; DANIEL MILLER ET AL., *HOW THE WORLD CHANGED SOCIAL MEDIA*, 1–24 (2016).

110. I chose this term as a reference to a documentary film that follows the life of Josh Harris, one of the internet pioneers, and his vision of the end of privacy in the Internet age: *WE LIVE IN PUBLIC* (Interloper Films & Pawn Shop Creatives 2009).

111. Amanda Lenhart, *Adults and Social Network Websites*, PEW RESEARCH CENTER (Jan. 14, 2009), <https://www.pewinternet.org/2009/01/14/adults-and-social-network-websites/>

indicated that 86% of American people were internet users, and 79% of them used Facebook, while 32% used Instagram, and 24% used Twitter.<sup>112</sup> Out of these 79% Facebook users, 76% reported that they visit the site daily, and 55% reported that they visit the site several times a day.<sup>113</sup> Other research of the Pew Research Center, which looked at data from 2005 to 2015, showed how during that decade the percentage of the U.S. population using one or more social networking sites increased from 7% in 2005 to 65% in 2015—a nearly tenfold jump in one decade.<sup>114</sup>

According to formal summaries from diverse social media and statistics-tracking websites, the popularity of social media websites is still growing. Facebook published an annual report in December 2015 that revealed that the website had 1.04 billion active users on an average daily basis, which represents an increase of 17% in active users compared to December 2014.<sup>115</sup> As of March 2018, the numbers increased to 2.20 billion monthly active users on average.<sup>116</sup> According to Statista, in October 2018, Twitter had approximately 330 million monthly active users, and this figure for Instagram was 1 billion.<sup>117</sup> Social media sites are also available on personal cellphones, so they can be easily accessed at just about any time and place.<sup>118</sup> Consequently, from 2013 to 2016, there was a remarkably rapid rise of mobile platforms, such as WhatsApp and WeChat,<sup>119</sup> on which several people in a group share information with one another in a semi-private-semi-public manner.<sup>120</sup> WhatsApp had 1.5 billion active users as of October 2018.<sup>121</sup> Perhaps needless to say, this is not a uniquely American

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[<https://perma.cc/Z6ZE-2JX9>]. According to Forrester research from 2008, the numbers are even higher, as 75% of internet users used social-media sites. See Kaplan & Haenlein, *supra* note 106, at 59.

112. Shannon Greenwood et al., *Social Media Update 2016*, PEW RESEARCH CENTER (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [<https://perma.cc/NL2N-DHKD>].

113. *Id.*

114. Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [<https://perma.cc/S4DB-TRF9>].

115. Facebook Inc., *Form 10-K Annual Report* (Jan. 28, 2016), <http://people.stern.nyu.edu/adamodar/pc/blog/Facebook10K2015.pdf>; [<https://perma.cc/4QY5-HFRE>]; Mark B. Gerano, *Access Denied: An Analysis of Social Media Password Demands in the Public Employment Setting*, 40 N. KY. L. REV. 665, 665 (2013).

116. Facebook Newsroom, FACEBOOK, INC. (Feb. 5, 2019, 1:03 AM), <http://newsroom.fb.com/company-info/>. [<https://perma.cc/WN6T-YA9C>].

117. Statista is a “Statistics Portal”, which clarifies that it includes: “Statistics and Studies from more than 22,500 Sources.” See STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/5HDR-859L>] (last visited Mar. 3, 2019).

118. MILLER ET AL., *supra* note 109, at 2.

119. STATISTA, *Supra* note 117.

120. MILLER ET AL., *supra* note 109, at 2.

121. STATISTA, *Supra* note 117.

phenomenon, as social media sites are commonly used around the world.<sup>122</sup> Indeed, social media has become an integral part of daily life in both the U.S. and elsewhere.<sup>123</sup>

In addition to that, the type of content being shared has continued to reveal more private aspects of users' identities.<sup>124</sup> In this way, users post a considerable amount of true and authentic information about themselves.<sup>125</sup> They perform this by sharing selfie pictures or pictures that they took that tell a story about their daily experience, their character (familial, provocative, etc.), and the things they like, which creates a narrative just as literal text does.<sup>126</sup> Research from 2008 revealed that Facebook's users presented around 88 photographs on average per user, most of which were tagged as public.<sup>127</sup> Alongside images and pictures, people usually post literal text. They can share their political views on Facebook or Twitter as well as on their own blog or other virtual forums; they can inform their numerous friends about a personal experience they had, about their family life, or their private habits. They do so sometimes explicitly by sharing a post about it and sometimes indirectly by "liking" a post about the issue on Facebook.<sup>128</sup> As Barnes shows in her empirical research, this phenomenon of sharing large amounts of private information online is becoming more common, especially among teenagers.<sup>129</sup> Following their activity on social

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122. For general information on how people use the internet platform more often today and the percentage of users in diverse countries, see THE WEB WORLDWIDE, <https://www.webworldwide.io/> [<https://perma.cc/W8R6-7V8B>] (follow "United States of America" hyperlink; then scroll down to "Connectivity"; repeat for other countries) (last visited Feb. 5, 2019).

123. MILLER ET AL., *supra* note 109, at 7.

124. Bernd Marcus et al., *Personality in Cyberspace: Personal Web Sites as Media for Personality Expressions and Impressions*, 90 J. OF PERSONALITY AND SOC. PSYCHOL. 1014, 1024–30 (2006); Michael Zimmer, *But the Data is already Public: on the Ethics of Research in Facebook*, 12 ETHICS AND INFO. TECH. 313, at 314–15 (2010).

125. Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1025 (2009); Barnes, *infra* note 129.

126. Katherine Hayles, *Deeper into the Machine: The Future of Electronic Literature*, CULTURE MACHINE (2003), <http://www.culturemachine.net/index.php/cm/article/viewArticle/245/241>; [<https://perma.cc/MW97-8RQJ>]; Alexandra Georgakopoulou, *From Narrating the Self to Posting Self(ies): A Small Stories Approach to Selfies*, 2 OPEN LINGUISTICS 300, 301–303 (2016) (focusing on women's selfies on Facebook and the way they tell a story). For distribution of percentage of photographs posted on social media, see MILLER ET AL., *supra* note 109, at 51.

127. Shanyang Zhao et al., *Identity Construction on Facebook: Digital Empowerment in Anchored Relationships*, 24 COMPUTERS IN HUMAN BEHAVIOR 1816, 1827 (2008).

128. Hanna Krasnova, *Online Social Networks: Why We Disclose*, 25 J. INFO. TECH. 109, 109–13 (2010); Nahon, *supra* note 77, at 766.

129. Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, 11 FIRST MONDAY 1, 2 (2006), <http://firstmonday.org/ojs/index.php/fm/article/view/1394/1312> [<https://perma.cc/4VUW-HK69>].

media sites reveals that young people tend to share their most intimate thoughts and behaviors online on a regular basis.<sup>130</sup>

### 3. *Why Do People Share Private Information on Social Media Sites?*

Much has been written from a psychological perspective on why people participate and share intimate information about themselves on social media sites.<sup>131</sup> People frequently share information online simply to create new friendships and stay in touch or re-connect with old friends.<sup>132</sup> They do so in order to be part of a community and sustain their community membership.<sup>133</sup> Sharing information in public helps individuals feel less alone, especially in difficult times.<sup>134</sup> It is part of the primordial human need for self-presentation and the individual's desire to raise her self-esteem by revealing herself to the world.<sup>135</sup> In this way, sharing information has become an essential part of the development of the individual's identity.<sup>136</sup>

These basic human motivations of an individual to live in public can sometimes distract her from fully understanding the real implications of her online behavior.<sup>137</sup> Virtual technology enables an individual to shift from one community to another more easily and supposedly to reveal in each one of them different aspects of private information in accordance with the individual's preference. However, people do not always fully understand that virtual technology also makes it easier to forward information from one community to another without one's notice and consent in a way that constantly jeopardizes their privacy.<sup>138</sup> People often reveal private information on semi-private social media sites, believing that the information will be accessible only to that specific community's members.

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130. *Id.* at 3.

131. Parent, *supra* note 19, at 272–74; Dinev & Hart, *supra* note 20, at 61–64. *See also supra* note 18 (elaborating on semi-public spheres); Petter Bae Brandtzæg & Jan Heim, *Why People Use Social Networking Sites*, in ONLINE COMMUNITIES AND SOCIAL COMPUTING, 143, 147 (A. Ant Ozok & Panayiotis Zaphiris eds., 2009).

132. Petter Bae Brandtzæg & Jan Heim, *Why People Use Social Networking Sites*, in ONLINE COMMUNITIES AND SOCIAL COMPUTING, 143, 147 (A. Ant Ozok & Panayiotis Zaphiris eds., 2009).

133. Ashwini Nadkarnia & Stefan G. Hofmann, *Why do people use Facebook?*, 52 PERSONALITY & INDIVIDUAL DIFFERENCES 243, 245–47 (2012); Amy L. Gonzales & Jeffrey T. Hancock, *Mirror, Mirror on my Facebook Wall: Effects of Exposure to Facebook on Self-Esteem*, 14 CYBERPSYCHOLOGY BEHAV. & SOC. NETWORKING 79, 81–82 (2010); Charles Steinfield et al., *Social Capital, Self-Esteem, and Use of Online Social Network Sites: A Longitudinal Analysis*, 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 434, 434–37 (2008); Guosong Shao, *Understanding the Appeal of User-Generated Media: a Uses and Gratification Perspective*, 19 INTERNET RESEARCH 7, 12–13 (2009).

134. Max Mills, *Sharing Privately: The Effect Publication on Social Media has on Expectations of Privacy*, 9 J. MEDIA L. 45, 47 (2017).

135. *Id.* at 46–47.

136. *Id.* at 47.

137. Barnes, *supra* note 129.

138. BENKLER, *supra* note 18, at 155–58.

Yet, in reality, other entities can easily have access to the information as well.<sup>139</sup> Castells stresses that this is the basis of the “network society”—the ease with which we can blur the boundaries between one network and another.<sup>140</sup> The information is also more permanent in the virtual space compared to traditional sites.<sup>141</sup> Hence, ultimately, social media users often expose content to more users than they expected, faster than they could have imagined, and for longer periods than they wished.<sup>142</sup>

Moreover, people post private information online to large groups of people (such as to all of their Facebook’s friends) since they have an imagined audience in mind, which consists of their casual friends and followers with whom they usually interact, their peers, or a “generic sympathetic reader.”<sup>143</sup> Although in practice, all of their Facebook friends and many other people can easily access the information, “others” are barely considered to be part of the imagined audience.<sup>144</sup> According to behavioral economic analysis, people suffer from a present bias: they prefer to enjoy their present needs and desires rather than think about an optional, vague future threat.<sup>145</sup> Therefore, even if the individual might be aware, in theory, of the possible risks of publishing private information online, the human tendency will be to prefer enjoying the current exposure rather than behaving in accordance with an optional future risk.

However, along with these cognitive biases of the individual, there is much more in this need “to live in public”<sup>146</sup> than lack of human rationality. Scholars show how technology, and in particular commercial companies which are based on technology, have the power and the practical ability to reconstruct our actions and minds as a group and as individuals and to influence social preferences and awareness through a process of communication.<sup>147</sup> Following this, it frequently seems that the only way to operate in our reality and be part of the social structure is by providing large

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139. Balachander Krishnamurthy & Craig E. Wills, *Characterizing Privacy in Online Social Networks*, Workshop on Online Social Networks ‘08, ACM 37, 37–38 (2008), [http://conferences.sigcomm.org/sigcomm/2008/workshops/wosn/slides/wosn08-characterizing\\_privacy.pdf](http://conferences.sigcomm.org/sigcomm/2008/workshops/wosn/slides/wosn08-characterizing_privacy.pdf). [<https://perma.cc/8QQA-FKUD>].

140. CASTELLS, *supra* note 18, at 48–51.

141. BENKLER, *supra* note 18, at 29–34; Goldie, *supra* note 8, at 143–45.

142. Nahon, *supra* note 75, at 51–52.

143. Daria Dayter & Susanne Mühleise, *Open Telling Stories about Self in Digital Contexts: Same, Same, but Different?* 2 LINGUISTICS 572, 574 (2016); Alice Marwick & Danah Boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA & SOC’Y 114, 115–16 (2011).

144. Dayter & Mühleise, *supra* note 143, at 573–74; Marwick & Boyd, *supra* note 143, at 118–22.

145. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1538–39 (1998) (referring to the present bias mostly in the context of criminal law).

146. See *supra* note 110, and accompanying text for discussion of “to live in public.”

147. CASTELLS, *supra* note 18, at 500–02.

amounts of information to third parties—Google, Facebook, cellphone apps, etc.<sup>148</sup>

Papacharissi and Gibson take this understanding further. According to them, modern life is full of the individual's social interactions on social network sites, where sharing information about oneself is the default.<sup>149</sup> Virtual technology, along with the commercial companies that are based on such technology, have cultivated a newer paradigm for sociality, in which in order to be social, you have to disclose information about yourself.<sup>150</sup> In order to sustain friendships, you have to share.<sup>151</sup> Thus, in their persuasive and powerful words, Papacharissi and Gibson explain how "Byte by byte, our personal information is exchanged as currency to gain digital access to our own friends."<sup>152</sup>

#### 4. *The Public-Private Dichotomy and the Privacy Paradox*

How does living in public influence the notion of privacy? Seemingly, if we follow the classical understandings of privacy, it appears that when we live and share information in public, we are, by definition, relinquishing our privacy.

This assumption is also based on the well-known dichotomy between the private sphere, in which the right to privacy is preserved, and the public sphere, in which information is open to all. This distinction was developed in sixteenth- and seventeenth-century Western thought.<sup>153</sup> The whole notion of the private sphere was formulated "for the purpose of setting limits on State power, both over property and religious conscience."<sup>154</sup> In this way, Anglo-American law came to recognize "the idea of a separate private realm, free from public power," in which the private individual is mostly free to act as she wants without the supervising eye of the State.<sup>155</sup> This is why the dichotomy of private-public sphere refers many times to what is hidden vs. what is open and to the individual vs. the collective.<sup>156</sup> Thus, if

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148. Papacharissi, *supra* note 18, at 243–44; Papacharissi & Gibson, *supra* note 105, at 75–76.

149. Papacharissi & Gibson, *supra* note 105, at 75–77.

150. *Id.* at 80.

151. Rachels, *supra* note 16, at 295–97; Papacharissi & Gibson, *supra* note 105, at 83–85; Zizi Papacharissi, *Privacy as a Luxury Commodity*, 15 FIRST MONDAY 1, 2–3 (2010), <http://firstmonday.org/ojs/index.php/fm/article/view/3075/2581>. [<https://perma.cc/3K58-N3TY>].

152. Papacharissi & Gibson, *supra* note 105, at 84.

153. Jeff Weintraub, *The Theory and Politics of Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 1 (Jeff Weintraub & Krishan Kumar eds., 1997).

154. Morton J. Horwitz, *The History of the Public/Private Distinction*, 13 U. PA. L. REV. 1423, 1423–28 (1982).

155. *Id.* at 1424.

156. Weintraub, *supra* note 153, at 4–5; see OTTO, *supra* note 31, at 183–85.

we follow this distinction, information that was published on social media sites, which appears to be public, seemingly cannot enjoy the protection of the right to privacy.

However, the sharp distinction between the two spheres has come under attack since the beginning of the twentieth century from diverse perspectives, including the perspective of women's rights and human rights.<sup>157</sup> These critical opinions derived from socio-political points of view, but contemporary scholars also questioned the distinction from a more descriptive point of view. In the context of the internet, many times it seems like the border between what is perceived as public and what is perceived as private has collapsed.<sup>158</sup> The internet seems to have led to the assimilation of the private space and the public space into one new location: "no place."<sup>159</sup> This new "no place" generates new types of individual behavior that may be characterized as both public and private. Cyberspace itself is perceived as both private and public and enables new terrain for activating both private and public life and identity.<sup>160</sup> As such, social media sites are governed by both the private and the public realms.<sup>161</sup>

As part of the contemporary private sphere/public sphere assimilation, people tend to share much more private information on social media sites—yet they still wish to retain some aspects of their privacy. As was described above, people are doing so due to cognitive biases or since they have to "trade" their privacy in order to gain social services and connections. As a result, a privacy paradox appears: people share information on social networks, and at the very same time consider this information to be private, as long as it is not disclosed by them outside of the network in which they initially published the information.<sup>162</sup>

Therefore, as Nissenbaum shows, in the internet age privacy becomes a paradoxical value; it becomes more "public" than ever.<sup>163</sup> Levin and

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157. See Weintraub, *supra* note 153, at 27–34; see generally Kennedy, *supra* note 99.

158. Papacharissi, *supra* note 18, at 231; see Smith et al., *supra* note 15, at 993.

159. JOSHUA MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR, 5–6 (1986); Zizi Papacharissi, *The Virtual Geographies of Social Networks: A Comparative Analysis of Facebook, LinkedIn and ASmallWorld*, 11 NEW MEDIA & SOC'Y 199, 206–07 (2009); see, e.g., Barnes, *supra* note 129 (describing this new location in the context of teenagers and social networks on the internet).

160. Zizi Papacharissi, *The Virtual Sphere: The Internet as the Public Sphere*, 4 NEW MEDIA & SOC'Y 9, 20 (2002).

161. See MILLER ET AL., *supra* note 109, at 2–3.

162. See also Barnes, *supra* note 129, (describing how youth do not understand the consequences of their sharing habits); cf. Smith et al., *supra* note 15, at 1000; Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors*, 41 J. OF CONSUMER AFF. 100, 118 (2007); Shankar V. Blasubramanian, *Mobile Marketing: A Synthesis and Prognosis*, 23 J. OF INTERACTIVE MARKETING 118 (2009).

163. Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 L. & PHIL. 562, 567 (1998); Austin, *supra* note 27, at 122–23.

Sánchez-Abril named this phenomenon “network privacy,” in which online users “have developed a new and arguably legitimate notion of privacy online.”<sup>164</sup> Lessig offers the term “privacy in public,” which means that people need privacy and control over their personal information, even when they publish it in a certain semi-public sphere.<sup>165</sup> As such, it seems as the traditional theories of privacy, which focus on intimate information that the individual kept to herself, can no longer serve as the theoretical basis for this public-privacy.<sup>166</sup> On the other hand, as I will elaborate further in Part IV, from a legal perspective, it appears problematic and perhaps impossible to embrace this paradoxical perception of the individual regarding her right to privacy.

### 5. *The Context of Employment*

Returning to the context of the workplace, the aforementioned considerations and difficulties seem to be even more relevant to the specific dynamic of the workplace. This is due to two main reasons previously implied. First, the blurriness between the private and public spheres appears in a unique form in the workplace.<sup>167</sup> Second, due to the power-dynamic of the workplace, the natural human need to share and live in public has crucial implications for the employee’s ability to enjoy her private life on the one hand, and at the very same time, enjoy all her labor rights and professional opportunities on the other hand.

In the workplace context, in addition to the general public-private dichotomy and blurriness, the classical private sphere seems to be parallel to the private sphere of the employee, and the public sphere seems to be parallel to her professional sphere, namely the workplace.<sup>168</sup> Seemingly, we can distinguish between these two spheres easily. However, even before the emergence of the internet platform in our lives, our professional and private lives were interwoven. In this regard, Schultz clarifies how work is an important component in our private life and identity, over and above its

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164. Levin & Abril, *supra* note 125, at 1002, 1043–46.

165. LESSIG, *supra* note 21, at 215, 218–22; Skinner-Thompson, *supra* note 26, at 1673–74.

166. Nissenbaum, *supra* note 163, at 564.

167. Hugh Collins, *The Protection of Civil Liberties in the Workplace*, 69 MOD. L. REV. 619, 623–24 (2006); see Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, 17–20 (LSE Law Sc’y and Econ., Working Paper, 2007) <https://www.lse.ac.uk/collections/law/wps/WPS06-2007Collins.pdf> [<https://perma.cc/6QTT-KDDQ>] (arguing that there is a difference between the public-private notion which refers to the State and public-private distinction in other areas of our life).

168. Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, 17–20 (LSE Law Sc’y and Econ., Working Paper No. 6, 2007), <https://www.lse.ac.uk/collections/law/wps/WPS06-2007Collins.pdf> [<https://perma.cc/6QTT-KDDQ>]; OTTO, *supra* note 31, at 183–85.

central role to provide our economic needs.<sup>169</sup> Indeed, work has always been an integral part of the way we perceive and present ourselves to the world, and it enabled us to be part of social and political communities.<sup>170</sup>

This work-private life integration is even more pronounced in the internet age. If in the past, we could have drawn a clear line between work time and space and private (or leisure) time and space, in the internet age it is far more difficult to do so. In the past, work was usually conducted in a clear and detached location and time of the day.<sup>171</sup> Back in the industrial age—and even in the beginning of the digital age—there existed a clearer dichotomy between work and leisure such that usually the workplace was isolated from social and personal considerations and contacts.<sup>172</sup> By contrast, in the internet age, work can be done in endless various forms, times, and places, so the lines between the professional and the private are constantly blurred.<sup>173</sup> With the advent of e-mail, mobile phones, and social media, the separation of work from non-work is much harder to sustain.<sup>174</sup>

In order to clarify and connect the new virtual zone of “no place” to the context of the workplace, all we need to do is move our gaze to all the endless moments in which the employee is acting and presenting herself as both a private person and a professional employee. Hence, the private person/professional employee can, and sometimes is even obligated to,<sup>175</sup> post a professional status on her Facebook page, and a few hours later, by using the very same Facebook account, she may publish a political status or share pictures from a party in which she participated. The private person/professional employee can send private and work-related e-mails from her private or professional e-mail account.<sup>176</sup> She can use the workplace laptop in order to continue working from home and then use it for personal needs, thereby archiving private information on the employer’s

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169. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1884–92 (2000).

170. *Id.*

171. See e.g., URSULA HUWS, *THE MAKING OF A CYBERTARIAT: VIRTUAL WORK IN A REAL WORLD* 52 (2003) (noting that work now often occurs in the home rather than the workplace); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* 29–33 (2004) (showing how in the industrial era, Taylorism restricted the employee to specific workplace and working time units); OTTO, *supra* note 31, at 183–85; Hani Ofek-Ghendler, “*Hanucha*” – *the Israeli Law of Work and Rest on the Background of Technology*, 40 TEL-AVIV UNIVERSITY LAW REVIEW 5 (IYUNEI MISHPAT) (2017) (Hebrew).

172. MILLER ET AL., *supra* note 109, at 85–86.

173. Katherine V.W. Stone, *Repute and Invention: The Changing Nature of Employment, the Vanishing Middle Class, and Implications for Social Policy* (Seminar at the Hebrew University of Jerusalem, June 2015); Gail Lasprogata et al., *Regulation of Electronic Employee Monitoring: Identifying Fundamental Principles of Employee Privacy through a Comparative Study of Data Privacy Legislation in the European Union, United States and Canada*, 2004 STAN. TECH. L. REV. 4, 1 (2004).

174. MILLER ET AL., *supra* note 109, at 85–86.

175. For obligatory use of private accounts in social network sites for professional purposes, see e.g., MELISSA GREGG, *WORK INTIMACY* 102–08 (2011); POTGIETER, *supra* note 18, at 5–32.

176. See e.g., *supra* note 72.

property.<sup>177</sup> She can create a professional mailing-list or lists of followers in her personal e-mail or Twitter account and publish both professional and personal statuses there.<sup>178</sup> She can, and sometimes she is even obligated to, be a friend on Facebook with her employer who is now exposed to all sorts of private information on her.<sup>179</sup> Moreover, virtual technology and the internet platform enable, and many times even force the employee to continue working for numerous short periods during her leisure time. This can be, for instance, by constantly answering e-mails from the employee's smartphone or having phone-calls during evening-time or during the employee's vacation<sup>180</sup> (in a way that also blurs the distinction between paid and unpaid labor).<sup>181</sup> Similarly, many workers conduct private activities, such as reading online news or checking their personal Facebook page during official work time at the office.<sup>182</sup> Indeed, some workers take advantage of the virtual capabilities in their workplace and engage in various private or even inappropriate activities during their working day.<sup>183</sup> But often this blurriness is benign: the worker conducts some small personal duties in the workplace, with the implicit or even explicit approval of the employer, mostly because she is spending a disproportionate part of her day at work anyway.<sup>184</sup> No matter the angle from which one looks, due to the internet platform and virtual technology, today it is much more complicated to draw a line between the professional and the personal

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177. Laura Evans, *Monitoring Technology in the American Workplace: Would Adopting English Privacy Standards Better Balance Employee Privacy and Productivity?* 95 CAL. L. REV. 1115, 1116 (2007); BIRNHACK, *supra* note 42 at 433.

178. POTGIETER, *supra* note 18, at 39—61.

179. POTGIETER, *supra* note 18, at 72—73; Yanisky-Ravid, *supra* note 28, at 75—77.

180. GREGG, *supra* note 175, at 39—69; Ofek-Ghendler, *supra* note 171, at 8.

181. See Frederick Pitts, 'A Science to it': *Flexible Time and Flexible Subjectivity in the Digital Workplace*, 7 WORK ORGANISATION, LABOUR & GLOBALISATION 95, 96 (2013); Ofek-Ghendler, *supra* note 171, at 8.

182. See *Facebook: Measuring the Cost to Business of Social Networking*, NUCLEUS RESEARCH 1 (July 2009) <http://nucleusresearch.com/research/single/facebook-measuring-the-cost-to-business-of-social-notworking/> [<https://perma.cc/7JQA-UMY8>], (reporting that nearly half of all American employees access their personal Facebook account while they are working at the office).

183. See *e.g.*, *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 655 (N.J. 2010) (describing an employee who improperly used her work computer to email her personal attorney); *2006 Workplace E-Mail, Instant Messaging & Blog Survey*, THE E-POLICY INSTITUTE (2006) <http://www.epolicyinstitute.com/2006-workplace-e-mail-instant-messaging-blog-survey> [<https://perma.cc/YHR7-KYL6>].

184. See, *e.g.*, the decision of the Israeli labor court in Nazareth: "the employee is not a servant. During the day, he has a right to deal with some of his private business, alongside his work, and as long as he is doing so in a reasonable way without causing a real damage to the employer". L (Nazareth) 1820/00 Golan v. Pentz (Hebrew); see also Matthew Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J. 577, 580–86 (2002) (describing the judgments of German courts; Virginia Mantouvalou, *Work and Private Life: Sidabras and Dziautas v. Lithuania*, 30 EUR. L. REV. 573, 575–82 (2005) (describing the judgments of the European Court).

behavior, time, and identity of the employee. As a result, it is difficult to say when an employee is entitled to enjoy her right to privacy and to be protected from the employer's intervention, and when the employee is behaving as a "pure" professional employee with all the corresponding duties to her workplace.

In addition, the general phenomenon of "public privacy," in which people have to relinquish some elements of their privacy in order to participate in social life, has its own unique implications in the field of labor and the concrete power dynamic within it. Through an empirical survey, Abril, Levin and Riego demonstrate how the respondents "generally want privacy from unintended employer eyes, and yet they share a significant amount of personal information online, knowing it could become available to employers and others."<sup>185</sup> Later on, they explain that even though the respondents feel unease at the lack of control over the information about them which is available online, it is obvious they will not stop participating in social network sites. This is because individuals need social network sites in order "to socialize, to interact, and to share truthful information about themselves . . ."<sup>186</sup> In other words, since most people are employees, it stands to reason that most employees suffer from the privacy paradox. However, in the concrete context of the workplace, since the employee needs her position to provide for herself and her family as well as to develop her personality and membership in society,<sup>187</sup> it would seem that the privacy paradox has further punitive implications for the employee.

In this respect, the right of the employee to have privacy and private life is correlated with her right to dignity, equality, and employment opportunities.<sup>188</sup> The employee is fearful about the use of her private information and wishes to conceal it from her employer's eyes not only because she desires her privacy but also because she is afraid it will influence her employment track.<sup>189</sup> This is why, in Levin's words, employees (as well as applicants) "desire to separate work from private life."<sup>190</sup> This is since they "wish to present their best professional persona in order to secure employment."<sup>191</sup>

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185. Abril, et al., *supra* note 62, at 66. This research is based on a survey which included approximately 2,500 Canadian and American undergraduate students. Therefore, it is questionable whether it can accurately indicate the behavior of adult employees, who might be more hesitant to share private information online, which is accessible to the employer.

186. *Id.* at 109.

187. Schultz, *supra* note 169, at 1886–92.

188. *See supra* Part II.

189. *See supra* notes 30, 33–37.

190. Avner Levin, *Losing the Battle but Winning the War: Why Online Information Should Be a Prohibited Ground*, 18 CANADIAN LAB. AND EMP. L. J. 379, 386 (2015).

191. *Id.* at 387.

#### IV. CURRENT POSSIBLE SOLUTIONS TO THE PRIVACY PARADOX

As we have seen so far, the classical understandings of the right to privacy are confronting many new challenges in the internet age, particularly within the specific context of labor. Current scholarship has referred to some of these challenges and offered new theoretical approaches for privacy. As I will show in this section, these approaches stem from flexible, adjustable legal tools. I refer to three main approaches: the contextual approach, the proportionality principle, and the pragmatic way the American and European legal systems developed the right to privacy. After presenting these three models, I will describe their deficiencies and suggest additional complementary procedural rules for the current models.

##### *A. The Multilayer/Contextual Approach*

The implications of the internet age for the right to privacy have attracted the attention of several scholars. Some of them believe that the notion of “[p]rivacy as we have known it is ending, and we’re only beginning to fathom the consequences.”<sup>192</sup> Many others wish to update the concept of privacy and attribute to it a more fluid interpretation that will enable it to be adjusted to the new and unfamiliar scenarios the internet age is generating.<sup>193</sup>

Thus, from a philosophical point of view, DeCew understands the right to privacy as consisting of multiple meanings and layers, enabling one to read it in various ways adapted to the concrete scenario at stake.<sup>194</sup> DeCew divides the right to privacy into three constituents: (a) informational privacy: the notion of control over one’s information, including the ease with which others can access and even control information on a person; (b) accessibility privacy, which refers mainly to physical privacy and is less unique to the internet age; (c) expressive privacy: the ability of the individual to freely express and socially interact—for example, on social media sites—and appears to be a more distinct product of the internet age.<sup>195</sup>

Another modern and multi-layered perception of the right to privacy can be found in Solove’s circumstantiated taxonomy of privacy. Solove

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192. Martin Enserink & Gilbert Chin, *The End of Privacy*, 347 SCI. 490, 491 (2015).

193. See e.g., Goldie, *supra* note 8, at 142; Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change*, 80 CAL. L. REV. 1133, 1135–36 (1992); DECEW, *supra* note 98, 46–60; Austin, *supra* note 27, at 119–21.

194. DECEW, *supra* note 97, at 1–8.

195. *Id.* at 75–79. In a similar manner, the American restatement regarding employee’s privacy distinguishes between two sorts of privacy of the employee: intrusion into the employee’s physical person and possessions and intrusion into the person’s physical or electronic location. See Finkin, *supra* note 23, at 591–92.

argues that the right to privacy contains six distinctive features. Apart from the three classical meanings of the right to privacy which were delineated at the beginning of this article,<sup>196</sup> Solove asserts that privacy can also refer to “secrecy—the concealment of certain matters from others;” “personhood—the protection of one’s personality, individuality and dignity; and . . . intimacy—control over, or limited access to, one’s intimate relationships or aspects of life.”<sup>197</sup> Even more importantly for current purposes, Solove argues that privacy “should be conceptualized contextually as it is implicated in particular problems.”<sup>198</sup> In this way, alluding to Wittgenstein’s pragmatism, he offers a pragmatic approach to privacy—“multiple conceptions of privacy”<sup>199</sup>—which interprets privacy within a particular context in accordance with the concrete activities and norms that surround the issue at stake.<sup>200</sup> Following this, in order to decide from a legal perspective whether the right to privacy has been violated or not, a normative analysis of the right with its concrete context and circumstances is needed.<sup>201</sup>

These ideas resemble the contextual approach, which is mostly associated with Nissenbaum’s “contextual integrity” method. This method stems from cultural and communication studies and focuses mostly on information technology and its significance for the common perception of privacy.<sup>202</sup> According to Nissenbaum, in order to decide whether the right to privacy has been violated or not, we have to take into account the rules and norms which govern the specific scenario in which the information was published, alongside local and general values and purposes.<sup>203</sup> Nissenbaum stresses that when a person reveals information, she does so in a specific context and agrees to reveal it solely within that context—it does not necessarily indicate her general agreement to reveal this information in other frameworks as well.<sup>204</sup> If we examine this statement in the context of the workplace, it means that if a person has published some private

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196. See *supra* Part II (privacy as the right to be let alone, privacy as access to the individual and privacy as control over one’s life)

197. Solove, *supra* note 7, at 1092–93.

198. *Id.* at 1093.

199. *Id.* at 1146.

200. See *id.* at 1126–29.

201. See *id.* at 1143.

202. See Nissenbaum, *supra* note 31, at 137–38; NISSENBAUM, *supra* note 97, at 234–35.

203. See Nissenbaum, *supra* note 32; NISSENBAUM, *supra* note 97, at 231–35; see also Zimmer, *supra* note 124 at 323.

204. Nissenbaum, *supra* note 31, at 137–38, 143. See Irwin Altman, *Privacy: A Conceptual Analysis*, 8 ENV’T & BEHAV. 7, 23–24 (1976) (contextualizing privacy interests in interpersonal situations); JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA, 8–9 (2000); see generally Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W. RES. J. OF L. TECH. & INTERNET 1 (elaborating on the history of information privacy and technology in the U.S.).

information about herself on a specific social media site, this does not mean that she has agreed to reveal this information to her employer in the context of her workplace.

In recent years, the contextual approach to privacy has been adopted by a growing number of scholars. For instance, Van den Hoven argues for a “spherical-approach,” which focuses on the concrete sphere where the information was published.<sup>205</sup> Cohen also argues for a contextual approach of the right to privacy from a post-liberal perspective. According to her, “privacy is not a fixed condition, nor could it be, because the individual’s relationship to social and cultural contexts is dynamic.”<sup>206</sup> In a similar manner, Spencer stresses that the right to privacy, as privacy itself, is a relative right subject to concrete culture, society, time, and space.<sup>207</sup> Therefore, the content and limits of the right to privacy will be determined in accordance with reasonable expectations of the individual regarding her privacy as well as the social conventions.<sup>208</sup> Confone and Robertson suggest a different model of privacy that conceptualizes it as a continuum.<sup>209</sup> Since privacy in this model can increase or decrease by varying amounts depending on the concrete scenario at stake, their model appears to have flexible foundations that are similar to those of the contextual approach.

Lastly, with her “privacy balloon” model, Yanisky-Ravid describes a flexible approach to privacy within the specific context of the workplace in the internet age.<sup>210</sup> This model refers to the familiar scenario of accessing information about an employee that is available on social media sites. It is based on the notion of privacy as an intangible “balloon” that accompanies an individual wherever he or she goes. “The size of the ‘balloon’ differs according to the interaction . . . Each person may choose the time, place, and level of disclosure of personal information, experience, and emotion as well as the company before whom such disclosures are made.”<sup>211</sup> Following this, the notion of privacy in this “privacy balloon” model is understood flexibly and even subjectively in accordance with the specific context in which the employee chose to share the information.

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205. Jeroen Van Den Hoven, *Information Technology, Privacy and the Protection of Personal Data*, in *INFORMATION TECHNOLOGY AND MORAL PHILOSOPHY* 301–21 (M. J. van den Hoven & J. Weckert eds., 2008).

206. Cohen, *supra* note 7, at 1908.

207. Shaun B. Spencer, *Reasonable Expectation of Privacy and the Erosion of Privacy*, 39 *SAN DIEGO L. REV.* 843, 844 (2002).

208. *Id.*

209. Ignacio Cofone & Adriana Robertson, *Privacy Harms*, 69 *HASTINGS L. J.* 1039, 1052–54 (2018).

210. Yanisky-Ravid, *supra* note 28, at 83–86.

211. *Id.* at 83–84.

### *B. The Proportionality Approach*

The contextual-flexible approaches to the right to privacy are quite new and explicitly suited to the unique challenges of the internet age. However, adopting a flexible approach in the context of an employee's privacy is not new. Long before the internet age, diverse scholars have elaborated on the proportionality principle, which also offered a flexible model that is sensitive to each specific context.<sup>212</sup> The proportionality principle determines whether a specific violation of the rights or interests of an individual is proportional and therefore valid. It considers a decision to be proportional if it follows three secondary criteria: (1) there is a rational connection between the goal of violating the right/interests and the means of accomplishing it, (2) there are no other possible and less restrictive means of achieving the goal, (3) there is a proportionate balance between the social benefit of achieving the goal and the harm that may be caused to the rights or interests of the individual.<sup>213</sup> Accordingly, in order to decide whether the violation of an employee's right to privacy was proportional or not, we need to implement the three secondary criteria and to balance the specific rights and interests at stake.

The proportionality principle is applicable in numerous countries around the world and is considered a leading judicial principal in many of them.<sup>214</sup> In the U.S., it seems that this principal has been implicitly implemented in diverse canonical decisions, many times under the title "strict scrutiny."<sup>215</sup>

Over the years, the proportionality principle has been applied in the field of labor law, including specifically with regard to the right to privacy. Thus, Davidov stresses that "Questions of workplace privacy are . . . another example for the usefulness of proportionality in resolving disputes and determining the boundaries of acceptable behavior in employment relations."<sup>216</sup> He further offers a list of substantive and procedural rules that can be used to balance the employer's interest in monitoring versus the

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212. See Eric Allen Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L. J. 1, 6–10 (2012); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 96 (2008).

213. See Aharon Barak, *Proportionality and Principled Balancing* 4 L. & ETHICS OF HUM. RTS. 2, 4–6 (2010).

214. DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 162 (2003) (demonstrating how the proportionality principle, which the author reads it as the one of the "ultimate rule of law," is implemented in diverse legal systems all around the world).

215. *Id.* at 162–63, 175–88.

216. GUY DAVIDOV, *A PURPOSIVE APPROACH TO LABOUR LAW* 186 (2016).

employee's right to privacy.<sup>217</sup> Similarly, Birnhack presents a set of standards that need to be implemented, alongside the proportionality principle, in order to balance the interests of the employer against the right to privacy of the employee.<sup>218</sup> Another detailed approach of the proportionality principle in the context of employment can be found in Colas Neila's regulatory criteria concerning inspection of employees' e-mails.<sup>219</sup> Among these criteria is a call to examine whether there was a transparent notice and an authentic consent; special circumstances which allow monitoring; the place, time and frequency of inspection; the subject and object of the inspection; and lastly, the purpose of inspection.<sup>220</sup>

Indeed, unlike contextual privacy, which seems to have a more subjective and amorphous notion of privacy, the proportionality principle offers concrete criteria for deciding whether the violation of privacy is proportional and therefore valid, or not. It also takes into consideration both the employee's and the employer's rights and interests. Yet, since the proportionality principle is based on open-ended standards and not on concrete solutions, it contains the features of fluidity and flexibility.<sup>221</sup> Thus, and just as in the contextual approach, it has the necessary flexible features, which enable it to shift and adjust to the legal rights and obligations according to the concrete scenario in question.

### *C. A Flexible Notion of Privacy in the American and European Legal Systems*

Finally, it appears that the flexible modern perception of the right to privacy has taken hold within the American and European legal systems.<sup>222</sup>

The European perception of the right to privacy was first articulated in 1950, in the European Convention on Human Rights (ECHR), as the right

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217. Guy Davidov, Comments on the Issue of Online Privacy at the Workplace, Multi-Disciplinary Workshop on Privacy in a Digital Environment at the Hebrew University of Jerusalem (December 2003) (Hebrew).

218. BIRNHACK, *supra* note 42, at 416, 452–61.

219. Eusebi Colàs Neila, *Fundamental Rights of Workers in the Digital Age: A Methodological Approach from a Case Study*, 89 WP C.S.D.L.E. "MASSIMO D'ANTONA." INT 27, 33–47 (2011).

220. See also Ana Belén Muñoz Ruiz, *Social Networking: New Challenges in the Modern Workplace*, 2 SPANISH LAB. L. & EMP. REL. J. 32, 34–39 (2013).

221. DAVIDOV, *supra* note 216, at 159–62, 180–91.

222. Note that I do not purport to conduct a comparative study in this regard. See e.g., OTTO, *supra* note 31, at 4–171 (conducting a comparative study concerning the U.S., Canada and Europe). Generally speaking, we can distinguish between two models of privacy—the theoretical ones which are elaborated in legal literature (and I have referred to them above); and the legal models of privacy which are implemented in a specific legal system in a specific country, and I will refer to them in this section. See H. J. McCloskey, *The Political Ideal of Privacy*, 21 THE PHIL. Q. 303, 306 (1971).

to “private life.”<sup>223</sup> It evolved along with anti-discrimination principles included in the ECHR and generally goes beyond the finite classical meaning of privacy, containing more elements and a connection to social rights, which enable it to be adjusted to the concrete issue at stake.<sup>224</sup>

Moreover, since the European notion of privacy is conceptualized as “the right to private life,” it holds specific characteristics that seem to be more fitting for some of the current challenges of the internet age. In this way, Mantouvalou suggests that the European right to private life in the context of employment is essentially about work-life balance and having private time outside the workplace.<sup>225</sup> Thus, the employer cannot make decisions, such as dismissal, based on activities the employee performed during her leisure time.<sup>226</sup> This is true even if these activities were conducted in public, including on social media sites, unless there is a clear impact or high possibility of impact on the workplace.<sup>227</sup> As Mantouvalou demonstrates later on in her writing, the European Court of Human Rights (ECtHR) took this argument a step further by clarifying in its judgments that the right to private life is not limited to one’s home and family circle only.<sup>228</sup> Rather, it is also relevant to working life when the employee behaves as a private person.<sup>229</sup> This broad approach emphasizes the importance of employees’ right to private life due to the parties’ unequal bargaining power.<sup>230</sup> Similarly, the German perception of the right to private life of employees as the “general right of personality” seems to be even more expansive and fitting in the internet age.<sup>231</sup> Finkin shows how German law endows employees with a right of personality, which constrains an employer’s ability to intrude into any personal areas of the employee (including in the virtual sphere) unless an adequate professional need can be

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223. European Convention on Human Right art 8, Nov. 4, 1950. *See also* OTTO, *supra* note 31, at 68–120.

224. OTTO, *supra* note 31, at 115–19; Rothstein, *supra* note 63; Jay P, Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289, 307–310 (2002); Mantouvalou, *supra* note 184, 575–82.

225. *See* Virginia Mantouvalou, *Life After Work: Privacy and Dismissal*, L. SOC’Y ECON. WORKING PAPERS 16 (2008) [http://www.lse.ac.uk/collections/law/wps/WPS2008-05\\_Mantouvalou.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2008-05_Mantouvalou.pdf); [<https://perma.cc/WJ4E-ZSLZ>]; *see also* Astrid Sanders, *The Law of Unfair Dismissal and Behavior Outside Work*, 34 LEGAL STUD. 328, 328–42 (2014) (connecting the subject to the issue of breach of personal confidence).

226. Mantouvalou, *supra* note 184, at 573–85.

227. *Id.*

228. *See id.* at 573–85; Sidabras and Dziautas v Lithuania, 2004-VIII Eur. Ct. H.R. 367 at 386.

229. *Id.*

230. *See id.*; Mantouvalou, *supra* note 184, at 573–85; *see also* HUGH COLLINS, JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT 202 (OUP, 1992); *see generally* HUGH COLLINS, EMPLOYMENT LAW 209–34 (2003) (describing privacy rights in the employment context both at and away from the workplace).

231. Finkin, *supra* note 184, at 580.

demonstrated.<sup>232</sup> Moreover, in Germany, the right to personality of the employee is predominant also within the workplace and limits the employer's ability to regulate the private behavior of the employee even there.<sup>233</sup>

In this way, the European notion of "private life" can be interpreted flexibly, including any private aspect of the employee's activity, even if it was conducted in public.

By comparison, the United States Constitution does not include an explicit provision regarding the right to privacy, aside from the Fourth Amendment, which deals with the protection against unreasonable searches by government officials. The U.S. Supreme Court has adopted the right to privacy as a constitutional right, and its scope and substance have evolved over the years.<sup>234</sup> At first glance, the interpretation of privacy in the U.S. seems to be quite strict and is most frequently mentioned with regard to protection against surveillance by the State or in cases dealing with the private behavior of a person in the private sphere.<sup>235</sup> Therefore, in the U.S., there appears to be only a small probability that the employee will have a clear zone of privacy in the workplace.<sup>236</sup> However, when we examine the legal and theoretical foundations of the American concept of the right to privacy in more depth, we gain other, more complex insights.

Rubinfeld argues, although he himself rejects this interpretation, that American jurisprudence had attributed the extensive terms of "autonomy" and "personhood" to the concept of privacy. By personhood, Rubinfeld means that "a person must be free to 'define himself.' Certain decisions in life are so 'central to the personal identities of those singled out' that the state must not be allowed to interfere with them."<sup>237</sup> Thus, even though this right to personhood seems to be mainly vis à vis the State, it has the potential to broaden the classical notion of privacy, since there are so many

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232. *Id.* at 583–84.

233. *Id.*

234. See DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 2–3, 112–17 (2008); OTTO, *supra* note 31, at 4–67; Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L. & POL'Y J. 175, 183–90 (1995); see also Finkin, *supra* note 23, at 4–10 (describing the Restatement (Second) of Torts and the Restatement of Employment Law, which refer to the right to privacy in the context of employees; Steven L. Willborn, Notice, Consent, and Nonconsent: Employee Privacy in the Restatement, 100 CORNELL L. REV. 1423 (2015) (referring to the notion of employees' privacy in the Restatement of Employment Law).

235. See e.g., Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744–47 (1989).

236. See e.g., Kesan, *supra* note 224, at 293 (noting lack of electronic privacy in the workplace); Yanisky-Ravid, *supra* note 28, at 87–88 (discussing the lack of legal protections against employer electronic surveillance of emails, mobile phones, etc.).

237. Rubinfeld, *supra* note 235, at 753; but see *id.* at 782 (dismissing this interpretation of privacy and suggests the anti-totalitarian principle as the guiding principle of the right to privacy in the U.S.).

daily actions in which we are constantly redefining ourselves.<sup>238</sup> Following this, the so-called restricted American approach towards the right to privacy has the potential to apply to various scenarios regarding an individual's private conduct.<sup>239</sup>

When we direct our views to the specific context of the workplace, Westin shows how the American approach to privacy is “eclectic” and based on several diverse sources.<sup>240</sup> Moving to the twenty-first century and the internet age, the “spiritual mother” of the contextual approach, Nissenbaum, stresses that precisely because the American privacy approach has no single, explicit constitutional source, is more sectoral, and was developed from one case to another, it has the potential to be more contextual.<sup>241</sup> Similarly, Otto demonstrates how “the evolution of privacy law in the USA proves its malleability amid changing social and political contexts.”<sup>242</sup> This is particularly true in the context of employment, which is based on diverse legal constitutional rights, laws, and specific regulations and agreements that apply to employees.<sup>243</sup>

Sachs also argues that the American notion of privacy is multi-dimensional in the specific context of employment law.<sup>244</sup> This is because it includes both the right of employees to be unwitnessed or undisclosed to their employer as well as their right to have personal autonomy and sovereignty over their private life decisions.<sup>245</sup> Following this, Sachs posits that employees are entitled to have “sphere autonomy,” and so the employer is allowed to have control and knowledge of the employee only in the specific context of employment.<sup>246</sup> When the employer wishes to enter or control the private life of the employee, a privacy violation occurs.<sup>247</sup> Thus, in the concrete context of employment, the American right to privacy seemingly reflects the European notion of private life. Similarly, from a bird's-eye view, Otto argues that in both the U.S. as well as most European countries, the interpretation of the right to privacy in general, and in the context of employment in particular, relies on the pragmatic approach. Both the American and European approaches conceptualize privacy in a flexible,

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238. *Id.* at 75356.

239. *Id.*

240. See Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT. L. REV. 271, 282–83 (1996).

241. NISSENBAUM, *supra* note 97.

242. OTTO, *supra* note 31, at 7.

243. OTTO, *supra* note 31, at 9–67.

244. See generally Benjamin I. Sachs, *Privacy as Sphere Autonomy*, 88 BULL. COMP. LAB. REL. 233 (2014).

245. *Id.* at 9394.

246. *Id.* at 9394.

247. *Id.*

contextual manner that “identif[ies] the legitimate interests at stake and the practices that interfere with individuals’ private lives.”<sup>248</sup>

*D. The Right to Privacy in the Internet Age – What Is Still Missing?*

At this stage, in view of modern dominant paradigms of the right to privacy, it appears that they all rely in some way on flexible foundations. Indeed, due to the vast changes that society has undergone in the internet age, a flexible notion or an adjustable balancing principle of the right to privacy is needed. A flexible notion/balancing principle of privacy enables the legal system to deal with endless new scenarios so as to assure its compatibility and relevance to people’s real experiences and needs. However, it seems that these flexible methods, which have dominated current scholarship, raised many new difficulties that call for additional ways of regulation.

First, precisely because of their immanent adaptability, these flexible approaches lack legal stability and certainty. The internet age has generated new flexible and even chaotic understandings of privacy, emphasizing the individual’s subjective meanings of privacy as well as the concrete context of every scenario. However, the legal system and the diverse actors in the workplace still need to rely on clear, definite, and predictable legal definitions. This is especially true within the particular employee-employer power dynamic of the workplace<sup>249</sup> in the fluid and chaotic internet age.<sup>250</sup>

Over the years, several scholars have criticized the proportionality principle, arguing that due to its indeterminacy, it leads to inconsistent application.<sup>251</sup> Another argument is that the proportionality principle gives judges enormous discretion, which exceeds and even diminishes the legislature’s and the executive’s authority.<sup>252</sup> Stone-Sweet and Mathews explain that there are significant differences in the way judges use the proportionality principle across time and jurisdiction.<sup>253</sup> This is the reason

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248. Marta Otto, *The Right to Privacy in Employment: In Search of the European Model of Protection*, 6 EUR. LAB. L. J. 343, 348 (2015).

249. Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 THE MOD. L. REV. 848, 853, 873 (1991) (regarding discourse on formalism, revealing how lack of clarity and consistency can be easily used by the “stronger” party to manipulate creative compliance on its behalf).

250. See ZYGMUNT BAUMAN, *LIQUID MODERNITY*, 160–65 (2000) (regarding the liquid modern reality); see also HUWS, *supra* note 171, at 126 (discussing the chaotic nature of the internet age); Austin, *supra* note 27, at 131–32 (explaining the need for fluid privacy levels between different contexts).

251. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3153–54 (2015).

252. See Stone Sweet & Mathews, *supra* note 212, at 76 (2009); Jackson, *supra* note 251, at 3153–66.

253. *Id.* at 162; Jackson, *supra* note 251, at 3156.

why it appears to be problematic to rely solely on the proportionality principle, supporting the view that it should be used alongside a set of other rules.<sup>254</sup> These arguments against the proportionality principle apply even more strongly against the contextual approach. They can also be easily directed against the American and European paradigms, which contain similar features of fluidity. The fact that the contextual approach is based on the specific context—which, by definition, varies from one occasion to another—makes it inconsistent and uncertain. Moreover, the contextual approach gives crucial weight to the social conventions that govern the specific sphere or context. But social norms can vary from one society and period to another, and privacy expectations and needs can be different from one subjective party to another.<sup>255</sup>

Secondly, part of these flexible approaches still assumes the existence of boundaries. Thus, the contextual approach is based on the assumption that we can distinguish between the contexts in which the individual, the employee, originally published the information about herself and other contexts in her life, such as the workplace. Similarly, according to the concept of “private life,” we need to distinguish between the private life and activity of the employee and her professional life and activity. This is so that an employer can only enter an employee’s professional life/sphere/context. However, scholarship on the internet and society undermines this notion of clear distinctions between private and public, or private and professional, especially in the context of the workplace. As presented above, the internet platform is characterized by the blurry nature of these well-known dichotomies so that it may often be difficult to distinguish when the individual is behaving as a private person and when as a professional employee.

Lastly, in the internet age there are numerous new potential monitors who can easily threaten an employee’s privacy. Yet they are not obligated to respect the employee’s right to privacy (at least at present).<sup>256</sup> Thus, if a new “supervisor” was exposed to certain information about an employee in a specific context, she could easily forward it to other contexts, including in the context of labor, without having any clear obligations not to do so. Once the employer receives the information through a third party and is forced by public pressure to take some forms of punitive action,<sup>257</sup> it is difficult to

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254. Stone Sweet & Mathews, *supra* note 212.

255. See Austin, *supra* note 27, at 132.

256. A first elaboration of a third-party commitment in this regard, for instance, to deleting certain personal information if requested, may be viewed as the “right to be forgotten” and the obligation it imposes, for instance, on Google. See e.g., Michael J. Kelly, & David Satola, *The Right to Be Forgotten*, U. ILL. L. REV. 1 (2017); McKay Cunningham, *Privacy Law That Does Not Protect Privacy, Forgetting the Right to Be Forgotten* 65 BUFF. L. REV. 495 (2017).

257. See *supra* Section III.B.

isolate the contexts one from the other. The new “supervisor” can exert substantial pressure on the employer to discipline the employee for her private actions, in a way that ultimately makes this disciplinary action a clear interest of the employer, whose business will otherwise suffer from shaming as well, with all the additional economic costs.<sup>258</sup> In other words, the internet has generated new contexts, which are neither private nor public, in which both the employee and the employer are subject to public supervision and pressure to act.

Thus, in the next and final chapter, I want to add a procedural approach to the diverse models of privacy. As will be shown in the coming lines, incorporating a procedural angle in the current models of privacy can assure more clarity and consistency in the legal world, alongside protection of and compliance with labor rights.

#### V. A PROCEDURAL APPROACH TO THE NOTION OF EMPLOYEE'S PRIVACY

Lessig has argued that the virtual world not only shapes our understandings about life but also shapes our thinking about law and regulation.<sup>259</sup> Indeed, as I have attempted to show in the previous part, it seems that the chaotic flexible nature of the internet age has led to the establishment of new chaotic and flexible concepts of privacy, alongside the strengthening of current flexible principles. It did so in a way that moved aside the classical understandings of privacy, which was assessed as inefficient in the internet age. However, the previous section exposed how the flexible approaches themselves raised new difficulties.

Thus, how can we solve the privacy dilemma? I believe that the unique power dynamic within the field of labor reinforces the need for additional procedural rules that are easy to follow and enforce.<sup>260</sup> As I will show in this last section, procedural rules regarding the right to privacy can assist in “paradoxical” cases, in which it is arguable whether the right to privacy was violated, but the employee still needs legal protection from the perspective of labor rights.

The call to provide employees with procedural rights and protection well beyond the scope of the right to privacy in the internet age is not new. As early as the 1970s, Summers stated that employees, including those who are not covered by collective agreements, should have procedural rights in order to enjoy basic legal protection from an employer's “unjust

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258. See Abril et al, *supra* note 62, at 69–71.

259. LESSIG, *supra* note 21, at 1–6.

260. See Guy Davidov & Odo Eshet, *Intermediate Approaches to Unfair Dismissal Protection*, 44 INDUS. L. J. 167, 187 (2015) (stating procedural rules are “easier for courts to review, easier for employees to enforce”); STONE, *supra* note 171, at 96–99.

discipline.”<sup>261</sup> Back then, and until our days, it seems that the notion of procedural rights of employees was more common in the context of public employment.<sup>262</sup> Yet, when dealing with the right to privacy of employees, which, as explained above, is highly complicated to accurately grasp and protect in the internet age, it appears turning also to procedural protection can be more effective. As I will show, procedural protection of the right to privacy of employees can stand even in all of the paradoxical cases of privacy, or when the public or the employer are constantly monitoring the employee, without clearly violating her privacy.

Generating the procedural aspects of employee’s right to privacy is a task that current literature seems to abandon. In the coming lines, I will offer three procedural and easy-to-follow rules, each relevant for a different stage of employment: (A) use of an anonymous C.V. in the initial stage of application to a workplace, (B) an obligation to create clear rules for every workplace together with employees’ representatives, (C) a mandatory cooling-off period before a dismissal that is based on online information, and in particular, online shaming.

#### *A. Anonymous C.V.*

As was demonstrated throughout this article, the process of employee monitoring in fact begins at the initial stage of being a candidate—long before the employee is actually working.<sup>263</sup> Examining a candidate by Googling her name or observing her profile on Facebook is not forbidden by the classical notion of privacy. As long as we are dealing with information that is accessible on semi-public spheres, the classical notion of privacy is not appropriate here. On the other hand, the flexible approaches deal well with the understanding that people live “in public” today. Therefore, they may have private aspects of their life accessible in the virtual public sphere that should nonetheless be private and protected from the disciplinary eye of a future employer. The flexible approaches can provide a theoretical understanding of the right to privacy in this context. However, it is questionable whether and how they can provide actual protection on the ground. Accordingly, it seems to be almost impossible to implement and enforce legal rules that forbid an employer to Google the name of a candidate or explore her Facebook page or her behavior on social media sites. There is a huge difference between a law that prohibits asking an employee for her Facebook password in order to follow her actions there

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261. Clyde W. Summers, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519 (1976).

262. *Id.*; Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1070–72, 1147–48, 1166–70 (1984).

263. See Yanisky-Ravid, *supra* note 28, at 63–68.

(which is easier to forbid and enforce), and a law that prohibits the employer from Googling the candidate's name.<sup>264</sup> Consequently, it would be extremely difficult to prove that the candidate was not accepted to the workplace due to her public online behavior, even though it was not connected at all with her professional life.

That is why I believe it is essential to establish a procedural rule that is easy to follow and enforce in this context. Moreover, in this stage of recruitment, the candidate's right to privacy is usually connected with her right to equality and to be free from discrimination due to her online behavior.<sup>265</sup>

A procedural rule mandating an anonymous application process offers a good balance between an employee's right to private life before hiring and the prerogative of the employer to freely select employees. To be sure, this is not a sweeping rule that fully bans the employer from considering any of the candidate's personal information. It only prevents the employer from Googling and tracking a candidate's name online before interviewing her. However, in the next stage, after a face-to-face interview, the candidate will be revealed and her name can be easily Googled by the employer. But at least she will have a chance to present herself at the interview and to create an impression with no pre-judgment, except based on the anonymous C.V. The cases of Sacco, Stone, or Richards (see above), who were doomed to long periods of unemployment with all the consequential phenomena of isolation and financial problems, tragically demonstrate the ease with which Googling a candidate's name can condemn her future employment possibilities.<sup>266</sup> Each of these women was highly qualified, yet one occasion in her life, which was documented online forever, came between her and future occupational opportunity and made it difficult for her to find a new workplace for a long period.

The idea of an anonymous recruiting process is not new and was offered before in several countries outside the U.S. around a decade ago, as part of the struggle against racism, sexism and classification. It was first developed due to the understanding that candidates are discriminated against on a daily basis, because of their ethnicity, gender, nationality, religion and more.<sup>267</sup> The anonymous classification process referred to

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264. Cf. Yanisky-Ravid, *supra* note 28, at 69–70; Gerano, *supra* note 115, at 665–66.

265. See *supra* notes 29–32.

266. RONSON, *supra* notes 86. See also *supra* notes 94, 96.

267. See ALL PARTY PARLIAMENTARY GRP. ON RACE AND CMTY., *Ethnic Minority Female Unemployment: Black, Pakistani and Bangladeshi Heritage Women*, 12 (2012) <http://www.runnymedetrust.org/uploads/publications/pdfs/APPGfemaleunemploymentReport-2012.pdf>; [https://perma.cc/7VW4-92HH]; Philip Oreopoulos & Diane Dechief, *Why Do Some Employers Prefer to Interview Matthew, but not Samir? New Evidence from Toronto, Montreal, and Vancouver*, CANADIAN LABOUR MARKET & SKILLS RESEARCH NETWORK 11–13 (2011); *Virgin Accused of Jobs*

many “classified” details such as name, date of birth, nationality, education, gender and so on. For these reasons, France enacted legislation requiring companies to anonymize job applications,<sup>268</sup> and also initiated a voluntary experiment that enabled candidates to apply with anonymous information (of gender, age and so on).<sup>269</sup>

Several other countries have initiated procedures for anonymous job applications, also for reasons of combating discrimination—but unlike in France, in other countries, this has been entirely voluntary. The UK,<sup>270</sup> Canada,<sup>271</sup> and Germany<sup>272</sup> launched voluntary projects in a limited number of companies, which committed to review job applications without details of name and contact details, gender, nationality, date and place of birth, disability, marital status, etc. The results of these initiatives are ambiguous, and it seems that they achieved only partial success, mostly due to the fact that they prevented the possibility of considering underprivileged backgrounds as a basis for affirmative action.<sup>273</sup> Alongside that, some of the missing details were relevant in order to assess a candidate’s experience and

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*Discrimination over Interviews for ‘Craig Owen but not for Max Kpakio’*, TELEGRAPH NEWS (Jan 31, 2013) <http://www.telegraph.co.uk/news/9839845/Virgin-accused-of-jobs-discrimination-over-interviews-for-Craig-Owen-but-not-for-Max-Kpakio.html> [<https://perma.cc/4KWC-2F5Z>].

268. Nicholas Boring, *France Government Must Apply Law Requiring Anonymous Job Applications*, LIBRARY OF CONGRESS (July 30, 2014) <http://www.loc.gov/law/foreign-news/article/france-government-must-apply-law-requiring-anonymous-job-applications/>; [<https://perma.cc/MAR9-S7W2>]; Holly Rubenstein, *Can Anonymous CVs Help Beat Recruitment Discrimination?*, THE GUARDIAN (Apr. 11, 2013), <https://www.theguardian.com/money/work-blog/2013/apr/11/can-anonymous-cvs-help-beat-job-discrimination> [<https://perma.cc/3ULT-9SD6>]; see also the original law. Loi No. 2006-396 du 31 mars 2006 pour l’égalité des chances (1) (French). This law from 2006 referred to companies with more than 50 employees, and came into force only in 2014, after France’s highest jurisdiction for administrative matters ordered the government to finally implement it (CE [Conseil d’Etat], 9 juillet 2014, M.Aet autres, Nos. 345253, 352987, & 373610) (French).

269. The initiative was launched at 2010 and involved around 1,000 companies. See Annabelle Krause et al., *Anonymous Job Applications in Europe*, 1 IZA J. OF EUR. LAB. STUD. 2–3 (2012).

270. In 2012, Britain introduced an initiative designed to tackle name biases. In this project, Britain’s biggest companies have voluntarily agreed to “recruit openly and fairly ensuring non-discrimination, including increased use of name-blank and school-blank applications.” As of the beginning of 2017, only around 180 companies have signed up to the project, albeit from a wide range of sectors. See GILL KIRTON & ANNE-MARIE GREENE, *THE DYNAMICS OF MANAGING DIVERSITY: A CRITICAL APPROACH*, 97 (2016); see also Press release, Cabinet Office and The Rt Hon Nick Clegg MP, Social Mobility Business Compact (Dec. 2, 2011) <https://www.gov.uk/government/news/social-mobility-business-compact> [<https://perma.cc/EE7S-N5DJ>].

271. The Canadian initiative was launched in 2013. See Catherine Skrzypinski, *Will Anonymous Job Applications End Hiring Discrimination in Canada?*, SOC’Y FOR HUM. RESOURCE MGMT. (Sept. 6, 2013), <https://www.shrm.org/ResourcesAndTools/hr-topics/global-hr/Pages/Anonymous-Job-Applications-Canada.aspx> [<https://perma.cc/ZGM8-A7RK>]; Oreopoulos & Dechief, *supra* note 267, at 11–13.

272. Germany launched the initiative in 2010 in eight companies. See Krause et al., *supra* note 269, at 4.

273. *Id.*

formal skills.<sup>274</sup> On the other hand, by using anonymous applications, employers could hire the most productive workers with no prejudice and increase the number and diversity of applicants.<sup>275</sup>

However, when it comes to the struggle against “Googlism” and the right of the candidate to have a private life that is detached and protected from her future employer, I believe that an anonymous C.V. may have a better chance of success. This is because the only blanked detail is the name of the applicant. Thus, the candidate will have a real opportunity to present herself clearly without all her private history, which is available online, at least until the interview stage. On the other hand, the employer will have a comprehensive and quite accurate picture of the candidate since only her name is missing. This way, the employer’s prerogative will be less diminished,<sup>276</sup> and neither important details about the candidate nor the means to positively assess her underprivileged background will have been omitted.

The details of this rule require further articulation. Among other things, we need to determine to which companies the rule should be applied (public, private, number of employees, etc.). Alongside that, in order to have a real impact, it is important to have an obligatory law in this context, as in France, which will include as many organizations as possible.

### *B. Clear Rules for Every Workplace*

With regard to the period of employment, we can formulate numerous concrete rules that can assist all the relevant parties to learn in advance how to adjust their behavior in the workplace and outside of it, online and offline. Some of these rules can deal with traditional ways of monitoring and some with new forms of privacy and oversight on social media sites.<sup>277</sup> Along these lines, for instance, concrete rules can apply to e-mail management policy—on professional and private e-mails, e-mails sent from a work address or from an employer’s electronic devices, etc.;<sup>278</sup> freedom of speech of the employee on social network sites—taking into consideration

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274. *Id.*

275. *Id.* at 15; see generally Alberto Alesina & Eliana La Ferrara, *Ethnic Diversity and Economic Performance*, 43 J. ECON. LITERATURE 762 (2005); Sander Hoogendoorn & Mirjam van Praag, *Ethnic Diversity and Team Performance: A Field Experiment*, IZA DISCUSSION PAPER SERIES, NO. 6731 (2012).

276. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 103 (2007).

277. See, e.g., Colàs Neila, *supra* note 219, at 33–47; BIRNHACK, *supra* note 42, at 455–63; Louise Thornthwaite, *Chilling Times: Labour Law and the Regulation of Social Media Policies*, 54 ASIA PAC. J. OF HUM. RESOURCES 332, 335–42 (2016).

278. See Rothstein, *supra* note 63, at 309–407e; see also Bărbulescu v. Romania, App. No. 61496/08, Eur. Ct. H.R. (2017).

her position, the type of work, and the type of speech; and ways to protect employees from “shaming” and violation of their privacy by colleagues and so on.<sup>279</sup>

In order to assure their effectiveness and relevance, privacy rules should be workplace-based,<sup>280</sup> taking into account the unique character of the actual workplace: whether it is a public organization or a private one,<sup>281</sup> a formal workplace or more “casual” one,<sup>282</sup> as well as specific job description and its hierarchical structure,<sup>283</sup> and so forth. Hence, it would seem to be more effective that the content of privacy rules be determined by the actors in the specific workplace, in accordance with their actual personalities and needs. However, it can be problematic to leave this task entirely in the hands of the actors in the workplace, in particular due to the unequal power within it.

Thus, during the employment period, the procedural rule should refer to a mechanism that will facilitate a privacy policy in each and every workplace in accordance with the workplace’s unique characteristics and needs. In order to balance the power dynamic between the employer and the employees, the mechanism should include a semi-mandatory arrangement regarding the privacy policy at the workplace that is imposed on every workplace with over X employees.<sup>284</sup> The arrangement will be written from a pro-employees’ perspective and will guarantee a strict protection of the right to privacy of the employee. This will create an incentive for employers to create their own workplace-adjusted policy. Otherwise, they will be liable for legal actions and forced to implement the semi-mandatory arrangement that is relatively strict.<sup>285</sup> Employers will be able to modify the arrangement only if: (a) they have a detailed privacy policy adapted to the workplace, (b) the policy was written and decided together with employees’ representatives.<sup>286</sup>

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279. See in this context a bill proposal in Israel calling to regulate this matter by creating a “shaming commissioner” in the public sector. Ultimately, the proposal was not passed [*The Last Bill of Yinon Magal: Protection for the Civil Servant Employees from Online-Shaming*, THE MARKER (Nov. 26, 2015), <http://www.themarker.com/news/politics/1.2785365> (Hebrew)].

280. Einat Albin, Sectoral Disadvantage: The Case of Workers in the British Hospitality Sector, 274 (2010) (unpublished Ph.D. thesis, University of Oxford) (on file with the British Library, University of Oxford).

281. See, e.g., Yanisky-Ravid, *supra* note 28, at 89–91.

282. BIRNHACK, *supra* 42, at 462.

283. *Id.*

284. Based on the model of Mundlak, in Guy Mundlak, *Information-Forcing and Cooperation-Inducing Rules: Rethinking the Building Blocks of Labor Law*, in LAW AND ECONOMICS AND THE LABOUR MARKET, 55, 77–83 (Gerrit de Geest, Jacques Siegers & Roger van den Bergh eds., 1999).

285. *Id.*

286. *Cf. id.*

The procedural rule of setting a privacy policy together with employees' representatives not only balances the power dynamic at the workplace but can also strengthen the collective perspective of the right to privacy and the whole concept of group privacy.<sup>287</sup> It can clarify that the question of privacy is not individual; rather it influences the professional and private conduct of the entire "employee group" in the company.

In unionized workplaces, obviously the employees' representative is the trade union.<sup>288</sup> However, not every workplace has a formal workers' representation or a functioning one.<sup>289</sup> In these cases, the voices or interests of employees regarding a privacy policy can be incorporated in other ways, for instance, by using social network sites or other virtual platforms,<sup>290</sup> which are beyond the scope of this article.<sup>291</sup>

Alongside the semi-mandatory arrangement, the procedural rule has to clarify how to assure real consent of the employees' representatives.<sup>292</sup> It also has to include a mechanism for arbitration in cases of disagreements, which will also involve employee representatives<sup>293</sup> or an authorized entity to whom both sides can turn in cases of disagreement or violation.<sup>294</sup> Alongside that, the rule needs to include a "mandatory disclosure" clause regarding the obligations of employers to declare their supervisory actions.<sup>295</sup> Lastly, the procedural rule has to address questions of publication and raising awareness regarding the privacy policy so that everyone will know how to behave and to what degree the employer is allowed to enter their private space.

287. See Taylor, *supra* note 34, at 13–36 (explaining the current crisis understanding of group privacy); Mundlak, *supra* note 35 at 217–22.

288. David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13, 14–18 (2005); DAVIDOV, *supra* note 216, at 238. See BIRNHACK, *supra* note 42, at 459 (detailing the role of trade-union regarding the privacy-question); see also Mundlak, *supra* note 35 at 219–21 (challenging the authentic willingness of trade-unions to protect the individual right to privacy of the employees).

289. DAVIDOV, *supra* note 216, 225–48; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 323 (2005).

290. Alex J. Wood, *Networks of injustice and worker mobilisation at Walmart*, 46 INDUS. REL. J. 259, 269–71 (2015).

291. See Estlund, *supra* note 289, at 381–88; see also Catherine L. Fisk, *Reimagining Collective Rights in the Workplace*, U.C. IRVINE L. REV. 523 (2014) (discussing, throughout the article, the importance of collective action of employees and other forms of organizations).

292. See Pauline, *supra* note 30, at 899–900.

293. Mundlak, *supra* note 284, at 77–83

294. See BIRNHACK, *supra* note 42 at 462 (proposing to establish a "privacy trustee" who will be the address for complaints on privacy violations by the employer/employees and serve as arbitrator in conflictual cases).

295. Cynthia L. Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 352–57 (2011).

### *C. Cooling-Off-Period Before Dismissal*

Another crucial stage in which the question of an employee's right to privacy can arise is before a possible dismissal due to the employee's private behavior. Generally speaking, there could be two different motivations for dismissal in the privacy context. The first is based on information that came into the employer's possession by violating the right to privacy of the employee in its classical sense. For instance, when an employer reads an employee's private e-mail stored on the employer's computer or sent from the work e-mail address<sup>296</sup> or when the employer tracks the employee's actions through her mobile, which was provided to her by the company (i.e., monitoring her text messages, exact location, etc.).<sup>297</sup> The second scenario, which is more associated with the modern interpretation of privacy and the constant use of social media sites, as well as with the connections between privacy and autonomy or freedom of expression, is the case of dismissal due to the employee's statements online. The first scenario can be based more easily on the right to privacy of the employee, even in its classical meaning since usually we are dealing with an action that the employee conducted privately, sometimes even secretly, to the dissatisfaction of the employer who discovered it eventually. The second scenario seems to be more problematic, yet more common. Among the many examples we can provide in this context, there is the case of Richards;<sup>298</sup> the website *Racists Getting Fired*;<sup>299</sup> the cases of Sacco and Stone, which were set out in Ronson's book on shaming;<sup>300</sup> etc. In all of these cases, the employer had access to the private realm of the employee, which was published in the public-private space through certain social media sites, and based on that publicly-private information, the employer decided on the dismissal of the employee. Another common feature of these cases is the rapidity and ease with which the employee was fired, usually one or two days after the story went viral.

Is there a need to form a procedural rule in these well-known scenarios of dismissal based on online shaming of the employee, or based on her online postings? Seemingly, if a person is acting in an inappropriate manner, he or she should not enjoy the protection of the right to privacy in order to continue acting wrongly and causing more damage to others.<sup>301</sup>

296. See, e.g., Rothstein, *supra* note 63; Bărbulescu v. Romania, App. No. 61496/08, Eur. Ct. H.R. (2017).

297. See, e.g., Arias v. Intermex Wire Transfer, L.L.C., No 1:15-cv-01101 JLT, 2015 WL 1285709 (E.D. Cal. Nov. 20, 2015).

298. See, e.g., Gannes, *supra* note 87; Franklin, *supra* note 87; RONSON, *supra* note 86.

299. Stroud, *supra* note 80, at 255–62.

300. See generally *supra* notes 92–96.

301. See Richard A. Posner, *The Right to Privacy* 12 GA. L. REV. 383, 394–403 (1978); Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 473–74 (1978).

However, in practice there are frequently mistakes in identifying the person who has committed the morally wrong act, yet the consequences of this mistake are tragic.<sup>302</sup> Moreover, most online shaming results from an unpopular opinion, which is not wrong in a legal or moral sense, rather only unpleasant to certain ears. Introna takes this argument further, arguing that we are always dealing with values and interests rather than facts. That is why, within the power-dynamic of the workplace, employees are “rightly concerned that the employer will only have ‘part of the picture’,” and thus the employer’s choices may only reflect the interests of the employer.”<sup>303</sup>

Furthermore, even if we are dealing with a clearly problematic statement, it is questionable whether the workplace is the right arena to regulate the private behavior of the employee, and whether the employer and the masses are the appropriate “judges.” There appears to be a significant lack of proportionality between the punishment and the “crime” in this context.<sup>304</sup> In Stroud’s words – “Why should one lose their job (and potentially future jobs, given the tenacious followers of this blog) because of one bad joke or one racial slur?”<sup>305</sup> Here again, it is worthwhile to refer to the incident of Sacco, who was immediately fired because of her provocative tweet, which was meant as a joke (although clearly in bad taste),<sup>306</sup> or to the case of Stone, who took provocative parodic pictures in the American national cemetery and was also immediately fired.<sup>307</sup> In both cases, the employees were dismissed due to public pressure and online shaming and could not find new employment for a long period, creating a clearly excessive “punishment.”

Therefore, in order to assure real protection of the employee’s privacy in the modern sense, to ensure that an employee can enjoy her rights to autonomy and freedom of expression, as well as her labor rights, to ensure that social online shaming does not become a disproportionately harsh means of punishment in the workplace, I believe we need to apply a procedural rule here.<sup>308</sup> Similarly, even in cases in which the employer is simply dissatisfied with an employee’s private statements or behavior

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302. Stroud, *supra* note 80, at 323–24.

303. Introna, *supra* note 36 at 35–36; *see also* Gavison, *supra* note 15 at 453–54.

304. *See generally* Stroud, *supra* note 80.

305. *Id.* at 259.

306. RONSON, *supra* note 86, at chapter four, and thereafter at 201–04.

307. RONSON, *supra* note 86, at 206–07.

308. For the enormous punitive implications of online-shaming, *see generally* Tara Milbrandt, *Caught on Camera, Posted Online: Mediated Moralities, Visual Politics and the Case of Urban ‘Drought-Shaming’*, 32 VISUAL STUDIES 3 (2017); Lilian Mitrou, *Naming and Shaming in Greece: Social Control, Law Enforcement and the Collateral Damages of Privacy and Dignity*, The 8th International Conference on Internet, Law & Politics Challenges and Opportunities of Online Entertainment 453 (2012).

online, without any public online shaming, in order to assure that the employee's right to private life is being protected, we need to provide the employee with procedural protection.<sup>309</sup>

Indeed, most current scholarship deals with this problem from the point of view of the right to a private life, which is detached from other contexts and in particular from the context of employment. Thus, an employer cannot dismiss an employee based on an act she committed in a private context unless the employer has a clear and direct professional interest in doing so.<sup>310</sup> However, as I have shown above, it is often quite difficult to distinguish between the public-professional sphere of the employee and her private sphere and to maintain consistent decisions in this matter. Moreover, I believe that even in cases that involve significant online shaming and pressure from the public, possibly making it in the interest of the employer to fire the employee, online-shaming cannot serve as a legitimate excuse for immediate dismissal.

Another way to deal with these scenarios is the strict approach of Levin, by which "no action could be taken against an individual—including in the employment context—based on his or her online information, except where that information reveals criminal, illegal or unethical conduct, or causes significant harm to others."<sup>311</sup> However, this approach appears to go too far and dramatically reduce employers' managerial prerogative. It does not take into consideration the simple understanding that many times, both employer and employee are under public pressure, and the employer is justifiably worried about the company's good reputation.

In my view, when we consider the endless cases of online shaming and public supervision, it becomes apparent that if only all the relevant sides—the employer, the employee, the public—had an opportunity to cool off a little, the harsh consequences of the employee's private behavior could be prevented.<sup>312</sup> Therefore, I propose a procedural rule of an obligatory cooling-off period, which focuses on the process, rather than the rationale of the dismissal.<sup>313</sup> This rule can apply in cases in which the employer wishes to dismiss the employee due to her online behavior or due to online shaming and public pressure to fire the employee. In this way, before a

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309. Clyde W. Summers, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519 (1976); *id.*; Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1070–72, 1147–48, 1166–70 (1984).

310. See discussion on the European interpretation of the right to private life which was elaborated in *supra* Section IV.C.

311. Levin, *supra* note 190, at 402–04.

312. Stroud, *supra* note 80, 252–73.

313. The term "cooling-off period" is borrowed from the psychology literature, in particular the context of anger management. See HOWARD KASSINOVE & RAYMOND CHIP TAFRATE, *ANGER MANAGEMENT: THE COMPLETE TREATMENT GUIDEBOOK FOR PRACTITIONERS* 3–4 (2002).

dismissal in this context, the employer will be obligated to wait for a month before being allowed to dismiss the employee. The lag time is needed since after a month, when public pressure has somewhat dissipated, the employer might no longer wish to dismiss the employee who is, presumably, a good professional worker. In this way, the cooling-off period will enable the employer to rethink the decision more substantively after public pressure has subsided and to examine whether it is just, necessary, and efficient. In some cases, the cooling-off period might even result in the disclosure that the public “online shamed” the employee mistakenly.<sup>314</sup> Thus, it is important that the employee be allowed to attend the workplace as usual during the cooling-off period so that the default would be the continuation of her employment contract without any unnecessary breaks.

Admittedly, this procedural rule can be helpful for many other scenarios of automatic dismissal. However, I believe that the cooling-off period is especially important in cases of online-shaming, in which the pressure to automatically dismiss the employee comes from the public, and not necessarily from the employer.

The cooling off period should be easy to apply and be formulated as follows:

The employer cannot dismiss an employee based on private behavior online or due to public pressure to fire the employee (“online-shaming”) for a period of at least one month after the statement is brought to the employer’s attention.

During this month, the employee will continue to work as usual: she will come to the workplace, perform the work, participate in all professional and social occasions at the workplace, and so on.

In cases of online-shaming, the employer has the prerogative to publish a public statement clarifying dissatisfaction with the employee’s behavior as well as the legal obligation regarding the cooling-off period.

The employer has a right to immediate dismissal of the employee only in rare cases that involve clear and substantial criminal or unethical behavior of the employee and only after receiving authorization from a competent legal body.<sup>315</sup>

If the employer chooses to dismiss the employee after the cooling-off period, the decision is still subject to judicial review in accordance with the right of the employee to privacy, autonomy and free speech (as with any other decision of the employer that appears to be illegal).<sup>316</sup> Moreover, the

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314. See *supra* notes 302–03.

315. By this I mean a court or a tribunal, or a state office designated by law for this purpose.

316. See *Eschert v. City of Charlotte*, No. 3:16-cv-00295, 2017 WL 8293616 (W.D.N.C. Aug. 23, 2017) (requiring the City of Charlotte, North Carolina had to pay \$1.5 million to an employee who was fired because of a Facebook comment).

employer must show that he or she truly considered continuing the employment contract with the employee and is behaving in good faith.

I believe that this procedural rule of a cooling-off period has the potential to calm the relevant parties, enabling the employee to enjoy the right to privacy and somewhat balancing the power-dynamic in this context. At the same time, it allows the employer to demonstrate to the public that its complaints are heeded, yet, since the employer must also follow the law, she cannot fire the employee right away. Thus, alongside the protection of the right to privacy of the employee in its contextual sense, employers will be able to protect their own reputation and avoid an economic boycott. The employer will be able to dismiss the employee by the end of the cooling-off month. However, this decision, like any other decision by the employer, will be subject to judicial review in accordance with the right of the employee to privacy, free speech, etc.

#### CONCLUSION

The internet has changed society. It has changed the way people behave and think, including in the context of employment relationships. This article aimed to demonstrate how the classical concept of privacy has changed in the internet age, specifically in the context of labor, both in the theoretical and practical senses. It did so by turning to literature from sociology, particularly in the fields of internet and society, which shed an important light on the concept of employees' privacy. We have seen that privacy is under constant threat from the employer, the employee, and above all, technology, as well as society as a whole, which urges us to share and live in public and constantly monitor one another. Only against this background can we truly understand the stories presented throughout this article and realize how they all concern the same issue—the privacy of employees—in both its classical, well-known definition and its modern definition adapted to the internet age.

Following these conclusions, I turned to modern interpretations of the right to privacy and their flexible perception and regulation of the issue. These modern flexible approaches provide solutions to some of the new challenges we are facing today. However, as I have tried to show, they are doing so only partially, and many times too vaguely, and appear to be infused with the same chaotic, fuzzy deficiency of the internet age. This is why this article ends with suggestions for formulating the procedural aspects of employees' right to privacy, which may enable resolution of some of the current challenges of the internet age and ensure the protection of labor rights.

The last part of this essay focused on three points of time in the employment track. First, in the initial stage of applying to a workplace, this article suggested the use of an anonymous C.V. process to combat

“Googlism.” Second, the article proposed a semi-mandatory procedural format to handle privacy violations during the employment period, through which concrete rules are set by the employer with the employees’ representatives. Lastly, at the end point of the employment period, I have suggested a mandatory cooling-off period before any dismissal based on online information, particularly online shaming.

Hopefully, this article will encourage others to develop additional procedural rules that, together with flexible approaches, can enable protection of the right to privacy of employees in the internet age. These rules should take into consideration the legal and social importance of employees’ privacy as well as the authority of the employer, insights on the internet and society, and the unequal power relationship between employer and employees.