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Introduction

Consent has always played a central role in conceptions of privacy. “The root idea . . . of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. Within this area, the individual person is . . . boss, sovereign, owner.”1 The “right to be let alone”2 has always been limited by the desire of most of us not to be left entirely alone. Thus, Robert Post observes, “the norms policed by [privacy law] are different” from non-waivable norms such as those prohibiting murder; privacy norms “mark the boundaries that distinguish respect from intimacy, and their very ability to serve this function depends upon their capacity for being enforced or waived in appropriate circumstances.”3

In light of the central role of consent in defining the right to privacy, it is puzzling to encounter a stubborn contrary resolution of the consent issue in cases in which written agreements purport to authorize privacy-invading practices, such as employee drug testing or the search of a premises for property held by a consumer in default on a loan.4 Courts that eschew reliance on consent in resolving privacy challenges to behavior expressly authorized by such written agreements resolve those challenges instead on the basis of substantive determinations of the acceptability of the challenged practices in light of various privacy and nonprivacy interests at stake. Thus, for instance, in Seta v. Reading Rock, Inc.,5 an employee had entered into a written drug-testing agreement, which was individually signed by the employee and exclusively covered the topic of drug testing (rather than covering many different employment-related topics,

1 JOEL FEINBERG, OFFENSE TO OTHERS 24 (1985).
4 See cases discussed infra Part I.C.
with the attendant risk that the employee was unaware of the agreement’s contents). However, when the employee submitted a urine sample for testing three months later and then brought a privacy challenge to his discharge after he tested positive, the court adjudicating his challenge did not invoke the parties’ written agreement at all.\(^6\) Instead it referred to the employer’s business and safety reasons for drug testing and, on that basis, upheld the testing.\(^7\) Additional privacy cases fitting the same pattern of failing to weigh written agreements, involving both drug testing and other behavior, such as searches of consumers’ homes for defaulted-upon property, are described in detail in Part I.C below. Sometimes the courts in these cases uphold the behavior covered by the written agreement (as in *Seta*) and other times (as in the consumer search cases just mentioned) they strike it down, but in neither circumstance does the written agreement factor in the court’s reasoning.\(^8\)

What can account for the insistent denial of the role of written agreements in these cases? This denial calls out for attention in light of the backdrop presumption of consent’s dispositive role in determining privacy rights.\(^9\) William Prosser, the originator of the influential four-part common law test for invasion of privacy, stated unequivocally that “chief among the available defenses is that of the plaintiff’s consent to the [privacy] invasion, which will bar his recovery.”\(^10\) While privacy law commentators have very frequently questioned the role of consent on *normative* grounds,\(^11\) the *descriptive* picture of agreement sometimes providing, but

\(6\) *Id.* at 1067.

\(7\) *Id.*

\(8\) See *infra* notes 60-120 and accompanying text.

\(9\) See *supra* notes 1-3 and accompanying text.


other times denying, immunity for privacy-invading behavior has gone unaddressed and remains in a puzzlingly muddled state.\textsuperscript{12} This Article both surfaces an underlying order in the treatment of agreement in the common law privacy cases and shows how this descriptive theory of privacy and agreement helps to sharpen normative analysis of the role privacy law affords to such agreement.\textsuperscript{13}

The key to understanding consent’s limits in cases such as \textit{Seta}, I will be suggesting, lies in the \textit{durational} aspect of the relationships in which the courts eschew reliance on consent. What is special and distinctive about the type of agreement at issue in these cases is that it is given in the context of an ongoing relationship in which the promulgation of the agreement and the occurrence of the behavior covered by the agreement are often widely separated in time, and in which there is typically uncertainty about if and when the privacy-invading behavior will transpire. By contrast, in the simpler situation of a spot transaction, in which an express agreement is coincident or almost coincident in time with the privacy-invading behavior, courts

\begin{itemize}
  \item \textsuperscript{12}See, \textit{e.g.}, Barnes, \textit{supra} note 11, at 1566-93 (noting and discussing various cases denying a role for consent under common law privacy, but also asserting that “[a]s with all torts, … it appears that consent is a defense in most cases of invasion of privacy” and that “[m]ost jurisdictions … hold that consent is either a defense or, rather that the absence of consent is itself an element of the tort”).
  \item \textsuperscript{13}For discussion of this Article’s focus on the common law right to privacy, see \textit{infra} Part I.A.
\end{itemize}
unhesitatingly rely on consent in resolving privacy claims\textsuperscript{14} (a descriptive feature of privacy law that this Article neither supports nor criticizes on normative grounds).\textsuperscript{15}

In what follows I seek not only to impose some clarity on what otherwise appears to be a vexing jumble of common law privacy decisions sometimes accepting but other times rejecting the role of agreement, but also to use this descriptive insight to clarify and contribute to normative debates over the role of agreement in privacy law. The full scope of the normatively appropriate limits on agreement to privacy-invading behavior is difficult to settle definitely – and this Article does not attempt such a task. However, the sharp differentiation surfaced below between cases involving in-advance agreement under uncertainty and cases involving other types of agreement is a place where increased normative clarity \textit{is} possible.

As described in Part II.A below, the differentiation in the case law turns out to map well onto what behavioral economics teaches about the nature of human rationality. A large body of evidence suggests the prospect of systematic errors in human decision making when there is uncertainty about future circumstances at the time a choice is made, even if the choice is one that could be reliably made once the circumstances in question have in fact arisen. As discussed in Part II.A, people frequently exhibit optimism bias, underestimating the probability that an undesirable event will happen to them down the road. In the employee drug testing context discussed above, for instance, employees may give their express agreement in advance to testing that might (or might not) occur at some unspecified point in the future. In this sort of context, the discussion in Part II.A suggests that individuals will predictably tend to underestimate the

\textsuperscript{14} See cases cited \textit{infra} Part I.B.

\textsuperscript{15} For discussion of the competing normative considerations in cases of such contemporaneous agreement, see \textit{infra} Part III.E.
chances of their actually being drug tested relative to the true probability of being tested.\textsuperscript{16}

Furthermore, as discussed in Part II.B, a strong focus at any given point of time on present over future consequences may lead individuals to slight the importance of harms that arise outside of the present – though, as I will discuss, the relationship of such “presentist” thinking to “rationality” is more complex than in the case of optimism bias. Part III sets forth and analyzes the mapping of the behavioral economic analysis in Part II onto the doctrinal pattern described in Part I.

The common law analysis and normative account offered here can provide useful guideposts if – consistent with a suggestive recent opinion by Justice Kennedy – the Supreme Court decides to take a new look at the Fourth Amendment’s “reasonable expectation of privacy” test.\textsuperscript{17} In last Term’s majority opinion in \textit{City of Ontario v. Quon},\textsuperscript{18} Justice Kennedy declined to reach the nature of the plaintiff-employees’ “reasonable expectation of privacy” in the face of an announced workplace electronic monitoring policy: “The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer…. It is preferable to dispose of this case on narrower grounds.”\textsuperscript{19} While the \textit{Quon} Court thus assumed, \textit{arguendo}, that under \textit{O’Conner v. Ortega}\textsuperscript{20} the employees had a “reasonable expectation of privacy” in their text messages despite the announced monitoring policy – and accordingly the Court resolved the case against them on grounds of the legitimacy of employer’s actions – lower courts are engaged in an ongoing struggle to adjudicate claims of employees under the “reasonable expectation of privacy” test, as


\textsuperscript{17} “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…..” U.S. CONST. amend. IV.

\textsuperscript{18} 130 S. Ct. 2619 (2010).

\textsuperscript{19} \textit{Id.} at 2629.

\textsuperscript{20} 480 U.S. 709 (1987) (plurality opinion).
Justice Scalia’s separate opinion in *Quon* (and a front-page story in the *New York Times* several months later) emphasized.  

For courts seeking to assess constitutional privacy claims in the face of announced employer policies, the pattern in the common law cases, and the “implicit behavioral rationality” this pattern reveals when viewed in light of behavioral economics, can provide both predictability and insight for Fourth Amendment analysis.

I. Consent in the Common Law of Privacy

Both descriptively and normatively, this Article places central emphasis on the common law of privacy, although, as just noted, the analysis also has potential implications for Fourth Amendment law in government workplaces and similar settings. Part I.A briefly summarizes the diverse strands of American privacy law, common law and otherwise. Part I.B documents the way in which contemporaneous express agreement is a widely recognized defense to common law claims of invasion of privacy. Part I.C shows that, by contrast, in relational contexts such as an employer-employee relationship or a non-spot consumer credit transaction, courts have not relied on in-advance express agreements in resolving common law privacy challenges. Thus, the analysis surfaces an underlying order in what otherwise appears to be a disconcerting jumble of common law privacy cases alternating between accepting and denying consent’s role.

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21 *Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring in the judgment) (“[L]ower courts will likely read the Court’s … expatiation on how the O’Connor plurality's approach would apply here (if it applied) as a heavy-handed hint about how they should proceed. Litigants will do likewise, … bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized.”); Adam Liptak, *Justices Are Long on Words but Short on Guidance*, *N.Y. Times*, Nov. 17, 2010, at A1 (“In June, the Supreme Court issued a decision on the privacy rights of a police officer whose … text messages had been reviewed by his employer. … A month later, … the federal appeals court in Atlanta complained that the privacy decision featured ‘a marked lack of clarity,’ and was almost aggressively unhelpful to judges and lawyers.”).

A. Common Law Privacy (and Analogous Constitutional and Statutory Law)

Samuel Warren and Louis Brandeis famously formulated the common law “right of privacy” as a general principle rooted in existing common law protection of property, contract, and other rights. The Restatement (Second) of Torts further delineated this privacy right by setting forth a four-part common law test for unlawful invasion of privacy; among other things such an invasion occurs whenever a person intrudes in an offensive manner upon the seclusion of another by eavesdropping or otherwise inappropriately invading one’s private space or affairs. This Article focuses on such intrusions upon seclusion in analyzing common law privacy.

Privacy protection arises not only from common law but also from a wide set of additional legal sources, including federal and state constitutional law and federal, state and local statutory law. Federal constitutional privacy arises under both the Fourth Amendment’s

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23 Warren & Brandeis, supra note 2.
24 See RESTATEMENT (SECOND) OF TORTS §§ 652A, 652B; Borse v. Pierce Goods Shop, Inc., 963 F2d 611, 621 (3d Cir. 1992) (referring to eavesdropping and other intrusions covered by Restatement (Second) of Torts § 652B). Section 652A of the Restatement (Second) of Torts (“General Principle”) provides in relevant part as follows:

The right of privacy is invaded by
(a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
(b) appropriation of the other’s name or likeness, as stated in § 652C; or
(c) unreasonable publicity given to the other’s private life, as stated in § 652D; or
(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

Section 652B (“Intrusion Upon Seclusion”) provides as follows:
One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

25 The prongs of the common law right to privacy other than the intrusion upon seclusion prong all concern publication or dissemination of material related to the plaintiff rather than the invasion of the defendant into a private sphere of the plaintiff’s. Cf. Shulman v. Group W. Productions, 955 P.2d 469, 489 (Cal. 1998) (“Of the four privacy torts identified by Prosser, the tort of intrusion into private places … is perhaps the one that best captures the common understanding of an “invasion of privacy”.

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prohibition on unreasonable searches and seizures, at issue in City of Ontario v. Quon,\textsuperscript{26} and the Due Process Clause’s protection of information privacy\textsuperscript{27} and of individuals’ fundamental decision rights.\textsuperscript{28} Meanwhile, topics covered under federal, state and local privacy statutes include electronic surveillance, drug and polygraph testing, data privacy, and many other issues.\textsuperscript{29}

This Article gives primary emphasis to common law privacy rights rather than privacy rights under constitutional and statutory law because the forces that shape and inform the common law are undoubtedly very different from those that shape and inform those other sources of law, and because the analysis offered here fits most naturally in the common law context. In the constitutional law context special structural and institutional features are in play. Most importantly, constitutional privacy law under both the Fourth Amendment and the Due Process Clause is centrally concerned with regulating the relationship between the individual and the state.\textsuperscript{30} Meanwhile, with respect to statutory law, a particular interest group may have exerted significant control over a statute,\textsuperscript{31} or a legislature may be acting in direct response to a

\begin{itemize}
  \item \textsuperscript{26} 130 S.Ct. 2619 (2010).
  \item \textsuperscript{27} See Whalen v. Roe, 429 U.S. 589 (1977); NASA v. Nelson, 512 F.3d 1134 (9th Cir. 2008), cert. granted, 130 S.Ct. 1755 (U.S. Mar. 8, 2010) (No. 09-530).
  \item \textsuperscript{30} Thus, for instance, in Jed Rubenfeld’s account, constitutional privacy law under the Due Process Clause is explained and justified by a principle of anti-totalitarianism, which obviously would not translate in any close way to the non-government contexts primarily regulated by common law privacy. See Rubenfeld, supra note 28, at 804-05 (“The right to privacy, as I have sought to elucidate it, became a right only at the moment when we constituted ourselves as a democratic polity. … The right of privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.”).
  \item \textsuperscript{31} See generally, e.g., George J. Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).
\end{itemize}
specific highly publicized incident in which citizens are strongly interested.32 Because the mechanisms that shape statutory law are often quite distinct from those that shape the common law, it is valuable to treat common law privacy rights separately from statutory privacy law even though both reach beyond the relationship between the individual and the state. Some of the forces that bear upon common law privacy rights are detailed in Part III.A below.

The suggestion is of course not that common law, constitutional, and statutory privacy rights do not exert important sway on one another; various commentators have theorized such connections.33 The point is that common law privacy – rooted in Warren and Brandeis’s seminal article34 and developed in the courts with the aid of common law privacy scholars such as Dean Prosser – is enough of a distinct phenomenon, with its own doctrinal structure and force, to warrant analysis in its own right.

A corollary of the legal focus of the analysis of common law privacy below is that the difficult theoretical question of the appropriate general conception of “privacy” need not be resolved in this work. A vast philosophical and legal literature has grappled with this question without reaching any sort of resolution; “perhaps the most striking thing about the right to privacy,” philosopher Judith Jarvis Thomson has observed, “is that nobody seems to have any very clear idea what it is.”35 The central task of the present work is to identify, and to present a normative argument in favor of, the common law’s sharply different treatment of different forms of express agreement to submit to actions that come within the ambit of the common law’s

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34 Warren & Brandeis, supra note 2.
intrusion upon seclusion branch, and none of the claims below is closely related to longstanding debates over the appropriate conceptual definition of “privacy.”

A final prefatory comment is important. The “right of privacy” of Warren and Brandeis, and of the analysis here, is quite distinct from the “privacy” right to make certain types of personhood-shaping or fundamental decisions. Privacy in the former context “limits the ability of others to gain, disseminate, or use information about oneself.” By contrast, the latter sort of privacy right under the Due Process Clause “is not informational but substantive – immunizing certain conduct – such as using contraceptives, marrying someone of a different color, or aborting a pregnancy – from … proscription or penalty.” Only the former sort of privacy right is embraced by the analysis below.

B. The Traditional Conception of Consent’s Role in Common Law Privacy

As noted in the Introduction, consent is commonly said to be a broad defense to common law privacy claims. Dean Prosser was categorical in asserting that “the plaintiff’s consent to the [privacy] invasion will bar his recovery as in the case of any other tort.” Indeed, the Restatement (Second) of Torts provides: “One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”

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36 For a critical review of the main theories of privacy, see Daniel Solove, Conceptualizing Privacy, 90 CALIF. L. REV. 1087 (2005).
38 Rubenfeld, supra note 28, at 740.
39 Id.
40 Prosser, supra note 10, at 419. The fiftieth anniversary of Prosser’s seminal article was celebrated earlier this year at a California Law Review symposium, see http://www.californialawreview.org/information/prosser-info, though none of the symposium articles that are publicly available analyze the topic of consent.
41 RESTATEMENT (SECOND) OF TORTS § 892A.
A particularly striking instance of the general principle of consent in common law privacy may be found in the context of express contemporaneous agreement to employee polygraph testing. While employee polygraph testing is now broadly prohibited under a federal statute, the Employee Polygraph Protection Act (EPPA), prior to the federal statute’s enactment several courts confronted common law intrusion upon seclusion challenges to polygraph testing in the presence of an express agreement to submit to such testing. The table in Appendix A lists these cases, organized by whether the agreement to submit to polygraph testing was contemporaneous or in-advance.

A leading pre-EPPA case illustrates how employees’ intrusion upon seclusion challenges to polygraph testing were quickly rejected on grounds of consent when employees had expressly agreed to testing at the time it occurred. In *Stewart v. Pantry Inc.*, the plaintiffs had undergone frequent polygraph testing and had signed written consent forms on each day that a polygraph test was performed. On the strength of the forms, the court ruled against the plaintiffs’ common law intrusion upon seclusion challenge to a polygraph test they had failed. “Consent … is a complete defense”, reasoned the court, to the plaintiffs’ claim of intrusion upon seclusion, and “no facts exist from which it can be inferred that the plaintiffs did not voluntarily and knowingly consent.”

The role of consent is similarly apparent in cases, listed in the upper portion of the table in Appendix B, involving employees’ contemporaneous express agreement to urine testing for drugs. Courts routinely rely on express agreement given at the time urinalysis is performed in dismissing drug testing challenges – thus marking a sharp contrast with the treatment of the in-

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44 *Id.* at 1368.
advance written agreement in the *Seta* case from the Introduction as well as the other in-advance cases discussed in Part I.C below.

*Jennings v. Minco Technology Labs, Inc.*\(^{45}\) is a well-known example of the role of contemporaneous express agreement in the drug testing context. The *Jennings* court concluded that urinalysis conducted upon the employee’s contemporaneous written agreement could not constitute an intrusion upon seclusion because the employee had consented to the testing:

In the present case, the particular privacy interest at stake is Jennings’s right to be free of any unwarranted intrusion into her private affairs. The heart of this privacy interest is the individual’s exclusive prerogative to determine when, under what conditions, and to what extent he will consent to divulge his private affairs to others. When he elects to do so, his privacy interest is invaded, of course, but the invasion does not constitute a legal wrong because his prerogative was secured to him and he exercised it as he saw fit. For example, his consent amounts to an absolute defense in any tort action based upon the invasion.

... 

Jennings’s employer threatens no *unlawful* invasion of any employee’s privacy interest.... The company’s plan contemplates, rather, that an employee’s urine will be taken and tested only if he consents. The plan therefore assumes, respects, and depends upon the central element of the right of privacy....: the individual’s exclusive right to determine the occasion, extent, and conditions under which he will disclose his private affairs to others.\(^{46}\)

Famously, the *Jennings* court was unmoved by the employee’s assertion that she could not afford to withhold her agreement to urinalysis and risk termination because she was “poor and need[ed] her salary to maintain herself and her family.”\(^{47}\) “A competent person’s legal rights and obligations,” said the court, “cannot vary according to his economic circumstances.”\(^{48}\)

\(^{45}\) 765 S.W. 2d 497 (Tex. App. 1989).
\(^{46}\) *Id.* at 500, 502 (citations omitted; emphasis in original); see also *id.* at 498 (describing the written agreement required at the time of urinalysis).
\(^{47}\) *Id.*
\(^{48}\) *Id.*
Vargo v. National Exchange,\textsuperscript{49} like Jennings, relies upon contemporaneous express agreement in disposing of an intrusion upon seclusion challenge to employee drug testing. In Vargo, a prospective employee and a representative of the employer discussed the employer’s drug testing requirement in some detail, gave his signed agreement to preemployment urinalysis on his employment application and provided a physician note about prescription medication that might show up on his drug screen.\textsuperscript{50} The appellate court approvingly adopted the trial court’s conclusion that the prospective employee “knew of the [drug testing] policy when he signed the Terms and Conditions of Employment” and concluded that “a waiver on the part of the prospective employee to undergo a test [sic] negates an invasion of privacy claim.”\textsuperscript{51}

Jevic v. Coca Cola Bottling Co.\textsuperscript{52} and Middlebrooks v. Wayne County\textsuperscript{53} follow the same pattern. In Jevic, a prospective employee signed a drug testing consent form at the testing site and then underwent testing. The court ruled against the prospective employee’s intrusion upon seclusion claim on the ground that “he consented to take the drug test.”\textsuperscript{54} In Middlebrooks as in Jevic, a prospective employee signed a drug testing consent form at the testing site and underwent testing. The lower court, in a ruling not at issue on appeal, held that the prospective employee’s “consent to the urinalysis test” vitiated his common law privacy claim.\textsuperscript{55}

\textsuperscript{50} Id. at 681-82.
\textsuperscript{51} Id. at 686, 690.
\textsuperscript{52} 1990 WL 109851 (D.N.J.).
\textsuperscript{53} 521 N.W.2d 774 (Mich. 1994).
\textsuperscript{54} Jevic, 1990 WL 109851, at *7-*8.
\textsuperscript{55} Middlebrooks, 521 N.W.2d at 776, 777 n.11. In Polinski v. Sky Harbor Air Service, Inc., 640 N.W.2d 391 (Neb. 2002), the court, employing somewhat cryptic reasoning, did not rely on an express agreement to employee drug testing given at the time of the drug test; however, the court found that the drug testing went beyond the scope of what was authorized by the employer’s in-advance drug testing policy, which only permitted testing in limited circumstances. The inconsistency between the earlier and later “agreements” presumably led to the court’s decision to rely on non-consent rather than consent grounds in adjudicating the employee’s intrusion upon seclusion challenge to drug testing.

In Groves v. Goodyear Tire & Rubber Co., 591 N.E.2d 875 (Ohio Ct. App. 1991), in contrast to the other drug testing cases discussed in this Part, the content of a contemporaneous express agreement
Contemporaneous express agreement appears to play an identical role in the workplace email monitoring context, as shown in Appendix C. In Parkstone v. Coons, the court, in ruling against an intrusion upon seclusion challenge to email monitoring, emphasized that “[e]ach time Parkstone signed on to the computer, he was required to click a box acknowledging that the computer system could be monitored.”

As the foregoing discussion suggests, the focus of the analysis in this Part is express agreement – not agreement implied from surrounding circumstances and actions in the absence of express statements by each party. Implied agreement to privacy-invading behavior is often important, perhaps especially in common law privacy claims under the publicity branches as opposed to under the intrusion upon seclusion branch emphasized in this Article. Here, however, the focus is express agreement, a point to which I return briefly in Part III.B.2 below.

was potentially unknown to the prospective employee signing the agreement. The employment application in question contained, among various other provisions, a term permitting pre-employment drug testing. While limited evidence in the record suggested that this term was “pointed out” to the employee, the circumstances in Groves were nonetheless quite different from those in the above-discussed cases in the sense that it is not clearly established that the employee was aware of the drug testing requirement. It is impossible to tell what effect the different nature of the agreement may have had on the Groves court because the employee’s brief in the case had violated a court rule in failing to provide any authority in support of the employee’s common law privacy claim (and the court “was aware of none”), and thus the court summarily dismissed the claim with a perfunctory quotation of a treatise statement that “the courts appear to be supportive of employer’s attempts to create a safe working environment by holding that drug-testing does not constitute an invasion of the employees’ common law right for privacy.” Id. at 878 (internal quotation marks omitted). Given the unusual facts, procedural default in the litigation, and perfunctory dismissal of the employee’s claim, Groves is not discussed further in this Article.

56 2009 WL 1064951 (D. Del).
57 Id. at *7.
58 See, e.g., Gill v. Hearst Publishing Co., 253 P.2d 441, 444 (1953) (in a case challenging a magazine’s publication of a photo of the plaintiffs, ruling against the plaintiffs on the ground that they “had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near” and that, thus, “[b]y their own voluntary action plaintiffs waived their right of privacy”).

In two of the employee polygraph and drug testing cases returned by the searches reported in Appendices A and B, the facts described in the court’s opinion did not make fully clear whether a court’s reference to a party’s “consent” just before a polygraph or drug test referred to an inference from a contemporaneous express or a contemporaneous implied agreement. In one such case, Farrington v. Sysco Food Services, Inc., 865 S.W. 2d 247 (Tex. App. 1993), the court concluded that the employee’s “consent” at the time his employer administered polygraph and drug tests negated the employee’s claim
C. The Limits on Consent’s Role in Common Law Privacy

In light of the role of consent in the privacy case law just described, it is confusing, even disorienting, to encounter cases of the sort described in the Introduction, in which some forms of express agreement are not viewed by common law courts as conveying consent to an intrusion upon seclusion. The present section describes several categories of such cases: first, cases challenging employee drug testing conducted under an express agreement entered into in advance of, rather than roughly contemporaneous with, the actual test; second, cases challenging creditors’ entry into borrowers’ homes to repossess defaulted-upon items under in-advance written loan contracts expressly authorizing such entry; and third, cases challenging employee polygraph testing sought to be conducted under an in-advance written agreement (though in none of these cases did the employees actually submit to testing, a potentially important factor that limits the relevance of the polygraph testing cases, as noted below). In all of these cases (with the exception of one unreported employee drug testing case59), common law privacy claims are resolved without any reference to the plaintiff’s in-advance agreement to submit to the privacy-invading behavior. Together, this body of case law suggests a pattern in which, when parties enter into in-advance express agreements governing uncertain future privacy-invading behavior, those agreements do not provide the grounds on which common law privacy claims are resolved.

59 See infra notes 67-68 and accompanying text.
Instead, privacy claims in these cases rise or fall with courts’ view of the substance of underlying privacy-invading behavior.

1. In-Advance Agreements – Employee Drug Testing

The Introduction offered the example of a challenge to employee drug testing conducted under an in-advance express agreement permitting such testing. In *Seta v. Reading Rock, Inc.*, the court eschewed reliance on the in-advance express drug testing agreement signed by the employee and focused instead on a substantive analysis of the employer’s safety and business considerations in analyzing an intrusion upon seclusion challenge to the testing. The court adopted this route despite the fact that the signed agreement addressed only the topic of drug testing and was in no way opaque to the employee.

*O’Connor v. Police Commissioner* and the other cases listed in the bottom half of the table in Appendix B are similar to *Seta*. In *O’Connor*, the plaintiff had entered into an in-advance express agreement to submit to urinalysis for drug use. In Massachusetts, where *O’Connor* was decided, tortious invasion of privacy falls under a general-purpose privacy statute providing that “a person shall have a right against unreasonable, substantial or serious interference with his privacy;” because this statute is viewed as legislatively endorsing, rather than displacing, common law privacy, the Massachusetts decisions are widely treated as analogous to common law decisions. Notwithstanding the plaintiff’s in-advance express agreement, the *O’Connor* court analyzed drug testing of the police cadets at issue in that case not

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61 See id. at 1067.
62 Id.
64 Id. at 1147.
65 MASS. GEN. LAWS ch. 214, § 1B.
based on the in-advance agreement to submit to the testing, but, rather, based on the balance of the competing substantive considerations at stake in testing cadets such as the plaintiff, whose results had indicated drug use. As the court explained, “the defendants had a compelling interest in determining whether cadets were using drugs and in deterring such use,” and “[t]hose interests outweigh the plaintiff’s privacy interest.”66

An unreported decision from Tennessee provides the sole exception to the refusal of common law courts to give weight to in-advance express agreement in any of the contexts

66 O’Conner, 557 N.E.2d at 1150. The O’Conner court, while balancing the substantive interests of the plaintiff and defendant in ruling on the nonconstitutional privacy challenge in the case, also briefly referred in the course of its nonconstitutional analysis to its earlier discussion of the plaintiff’s constitutional challenge:

Our determination that the warrantless, suspicionless urinalysis testing of police cadets in the circumstances of this case is not ‘unreasonable’ within the meaning of [the state constitution] not only disposes of the plaintiff’s [constitutional] claims . . . but it substantially resolves the plaintiff’s claim under [Mass. Gen. Laws ch.] 214, § 1B. . . . [T]he test of reasonableness depends on a balancing of the competing interests of the plaintiff and the defendants, the very process we undertook in considering the plaintiff’s [state constitutional] claim.

Id. at 1149-50. And in turn the court’s constitutional analysis does not entirely ignore the plaintiff’s in-advance agreement, although it explicitly and strongly rejects a controlling role for “consent.” The relevant passage in the court’s constitutional analysis provides as follows:

[T]o determine a search’s reasonableness and, therefore, validity [under the state constitution], we have balanced the governmental need for the search against the search’s intrusiveness into a person’s reasonably expected privacy. We employ the same process in this case. In doing so, we do not take lightly the intrusiveness of collecting a urine sample and subjecting it to chemical analysis, including the fact that such testing may be capable of revealing not only illicit drug use but other personal information, such as pregnancy, as well. We accept as true, too, that the intrusiveness is increased by cadets’ being monitored in the act of urinating (a practice that helps to ensure the integrity of the urine sample). However, we also take into account, as a factor that diminishes the degree of intrusiveness, that the cadets agreed to urinalysis testing before accepting employment.

The Chief Justice, in his concurring opinion, states that the cadets’ written agreement to submit to urinalysis testing constitutes consent, and that, given such consent, the court’s ‘resort to the manipulable balancing inquiry’ is inappropriate. Obviously, we do not agree. Surely, the plaintiff would not be barred from relief if his consent to be the subject of a search and seizure were unreasonably required as a condition of employment. For example, if the plaintiff were seeking employment as a laborer, the State could not constitutionally require his consent to urinalysis testing as a precondition to such employment, and any consent given would be ineffective.

Id. at 1149. Overall, then, the court seems largely to reject a role for consent even in the constitutional analysis noted briefly in its nonconstitutional analysis.
discussed in this Part. In *Stein v. Davidson Hotel Co.*, the court referred to an in-advance express agreement in ruling against an employee’s intrusion upon seclusion challenge to employee drug testing.

The express agreement employee drug testing cases discussed here and in Part I.B above represent only a fraction of the large body of common law privacy cases involving employee drug testing, and thus it is worth underlining the important, though unsurprising (in light of discussion thus far), fact that in the more common employee drug testing scenario in which an inadvance express testing policy contemplates in-advance implied, rather than express, agreement by employees – in the form of their continuing to work after the policy is communicated to them – the implied acceptance of the express policy never leads to a “consent” defense to a common law privacy claim. Thus, for example, in *Hennessey v. Coastal Eagle Point Co.*, the employer’s written drug testing policy, announced in a memorandum to employees that was solely addressed to the topic of drug testing, provided that an employee might “at any time be required to give a urine or blood sample in order to determine compliance with the policy,” and there is no question that Hennessey was aware of this policy and continued to work for Coastal Eagle Point after it went into effect (though he did not make an express agreement to the policy). When Hennessey submitted a urine sample for drug testing the following year and brought a privacy challenge to his discharge after he tested positive, the court adjudicating his challenge did not in any way invoke the written term or any notion of consent;

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68 Id. at *9. Outside the employment context, *Bone v. CSX Intermodal, Inc.*, 2001 WL 1906279 (W.D. Tenn.) (unreported magistrate judge’s order) deemed a non-employee independent contractor’s in-advance written agreement to submit to urinalysis to provide a consent defense to a common law privacy challenge brought by the independent contractor.
instead it engaged in a detailed balancing of the employee privacy interests implicated by drug
testing and the employer’s business and safety concerns.\textsuperscript{70}

\textit{Baggs v. Eagle-Picher Industries, Inc.}\textsuperscript{71} is similar. In \textit{Baggs}, the employer had
promulgated a clear, written in-advance drug testing policy that was posted on employee bulletin
boards and included in the company handbook distributed to employees (though, less
compellingly than in most of the case law in this area, not separately distributed to employees).\textsuperscript{72}

Despite the existence and dissemination of the policy, the court did not rely on any form of
agreement when employees challenged a later drug test on intrusion upon seclusion grounds.\textsuperscript{73}

Instead the court performed a substantive analysis of the drug testing policy. The governing state
law in \textit{Baggs} broadly permitted “intrusive and even objectionable means” of obtaining
information from employees if the information were “employment-related” in any way, and so
not surprisingly the court upheld the policy, as the information produced by drug testing was
clearly “employment-related”.\textsuperscript{74} But employee “consent” did not factor in the court’s decision.\textsuperscript{75}

Moreover, because the district court decision in \textit{Baggs} did rest in part on the existence of the in-
advance term in ruling against the employee’s privacy challenge,\textsuperscript{76} the court of appeals’ failure
to rely in any way on it seems especially noteworthy.

\textsuperscript{70} \textit{Id.} at 13, 19-24.

\textsuperscript{71} 957 F.2d 268 (6th Cir. 1992).

\textsuperscript{72} \textit{Id.} at 270.

\textsuperscript{73} \textit{Id.} at 273-75.

\textsuperscript{74} \textit{Id.} at 275.

\textsuperscript{75} \textit{See id.}

\textsuperscript{76} \textit{See Baggs v. Eagle Pitcher Industries, Inc., 750 F. Supp. 264, 272 (W.D. Mich. 1990).} Note also that
although the court of appeals in \textit{Baggs} does not refer to any contemporaneous express agreement at the
time the drug testing was conducted, the district court’s opinion makes brief mention of a
contemporaneous consent form in the court’s recitation of the facts of the case, \textit{see id.} Because the
district court rested its ruling against the employee’s intrusion upon seclusion claim in part on the in-
advance policy but did not in its analysis make any reference to the contemporaneous consent form, it
may be that the court of appeals was not aware of, or at least not focused on, that form when it
adjudicated the case. Under the line of cases discussed earlier, a contemporaneous express agreement
negates a claim of intrusion upon seclusion without regard to the nature of the employer’s substantive
Likewise, in *Ritchie v. Walker Manufacturing Co.*,

an in-advance express drug testing policy, addressing only the topic of drug testing, was disseminated to all employees. The court, however, made no reference to consent in upholding drug testing against a challenge under a Nebraska intrusion upon seclusion statute mimicking common law privacy.

interest. It bears noting that none of the other intrusion upon seclusion drug testing cases discussed in Part I.C involved any sort of contemporaneous consent form, at least insofar as the courts’ opinions reveal.

There is no direct authority contrary to the in-advance drug testing policy cases discussed in the text. In a dictum, the court in *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1041 (D. Kan 1998) (emphasis added), stated that “by accepting employment in a workplace which required drug testing, plaintiff implicitly agreed to comply with IBP policy and protocol on drug testing,” but because IBP’s actions were not consistent with its in-advance drug testing policy, the court’s statement about consequences of actions consistent with the policy was not necessary for the decision in the case and, thus, was dicta. In fact, the *Frye* court ruled in the *employee’s* favor on his common law privacy challenge to employee drug testing. *See id.* at 1042.

Apart from the dictum in *Frye*, the court in *Texas Employment Comm’n v. Hughes Drilling Fluids*, 746 S.W.2d 796, 800-02 (Tex. App. 1988), a statutory unemployment benefits case, may have given weight to an in-advance drug testing policy in assessing whether a discharged employee’s refusal to submit to employee drug testing was statutory “misconduct” disqualifying the employee from unemployment benefits, see TEX. REV. CIV. STAT. ANN. art. 5221b-3 (“An individual shall be disqualified for [unemployment] benefits: … (b) [i]f … he has been discharged for misconduct.”); id. art. 5221b-17(g) (“‘Misconduct’ means … violation of a policy or rule adopted to ensure orderly work and the safety of employees, but does not include an act of misconduct that is in response to an unconscionable act of an employer or superior.”). In *Hughes*, the Texas Employment Commission argued that the employer’s demand that the employee submit to drug testing was “unreasonable” – and thus could be refused without the employee’s having engaged in statutory “misconduct” – in part because of the conflict between the demand and the employee’s constitutional and common law privacy rights. *See Hughes*, 746 S.W.2d at 800. Thus, although the case did not involve a common law cause of action and accordingly is not within the sample of cases analyzed in this Article, the court addressed common law privacy in resolving the statutory claim in the case. In assessing the Texas Employment Commission’s constitutional argument, the court in *Hughes* made specific reference to the employer’s in-advance policy: “[The evidence conclusively establishes that [the employee] consented to the urine drug-screening process by his conduct in continuing to work after receiving actual notice that the provisions of the policy constituted conditions of his continued employment with Hughes.” *See id.* (emphasis added); *but see, e.g.*, National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 937, 943 (D.C. Cir. 1987) (analyzing a program requiring employees to “sign a form agreeing to participate in urinalysis drug testing” and asserting that “urinalysis cannot be redeemed by a public employer’s exaction of a ‘consent’ to the search”). However, with respect to its common law analysis, *see Hughes*, 746 S.W.2d at 802, the *Hughes* court does not refer specifically to the in-advance policy, and, because the drug testing at issue was conducted upon contemporaneous express agreement, *see id.* at 799, the discussion above, *see supra* Part I.B, suggests that consent would vitiate any common law privacy violation. While *Hughes* was not in the sample of cases analyzed in the text (because, as already noted, it did not involve a common law privacy cause of action), I discuss it because, as my colleague William Eskridge observed to me, it is relied upon as precedent in *Farrington v. Sysco, Inc.*, 865 S.W.2d 247 (Tex. App. 1993), an employee drug testing case.
In all of the in-advance agreement employee drug testing cases discussed thus far, some or all of the employees challenging the testing had actually submitted to testing – and then complained after receiving a positive test result – and thus such cases make clear that the failure of courts to rely on in-advance drug testing provisions cannot be attributed to any notion of an employee’s “revocation” of in-advance agreement when the testing was to be done. (Naturally, agreement to submit to privacy-invading behavior could only be effective (if at all) until withdrawn – but no withdrawal occurred in the cases discussed thus far.\textsuperscript{79}) In other cases of in-advance employee drug testing policies, by contrast, employees refuse to submit to testing authorized by the policies and then bring legal challenges when they are fired for their refusal to submit to testing. Such cases may rest on grounds of revocation of the earlier “acceptance” of the employer’s written drug-testing policy, but alternatively they may rest on the same general disregard of in-advance stipulations observed in Seta, O’Conner, Hennessey, and Baggs, and thus they are noted here for completeness.

A leading example in this category is Twigg v. Hercules Corp.,\textsuperscript{80} in which the employer had promulgated “a policy of mandatory, random drug testing” in a memorandum that was solely devoted to the topic of drug testing; Twigg, however, refused to be tested when selected for testing three years later.\textsuperscript{81} Following his refusal, Twigg was discharged.\textsuperscript{82} (Twigg had also been

\textsuperscript{79} Strictly as a matter of logic, one could construct a system in which an in-advance agreement is “revoked” unless it is expressly reaffirmed at the time of testing (via a contemporaneous express agreement) – but obviously the doctrine of common law privacy does not establish such a regime.

\textsuperscript{80} 406 S.E. 2d 52 (W.Va. 1990).

\textsuperscript{81} Id. at 53.

\textsuperscript{82} Id.
selected for testing on two previous occasions, and in both of those instances, he voiced his objections to random drug testing but ultimately submitted to testing. According to the court, common law privacy protects an employee from being required to submit to drug testing unless the testing is based on individual suspicion of drug use or the employee’s job is a safety-sensitive one, which was to be determined on remand. Thus, despite the in-advance policy, Twigg’s discharge would violate his common law privacy rights unless his job was a safety-sensitive one, a point on which the court on remand denied the employer’s motion for summary judgment. “Since we have previously held that “the right to privacy is an individual right that should be held inviolate,”” we refuse to allow an employer to intrude upon this right of his employee absent some showing of reasonable good faith objective suspicion, unless the employer can articulate either a public safety concern or concerns for the safety of other employees.”

Likewise, in Gilmore v. Enogex, Inc., when the employer sought to conduct urinalysis under its in-advance drug testing policy a few weeks after the policy was announced (in a memorandum that was solely addressed to the topic of drug testing) and some employees objected, the court addressing the employees’ privacy challenge engaged in the same form of substantive balancing observed in the employee drug testing cases discussed above – and (unlike in the cases discussed above) it explicitly rejected consent as a ground of decision:

83 Id.
84 Id. at 54-57. The court ruled on the basis of common law privacy. See id. at 54 (asserting that “[i]n West Virginia, a legally protected interest in privacy is recognized” (internal quotation marks omitted), and citing two common law privacy cases, Roach v. Harper, 105 S.E.2d 564 (W.Va. 1958), and Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W.Va. 1984), in support of its assertion).
85 Id. at 55-56.
87 Twigg, 406 S.E.2d at 57 (quoting Cordle, 325 S.E. at 116 (quoting Roach, 105 S.E.2d at 568)).
88 878 P.2d 360 (Okl. 1994).
We hold Enogex’ demand that Gilmore undergo a drug test to continue in his at-will employment status may be viewed as so intrusive by itself as to [be] nonconsensual … But when Gilmore’s privacy concerns are balanced against Enogex’ legitimate interest in providing a drug-free workplace, his invasion-of-privacy claim fails to meet the law’s highly-offensive to a reasonable person test.\textsuperscript{89}

Also similar is \textit{Johnson v. Carpenter Technology, Inc.}\textsuperscript{90} The \textit{Johnson} facts parallel those in \textit{Gilmore}; the employer announced a drug-testing policy and then a few weeks later sought unsuccessfully to conduct testing on the plaintiff, who challenged his dismissal for refusing to submit to testing.\textsuperscript{91} The court, in addressing intrusion upon seclusion, made no mention of the in-advance policy in ruling in the employer’s favor.\textsuperscript{92}

In sum, in-advance express drug-testing policies, like in-advance express drug-testing agreements, are generally not relied upon by courts faced with common law privacy challenges to employee drug testing. Instead, claims based on common law privacy are typically resolved by substantive, and often quite involved, assessment of the employer’s, and in some cases employees’, interests. In many cases of in-advance express policies – and in all of the cases involving in-advance express agreement – employees actually submitted to drug testing, so it cannot be argued that their in-advance agreement (either express or implied) was revoked before the testing occurred. Moreover, because the employees who actually submitted to testing all tested positive for drugs, the courts’ refusal to rule definitively against employees on grounds of consent – in contrast to the cases discussed in Part I.B – cannot be explained on grounds of more sympathetic behavior with respect to drug use by employees in the in-advance agreement cases than in the contemporaneous agreement cases.

\textsuperscript{89} \textit{Id.} at 366-67 (emphasis removed). It is unclear whether the court’s reference to “nonconsensual” behavior related to the in-advance policy or the verbal request for a urine sample on the day of the drug testing.

\textsuperscript{90} 723 F. Supp. 180 (D. Conn. 1989).

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.}
Three final comments on the employee drug testing cases are important before proceeding. First, one might respond to the account here by observing that most courts assessing in-advance agreement to employee drug testing in the end rule against the employees, and thus perhaps courts are simply resolving on non-consent grounds cases that they would otherwise resolve in the same manner (against the employees) on consent grounds. Many courts, after all, do not expressly reject a role for consent but simply fail to rely on it. However, the objection seems unconvincing. Apart from the level of involvement and apparent effort in the courts’ balancing inquiries, if courts prefer non-consent to consent grounds for resolving drug testing cases, then one would expect that they would also resolve the drug testing cases discussed in Part I.B on non-consent grounds— but, as already discussed, but the pattern in the case law is just the opposite; the cases are resolved on consent grounds. Moreover, in the context to be discussed next—entry upon consumer premises—common law courts not only eschew any reliance on in-advance agreement but find for the plaintiffs on their privacy claims, so the failure to rely in in-advance agreement more clearly controls the outcomes in these cases.

A second point of note is that the cases discussed in this section help to clarify the relationship between common law privacy claims and the employment-at-will doctrine, under which an employer may generally fire an employee for even arbitrary reasons. The at-will rule governs the general circumstances under which an employee may be discharged assuming there is no contractual term addressing the topic of discharge, but the rule does not control the availability of tort actions arising from an employer’s intrusion upon an employee’s seclusion. In other words, independent legal rights an individual may have, including when working for an employer, are generally not altered by the at-will rule. Under employment at will an employer

93 See, e.g., Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).
can fire an employee for even an arbitrary reason, but the employee drug testing cases highlight how independent legal entitlements arising from the law of tort – including common law privacy rights – are not automatically checked at the workplace door for at-will employees. I return to the relationship between common law privacy and employee discharge in Part III.D.

As a final observation, the goal in the discussion of employee drug testing in Parts I.B. and I.C has been simply to try to place some descriptive structure on an otherwise unwieldy body of much-discussed employee drug testing case law at times accepting, and at other times rejecting, a role for “consent” in analyzing such drug testing. The important normative questions raised by this body of case law – should contemporaneous express agreement be dispositive in a case such as Jennings? and should in-advance agreement not be given weight, as in a case such as Seta – are discussed further at the end of Part I as well as in Part III.E. Before doing that, it is helpful to explore additional domains in which in-advance express agreements sanctioning privacy-invading behavior are disregarded by courts addressing common law privacy claims.

2. In-Advance Agreements Permitting Entry onto Consumer Premises

The refusal to credit in-advance express agreement is observed in the consumer setting as well as with respect to employee drug testing. In the consumer setting, creditors have sometimes sought to enforce broad in-advance express agreements permitting entry onto consumers’ premises for purposes of repossessing goods in case of a default. Thus, in St. Julien v. South Central Bell Telephone Co., 433 So. 2d 847 (La. App. 1983), though the court found a lack of evidentiary support for a telephone company’s claimed in-advance express agreement authorizing entry onto a consumer’s premises in the event of a default, the court also stated (quoting a sister court’s earlier decision in

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The court, however, declined to give effect to this term, which the court said was “essentially a waiver of the Fassitts’ right to privacy in their home,” though the specific cause of action brought by the Fassitts was trespass rather than intrusion upon seclusion. “The courts have always indulged every reasonable presumption against waiver [of the right to privacy in the
home]. Public policy cannot condone the use in a sale or lease contract of a provision irrevocably authorizing entry into a debtor’s or lessee’s home.\textsuperscript{100} Much like the \textit{Twigg v. Hercules Corp.} court’s reminder that “the right to privacy is an individual right that should be held inviolate” against the intrusion represented by drug testing without individualized suspicion or important safety considerations,\textsuperscript{101} the court in \textit{Fassitt} refuses to allow the in-advance express agreement to negate a common law privacy challenge. The \textit{Fassitt} court’s reasoning continued:

\begin{quote}
We decline to construe the quoted provision, \textit{incorporated into a printed form contract as a necessary condition of the agreement,} as irrevocable permission to enter a private home any time, day or night, occupied or unoccupied, under any circumstances. Law and order cannot allow such a construction, which would tend to encourage breaches of the peace. We therefore conclude that the contractual authority relied upon by [the company] is insufficient to legitimate an otherwise illegal entry.\textsuperscript{102}
\end{quote}

While the emphasized portion of the court’s language here suggests that the adhesive nature of the contract may have played some role in its reasoning, other aspects of the court’s reasoning would not vary with the presence or absence of adhesive circumstances.\textsuperscript{103} Just as the written employee drug and polygraph testing agreements discussed above and below do not involve terms that are in any way in “fine print” – indeed they are often the sole subject of the agreement in question – the overall reasoning in \textit{Fassit} suggests that “fine print” and adhesiveness, while clearly present in the case, were not the central basis of the court’s conclusion.

\textit{St. Julien} and \textit{Fassitt} are discussed in prior privacy law scholarship that also notes in passing an additional entry-upon-premises privacy challenge not reflected in the search reported

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} 406 S.E. 2d 52, 55-56 (W.Va. 1990) (internal quotation marks omitted).

\textsuperscript{102} \textit{Fassitt}, 297 So.2d at 287 (emphasis added).

\textsuperscript{103} \textit{See id.} (“Public policy cannot condone the use in a sale or lease contract of a provision irrevocably authorizing entry into a debtor’s or lessee’s home. . . . Law and order cannot allow such a construction, which would tend to encourage breaches of the peace”).
In Appendix D (because the case did not contain the stated search terms). In *Girard v. Anderson*, an agreement governing the credit sale of a piano stipulated, “[I]n case of any default made in the payments … it shall be right and lawful for [the creditor] to peaceably or forcibly, and without process of law, enter the premises where said property is … and to take … possession thereof.” The creditor’s agents in *Girard* entered the consumer’s home when they were not home and repossessed the piano. The *Girard* court referred to “protecting the sacredness of the home” and “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches” (quoting the Fourth Amendment) in ruling that “[a]n agreement permitting a family’s home to be broken open and entered for the purpose of forcibly taking possession of property therein is contrary to good public policy and void to that extent.” Thus, in *Girard*, an in-advance express contractual provision was found not to provide valid consent to future privacy-invading behavior.

In short, in-advance express agreements authorizing entry into a home do not immunize a later entry from challenge under either common law privacy or other legal provisions. By contrast, an individual’s contemporaneous express agreement to a premises entry unquestionably defeats a common law privacy challenge on grounds of consent.

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104 This case law is discussed in Barnes, *supra* note 11, at 1592-93. Despite its discussion of *St. Julien, Fassitt*, and *Girard*, the general posture of Barnes’s article is that consent, while normatively objectionable, is broadly operative in common law privacy. See, e.g., *id.* at 1570 (“As with all torts, … it appears that consent is a defense in most cases of invasion of privacy …. Most jurisdictions … hold that consent is either a defense or, rather that the absence of consent is itself an element of the tort.”). Barnes does not suggest the descriptive pattern in the cases discussed in this Part.

105 257 N.W. 400 (Iowa 1934) (discussed in Barnes, *supra* note 11, at 1592-93).

106 *Id.* at 402.

107 *Id.*

108 *Id.* at 402-03.

109 See, e.g., *Engman v. Southwestern Bell Telephone Co.*, 631 S.W.2d 98 (Mo. Ct. App. 1982) (in a case of contemporaneous express agreement to entry onto a premises, stating that “the plaintiff’s consent to the invasion … will bar his recovery”) (internal quotation marks omitted). The well-known case of *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) is not to the contrary. In *Dietemann*, the defendants called on the plaintiff at his home, secretly transmitted the parties’ conversation by radio transmitter to a
3. **In-Advance Agreements – Employee Polygraph Testing**

A third example of the disregard of in-advance express agreement in common law privacy cases comes from challenges to employee polygraph testing prior to the enactment of the Employee Polygraph Protection Act.\(^{110}\) Thus, for example, in *Cordle v. General Hugh Mercer Corp.*,\(^{111}\) in the lower half of the table in Appendix A, a clear in-advance written agreement signed by employees allowed polygraph testing; the agreement stipulated that an employee would “take a polygraph examination prior to, during, or at the termination of my employment.”\(^{112}\) The plaintiffs were fired following their refusal to be tested after their employer notified them in writing that it “consider[ed the employees’] failure to take this examination a breach of [their] agreement.”\(^{113}\) Despite the in-advance express agreement, the *Cordle* court did not resolve the employees’ privacy challenge on grounds of consent. To the contrary, it found that the polygraph testing requirement was substantively unlawful under a line of common law privacy precedents:

>[A]s the following cases indicate, in West Virginia, a legally protected interest in privacy is recognized.

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\(^{111}\) 325 S.E. 2d 111 (W. Va. 1984).

\(^{112}\) *Id.* at 116-17.

\(^{113}\) *Id.* at 113 n.5.
In *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958), the plaintiff asserted that her landlord, the defendant, installed a listening device in the plaintiff’s apartment by way of which the defendant heard the plaintiff’s confidential conversations. The West Virginia Supreme Court of Appeals concluded in *Roach* that the plaintiff had a right to maintain an action for ‘invasion of privacy.’ This Court stated that ‘the right to privacy is an individual right that should be held inviolate. To hold otherwise, under modern means of communication, hearing devices, photography, and other technological advancements, would effectively deny valuable rights and freedoms to the individual.’ 143 W.Va. at 876, 105 S.E.2d at 568. Syllabus point 1 of *Roach* states as follows: ‘The right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages.’ 114

Thus, in *Cordle*, the required polygraph testing violated common law privacy despite the unambiguous express agreement signed by the employees beforehand.

Just as in the employee drug testing context, it is unsurprising with respect to employee polygraph testing to find a similar failure to rely on consent when agreement to an employer’s express in-advance polygraph testing policy is, rather than express, implied from continuing to work after the policy is in place. Thus, in *Texas Department of Mental Health and Mental Retardation v. Texas State Employees Union*, 115 a Texas court of appeals agreed with a trial court determination that employee polygraph testing was an unlawful intrusion upon seclusion despite the existence of an in-advance written policy governing such testing. 116 (The court, unlike the trial court it was reviewing, thought some forms of employee polygraph testing would be acceptable under common law privacy.) 117 The Texas Supreme Court resolved the case entirely on constitutional grounds, reversing the court of appeals and broadly striking down employee

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114 *Id.* at 117.
116 *Id.* at 512-13.
117 *Id.* at 513-14.
polygraph testing.\textsuperscript{118} In resolving the common law privacy claim, the court of appeals gave no weight to the in-advance written polygraph testing policy, which was clearly announced to all employees.\textsuperscript{119} (It is unclear from the court’s opinion how much time passed between the announcement of the policy and the legal challenge and, thus, unclear how much acquiescence in the policy took place.) Rather than relying on the in-advance express policy, the court examined at length the competing employee privacy and legitimate employer interests and derived from that balance the limited forms of employee polygraph testing policy that would be consistent with common law privacy.\textsuperscript{120}

To be sure, in both \textit{Cordle} and \textit{Texas Department of Mental Health and Mental Retardation}, there is some ambiguity over the potential revocation of agreement to submit to polygraph testing; in neither case did employees actually submit to such testing. Thus, the pre-EPPA employee polygraph testing case law, while broadly corroborative of the pattern discussed in this Part, might result from an altogether distinct feature of the cases.

\section*{4. Summary and Additional Forms of In-Advance Agreement}

Thus, in cases of in-advance express agreement governing employee drug testing, creditors’ entry onto consumers’ premises, and employee polygraph testing, the existing case law generally does not rely on the in-advance agreement in resolving common law privacy claims. Instead these claims are resolved based on substantive analysis of the arguments for and against the privacy-invading behavior. In the employee drug testing context, courts often, though not always, rule against common law privacy claims based on the substantive interests at stake; by

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{118} Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987).
\item\textsuperscript{119} \textit{Texas Department of Mental Health and Mental Retardation}, 708 S.W.2d at 500-02.
\item\textsuperscript{120} \textit{Id.} at 504-10, 513-14.
\end{enumerate}
\end{footnotesize}
contrast, in the case of express agreements governing both entry onto premises and employee polygraph testing, common law courts not only eschew reliance on consent but go on to find intrusions upon seclusion despite the in-advance express agreements.

It bears noting that all of the case law discussed thus far addresses the effects of in-advance express agreement in contexts in which the privacy considerations at stake are relatively weighty (even though the interests on the other side, such as avoiding drug-related performance problems and damage to defaulted-upon consumer goods, are substantial as well). When either the body or the home is at stake, privacy protection is at its highest point.121 I return to this observation in Part III.C below.

To be sure, in-advance express agreements are observed in additional contexts – such as email monitoring – but the treatment of such agreements in the intrusion upon seclusion case law in these areas is limited and (perhaps in part for that reason) relatively indeterminate; email monitoring, for instance, seems to be more frequently challenged under statutes, especially the Electronic Communications Privacy Act, than under the common law, and, moreover, email monitoring may not involve “intrusion” in the first instance, as discussed more fully below. Apart from in-advance express agreements to workplace email monitoring and to the forms of behavior discussed above, it is conceivable that in-advance express agreements to additional forms of privacy-invading behavior have arisen on occasion in the common law case law (without my having uncovered them despite the case law searches detailed in the Appendix), and if any such cases treat in-advance express agreements differently from the treatment described here, then the descriptive claim offered here would obviously require qualification to that extent.

The email monitoring case law, however, is—while not easy to parse—broadly consistent with the case law discussed thus far.

**a. In-advance policies—workplace email monitoring**

The common law intrusion upon seclusion cases involving express agreement to email monitoring (listed in the table in Appendix C) are notable for the difficulty in parsing them. In *Kelleher v. City of Reading*, for instance, a federal district court’s rejection of an intrusion upon seclusion challenge to email monitoring may have rested on the fact that, under the employer’s computer policy, email messages were “the property of” the employer, or instead it may have rested on the employer’s actual and known practice of monitoring or, thirdly, on the in-advance agreement referencing monitoring:

The City’s Guidelines regarding the expectation of privacy of e-mail messages, which are uncontroverted, explicitly informed employees that there was no such expectation of privacy:

*Messages that are created, sent, or received using the City’s email system are the property of the City of Reading.* The City reserves the right to access and disclose the contents of all messages created, sent or received using the email system. …

Plaintiff signed an acknowledgement that she had received and read the Guidelines on September 16, 1999. Although plaintiff contends that other employees were not subject to such review, … Defendant presents evidence … of at least on other instance in which an employee had his email communications monitored and reviewed. … [P]laintiff clearly lacked a reasonable expectation of privacy with respect to her e-mail communications on the City of Reading’s email system.

If the thrust of the court’s reasoning here is that the plaintiff lacked a reasonable expectation of privacy because the city owned “messages that are created, sent, or received using the City’s

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122 2002 WL 1067442 (E.D. Penn.)
123 *Id.* at *8.
124 *Id.* (emphasis added)
email system”125 – that such messages were “the property of the City” – then its decision is consistent with the body of cases discussed above, for undoubtedly an individual’s bodily substances or home could not be made “the property of” another party through the sort of language quoted above – and thus such an argument distinguishes email monitoring from the cases discussed above. By contrast, if the thrust of the Kelleher court’s reasoning is that the plaintiff lacked a reasonable expectation of privacy because the in-advance agreement signed by the plaintiff permitted the company to “access … all messages created, sent, or received using the email system,”126 then the decision is potentially in tension with the body of case law discussed above – though fuller discussion of this issue is deferred until Part III.C.127

Similar to Kelleher, although briefer in its reasoning, is Hammer v. Hair Systems Inc.128 In Hammer, as in Kelleher, it is unclear whether the court’s dismissal of a common law privacy challenge to email monitoring is based primarily on the employer’s ownership and business control over the email system or on the in-advance express agreement referencing email monitoring.129

While Kelleher and Hammer both involved express in-advance agreements, it is worth briefly noting a much-discussed email monitoring case in which an express in-advance policy

125 Id.
126 Id.
127 See infra notes 189-195 and accompanying text (noting that the case against relying on in-advance agreement may be weaker for email monitoring than for cases such as employee drug and polygraph testing and entry onto consumers’ premises because the privacy interests are at their highest level in the latter cases).
129 The court’s common law privacy discussion reads in its entirety as follows:

[Plaintiffs signed multiple documents concerning the company’s e-mail and internet policy to the effect that these tools were to be used solely for business purposes. The forms included a document in which plaintiff acknowledged that he had no expectation of privacy in connection with his use of company e-mail, internet, or voice mail. Thus defendant’s review of plaintiffs’ e-mail or voice mail was not [an intrusion upon seclusion].]

Id.
was impliedly accepted by employees in the manner of drug testing cases such as *Twigg v. Hercules Corp.* from above. In *Garrity v. John Hancock*, the plaintiffs brought an intrusion upon seclusion challenge to the employer’s review of sexually explicit emails about which another employee had complained. The employer’s written email policy specifically provided as follows:

Messages that are defamatory, abusive, obscene, profane, sexually oriented, threatening or racially offensive are prohibited.

All information stored, transmitted, received, or contained in the company’s E-mail systems is the property of John Hancock. It is not company policy to intentionally inspect E-mail usage. However, there may be business or legal situations that necessitate company review or E-mail messages and other documents.

Company management reserves the right to access all E-mail files.

Despite the clear language in this in-advance express policy, the court made no reference to the policy in resolving the intrusion upon seclusion claim; instead it relied on a blend of plaintiffs’ acknowledgement that they subjectively assumed their emails might be forwarded to others (and thus the emails were not “private”) and the fact that emails transmitted over the employer’s intranet were technologically accessible to the employer.

As the court explained:

*Smyth v. Pillsbury* is instructive here:

Once Plaintiff communicated … to a second person … over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost. *Significantly, the defendant did not require plaintiff, as in the case of urinalysis or personal property search, to disclose any personal information about himself. Rather, plaintiff voluntarily communicated … over*

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131 2002 WL 974676 (D.Mass.).
132 *Id.* at *1.
the company e-mail system. We find no privacy interests in such communications.\footnote{Id. at *2 (quoting Smyth v. Pillsbury, 914 F. Supp. 97, 101 (E.D. Pa. 1996)) (emphasis added).}

The Garrity court’s heavy reliance on Smyth underlines the fact that the decision in Garrity did not rest on the in-advance email monitoring policy, for in Smyth the employer’s in-advance policy actually affirmatively “assured its employees, including plaintiff, that all e-mail communications \textit{would remain confidential} … and could not be intercepted and used by defendant against its employees as grounds for termination or reprimand.”\footnote{Smyth, 914 F. Supp. at 98 (emphasis added).} Thus, the Smyth court’s rationale in finding no intrusion upon seclusion could not rest upon the employer’s in-advance policy, and as described above it rested instead on the technological features of a company intranet site.\footnote{Id. at 101. \textit{Cf.} Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 2d 914 (W.D. Wisc. 2002) (holding, in a case with no express policy governing email monitoring, that a reasonable fact finder could find a review of email in employee’s personal Hotmail account, which employee accessed from his office computer, to be an intrusion upon seclusion).} Accordingly, and consistent with the case law discussed above, the Garrity court does not rely on the employer’s in-advance express policy and instead looks to substantive features of the challenged employer behavior in resolving the plaintiffs’ intrusion upon seclusion claim.

An additional case in which email monitoring by a company with an in-advance express monitoring policy was challenged as a common law intrusion upon seclusion is Thygeson v. U.S. Bancorp.\footnote{Thygeson v. U.S. Bancorp. (D. Or., Dec. 1, 2004) (unpublished order adopting an unpublished magistrate judge’s findings and recommendation).} Thygeson, decided by a magistrate judge, leaves unclear what role the in-advance express policy played ruling in the employer’s favor on the employee’s intrusion upon seclusion claim; much of the magistrate judge’s reasoning was independent of the in-advance policy, but the magistrate judge did also refer to that policy (the receipt of which, unlike in Garrity, had
been acknowledged in writing by the employee). \footnote{137 See Thygeson v. U.S. Bancorp, 2004 WL 2066746 (magistrate judge’s findings and recommendation), at *5, *17-*21.} The magistrate judge, however, relied significantly on \textit{Garrity}, which, as already noted, clearly follows the various areas of case law discussed earlier in this Part. \footnote{138 \textit{Id.} at *19. In other email monitoring cases, the parties dispute whether the employee had signed an in-advance express monitoring agreement, had been informed of such an agreement, or had entered into an agreement that actually authorize email monitoring; naturally, in light of the case law described in the text, courts in such cases analyze intrusion upon seclusion challenges to monitoring on non-consent grounds. \textit{See}, \textit{e.g.}, Olson v. Holland Computers, 2007 WL 2694202, *4 (Ohio Ct. App.); Brown-Crisuido v. Wolfe, 601 F.Supp.2d 441, 450, 455 (D. Conn. 2009).} As the email monitoring cases as well as many of the employee drug testing cases discussed above illustrate, employees may usually lose intrusion upon seclusion challenges even though the courts disregard in-advance express agreements entered into by the parties. The central point for purposes of the present analysis is not the ultimate outcome of the cases but, rather, the treatment of such in-advance agreement. Of course, the failure to credit in-advance express agreement is of greatest moment in a context, such as entry upon consumer premises or employee polygraph testing, in which the challenged behavior constitutes an intrusion upon seclusion \textit{unless} valid consent to the behavior immunizes it from challenge.

\textbf{b. Workplace email monitoring and the question of defining “intrusion”}

In the view of the \textit{Smyth} court, workplace email monitoring was not an intrusion on employee’s seclusion because the employer “did not require plaintiff, as in the case of urinalysis or personal property search to disclose any personal information about himself” but rather monitored the plaintiff’s communication “over the company e-mail system,” in which the court found “no privacy interests” in light of the employer’s pervasive control over the system. \footnote{139 \textit{Smyth}, 914 F. Supp. at 101 (emphasis added).} This reasoning illustrates an important broader point about the intrusion upon seclusion cause of

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action. This broader point is that certain forms of behavior (including, potentially, email monitoring) are nonactionable under this cause of action not because of any form of agreement between the parties but because of some other feature of the behavior being challenged. If, for instance, a defendant questions a plaintiff’s friends and colleagues about information the plaintiff may have shared with them, such questioning is generally not found to be unlawfully intrusive because, in the words of a well-known decision ruling against an intrusion upon seclusion challenge by consumer activist Ralph Nader, the questioning was “not designed to elicit information which would be unavailable through normal inquiry or observation.”\textsuperscript{140} The central issue in such cases is not any form of agreement by the plaintiff but, rather, the lack of intrusiveness of verbal questioning as a form of behavior in the first instance. I return to the issue of defining “intrusion” in Part III.C below; until then I focus attention on the contexts of employee drug and polygraph testing and entry upon consumer premises − contexts in which the existence of an “intrusion” is uncontroverted.

5. Why Do Firms Announce In-Advance Terms?

An intriguing question raised by the courts’ failure to credit in-advance express agreements in common law privacy cases concerns why employers and creditors would nonetheless draft such agreements. If such agreements do not help to sustain future employee drug testing, entry onto premises or employee polygraph testing against challenge, then why were such agreements employed at all? Indeed, one might suggest, a savvy employer or creditor should hold its cards close to its vest, not revealing that it might in the future seek to subject an employee or consumer to a drug or polygraph test or an entry upon premises. Particularly in the employment context, the employee may be vulnerable at the point of a future test request and

\textsuperscript{140} Nader v. General Motors Corp., 255 N.E. 2d 765, 767 (N.Y. 1970).
thus may be hard pressed not to submit to testing. On this account, failing to seek an in-advance agreement permitting employee drug or polygraph testing might have helped to retain unsuspecting employees at a time at which they could have pursued alternative options more readily than in the immediate aftermath of the announcement of a drug or polygraph test.

However, it is reasonable to imagine that the employers, as well as the creditors, in the cases described above often had more to gain than to lose from drafting in-advance agreements notwithstanding the common law courts’ failure to honor them as establishing consent. The behavioral economics analysis in Part II below suggests that in-advance express agreements governing uncertain future behavior are likely to have modest, if any, effects on employee and consumer decision making even if such agreements are (erroneously) believed to be legally controlling; both the likelihood and the significance of an employee drug or polygraph test or an entry upon premises at some point in the future will often be heavily discounted. Furthermore, in-advance agreements may significantly increase the odds of contemporaneous express agreement to drug or polygraph testing or entry upon premises by employees or consumers who are not aware that the in-advance agreement is not controlling – and, as described in Part I.B, contemporaneous express agreement will always defeat an intrusion upon seclusion claim on consent grounds. (Of course, the in-advance term does not in fact obligate the employee or consumer to give contemporaneous express consent; that is the central point of the unenforceability of the in-advance term. But employees and consumers will sometimes, if not often, be unaware of their rights.) The inclusion of a term in an in-advance agreement may also strengthen an employer or creditor’s position under a substantive privacy balancing test by providing some suggestion to courts of the firm’s genuine interest in engaging in the privacy-invading behavior.
In the specific context of employment, to the extent an employee would attach weight to the in-advance agreement being proffered, it is not just the employee but also the employer who might gain from addressing testing ahead of time. For both parties – not just the employee – might suffer if, after relationship-specific human capital had continued to accumulate, the employment relationship were to unravel in a dispute over the administration of a drug or polygraph test. And the argument is clearer still for the creditor-borrower relationship; obviously the creditor faces some vulnerability vis-à-vis the borrower once credit is extended, and, to the extent a consumer would attach significance at the outset to the in-advance agreement being proffered, such an agreement may discourage borrowing by those more likely to default and, on this ground, may be attractive to creditors.

It is important not to overstate here; for instance, in the employment context, while the existence of relationship-specific human capital makes premature separation from employment costly both to employee and to employer, other features of the employment relationship, such as rising wages (relative to productivity) over time, make premature termination uniquely costly for employees. Still, it is not unreasonable to envision overall benefits to in-advance agreements for employers and creditors despite the ineffectiveness of such agreements in establishing a consent defense to a common law privacy claim.

II. Rationality and Consent in Behavioral Economics

As described in Part I, when in-advance express agreements purport to authorize privacy-invading behavior that might, but need not, occur sometime in the future, common law courts eschew reliance on the in-advance agreement in adjudicating privacy claims. Instead, the courts

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appear to engage in a substantive determination of the weight of the privacy and nonprivacy considerations at hand. What might underlie the common law courts’ hesitance to credit the in-advance agreement? This Part describes two robust strands of human behavior that plausibly underlie the common law courts’ approach.

Part II.A outlines the way in which boundedly rational individuals tend to underestimate the likelihood that negative things will happen to them. When an event such as an intrusion upon privacy may but need not occur at some point down the road, many individuals will tend to presume that the event won’t happen to them. This Article adopts – though it does not independently defend – the presumption that arrangements with costs in excess of benefits to the parties as a consequence of one side’s factual misimpressions are normatively undesirable.\footnote{Obviously, those who give little or no weight to any sort of efficiency analysis may find this normative approach unsatisfying.} Under such factual misimpressions by one side to an agreement, the costs of the agreement may exceed its benefits.

Part II.B goes beyond the issue of “errors” committed by boundedly rational individuals and notes how the time-inconsistent discounting displayed by many individuals may also help to shed light on how individuals respond to in-advance agreements to future privacy-invading behavior. Behavioral economics has emphasized the tendency of many individuals “to spend rather save, consume desserts over salads, and go to the movies instead of the gym despite all of their best intentions.”\footnote{Christine Jolls, Behavioral Law and Economics, in Economic Institutions and Behavioral Economics (Peter Diamond & Hannu Vartainen eds., 2007), available at http://www.law.harvard.edu/faculty/jolls/pdfs/Behavioral%20Law%20and%20Economics%204-06.pdf, p.16.} At any given point of time, an individual may greatly discount future periods relative to the present – what Jon Elster calls “the priority of the present.”\footnote{Jon Elster, Ulysses and the Sirens 71 (1979).} Such an individual may be willing to incur a cost in period t in exchange for a gain in period t+1 – so
long as period t is at some future point, not at the present – much as many individuals will express a preference for $110 in a year and a week over $100 in a year, but then will prefer to receive $100 today over $110 in a week.\textsuperscript{145} Such time-inconsistent discounting is of obvious importance to the analysis of in-advance agreements – though its normative status differs importantly from that of bounded rationality, as discussed at the end of Part II.B.

The optimism bias and time-inconsistent discounting discussed here represent familiar behavioral economics territory; no significant independent contribution is intended in highlighting their basic implications for in-advance agreements governing potential future privacy-invading behavior. A more sustained normative defense of the common law privacy precedent summarized in Part I, however, raises additional complexities, which are analyzed in Part III.

A. Human Perception of Probabilistic Events

The area of decision making under uncertainty has been extensively studied by behavioral economics.\textsuperscript{146} Often, systematic errors afflict estimation of the probability of uncertain events. Overestimation of probabilities may occur in the case of highly salient, gripping disasters such as nuclear accidents and airplane crashes.\textsuperscript{147} For many of life’s misfortunes, however, underestimation is common\textsuperscript{148} – in significant part as a consequence of people’s optimistic disposition.

\textsuperscript{146} The still-classic work is \textit{Judgment Under Uncertainty} (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).
\textsuperscript{148} See, e.g., id. Viscusi’s suggestion that the probabilities of some negative events are underestimated contrasts with Alan Schwartz’s view that because “negative information is more vivid than positive
Optimism bias, which has been documented across hundreds of empirical studies,\(^{149}\) refers to the fact that people are often unrealistically optimistic about the probability of negative things happening to them. Most people believe that their chances of such events as having an auto accident, contracting a particular disease, or getting fired from a job are significantly lower than the average person’s chances of suffering from these outcomes.\(^{150}\) Richard Thaler and Cass R. Sunstein offer a characteristically engaging account of optimism bias:

Before the start of Thaler’s class in Managerial Decision Making, students fill out an anonymous survey on the course Web site. One of the questions is ‘In which decile do you expect to fall in the distribution of grades in this class?’ Students can check the top 10 percent, the second 10 percent, and so forth. Since these are MBA students, they are presumably well aware that in any distribution, half the population will be in the top 50 percent and half in the bottom. And only 10 percent of the class can, in fact, end up in the top decile.

Nevertheless, the results of this survey reveal a high degree of unrealistic optimism about performance in the class. Typically less than 5 percent of the class expects their performance to be below the median (the 50th percentile) and more than half the class expects to perform in one of the top two deciles.

This applies to professors, too. About 94 percent of professors at a large university were found to believe that they are better than the average professor….\(^{151}\)


\(^{149}\) A bibliography is available from Neil Weinstein, one of the original contributors to the literature on optimism bias.


\(^{151}\) Richard T. Thaler & Cass R. Sunstein, *Nudge* 31-32 (2008). In the specific case of grades, it is possible that some individuals fail accurately to assess or report their predictions because to do so would be demoralizing – and such demoralization itself could conceivably further depress academic performance. Conversely, realistically confronting one’s prospects might well spur additional studying time and thus improve performance. Apart from the grade example, optimism bias has been observed in hundreds of diverse contexts. *See supra* note 149.
early study of privacy concerns about Facebook found that the majority of users thought that “their own privacy” risks on Facebook were moderate but agreed strongly “with the idea that the information other [Facebook] members reveal may create privacy risks to those members.”

Likewise, when subjects in a 2005 survey were asked about the probability of identity theft, the ratio of those who significantly underestimated the risk to those who significantly overestimated the risk was approximately 3:1 (though underestimation of the risk of identity theft may have declined very recently in response to extensive media and other attention to identity theft).

More generally, it is important not to overstate the force of optimism bias. As already noted, in a highly emotionally gripping context such as the threat of a nuclear accident, overestimation rather than underestimation of risk may be common. But in the case of the less sensational and dramatic privacy invasions discussed in Part I, the available evidence, both outside and inside the privacy context, suggests that underestimation of the probability of an uncertain future invasion is most likely.

Of course, even assuming the average person underestimates the probability of a negative event occurring, it is possible that some individuals will estimate the probability accurately or even will overestimate it. Indeed, it would be shocking if human beings were homogeneous in

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154 See, e.g., Viscusi, *supra* note 147, at 150.

155 See Jolls, *supra* note 150, at 1659 n.23 (studies outside the privacy context); Acquisti & Gross, *supra* note 152 (study in the privacy context); Acquisti & Grossklags, *supra* note 153, at 30 (study in the privacy context).
their estimations of probabilities of uncertain future events.\textsuperscript{156} I return to heterogeneity in individuals’ biases in Part III.B below.

A straightforward implication of the discussion here is that when people are asked to accept the possibility of privacy-invading behavior that will occur only probabilistically at some point down the road, many of them will underestimate the probability that the act will in fact occur.\textsuperscript{157} The basic argument here may be illustrated by returning to the comparison of \textit{Stewart}, finding that employees had given contemporaneous agreement to polygraph testing and thus could not bring their common law privacy challenge to such testing, and \textit{Cordle}, ruling in favor of a common law privacy challenge to employee polygraph testing despite an in-advance agreement authorizing such testing.\textsuperscript{158} (The same point could be made, of course, about the contrast between employee drug testing cases heeding contemporaneous agreement and employee drug testing cases disregarding in-advance agreement.) In \textit{Stewart}, while it might be objectionable to require the polygraph testing that was under challenge in the cases, it is not objectionable on the ground that employees might be misestimating the probability that they would be tested down the road; the probability at the time of agreement was one, and the employees knew it.

Of course, it is conceivable that an employee might underestimate the risk of poor performance on the polygraph test that was about to occur even given a 100\% probability of being tested. However, the dramatic, even somewhat fantastic, quality of imminent polygraph

\textsuperscript{156} See Jolls & Sunstein, \textit{supra} note 22, at 228-30 (discussing heterogeneity among individuals in their degrees of bias).
\textsuperscript{157} See Alessandro Acquisti, \textit{Privacy in Electronic Commerce and the Economics of Instant Gratification}, FIFTH ACM CONF. ON ELECTRONIC COMMERCE 21, 24 (2004) (“Optimism bias may lead us to believe that we will not be subject to privacy intrusions.”).
\textsuperscript{158} See \textit{supra} notes 43-44 and accompanying text (\textit{Stewart}); \textit{supra} notes 111-114 and accompanying text (\textit{Cordle}).
testing from the perspective of an average employee (wires being attached to one’s body, etc.) might more plausibly suggest overestimation, rather than underestimation, of the probability of a negative test outcome at that point in time. As noted above, whether individuals underestimate or overestimate the probability of negative events can vary with the context. Of course, even if individuals confronted with the imminent prospect of a polygraph test do underestimate the probability of poor performance on the test, their bottom-line underestimation of a negative outcome will still be less than in the case of an in-advance polygraph testing agreement under the highly plausible assumption that there is at least some underestimation at the time the in-advance agreement is reached of the probability that polygraph testing will occur down the road.

Consider by analogy the difference between an in-advance express agreement to submit to any and all medical procedures deemed appropriate by one’s treating physician over the course of one’s relationship with the physician, on the one hand, and the usual “informed consent” forms signed immediately before a medical procedure, on the other. Even in the latter case, of course, an optimistically biased patient may underestimate the probability of a negative outcome from the procedure, but clearly the scope of likely optimism bias with respect to the probability of a negative outcome is greater with the in-advance agreement to uncertain future procedures, whose very occurrence is unknown at the time of the agreement.

In light of the differential scope for underestimation in the case of contemporaneous versus in-advance agreement, the behavioral economics analysis described above provides an important ground on which to question in-advance agreement, wholly apart from the harder normative question of whether contemporaneous agreement to an invasion such as polygraph testing should be given effect. Part III.A below further develops this normative argument in favor of the line drawn in the common law privacy case law, but first the discussion turns to a
separate aspect of behavioral economics that may also bear on the law’s distinction between contemporaneous and in-advance agreement.

Note that both here and in the following discussion of time-inconsistent discounting, the argument is not that these factors are the only possible explanations for the fact that we observe in-advance express agreements governing privacy-invading behavior in the case law; there are certainly alternate possible explanations for the observation of such terms – for instance, that parties use them in an effort to screen for desirable employees or consumers, who may be more likely to agree to the terms. The argument instead is that the behavioral economics factors emphasized in this Part can explain the courts’ differential treatment of contemporaneous and in-advance express agreements, an argument developed more fully in Part III.

B. Time-Inconsistent Discounting

A large body of empirical evidence suggests that the degree to which people discount a future consequence relative to a consequence earlier in time swings dramatically with whether the earlier consequence is viewed as in the present or, like the later consequence, in the future. “Now” occupies a distinctive control over people’s decision making – leading to what may well be failures of will power as people ignore or greatly downplay consequences outside of what they conceive as the “present.”

159 Time-inconsistent discounting can occur without individuals being aware of the inconsistency, but failures of will power may well connote such an awareness. See, e.g., Jon Elster, Introduction, in THE MULTIPLE SELF 1, 15-16 (Jon Elster ed., 1985) (discussing cases in which individuals have strong presentist orientations but do not perceive any sort of intertemporal inconsistency); Lee Anne Fennell, Willpower Taxes, GEO. L.J. (forthcoming 2011) [draft p.7] (“[M]yopia … that simply distorts the relative size of future rewards without offering the actor any insight into the distortion does not call for the exercise of willpower”). I return to the issue of individual awareness of time-inconsistent discounting below.
As a summary of the existing body of evidence of such time-inconsistent discounting, consider the graphical representation in Figure 1.\textsuperscript{160} The vertical axis shows the discount factor exhibited by individuals in a given study, while the horizontal axis shows the study’s time horizon. The discount factor is the weight given to the future period, relative to a weight of one for the present. As shown on the graph, the longer the time horizon, the higher the discount factor – and thus the lower rate at which individuals discount the future. This evidence suggests that discounting rises and falls – rather than remaining consistent – across different time horizons. The data in the graph further show that the pattern of declining discount rates with the length of the time horizon is almost solely a product of people’s strong impatience for near-term or immediate rewards; when the creators of the graph omitted studies with time horizons of less than one year from the analysis, discount rates and the length of the time horizon across the remaining studies were essentially uncorrelated.\textsuperscript{161} Thus, the empirical evidence points toward what behavioral economics has termed “hyperbolic discounting,” under which periods after the present are discounted substantially in relation to the present but are discounted only modestly in relation to other periods.

\textsuperscript{160} The figure is from Frederick, Loewenstein & O’Donoghue, \textit{supra} note 145, at 362.

\textsuperscript{161} \textit{Id.}
A separate source of empirical support for time-inconsistent discounting is the observation of preference reversals in intertemporal decision making. A preference reversal occurs when an individual prefers to receive (say) $110 a week after a specified future date to $100 on this date but then, when the date actually arrives, prefers to receive $100 immediately to $110 in a week. Such inconsistency over time is an obvious consequence of the asymmetric discounting of future periods depending on whether they are being compared to other future periods or to the present. A number of empirical studies find such preference reversals.\(^\text{162}\)

Under a pattern of hyperbolic discounting, individuals will tend to discount future consequences – such as potential privacy invasions under an in-advance agreement – even when individuals might care greatly about these consequences (if they end up occurring) when the time comes. Just as many individuals give very different answers to the question of whether they would like to be saving for retirement and the question of whether they are saving for retirement,\(^\text{163}\) individuals may “desire” future privacy protection but fail to act on that desire in

\(^{162}\) For a summary of the studies, see id. at 361-62.

\(^{163}\) See Christine Jolls, Behavioral Economics Analysis of Employment Law, in BEHAVIORAL ECONOMICS AND PUBLIC POLICY (Eldar Shafir ed., forthcoming 2011) [draft at 4].
an exhibition of hyperbolic discounting. In the context of consumer privacy, Alessandro Acquisti and Jens Grossklags suggest that if “individuals have time inconsistencies of the form we describe, they might easily fall for marketing offers that offer low rewards now and a possibly permanent negative annuity in the future.”\textsuperscript{164}

However, at least two difficulties arise with this analysis. First, it is possible that individuals who engage in time-inconsistent discounting are aware of this fact and take steps in response; indeed, much of the behavioral economics literature on time-inconsistent discounting proceeds on precisely this assumption.\textsuperscript{165} In the words of economists Ted O’Donoghue and Matthew Rabin, individuals who exhibit time-inconsistent discounting may be “sophisticates” rather than “naifs,”\textsuperscript{166} and insofar as that is true, it is conceivable that time-inconsistent discounting could lead individuals to seek out privacy-protective agreements at the outset of a relationship as a form of precommitment device in the face of their known time-inconsistent discounting, much as time-inconsistent discounting may lead individuals to a hands-tying approach to retirement saving.\textsuperscript{167}

Second, even under the assumption – which I shall make throughout the remainder of the Article’s discussion of time-inconsistent discounting – that individuals are naifs rather than

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\textsuperscript{164} Acquisti & Grossklags, \textit{supra} note 153, at 31; see also Acquisti, \textit{supra} note 157, at 24-27 (discussing consumer privacy and time-inconsistent discounting); Katherine J. Strandburg, \textit{Social Norms, Self Control, and Privacy in the Online World, in PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION} 31, 39 (Daniela Raicu and Katherine J. Strandburg, ed., Springer, 2005) (noting that individuals “may disclose personal information in transactions with websites . . . because the temptation of immediate gratification overcomes a longer-term preference not to disclose such information”). \textit{Cf.} Froomkin, \textit{supra} note 11, at 1502 (“[C]onsumers … will sell their data too often and too cheaply. Modest assumptions about consumer privacy myopia suggest that even Americans who place a high value on information privacy will sell their privacy bit by bit for frequent flyer miles”); Kang, \textit{supra} note 11, at 266 n.301 (1998) (referring to the possibility that “individuals systematically overvalu[e] the short-term benefits of disclosing personal information, such as receiving a $0.15 discount on dry pasta at the local grocery store, and undervalue[e] the long-term harm of detailed profiles, such as having recorded one’s grocery and household purchases . . .”).

\textsuperscript{165} For discussion, see Jolls, \textit{supra} note 163 [draft at 7 n.2].

\textsuperscript{166} Ted O’Donoghue & Matthew Rabin, \textit{Doing It Now or Later}, 89 AM. ECON. REV. 103, 103 (1999).

\textsuperscript{167} Again, Jolls, \textit{supra} note 163 [draft at 4-7], provides further discussion.
sophisticates with respect to time-inconsistent discounting, a crucial difficulty with an analysis based on time-inconsistent discounting is that it is unclear how to decide which “self”’s views to follow: “Why should (if they should) the preferences of the self” who cares a great deal about a future period t when period t actually arrives be viewed as more “worthy” than the preferences of the self who, well in advance of period t, is not particularly concerned about period t?168 Apart from some relatively special cases,169 it is difficult, within an economic framework, to address this question in a rigorous way.170 But for some the intuition that hyperbolic discounting is a normatively undesirable form of “weakness of will” is strong, and for those the account here of time-inconsistent discounting works in tandem with Part II. A’s efficiency argument from bounded rationality. Both accounts favor the distinction in the common law privacy cases between contemporaneous and in-advance agreement, as described more fully in the next Part.

III. Applying Behavioral Economics: Normative Analysis of Consent in Common Law Privacy

As noted above, a straightforward application of the analysis of optimism bias in Part II.A suggests a normative argument in favor of courts’ unwillingness to rely on in-advance agreement in resolving common law privacy claims, and Part II.B lends further support to the courts’ approach if time-inconsistent discounting is viewed as undesirable.171 Section A briefly elaborates these points and links them to a broader theme in legal analysis of behavioral

168 Jolls, supra note 143, at 16-17.
169 See Jolls, supra note 163 [draft at 7 & n.2] (discussing literature on the prospect of a policy making all temporal selves better off).
170 The discussion here envisions different selves’ preferences to be, themselves, not affected by the choice of a legal rule. Matters are more complex still if the choice of rule itself affects people’s preferences. Again, the analysis below will not seek to address these controversies and is simply directed to those who, for independent reasons, view time-inconsistent discounting in “weakness of the will” terms.
171 Cf. Barnes, supra note 11, at 1616-17, 1618-19 (in the context of computer spyware, defending contemporaneous agreement over in-advance agreement on normative grounds).
economics — the theme that common law rules may exhibit an implicit behavioral understanding of human decision making. Section B discusses potential objections to the behavioral economics argument in favor of the line drawn in the common law privacy cases. Section C discusses the domain of the behavioral economics argument offered here, while section D briefly notes the relationship between consent’s role in common law privacy and the employment law tort of “wrongful discharge in violation of public policy.” Finally, section E discusses the broader question of the validity of consent to privacy-invading conduct even in the absence of the behavioral economics concerns with in-advance agreement emphasized in this Article; as I shall describe, behavioral economics of course does not exhaust the set of reasons that might lead one to question a role for consent to privacy-invading behavior — but behavioral economics does define a sphere within which increased normative consensus on consent’s role is possible.

A. The “Implicit Behavioral Rationality” of Common Law Privacy

As suggested in Part II.A, many individuals are likely to act upon misimpressions (underestimates) of the probability of future negative events. It follows that there is a clear normative basis for questioning, on grounds of efficiency, the force of in-advance agreements governing uncertain future privacy-invading behavior. If individuals governed by such in-advance agreements will often misperceive their true effects, then the unfettered private contracting model will produce arrangements that are inefficient, as individuals agree or submit to policies that in truth impose costs in excess of their benefits. (Again, this Article does not independently defend the presumption that efficiency considerations play at least some role in a normative analysis.) While it may be reasonable to presume that private contracting is well-suited to producing efficient results when parties have accurate estimates of costs and benefits,
that conclusion does not follow when one side operates under systematic misimpressions (as will occur with in-advance privacy agreements for individuals who are optimistically biased).

Similarly, if the empirical suggestion of time-inconsistent discounting described in Part II.B is deemed to be normatively undesirable, then, again, the common law approach of denying effect to in-advance agreements governing future privacy-invading behavior makes sense on efficiency grounds. Indeed, time-inconsistent discounting maps directly onto the temporal contrast between contemporaneous and in-advance agreement to privacy-invading behavior – though optimism bias also maps closely onto that temporal contrast for the obvious reason that uncertainty existing at time $t$ may often be resolved by a future point $t'$.

Note that the central argument here turns on biased perceptions of the probability of future eventualities and time-inconsistent discounting of the future – not a lack of basic knowledge of the features of those future eventualities. The core concern with the in-advance agreements and policies discussed in Part I.C above is not a concern that an employee didn’t know what a drug or polygraph test was or that consumer couldn’t fathom an entry upon premises by a creditor; the central issues are the serious underestimation of the probability that such events will occur and (potentially) the strong “priority of the present” exhibited by many individuals. Thus, the concern is quite distinct from the important argument by many privacy law commentators that vague, general data privacy releases in on-line or other settings leave consumers with little idea of the nature or attributes of the privacy intrusions that could occur in the future. As one commentator has explained this problem:

The potential future uses of personal information are … vast and … unknown …. [A] person who signs up for a discount supermarket shopper card might have some vague knowledge that her personal information will be collected. … But what if the person were told that information about the contraceptives and over-
the-counter medications she buys would be made available to her employer? Or given to the government?"

In the cases discussed in Part I.C, by contrast, the in-advance agreements did refer to the specific intrusions that might occur; the central issue is that these intrusions are probabilistic and in the future, not that they are incompletely specified or highly opaque to the plaintiffs. (Even in the entry-upon-premises cases, where the in-advance agreement was one term among a substantial number of terms in the contract, the agreement to allow entry was often prominently featured in all capital letters – though without seeing the full contracts at issue in these cases it is impossible to be certain about how prominent the entry terms were.) Of course, it is important not to exaggerate the point here; it may be impossible to understand urine or polygraph testing fully until the test has actually been administered, and it may be impossible to understand a creditor’s entry upon premises until it actually occurs. On that account, however, even contemporaneous

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172 SOLOVE, supra note 11, at 88; see also, e.g., In the Matter of Sears Holdings Management Corp., FTC File No. 082 3099 (June 4, 2009) (finding that Sears’s disclosures to on-line consumers about information collection were insufficiently clear and transparent under the Federal Trade Commission Act); Alessandro Acquisti & Jens Grossklags, What Can Behavioral Economics Teach Us about Privacy, in DIGITAL PRIVACY: THEORY, TECHNOLOGIES AND PRACTICES 363, 364 (Alessandro Acquisti et al. eds. 2008) (similar to Solove); Barnes, supra note 11, at 1616-17 (suggesting that computer users have very little grasp of the specific and diverse ways in which spyware gathers and transmits information about them); Cohen, supra note 11, at 1397, 1433 (similar to Barnes); Janice Tsai, Serge Egelman, Lorrie Cranor & Alessandro Acquisti, The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study, 2 INFORMATION SYSTEMS RES. 2 (presenting findings indicative of the fact that consumers are often unaware of potential forms of privacy invasion that may occur on-line). Outside of the privacy context, general discussions of the failure to appreciate the fact of a particular harm at all – as distinguished from misestimating its probability or discounting it heavily because it is well into the future – include Robert A. Hillman & Jeffrey J. Rachlinski, Standard Form Contracting in the Electronic Age, 77 N.Y.U. L. REV. 429, 440 (2002) (“Businesses understand the true risks of contracts better than consumers, and hence can include terms in the form that are much more favorable to them than consumers know or appreciate. In effect, businesses have incentives and opportunities both to allocate the risks of the contract efficiently and to impose hidden risks on consumers when possible”); and Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. CHI. L. REV. 1203, 1207 (2003) (arguing that ‘‘courts’’ initial analytical step [in deciding unconscionability claims under contract law] should be an analysis of whether a challenged contract term is salient to a significant number of buyers” because when “a contract term is non-salient to most purchasers, … those purchasers are incompetent to protect their interests vis a vis that term”).
agreement (just before the privacy-invading behavior) would be problematic – yet the common law case law described in Part I uniformly treats such agreement as dispositive against plaintiffs.

When, converse to the case of in-advance agreement, agreement is given roughly contemporaneously with the occurrence of an unambiguous privacy-invading behavior such as drug or polygraph testing or an entry upon premises, there is not only no incompletely specified privacy-invading behavior but also no uncertainty (or at a minimum less uncertainty) and no delay in consequences, and thus no scope for optimistically biased probability assessments or time-inconsistent discounting. In this context, the behavioral economics analysis in Part II offers no basis on which to question the agreements reached by private parties, and, consistent with this reasoning, the common law cases are resolved on grounds of consent. Of course, other potential grounds exist for raising normative questions about the private-contracting model, as noted in Part III.E below. However, those grounds are subject to significant dispute. By contrast, agreeing or submitting to in-advance agreements governing privacy-invading behavior on the basis of systematic misimpressions represents a context in which greater normative consensus on restricting consent’s role is possible; and the same may be true for agreeing or submitting to such in-advance agreements on the basis of time-inconsistent discounting (although this Article does not take a position on that issue).

Of course, it remains possible that the common law’s “cure” is worse than the disease. While enforcing in-advance agreements may produce inefficient outcomes in some cases (as individuals agree or submit to terms whose true costs exceed their benefits), in other cases the common law’s refusal to enforce such agreements may deprive parties for whom the agreements would be efficient of a desirable tool for structuring their relationship – for instance because some individuals fail to exhibit optimism bias and time-inconsistent discounting and in-advance
terms affirmatively facilitate (for such individuals and their contracting partners) efficient signaling or serve as valuable precommitment devices against future “lapses” into drug use, debt non-repayment, or other undesirable actions. (Note, importantly, that signaling accounts require that individuals attach substantial weight to the concessions reflected in in-advance agreements; again, behavioral economics calls that premise into question.) Moreover, the choice of the legal treatment of in-advance agreement may differentially benefit and burden different employees (and such distributional effects might in turn have efficiency effects depending on the particular definition of efficiency being employed\textsuperscript{173}). Conceivably, a party might substitute disadvantaging members of a particular race or sex if unable to rely upon in-advance agreements to various forms of privacy-invading behavior. Although a comprehensive cataloguing of the effects of the common law privacy doctrine described above would be necessary to offering an airtight normative defense of that doctrine, an important potential point in favor of the line drawn by the common law is that parties are not precluded from engaging in the underlying privacy-invading behavior at issue; all that is required is either a contemporaneous express agreement or a substantive analysis of the considerations for and against the behavior in question – an inquiry that may in fact partially duplicate an efficiency analysis. The case here is parallel to another case of disregard of an in-advance agreement: the failure – arguably on grounds of optimism bias – to enforce liquidated damage clauses.\textsuperscript{174} In the liquidated damages clause context, the efficiency cost of disregarding the in-advance agreement is limited – not negated by any means, but limited in its magnitude – because the law itself provides for damages from breach of contract. So too, here, the potential costs to the parties of the courts’ failure to enforce in-advance express agreements in response to common law privacy claims should not be overstated.

\textsuperscript{173} See generally Louis Kaplow & Steven Shavell, Fairness vs. Welfare 28-31 (2002).
Note that in the context of in-advance express agreement when the potentially tortious event occurs without any notice – such as hazardous ski conditions that contribute to a serious accident – the situation importantly differs in the sense that there is no opportunity for contemporaneous agreement once the uncertainty has been resolved, and thus the efficiency cost of denying effect to an in-advance agreement is likely to be greater.

The fit of the common law privacy approach to the behavioral economics analysis in Part II parallels other domains in which the common law has been thought to exhibit an “implicit behavioral rationality.” In his well-known study of hindsight bias and the law, Jeffrey Rachlinski suggests that, in myriad ways, the judicial response to the tendency of people to think they knew all along what they know with the benefit of hindsight has succeeded in responding effectively to this bias:

> [C]ourts have . . . done a remarkable job of adapting to the limitations of human judgment in hindsight. [T]he courts have developed rules that take advantage of specific opportunities to avoid the bias. For example, when a reliable ex ante assessment of reasonable care is available, such as custom in medical malpractice, courts rely on it rather than their own independent assessment of reasonable care. . . . Rules have evolved that reduce the bias’s impact, and when its influence cannot be purged, sensible second-best rules have emerged.

As in Rachlinski’s description, in the account offered here the law seems to have “adapted well to the fallibility of human judgment.” And, just as this feature of courts’ behavior means that “understanding the hindsight bias is . . . critical to understanding the law,” so too understanding optimism bias helps us to make sense of the otherwise confusing set of common

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175 Jolls & Sunstein, supra note 22, at 235.
177 Id. at 575.
178 Id.
law privacy cases. (Again, the same may be true for time-inconsistent discounting, but the normative status of time-inconsistent discounting is more contested.)

Of course, one may not be persuaded by the normative claim offered here but still accept Part I’s descriptive claim about the pattern of common law privacy cases adopting versus eschewing consent as a ground for decision. The two claims may rise or fall separately—though, following a similar suggestion by Professor Einer Elhauge, the argument here “also invokes that combination of descriptive and normative claims that is the particular province of law professors.” That is, while legal analysis may often include pure descriptive or pure normative analysis, I agree with Elhauge’s suggestion that part of what distinguishes legal theory from purely a descriptive or normative undertaking is that “it also focuses on determining which of the possible normative justifications is most consistent with the descriptive landscape.”

“The best legal theory might thus be neither the most descriptively accurate nor the most normatively attractive, but rather the theory that provides the best combined fit of descriptive explanation and normative justification.” Here, as in Elhauge’s analysis, the “normative and descriptive claims stand separately” but may also “draw additional strength from their combination.” By contrast, a normative theory of privacy and consent that emphasized, for instance, bargaining power or the availability of other options at the time an agreement is sought would imply greater willingness to rely upon in-advance agreement than contemporaneous

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181 Id. at 2036.
182 Id.
183 Id. at 2035.
agreement, at least by an employee – yet the descriptive pattern in the case law is just the opposite.\footnote{For critique of the bargaining power argument on normative rather than descriptive grounds, see infra Part III.B.1.}

Note that in the behavioral economics account offered in this Article, the sensibleness of judicial decision making may well reflect implicit rather than explicit responses by judges to the features of human behavior described above – as reflected in the phrase “implicit behavioral rationality.”\footnote{See Jolls & Sunstein, supra note 22, at 235.} Courts may have an intuitive skepticism about in-advance agreements authorizing employee drug or polygraph testing or premises-invading repossessions, based upon courts’ background sense of human nature; of course this may happen without courts having an explicit awareness of what they are doing.

B. Potential Objections

Although the basic application of the behavioral economics analysis to the case law described in Part I is relatively straightforward, a few wrinkles require additional discussion.

1. Questioning the Desirability of Preferring Contemporaneous Agreement

A first response to the normative argument offered here in favor of the consent line drawn in the privacy case law is that, while behavioral economics offers good reasons to be concerned about giving effect to in-advance agreement, the net result of the twin features of current doctrine – relying on contemporaneous but not in-advance express agreement – is that parties, without announcing their intentions in advance, can engage in privacy-invading behavior with impunity as long as they procure a contemporaneous agreement. (In other words, what was described above as limiting the potential costs of the common law approach – that
contemporaneous agreements would be enforced – might actually exacerbate those costs.) In the employment setting in particular, contemporaneous agreements may often be relatively easy for employers to procure regardless of an employee’s strong feelings about the privacy-invading behavior. As the employee argued unsuccessfully to the court in *Jennings v. Minco Technology, Inc.*, she could not afford to withhold her contemporaneous agreement to urinalysis because she was “poor and need[ed] her salary to maintain herself and her family.”

However, the normative argument offered here is one in favor of drawing a distinction between contemporaneous and in-advance agreement; it suggests that in-advance agreement should carry less force than contemporaneous agreement, but there is no argument that contemporaneous agreement should be controlling. Indeed, as discussed in Part III.E below, contemporaneous agreement may be troubling on familiar grounds. The analysis here simply shows that there are separate concerns with in-advance agreement – and, thus, that differential treatment of contemporaneous and in-advance agreement stands on sensible normative footing.

It might still be urged that in the workplace context, the employee who is asked for contemporaneous agreement to urinalysis or polygraph testing after working at a firm for decades with no mention of such testing is actually in a significantly worse position than the employee who learns well in advance of any actual drug or polygraph testing that such testing might occur at some future point on the job and then later is asked for contemporaneous express agreement to urinalysis or polygraph testing. The premise of this objection, however, is that

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186 765 S.W. 2d 497 (Tex. App.-Austin 1989).
187 *Id.* at 502.

An employee offered the choice between submitting to an intrusive and degrading search procedure required by her employer and losing her job might rationally choose to undergo the search, particularly if she must rely on her income to meet ongoing financial
an uncertain and nonspecific advance statement about testing would be meaningful in a significant way to the employee, who might then choose a different job or alter behavioral choices such as illegal drug use – but this is precisely the idea that the behavioral economics evidence in Part II calls into question. The evidence in Part II suggests that the nonspecific in-advance statement, when the privacy-invading behavior is uncertain and (if it will occur at all) delayed, is unlikely to have a large effect on employees’ decisionmaking. While employees may give their contemporaneous agreement to privacy-invading behavior because of a lack of other options (and while other options may indeed be more plentiful in advance), the discussion in Part II suggests that employees are likely simply to offer their in-advance agreement without making any use of these other available options. To repeat, nothing in this Article seeks to offer a normative defense of relying on even contemporaneous agreement; the suggestion is instead that even if contemporaneous agreement is relied upon, nonetheless behavioral economics analysis provides a good reason that in-advance agreement should not be.

It also bears emphasizing that the normative weight of contemporaneous agreement may be greater in certain workplace contexts – such as workplace email monitoring – than it is with respect to the employee drug and polygraph testing context; thus, even if one does not accept the argument in the previous paragraph for urinalysis or polygraph testing specifically, one may accept it in other settings. In a context such as workplace email monitoring, it may be possible for employees from whom contemporaneous agreement is sought to make behavioral adjustments that largely or entirely eliminate the invasiveness of the behavior in question. In the example of Parkstone v. Coons, from the earlier analysis of contemporaneous agreement to email monitoring, because the employee was clicking a box at every computer sign-on to

commitments or if she stands to lose a substantial and irreplaceable investment in security and its attendant benefits accumulated over her years of employment.

189 2009 WL 1064951 (D. Del.).
acknowledge the monitoring, the employee might well be able to avoid disclosing anything viewed as private over the email system. The brute privacy incursion of having to perform “an excretory function traditionally shielded by great privacy”\textsuperscript{190} and then furnish the products of one’s performance for testing – perhaps all while “a monitor of the same sex … remain close at hand to listen for the normal sounds”\textsuperscript{191} in an effort to avoid sample tampering – is not at all affected by contemporaneous agreement; by contrast, if one is told that one’s email is being monitored at a particular point and one gives contemporaneous agreement to the monitoring, it is possible that one can eliminate the invasiveness of the behavior by changing one’s own actions accordingly (just as the impact of the \textit{results} of drug testing may be avoidable by refraining from drug use).

The discussion of the court in \textit{In Re Asia Global Crossing},\textsuperscript{192} a bankruptcy case that addressed email privacy, is illustrative in this connection. (\textit{In re Asia Global Crossing} was not discussed in Part I.C above because the legal question at issue in the case was not whether the email monitoring was an intrusion upon seclusion under the common law of privacy but rather whether employees had waived the attorney-client, work product, or joint defense privileges in using their company’s email system to communicate with their personal attorneys, but in the course of adjudicating these questions, the bankruptcy court roamed broadly over both constitutional and common law privacy case law, including limited mention of intrusion upon seclusion cases.\textsuperscript{193}) The \textit{Asia Global Crossing} court observed that “at log-on, some business computers … warn users about personal use and the employers’ right to monitor [and] the user

\textsuperscript{191} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 661 (1989).
\textsuperscript{192} 322 B.R. 247 (Bkrtcy. S.D.N.Y. 2005).
\textsuperscript{193} Id. at 251, 256-58.
actually consents to the limits.”194 If users are greeted each morning at log-on with a requirement that, to start working on the computer, they must expressly agree to monitoring of their email and limits on their use of email, then it is possible that users are to a substantial degree able to avoid significant invasions of their privacy. It is important for purposes of this argument, of course, that monitoring is actually clear and salient to employees – something of which they are actively aware on an everyday basis.195

To the extent that contemporaneous express agreement to employee drug and polygraph testing is thus on weaker normative ground than contemporaneous express agreement to workplace email monitoring, an interesting intermediate solution (not reflected in the existing case law) would occupy a position between blanket acceptance of contemporaneous express agreement (the current position) and complete disregard of such agreement in the context of employee drug and polygraph testing. Under this solution, contemporaneous express agreement to employee drug or polygraph testing would defeat a claim of intrusion upon seclusion only if the contemporaneous agreement were given by a new employee at the time employment starts, either in connection with a one-time test immediately upon commencing employment or in connection with a routine – say, weekly – testing regime commencing with the start of employment. (An employer that was not otherwise planning to utilize testing on either a one-

194 *Id.* at 261. In *Asia Global Crossing*, the court itself did not seem to draw a strong distinction between the regular log-on protocol apparently used for court personnel (which seemed to involve contemporaneous agreement) and the in-advance corporate email policies at issue in the case before it. *See id.* at 258-61 (quoting from the written “Corporate E-mail Policy” but then discussing the log-on protocol in use at the court). However, because the evidence about the company’s in-advance policy was “inconsistent,” *id.* at 260, the court did not reach a final resolution with respect to the contested email monitoring.

195 *Cf.* Barnes, *supra* note 11, at 1616 (“[M]ost consumers are not aware of the surveillance that is continually transpiring” and therefore, spyware “should be required to periodically ‘knock and announce’ before entering the consumer’s home/computer and transmitting the private surveillance data”); Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 910-11 (2002) (firms should be required “to obtain the consumer’s express consent each time it wishes to share personal data about that consumer with a third party”).
time, preemployment basis or a regular, routine basis would have to alter its plans – for instance by substituting routine drug or polygraph testing for random testing at unspecified, probabilistic points – if it wished to reply on contemporaneous express agreement under this regime.) Such an approach would avoid both the behavioral economics critique of relying on an in-advance agreement governing uncertain future behavior and the vulnerability problems that come with acceding to contemporaneous express agreement relatively late in the game by a long-time employee.

2. Debiasing?

A second set of potential objections to normative defense of the common law privacy cases on behavioral economics grounds involves prospects for “debiasing.” One version of this response suggests that it is conceivable that strictly heeding in-advance terms – contrary to the actual decisions of common law courts – would encourage individuals to engage in “self-debiasing” mechanisms in response to their optimism bias and, if it is viewed as undesirable, their time-inconsistent discounting. Such self-debiasing mechanisms have received occasional attention in the legal literature. However, under the seemingly reasonable assumption that such mechanisms are unlikely to be widely employed regardless of the legal regime governing agreement to privacy-invading behavior, the normative argument in favor of the existing approach of the courts remains intact. If strictly heeding in-advance agreements would not induce individuals to take significant steps to reduce their level of optimism bias or time-

inconsistent discounting – and it seems plausible that it would not have this effect – then the case law in Part I is consistent with, not at odds with, the behavioral economics analysis in Part II.

A second version of the “debiasing” objection is more plausible. On this view, common law privacy itself might seek to take on a debiasing function. Instead of entirely eschewing reliance on in-advance terms in light of optimism bias and time-inconsistent discounting, it is possible to imagine the law tackling such phenomena more directly.197 Existing work in behavioral law and economics suggests means for reducing optimism bias through legal measures requiring statements that harness the availability heuristic and frame consequences effectively.198 Thus, for instance, in the case of a risky product, while a generalized warning may have only modest impact on the probability estimates of optimistically biased consumers, providing a specific narrative account of harm from the product may do far more to debias consumers.199 And if time-inconsistent discounting is also viewed as undesirable, then it is plausible to imagine using similar measures to increase the impact of future consequences on people’s decision making. Thus, instead of entirely eschewing reliance on in-advance agreements in the contexts discussed above, it is conceivable that privacy law could require those seeking to rely on in-advance agreements to take steps to reduce optimism bias and (if the law sought to do so) time-inconsistent discounting – for instance by providing a real-world narrative of someone who was unpleasantly surprised by drug or polygraph testing or an entry upon premises.200

197 See generally Jolls & Sunstein, supra note 22, at 200 (“Legal policy may respond best to problems of bounded rationality not by insulating legal outcomes from its effects, but instead by operating directly on the boundedly rational behavior and attempting to help people either to reduce or to eliminate it.”).
198 See id. at 207-16.
199 See id. at 212-16.
The potential appeal of such strategies for debiasing through law is particularly significant when individuals exhibit significant heterogeneity in their risk estimation biases. While eschewing reliance on in-advance agreements bars effective consent even by those who do not underestimate the risk of future privacy-invading behavior under the agreements, it is plausible that legal debiasing strategies focused on “bringing home” the risks to those individuals who suffer from optimism bias would leave outcomes for individuals not suffering from such bias relatively unaffected. Similar points may apply with respect to time-inconsistent discounting; while, as discussed above, many individuals may, at any given point in time, significantly discount “later” relative to “now,” some individuals may not exhibit this pattern or may even exhibit the opposite tendency toward “hyperopia – an overweighting of the future relative to the present that manifests itself in behaviors like extreme miserliness and workaholism.” Compared to denying effect to in-advance agreements, strategies for debiasing through law may well have no or fewer untoward effects on those who do not exhibit time-inconsistent discounting.

While strategies for debiasing through law may thus be normatively appealing on a number of grounds, they have not been adopted in the common law of privacy with respect to the treatment of express agreements – perhaps because the strategies are too difficult for courts to craft and administer. Indeed, the close analogues to such strategies in observed practice outside the privacy domain seem to involve administrative agencies or other non-judicial actors.

While common law courts have often required “informed consent” to medical procedures or

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201 See Jolls & Sunstein, supra note 22, at 228-30.
202 See id. at 229-30.
203 See Fennell, supra note 159.
204 See, e.g., Jolls & Sunstein, supra note 22, at 212-16.
generalized warnings in the context of risky products, those warnings have required factual
disclosures without attempting to debias individuals who, for instance, will be led by optimism
bias to assume that their personal risk is much lower than the generalized risk reflected in a
product warning. Without a large agency role, an approach of debiasing through law may be
too unwieldy – and agencies have of course not played much, if any, role in the sorts of common
law privacy disputes discussed above. Thus, it does not seem surprising that common law
privacy has sought, not to debias those confronted with in-advance terms, but to turn the
conversation away from in-advance agreement entirely.

Although the focus of this Article’s analysis of common law privacy has been on the role
of express agreement, brief consideration of implied agreement to privacy-invading behavior
provides an intriguing suggestion of the reliance on a debiasing-type approach when such an
approach is feasible for common law courts. When in-advance agreement to a behavior such as
drug testing is so obvious in the particular circumstances that a court is willing to imply it
without the parties having made any sort of express agreement – such as, one imagines, in the
context of testing of an Olympic athlete for performance-enhancing drugs – the very
circumstances that support the implication of the agreement also suggest that the individuals in
question will be “debiased” to a significant degree. If drug testing in a given circumstance is
sufficiently self-evident that agreement to it will be implied by a court, then individuals are much
less likely to underestimate the probability of testing on account of optimism bias – though,
interestingly, they may still discount future testing in a time-inconsistent fashion. In effect, the
surrounding circumstances effect the debiasing of affected individuals, at least insofar as
optimism bias is concerned. It is important not to make to much of this point, however, as

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205 See, e.g., Magana v. Elie, 439 N.E.2d 1319, 1321 (Ill. App. 1982) (informed consent requirement);
agreement to privacy-invading behavior involving the contexts of body and home emphasized above would rarely be implied by common law courts.206

3. Simple Information Failure?

An alternative potential account of the common law’s differential treatment of contemporaneous and in-advance express agreement emphasizes not limitations on human rationality in *processing* and *evaluating* relevant information but, rather, the simple lack of full information at all. Individuals entering into an in-advance express agreement to submit to employee drug testing, entry upon premises, or employee polygraph testing often will not be aware of the precise “audit rate” – the rate at which the privacy-invading behaviors occur on average. But without some form of bias such as optimism bias, there is no reason to suspect that people’s errors in estimating the audit rate will be other than random; some may underestimate the rate, while others may overestimate it. In the absence of a systematic tendency toward underestimation of the risk of uncertain future privacy-invading behavior, there is no reason to think that, in many or most cases, entering into an in-advance agreement will fail to maximize the parties’ gain from trade. Thus, simple information failure does not well account for the case law pattern described in Part I.

C. The Domain of the Argument

It is important to emphasize the domain of the normative argument offered in this Part. It is easy to envision a sensible system in which in-advance agreements governing privacy-invading behavior are not given effect when *fundamental privacy interests – such as those*

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206 As noted earlier, implied agreement is more likely to come up in connection with aspects of common law privacy other than the intrusion upon seclusion branch.
related to the body or the home – are at stake, but in which such agreements are given effect when the privacy interests at stake fall outside of those fundamental categories. There are costs in having common law courts make substantive determinations of whether in a given case the privacy considerations outweigh the countervailing interests and in precluding the efficient signaling and precommitment that may be achieved through in-advance agreements, and when privacy concerns arise outside of the contexts of the body and the home, avoiding these costs may make good sense. To be sure, individuals are just as likely to err in assessing the probability of uncertain future events when privacy concerns are outside of those contexts as when they are within them – but such errors should be less costly in the former case. Indeed, in some workplace environments, a step such as email monitoring may not generate serious privacy concerns – for instance because social or other norms in those environments severely limit the likely circumstances in which monitoring might actually occur.

It follows that if, contrary to the limited body of common law email privacy cases discussed in Part I.C, future courts were routinely to uphold email monitoring against common law privacy claims based solely on in-advance express agreements governing such monitoring, this approach would not necessarily be inconsistent with the normative account offered here. If other considerations differ by a large enough margin, then differential reliance on in-advance express agreement across different contexts within common law privacy may make good sense.

A parallel analysis applies to the definitional threshold of an “intrusion.” As discussed in Part I.C.4, common law courts often hold some behavior – such as questioning a plaintiff’s friends and colleagues – to be nonintrusive as a matter of definition. This is so despite the fact that an individual who chooses to share information with an acquaintance may both optimistically underestimate the probability that the information will end up in another party’s
hands at some point down the road and engage in time-inconsistent discounting with respect to such a potential future outcome. Indeed, it would even be possible to describe cases such as *Nader v. General Motors Corp.*[^207] as cases in which the plaintiff impliedly agreed to the disclosure of the at-issue information by sharing it with one or more acquaintances – yet such implied agreement is subject to the same potential problems of optimism bias and time-inconsistent discounting as is an in-advance express agreement. However, the invasion in a case such as *Nader*, while certainly upsetting to the plaintiff, may be less disturbing because the most private territories – the physical structures of the body and the home – were not at issue in the case.[^208]

The discussion here about the domain of the argument also loops back to the focus in Part I on intrusion upon seclusion claims within the common law of privacy. As just noted, to count as an “intrusion,” behavior must be of a particular character.[^209] By contrast, other strands of common law privacy – all of which are related to the defendant’s disclosure of information to third parties – do not depend upon particular types of “intrusions,” and thus they may embrace a

[^207]: 255 N.E.2d 765 (N.Y.1970); see also, e.g., Johnson v. Stewart, 854 So.2d 544 (Ala. 2002); Johnston v. Fuller, 706 So.2d 700 (Ala. 1997).

[^208]: It is even possible that distinguishing between contemporaneous and in-advance agreement on behavioral economics grounds is best limited only to invasions of *bodily* privacy. In the entry-upon-premises context, there is a competing account of the distinction between contemporaneous and in-advance agreement – that the latter, if enforceable when unaccompanied by the former, could lead to breaches of the peace that, almost by definition, cannot occur with contemporaneous agreement: It is consistent with the underlying policy to find that a consent given contemporaneously with the possession is effective and, on the other hand, that one given weeks or months before in … the security agreement is ineffective. … The contemporaneous consent affords substantial protection against violence, while an earlier written consent does not. Since the goal of the breach of peace restriction is to prevent violence, … the distinction is appropriate.


Mikolajczyk also notes, more akin to the analysis in this Article, that in the case of “a consent given contemporaneously” the “debtor fully appreciates the consequences of his consent,” id., but he does not pursue this line of argument beyond his passing comment.

broader swath of conduct and be less matched to the normative case against in-advance agreement developed here.

D. Notes on Consent and the Tort of “Wrongful Discharge in Violation of Public Policy”

Several of the employee privacy cases described in Part I involved employees who brought privacy-based challenges to their termination, either for refusing to submit to drug or polygraph testing or for the results of such testing. The cause of action in these cases is the tort of “wrongful discharge in violation of public policy,” a limited exception to the general workplace rule of employment at will. In these cases, the “public policy” claimed to be violated by the discharges was the common law right against intrusion upon seclusion.

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210 For a clear statement of the “wrongful discharge in violation of public policy” tort, see Kim, supra note 188, at 721-23.
211 See supra note 93 and accompanying text.

In another employee drug testing case, Rushing v. Hershey Chocolate-Memphis, 2000 WL 1597849 (6th Cir.), the employee refused to submit to testing and was fired as a result, but in the ensuing lawsuit the employee brought only an intrusion upon seclusion challenge and not any type of challenge to the discharge. Not surprisingly, the Hershey court ruled against the employee’s direct claim of intrusion upon seclusion, as no test had been conducted (though the court also offered the alternative grounds that the employer had a strong interest in drug testing). See id. at *2-3; see also Luedtke v. Alaska Nabors Drilling Co., 768 P.2d 1123, 1130-38 (Alaska 1989) (ruling against direct claim of intrusion upon seclusion brought by employee who refused testing, while entertaining on the merits a claim of wrongful discharge brought by the employee); cf. Kelly v. Mercoid Corp., 776 F. Supp. 1246, 1256-57 (N.D. Ill. 1991) (no intrusion upon seclusion when employee refused to submit to urinalysis for mercury testing). Note that neither Rushing nor Luedtke is included in the table of cases in Appendix B because in neither case was there evidence of an express agreement or policy governing drug testing. Note also that the Hershey decision is an unpublished opinion, citation of which is “disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.” Sixth Circuit Rule 28(g).

In some states an action for wrongful discharge in violation of public policy cannot look to common law, including the common law of privacy, as a source of public policy. In such states, a wrongful discharge challenge to termination related to employee drug or polygraph testing would require an applicable constitutional, statutory, or regulatory provision as a source of public policy. See, e.g.,
As described in Parts I.B and I.C, courts reject wrongful discharge claims based on common law privacy on grounds of consent in cases in which the challenged employer behavior follows contemporaneous express agreement to the behavior, but they do not rely on consent in the case of in-advance express agreement. (Whether the claim is nonetheless rejected will depend on a substantive analysis of the privacy-invading behavior in question, as described above.) The implication of this doctrinal mapping is that the “public policy” reflected in common law privacy may be violated in the absence of contemporaneous express agreement even when it would not be violated in the presence of contemporaneous express agreement. Thus, the shortcomings of in-advance express agreement are protected as a matter of public policy. This point bears emphasis because it is sometimes suggested that the wrongful discharge tort is largely or exclusively focused on protecting “third party interests” apart from those of the individual employer and employee.213 The case law in Part I, however, suggests that, at least in the common law privacy context, the tort of wrongful discharge is not limited in this way, as particular employer behavior – such as drug testing – that either may or may not be viewed as having third party effects either is or is not assailable under the wrongful discharge tort depending on whether the behavior follows the employee’s contemporaneous express agreement.

Thus, whatever the logical appeal of the notion that a privacy invasion cannot give rise to a claim for wrongful discharge in violation of public policy because “[t]he right to privacy is, by its very name, a private right, not a public one,”214 this notion is at odds with the existing common law privacy cases. The idea that “[t]he parties could have lawfully agreed that [the employee] would

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716-19 (Tenn. 1997); Stewart v. Pantry Inc., 715 F. Supp. 1361, 1364 (W.D. Ky. 1988). Thus, in both Stein and Stewart, the common law privacy analysis involved a direct claim of intrusion upon seclusion (as shown in the tables in Appendices A and B).


submit to urinalysis without violating any public interest” simply does not conclude, in the existing common law cases, the question of the legality of discharge in the absence of a contemporaneous express agreement. Put differently, a substantive judicial inquiry into employer versus employee interests with respect to a privacy-invading behavior is neither purely a mandatory rule nor purely a default rule; which one it is depends on the timing of the employee’s agreement to submit to the employer behavior.

This analysis is narrower than Judge Becker’s brief but sweeping dismissal of the role of consent in the employee drug testing case of Borse v. Piece Goods Shop, Inc. In Borse, in which the employee challenged the drug testing policy immediately upon its announcement (and thus arguably neither expressly nor even impliedly agreed to submit to drug testing), the court resolved the common law privacy challenge by engaging in lengthy balancing of the employee’s privacy interests and employers’ business interests in drug testing. Despite the arguable lack of any form of agreement in Borse, Judge Becker explicitly addressed, and rejected, a role for consent under common law privacy doctrine. After noting that the court in Jennings v. Minco Technology Labs, Inc. “reasoned that the employer’s urinalysis program would not violate plaintiff’s privacy because her urine would be tested only if she consented,” Judge Becker wrote as follows:

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215 Id. Luck itself involved a contemporaneous express agreement, so the court’s constitutional ruling in favor of the employer on grounds of consent is consistent with the outcome that would be reached under the common law. However, the court’s rationale under the California constitution seems much broader, as stated in the text.
216 See cases cited supra notes 45-51, 69-70, 78, 80-92, and 111-114.
217 963 F.2d 611 (3rd Cir. 1992).
218 Id. at 620-25. The absence of any support for an express agreement is the reason the Borse case is not included in the case table in Appendix B.
[B]alancing [of employee’s privacy interests against employers’ legitimate business needs] is more consistent with Pennsylvania law that the approach taken by the Texas court in Jennings. … [U]nder Pennsylvania law an employee’s consent to a violation of public policy is no defense to a wrongful discharge action when that consent is obtained by the threat of dismissal.”

The Pennsylvania cases referenced by Judge Becker in support of his view that “an employee’s consent to a violation of public policy is no defense to a wrongful discharge action when that consent is obtained by the threat of dismissal” all involved the question of consent to polygraph testing – a context in which a Pennsylvania state statute explicitly prohibits employers from requiring testing “as a condition for employment or continuation of employment.” Under the common law, by contrast, the case law is unanimous in allowing employers to make contemporaneous express agreement to employee drug testing a condition of employment, as described in Part I.B. In the common law context, a narrower rationale for the rejection of a dispositive role for consent focuses on the particular problems with in-advance as opposed to contemporaneous agreement.

Note that in principle, courts’ analysis of common law privacy in cases litigated under the wrongful discharge cause of action could differ from their analysis in cases involving a direct common law privacy cause of action. The tables in the Appendices, however, suggest that the pattern detailed in Part I with respect to contemporaneous versus in-advance express agreement holds in both cases involving a direct common law privacy cause of action and cases involving a wrongful discharge cause of action based on the public policy of protecting common law privacy.

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221 Borse, 963 F.2d at 625.
222 Id. at 625 n.18; 18 PA. CONS. STAT. §7321(a).
224 A concluding comment related to the tort of wrongful discharge in violation of public policy concerns the Seta case discussed in the Introduction and in Part I.C. In Seta, although the court did not refer to the in-advance express agreement in resolving the employee’s claim of common law invasion of privacy, the
E. **Beyond Behavioral Economics: Additional Grounds for Questioning Consent in Privacy Law**

The set of cases in which behavioral economics provides reason to question the force of an agreement to submit to privacy-invading behavior of course does not necessarily exhaust the circumstances in which agreement to submit to privacy-invading behavior should (or would) be denied effect by the law. Even in the context of a contemporaneous express agreement made in direct contemplation of its effects, it is entirely reasonable to question, on grounds of some conceptions of rationality, certain forms of agreement, as choice may be severely constrained or crucial information or perspective needed for appreciating the situation at hand may be lacking. Amartya Sen, for instance, asks us to “[c]onsider a person whom we find cutting off all his toes with a blunt knife, who responds when one asks if he has examined “what the consequences of not having any toes would be,” “No, I have not, and I am not going to, because cutting off my toes is definitely what I desire.”

Is this individual “rational”? Should we not only leave his court did make passing reference to an in-advance agreement on drug use (though not the agreement on drug testing) in assessing the employee’s claim of wrongful discharge in violation of public policy. See Seta v. Reading Rock, Inc., 654 N.E.2d 1061, 1067 (Ohio Ct. App. 1995). As discussed above, wrongful discharge claims often specifically attribute the wrongfulness of a discharge to the violation of the public policy reflected in the intrusion upon seclusion tort, see cases cited supra notes 45-51, 69-70, 78, 80-92, and 111-114, but in Seta the court’s discussion of the wrongful discharge claim made no mention of common law privacy at all:

We further find that appellant’s discharge did not violate public policy. ‘Public policy warrants an exception to the employment at will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute…’ Public policy may also warrant an exception to the employment-at-will doctrine when the discharge is ‘of equally serious import as the violation of a statute.’ In the case at bar, appellant’s discharge did not violate any statute. Nor can we say that a discharge for screening positive for illegal drugs is ‘of equally serious import as the violation of a statute.’

*Id.* (internal citations omitted). Thus, while the court referred briefly to the in-advance agreement related to drug use in discussing a claim unrelated to common law privacy, see id., it made no mention of any in-advance agreement in ruling on the plaintiff’s claim of common law invasion of privacy, which it rejected purely on the basis of the employer’s interest in “creat[ing] a safe working environment,” *id.*

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226 See *id.*
toe-cutting unencumbered but as Sen writes, suggest “that our hero should use a sharper knife..., since this would better serve his objective of cutting off his toes”?

Similarly, in the privacy domain, imagine that an employer sought contemporaneous express agreement to video monitoring of all workplace restroom stalls or asked an applicant for a bookkeeping position with no safety aspects to give contemporaneous express agreement to direct observation drug testing (where the employer directly watches the act of urination to avoid any tampering with the sample). While the cases and behavioral economics analysis discussed above would provide no basis for any limitation on the effect of such agreement on a common law privacy challenge by employees, such an agreement may well not be “rational,” and a court might nonetheless choose not to give effect to such an agreement in an intrusion upon seclusion case. To take another example, based on varying the striking facts of Superior Court v. Feminist Women’s Health Center, if an employer – for voyeuristic reasons, rather than the health-policy reasons in the actual case – decided to require all of its female employees to perform public cervical self-examinations on a weekly basis, the employer would presumably lose on a common law privacy challenge brought by employees simply because of the substantive nature of the cervical self-examination requirement. It seems unlikely to matter much to the outcome whether employees had given contemporaneous express agreement to the self-examinations, even though such agreement would be unassailable on the behavioral economics grounds emphasized above. It is possible, in short, that certain privacy violations would so affront societal norms that consent

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227 *Id.*
228 *Cf.* Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419 (S.D. 1994) (finding intrusion upon seclusion in a case in which a business owner repeatedly observed employees through a hole in the restroom wall).
229 *Cf.* Wilcher v. City of Wilmington, 139 F.3d 366, 379-80 (3rd Cir. 1998) (remanding for a determination of whether direct observation drug testing constituted an intrusion upon seclusion even in the highly safety-sensitive position of firefighter).
should not be allowed and, one suspects, probably would not be allowed as a defense. As Robert Post writes, “In the case of . . . intrusion, the civility rules maintained by the tort . . . define the substance of community life.”

Perhaps not surprisingly, in the real world such extreme illustrations of contemporaneous express agreement have not arisen, and thus the existing case law suggests, as described in Part I.B above, that courts will treat contemporaneous express agreement to privacy-invading behavior as consent in resolving common law privacy claims. Many commentators, however, have criticized the role given to consent. Perhaps the employee who offers contemporaneous express consent to observed urination or cervical self-examination is not truly the agent of decision: “Although the individual’s own acts breach . . . territorial boundaries, the source of the breach is understood to be located elsewhere; through the exercise of power by another, the individual, in a sense, has become an agent of her own violation.”

“Economic circumstances might induce the employee to agree to a form of self-violation.” Fourth Amendment doctrine addressing whether a search has been “voluntarily” consented to similarly seeks to address, through a balancing of various substantive considerations, whether consent was not, in fact, voluntary. But theorizing what makes self-abnegation legally objectionable in some circumstances, and rigorously defining these circumstances, presents obvious difficulties. Is any “agreement” by an employee to any sort of privacy-invading behavior invalid because of the

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231 Post, supra note 3, at 1008.
232 Kim, supra note 188, at 698.
233 Id. at 720. Dean Willborn adopts the contrary view that contemporaneous agreement, freely given, should always be dispositive in employee privacy claims. See Steven L. Willborn, Consenting Employees: Workplace Privacy and the Role of Consent, 66 L.A. L. REV. 975 (2006).
employer’s power?235 (Even an efficiency-based account, which is not what is usually contemplated in the scholarly literature in this area, is very difficult to pin down; the suggestion, for instance, that an absolutely nonwaivable rule against certain privacy-invading behavior is necessary to prevent an adverse selection or “lemons” problem in the employment market236 is plausible, but, without any supporting evidence, it is far from definitive because, in theory, any employment benefit, not just a benefit related to privacy, could be subject to an adverse selection problem.)

The suggestion pressed in this Article, however, is the narrower claim that, relative to the case of contemporaneous agreement, distinctive and analytically clearer problems arise with in-advance agreement governing uncertain future behavior. Even if we cannot resolve which forms of contemporaneous agreement (if any) should be denied effect in common law privacy, we can understand and plausibly defend, through behavioral economics, common law courts’ special reluctance to heed in-advance agreement, at least where the body or the home is at stake. Behavioral economics, while it cannot provide a complete conception of “rationality,” can tell us whether an agreement to submit to the possibility of some invasion of body or personhood at some point in the perhaps-distant future is an agreement that was likely to have been accurately comprehended and assessed at the time it was entered into. This somewhat more procedural conception of rationality237 is the focus of this Article’s analysis – a focus that reflects not a view

235 Cf. Kim, supra note 188, at 718-19 (referring to “the indeterminacy inherent in the notion of consent” because of the lack of “an independent theory to explain which circumstances are relevant to determining whether consent was freely given”). For an attempt to isolate factors that make consent more “free,” see Willborn, supra note 233, at 1002-08.
236 See Kim, supra note 188, at 711.
237 See generally Jolls, Sunstein & Thaler, supra note 179, at 1480-81 (to a large degree, adopting the procedural conception).
that the procedural conception is the only or best definition of “rationality,” but that departures from this conception of “rationality” are easier places for normative consensus (around the idea that actions taken by those operating under misimpressions of fact are normatively suspect).

Conclusion

The relationship between common law privacy and consent has been shrouded in a conflicting web of decisions that alternately rely upon and deny the effect of express agreement in resolving common law privacy challenges to privacy-invading behavior. As shown in Part I, however, the decisions turn out to follow a relatively clean pattern; an express agreement contemporaneous with the privacy-invading behavior is generally a valid defense to an intrusion upon seclusion claim, while in-advance express agreement in the contexts in which it has been repeatedly litigated in the intrusion upon seclusion case law – especially employee drug and polygraph testing and consumer credit terms governing repossession of goods – is almost never the ground on which such cases are resolved. Parts II and III suggested how this pattern in the case law fits well with behavioral economics analysis of assessment of the probabilities of uncertain future events and time-inconsistent discounting.

This Article has sought to provide a relatively comprehensive treatment of the role of express agreement in the adjudication of common law privacy challenges to searches, tests, and other forms of intrusion, but several important questions call out for further investigation. First, the law in the Fourth Amendment context is in a much greater state of flux than the common law. A better understanding of both the descriptive and the normative dimensions of

238 See Sen, supra note 225 (criticizing Jolls, Sunstein, and Thaler, supra note 179, for focusing on the more procedural definition).
constitutional privacy law with respect to contemporaneous versus in-advance agreement would helpfully complement the common law analysis offered here.

More broadly, it is of course clear that in-advance express agreements relating to uncertain future events are binding in a great many non-privacy contexts – though certainly not in all such contexts; indeed, in-advance agreements relating to uncertain future events are at the very heart of the law of contract. Thus, a question of obvious interest – but, unfortunately, also of great difficulty – is how the privacy context relates to these other contexts. The question is difficult in part because it seems likely that answering it satisfactorily would require some agreed-upon normative conception of privacy – in order to understand how the privacy context might normatively differ from contexts in which in-advance agreements relating to uncertain future events are viewed as controlling – yet a consensus even on privacy’s conceptual definition, never mind its normative desirability, has eluded distinguished commentators for a very long time. To put the point another way, while it is evident that the normative argument in Part III was not (and obviously could not be, without specifying a normatively compelling conception of privacy) an argument linked specifically to privacy, the independence of Part III’s argument from any particular conception of privacy is as much a strength as a weakness of the argument in light of the longstanding dissensus about what “privacy” is. Even if a full conceptual account of privacy and its relation to different forms of agreement remains for now out of reach, what is clear at present is that, where common law intrusion or similar privacy claims are concerned, the sharply different approaches courts take to in-advance versus

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239 Compare, e.g., Martindale v. Sandvik Inc., 800 A.2d 872 (N.J. 2002) (upholding in-advance express agreement requiring submittal to binding arbitration of any employment claims that might arise in the course of the employment relationship), with Eisenberg, supra note 174, at 225-36 (describing – and linking in part to contractors’ optimism bias – courts’ refusal to enforce in-advance express agreements specifying extracompensatory liquidated damages).

240 See supra notes 35-36 and accompanying text.
contemporaneous express agreement exhibit an “implicit behavioral rationality” that, as noted in Part III, has been observed as well in other areas of the common law.
Appendix A: Case Search Results – Employee Polygraph Testing Cases

The search string used to identify the employee polygraph testing cases discussed in Part I of the Article is as follows:

(polygraph! (lie /3 detect!)) & (employer! employee!) & ((intrusion intrud!) /s (seclusion priva!))

The database used is the ALLCASES database in Westlaw. All cases returned by the search were manually reviewed by the author.

The following cases returned by the stated search met this Article’s criteria of being cases in which the facts indicate some form of express term governing polygraph testing and in which an employee’s intrusion challenge to such testing was the basis of a cause of action in the case. Cases listed but not shaded are cases in which the existence of an express term governing polygraph testing was unclear from the court’s opinion; see note __ for fuller discussion.

<table>
<thead>
<tr>
<th>Case</th>
<th>Contemporaneous express agreement</th>
<th>In-advance express agreement</th>
<th>In-advance express policy</th>
<th>Court relied on consent in resolving common law privacy claim</th>
<th>Direct common law privacy cause of action</th>
<th>“Wrongful discharge” cause of action with public policy based on common law privacy†</th>
<th>Testing was actually conducted</th>
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<td>√</td>
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† See Part III.D for detail on the “wrongful discharge” cause of action.

e Texas Department of Mental Health and Mental Retardation v. Texas State Employees Union, 708 S.W.2d 498 (Tex. App. 1986).
Appendix B: Case Search Results – Employee Drug Testing Cases

The search string used to identify the employee drug testing cases discussed in Part I of the Article is as follows:
(drug /s test!) & urin! & (employer! employee!) & ((intrusion intrud!) /s (seclusion priva!))
The database used is the ALLCASES database in Westlaw. All cases returned by the search were manually reviewed by the author.

The following cases returned by the stated search met this Article’s criteria of being cases in which the facts indicate some form of express term governing drug testing and in which an employee’s intrusion challenge to urinalysis for drugs was the basis of a cause of action in the case. Cases listed but not shaded are cases in which the existence of an express term governing drug testing was unclear from the court’s opinion; see note __ for fuller discussion.

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<th>In-advance express policy</th>
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<td></td>
<td>No</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>Frye¹⁴</td>
<td>√</td>
<td></td>
<td></td>
<td>See Part I, note 55</td>
<td></td>
<td>√ *</td>
</tr>
<tr>
<td>Twigg¹⁵</td>
<td>√</td>
<td></td>
<td></td>
<td>No</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>Gilmore¹⁶</td>
<td>√</td>
<td></td>
<td></td>
<td>No</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>Johnson¹⁷</td>
<td>√</td>
<td></td>
<td></td>
<td>No</td>
<td></td>
<td>√</td>
</tr>
</tbody>
</table>

* For some plaintiff-employees; others refused to submit to testing.
** On one occasion; the plaintiff refused on a second occasion.

† See Part III.D for detail on the “wrongful discharge” cause of action.
¶ Middlebrooks v. Wayne County, 521 N.W.2d 774 (Mich. 1994).
† Ritchie v. Walker Mfg Co., 963 F.2d 1119 (8th Cir. 1992).
Appendix C: Case Search Results – Workplace Email Monitoring Cases

The search string used to identify the workplace email monitoring cases discussed in Part I of the Article is as follows:

(email! e-mail!) & (employer! employee!) & ((intrusion intrud!) /s (seclusion priva!))

The database used is the ALLCASES database in Westlaw. All cases returned by the search were manually reviewed by the author.

The following cases returned by the stated search met this Article’s criteria of being cases in which the facts indicate some form of express term authorizing email monitoring and in which an employee’s intrusion challenge to such monitoring was the basis of a cause of action in the case.

<table>
<thead>
<tr>
<th>Case</th>
<th>Contemporaneous express agreement</th>
<th>In-advance express agreement</th>
<th>In-advance express policy</th>
<th>Court relied on consent in resolving common law privacy claim</th>
<th>Direct common law privacy cause of action</th>
<th>“Wrongful discharge” cause of action with public policy based on common law privacy†</th>
<th>Monitoring actually occurred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parkstonew</td>
<td>√</td>
<td>Yes</td>
<td></td>
<td>√</td>
<td></td>
<td>√</td>
<td>Yes</td>
</tr>
<tr>
<td>Kelleherx</td>
<td>√</td>
<td>Unclear from opinion</td>
<td></td>
<td>√</td>
<td></td>
<td>√</td>
<td>Yes</td>
</tr>
<tr>
<td>Hammery</td>
<td>√</td>
<td>Unclear from opinion</td>
<td></td>
<td>√</td>
<td></td>
<td>√</td>
<td>Yes</td>
</tr>
<tr>
<td>Garrityz</td>
<td>√</td>
<td>No</td>
<td></td>
<td>√</td>
<td>**</td>
<td>√</td>
<td>Yes</td>
</tr>
<tr>
<td>Thygesonaa</td>
<td>√</td>
<td>Unclear from opinion</td>
<td></td>
<td>√</td>
<td></td>
<td>√</td>
<td>Yes</td>
</tr>
</tbody>
</table>

* The agreement was via a click box on a computer rather than through a signature.
** Garrity involved Massachusetts law; as discussed in Part I, Massachusetts has a general privacy statute that mimics the common law.

† See Part III.D for detail on the “wrongful discharge” cause of action.

w Parkstone v. Coons, 2009 WL 1064951 (D. Del.).
x Kelleher v. City of Reading, 2002 WL 1067442.
z Garrity v. John Hancock, 2002 WL 974676 (D. Mass.).
Appendix D: Case Search Results – Entry Upon Premises Cases

The search string used to identify the entry upon premises cases discussed in Part I of the Article is as follows:

```
((enter! entry) /s premise!) & (lender! borrower! creditor! mortgagor! mortgagee! lessor! lessee!) & ((intrusion intrud!) /s (seclusion priva!))
```

The database used is the ALLCASES database in Westlaw. All cases returned by the search were manually reviewed by the author.†

The following case returned by the stated search met this Article’s criteria of being a case in which the facts indicate some form of express term authorizing entry upon premises and in which a consumer’s intrusion challenge to such entry was the basis of a cause of action in the case.

<table>
<thead>
<tr>
<th>Case</th>
<th>Contemporaneous express agreement</th>
<th>In-advance express agreement</th>
<th>In-advance express policy</th>
<th>Court relied on consent in resolving common law privacy claim</th>
<th>Entry actually occurred</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>St. Julien</em>bb</td>
<td>√</td>
<td></td>
<td></td>
<td>No</td>
<td>√</td>
</tr>
</tbody>
</table>

† A similar search for intrusion challenges in cases with in-advance residential and commercial lease agreements permitting landlords to enter upon tenants’ premises (tort! & (landlord! & tenant!) & ((intrusion intrud!) /s (seclusion priva!)) in the ALLCASES database in Westlaw returned no relevant case law.