

Securing privacy at work: the importance of contextualized consent

Elin Palm

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Abstract The starting point of this article is that employees' chances of securing reasonable expectations of privacy at work must be better protected. A dependency asymmetry between employer and job-applicant implies that prospective employees are in a disadvantaged position vis à vis the employer regarding the chances of defending their reasonable interests. Since an increased usage of work related surveillance will, to a larger extent, require of job-applicants that they negotiate their privacy interests in employment contracting, it is important to consider means of strengthening employees' negotiating power. This article emphasizes the importance of contextualizing consent for contractual agreements to be ethically acceptable.

Keywords Asymmetry · Autonomy · Consent · Contract · Contractual consent · Contextualized consent · Employee · Employment · Privacy · Surveillance · Workspace privacy · Workspace surveillance

Introduction

The relationship between workers and management has traditionally been one of control. In light of increased use of surveillance technology as a means of selection and supervision in the context of work, prospective and actual employees have become more visible and traceable than previously and will, to a greater extent, have to defend their privacy interests in employment negotiations.¹ That is, during the hiring process and when negotiating with

employees for advancement within the firm, employers may be legally entitled to request personal data from job-applicants and current employees in the form of for instance drug- and psychological tests. Throughout the term of employment, the employer can subject the employee to observation, e.g., by searching desks and lockers, intercepting e-mail or phone conversations, measuring productivity by means of key-stroke accounting, and/or utilizing RFID-tags to trace movements throughout the workspace (cf. Phillips 2005, 39–41).

Following Jon Elster's (1983) discussion on preference adaptation, individuals' choices are contextually conditioned. Like the fox in the fable adjusting his preferences regarding grapes according to his chances of reaching them, individuals are likely to modify their preferences in the light of their chances of fulfilling them. In the same vein, the prevalence of surveillance in a given workplace may influence the privacy claims that job-applicants and employees raise in employment negotiations. That is, surveillance technology used by employers to select job-candidates in the hiring process and/or to monitor employees at work may lead job-applicants to downplay their privacy claims in order to secure a position. The case has also been made that individuals subject to surveillance come to exercise a form of self-censorship negative to personal autonomy (cf. Zuboff 1988). Arguably, these

E. Palm (✉)
Department of Philosophy, The Royal Institute of Technology,
Teknikringen 78 b, 100 44 Stockholm, Sweden
e-mail: elinpalm@infra.kth.se

¹ Before entering the discussion proper, a few words should be said about how surveillance is understood in this article. Activities that collect and store information about individuals and their doings in order to influence or control them are labeled surveillance (as opposed to monitoring that collects data without a specific purpose). However, this analysis is not only concerned with the use of technology developed with the specific intention to control individuals but also with technology capable of doing so i.e. surveillance capable technology.

tendencies are of significance for the quality of job-applicants/employees' consent in negotiations regarding work conditions.

In this article, the meaning and importance of the notions of voluntariness, choice and consent are discussed in relation to workspace surveillance. The key claim is that a dependency asymmetry between employer and employee has a direct impact on how freely the employee may consent to an employment contract. This suggests that a greater sensitivity to the quality of the often underprivileged job-applicant's/employee's consent is required. Arguably, the context in which privacy claims are raised and framed by current or prospective employees helps to determine whether contractual agreements regarding privacy may be considered morally justifiable or not.

Section "[Surveillance at work: diverging interests](#)" investigates the contracting parties' diverging interests in employment negotiations. The succeeding section explains the meaning and value of privacy in the context of work. Section "[An asymmetric power relation](#)" discusses a relational asymmetry between employer and actual or prospective employee. Section "[Voluntariness and contractual consent](#)" analyzes the findings that Sect. "[Necessary conditions for morally acceptable consent](#)" uses as input to identify morally acceptable terms of contracting. The last section provides a conclusion.

Surveillance at work: diverging interests

Employer and actual or prospective employee have various interests regarding the terms and conditions of employment. Employers' access to and employees' control over personal data is only one example of many diverging interests. Of concern here, however, are potentially conflicting interests relevant to workspace surveillance.

A feature characteristic of the employment relation is the employer's right to request information about the employee's person, her work capacity and work performance. Employers are likely to be interested in securing a certain amount of information about employees and controlling their activities before and in the course of employment. Before hiring new staff, employers may be interested in obtaining personal data. For example, health tests may help employers to conduct better-informed selections of new hires. In order for employers to use staff and equipment in an optimal way, prevent misuse of time or materials, or detect improper behaviour, a certain amount of information about the employees and their activities is necessary. Both direct and instrumented observation can be used to observe workers. Whereas open office landscapes facilitate direct observation, computer-based performance monitoring e.g., key-logger systems

and telephone call accounting, provide an instrument for measuring employee capacity and/or productivity. Employers may also want to subject workers to surveillance to improve security, both for employees themselves and for others. For example, surveillance cameras may serve to detect and/or stifle sexual harassments (Miller and Weckert 2000). The case could be made that the better-informed employers are, the better hiring decisions they can make, and consequently, the better they can run the firm. Once hired, employers may be interested in subjecting the workers to surveillance in order to reveal whether or not they live up to the agreements of the employment contract thereby discouraging moral hazard.

Continuous surveillance may deter employees from hiding information relevant to employers.

However, employers' interests related to the exercise of control are potentially privacy invasive and may run counter to employees' interests in privacy at work. Arguably, there are two aspects of privacy that should be recognized in the realm of work. These aspects are briefly introduced in the following.

The frequently met argument that individuals differentiate relations and control their social roles by distributing and restricting others' access to information about themselves (cf. Fried 1984; Rachels 1975; Scanlon 1975) applies in the context of work as well. The ability to control personal information in order to influence how others perceive oneself and to influence social relations is just as important in one's professional life as in one's social life. By compartmentalizing aspects of themselves employees can decide when to act strictly professionally and when, and in relation to whom, to relax that role. Importantly, informational privacy includes not only unique identifiers and obviously sensitive data such as sexual orientation or genetic makeup, but also information that can become privacy sensitive in the context of work e.g., as a result of combinations of different types of data. Aggregation of data that per se may be considered harmless may generate privacy sensitive compilations, e.g., in the form of digital personas (cf. Clarke 1994). That is, informational privacy denotes an employee's chance of controlling and restricting certain aspects about herself, both socially stigmatizing data and information that the individual herself consider privacy sensitive. The type of information concerned may range from information about the content of the worker's computer screen to genetic data. In brief, the worker needs to control her self-representation and to be able to compartmentalize certain aspects of herself. Control over personal aspects is necessary for workers to govern their persona and the various roles they hold in relation to customers, colleagues and managers.

A somewhat different aspect of privacy concerns employees' ability to withdraw from observation to

secluded areas and/or to have private use of certain domains at certain times. It concerns a worker's ability to withdraw from public gaze, to be to herself and to, at times, carry out certain work tasks in private. Employees working in a fixed work site may claim access to areas where they can relax without observation, external demands or evaluation. This may be a question of a temporary leave of the shop- or factory floor to conduct certain tasks in isolation. For mobile workers, it may concern freedom from revealing one's position at all times as can be done by means of RFID or GPS. Although few empirical studies have been conducted on the perception of surveillance among mobile workforces, some such studies indicate that mobile workers carrying RFIDs or using GPS-equipped company vehicles or cell-phones request freedom from having their location revealed and/or their movements traced and tracked at all times (Lennerfors 2004; Voukko 2007). Moreover, this aspect refers to the employee's ability to influence her physical workspace in terms of choosing and/or personalizing her work-station, and to control personal belongings kept in the workspace and work tools (cf. Brey 2005). In short, Local privacy denotes workers' expectations of restricted physical access and seclusion.²

In reality, the interests of the contracting parties are not necessarily of the either/or kind. Above, their interests were contrasted in order to focus on potential conflicts. An often-made assumption is that the employer only cares about maximizing income in the short run. In some cases managers may run their business profitably over the long run and attempt to align the interests and privacy concerns of management and workers. In some cases workers within the same firm will have different privacy regimes imposed, depending on their status, job and access to sensitive information. For this discussion, however, we are concerned with the fact that where interests do conflict, employees are typically less able to secure their interests. Section “[An asymmetric power relation](#)” will explicate how. And, due to the increased development of work related surveillance technology, current and prospective employees may have to negotiate interests that run counter to those of the employer.

The meaning and value of workspace privacy

Having discussed potentially conflicting interests, this section explicates why employees' chances of securing

reasonable expectations of privacy is of significant importance.

Regarding public surveillance, the case has been made that individuals typically anticipate surveillance and that they conform to observation with awareness. Airports are examples of areas where individuals refrain from certain behaviours due to the prevalence of surveillance technology. “We know, for example, when we're going through the security line at the airport not to make jokes about terrorists or we'll get nailed, and nobody wants to get nailed for cracking a joke” (Zuboff 1988). This type of self-censorship, however, has been said to represent a diminution of personal freedom (Zuboff 1988). Others have described individuals' reactions to surveillance in terms of adaptive behaviours, manufactured selves and anticipatory conformity (Brown 2000) indicating that when subject to observation and control, individuals fail to act in concert with their true selves. Arguments have been given to the effect that the more individuals are subject to observation, the more likely they are to take the observer's (known or presumed) view and to evaluate their actions from that perspective (Bentham 1787; Foucault 1975; Williams 1994). Such a tendency in the workspace may, over time, reduce the ability of employees to exercise self-control at work. Surveillance may promote self-discipline in the behaviour of workers and they may incorporate, and act in accordance with, the views of others' to an extent that they no longer can be said to govern themselves. How well workers can restrict others' access to their persons or digital footprints will most likely influence how much they consider themselves in charge of their affairs. Moreover, it has been emphasized that access to secluded areas is necessary for the ways in which individuals articulate themselves (Cohen 2002; Rössler 2005) and for individuals to prepare their on stage performance and to cope with public exposure (Goffman 1971; Simmel 1995). These aspects are particularly important in cases where individuals are subjected to surveillance over time as is possible in the context of work.

Arguably, the previously mentioned aspects of privacy should be protected—informational privacy and local privacy—in order to ensure workers the ability to express their autonomy i.e., the various ways in which an individual can play a governing role in her own actions. The acts of deciding what to reveal of oneself to others, compartmentalizing information, creating personal space, influencing relationships and surroundings—are all expressions of self-government. Workspace privacy concerns the extent to which employees can decide over matters that concern them, control who has access to information about them (both direct sensory access and stored data) and establish and develop different types of relations (Palm 2009). Although important for reasons like

² Traditionally, the main focus of privacy protection has been that of personal data and informational privacy is often conflated with data protection. A central aim of this analysis is to broaden the scope of the notion of privacy from the dominant and rather narrow focus on informational privacy to include local privacy as well.

dignity (Bloustein 1964; Levin 2005), democracy (cf. Lever 2005; Regan 1995), one of the more fundamental aspects of privacy is that it serves to secure personal autonomy. Both informational and local privacy are necessary for individuals to form their own standards and to act in accordance with them. Claims regarding these aspects are reasonable in that they enable workers to act autonomously (Rössler 2004; Palm 2009). Unless privacy is secured, individuals are unable to develop themselves in accordance with their own chosen life-plans (however, rough and imprecise these might be) towards a life that is personally rewarding (Rössler 2005, 44). Workers should be able to control both direct physical admission to spaces and a metaphorical access to their personhood. Informational and local privacy are important for the reason that they allow employees to form and enact their own goals and express their identity and values.

Admittedly, the two dimensions overlap but they do not collapse into one. Control over others' access to information about oneself could be exercised by seclusion but such a strategy would be untenable over time. Nevertheless, withdrawal serves an important function in enabling employees' tranquility and giving them time for self-reflection. Even though the means of protecting these two dimensions may differ, the reason for protecting them is the same.

The argument that privacy should be protected for the reason of autonomy may seem somewhat puzzling in a context where individuals typically surrender parts of their discretionary power to the employer when entering a position. The absence of individual control is typically a prerequisite for an employment relationship to come into existence. But even if workers cannot be granted full freedom to decide in all matters that concern them, there is still room for them to influence and control their person and situation. If we cannot influence how others perceive us by limiting the disclosure and dissemination of data concerning ourselves, we have lost a great measure of our ability to make meaningful decisions. The case has been made that such control is particularly important in a relationship between an individual and an organization since workers could unwittingly experience a loss of autonomy that might result from decisions made about them on the basis of e.g., collected data. Even if not directly harmed, an individual could be wronged in the process (Alpert 2003, 303).

An asymmetric power relation

In the following, the relation between employer and actual or prospective employee and the contracting parties' chances of securing their interests are discussed.

Employers are typically entitled to control their property and employee productivity. Furthermore, they are responsible for the protection of employees and third parties against harm. The extent to which these rights and responsibilities justify surveillance conduct is subject to disagreement however. On the one hand it could be argued that the employer's duty to secure employees' interests e.g., to prevent injuries at work, speaks to a right of employers to subject employees to surveillance. That is, since employers are held accountable for harms like occupational injuries and fatalities, they have an interest in access to as much information as possible about employees and the ways in which they carry out their work assignments. On the other hand, employing surveillance technology with the aim of obtaining as much information as possible about the workers is most likely to harm one of the employees' fundamental rights and interests—privacy.

On the European labour market, current and prospective employees enjoy certain protection from collectively negotiated standards and labour laws regulating the application and hiring procedure, as well as from national and international privacy codes and laws (European Industrial Relations Observatory 2003). Still, single employees or job-applicants are typically disadvantaged when it comes to advocating their interests. Although some workers may be in a strong position vis à vis the employer at times, this is not the case for workers in general (cf. Bagchi 2003, 1885). The employer is typically in a better position to secure a beneficial contract with an employee than vice versa—an asymmetric power relationship that stems from an asymmetry in numbers (there being more workers than employers) and from employees' dependence on work for income.³ And, as long as employers have better chances of securing a successful deal with a job-applicant than the other way around, employees will be underprivileged in securing their interests. Importantly, most job-applicants cannot avoid surveillance by strategically choosing a position. Although avoiding surveillance in public can be rather difficult as for instance when traveling by air and when surfing the Internet,⁴ in order to avoid surveillance at work individuals may have to abstain from working. Given the social importance of work i.e., the most important means of securing ones living and an ever so important way of self-realization, a freedom of choice argument is not as readily applicable in relation to work as it might be in other cases. And, even if modern surveillance technology enables an equal application since there are few

³ Admittedly, the reverse may hold. At times, employers find difficulties to recruit workers and consequently job-applicants' negotiating power are strengthened. For the most, however, the situation in focus holds.

⁴ Although used here, it should be noted that the distinction between a public and a private sphere is found problematic.

economical or practical obstacles preventing surveillance of all employees within a firm, e.g., low-skilled work force, temporary labour force and young people with little or no work experience are more likely to be subjected to monitoring practices than what the managerial layers are. These groups generally have fewer alternatives to choose between when applying for jobs. In consequence, employers are in a better position to acquire information about employees than vice versa. Whereas employers can choose whom to employ, prospective employees can only influence an employer's decision to hire or not—typically by providing information about themselves. In doing so, job-applicants will try to avoid disclosing negative information. The employer's disclosures on the other hand are generally intended to entice candidates whom they deem suitable. Surveillance technology reinforces the effects of the asymmetry and serves as a means for employers to expose nondisclosures.

Due to this dependency asymmetry, in employment negotiations prospective employees may trade away more of their privacy claims than what is in their reasonable interest (cf. Miller and Weckert 2000; Hoeren and Eustergerling 2005, 226–227; Phillips 2005, 60). In order to be considered a competent and cooperative worker rather than a trouble maker, the applicant may abstain from stressing privacy interests.⁵ That is, job-applicants may accept worse work conditions than they would have had the circumstances under which they negotiate been more favorable to them.

Voluntariness and contractual consent

The asymmetric dependency between employer and actual or prospective employee motivates an analysis of the meaning and significance of voluntariness choice and consent in employment negotiations. Two opposing views on voluntary action and consent represented by Robert Nozick (1974) and Jon Elster (1983) are used to indicate conditions under which contractual consent can be considered ethically justifiable.⁶

A common means of compensating for epistemological or dependency asymmetries and of securing the exercise of personal autonomy is the doctrine of informed consent. Informed consent refers to legal rules that prescribe

behaviours of physicians and other health care professionals treating patients or clients (Berg et al. 2001; Beauchamps et al. 1986), initially introduced in clinical practice and biomedical research to rectify the asymmetry between medical professional and patient with the primary aim of safeguarding voluntariness and the weaker party's autonomy (cf. The Declaration of Helsinki 1985). More recently, informed consent has been translated into data processing and become ubiquitous in data protection laws (van den Hoven 2000, 63).

Although it is seldom disputed that consent, in order to be meaningful, should be given without coercion, the definition and boundaries of coercion are often subject to disagreement. While some types of coercion are obvious, there are less recognized, implicit forms that would benefit from greater awareness.

An act is typically considered voluntary if the agent has consented to it in a free and informed manner. The granting of consent is typically taken to ensure autonomy and voluntariness in decision-making and functions, explicitly or implicitly, as a criterion of the moral acceptability of contractual agreements regulated in the health care context, research and in economic reasoning (Peter 2004). The connection between informed consent and moral legitimacy seems to be that if it can be shown that an act has been voluntarily chosen, then personal autonomy has been respected and the agent can be held responsible for her actions.⁷

However, establishing that an act was voluntarily undertaken is a rather difficult task that to a large extent depends on the underlying view of the moral agent. In order to exemplify—whereas a communitarian typically describes the individual in terms of social situatedness, a libertarian of Robert Nozick's kind would not necessarily dispute that the environment influences an individual's preferences and choices, but would typically reject this influence as irrelevant to the degree that their choices can be considered autonomous expressions. Drawing on a strictly negative concept of liberty, Nozick holds that individuals are free to pursue their plans as long as they are not physically forced to do otherwise or in an outright manner prevented from doing what they want to accomplish. Accordingly, involvement of physical force, threat or punishment circumventing individuals' freedom to act are then the only acceptable reasons for questioning a person's consent. If others have acted within their right, an individual's consent should not be called in question (Nozick 1974, 262–265). And as long as they do not violate the

⁵ It should be noted that job-applicants are more vulnerable than employees when it comes to securing their privacy interests. If surveillance technologies are implemented in the course of employment, an employee has already had the chance to establish their value to the employer and hence gained some room for negotiation.

⁶ The asymmetry affects most any terms and conditions. Of interest here, however, is the impact of workspace surveillance on employees' privacy claims.

⁷ Voluntariness is typically considered necessary for ascriptions of (moral) responsibility or legal liability and for individuals' true selves to be reflected in their decisions. If not voluntarily conducted, then something else (or someone else) is performing the act in question.

rights of others, individuals should be at liberty to make their own decisions, even irrational ones (Nozick 1974, 28–33).

Voluntariness and consent as conceived by Nozick may seem extreme. Nevertheless, this view has been rather influential in labour relations and deserve further attention. Ian Maitland for instance, argues that prevailing employment contracts should be considered voluntary since the contracting parties are not only free to take or leave the rules provided by the law, but also nothing prevents them from not to contract with a corporation, at all, or from limiting their business to other types of business organization (Maitland 2001, 132). This clear-cut view on moral agency and voluntariness is also expressed in the North American Employment at Will (EAW) tradition in which the terms of employment, including privacy provisions, are negotiated in the labour market, the employer–employee relation is considered perfectly symmetric since no employer is forced to offer a position on unacceptable conditions and no job-applicant is forced to accept a position (Phillips 2005, 59–60). In effect, if a job-applicant is not literally forced to accept a non-beneficial employment, no intervention could be justified, even though, in the view of others, the contract would imply a distasteful loss of privacy.⁸ While current or prospective employees may make mistakes and may consent to, for instance, bad working conditions, preventing them from entering certain contracts would be a greater wrong against them than what acceptance of less fortunate agreements would be.

Undue pressure is, following the reasoning above, limited to explicit force and outright manipulation. A lack of reasonable alternatives would not amount to coercion of a prospective employee who agrees to work conditions that she does not find fully acceptable.

In stark contrast to the libertarian reasoning previously presented, consider the premise that an individual's preferences and choices largely depend on whether and to what extent she considers her alternatives attainable. Jon Elster offers the fable of the fox who, when facing grapes beyond his reach, convinces himself that the grapes would be sour anyhow. The fable serves to illustrate that the set of alternatives open to us shapes our preferences, e.g., we tend to downgrade the desirability of options that seem unreachable. The fox does not want the grapes *because* he cannot reach them. Although a subconscious process, our preferences are to a large extent formed by what we consider feasible. Elster does not say that individuals have other and more authentic preferences than those expressed by their consent. The point is rather that we ought to

consider, not only *what* preferences individuals have with regard to privacy but *why* they have them.

Moreover Elster discusses preference adaptation in relation to liberty, emphasizing that having a large number of options does not guarantee liberty. The *quality* of the alternatives is of importance as well. That is, an individual is not free to act just because there are a great many alternatives open to her—she must also value and (autonomously) want these options in order to be free in a meaningful sense. In addition to freedom from outright force, a certain motivation to act is important when discussing voluntariness.

Considering the subconscious shaping of preferences, even if no explicit force has been exercised, it is implausible to assume that an individual's choice necessarily reflects her best interest, given the limited freedom of choice most people face with regard to work. Job-applicants are generally in no position to abstain from work altogether and only a few can pick and choose among a large number of attractive positions, refraining from entering any employment contract at all until their preferences are fully satisfied. In reality, applicants may downplay their preference for privacy at work, seeing that they have a much better chance of getting a job if they do. For these reasons, the privacy claims that applicants manage to raise should not be considered synonymous with their privacy interests.

Necessary conditions for morally acceptable consent

Drawing on Elster's reasoning on preference adaptation, this section suggests a contextualization of contractual consent to better accommodate employees underprivileged position in employment negotiations.

Although the libertarian perspective provides more clear-cut rules for discerning what is due to undue pressure than Elster's perspective does, the former does not provide us with a fair description of the choice that the moral agents have. Even if it may be shown that an individual has consented in absence of physical coercion, the impact of implicit forms of coercion should not be underestimated. The purported conclusion in Nozick's reasoning is that, by the mere fact of consenting the contracting parties have *voluntarily* consented to the prevailing employment contracts, and hence that the contractual agreement is morally legitimate. This conclusion is based on an overly simplistic view on decision-making and on a confusion of the choice that individuals have made with consent, where consent is taken to warrant voluntariness (and consequently moral legitimacy). The fact that contracting parties had the ability to choose between a set of alternatives does not in itself exclude a certain element of coercion. For that reason, *de*

⁸ Following Nozick, to question the validity of the job-candidate's consent would be equivalent to underestimating her capacity as a rational decision-maker.

facto choices should not automatically be considered acts of consent (Peter 2004, 3). Even if it is difficult to identify a choice that would reveal a person's true preference, considering all *de facto* choices as autonomous acts and as expressions of the individual's preference is an over-simplification. An individual's consent should reasonably not be considered in isolation, detached from the situation in which it is given, from information about alternative options and from attachments that may influence her choice etc. An unconditioned freedom of contracting, starting here and now, would likely benefit only those initially best off, i.e., the contracting parties who are already in an advantageous position when negotiating their interests. Certainly, Nozick states that individual acts are acceptable as long as they have no adverse effects on others, neither now nor in previous steps (cf. the principle of justice in transfer in Nozick 1974). Still, little is done to ascertain the correctness of previous agreements. Maitland assumes that prevailing labour market conditions are fair and hence, that contractual agreements are just, as long as no coercion is involved.⁹ Unless libertarians of Nozick's and Maitland's mold can show that the contracting situation is initially fair there seem to be more convincing reasons to treat employees' privacy claims in employment negotiations as potential sour grapes, i.e., given up because they seem unattainable.

Importantly, both uncertainty and limited alternatives and options with undesirable consequences are factors that influence the extent to which current and prospective employees may be considered free to express meaningful consent. If the conditions under which the negotiations take place are unclear to a prospective employee, she cannot make an informed decision and alternatives that are few and/or unreasonable may give rise to preference adaptation.

The problem with *uncertainty* can be illustrated by a scenario where a potential employer requests a privacy intrusive pre-employment test. Whether the job-applicant can consent in an informed manner, to undergo the test or not depends on whether the test is openly motivated and, preferably, part of a standard procedure like a firm's recruiting program. Absent a policy clearly demonstrating the reason behind and weight ascribed to the required test, the applicant may accept it for safety's measure rather than forego the job. Hence, in a situation involving access to personal data, the parameters should be public and known to everyone affected thereby. Individuals must have the opportunity to debate potentially privacy-invasive

measures and these should be justified in the court of rational debate (Tavani 2007, 16).

The importance of the *quality* of options can be illustrated with a situation where the current or prospective employee is sufficiently informed about and aware of the available options but where reasonable alternatives appear to be unattainable. If the most reasonable alternatives available carry unacceptable implications, then acceptance can hardly be considered an expression of consent - at least not in any meaningful sense. A job-applicant would not, in any substantial way, enjoy more freedom if she faced the choice between 100 jobs in sweatshops than if she had only one decent job offer. Although consent is necessary, it is insufficient to rule out undue pressure. The extent to which the job-applicant autonomously wills, and could have reason to will, the different options matter. Elster's reasoning on preference adaptation illustrates the need to consider the context in which individuals express consent in contractual negotiations. It indicates that privacy may become a sour grape in employment negotiations where employees typically are in an underprivileged position *vis à vis* the employer.

The notion of contextualized consent drawing on Elster's discussion on preference adaptation is introduced to highlight the need for fair terms of contracting. Importantly, the principle of informed consent recognizes potential asymmetries between the contracting parties and serves to rectify such imbalance. It also stresses a certain level and quality of information for consent to be valid. Elster, however, draws our attention to how actual conditions influence preference formations and consequently what individuals consent to. In light of this reasoning, conditions central to fair employment contracting will be sketched.

As a small step towards ethically acceptable employment negotiations, elements central to contractualist theory are used to draft criteria for fair conditions of contracting.

Firstly, the Rawlsian idea of fair background conditions will serve as a precondition for fair contracting. For consent to be substantial, the moral agent must recognize the framework in which she expresses consent and must accept the constraints that have shaped the set of alternatives that she faces (Rawls 1971, 83–90, 2001, 6 pp). The agent must enjoy the chance to utilize and express her civic rights and liberties within a given socio-political system. And, she must be certain that men and women of all nationalities and ethnicities are granted the same rights to apply for job-positions and to fair contractual procedures. In brief, this would mean equal and fair terms for all individuals irrespective generation, social position etc. Secondly, this requirement will be strengthened by an obligation specified by Thomas Scanlon (1998). Once acceptable background conditions are in place, Scanlon argues, it is necessary that

⁹ However, such a non-contextual view on consent does not guarantee voluntariness and hence does not ensure the moral acceptability of contractual agreements.

individuals take each other's reasonable interests into consideration and justify acts that (in a foreseeable way) affect the other with reasons acceptable to all rational and reasonable persons (Scanlon 1998, 191 pp). Underlying both theories is a view of the moral agent as having the capacity to be both rational and reasonable, and hence responsible to respect humanity both in herself and in others. These requirements prevent the more privileged party from utilizing other's weakness. Rather, the better off party is responsible for taking the weaker party's best interest into consideration, whether explicitly stated or not.

Certainly, it could be questioned whether any hiring situation ever could pass Scanlon's test. The point here, however, is that the burden of proof falls on the shoulders of those implementing or utilizing privacy invasive control measures (whether technologically assisted or not). That is, the stronger party must provide reasons for these activities—reasons acceptable to rational and reasonable counterparts.

Conclusions

The primary aim of this discussion has been to highlight the moral implications of the dependency asymmetry between employers and current or prospective employee. The case has been made that surveillance conduct in the context of work reinforces the asymmetry and that actual and prospective employees are in a weak position to secure reasonable claims like privacy in employment negotiations. A failure to protect privacy is problematic for the reason that we thereby fail to secure the more fundamental value of autonomy. In order to strengthen employees' chances of securing reasonable claims like privacy, conditions under which the parties' contractual consent can be considered ethically justifiable are suggested. The principle of informed consent has been used as input for how to understand voluntariness and morally acceptable consent. Then, by contrasting the views of Robert Nozick and Jon Elster on voluntariness and choice, the idea of contextualizing consent has been developed. Contextualized consent, drawing on Jon Elster's discussion on preference adaptation, is introduced to show the importance of the context in which contractual consent is expressed and the need for fair conditions of employment contracting. By introducing elements central to contractualist theory, the contractual procedure is provided a normative foundation. For contractual agreements to be morally justified, background justice must be in place. And, in addition to this structural precondition, at an interpersonal level, the contracting parties are held mutually responsible to justify acts affecting others with reasons valid for all rational and reasonable individuals. Hence, the employer must publicly explain why employees should be subjected to potentially

privacy- intrusive conditions, showing why the nature of a certain position requires the particular data that the proposed test can provide. The parties have a reasonable duty to disclose relevant information to each other and to respect their relative capacities of securing interests. Fair terms of contracting can, with time, foster reliable preferences, and consequently, reliable expressions of consent.

Most importantly, it is required that the contracting parties respect each other's best interest whether explicitly claimed or not. And although necessary to establish that acts and agreements are voluntarily conducted, an employee's consent is per se insufficient to guarantee fairness. She must also, in the capacity of a rational and reasonable person, have reason to will the contractual conditions. In this way, the importance of the context in which consent is stated and the social shaping of individuals' preferences are taken seriously. *In sum*, the contractual procedure must be fair and the content should be reasonable in the sense that one party does not waive certain rights and liberties or consent to conditions harming their reasonable interests.

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