Ethical Problems in Work and Working Environment Contexts

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This licentiate thesis consists of the following introduction and:


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Abstract


This thesis identifies and systematizes two categories of practical problems that stem from work and working environment contexts: workplace privacy and occupational health risks. The focus of the discussion is on ethical justification. Do we have reason to accept a certain level of (potential) harm to employees by virtue of the fact that they are employees, and if so, under what circumstances? The thesis consists of a brief introduction and three essays.

In Essay I, it is argued that employees have a prima facie right to privacy, but that this right can be overridden by competing moral principles that follow, explicitly or implicitly, from the contract of employment. Three types of justification are specified: those that refer to the employer’s interests, those that refer to the interests of the employee, and those that refer to the interests of third parties.

A set of ethical criteria is developed and used in the subsequent essay to determine the moral status of infringement of workplace privacy.

In Essay II, these criteria are applied to three broad categories of intrusive workplace practices: (1) monitoring and surveillance, (2) genetic testing, and (3) drug testing. Scenarios are used to show that such practical ethical problems can be handled systematically using proposed guidelines. It is also shown that some practices are dubious and at least some of them can be replaced by less intrusive means of ensuring the desired outcome, for instance efficiency or safety in a workplace.

Essay III deals with the fact that health and safety standards for employees are less protective than those that apply to the public. Emphasis is put on the distinction between exposure and risk, and this distinction is claimed to be a key factor in the relevance of arguments in favour of such double standards. The analysis of ‘double standards’ for public and occupational exposure to risk aims to show that a justification of such standards is closely linked to two separate types of issues, namely empirical and normative issues. It is claimed that this kind of differentiation seems to be supported neither by a reasonable conception of the contract of employment nor by any obvious ethical principle that is applicable to workplaces or work situations in general.

Key words: Contract of employment, double standards, drug testing, ethics, ethical justification, exposure, genetic testing, health and safety standards, privacy, surveillance, risks, work, work environment

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Essay I:
Privacy at Work – Ethical Criteria

Essay II:
Applying Ethical Criteria for Privacy
Forthcoming in The Ethics of Workplace Privacy, P.I.E. - Peter Lang.

Essay III
Occupational and Non-occupational Health Risks – Can Double Standards be Justified?
Submitted manuscript.
1 Introduction

Various circumstances have brought the issues of privacy and risks in the employment context to the forefront of the legal and policy agendas in several countries. Foremost among these circumstances is probably technological development. New technologies have in many cases alleviated the pressures of work and improved working conditions, but at the same time, they have caused new problems for workers. How problems connected to the working environment should be handled and, it is hoped, solved, depends on their character. Some problems are technological, some are legal, and some are ethical. Ethical problems pose questions to be answered from within the field of moral philosophy.

In this thesis, I explore two general problems that are central to work and the working environment: privacy in the workplace and occupational health risks. The proposed solution to the first problem consists of a set of ethical criteria, which can be used to determine whether a particular infringement of an employee’s privacy is morally justified. To tackle the second problem, I introduce and explore a distinction between exposures and risks, which is used for comparing occupational health risks with non-occupational health risks. The upshot of that analysis is a negative conclusion: double standards of risk, it is argued, cannot be ethically justified.

The focus is on ethical justification. Does the specific nature of work and the working environment give us reasons to accept certain infringements of workers’ privacy or certain levels of risk for the workforce, and if so, how?

1.1 The aim, scope, and plan of the thesis

The aim of this thesis is to identify and systematize ethical problems that stem from the workplace and the working environment. My intention is to achieve a more distinct picture than what has, to my knowledge, been offered so far, of what employers and employees have to deal with from an ethical point of view. This will demand a discussion of the underpinnings of the different normative statements made in this context. For example, what is the basis for the statement that an employee’s privacy is being intruded on in a morally wrong way? What is the basis for employees being protected by health and
safety standards that allow higher exposure to risk than those that apply to the
general public? Are there morally relevant features in the working situation
that justify a higher exposure to risk than would be justified in other
situations?

This thesis has two related purposes in relation to workplace privacy. First, it
aims to provide a reasonable account of ‘privacy in the workplace’ and to
develop a set of criteria for intrusions into an employee’s privacy to be
justified. Second, it aims to show that these criteria are both reasonable and
practicable and that they can be used to determine the moral status of
infringements into workplace privacy.

With regard to occupational health risk, my aim is to develop the argument
that different standards for occupational and non-occupational risk cannot be
justified. I shall do this by exploring the distinction between exposures and
risks.

After this introductory chapter, this thesis consists of three essays numbered
I to III. The contents of the essays are summarized in section 1.7.

1.2 The method of ethics
There are many disputes about the nature of moral philosophy, but most of us
would agree that there is a large body of beliefs and convictions to the effect
that there are certain acts that ought to be done and certain things that ought
to be brought into existence. It would be a mistake to assume that all of these
convictions are true or even that they are all clear. A proposed task for moral
philosophy, which I profess myself an adherent of, is to compare the various
convictions and beliefs, and to investigate which best survive such
examination, and which must be rejected either because they are ill-grounded
or because they contradict other convictions that are better grounded. I am a
disciple of the so-called analytic tradition, which seeks to clear up ambiguities
that loiter in expressions of moral convictions – a task that is vital in such an
exercise. This task is an essential part of what I believe is the method of ethics.
1.3 Applied ethics and normative theory

In this thesis, this method is applied to practical ethical problems that stem from a special area, namely work and working environment contexts. The concept ‘applied ethics’ is often referred to as the application of moral philosophy to practical problems. The theoretical field of this thesis is consequently applied ethics. Since I am concerned with practical problems relating to work and the working environment, one may also label this particular field as ‘working environment ethics’, in the same fashion as we designate the ethics of the medical area bioethics.

Irrespective of the area of application, however, some sort of normative theory is necessary for such an exercise. To understand my use of normative theories in this thesis, it is illuminating to consider two different views concerning the rightness and wrongness of acts and how we ought to act: a utilitarian view and a right-ethicist\(^1\) view.

According to the utilitarian view, as developed by Jeremy Bentham (1789) and other well-known proponents such as John Stuart Mill (1871), George Edward Moore (1912), Richard Hare (1981), and Peter Singer (1979), an action, A, is right if, and only if, A produces at least as much utility as every alternative action open to the agent. It we transfer this idea to the context of the working environment, the utilitarian seems to prescribe that the working environment should be devised in such a way as to satisfy the utilitarian criterion of rightness; the overall welfare of all sentient beings should be maximized. To relate this view to the working environment, it might be useful to distinguish two versions of the utilitarian view, a global version and a local one. The former considers the welfare of every sentient being (during the whole history of sentient beings). According to the latter, the relevant welfare is only that of the people within the institution of workplaces.\(^2\) An obvious problem with this suggestion is of course the difficulty of defining the people within the institution of workplaces. However, the important point is that the latter view is consequentialist. The consequences are what matter. It is the consequences of adopting certain policies or applying certain practices in the

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\(^1\) The term “right-ethicist” has several connotations. In this thesis, it is primarily associated with the work of W. D. Ross. See Ross (1930) and Ross (1939).

\(^2\) I am aware that this version may not be called utilitarian at all.
context of the working environment that should be evaluated. The answer to, for example, the question whether a certain intrusion into an employee’s privacy is morally right or wrong is to be found from the consequences of the action.

Despite some initial plausibility, these versions of utilitarianism are problematic. First, just what exactly is ‘utility’? The sum total of ‘the good things of life’ is reduced by classical hedonists to the mental qualities of pleasure and pain. But, even if it were possible to quantify diverse sorts of happiness and suffering, we would have to take a further step according to the utility principle, and make a public measure of an intersubjective quantity of utility. Second, in either version it is impossible to know whether a certain act, a certain policy, and so forth leads to better consequences than those of all the alternatives. These problems, as well as several others, reduce the practical value of a strict utilitarian theory.

Nevertheless, despite these shortcomings, we may make rough evaluations of outcomes, and at least in some cases we may have strong reasons to believe that a certain act or a certain kind of acts will lead to bad consequences. We may, for example, have good grounds for believing that an act resulting in severe intrusions into a worker’s privacy is such an act. And if we had good reasons to presuppose that the good consequences far outweighed the bad ones, and the same end was reachable by means of an alternative, less intrusive action, most of us would say that the latter action was the morally preferable one.

Thus, the core concept of the utilitarian view is the moral importance of the consequences of action. Arguing with reference to consequences seems very reasonable. And it appears both possible and reasonable to do so without a commitment to any strict utilitarian theory. Furthermore, this sort of argumentation, in terms of moral values, also seems to be compatible with a more right-ethicist approach, one that is based on the notion of prima facie rights and duties. Since that notion is frequently used in this thesis, it is appropriate to explore its meaning. In doing that, I also intend to explain how that normative idea can also be used for moral reasoning in terms of consequences.
The notion of *prima facie* rights and duties is primarily associated with the work of W. D. Ross. According to Ross’s influential view, such a duty, with its corresponding right, is a moral obligation, which is binding unless there is a stronger, overriding obligation. An actual duty, in contrast, is a remaining duty, all things considered. This means that in complex cases where more than one moral principle applies, there will be only one duty proper. A *prima facie* duty, according to Ross, is a conditional duty. It is to be understood:

[A]s a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g. the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant. Whether an act is a duty proper or actual duty depends on all the morally significant kinds it is an instance of.

It is important to notice that ‘*prima facie*’ does not, according to Ross, refer to a certain kind of duty, but something that is related to duty and right. Anyhow, the core of the idea is that every *prima facie* duty and right has moral significance, but that *prima facie* duties and rights can be overridden by other such duties and rights.

In a similar manner, we can hold that we universally have a duty not to infringe the privacy of others; every action that intrudes into the privacy of a person has a tendency to be morally wrong. On the other hand, moral principles do not, according to this view, determine what is an actual duty. Which principle prevails or overrides others will depend on how the relevant properties are instantiated in a particular situation. In other words, when *prima facie* duties conflict, one ought to do what satisfies all of them best.

A right-ethicist view like this is certainly not compatible with the utilitarian criterion of rightness. However, in normative reasoning concerning practical ethical problems, it can be fruitful to use some essential ideas from both these views. My contention is that essential ideas from both these normative

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3 See Ross (1930) and Ross (1939).
4 Ross (1930), Chapter 2.
5 Ibid.
positions can appear as important arguments in applied ethics. Therefore, I find essential elements of both of the views useful in this essay.

Thus in this thesis we shall use a consequentialist way of reasoning – in terms of Ross’s idea of *prima facie* duties. And maybe Ross himself gave support to this. He conceded, in contrast to his general critique of utilitarianism, that public support for *prima facie* principles can be justified on utilitarian grounds.7

### 1.4 Two levels of analysis

The terms ‘rights’ and ‘duties’ are ambiguous in a certain systematic way, which has great relevance to the discussion in this thesis. These terms may be taken in a *factual* or a *normative* sense.8 If we, for instance, say that a worker has a right to something, or that he or she has a certain duty, the statement may be either factual or normative. What we mean if the statement is factual is that the worker in question has a right or a duty according to a certain system, for example the legal system of which he or she is a citizen, and other commitments made through a contract of employment, membership of a union, and so on. Suppose that we, for example, interpret a statement concerning a certain worker’s right to get 25 days’ vacation per year in a factual sense. If we, after consulting the relevant laws and regulations, conclude that he or she has that right, then the statement concerning the right in question states a fact about the legal system. Furthermore, the employer has also certain rights and duties according to such systems. And it is a fact that employers in several countries have certain rights to subject their employees to, for instance, surveillance, tests, certain levels of chemical exposure, and so on. Statements that articulate such rights are also statements about a certain legal system. Whether we think that such a system allows or forbids too much, employers and employees have in a factual meaning rights and duties in terms of which their practices are regulated. The parties have these rights and duties according to a legal system.

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7 See Ross (1930), Chapter 2.

8 This division into levels of analysis is greatly influenced by Lars Bergström’s elaboration in “The Concept of Ownership”. See Bergström (2000).
On the other hand, on a normative interpretation, the statement that an employee has the right not to be observed in certain situations for example does not describe a matter of fact (about current legislation and workplace regulations). It says something about the way things ought to be. This differentiation is associated with the idea that there is a logical gap between ‘is’ and ‘ought’, often referred to as ‘Hume’s Law’. In other words, from premises about how the world is, nothing can be derived about how the world ought to be. If this is true, it means that normative rights and duties are logically independent of factual right and duties, for example factual rights and duties expressed in labour law.

Of course, this does not mean that normative reasoning about practical matters is independent of empirical facts. On the contrary, knowledge of relevant empirical facts is certainly important and even necessary for any successful efforts to practise normative ethics. Keeping the levels of analysis apart is, however, essential. The factual ‘right-questions’ about current legal systems in the main have to be answered by legal theorists and social scientists. The normative ‘right-questions’ are a different kind of question, concerning what would follow from a normatively justifiable contract of employment or what would follow from justifiable legislation concerning workers and workplaces. The latter is different from the former in that it is independent of established systems of rules and legal decisions.

In this thesis, I am concerned with the normative issues, and I think it is important to distinguish these two directions of interpretation, which may also be regarded as two levels of analysis.

1.5 The contract of employment as a basis for ethical justification

An examination of ethical problems in working environment contexts is connected to the issue of the moral status of the employer-employee relationship, as set forth in a contract of employment. For example, it has generally been claimed that workplaces are a separate case that needs special treatment in an ethical analysis. If that is true, what is special about work and

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9 The idea that nothing about the way things ought to be can be derived from a set of factual premises is mainly associated with the work of David Hume. See Hume (1740) pp. 469-470.
workplaces? What are the special features that are morally relevant in such contexts? Arguably, the employer-employee relationship is the determining factor. The fact that this relation is often regulated in existing employment contracts does not, however, tell us much about its moral status. Even in relation to current employment contracts we need to ask what is in such a contract, since the relation between the employer and the employee in most cases has many aspects that are not covered by the employment contract. Still, if we manage to explicate the contents, another normative question remains: what ought a contract of employment contain? These questions are scarcely elaborated in this thesis. I take rather for granted that these questions can be answered and that a legitimate contract of employment will constitute the basis of what is morally relevant in the employer-employee relationship.

In surveys of the body of practical ethical problems in working environment contexts, two main groups of problems have emerged. First, issues relating to privacy and, second, issues relating to risks. For both categories, it seems to be true that causing certain (possible) harms to an employee may be legitimate, but intrusions into privacy and exposures to risk need a justification in order to be legitimate. The view presented here is that such a justification must be based on what the employer can require of the employee according to the contract of employment. For the purposes of this thesis, it is essential to focus on the part of their relationship that makes one of them employed by the other, namely the contract of employment.

The complexity of modern business organisations makes it possible for an employee to stand in different relations to various persons and groups within the company in which he or she is employed. Nevertheless, in legal contexts the company is treated as a single entity, and this simplification can also be used in a moral analysis. Thus, I shall assume in this thesis that the employee has an employer that can be treated as a single entity when considering the moral rights and claims that emanate from the contract of employment.

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10 See, for instance, Boatright (2003); Fredrick (1999); Desjardin & Mc Call (1990); Hoffman, Fredrick, & Schwartz (2001); Shaw & Barry (2001).
1.6 Short background to ‘the ethics of working environment’

The concept of the ‘working environment’ is of recent origin, even though issues that relate to that concept have probably been discussed as long as employers and employees have existed. Worker protection legislation can in Swedish jurisdiction be dated back to 1739. That law established that children should have reached the age of twelve or ten, depending on the nature of the job, in order to be allowed to work in a factory. One hundred and sixty years later, the first laws concerning adult workers were established. The motives for the laws were similar in one aspect: they were intended to prevent risks and protect workers’ health and safety. Another explicit motive for the former law was to assure those who would become workers a certain level of education and religious awareness. Two motives can be said to be in the core of the working environment concept: health and safety and personal development. One can also see a shift in vocabulary concerning worker and workplace issues in the development of law, from a focus on preventing occupational hazards through the protection of workers to a much wider working environment concept that involves both physiological and psychological comfort and well-being. Our current understanding of the concept involves societal aspects, such as systems of wages, career opportunities, personnel administration, and so on, as well as medical ones. Thus, the modern concept of the ‘working environment’ has several connotations, and includes almost everything that surrounds an individual in everyday work.

The conceptual change described can be very important for various reasons. The statement that a certain issue is a working environment issue seems to imply for example some kind of responsibility on behalf of the employer. This state of facts, together with technological developments in this area, which also influence the need for governmental regulations and legislation, has created several new practical problems. The problems discussed in the current literature with regard to workplace issues of an ethical character can be

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11 The short historical background presented here rests to a great extent on Hansson (1999) and is limited to a Swedish context.

12 I am indebted to Lars Lindblom for this point, as well as for other parts of the description of the concept of the working environment.
subsumed under two broad headings: first, discussions concerning work hazards and risks, such as allowable limits of harmful exposure at work; and second, discussions concerning matters of privacy and integrity, such as the application of screening practices, surveillance, drug testing, and so on. These issues have been discussed by scholars and practitioners from a variety of fields, but so far, at least to my knowledge, no attempt has been made to provide a unified theory for the ethics of the working environment.

1.7 Preview of Essays I to III

In Essay I (written together with Sven Ove Hansson), we argue that employees have a prima facie right to privacy, but that this right can be overridden by competing moral principles that follow, explicitly or implicitly, from the contract of employment. The focus is on how and when infringements of a worker’s privacy can be morally justified. Three types of justification are specified, namely those that relate to the employer’s interests, those that relate to the interests of the employee, and those that relate to the interests of third parties.

A set of ethical criteria is developed and summarized into guidelines for determining the moral status of infringements of workplace privacy.

In Essay II, these criteria are applied to three classes of workplace practices that involve intrusions of privacy: (1) monitoring and surveillance – for example the monitoring of employees’ use of telephones, electronic mail, computer terminals and Internet use; (2) genetic testing to examine workers for possible genetic predispositions, which might aid disease prevention; and (3) drug testing. The legitimacy of each practice is considered.

Using various scenarios that involve these themes, I try to show that it is possible to handle such practical ethical problems systematically using the proposed guidelines. In Essay II, I also intend to show how certain practices are dubious when assessed according to the criteria offered and how at least some of them could be replaced with less intrusive means of ensuring efficiency or safety in the workplace.

Essay III deals with fact that the health and safety standards that apply to employees are less protective than those that apply to the public. Emphasis is put on the distinction between exposure and risk, and this distinction is
claimed to be a key factor in the relevance of arguments in favour of such
double standards. The analysis of ‘double standards’ for public and
occupational exposure to risk aims to show that a justification of such
standards is closely linked to two separate types of issues, namely empirical
and normative issues. Whether we have reasons for accepting a double
standard for protection depends on how it is to be understood in relation to
the distinction between exposures and risks, and emphasis should be placed
on the need for normative support for double standards concerning risks. The
relation between work-related risks and occupation is discussed and analyzed,
and it is argued that our assessments in relation to double standards of risk are
linked to certain activities rather than to certain occupations. In the concluding
section of Essay III, it is claimed that a justification of this kind of
differentiation appears to be supported neither by a reasonable conception of
the contract of employment nor by any obvious ethical principle that is
applicable to workplaces or work situations in general.
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