Ethical Issues Surrounding the Asymmetric Nature of Workplace Monitoring

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Abstract. Public discussion of the privacy concerns of individuals has focused on protecting them from criminal attacks, government spying and the manipulation of consumers by businesses. While these are important areas of concern, there is also a significant ethical and societal risk from privacy intrusion from other sources, such as employers. Many employers gather extensive and highly personal information on their staff. The availability of this information is often asymmetric, with higher status employees having correspondingly greater access to the personal data of others. This paper examines some of the risks inherent in this asymmetry and discusses to what extent existing legal and social measures are sufficient to protect individuals, organisations and society.

Keywords: Ethics, privacy, workplace monitoring.

1 Introduction

This paper argues for the need to reconsider the ethics of common workplace monitoring practices due to their effects on employees, employers, the economy and society as a whole. Such an examination is particularly important due to the increasing deployment of technology that enables the monitoring of ever greater aspects of employee's lives [Moore(2012)]. The main body of the paper is divided into five sections. The first provides a brief summary of evidence that workplace monitoring is asymmetric. This is followed by an examination of disparities between workplace privacy and privacy in other contexts, such as in police investigations or between individuals. The third section then outlines a number of studies that show how monitoring can lead to psychological and physical harm suggesting that there is an ethical requirement for legislative protection. The paper also examines a common criticism of any restriction on how workplaces function, that of the need to optimise businesses for profitability in a competitive economy [Bork(1991)]. The analysis is also used to evaluate the argument that within many countries, one is free to leave an employer, and thus the potential harm caused by workplace practices has been freely balanced with the benefits the employer provides and thus is inherently ethical. The basis for these anti-legislative arguments is examined, focusing on monitoring effectiveness at increasing productivity and addressing risk. The paper then highlights the additional risks that monitoring bring, specifically in how monitoring can be used to undermine

the investigation of unethical and illegal business practices. Failing to protect against such practices can cause wide reaching economic and social damage. This is highlighted by recent business scandals such as the incidents of phone hacking by journalists in the UK [BBC(2012)] and the misleading sale of sub-prime mortgage investments in the US [Khuzami(2010)]. The paper then examines to what extent unions and professional associations can address workplace privacy issues. The paper concludes by summarising six key points that privacy legislation should include to ensure that the ethical issues outlined in this paper are addressed.

2   Asymmetry

Asymmetries occur from the beginning of employment, where employees provide a detailed CV of their working history and any relevant employment factors. Although there are legal restrictions on what personal information can be requested, it is not uncommon for lifestyle information, such as marital status, to be shared. Most employers keep a record of employee performance along with any information that is deemed relevant, such as days off sick or holidays. Most periods of absence will require some form of permission or justification, particularly for long medical absences. Such highly personal information can then form part of an individual's employment record. This record is typically only visible to more senior staff.

One area of particular concern is the asymmetric working practices of Human Resource (HR) departments [Renwick(2003)]. Kochan [Kochan(2004)] argues that the role of such departments has shifted from personnel administration to a strategic position focused directly on fulfilling the goals of senior management. The concern with such an emphasis is that that it can lead to HR departments attempting to manipulate employment law in favour of employers and against the best interests of employees.

A survey by Vorvorenau et al. [Vorvorenau(2000)] notes that according to several studies in the 1980's, surveillance is most prevalent in clerical fields and low level professional jobs. The authors also suggest that as the technological tools have developed, more low-level jobs are being widely monitored.

3   Legislation and Cultural Norms

Many countries recognise the potential problem of privacy invasion by employers. However, between different countries there is significant variation on the restrictions imposed on employer's use of monitoring technology. A detailed comparison of differences between US and EU privacy legislation has been produced by Mitrou et al. [Mitrou(2006)] This analysis indicates the relatively weak protection provided by US law relative to that in the EU. Although it should be noted that some European governments, such as the UK, have senior political figures who are actively opposed to such policies and have proposed changes to bring their employment legislation closer to that of US practices [Grice(2012)]. Three significant areas of legislation can be identified:

- Non-Work Use of Technology Within the Workplace, such as email, web browsing, printing
- Monitoring and Tracking Employees While They Work, such as security cameras, computer loggers, GPS trackers
- Out of Work Hours Monitoring, such as Facebook, Twitter

3.1   Non-work Use of Technology within the Workplace

Monitoring of employee's personal communication within work has been possible prior to the widespread use of email and web access, with many countries having no protection against employers opening employee postal mail. However such action is difficult to perform secretly. The overt nature of this monitoring may go some way to explaining why it is relatively less common than the monitoring of employee's email [Introna(2000)]. Outside of organisations such monitoring is culturally unacceptable and would be objectionable and illegal for individuals except under the most intimate of personal relationships. However, the violation of such norms by authorities is not uncommon. In the case of police authorities, the legitimacy of such actions is often limited by the need for additional evidence that an individual is likely to be engaged in some form of illegitimate activity [UN(2009)]. There may also be strong limits on how information gathered under such circumstances can be used and for the need for timely communication that an individual has been monitored. In contrast, for some countries, employers may only be required to provide an argument that there is a business need for such monitoring [Mitrou(2006)].

3.2   Monitoring and Tracking Employees While They Work

Over the past forty years, businesses have been steadily increasing the degree to which their organisational activity is recorded and controlled by computers. This technology has the potential to increase automation and help prioritise productive work and thus increase the amount of profitable output per employee. While such technology can be used to monitor the physical mechanisms and processes of a business, it can also be applied to employees themselves, treating them as components within a business machine that can be optimised for profit. Many cultures have expectations that all human beings be treated as individuals and that their feelings and personal preferences be considered in any interaction. To treat them otherwise is to treat them as an object and thus to treat them without respect. One concern with increasing technological monitoring and tracking, particularly when it is performed secretly, is that it encourages dehumanisation of employees. Treating them as statistics that are controlled by rules and computerised processes [Lammers(2009)] rather than individuals that can be inspired by leaders.

3.3   Out of Work Hours Monitoring

There is also concern that monitoring may reduce the degree to which individuals can have a free private life outside of work. Without prior evidence of wrongdoing, some

businesses [AMA(2007)] would appear to be secretly tracking and recording employees' personal life in a way that would be unacceptable for individuals, or many government authorities. Similar issues apply to monitoring of employee's behaviour outside of work. Some steps have been taken to provide legal protection against this intrusion [Yahoo(2012)] and recently a number of US states have prevented employers from forcing potential employees to reveal their passwords to social media systems [KnowledgeCenter(2012)]. Monitoring of an employee's personal life in this way runs the risk of employers imposing lifestyle restrictions that may have no bearing on an employee's effectiveness and may be merely unjustified prejudice. Many countries have introduced specific laws to protect against the problem of prejudice, focusing on bias against those with a particular sex, race, religion or sexual orientation. However, these can be seen as simply examples of a more general psychological tendency towards irrational poor treatment of those with identifiable appearance, opinions and behaviour [Tajfel(1982)]. It could be argued that the potential productivity and security gains of out of work-hours communications and social media monitoring do not outweigh the likelihood of prejudiced treatment by employers.

   With the growth and popularity of the internet. all individuals have the potential to communicate and influence millions of people. This represents a potential problem for employers as businesses need to maintain corporate secrets and a good reputation with their customers. However, such concerns can lead to a highly autocratic working environments where any criticism of an organisation is seen as being potentially harmful, particularly if such criticism is made public. The rise of social media has intensified this issue. Many users of such services experience them as an extension of existing social comunication with friends and family. Traditionally, during most social interactions, employees would suffer no consequences for speaking openly about their feelings concerning their life, including their workplace, as such communication would remain private. However, when comments are made using social media systems, employers can actively monitor such communications and use them as the basis for disciplinary action including dismissal. Such disciplinary action can occur even if comments are, in reality, only viewed by a small group of friends and family. This can be seen as a breaking of the cultural norms of informal social communication that individuals have come to expect.

4   Physical Harm

Although the breaking of cultural norms of privacy by employers would appear unethical, it could be argued that provided individuals can maintain a free private life outside of the workplace there may not be a need for significant employment privacy legislation. Some have suggested [Bork(1991)] that it is, itself, a cultural norm that employment is not a private activity. However, beyond the ethics of cultural expectations there is also evidence that loss of privacy in and of itself can be harmful, both for the individual and the authority engaged in the monitoring. For example, the

dramatic effects of the Stanford Prison Experiment [Zimbardo(2007)] have revealed the ease with which dehumanisation can lead to abusive treatment by otherwise psychologically healthy individuals. This is particularly the case when a controlled group is viewed as a potential threat. The effect of focusing on employees in this way and evaluating their actions remotely and secretly is likely to increase the chances of abusive behaviour.

Thankfully, most workplaces are limited in the degree to which those in power can physically harm individuals. However, psychological harm in the form of workplace bullying remains a major concern, with evidence that it can be sufficiently stressful to create post traumatic stress disorder [Matthiesen(2004)].

In addition, recent research has demonstrated that asymmetries of power cause moral hypocrisy. The study by Lammers et al. [Lammers(2010)] shows that as individuals feel more powerful they are motivated to judge others harshly while simultaneously being motivated to engage in practices they themselves would describe as immoral. Crucially, immoral actions by the powerful are significantly more likely when such actions can be performed in secret. Secretive remote monitoring technology is likely to exacerbate this effect.

Likewise, if monitoring leads to a reduction in an employee's sense of control over the work that they do, they may suffer physical harm. An extensive study of the effects of working practices and health [Marmot(1991)] has shown that such a lack of control within work is one of the strongest factors influencing relative life expectancy, particularly due to the increased risk of heart disease. The potentially alienating effect of having one's work monitored and judged remotely, as opposed to having a close and supportive relationship with a manager, has also been found to increase the risk of mortality from cardiovascular disease [Marmot(1991)]. The magnitude of such an effect suggests that, in addition to privacy legislation, the wider issue of employee control within work is an area that may require governmental protection.

5   Choice and Rights

One argument against legal restrictions on workplace practices is that employees are freely choosing their employment. Thus, any imposed working conditions are inherently ethical as the employee has balanced the costs of such employment with its benefits. To make this choice explicit, some legal jurisdictions require that employees clearly consent to monitoring activity. However, if there is no organisational support for individuals working without monitoring, there is a question as to whether such consent is real; particularly as the consent may form part of an employment contract and be made when an employee is being interviewed. If the alternative to consent is not to be employed, then it would appear that consent is being coerced and thus not providing any real ethical protection.

Even if monitoring consent is not a real choice within a workplace it could be argued that employees are free to chose their employers and thus have implicitly consented, provided they are informed. In cultures where monitoring is widespread, it

could even be argued that consent is implicit, as employees have no cultural expectations of workplace privacy. However, most countries see limits to this argument; indeed one of the main roles of ethics is to identify rights that a citizen cannot lose. While there may be some moral absolutist arguments for such rights, they can also be interpreted as a counter balance to some of the harmful workplace practices that may naturally emerge from asymmetries of power and its effects on human psychology.

6   Economic Growth

While there are ethical arguments for minimising harm within the workplace, a number of commentators have suggested that even harmful workplace practices may still be legitimate. Arguments [Hines(2001)] have been made that despite some working environments being highly undesirable, the trickle-down benefits of being a part of a successful company and a growing national economy are such that even oppressed employees are ultimately gaining. However, the actual resulting benefits to employees may well be marginal if there is limited redistribution of wealth; for example, as a result of widespread tax avoidance [Henry(2012)]. For countries with little or no unemployment benefit, the alternative to undesirable working may well be physical harm from deprivation. However, there is concern that the gain to employers from exploitative working environments may be so great that they may actively undermine alternative, more appealing, sources of employment, or self provision, in order to increase the size of their workforce and their relative power over it [Perelman(2000)].

Workplace monitoring practices may also be unnecessarily negative, with unpleasant working environments conveying little commercial benefit but emerging as a result of unjustified fears [Tversky(1973)] or an intrinsic desire by senior staff for greater control over those they manage [Lammers(2010)]. Indeed studies of the effects of surveillance and monitoring on employees have indicated that there can be significant negative effects on morale and productivity if such practices are perceived to be unfair or unreasonable [Vorvoreanu(2000)]. Some workplace privacy legislation contains terms such as 'unjustified', 'excessive' or 'inappropriate', intended to limit these purely negative practices. However, such terms are clearly open to interpretation, so there is a question as to the real degree of protection that they can provide; particularly given the significant asymmetry of resources in pursuing legal claims.

6.1   Motivation and Inequality

Some have suggested that an economy is most productive as a result of having the carrot of relative status, power and wealth and the stick of disrespect, loss of control and destitution. While it is plausible to see how this could be motivating to the small number that succeed in such an environment, psychological studies indicate that there are limits to how effective it is at motivating those at the bottom [Vorvoreanu(2000)]. The most significant example of such a failure is in the treatment of the unemployed. The disrespect shown to the unemployed [Starin(2002)] is likely to trigger depression [Montgomery(1999)] which is highly limiting to motivation [Simon(2001)].

6.2   Asymmetry as a Factor in Unethical Business Practice

With increased monitoring capability it is possible that employers will attempt to identify and stop any perceived threats to an organisation even those that are legitimate. A recent case in America involving the Federal Drugs Administration (FDA) has highlighted this issue [NYTimes(2012/07/15)]. Five scientists working for the FDA were concerned about mismanagement and safety abuses in the review of medical equipment. Following a number of public leaks concerning these issues, FDA officials constructed a list of 'collaborators' that they felt were working together to put out 'defamatory' information about the agency. The affected individuals included congressional officials, academics and journalists. The list was produced as a result of extensive monitoring of all of the employee's emails and documents. The monitoring included confidential letters to congressional offices and oversight committees, drafts of legal filings and grievances. A governmental review of the scientists' medical claims found they had identified "a substantial and specific danger to public safety" [NYTimes(2012/07/15)]. A further press article suggested that one of the scientist's actions was sufficiently provocative that the agency's managers felt they had to resort to these extreme tactics [NYTimes(2012/07/31)]. Unfortunately, due to the asymmetric nature of such monitoring it is not possible to obtain an equivalently detailed account of the actions and motivations of the managers. This highlights how easily monitoring can change from preventative to combative, especially where litigation is involved. It is of particular concern due to the generally high rates of retaliation against whistle blowing employees [Reuters(2012)]. This suggests that the very technology that is being advocated as an aid to economic growth may in fact be contributing to the concealment of unethical or illegal business practices. Such behaviour may result in significant social and economic loses and thus outweigh any productivity gains such technology could provide.

7   Unions and Professional Associations

While, historically, employee groups, such as unions, have played an important role in ensuring protection for their members, their influence has steadily fallen in a number of countries, particularly the UK [Wright(2011)] and USA [Mayer(2004)]. In addition, some unions have adopted a less confrontational approach to collective bargaining, which, in some cases, has resulted in compromises on working conditions to minimise redundancies [Wright(2011)].

Professional associations are also limited in the degree to which they will protect members against unethical workplace practices. For example, while the Association of Computing Machinery has a detailed ethical code [ACM(1992)] which, if followed, could address many of the issues identified within this paper, it also includes terms suggesting that those who follow such principles will not be helped by the organisation. This is evident in the line: "If one decides to violate a law or rule because it is viewed as unethical, or for any other reason, one must fully accept responsibility

for one's actions and for the consequences." If one of the consequences of ethical action is unjust treatment by employers it seems reasonable that those imposing such ethical standards should be partially responsible for supporting those that follow them. However, the practical costs of assisting with litigation and the political consequences of such support may prevent any practical action on these ethical issues.

As a result, for many employees it falls to governmental legislation to provide ethical protection. Within Europe at least, there have been a number of new employment laws introduced. These have emerged largely as a result of policies developed to unify employment law across the European Union. However, there has been some political opposition to such laws and even the suggestion that some countries, particularly the UK, may split from the Union, in part, because of objections to such legislation [Cameron(2013)].

8   Conclusions

This paper has identified a number of problems inherent in asymmetric workplace monitoring. These problems can be seen as a practical justification for the need for privacy legislation. These problems could be addressed by ensuring legislation protects the following five privacy needs:

1. The need for monitoring to be obvious as secretive monitoring is a moral hazard that may lead to abuse.
2. The need to restrict monitoring to explicitly commercial factors to minimise the effects of prejudice.
3. The need to treat employees with respect, ensuring that their preferences are acknowledged by providing them with real choices in how their work is performed.
4. The need to minimise asymmetries of control and judgment to ensure that monitoring directly addresses risks and commercial needs, rather than being an intrinsically motivated indulgence of the powerful.
5. The need to ensure that employee monitoring does not lead to a diminished sense of control over employee's work as a loss of control can cause physical harm.

Leading to perhaps the most critical ethical consideration:

- The need to protect open, public discussion of workplace practices by employees to facilitate improvements in working conditions and to ensure they are legal and moral.

A common theme throughout this paper has been the identification of ways in which restrictions on employers are often less than those imposed on business to consumer relationships, individuals or governments. This raises the question as to why such a significant part of the lives of most people is not being held to the same standard. It is hoped that the arguments presented in this paper go some way to highlighting this issue.

References

[ACM(1992)] ACM Code of Ethics and Professional Conduct (1992),
`http://www.acm.org/about/code-of-ethics`

[AMA(2007)] Electronic monitoring surveillance survey (2007),
`http://press.amanet.org/press-releases/177/`
`2007-electronic-monitoring-surveillance-survey/`

[BBC(2012)] Phone Hacking Scandal (2012), `http://www.bbc.co.uk/news/`
`uk-14045952`

[Bork(1991)] Bork, R.H.: The Tempting of America: The Political Seduction of the Law. Sinclair-Stevenson (1991)

[Cameron(2013)] Cameron, D.: UK and the EU (2013),
`http://www.bbc.co.uk/news/uk-politics-21160684`

[Glassdoor] Glassdoor and inside look at jobs and companies,
`http://www.glassdoor.com/`

[Grice(2012)] Grice, A.: Bosses told they can't 'fire at will' (2012),
`http://www.independent.co.uk/news/uk/politics/bosses-told-`
`they-cant-fire-at-will-theyll-have-to-pay-off-staff-instead-`
`7836789.html`

[Henry(2012)] Henry, J.S.: The Price of Offshore Revisited. Tax Justice Network (2012)

[Hines(2001)] Hines Jr., J.R., Hoynes, H.W., Krueger, A.B.: Another look at whether a rising tide lifts all boats. Working Paper 8412, National Bureau of Economic Research (2001)

[Introna(2000)] Introna, L.: Workplace surveillance, privacy and distributive justice. Computers and Society, 33–39 (2000)

[Kanagaretnam(2008)] Kanagaretnam, K., Lobo, G.J., Mohammad, E.: Determinants and consequences of large CEO pay. Int. Jou. Accounting & Finance, 61–82 (2008)

[Khuzami(2010)] Khuzami, R.S., Reisner, L.L., Lench, K.R.: Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (2010),
`http://www.sec.gov/news/press/2010/2010-123.htm`

[KnowledgeCenter(2012)] Maryland employers cannot ask for facebook passwords,
`http://knowledgecenter.csg.org/kc/content/maryland-employers-`
`cannot-ask-facebook-passwords`

[Kochan(2004)] Kochan, T.A.: Restoring trust in the Human Resource Management profession. Asia Pacific Journal of Human Resources–13 (2004)

[Lammers(2010)] Lammers, J., Stapel, D.A., Galinsky, A.D.: Power increases hypocrisy moralizing in reasoning, immorality in behavior. Psych. Science 21, 737–744 (2010)

[Lammers(2009)] Lammers, J., Stapel, D.A.: How power influences moral thinking. Personality & Social Psychology 1, 61–82 (2009)

[Marmot(1991)] Marmot, M.G., Smith, G.D., Stansfeld, S., Patel, C., North, F., Head, J., White, I., Brunner, E., Feeney, A.: Health inequalities among British civil servants: the Whitehall II study. Lancet 337(8754), 1387–1393 (1991)

[Matthiesen(2004)] Matthiesen, S.B., Einarsen, S.: Psychiatric distress and symptoms of PTSD among victims of bullying at work. British Journal of Guidance & Counseling 32(3), 335–356 (2004)

[Mayer(2004)] Mayer, G.: Union Membership Trends in the United States. Congressional Research Service (2004)

[Mitrou(2006)] Mitrou, L., Karyda, M.: Employees' privacy vs. employers' security: Can they be balanced? Telematics and Informatics 23(3), 164–178 (2006)

[Montgomery(1999)] Montgomery, S.M., Cook, D.G., Bartley, M.J., Wadsworth, M.E.: Unemployment pre-dates symptoms of depression and anxiety resulting in medical consultation in young men. International Journal of Epidemiology 28(1), 95–100 (1999)

[Moore(2012)] Moore, S.: Monitoring Employee Behavior in Digital Environments is Rising (2012), http://www.gartner.com/it/page.jsp?id=2028215

[NYTimes(2012/07/15)] FDA surveillance of scientists spreads to outside critics (2012), http://www.nytimes.com/2012/07/15/us/fda-surveillance-of-scientists-spread-to-outside-critics.html

[NYTimes(2012/07/31)] Dr Robert Smith caustic crusader in FDA spying scandal, http://www.nytimes.com/2012/07/31/us/dr-robert-smith-caustic-crusader-in-fda-spying-scandal.html

[Perelman(2000)] Perelman, M.: The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation. Duke University Press (2000)

[Renwick(2003)] Renwick, D.: HR managers. guardians of employee wellbeing? Personnel Review, 341–359 (2003)

[Reuters(2012)] Retaliation rate against us company whistleblowers climbs (2012), http://blogs.reuters.com/financial-regulatory-forum/2012/09/06/retaliation-rate-against-u-s-company-whistleblowers-climbs-senior-staff-affected-survey-finds/

[Simon(2001)] Simon, G.E., Barber, C., Birnbaum, H.G., Frank, R.G., Greenberg, P.E., Rose, R.M., Wang, P.S., Kessler, R.C.: Depression and work productivity: the comparative costs of treatment versus nontreatment. Occup. Environ. Med. 43, 2–9 (2001)

[Starrin(2002)] Starrin, B.: Unemployment, poverty and shame: Exploring the field (2002), http://www.humiliationstudies.org/documents/StarrinUnemploymentPovertyShame.pdf

[Tajfel(1982)] Tajfel, H.: Social Identity and Intergroup Relations. CUP (1982)

[Tversky(1973)] Tversky, A., Kahneman, D.: Availability: A heuristic for judging frequency and probability. Cognitive Psychology 5(2), 207–232 (1973)

[UN(2009)] United Nations Office On Drugs and Crime. Current practices in electronic surveillance in the investigation of serious and organized crime (2009)

[Vorvoreanu(2000)] Vorvoreanu, M., Botan, C.H.: Examining electronic surveillance in the workplace: A review of theoretical perspectives and research findings. In: Int. Comm. Assoc. Conf. (2000)

[Wright(2011)] Wright, C.F.: What role for trade unions in future workplace relations? ACAS (2011)

[Yahoo(2012)] Job seekers getting asked for facebook passwords, http://finance.yahoo.com/news/job-seekers-getting-asked-facebook-080920368.html

[Zimbardo(2007)] Zimbardo, P.: The Lucifer Effect: Understanding How Good People Turn Evil. Random House (2007)