

THE EMERGING AMERICAN APPROACH TO E-MAIL PRIVACY IN THE WORKPLACE: ITS INFLUENCE ON DEVELOPING CASELAW IN CANADA AND ISRAEL: SHOULD OTHERS FOLLOW SUIT?

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Much has been said concerning the law's failure to keep up with technology. Indeed, apart from constituting the chief means of private communications from the workplace,¹ e-mail systems can now comfortably create an exact record of communications, an advance that presents special privacy problems in the work environment² yet to be fully addressed by most democracies' respective legal systems.³ While the United States is certainly no exception to the law's tendency to lag behind in this respect, the caselaw—however meager—that does develop in this country is of particular interest to comparative scholars.⁴

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1. Between family and friends, in a manner similar to previous telephone use.

2. For instance, not only are employees often unaware that they are being monitored via e-mail (unlike cameras or other such tests the courts have dealt with in the past that are rather conspicuous), but as Mark Jeffery notes in his instructive introduction to *Information Technology and Workers' Privacy: Introduction*, 23 COMP. LAB. L. & POL'Y J. 251, 257 (2002): "[I]t may be impossible for employees to delete information in such a way that it is completely removed from the system." Surveillance is therefore both practical and imperceptible. What is more, distinguishing between "private" and "public" content, as shall be later discussed, is an arduous if not impossible task for both courts and employers. Christophe Vigneau points to this difficulty in *Information Technology and Workers' Privacy: The French Law*, 23 COMP. LAB. L. & POL'Y. J. 351, 351–52 (2002), noting that "new technologies blur the frontier between professional and private lives" thus allowing for "new faces of subordination" (*citing* A. Suptot, *Les nouveaux visages de la subordination*, 2 DROIT SOCIAL 132 (2000)).

3. "In none of the countries that we studied [France, Germany, Italy, Spain, the United States, Brazil, and England] do employers and workers have clear guidelines on the extent to which the law will accept computer surveillance and the processing of personal data at work." Jeffery, *supra* note 2, at 277. The same, as elucidated below, is true for Canada and Israel, who have developed even less guidelines than the above-mentioned countries (particularly France and the United States).

4. "This situation presents an unusually good opportunity for comparative labor law. New technologies and techniques have become available to employees throughout much of the world

Endowed with a relatively unique capacity to extend beyond its national borders, American law serves to persuasively guide sister jurisdictions, who look to this emerging jurisprudence for inspiration in treading uncharted legal territory. Thus, for instance, Canadian courts⁵—and certainly the Israeli Supreme Court—have been known to routinely cite U.S. jurisprudence when tackling novel juridical issues.⁶ In fact—for better or for worse—it is not uncommon to see a significant portion of leading Supreme Court judgments in both these countries dedicated to a survey of the American approach to previously unaddressed challenging issues of law.⁷

at much the same time, so all countries where the use of computers is widespread are obliged to address very similar questions.” *Id.* at 252.

5. Aharon Barak, President of the Israeli Supreme Court, confirms both Canada’s and Israel’s notable reliance upon comparative law and U.S. jurisprudence in particular. As he explains: “[T]he Supreme Court of Canada is particularly noteworthy for its frequent and fruitful use of comparative law Justice Claire L’Heureux-Dubé of the Canadian Supreme Court has rightly observed that ‘[i]f we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are.’ ” Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002). With respect to Canada, see C.P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM (1993) (discussing the “Americanization” of Canadian criminal law, moving from a “crime control” to a “due process” model, following the Charter’s adoption, as the courts increasingly turned to American jurisprudence to revolutionize criminal law).

6.

I have found comparative law to be of great assistance in realizing my role as a Supreme Court judge. The case law of the supreme courts of the United States, Australia, and Canada, of United Kingdom courts, and of the German Constitutional Court have helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge “expands the horizon and the interpretive field of vision. Comparative law enriches the options available to us.” . . . Comparative Law and the Interpretation of Statutes—Comparative law is an important source from which the judge may learn the objective purpose of a statute. This is the case with regard to both the specific purpose (“microcomparison”) and the general purpose (“macrocomparison”) of the statute. The comparison is relevant even if it is clear that the legislature was not inspired by foreign law. In looking for the specific statutory purpose, a judge may be inspired by a similar statute in a foreign democratic legal system. This is so when he wishes to learn of the purpose underlying legislation that regulates a legal “institution,” such as an agency or a lease. The judge does not refer to the details of the foreign laws. Rather, he examines the function that the legal institution fulfills in the two systems. If there is a similarity in the functions, he may find interpretive ideas about the (objective) purpose of the legislation Israeli law, for example, makes extensive use of comparative law. When the Supreme Court of Israel encounters an important legal problem, it frequently examines foreign law. Reference to United States law, United Kingdom law, Canadian law, and Australian law is commonplace Many democratic countries derive inspiration from the United States Supreme Court

Barak, *supra* note 5, at 110–12. See also Pnina Lahav, *American Influence on Israel’s Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21, 23 (1981).

7. *Inter alia*. However, due to their specific reliance on American caselaw, this paper intends to focus on Canada and Israel exclusively.

In view of American jurisprudence's persuasive influence upon the law's development in these particular jurisdictions (Canada and Israel), and the latter countries' increasing reliance on emerging U.S. legal trends, it is incumbent upon us to inquire into both the substance of the American approach pertaining to e-mail "eavesdropping" in the workplace and its potential influence on the evolution of Canadian and Israeli law in that area. In other words, these two countries specifically form the object of our present analysis precisely by virtue of their peculiar penchant for considering American jurisprudence swaying.⁸ What is more, American caselaw is clothed in additional significance in light of these countries' failure to develop their own position respecting e-mail surveillance in the employment context to date.⁹

Particularly telling for our purposes is American Courts' inclination to frame e-mail eavesdropping issues in the workplace as matters of property rights¹⁰ or the inextricably linked contractual reasoning—whereby the employer exercises quasi-absolute sovereignty over employees, having availed himself or herself of their services by virtue of the employment contract.¹¹ More importantly perhaps, employees are perceived as having "contracted away" certain rights, by "agreeing" to enter a "private" contract, to which "public" human rights discourse has very little relevance. This is illustrated by the confusion of the concepts of "notice" and "consent," whereby one is assumed to necessarily give rise to the other in the employment context.¹²

Thus, having "voluntarily" contracted away their services, employees retain very few rights—including expression and

8. In the Canadian case, perhaps due to geographical proximity, and in the Israeli, as inspiration from a sister democracy where many prominent academics are schooled. (That is to say receive advanced law degrees in the United States.)

9. Regarding Canada, see Marc-Alexandre Poirier, *Employer Monitoring of the Corporate E-mail System: How Much Privacy Can Employees Reasonably Expect?*, 60 U. TORONTO FAC. L. REV. 85 (2002).

10. Balancing between privacy and ownership. See Lawrence E. Rothstein, *Privacy or Dignity?*, *Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379 (2000).

11. Qualified only by narrowly tailored exceptions.

12. See Roberto Fragale Filho & Mark Jeffery, *Information Technology and Workers' Privacy: Notice and Consent*, 23 COMP. LAB. L. & POL'Y J. 551, 552 (2002) (citing the American understanding, as reflected in the ratio of *Forsyth v. McKinney*, 8 N.Y.S. 561 (Sup. Ct. 1890)) (where the Court said, "It is the right of the employer to establish rules. If a workman, on seeing these rules, is dissatisfied with them, he need not accept the employment. If he accepts it, however, he must obey the rules.") Fragale and Jeffery apply this thinking to the present context, instructively noting, "According to this perspective, once employees or candidates have been notified of the 'rules'—or in this case, the surveillance . . . they may decide whether or not they wish to work under these conditions."

maintaining interpersonal relations—all of which may be curtailed at the employer's whim.¹³ In contradistinction, in countries where workers' rights are accordingly construed affirmatively,¹⁴ a communitarian, dignity-oriented understanding limiting employer sovereignty has triumphed. There, the employee remains part of a greater community, entitled to intervene in the employment relationship in order to uphold the former's inalienable rights, irrespective of contract.¹⁵ Most significantly perhaps, constitutional values and human rights discourse permeate the otherwise private relationship, reflecting society's concern for the preservation of certain values and norms (dignity, privacy) even behind "closed doors." Not surprisingly, the very distinct approaches taken with respect to e-mail eavesdropping issues in the workplace by the United States and Continental countries (primarily France¹⁶), respectively, may be attributed, at least in part, to these discrete legal systems' differing construction of the employee's status vis-à-vis his or her employer and the relevance of human rights values to the "private" realm.¹⁷

For our purposes, the American understanding of the worker's status appears to derive from that system's peculiar attachment to the

13. See Section III, *infra* and definition of the employment-at-will doctrine in Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMPL. RTS. & EMPL. POL'Y J. 453 (2001):

The contract of employment embodying employment at will may be used by the employer to reach control of the employee's private life, not only at work but also in his activities off the premises outside of working hours. In *Ball v. United Parcel Service*, the employer required all employees to authorize deductions from their pay to the community charity, United Way.

14. To borrow Isaiah Berlin's language, a "freedom to" rather than "freedom from," a "negative" understanding of rights as can be said to prevail in the United States. Such is the case in France and Germany. See Vigneau, *supra* note 2, at 353.

15. "Employees do not abandon their rights at the workplace door," as per the French approach. *Id.* See Section V, *infra*.

16. To this end, this paper shall raise the French case merely as an example seeking to illustrate the latter understanding of the relationship between human rights and the employment contract and its relevance to matters of eavesdropping in the workplace.

17. Specifically, Article 29 Working Party of the European Union (which is considered a moral authority on workers' rights) adopted its Working Document on the Surveillance of Electronic Communication in the Workplace, 5401/01/EN/Final, WP 55, adopted on May 29, 2002, focusing on employee human rights to privacy in this context. See ON-LINE RIGHTS FOR EMPLOYEES IN THE INFORMATION SOCIETY: USE AND MONITORING OF E-MAIL AND INTERNET AT WORK (Roger Blanpain ed., 2002) [hereinafter ON-LINE RIGHTS FOR EMPLOYEES], and its review by Paul Roth, *Review: On-Line Rights For Employees in the Information Society: Use and Monitoring of E-Mail and Internet at Work*, 23 COMP. LAB. L. & POL'Y J. 241 (2001) (noting that the European "approach is governed by the more strict requirements of the European Union Personal Data Directive." Significantly framing the issue in human rights terms, some authors go beyond arguing that the employer violates employees' human rights by monitoring their e-mail and even claim that employees may have a human right to use the employer's e-mail for purposes unrelated to their work).

notion of “employment-at-will.”¹⁸ That is the idea that, through contract, the employer has acquired absolute¹⁹ control over the workforce,²⁰ which has in turn alienated part of certain rights.²¹ The contractual/property-based reasoning underlying the absolute understanding of employer sovereignty, reflected by the “employment-at-will” doctrine, in turn colors the developing e-mail eavesdropping caselaw deriving therefrom, as shall be further discussed below.

This article shall therefore attempt to compare the respective legal cultures and relevant juridical principles of Canada and Israel as contrasted with the United States (as opposed to merely focusing on their legal doctrines). Accordingly, rather than inquire into the law in the three states’ similarity or difference, the article seeks to explain whether the more collectivist legal culture in countries that have not yet developed a clear rule on e-mail privacy in the workplace, can sustain the liberal contractarian U.S. principles referred to. This is particularly important for legal systems such as Israel and Canada, where constitutional human rights values “permeate” the “private” sphere,²² thus to a certain extent collapsing the “public-private” divide. Accordingly, it is submitted that communitarian legal systems, whose understanding of employee status diverges significantly from one of (quasi) absolute employer sovereignty, and who are more willing to incorporate constitutional values into their “private” law,

18. As distinguished from “reasonable notice” regimes of more regulated character, such as in Canada, Israel, and the United Kingdom. Madeleine M. Plasencia defines the notion of “employment-at-will” as follows: “[A]n employer may dismiss an ‘at will’ employee without notice, ‘for good reason, bad reason or no reason at all’, so long as the proffered reasons for dismissal do not violate random whistle-blowing provisions or federal and state anti-discrimination statutes.” Madeleine M. Plasencia, *Employment at Will: The French Experience as Basis for Reform*, 9 COMP. LAB. L. J. 294, 294 (1988). See also Ann C. McGinley, *Rethinking Civil Rights and Employment at Will*, 57 OHIO ST. L.J. 1443, 1444 n.1 (1996) (“The employment at will doctrine is a doctrine at common law that permits the employer to discharge an employee for any reason or for no reason at all.”).

19. Subject to very narrow exceptions painfully carved out recently by courts over the last twenty years. See McGinley, *supra* note 18.

20. See Plasencia, *supra* note 18.

21. For example, the right to absolute expression and to association (most obviously in the dating context).

22. Expression coined by President Aharon Barak, Chief Justice of the Israel Supreme Court. See Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW 29 (Friedmann & Barak-Erez eds., 2001). President Barak raises the “strengthened indirect application model,” whereby constitutional human rights, enshrined in Israel’s Basic Laws “permeate” the private sphere. The private realm is therefore not immune from abiding by these values, which is significant for the employment context, whose “private” character is often invoked for justifying denying basic employee rights. For the Canadian context, see E. Weinrib & L. Weinrib, *Constitutional Values and Private Law in Canada*, in HUMAN RIGHTS IN PRIVATE LAW 47 (Friedmann & Barak-Erez eds., 2001). See also FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW (Alfredo Rabello & Peter Sarevic eds., 1994).

would be well-advised to exercise caution in attempting to integrate American notions of employment-at-will to e-mail privacy in the workplace.

Ultimately, the distinction justifying rejecting the American approach in this instance may be reduced to one between regimes maintaining a relatively strong separation between “private” and “public,” relegating human rights issues only to the public sphere, as per the U.S. experience and those that choose a more integrative approach. The latter description better suits both Canada and Israel, that, to a certain degree, indirectly infuse human rights into the “private” sphere.²³ This distinction sheds light on the United States’ reliance on employment-at-will, since employment relations are perceived as purely “private,” therefore not justifying interference, while Canadian and Israeli courts will balance competing values of privacy and property, refraining from drawing a clear delineation between “private” and “public,” thus allowing human rights discourse to permeate “private” employment relationships.²⁴ In this vein, discussing the appropriateness of looking to other legal orders for comparative guidance, Israeli Supreme Court President Barak sagely notes,

Comparative analysis is possible only if the two legal systems share a common ideological basis A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. As judges, we must also examine whether there is anything in the historical development and social conditions that makes the local and the foreign system different enough to render interpretive inspiration impracticable. . .

While both Canada and Israel are liberal democracies, like the United States, sharing common numerous values and assumptions about the “good,” they remain distinct from the latter in their respective approach to human rights in the “private” realm and how that impinges upon employee status.²⁵ This should be borne in mind as these two countries struggle to shape their e-mail surveillance jurisprudence in the work environment.

A legal construction of the issue of e-mail eavesdropping in the workplace predicated on an employer sovereignty or

23. *Id.*

24. This can be said to be true, to a certain extent, in the United Kingdom, where the European Convention on Human Rights has influenced the common law, particularly in warranting a recognition of the right to privacy in this context. See Mark Jeffery, *Information Technology and Workers’ Privacy: The English Law*, 23 COMP. LAB. L. & POL’Y J. 301, 306 (2002).

25. See Barak, *supra* note 5, at 29.

property/contract rationale is poorly suited to both Israel and Canada, whose respective systems feature a collectivist, dignity-oriented understanding of employee status, where human rights are applicable to the employment relationship. In a word, it is submitted that the difference between a communitarian oriented and the purely contractarian order, peculiar to the American system, and the “permeation” of human rights into the private realm must be factored into the development of the law concerning e-mail surveillance in the workplace.

By contrast, the Continental idea, illustrated by the French experience,²⁶ whereby the employee does not contract away the majority of his or her rights but rather preserves them in the workplace is more appropriate for the Canadian and Israeli context.²⁷ Likewise, the Continental tradition of allaying the unbridled application of contract law—*pacta sunt servanda*—to the employment relationship via the importation of concepts such as “*abus de droit*” (abuse of right) foster a mitigated vision of employer sovereignty.²⁸ Indeed, going past the “notice” requirement to satisfy exigencies of consent, the French approach has been to incorporate the principle of proportionality and relevance.²⁹ Importantly, these additional requirements (whose elaboration is beyond the scope of this paper) allow for a more flexible, contextual approach, whereby,

employers have the right to monitor the work activities of their employees but only to the extent that this does not impinge upon employees’ right to privacy . . . [A]ny limitation that employers impose upon the individual rights and personal freedom of employees must always be *proportionate* to the aim pursued and . . . must always be done in good faith.³⁰

26. Raised as an example but exceeding the parameters of this discussion.

27. This approach, framed in rights (rather than contractual/property) discourse, giving primacy to employee human rights, all the while balancing them with those of the employer, is best summarized by Frank Hendrickx, *Privacy and Employment Law: General Principles and Application to Electronic Monitoring*, in ON-LINE RIGHTS FOR EMPLOYEES, *supra* note 17, at 49:

employees do not abandon their privacy rights when entering into an employment relationship. At the same time an employment relationship implies significant limitations of the right to privacy. The employee’s fundamental rights will not be lost, but become qualified by conflicting rights and interests of employer, colleagues and third parties.

28. Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995) (Perillo argues that abuse of right does exist in American law, an issue that exceeds the scope of this paper).

29. See Vigneau, *supra* note 2, at 354 (“The principle of relevance thus requires employers to justify any installation of surveillance equipment or any collection of personal data.”).

30. As per the *Nikon* case, decided by the Cour de Cassation on Oct. 2, 2001. See Vigneau, *supra* note 2, at 355, 363 (emphasis added).

This paper will adopt the following structure. Following a brief introduction, Section III offers a succinct overview of the present state of American law respecting e-mail surveillance in the workplace, focusing on the underlying rationales. Section IV will offer a similar survey of the Canadian state of the law to date in this area, more importantly followed by a discussion of the constitutional and legal-cultural imperatives suggesting an importation of human rights discourse into the private sphere. Similarly, Section V will echo the above, evaluating the Israeli situation in this respect. Having conducted an examination of the juridical culture defining the normative framework prevailing in each of these countries, Section VI will engage in a comparative exercise aimed at highlighting the differences between the legal systems explored above, concluding that the American approach to e-mail eavesdropping predicated on quasi-absolute employer sovereignty, advanced by the notion of employment-at-will, is particularly ill-suited for adoption in other systems.

I. EMPLOYEE STATUS: THE COMMUNITARIAN (DIGNITY-ORIENTED) VERSUS THE CONTRACTARIAN VISION

Long has the law progressed since the *Lochner* era in terms of recognizing the need to protect workers' dignity in view of their vulnerability.³¹ Indeed, this milestone of sorts served to erode and perhaps even unmask the artificial character of a strictly construed public/private distinction. It further led to recognition of the improbability of true contractual freedom in the employment context, in light of the imbalance of power characterizing labor relations. For that reason, courts and legislators, primarily outside the United States,³² have wisely come to recognize that an employee's consent to certain intrusive measures is not necessarily freely obtained. The rationale underlying this approach has been the understanding that individuals will consent to almost anything when their ability to feed their families is at stake. In consequence, society will not tolerate the alienation of certain rights, *sine qua non* to personal dignity, on the basis of the employment contract's "private" character.³³

31. See *Lochner v. New York*, 198 U.S. 45 (1905).

32. See David Schneiderman, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 OSGOODE HALL L.J. 401, 410 (2002) (discussing the buyer-seller model, "the development of an essentially exploitative economy in which power, not contract, actually dominated employer-employee relationships").

33. See Rothstein, *supra* note 10.

Indeed, “the throwing of freedom of contract into the balance of basic rights conceptually reopens the policy determination of twentieth century welfare-state legal systems that employees are entitled to a protected status which protects them against the ravages of the free market. Restriction of the freedom of contract lies at the root of this welfare-state policy.”³⁴

In contradistinction, the United States, as Section III discusses, has uniquely favored an “employment-at-will” understanding of employee status,³⁵ whereby other countries including the Continent and some common-law countries (the United Kingdom and Israel) have palliated this absolutist notion of employer sovereignty by infusing the contractual employment relationship with human rights values and balancing the right to property with that to dignity, privacy, and free expression. Plainly put, while an individualistic, contractarian conception of employee rights has prevailed in the United States,³⁶ other legal orders, as noted, have favored a communitarian vision,³⁷ whereby employee rights survive the contracting of services.³⁸ Indeed, the employee’s “fundamental right to communicate”³⁹ is emphasized, independent of the employer’s ownership of the tools being used.⁴⁰ This latter approach better comports with systems such as Canada’s and Israel’s, whose respective

34. Frances Raday, *Privatising Human Rights and the Abuse of Power*, 13 CAN. J.L. & JURIS. 103 (2000).

35.

In the United States, employment law had its origin in the law of master and servant applied primarily to domestic servants, farm hands and apprentices. Although some terms were bargained, most were imposed by law, based on the status of the employee. With industrialization during the 19th century, employment law moved from one of status to contract with employment governed by terms agreed upon by the employer and employee All risks arising out of employment are regulated by the express terms or implied contract between the parties.

Summers, *supra* note 13, at 453–54.

36. “Freedom of contract was thus conceived as an aspect of individual liberty.” *Id.* at 455.

37. See Matthew W. Finkin, *The Kenneth M. Piper Lecture: Employee Privacy, American Values, and the Law*, 72 CHI.-KENT. L. REV. 221 (1996) (“European nations, where detailed codes of data protection for employment (and all other sectors of personal data collection by organizations) are laid down by statute and administered by regulatory data protection commissions.”).

38. Indeed, the 1992 amendments to the French Labour Code, comporting with the implementation of the European Community Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, further broadened employee rights in that country. For a detailed analysis, see Rothstein, *supra* note 10.

39. Freedom of expression and the right to privacy are therefore considered fundamental rights under the European approach that are not lost merely by entering into the employment relationship. See ON-LINE RIGHTS FOR EMPLOYEES, *supra* note 17, at 241.

40. This is not to suggest that the latter’s rights are disregarded. Instead, what is significant is the framing of the issues in terms of human rights—rights that do not disappear merely by virtue of the employer’s ownership of the tools in question or of the contracting of services.

High Courts have suggested the influence of constitutional values, such as privacy and dignity, on “private” disputes.⁴¹

Earlier laws, enacted to protect workers’ dignity as a direct result of their plight across the Western world have, not surprisingly, failed to properly anticipate the technological revolution that is upon us. The latter naturally exposes us to a plethora of intrusions into our valued seclusion, thus threatening our privacy—a cherished component of human dignity. More specifically, in the workplace, e-mail—our preferred mode of communication and vehicle for expression—can easily become a sophisticated monitoring device, allowing employers to casually infringe upon their employees’ privacy.⁴²

As noted, the workplace balance of power renders employees ill-equipped to defend their privacy interests for fear of joining the multitudes of unemployed. In addition to infringing on the privacy aspect of dignity, intercepting electronic correspondence can also be said to violate freedom of expression *qua* dignity, e-mail having for the majority of us become a—if not the—chief means of communication in an increasingly mobile world.

In addition to the absence of proper statutory regulation of new technologies in communication, the scarce jurisprudence that we do have, primarily of American origin, appears to be developing in the direction of upholding the notion of employment-at-will in this area as well. As shall be submitted below, American courts that have dealt with the matter have embraced the approach of equating privacy rights with property rights and ownership. It is submitted that this is, and certainly should be, of concern to jurists in countries such as Canada and Israel, which, as noted, commonly look to American jurisprudence and are somewhat inclined to follow the example set thereby in novel areas of law. To import such an absolute concept, which lends itself only to carefully carved-out exceptions,⁴³ would signify an unnecessary reduction in flexibility.

41. See Section IV and Section V (discussions of Canada and Israel, respectively), *infra*.

42. “According to a recent Washington Internet Daily release, more than 80 percent of major US companies review the email that employees write and the Web sites that they visit. Sixty-seven percent of employers have disciplined or terminated at least one employee for improper or excessive use of email or Internet access.” See Frank C. Morris, Jr., *The Electronic Platform: Email and Other Privacy Issues in the Workplace*, 20 COMPUTER & INTERNET L. 1 (2003).

43. See MARK A. ROTHSTEIN, *EMPLOYMENT LAW: CASES AND MATERIALS* (4th ed. 1998).

II. A WORD ON EMPLOYER RIGHTS

Having highlighted some of the concerns that relate to employee dignity and technology in the workplace, it is imperative not to disregard employers' pertinent misgivings in this situation. Given the significant liability that employers can incur as a result of libelous, harassing, or otherwise offensive or illicit expressions emanating from their system,⁴⁴ curtailing their sovereignty as it relates to surveillance in their realm is hardly without consequence.⁴⁵

Without a doubt, employers must be given proper means to effectively control communications from the office, so as to shield them from liability. Alternatively, their liability for these exchanges must be limited, thus decreasing the need for employer monitoring of employee communications. This paper by no means attempts to suggest anything less. Instead, it merely proposes that honoring the employer's legitimate concerns does not necessarily entail adopting a thoroughly absolutist notion of employer sovereignty, predicated on contractarianism (notions of employment-at-will), where the United States appears to be headed. In the alternative, limiting employers' potential exposure to liability triggered by their employee's communicative conduct may serve to reduce their interest in monitoring. Having presented the matter at hand, let us, at this juncture, proceed to an overview of the respective legal systems forming the subject of this present inquiry.

III. THE AMERICAN APPROACH

A. *The Normative Framework*⁴⁶

Although neither fully developed nor uniform, American courts can generally be said to have concluded that the interception (tracing) of employee e-mails when dealing with an office e-mail system (rather than one belonging to a third party providing the service) does not

44. See Jeffery, *supra* note 2, at 253-54 ("[E]mployers may feel obliged to store such data [personal data] so that they will be able to defend themselves should their organization at some time in the future be subject to a civil claim or criminal charge relating to these matters [i.e., health, anti-discrimination, etc.].").

45. See *Strauss v. Microsoft*, 856 F. Supp. 821 (S.D.N.Y. 1994) (concerning harassment in a racially hostile environment); *Stratton Oakmont v. Prodigy Services Co.*, No. 94-31063, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct., May 24, 1995) (concerning defamation).

46. For a thorough discussion, beyond the scope of this paper, see Matthew W. Finkin, *Information Technology and Workers' Privacy: The United States Law*, 23 COMP. LAB. L. & POL'Y J. 471 (2002).

constitute covert eavesdropping. The rationales generally offered in support of this position are the following:

1. Employees have no reasonable expectation of privacy when using company e-mail/Internet facilities.
2. The employer's ownership of these work tools entitle her to monitor their use in any way she deems fit.

This seemingly dry legal analysis is firmly rooted in the deeply ideological belief in individualism defining American employment law, "As *Payne* and *Adair* demonstrate, defining the contract of employment as one terminable at will empowers the employer to subordinate employees, *treating them as mere suppliers of labor with no recognition of them as persons entitled to personal autonomy*. In the course of a century, the courts have softened the doctrine only [slightly]."⁴⁷ Indeed, "[E]mployees, while at work, have nearly no legal protection of personality, the right to assert who they are or what they believe, even though the employer's interest is minimal or non-existent."⁴⁸

These relevant legal avenues beg further examination as we endeavor to comprehend the American understanding of e-mail privacy in the workplace. Much has already been written respecting U.S. legislation and caselaw on the matter,⁴⁹ and the purpose of this

47. See Summers, *supra* note 13, at 457 (emphasis added).

48. *Id.*

49. See Jarrod J. White, *E-Mail @Work.com: Employer Monitoring of Employee E-Mail*, 48 ALA. L. REV. 1079 (1997); Erin M. Davis, Comment, *The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees*, 12 ALB. L.J. SCI. & TECH. 683 (2002); C. Forbes Sargent, III, *Electronic Media and the Workplace: Confidentiality, Privacy and Other Issues*, 41 B.B.J. 6 (1997); Deborah M. McTigue, *Marginalizing Individual Privacy on the Internet*, 5 B.U. J. SCI. & TECH. L. 5 (1999); Joshua S. Bauchner, *State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate*, 26 BROOK. J. INT'L L. 689 (2000); Alan F. Westin, *The Kenneth M. Piper Lecture: Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT. L. REV. 271 (1996); Finkin, *supra* note 37; Anne L. Lehman, *E-Mail in the Workplace: Question of Privacy, Property or Principle?*, 5 COMM'LAW CONSPECTUS 99 (1997); Matthew Finkin, *Book Review: Privacy & Employment Law*, 21 COMP. LAB. L. & POL'Y J. 813 (2000) (reviewing JOHN D.R. CRAIG, *PRIVACY & EMPLOYMENT LAW* (1999), *ZUR AUTONOMIE DES INDIVIDUUMS* (Dieter Simon & Manfred Weiss eds., 2000)); Samuel A. Thumma & Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (1999); Sarah DiLuzio, Comment, *Workplace E-Mail: It's Not as Private as You Might Think*, 25 DEL. J. CORP. L. 741 (2000); Alexander I. Rodriguez, *All Bark, No Byte: Employee E-Mail Privacy Rights in the Private Sector Workplace*, 47 EMORY L.J. 1439 (1998); Summers, *supra* note 13; Jay P. Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289 (2002); Rafael Gely, *Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law*, 53 FLA. L. REV. 669 (2001); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825 (1998);

endeavor is not to analyze the American state of the law, but rather to focus on the underlying rationale. Therefore, a brief survey rather than a detailed analysis shall be sufficient for our purposes.

Hence, prior to proceeding with a survey of the normative framework, it is incumbent upon us to clarify that the American position has thus far produced a narrow construction of e-mail privacy rights in the workplace. This is essentially the fruit of two rationales, both predicated on employer sovereignty.

Namely, employees do not have a reasonable expectation of privacy at their place of work⁵⁰ when using computer facilities owned by the employer (property rationale). Second, since employers own the work tools, they can initiate surveillance at will.⁵¹ In other words, privacy, as in the days of yore, derives from property rights.⁵²

The rationale having been stated let us turn to the legal framework. First, the Fourth Amendment of the U.S. Constitution⁵³ protects individuals from unreasonable searches and seizures by federal authorities. Accordingly, only those employed by government employers benefit from this protection.⁵⁴ Moreover, only

Dan McIntosh *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 *HAMLIN L. REV.* 539 (2000); Todd M. Wesche, *Reading Your Every Keystroke: Protecting Employee E-Mail Privacy*, 1 *J. HIGH TECH. L.* 101 (2002); Rebecca Ebert, *Mailer Daemon: Unable to Deliver Message Judicial Confusion in the Domain of E-Mail Monitoring in the Private Workplace*, 1 *J. HIGH TECH. L.* 63 (2002); Gregory I. Rasin & Joseph P. Moan, *Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace*, 66 *MO. L. REV.* 793 (2001); Poirier, *supra* note 9, at 85; Benjamin F. Sidbury, *You've Got Mail . . . and Your Boss Knows It: Rethinking the Scope of the Employer E-Mail Monitoring Exceptions to the Electronic Communications Privacy Act*, 2001 *UCLA J. L. TECH.* 5 (2001).

50. See the leading case of *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996). See also *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143-RWZ, 2002 U.S. Dist. LEXIS 8343 (D. Mass. May 7, 2002) (where the employees' belief as to their privacy entitlement was deemed unreasonable in view of the employers' policy on sexually explicit content).

51. See Charles Morgan, *Employer Monitoring of Employee Electronic Mail and Internet Use*, 44 *MCGILL L.J.* 849 (1999).

52. The ideological distinction in question was succinctly stated in the following manner: "European law treats privacy as a matter of human dignity while American law treats privacy as a property right. This may explain the difficulties American employees face in obtaining favorable treatment with respect to privacy in the workplace." Peter J. Isajiw, *Workplace E-Mail Privacy Concerns: Balancing the Personal Dignity of Employees with the Proprietary Interests of Employers*, 20 *TEMP. ENV'T'L. L. & TECH. J.* 73, 78 (2001).

53. U.S. CONST. amend. IV, § 1 (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"). On the constitutional privacy right generally, see *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (on the zone of privacy created by the Bill of Rights); *Katz v. United States*, 389 U.S. 347, 361 (1967) (asserting the unconstitutionality of warrantless electronic surveillance). See also Ken Gormley, *One Hundred Years of Privacy*, 1992 *WIS. L. REV.* 1335 (1992).

54. See *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (Fourth Amendment applies to searches conducted by public employers); *Simmons v. Southwestern Bell Tel. Co.*, 452 F. Supp. 392, 394-95 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979) (protection only against government intrusions into privacy).

“unreasonable searches,” performed where the employee has a “reasonable expectation of privacy” are excluded. In consequence, constitutional protection is of limited application to our inquiry, as only few (namely government employees) can practically avail themselves of its safeguards against employer intrusions.

Of greater pertinence in the evolution of American caselaw is the Electronic Communications Privacy Act (ECPA).⁵⁵ Title 1 of the ECPA section 2511 prohibits to “intentionally intercept, endeavor to intercept, or procure any other person to intercept or to endeavor to intercept any . . . electronic communication.”⁵⁶ It is also forbidden to disclose or utilize the contents of an electronic communication that the disclosing individual knows or has reason to know had been intercepted in the above manner.

This seemingly broad rule—significantly not developed with either e-mail or the workplace in mind—is however subject to two important exceptions that are of particular relevance in the employment context. First, consent⁵⁷ of a party⁵⁸ to the communication (express or implied) excuses an otherwise proscribed interception. As noted, that is most telling since consent, needless to say, takes on a rather distinct flavor in the workplace, colored by the power imperatives of subordination and hierarchy. Moreover, it importantly reflects a contractarian understanding of employment relations, an example of modern workplace issues colored by the traditional employment-at-will doctrine.

The second exception is the so-called “business use” exception,⁵⁹ applicable where an agent of a provider of wire or electronic communication services “intercepts, discloses, or uses that communication in the normal course of his employment while engaged in any activity which is necessarily incident to the rendition of his service or to the protection of the rights or property of the provider of that service.”

55. 18 U.S.C. §§ 2510–2522 (2000). E-mail has been held to fall under the purview of this law. *See* *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 461 (5th Cir. 1994). For a more in-depth analysis of the problems associated with this legislation (beyond the scope of this present endeavor), *see* *Isajiw, supra* note 52.

56. 18 U.S.C. § 2511 (2000).

57. 18 U.S.C. § 2511(2)(d) (2000); 18 U.S.C. § 2701(c)(1)–(2) (2000).

58. Rather than both or all parties. Consent-based excuse clearly derived from an employment-at-will understanding of employment relations, where the employee is deemed to have “voluntarily” contracted away certain rights.

59. 18 U.S.C. § 2510(5)(a) (2000).

Both exceptions have been broadly construed in the workplace context.⁶⁰ Indeed, provided that (i) the employer is the “provider” of the e-mail service,⁶¹ and (ii) the activity occurs in the normal course of the individual’s employment—which is generally the case—e-mail surveillance is allowed to proceed relatively unfettered. Indeed, “Case law interpreting ECPA is virtually uniform in finding that employers can monitor with or without consent, even without notice.”⁶² Significantly, this understanding of a specific issue arising in the employment context derives from the overarching concept of “employment-at-will,” which dominates the American perspective on employment relations.

This having been said, the caselaw to date has significantly limited section 2511’s application in the workplace context. Firstly, respecting eavesdropping generally, interception must be contemporaneous with transmission in order to amount to eavesdropping.⁶³ This is, of course, rarely if ever the case for e-mail (which is generally first stored then acquired). Notably, forty-eight states and the District of Columbia have adopted legislation mirroring the above-cited federal ECPA, prohibiting the interception of electronic communications and similarly setting out the one-party consent, “business extension,” and “provider” exemptions.

Yet a third normative facet relevant to e-mail eavesdropping in the workplace is traditional tort law.⁶⁴ More specifically, the pertinent

60. See Morris, *supra* note 42: “The outcome of Garrity [decision cited above] provides a clear basis for promulgating strongly worded policies regarding Internet and email use to reduce employees’ expectation of privacy. Still, some of the first cases to address monitoring suggested that an employer could conduct any type of surveillance that it liked of the computer, email, and Internet access that it provided to employees whether or not it had a policy to that effect.” Such cases include, Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996) (holding that, even in the absence of a company e-mail policy, plaintiff did not have a reasonable expectation of privacy in his work e-mail); McLaren v. Microsoft Corp., No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103 (Ct. App. 5th Dist. May 28, 1999) (holding that there can be no reasonable expectation of privacy in an employer-owned e-mail system); Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001) (involving a government agency, yet the employee lost even on invocation of the Fourth Amendment). The author does note certain exceptions, particularly unexpected laptop monitoring, as in Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002).

61. See the “provider exception” of 18 U.S.C. § 2511(2)(a)(i) (2000).

62. See Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L. J. 301 (2003) (citing Smyth, 914 F. Supp. 97 [finding in favor of employer who intercepted employee’s e-mail]); Restuccia v. Burk Tech., Inc., No. 95-2125, 1996 Mass. Super. LEXIS 367, at *1 (Mass. Super. Aug. 13, 1996) (finding that a back-up system that automatically stored employee e-mail messages was the “type of permissible interception contemplated by the ordinary course of business exception”); McLaren, No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103 (holding that e-mail messages contained in the company computer were not an employee’s personal property, but were “merely an inherent part of the office equipment.”).

63. Steve Jackson Games Inc. v. United States Secret Service, 36 F.3d 457 (1994).

64. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

American common-law tort of invasion of privacy that may be invoked in this context is premised on four theories of liability, one of which is significant for our purposes.⁶⁵ Namely, unreasonable intrusion into the seclusion of another, if shown to be highly offensive to the reasonable person (“intrusion” that is “highly offensive” to a “reasonable person”). Consent is again a valid defense that has been broadly construed in the workplace (so as to require the employee to have both a subjective expectation of privacy that can be objectively justified).⁶⁶ Accordingly, the leading case of *Smyth v. Pillsbury Co.*⁶⁷ may be said to stand for the proposition that employees—in contradistinction to Web surfers generally—do not have a reasonable expectation of privacy at work because “no reasonable person would consider the defendant’s interception of [his] communications to be a substantial and highly offensive invasion of his privacy.”⁶⁸

In stark contradistinction to the French approach, briefly alluded to above, American law, as Professor Finkin notes:⁶⁹ “licenses employers to monitor their employees’ computer utilization with impunity; it requires no calibration of the monitoring against the reason given to justify it, save when the message is actually ‘intercepted.’ Employers are thus free to intrude to greater extent than circumstances would justify.”⁷⁰ This might be attributed to the legal culture, deriving from the common law tradition of old, whereby as Matthew Finkin notes “the law accords the employer near plenary power to govern the workplace; in fact to govern the worker.”⁷¹

IV. CANADA

This section intends to examine the significant differences that exist between applicable American and Canadian privacy legislation

65. For further discussion, please see Gabel & Mansfield, *supra* note 62, at 301. The authors define the relevant tort in the following manner: “The tort of intrusion on seclusion consists of intrusion into a matter in which the employee has privacy (i.e., the employer has no legitimate interest) and by means that would be objectionable to a reasonable person.”)

66. For a current analysis of the state of the law, see Eric P. Robinson, *Big Brother or Modern Management: Email Monitoring in the Private Workplace*, 17 LAB. LAW. 311 (2001).

67. 914 F. Supp. 97 (E.D. Pa. 1996).

68. *Id.* We should note that this case is somewhat peculiar, as the e-mail in question had been sent to the employee’s own supervisor, thus severely undermining an expectation of privacy line of argument.

69. See Finkin, *supra* note 46, at 476.

70. Unlike in France, where the additional requirements of proportionality and relevance cited *supra* serve to reverse the onus and protect employees.

71. See Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J. 577 (2002). Importantly, he notes the deep divide between the (traditional) common law and civilian approach in terms of conceiving the employee as a person.

and, perhaps more importantly, their respective legal and political cultures. Indeed, it has been suggested that under the Canadian approach, privacy and property rights are not “mutually exclusive,” and that privacy generally lends itself to a generous construction, independent of contract or ownership. Instead, rights to property and property are to be balanced contextually. Unlike the United States, therefore, Canada cannot be said to adhere to the “classical” concept of the protection of human rights,⁷² understood as pertaining to the public sphere alone.⁷³ Instead, Charter values, as shall be discussed, permeate our understanding of private dealings, qualify our tolerance for unfair “agreements,” and disrupt any strict demarcation between private and public, reflecting the “major shift in Anglo-American law came when the emphasis on property and contract was displaced by a new concern for human rights.”⁷⁴

Although, as it stands, no single rule has yet materialized concerning the subject of our inquiry,⁷⁵ a “rule seems to be emerging to the effect that employees do not have an objectively reasonable expectation of privacy in e-mail messages stored on a computer that is

72. See Henkin’s definition: “Human Rights, I stress, are rights against society as represented by government and its officials by group definition.” LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 2 (1979). See also Michael J. Horan, *Contemporary Constitutionalism and the Legal Relationship Between Individuals*, 25 INT’L & COMP. L.Q. 848, 851 (1976) (“as far as constitutionalism is concerned, the classical position of the individual vis-a-vis other individuals still persists. It is still the state, acting through law, which is to shoulder these new social and economic responsibilities, not private individuals, groups or associations.”).

73. Notwithstanding the ruling in *Retail, Wholesale, and Dep’t Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573, the Canadian Supreme Court has increasingly been inclined to support the application of Charter principles to the private sphere, as discussed below. Also, “the Charter will apply to any order made by a court for predominantly public purposes; for example, an order made to protect the administration of justice, even if that order is based on common law and not legislative sources, and regardless of whether it was made at the court’s own initiative or at the behest of a private litigant. The crucial factor is the public purpose for which such an order is made. In addition, private citizens may act as agents of the government, making their actions subject to the Charter.” *Dolphin Delivery*, [1986] 2 S.C.R. 573 (citing John Dawson, *Compelled Production of Medical Records*, 43 MCGILL L.J. 25 (1998)). See Brian Slattery, *The Charter’s Relevance to Private Litigation: Does Dolphin Deliver?*, 32 MCGILL L.J. 905 (1987).

74. Which in the United States, as noted above, has yet to progress to the employment e-mail context. See Michael Wines & Michael P. Fronmueller, *American Workers Increase Efforts to Establish a Legal Right to Privacy as Civility Declines in U.S. Society: Some Observations on the Effort and Its Social Context*, 78 NEB. L. REV. 606 (1999) (noting that in light of the above-stated shift “Perhaps, the time has come to dispense with the discredited notion of employment at will and to replace it with a new approach to employment in which workers’ human dignity, job security, and health are paramount.” In that vein, he cites Deborah A. Ballam, *The Traditional View of the Origins of the Employment-at-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1, 48–49 (1995)).

75. What is more, aside from Quebec (see *infra*), protection of privacy in the private sector generally—let alone matters pertaining specifically to e-mail—“is sporadic and uneven, . . . what the Privacy Commissioner has termed ‘a patchwork’ of laws, regulations and codes [T]his patchwork becomes even more inadequate in the face of new developments in electronics, computers, and communications technology.” See Wines & Fronmueller, *supra* note 74, at 628.

part of a communication system provided by the employer.”⁷⁶ One thing, however, is clear: ownership/property reasoning is paradoxically taking hold of Canadian commentaries on the matter, contrary to Canadian thinking on privacy issues thus far.⁷⁷ As the following demonstrates, Canada’s construction of privacy rights, generally and in the employment context, has been broad. In consequence, it is reasonable to expect that any rule that does form pertaining to e-mail eavesdropping will reflect that understanding, rather than one based on absolute notions of property or contract.⁷⁸

Mindful of the fact that most employees, particularly in these most troubled economic times, are thirstily vying for scarce situations,⁷⁹ legal cultures such as Canada’s⁸⁰ and Israel’s⁸¹—of collectivist orientation as entrenched welfare states—would not appear fertile ground for the implantation of the budding U.S. doctrine respecting employee e-mail privacy, emphasizing an individualistic understanding of property and contractual rights.

What is more, Canadian courts are free from the constraints imposed by the stricter American version of the “employment-at-will” doctrine, which requires that exceptions to employer sovereignty be

76. See Poirier, *supra* note 9.

77. See Schneiderman, *supra* note 32, at 403: “In an age of economic globalization, states increasingly are under pressure to adopt legal regimes that emulate economic success experienced elsewhere.” Clearly, Canada is heavily influenced by the American experience. He argues “that Canadian courts are embracing the ‘buyer-seller’ model of constitutional interpretation. This model places emphasis on market relations and conscripts constitutional interpretation as a promotional vehicle for market values. It is a model conducive to the market exchange that was a dominant mode of constitutional interpretation in the United States in the late nineteenth and early twentieth centuries While Canada is not experiencing, nor has it experienced, a type of *Lochner*ian episode, constitutional interpretation currently is shifting conspicuously in the direction of the market model. This shift comports well with the buyer-seller model identifiable in the *Lochner* era.”

78. See Jeremy DeBeer, *Employee Privacy: The Need for Comprehensive Protection*, 66 SASK. L. REV. 38 (1997) (“[Canadian] Society has begun to pay more attention to privacy. This is especially true in the context of the employment relationship, where a power imbalance creates a greater need for privacy protection.”).

79. Even the once infamously prosperous sectors such as “high tech” are no longer inclined to seduce employees. Instead, the market is flooded with talent, whose expectations respecting proposed work conditions have markedly declined.

80. See David Johnson & R. Brian Howe, *Human Rights Commissions in Canada: Reform or Reinvention*, 12 CAN. J. L. & SOC. 1 (1997) (“we can justifiably speak of ‘rights consciousness’ as being one of the leading intellectual currents in contemporary Canadian political culture.”). See also Alan Cairns, *The Embedded State: State-Society Relations in Canada*, in KEITH BANTING, STATE AND SOCIETY: CANADA IN COMPARATIVE PERSPECTIVE (1986); Peter H. Russell, *The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic’s Report Card*, in PROTECTING RIGHTS AND FREEDOMS (Philip Bryden, Steven Davis & John Russell eds., 1994); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (1989); W.A. BOGART, COURTS AND COUNTRY: THE LIMITS OF LITIGATION AND THE SOCIAL AND POLITICAL LIFE OF CANADA (1994).

81. See Section V, The Israeli Case, *infra*.

painfully carved out.⁸² They therefore need not fear “opening floodgates” by creating a new ground for employee suits.⁸³ Instead, the employment relationship is more generally described as contractual in nature,⁸⁴ thus allowing for greater flexibility.

More importantly, perhaps, the enactment of the Charter of Rights and Freedoms has revitalized both the Canadian judiciary’s attitude regarding the invocation of human rights and the popular consciousness thereof. Indeed, the Charter, in its “value vehicle” capacity, has shaped both judicial mores and political culture, thus allowing human rights discourse to influence, if not determine, Canadian doctrine on many legal issues. Although not officially subject to the Charter, even matters of “private” ilk are not spared the impact of Charter values, however indirect, as the following shall discuss.

A. *The Canadian Charter of Rights and Freedoms*⁸⁵

Like the U.S. Constitution, the Canadian Charter’s application is predicated upon “state action,” protecting against government intrusion. While its relevance to the private realm is questionable at best, it is not to be entirely excluded. Indeed, like the Israeli Basic Laws⁸⁶ (which it served to inspire), the Canadian Charter’s values must infuse the interpretation of all legislation.⁸⁷

In Justice McIntyre’s words:

Where . . . private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is distinct from the question whether the judiciary ought to apply and develop the principles of the common

82. Canada instead has adopted the “reasonable notice” model, and employment relations are governed by various statutory and regulatory schemes in every province.

83. For wrongful dismissal. Moreover, “the law has been extraordinarily slow to respond to the issue of wrongful discharge. Even though the United States has more than fifty years of experience regulating employment through state and federal legislation, not until the 1970s and 1980s did courts begin to recognize exceptions to the historical, and uniquely American, employment-at-will rule. Over 60 countries, including Sweden, Norway, Canada, Japan, and the European Community, as well as countries in South America, Africa, and Asia, provide statutory protection from wrongful discharge.” See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U.L. REV. 849, 855 (1994).

84. Governed by general rules of contract and regulations. See Johanne Savard, *General Overview of Employment Law in Canada*, 1 A.L.I.-A.B.A. COMPLYING WITH THE LABOR AND EMPLOYMENT LAWS OF THE NAFTA COUNTRIES (March 2001).

85. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

86. See Section V, *infra*.

87. See *Retail, Wholesale, and Dep’t Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.⁸⁸

Like their Israeli counterparts, Canadian courts have yet to address questions of e-mail surveillance in the workplace head on. As the ink of this present article dries, Canada does not yet have a clear answer respecting the state of the law on this matter. Nevertheless, inspired by a handful of American decisions, several Canadian commentators have tended to suggest that employers may monitor e-mail under any circumstances they deem fit.⁸⁹ The responses seem to be based on two above-cited premises, both taken from American jurisprudence on the subject. Namely, employees have no reasonable expectation of privacy when using company e-mail and Internet facilities, and the employer's ownership of these work tools.

Regardless, privacy principles gleaned from Charter jurisprudence,⁹⁰ judicial interpretation of privacy legislation, and pending legislation concerning privacy all suggest that employees do in fact have a reasonable expectation of privacy in their use of e-mail and the Internet in the workplace setting and that employers have a right to monitor such use only if the monitoring is performed reasonably and in accordance with employees' consent or on the basis of a compelling specific interest.⁹¹

More specifically, privacy is gleaned from Section 8 of the Canadian Charter of Rights of Freedom and ensuing caselaw.⁹² Thus, in *Hunter v. Southam Inc.*,⁹³ Supreme Court Justice Dickson (as he was then) ruled that Section 8 seeks to supply "a broader protection of the individual's right to privacy than could be found in traditional Common Law doctrines."⁹⁴ Explicitly, the former Chief Justice Dickson held that the section 8 right was the constitutional embodiment of the "right to be let alone by other people."

88. *Id.* Similarly, in *Hill v. The Church of Scientology*, [1995] 2 S.C.R. 1130, Justice Cory altered the common law of defamation in order to allow it to better comport with Charter values, even though the Charter did not directly apply.

89. Articles cited by Morgan, *supra* note 51.

90. See DeBeer, *supra* note 78. "Since its introduction in 1982, the Charter has transformed the way privacy rights are protected in Canada. Although it contains no express right of privacy, Canadian jurisprudence has implied such a right within the provisions of the Charter, particularly within ss. 7 and 8."

91. For further detail, see Morgan, *supra* note 51.

92. See leading case of *R. v. Duarte*, [1990] 1 S.C.R. 30.

93. [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

94. See Morgan, *supra* note 51.

Likewise, in *R. v. Duarte*,⁹⁵ a case dealing with the “reasonable expectation of privacy” (in the criminal context), Canada’s Supreme Court instructed that the following evaluation guide us in this respect: “the person whose words were recorded spoke in circumstances in which it was reasonable for that person to expect that his or her words would only be heard by the person he or she was addressing.” Furthermore, the evaluation of whether the “reasonable expectation of privacy” exists must be contextual.⁹⁶ That is to say “that Charter rights, and any limits imposed on them, must be analysed not in the abstract, but in the factual context that gives rise to them.”⁹⁷

Applied to the matter forming the subject of this examination the following may be asserted: In view of the fact that Charter values, including privacy, may be said to seep into our understanding of private legal issues as well, the right to e-mail privacy in the work environment will be shaped and defined in a manner comporting with Charter principles (that is to say, a broad construction of privacy). In other words, just as Charter principles from the criminal field are increasingly being applied to the civil realm, in an era of “privatization of human rights,”⁹⁸ there appears to be a convergence of principle in all contexts. Indeed, the right to privacy in this respect shall be evaluated contextually—that is to say, in function of content and the like—not ownership of servers and whether the employee “alienated” his or her rights to privacy by contracting his or her services.⁹⁹

95. *R v. Duarte*, [1990] 1 S.C.R. 30.

96. See *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1325, 64 D.L.R. (4th) 577, 1989 A.C.W.S.J. LEXIS 44257 at *34 (Wilson, J., concurring).

97. Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT. J. CONST. L. 13 (2002).

98. See Raday, *supra* note 34.

99.

A more recent decision struck a balance between employee and employer interests in addition to considering management and union rights. In *Re Saint Mary’s Hospital*, the arbitrator placed the onus on the employer to justify the encroachment upon the employees’ right to privacy by applying the following test. The employer must demonstrate:

- that there is a substantial workplace problem and that there is a strong probability that surveillance will assist in solving the problem;
- that initiating use of the specific form of surveillance is not in contravention of any terms of the collective agreement;
- that it has exhausted all reasonable alternatives and that there is no less intrusive means of correcting the problem; and
- that the surveillance was conducted in a systematic and non-discriminatory manner. ((1997) 64 L.A.C. (4th) 382)

. . . .

. . . If it is reasonable for employees to be protected from a search of their desks and the reading of their personal correspondence, it may be no less reasonable that they be protected if the correspondence is stored on a computer rather than on paper and in a

What is more, the Canadian welfare state has rejected the American approach discussed above, deeming privacy to flow from property. As Canadian commentators Poirier and Morgan have respectively asserted: "Canada understands privacy as independent of property: *R v. Dymont, and Plant*, indicate that individuals may have a privacy interest in personal information regardless of proprietary interests."¹⁰⁰ Significantly, this understanding would shelter employees invoking Charter values from an unrefined property based *réplique* when privacy and dignity are violated via unwarranted eavesdropping.

1. The Quebec Charter

Each province of the Canadian federation features its own provincial legal system. Subject to a number of exceptions,¹⁰¹ employment law in Canada falls under provincial jurisdiction. Although a thorough analysis of each individual province's system in this area exceeds the boundaries of our present endeavor, Quebec's unique system is worth highlighting.¹⁰² This need for a certain degree of separate treatment is true both by virtue of its distinct preservation of a Civilian (Napoleonic) private law system and of its staunchly collectivist political culture and unions' role therein. Moreover, Quebec boasts its own Constitution, the Quebec Charter, of constitutional status in that province, equally applies to private action (unlike the Canadian Charter of Rights and Freedoms and the U.S. Constitution).¹⁰³

Notably, according to Section 5 of the Quebec Charter, every person has the right to respect for his/her private life.¹⁰⁴ Although the section has yet to be applied to e-mail eavesdropping, the subject of the present inquiry, the Quebec Court of Appeal concluded that

desk drawer. Ownership of the item, in this analysis, becomes irrelevant and it is the employee's expectation of privacy that governs. Following this model, an employer would require reasonable cause to justify the search, would have to conduct the search in a non-discriminatory manner and would have to exhaust other alternatives prior to conducting the search.

Michael G. Sherrard, *Workplace Searches and Surveillance Versus the Employee's Right to Privacy*, 48 U. NEW BRUNSWICK L.J. 283, 291, 297 (1999).

100. See Poirier, *supra* note 9.

101. For instance, inter-provincial or international transportation, railways, banking, communications, aeronautics, shipping, broadcasting, etc.

102. Both legally and politically speaking.

103. Charter of Human Rights and Freedoms, R.S.Q. c. C-12 [hereinafter Quebec Charter].

104. Specifically, Section 5 states "every person has a right to respect for his private life." *Id.* § 5. The provision, the Courts have held, is to be generously construed. See the leading cases of *Godbout v. City of Longueuil*, [1997] 3 S.C.R. 844, and *Aubry v. Editions Vice-Versa Inc.*, [1998] 1 S.C.R. 591.

cellular phone users were entitled to a reasonable expectation of privacy.¹⁰⁵ This is, needless to say, relevant to e-mail for “Like e-mail, analog cellular communications are vulnerable to interception.”¹⁰⁶

2. The Quebec Civil Code (C.C.Q.)

Like the Quebec Charter, C.C.Q. boasts several provisions that serve to support the argument that e-mail eavesdropping in the workplace will receive different, more dignity-oriented, treatment in this province. Under article 35 of the C.C.Q., “every person has a right to the respect of his reputation and privacy. No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.”¹⁰⁷ More specifically for our purposes, Article 36(2) C.C.Q. follows that general statement and further provides that “intentionally intercepting *or using* his private communications” may be deemed an unlawful invasion of privacy.¹⁰⁸

Respecting the employment context in particular, Art. 2087 of the C.C.Q. states the following: “The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and *dignity* of the employee.”¹⁰⁹ Furthermore, contrary to the capricious spirit of the American Employment at Will doctrine, the Civil Code of Quebec includes a specific provision respecting the tacit renewal of a fixed term contract of employment, Article 2090.¹¹⁰

In a similar spirit, the Protection of Personal Information in the Private Sector Act sets out strict rules pertaining to personal information collects, taken in the course of carrying on an undertaking.¹¹¹ The Act is unique in North America, in terms of the breadth of protection extended.

Although we reserved our present more detailed analysis to Quebec, all Canadian jurisdictions have enacted employment standards legislation, which guarantees minimum rights to all

105. *Rev'd R. v. Solomon*, [1996] A.Q. no. 2131, (Que. C.A.) online: QL(QJ), (Appeal to the S.C.C. dismissed, [1997] 3 S.C.R. 696).

106. See Poirier, *supra* note 9. See also A. Gahtan, *Monitoring Employee Communications*, 2 INFO. & TECH. L. 29 (1998).

107. C.C.Q. art. 35 (2004).

108. C.C.Q. art. 36(2) (2004) (emphasis added).

109. C.C.Q. art. 2087 (2004) (emphasis added).

110. Article 2090 provides “A contract of employment is tacitly renewed for an indeterminate term whether the employee continues to carry on his work for five days after the expiry of the term, without objection from the employer.” C.C.Q. art. 2090 (2004).

111. L.R.Q., chapter P-39.1

employees. Importantly, these provisions are of public order and cannot be contracted out from, in sharp contrast with the *laissez faire* "employment-at-will" approach.¹¹² Under these varied provincial privacy acts, eavesdropping is considered to be a violation of privacy and may give rise to damages or to an injunction.

B. Criminal Code Provisions

As in Israel, the relevant legislation governing e-mail eavesdropping are the invasion of privacy provisions of the Criminal Code, sections 183 to 196.¹¹³ For its part, section 183 defines "interception" and "private communications." "Intercept" includes "the listening to, recording or acquiring [of] a communication, or acquiring the substance, meaning or purport thereof." "Private communication" refers to "any oral communication, or any telecommunication . . . made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it." The wording is broader than in the United States. Exceptions include section 184(2)(a), it is stated that section 184(1) of the Criminal Code does not apply to "a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it." Section 184(1) provides that "every one who, by means of any electro-magnetic, acoustic, mechanical or other device, willfully intercepts a private communication is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years."

112. These provinces are: Newfoundland (An Act Respecting the Protection of Personal Privacy, R.S.N. 1990, c. P-22); Manitoba (The Privacy Act, R.S.M. 1987, c. P-125); Saskatchewan (An Act Respecting the Protection of Privacy, R.S.S. 1978, c. P-24); British Columbia (Privacy Act, R.S.B.C. 1996, c. P-373).

113. S.C. 1985, c. C-46, s. 184. The relevant portions of § 184 provide:

- (1) Everyone who, by means of any electro-magnetic, acoustic, mechanical or other device, willfully intercepts a private communication is guilty of an indictable offence
 - b. Subsection (1) does not apply to
 - i. a person who has the consent to intercept, express or implied of the originator of the private communication or of the person intended by the originator thereof to receive it . . . ,

A "private communication" is defined in section 183 of the Code as being "any oral communication, or any telecommunication, that is made in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any other person other than the person intended by the originator to receive it" S.C. 1985, c. C-46, § 184.

C. Overview: Additional Legislation

At first glance, Canadian legislation pertaining to privacy appears to abound. Nevertheless, a closer look reveals that, for the most part, these apply solely to public sector employers and therefore do not merit detailed treatment at this juncture. Suffice it to mention, the Federal Privacy Act¹¹⁴ and the relatively new Personal Information Protection and Electronic Documents Act (PIPA)¹¹⁵ is another step reflecting the Canadian interest in the protection of privacy. This Act applies to employers subject to the federal jurisdiction and it imposes upon said employers the duty to protect the personal information pertaining to their employees.

D. Tort Law

The statutory tort of the invasion of privacy varies by province.¹¹⁶ The requirement that the intrusion be “highly offensive” to a reasonable person set forth in the American common law is absent in both article 36 of the Civil Code of Quebec (dealing with breach of privacy) and in the Canadian common law of tort. This is significant in that it illustrates the greater generosity of the Canadian approach in sanctioning privacy infringements more readily.

Accordingly, provincial Privacy Acts have been broadly interpreted.¹¹⁷ Respecting effective consent pertaining to electronic surveillance, the *Ferguson* court held one party’s consent to the interception of private communications was insufficient, stating: “[I]f the other party to the conversation could unilaterally consent to and authorize the third party listening or recording, then the purpose of

114. Revised Statutes of Canada 1985, c. P-21. Also of interest is the Radiocommunications Act, 1991, ch. 11. The Act includes the following privacy protection provisions. According to § 9(1.1) and § 9(2), “except as prescribed, no person shall intercept and make use of, or intercept and divulge, any radiocommunication [defines a radiocommunication as “any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 GHz propagated in space without artificial guide except as permitted by the originator of the communication or the person intended by the originator of the communication to receive it”].”

115. Personal Information Protection and Electronic Documents Act (PIPA) – 2000 C.5.

116. The provinces that have created a statutory tort of invasion of privacy are: British Columbia (Privacy Act, R.S.B.C. 1979, c. 336); Manitoba (The Privacy Act, R.S.M. 1987, c. P125); Newfoundland (Privacy Act, R.S.N. 1990, c. P-22); Saskatchewan (The Privacy Act, R.S.S. 1978, c. P-24). The courts have left the door open for a general American-style privacy tort and have not rejected it as in England. For a broader discussion, see J. Craig, *Invasion of Privacy and Charter Values: The Common-Law Tort Awakens*, 42 MCGILL L.J. 355 (1997).

117. Most notably in the province of Manitoba, in *Ferguson v. McBee Technographics Inc.*, [1989], 58 Man. R. (2d) 119, 24 C.P.R. (3d) 240 (Q.B.).

the legislation would be frustrated and the person whose privacy was sought to be preserved would have no protection at all.”

E. Culture

As noted, this paper makes no attempt at a thorough examination of Canadian legislation on the subject. Instead, it proposes to highlight the juridical culture underlying privacy and related legislation—namely, one that does not equate the latter right with property. It is this dignity-oriented thinking and collectivist understanding of labor law, it is argued, that should animate the formation of a rule pertaining to e-mail eavesdropping in the workplace.

Although somewhat redundant, it may be necessary to state Canada's positive conception of the state, as compared to the United States. While Ontario and Alberta can arguably be said to be straying from this approach, a pronounced degree of interventionism has characterized Canadian political culture throughout the years. As Arthurs explains:

The crucial factor differentiating the Canadian from the U.S. case, and that of Quebec from most other Canadian jurisdictions, is support for state intervention in the labor market. Intervention has a peculiarly Canadian pedigree. From the first decade of the 20th century, the Canadian state provided elaborate peacekeeping procedures to avoid or resolve industrial conflict during the postwar period, moreover, Canada began to put in place elements of the framework of a modern welfare state.¹¹⁸

Needless to say, Quebec “retains a strong solidaristic character; vestigial social democratic governments hold office in Saskatchewan and Manitoba.”¹¹⁹

Canadian judges echo this solidaristic approach, protective of workers' dignity. Thus, for instance, judges developed the concept of reasonable notice as contrasted with termination at will in the United States where, in essence, a hiring was presumed to be terminable at will unless the parties express a contrary intent.¹²⁰ For indeed, Canadian judges recognized that one of the purposes of the law is, as

118. H.W. Arthurs, *National Traditions In Labor Law Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL'Y J. 645 (2002).

119. *Id.*

120. Chi Carmody & M. Norman Grosman, *Lazarowicz v. Bardal: Reasonable Notice and Relational Contracts in Canadian Cases on Employment Law*, 24 C.C.E.L. 249 (2d ed. 1997).

Blackstone says, to protect “the weak from the insults of the stronger.”¹²¹

Moreover, Canada’s “far-reaching social security system and legislation aimed towards creating a dignified work place” illustrates our concern with protecting employees as a vulnerable group in society.¹²² Echoing this approach, former Chief Justice Dickson instructed the fact that a given value is elevated to an “international human right” generally suggests its primacy. For our purposes, respecting the values housed by the International Covenant on Economic, Social and Cultural Rights begs respect for the protection of employees as a vulnerable group in society.¹²³

As Frances Raday explains, “[I]n our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise when contrasted with an employer’s power to dismiss, a landlord’s power to exclude the needy, or an entrepreneur’s refusal to provide service.”¹²⁴ Thus, the privatizing of human rights commands respect for their human rights, in Raday’s words, “not only as against the power of the state but also in their dealings with one another.”

In light of the prominence of socio-democratic forces and unions on the Canadian landscape, coupled with the Charter’s impact on both judicial and popular understanding of modern issues—be they “private” or “public”—touching on human rights, the American approach to e-mail eavesdropping in the workplace is unlikely to find fertile soil in this country.

V. THE ISRAELI CASE

As Section IV did for Canada, Section V will offer an exploration of the evolving Israeli caselaw and potentially applicable legislation, highlighting the differences between the Israeli and American legal framework, illustrating the inappropriateness of integrating U.S. jurisprudence in this context, as is often the trend in that country.

121. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1979).

122. Stacey Reginald Ball, *Bad Faith Discharge*, 39 MCGILL L.J. 568 (1994).

123. *Id.*

124. See Raday, *supra* note 34, at 106 (quoting Macdonald, *Postscript and Prelude—the Jurisprudence of the Charter: Eight Theses*, 4 SUP. CT. L. REV. 321, 347 (1982)). See also Frances Macdonald, *Postscript and Prelude—The Jurisprudence of the Charter: Eight Theses*, 4 SUP. CT. L. REV. 321, 347 (1982).

A. The Normative Framework

The Israeli *Basic Law: Human Dignity and Liberty*¹²⁵ is said to infuse our construction of all legislation with its values.¹²⁶ Of constitutional stature, it has been understood to require the courts to view extant legislation through the lens of the new constitutional rights. President Aharon Barak, the Israeli Chief Justice, instructs on the justification protection of human rights to the “private” sphere as follows:

The danger to human rights does not exist only from the direction of state power . . . it must be recognized that there is great danger for human rights from non-state bodies . . . from private bodies and, especially, from powerful private organizations, such as certain private companies. If a small municipality is not entitled to discriminate why a large corporation should be entitled to do so?¹²⁷

An assertion of this nature seems to suggest that Israel’s approach to the recognition of human rights in the so-called “private” sphere differs rather significantly from the relatively strict separation conceptually featured in the United States and may be said to go even further than its Canadian counterpart. This by virtue of the Court’s willingness to explicitly recognize the “privatization of human rights”—or at least the increasing blurring of lines between spheres.

Accordingly, since, like Canada, Israel’s courts have not yet supplied us with a definitive answer pertaining to electronic eavesdropping in the employment context, it is likely that human rights discourse shall protrude a discussion of this character. While this leaves us only able to speculate as to potential outcomes in that realm, a discussion of “eavesdropping” more generally may, deriving from the most relevant piece of legislation, the Eavesdropping Law,¹²⁸ may serve to shed some light on that system’s approach to the matter. Eavesdropping is considered legal when consent is obtained.

B. Does the Eavesdropping Law Even Apply?

Having said this, it is worth noting that the Eavesdropping Law’s application to this realm is entirely questionable since a private entity

125. Basic Law: Human Dignity and Liberty, 1992 (Isr.), available at 26 ISR. L. REV. 248 (1992). See also <http://www.israel.org/mfa/gov>.

126. M.A.Cr. 537/95, Ganimat v. State of Israel, 49(3) P.D. 355 (1995).

127. Hevra Kadisha, Jerusalem Burial Co. v. Kestenbaum, 46(2) P.D. 464, 530, per P. Barak. See also Aharon Barak, *Protection of Human Rights in Private Law*, in BOOK TO KLINGHOFER ON PUBLIC LAW 163 (A. Barak, ed., 1993).

128. The Eavesdropping Law, 33 L.S.I. § (1979-5739) 2(a), available at <http://www.technolawgy.com> [hereinafter Eavesdropping Law].

cannot by definition engage in “covert eavesdropping,” as proscribed. Succinctly, a number of rationales potentially negate its potential possible application, as does the Basic Law. Significantly, the Eavesdropping Law is a criminal statute that sets out a draconian punishment of five years and Israeli courts have yet to apply it in this context.

1. The Statutory Language

Sub-section 2(a) of the Eavesdropping Law reads as follows: “One who covertly eavesdrops, without legal authorization is liable for five years imprisonment.” Interestingly, the statutory scheme provides that a private entity cannot legally engage in covert eavesdropping (wiretapping), since such a body is not eligible to obtain authorization for such purposes. In consequence, it is incumbent upon us to proceed to an examination of whether the matter we are dealing with (employer access to employee e-mails) can properly be deemed to constitute covert eavesdropping (which is necessarily prohibited, given the impossibility of obtaining legal authorization).

The Eavesdropping Law’s definitional section defines eavesdropping thusly: “eavesdropping- eavesdropping on another person’s conversation, recording or copying another person’s conversation, through the use of an instrument (mechanism).” The matter we are concerned with satisfies the first part of the definition. For, indeed, the statute defines conversation as: “speech or communication via cable, including . . . Communication between computers.”

The legal issue is therefore raised by the end part of the definition, according to which eavesdropping must be effected using an instrument. The term “instrument” is not defined in the statute’s definitional section, thus raising the question of whether the legislator’s intent was to describe a particular instrument, geared toward eavesdropping, or whether any instrument used for these purposes qualifies.

Section 1 of the Eavesdropping Law¹²⁹ determines that covert eavesdropping is listening to a conversation without the consent of any of the parties to that conversation. Significantly, listening in becomes legal the moment authorization to this effect is secured from one of the parties to the conversation. It therefore follows

129. *Id.* § 1.

that, although the matter at hand may qualify as “eavesdropping,” arguably, company employees may be said to have given their tacit consent to their employer to intercept their e-mails when these were received through the company system. Indeed, District Court caselaw (that has not yet been overturned) does confirm that the eavesdropping forming the subject of this paper may also be included herein, within the boundaries of the said consent. This view finds support in the literature (academic writing).

Can employees in fact be said to have given their tacit consent to their employer as noted above? The caselaw has yet to address this covert eavesdropping-related issue. We may perhaps attempt to elucidate the matter by way of analogy from other areas of labor law, which require balancing between the employees’ right to privacy and the employer’s property rights, such as the issue of whether an employee may be deemed to tacitly consent to searches of their desk drawers, which are the property of their employer. Unlike in the United States, property does not automatically trump dignity (they’re not even explicitly mentioned). Instead, both these values are balanced, on a case-by-case basis.

In summary, there are a number of cumulative rationales serving to negate the Eavesdropping Law’s potential application to the employment context, in addition to the basic rule, according to which the criminal realm is subject to narrow interpretation of the various provisions contained therein. This is especially true in light of the draconian punishment set out in the Eavesdropping Law (namely, five years’ imprisonment for violating the law). In truth, to the best of our knowledge, Israeli Courts have not yet applied the Eavesdropping Law to the issue of the various interpretations of infiltrating computers, including transferring information contained in computer files. Having said this, the matter of tracing e-mails stored in computers has yet to be addressed. Furthermore, as noted, Israeli law tends to adopt American rulings respecting issues novel to it. American law provides that tracing employees’ e-mails—certainly when we are dealing with an office e-mail system (rather than one belonging to a third party, providing this service)—does not constitute covert eavesdropping.

C. Juridical Culture

In the absence of a clear statutory or judicial position on e-mail eavesdropping in the workplace, the appropriateness of transferring American trends in that area to the Israeli context will in large part

depend on its juridical culture pertaining to labor relations. As Ran Hirshl explains in his informative article on the subject, Israel boasts a “long tradition of ‘Hebrew labor.’ ” That and collectivism are undoubtedly “central values of Zionism [given] the historical role of the Labor Movement and especially the Federation of Jewish Labor in Israel (Histadrut) in the formation of the state; the deeply collectivist roots of Jewish ethno-republicanism underlying the country’s political culture”¹³⁰ Significantly, in a 1997 decision, Israel’s Supreme Court unanimously reasserted the centrality of collectivism to Israel’s labor law regime.¹³¹ Indeed, contrary to the American purely neo-liberal conception of labor relations, Israel’s understanding thereof is staunchly communitarian,¹³² where the worker’s inalienable rights as a member of a community can prevail over contract.

Granted, Israel has in recent years been arguably shifting away somewhat from what was a thoroughly socialist approach to a more Americanized one, as the by-product of privatization.¹³³ However, to

130. Ran Hirschl, *Israel’s ‘Constitutional Revolution’: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998). It should be noted that Hirschl’s thesis, contrary to the one advanced by this present endeavor, suggests that the trend in Israel is toward Americanization or a “shift towards a neo-liberal position” (but that may have been related to Oslo boom and may yet be reversed). *See also* ISRAELI DEMOCRACY UNDER STRESS (Ehud Sprinzak & Larry Diamond eds., 1993) (“the new conception of labor relations in Israel presumes freedom of contract between employer and employee” but it’s not absolute even though we may be headed there).

131. H.C.J.7029/95 New Histadrut General Federation of Labour v. Amit Employees’ Histadrut of Maccabi, 51(2) PD 97.

132. *See* GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993) (highlighting the contrast between the United States’ predominantly individualistic political culture and Israel’s communitarian one). *See also* MICHAEL ROSENFELD, 11 CONST. COMMENTARY 432 (1994) (*reviewing* GARY J. JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993)):

The contrast between the United States’ sharply defined individualist constitutional identity and Israel’s problematic constitutional identity caught between strong communal and individualistic tendencies casts light both on Israeli and American constitutionalism. On the one hand, the contrast in question makes palpable the limits of Israeli receptivity to the importation of American constitutional norms. On the other hand, this contrast draws attention to the way in which America’s strong constitutional identity inhibits the formation of any workable synthesis between any genuine communitarian ethos and the prevailing constitutional culture. In particular, Jacobson makes a persuasive case for the proposition that all of the recent attempts to revive or rethink republicanism to stir American constitutionalism towards a more communitarian course are bound to fall short. Indeed, given America’s firmly implanted individualist constitutional identity, republicanism cannot generate sufficient appeal unless it is shorn of its anti-individualist features or complemented by strict adherence to fundamental liberal norms. In short, because of the constraints imposed by America’s constitutional identity, the most that the revival of classical republicanism could hope to achieve is to temper the prevailing individualism rather than fomenting any major shift towards communitarianism.

133. Hirschl, *supra* note 130.

say that a move from a government-centric admittedly socialist approach to a modern welfare state (similar to Canada) is tantamount to adopting an American vision of labor relations (as Hirshl suggests) is highly exaggerated. Even in its present state, Israeli political culture remains a collectivist one, with dignity as the first constitutional value, permeating the entire legal system. Accordingly, Israeli courts, despite their favorable treatment of libertarian values in recent years,¹³⁴ would be hard pressed to construe privacy so narrowly and in accordance with property-minded considerations.

VI. COMPARING APPROACHES: WHICH IS BETTER SUITED?

Having briefly summarized the state of the law in this area (or lack thereof), at this juncture I will proceed to further analyze the rationales underlying the American thinking on this issue, from which unfavorable outcomes for the worker, antithetical to more collectivist political cultures, commonly result. When contrasted with the Continental approach to regulating electronic surveillance in the employment context, which proscribes e-mail monitoring based on dignity considerations,¹³⁵ it becomes apparent that the American understanding of this same issue is predicated on a somewhat outmoded understanding of privacy *qua* property.

Van Den Haag's statement best summarizes this view:

"privacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is the exclusive right to dispose of access to one's proper (private) domain"

. . . .

. . . [W]hen a worker sells her capacity to labor, she alienates certain aspects of her person and puts them under the control of the employer. Thus in the U.S., workers in the workplace, except occasionally in restrooms and employee locker rooms, are not generally protected from surveillance on the grounds that the premises and equipment are possessions of the employer and the employee can have no legitimate expectation of intimacy or of protection from employer intrusion. The employee, in the employment-at-will setting, has implicitly consented to the

134. *Id.*

135. See Rothstein, *supra* note 10.

employer's right to monitor the employee closely "for any reason, no reason, or even reason morally wrong" or lose her job.¹³⁶

A. *Privacy Deriving from Ownership: A Conception Dead but Unburied?*

In attempting to address the seemingly odd link between privacy and property, we must turn, if only for a brief moment, to the historical roots of the right to privacy under common law. Indeed, under the English common law, the right to privacy was first recognized by virtue of its intricate link to personal property. This is evidenced by the now infamous saying "the house of every man is to him as his castle," first coined by the House of Lords in the *Semayne* case (now colloquially known as "a man's home is his castle"). This alluded to the conception that a person's right to privacy essentially derives from property rights. In view of that, the right to privacy was first recognized in relation to trespass, thus confirming what for many years was the reigning conception of privacy as rooted in ownership. This historical aperçu would serve to shed some light on the ownership rationale offered in contemporary discourse as justifying the denial of employees' e-mail privacy rights when the server and enabling software belongs to the employer.¹³⁷

This application is problematic in the workplace context, for this antiquated rationale would dictate that the employee has no right in his e-mails' content for it is his employer's property—not his own. This discounts context. The failure to separate between property and privacy in modern days is dangerous socio-economically, suggesting that privacy is only available to property owners, as was the case in days of yore.

This is precisely the view of privacy that has significantly evolved on the Continent and is now commonly recognized as an "extra-patrimonial" personality right—inalienable and distinct from property.¹³⁸ It relates to moral autonomy, such is encompassed by human dignity (the top value in most Continental constitutions):

136. *Id.* at 381–83 (citations omitted).

137. For a more in-depth analysis of the historical considerations, see Morgan, *supra* note 51.

138.

In France and Italy, for example, any employee monitoring requires notification and must be directly related to the employee's work. Furthermore, monitoring must be proportional in both nature and intensity to the importance of the employee's tasks. This approach realizes that employees have private lives that extend beyond and are bound up with the workplace. As employees spend a majority of their time at work, inevitably some non-business related activity intrudes in their day, requiring inherently private, personal communication to take place while at work. Moreover, this view recognizes that while a person

At the heart of the term “human dignity” as an operational concept, lies the assumption “that man is a free being, at liberty to develop both his body and spirit in accordance with his will”. Indeed, central to the concept of human dignity is both freedom and the sanctity of life. Thus, human dignity is based on autonomy of the will This is to say, human dignity refers to man’s ability to freely design his life and develop his personality as he wishes.¹³⁹

Indeed, civilian systems, namely Germany’s, explicitly recognize the employer’s “personhood” and corollary right to respect in law, whereas, quite tellingly, “the German word has no good counterpart in contemporary American usage.”¹⁴⁰

Accordingly, the American idea that the employer has contracted for the “use” of his employees during working hours precludes a broad dignity-based understanding of employee e-mail privacy in that country. Suggesting that the employee can exclude his employers from communications created during work hours on the employer’s premises and using his property (i.e., server) runs contrary to that contract/property reasoning.

In the United States, “When a worker sells her capacity to labor, she alienates certain aspects of the person and puts them under the control of the employer. Thus in the United States workers are rarely free to speak at liberty in the workplace, except occasionally in restrooms and employee locker rooms.”¹⁴¹

This highly individualistic nineteenth-century liberalism approach is incompatible with more collectivist welfare states, such as Canada and Israel, whose respective systems extend human right protections to vulnerable groups within the so-called “private” sphere, infused with values of dignity and privacy. That approach reflects an understanding of the power imbalance in the employment¹⁴² context. It is perceived to vitiate any truly freely given consent, but that further fails to comport with the legislative framework in these countries, which differ significantly from the American model, yet resemble each other.¹⁴³

subordinates herself to her employer while at work, this subordination extends only to the performance of work-related activities. The employee sells her services to the employer and nothing more. Her autonomy and intimate personality cannot be sold.

See Isajiw, *supra* note 52 (citing Rothstein, *supra* note 10) (footnotes omitted).

139. A Barak *Substantive Human Dignity*, Address at Hebrew University (1999).

140. Finkin, *supra* note 71, at 580.

141. Rothstein, *supra* note 10.

142. See DeBeer, *supra* note 78.

143. Thus, in Canada, dismissal must be based on just cause, in stark contrast to the “employment-at-will” rationale. In Ontario, for example, just cause or “willful misconduct,” is

Exploring the conception of the employment relationship in both Canada and Israel reveals a distinct understanding of that notion, which does not appear to comport with the American notion of “employment-at-will.” Indeed, rather than allowing absolute employer sovereignty, with a few carefully carved-out exceptions, to prevail, these welfare states subject the employment contract to a number of restrictions aimed at upholding the employee’s inalienable rights in the face of potential vulnerability, qualifying true contractual autonomy. Hence, the American idea that the employer has contracted for the “use” of his employees during working hours arguably precludes a broad dignity-based understanding of employee e-mail privacy in that country.

By contrast, Canada’s and Israel’s respective understanding of employment relationship better lends itself to the Continental/French approach, which may be described as dignity-oriented–communitarian.¹⁴⁴ Such an approach better comports with the International Labor Organization’s (ILO) Constitution, which stresses the fundamental right of employees to work “in conditions of freedom and dignity.”¹⁴⁵

In contradistinction to the American notion of “employment-at-will,” the idea of worker status on the Continent may be summarized as follows: “In the rest of his life the worker remains free . . . even during the execution of his work.” In this vein, as Lawrence Rothstein explains, France’s Lyon-Caen argued that fundamental rights and liberties, particularly those that could be considered rights of personality, cannot be abrogated by the worker’s consent or be alienated: “For his salary the worker exchanges services, which are defined by the employer, but which leave intact a core which

the required standard of cause for discharge as set out in the Employment Standards Act, R.S.O. 1990, c. E. 14.

144.

[I]n continental Europe (and countries influenced by continental labor law), the value most frequently mentioned in the electronic surveillance context is human dignity . . . [C]ontinental European countries manifest a concept of human dignity more related to notions of community and citizenship than property. French, Italian, German and Spanish do not even have a direct equivalent of the English word “privacy.” *The concept of human dignity is a social one.* French labor relations and labor law have focused on the notion of the enterprise as a community and employers and employees as citizens of that community with both rights and duties.

See Rothstein, *supra* note 10, at 383–84 (emphasis added).

145. Declaration concerning the aims and purposes of the International Labour Organization, adopted by the General Conference of the International Labour Organization, 26th Sess., Philadelphia, May 10, 1944.

corresponds, in a given epoch and a given civilization, to the idea of human liberty.”¹⁴⁶

Accordingly, the law “considers that the employee, although subordinated to the employer, always remains a free citizen whose fundamental rights do not disappear when he is at his job.”¹⁴⁷ This idea is reflected in a general principle affirmed by France’s highest court, la Cour de cassation, in *Nikon*:

that the employee is entitled, even during work hours and at his workplace, to have the intimacy of his private life respected; that this implies in particular the secrecy of correspondence; that the employer may not therefore, without violating his fundamental freedoms, examine personal emails sent and received by an employee provided as a work tool, and this applies even if the employer has forbidden the non-professional use of the computer.¹⁴⁸

This approach, as noted, would accord with one that recognizes human rights as “permeating” private law. Since the Canadian, and particularly Israeli, legal system have, to some extent, shown themselves receptive to a more fluid distinction between the private and public realm with respect to constitutional discourse, they are arguably fertile ground for a dignity-centered vision of new technologies in the workplace.¹⁴⁹

B. A Final Word

These ideological differences between the contractarian and communitarian approach to employee status and rights reflect a profound difference in their respective juridical culture. As David Millon explains that contractarians believe that individuals should be free to make their own choices about how to live with minimum legal interference. Articulated simply, communicarians believe that

by virtue of membership in a shared community, individuals owe obligations to each other that exist independently of contract

146. GERARD LYON-CAEN, *LES LIBERTES PUBLIQUES ET L'EMPLOI* 154 (1992) (a report by the dean of the French labor lawyers, cited in Rothstein, *supra* note 10, at 384–85).

147. Rothstein, *supra* note 10.

148. Cited in Vigneau, *supra* note 2, at 355.

149. See Barak, *supra* note 22, at 29. President Barak raises the “strengthened indirect application model,” whereby constitutional human rights, enshrined in Israel’s Basic Laws “permeate” the private sphere. The private realm is therefore not immune to abiding by these values, which is significant for the employment context, whose “private” character is often invoked for justifying denying basic employee rights. For the Canadian context, see Weinrib & Weinrib, *supra* note 22. See also FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW, *supra* note 22.

....

... Insisting on the market's sufficiency for the sake of individual liberty therefore ignores those civic obligations that flow from the social aspect of human existence. To communitarians, life chances should not depend entirely on accidents of birth and bargaining power: people are entitled to more out of life than what they can pay for.¹⁵⁰

In view of the latter's propensity to more adequately comport with both the Canadian and Israeli legal cultures and construction of privacy rights, it appears that these two countries should reject an "employment-at-will" approach to e-mail eavesdropping in the workplace, premised on absolutist contractarian orientations. Although both these countries, as noted, are heavily influenced by American trends (for differing reasons), their conception of employee status is significantly dissimilar from the United States. Removed from the "employment-at-will" doctrine, Canada and Israel's respectively collectivist cultures are far more zealous in their protection of workers' privacy and dignity, regarding certain dignity-based rights as inalienable, sacrificing uninhibited contractual freedom in the labor realm in exchange thereof.¹⁵¹ More importantly, perhaps, the line between "private" and "public," so strict in the United States in principle, has been blurred in these latter countries, thus allowing constitutional values to permeate.

150. See David Millon, *New Directions in Corporate Law: Communitarians, Contrarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1382–1383 (1993). Millon—referring to ideological differences (dealing with a different context—the shareholder context). See also David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 977 (1998).

151. Being mindful, for instance, of Israel's interventionism/socialist history and Canada's active and powerful unions. Respecting the Israeli case, see the 1995 *Bezek* case: "Clearly, the Israeli Government is both an active and influential force in the labour relations structure and in the negotiations respecting labour agreements. This interventionism has diverse causes. Suffice it to say that in addition to it being one of the largest employers in our economy, the State intervenes in labour relations as an active and highly influential agent, in 'package deals', in wages, taxes and price policy." H.C. 1074/93, *Attorney-General v. National Labor Court*, 49(2) P.D. 485.

