

Does the ‘Right to Disconnect’ *Truly* Exist?

Annie Gitter*

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I. WHAT IS THE RIGHT TO DISCONNECT?

In recent years, several nations have moved, or are moving, toward adopting the concept of the right to disconnect.¹ The European Union passed legislation concerning the right to disconnect, and Kenya is now following suit with a bill in the legislature.² Countries define themselves through their ideals and motives, with work-life balance being a rising point of contention.³ As variables and characteristics of a country’s workforce change, the working dynamics also shift. For example, in France, the retirement age is rising.⁴ In America, many people pride themselves and attempt to distinguish themselves through their career

* © 2025 Annie Gitter. J.D. Candidate 2025, Tulane University Law School. The author is grateful to Professor Brian Frye for his guidance throughout the drafting of this Comment, and she would like to thank the members of the *Tulane Journal of International and Comparative Law* for their dedication and time during the publication of Vol. 33, Issue 1. In addition, the author thanks her family for their support.

1. Elizabeth Walker, *What is the Right to Disconnect?*, PEOPLE KEEP (June 14, 2023, 9:13 AM), <https://www.peoplekeep.com/blog/what-is-the-right-to-disconnect#:~:text=Most%20countries%20with%20legislation%20on,have%20written%20laws%20about%20disconnecting.>

2. Niha Masih, *Tired of After-Work Emails and Calls? In These Countries, They’re Outlawed*, WASH. POST (Feb. 1, 2023, 5:26 AM), <https://www.washingtonpost.com/business/2023/02/01/right-to-disconnect-laws/>.

3. *Global Life-Work Balance Index 2024*, REMOTE, <https://remote.com/resources/research/global-life-work-balance-index> (last visited Mar. 18, 2024).

4. Miles Parks, *Despite Fierce Protests, France Has Raised the Retirement Age from 62 to 64*, NPR (Apr. 15, 2023, 7:59 AM), <https://www.npr.org/2023/04/15/1170246219/despite-fierce-protests-france-has-raised-the-retirement-age-from-62-to-64>.

success, money, and prestige—what some may call the American Dream—though the focus on success may be shifting.⁵

The European Law Institute stated that the rise in remote working and technological advances are contributing factors to the need for the right to disconnect.⁶ Employees, since the COVID-19 pandemic, have been voicing their concerns regarding a “blurring of the boundary between work and private time, the unpredictability of working hours, the need to work outside agreed hours (usually without payment), and the resulting negative impact on their physical and mental health and private lives.”⁷ During the pandemic, many workers felt pressured to always remain online and respond to anything and everything sent their way with a sense of urgency. This issue has continued even with the pandemic subsiding as remote work has become increasingly more common amongst companies and countries.⁸ This feeling of overwork and burnout during the pandemic is what prompted this legislation to be drafted in the first place.⁹

A right to disconnect is seen as an employee’s right “to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours.”¹⁰ Moreover, “working tasks literally invaded private life-spaces, including the time spent with family, relatives, and friends, which is typically meant to allow individuals to enjoy their life outside work.”¹¹ This digital push was driven by COVID-19, which fortunately kept several businesses going, but at the cost of harming individual employees.¹² The technological advancements provided several benefits for companies: “greater autonomy, better work-life balance, improved productivity, and environmental benefits,” but it also “create[d] pressure

5. Jacquelyn Smith, *This is How Americans Define Success*, BUS. INSIDER (Oct. 3, 2014, 11:05 AM), <https://www.businessinsider.com/how-americans-now-define-success-2014-10>.

6. *ELI Guiding Principles on Implementing Workers' Right to Disconnect*, EUR. L. INST., <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-guiding-principles-on-implementing-workers-right-to-disconnect/> (last visited Mar. 18, 2024).

7. Szymon Kubiak and Katarzyna Magnuska, *The Right to Disconnect: Real Relief for Employees or Just Additional Obligations for Employers?*, LEXOLOGY, (June 17, 2021), <https://www.lexology.com/library/detail.aspx?g=0046625c-4767-4584-a6e8-9c204d38a330>.

8. Melody Burke, *The Right to Disconnect: Emerging Issues and Ways to Overcome Them*, ONLABOR, (Mar. 30, 2022), <https://onlabor.org/the-right-to-disconnect-emerging-issues-and-ways-to-overcome-them/>.

9. *Id.*

10. Anne Bruijn, *The Right to Disconnect: A European Overview*, OYSTER (Dec. 17, 2021), <https://www.oysterhr.com/library/right-to-disconnect-a-european-overview>.

11. EUR. L. INST., *supra* note 6.

12. *Id.*

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for employees to be constantly accessible [which] may pose potential health issues, as well as causing work-life balance conflict linked to working longer hours.”¹³

Several countries, mainly within the European Union, have drafted legislation with the intended goal of creating a right to disconnect.¹⁴ Many individual nations, including some outside of the European Union, namely Argentina, Chile, Italy, Mexico, and Ukraine, have implemented either the right to disconnect, or something named similarly, which applies to their remote workers, requiring that a mandatory period of rest.¹⁵

Belgium first proposed the Right to Disconnect in 2018, whereby private sector employers had a duty to meet “at regular intervals” with safety and health teams to analyze technology and the right to disconnect.¹⁶ Notably, only a handful of employers invoked rules pertaining to the right to disconnect following that movement, and in 2022, a mere fourteen percent had implemented a policy at their company.¹⁷ In October of 2022, new legislation attempted to strengthen this right by articulating that “all employers in the private sector with twenty employees or more are required to implement the right to disconnect for all categories of employees in a collective bargaining agreement or through their work rules.”¹⁸ Notably, if there is a “national or sectoral CBA,” the legislation “lapses.”¹⁹ After the amendment, roughly fifty percent of companies fulfilled the right to disconnect obligation by the end of 2022.²⁰ The work rules or CBA rules must contain provisions about the right to disconnect, including:

the practical arrangements for the application of the employees’ right not to be contactable after working hours; instructions for the use of digital tools to guarantee rest periods, holidays, and employees’ private and family life; training and awareness-raising measures for

13. Bruijn, *supra* note 10.

14. Beatriz García Fernández-Viagas, *The Right to Disconnect from Work: Soon a Reality in Europe*, ENHESA (Oct. 28, 2021), <https://www.enhesa.com/resources/article/the-right-to-disconnect-from-work-soon-a-reality-in-europe/>.

15. Ward Bouciqué and Ester Vets, *The Right to Disconnect: Which Countries Have Legislated?*, IUS LABORIS (July 26, 2023, 1:00 PM), <https://iuslaboris.com/insights/the-right-to-disconnect-which-countries-have-legislated/>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

employees and management staff on the wise use of digital tools and the risk of excessive connection.²¹

This right to disconnect in its application is focused currently on federal civil servants, which includes roughly sixty thousand people that should not be contacted outside of traditional work hours, excluding “exceptional and unforeseen circumstances.”²² Belgium has not imposed sanctions for employers who have failed to follow the right to disconnect legislation, though arguably, the right to disconnect may fall under Belgium’s general “well-being at work” obligation and an employer *could* be held responsible under that theory, which if not abided by, could result in sanctions.²³

France is recognized as a nation who protects employees’ rights since 2017.²⁴ Though not expressly named “the right to disconnect,” companies with fifty or more employees must “draw up a charter of good conduct, negotiated in conjunction with union representatives, setting out the hours when staff are not supposed to send or answer emails.”²⁵ The French see a benefit to having their employees enjoy their time off, time with family, and believe that it provides for a better work product.²⁶ Again, this law may vary for it is not implemented for smaller companies thus far.²⁷

The European Parliament in January of 2021 “passed a legislative initiative on the right to disconnect.”²⁸ This movement suggested that the EU created something that sought protection for digital workers that enables them to not work outside of their set business hours and not face repercussions.²⁹ Following this proposal, many countries followed suit

21. *Id.*

22. Jack Kelly, *Belgium, Portugal and Other European Countries Prohibit Managers from Contacting Employees Outside of Working Hours*, FORBES (Feb. 3, 2022, 3:06 PM), <https://www.forbes.com/sites/jackkelly/2022/02/03/belgium-portugal-and-other-european-countries-are-ahead-of-the-us-prohibiting-managers-from-contacting-employees-outside-of-working-hours/?sh=3de587331d00>.

23. Bouciqué and Vets, *supra* note 15.

24. Heather Taylor, *The Right to Disconnect: What Can the UK Learn from Europe*, LANCASTER UNIV., (Apr. 30, 2021), <https://www.lancaster.ac.uk/work-foundation/news-and-events/blog/the-right-to-disconnect-what-can-the-uk-learn-from-europe>.

25. *Id.*

26. *Id.*

27. *Id.*

28. Maartje Govaert, Annette van Beers, Christine Daniels, *The Right to Disconnect*, NORTON ROSE FULBRIGHT; BLOG NETWORK (Mar. 25, 2021), <https://www.globalworkplaceinsider.com/2021/03/the-right-to-disconnect/>.

29. *Id.*

individually in protecting the work-life balance of their employees.³⁰ Ireland's employees were provided with a right to disconnect, which is outlined in three components: the right of the employee not to have to "routinely perform outside of their normal working hours"; the right to not be punished for not going to work events occurring after hours, and the "duty to respect" employee's right to disconnect.³¹ Analogously to Belgium, there is currently not a punishment or repercussion for an employer who does not follow this obligation.³²

A study vocalized by the Industrial Relations and Labour Law concluded that employees who follows the right to disconnect framework maintain a better work-life balance, and are more satisfied than employees who work for employers not abiding by the directive.³³ Notably, in Belgium, there has been a somewhat positive impact for roughly forty-five percent of employees; in France, there has been a somewhat positive impact for almost fifty percent of employees, and in both countries, there has been very little or no negative impact based on the right to disconnect as it pertains to themselves personally.³⁴ This study concludes with an analysis that the right to disconnect is assisting with overall work-life balance and happiness in the countries where it has been implemented.³⁵

There have also been individual companies who have acted within themselves to provide a better work-life balance and right to disconnect, for example, Volkswagen and Rentokil.³⁶ In 2012, Volkswagen set internal limitations whereby email could not be accessed in the night hours until morning, and shutting down the email server over weekends.³⁷ France sanctioned Rentokil by imposing a sixty thousand euro fine for failing to clearly denote the expected hours for their remote employees during a workday.³⁸ As is evident above, this implementation is not fairly distributed amongst all employees, sectors, or nations.³⁹ As articulated by

30. Taylor, *supra* note 24.

31. *Id.*

32. *Id.*

33. *Industrial Relations and Labour Law, Right to Disconnect: IMPLEMENTATION AND IMPACT AT COMPANY LEVEL* [AN EUROFUND REPORT], <https://industrialrelationsnews.ioe-emp.org/industrial-relations-and-labour-law-january-2024/news/article/right-to-disconnect-implementation-and-impact-at-company-level-an-eurofound-report> (last accessed Mar. 20, 2024).

34. *Id.*

35. *Id.*

36. Jonathon Keane, *The Legal Right to Disconnect Could Become the Norm in Europe*, CNBC, (June 22, 2021), <https://www.cnbc.com/2021/06/22/right-to-disconnect-could-become-the-norm-in-europe.html>.

37. *Id.*

38. *Id.*

39. *Id.*

France's general secretary of the TUC, Frances O'Grady, "[t]oday's technology can easily blur the line between work and home, with no let-up from work stresses."⁴⁰

II. HISTORY OF AN ATTEMPT TO ACHIEVE A WORK-LIFE BALANCE

Notably, most cultures are all 'working' the same number of hours per week, broadly speaking.⁴¹ For members of the European Union between twenty and sixty-four in age, the average work week consisted of thirty-seven and a half hours.⁴² In the United States, the average work day is 8.01 hours, with five days of work, averaging roughly forty hours per week.⁴³ Spain's work⁴⁴ as evident in the numbers, most countries are working *roughly* the same hours per week. This raises the question of which countries are truly allowing workers to genuinely have time off?⁴⁵ Historically, the concept of giving workers an actual break is not a new phenomenon.⁴⁶ In Spain, the tradition and custom of a 'siesta' has carried on for years, and it is a common practice. Italy has maintained as well.⁴⁷ Siestas are justified by two rationales: the effects of the Civil War and physical effects of outdoor labor. First, following the Civil War, many individuals held two occupations, and the two-hour period allowed them to "recharge a bit" prior to beginning the second half of their workday. Second, for physical labor workers, it was to protect them from the scorching sun during its peak.⁴⁸ Other countries situated near the equator

40. *Id.*

41. Charlie Giattino, Esteban Ortiz-Ospina and Max Roser, *Working Hours*, OUR WORLD IN DATA, (2013), <https://ourworldindata.org/working-hours>.

42. EUROSTAT, [\(https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-202309201#:~:text=In%202022%2C%20the%20usual%20working,and%20Bulgaria%20\(40.2%20both\)\)](https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-202309201#:~:text=In%202022%2C%20the%20usual%20working,and%20Bulgaria%20(40.2%20both)) (last accessed Mar. 18, 2024).

43. *Average Hours Employed People Spent Working on Days Worked by Day of Week*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/charts/american-time-use/emp-by-ftp-job-edu-h.htm> (last accessed Mar. 18, 2024).

44. *Working Hours & Days in Spain*, HORIZONS, <https://joinhorizons.com/countries/spain/hiring-employees/working-hours-and-days/#:~:text=The%20standard%20working%20week%20in%20Spain%20is%2040%20hours> (last accessed Apr. 3, 2024).

45. EUROSTAT, *supra* note 42; U.S. BUREAU OF LAB. STAT., *supra* note 43; HORIZONS, *supra* note 44.

46. Michael Breus, *Siestas*, SLEEP DOCTOR, (Jan. 24, 2024), <https://sleepdoctor.com/circadian-rhythm/siestas/#:~:text=Spanish%20workers%20today,Where%20Did%20the%20Siesta%20Originate%3F,the%20midday%20is%20often%20hot>.

47. Steph Koyfman, *Do They Really Take Siestas in Spain?*, BABEL MAG., (Sept. 20, 2022), <https://www.babel.com/en/magazine/do-they-really-take-siestas-in-spain>.

48. *Id.*; BCN EXCLUSIVE PRIVATE TOURS, <https://barcelonaexclusiveprivatetours.com/blog/a-brief-history-of-the-spanish-siesta#:~:text=The%20Spanish%20siestas%20likely%20started,families%20away%20from%20the%20elements> (last accessed Mar. 18, 2024).

have also adopted the siesta concept to protect their workers, namely: Greece, Ecuador, Costa Rica, Mexico, and the Philippines.⁴⁹ Siestas originated in Italy, whereby before air conditioning existed, workers were given a siesta to have time away from the beaming sun.⁵⁰ More recently, however, in Spain, siestas have become less common with a whopping fifty-eight percent of Spanish employees voicing that they do not take a siesta anymore.⁵¹

Recently, the European Union has drafted legislation concerning the “right to disconnect,” which “refers to a worker’s right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours.”⁵² Kenya has followed suit, and imposed a monetary penalty if an employer violates the rules.⁵³ In preparing for this movement, Kenyan employers, in some scenarios, have to amend their policies to ensure they are abiding by these right to disconnect policies.⁵⁴ This concept is due to technological advances, and that people are now “always ‘on call’” due to the “continuous remote access.”⁵⁵ Importantly, some have criticized this movement for “hinder[ing] the flexibility that digital tools offer,” and there is a fear that “employers might prefer hiring candidates without familial obligations, as they might be perceived as more available after hours, even if the “right to disconnect” is in place.”⁵⁶ In its application this right is too broad. Drawing the line between workers having a substantial “fundamental right,” but also a right that is equal amongst individuals, occupations, and application, is not an easy issue to solve.⁵⁷

Is the right to disconnect a movement of the future? The legislation itself follows as technology has advanced, so is this something that can

49. Koyfman, *supra* note 47.

50. Breus, *supra* note 46.

51. *Id.*

52. EUROFOUND, <https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/right-disconnect#:~:text=On%2021%20January%202021%2C%20the,disconnect%20outside%20their%20working%20hours> (last accessed Mar. 18, 2024).

53. Johnny Wood, Ian Shine, *Right to Disconnect: The Countries Passing Laws to Stop Employees Working out of Hours*, WORLD ECON. F., (Feb. 3, 2023), <https://www.weforum.org/agenda/2023/02/belgium-right-to-disconnect-from-work/#:~:text=A%20legal%20right%20to%20rest,during%20non%2Dwork%20hours>.

54. Nazanin Afshar and Carol Ibrahim, *4 Steps to Prepare for Kenya’s Proposed “Right to Disconnect” Law*, FISHER PHILLIPS, (Dec. 19, 2023), <https://www.fisherphillips.com/en/news-insights/kenyas-proposed-right-to-disconnect-law.html>.

55. EUROFOUND, *supra* note 52.

56. Afshar and Ibrahim, *supra* note 54.

57. Keane, *supra* note 36.

and will become more widespread than it currently is?⁵⁸ This comes down to individual ideals and the personal emphasis placed on work.⁵⁹ Many people in the present climate feel burnt out, or as though they cannot keep up, and for those reasons, they seek newer, more lenient jobs.⁶⁰

Decades ago, when an employee went home, there was no such thing as email, cell phones, etc., there was no concern nor need for the right to disconnect.⁶¹ Now, with technology progressing so rapidly, many employees and countries, feel as though their employees are never 'off,' and are never able to disconnect. This is where new legislation comes in; we have become "a society that never shuts off."⁶² Agius Saliba noted that this issue of feeling "always-on" and overworked is not something that COVID-19 created, but rather something that existed before the pandemic and will continue for the future for both remote and in person employees.⁶³

There are many concerns about overworking: burnout, fatigue, mental health, stress, physical health, and more.⁶⁴ A study by Cornell University's Assistant Professor of Labor Relations, Law and History, Duanyi Yang, "suggests that remote jobs can boost workers' wellbeing and work engagement, but only if their work is restricted to regular hours."⁶⁵ Further, this study suggests that "there is a need for new labour standards and management practices to prevent people from working extended hours at home."⁶⁶

Much of this movement occurred during and following the COVID-19 pandemic, where studies have confirmed that workers abruptly shifted to the concept of "telework" due to health concerns, but that this trend did

58. Kathy Edens, *What is the "Right to Disconnect" and When Will the US Adopt It?*, SOGOLYTICS, (Dec. 31, 2021), <https://www.sogolytics.com/blog/what-is-right-to-disconnect/>.

59. Hélène Bozet, *The Right to Disconnect: Finding the Optimal Balance Between Work and Life*, GENERATIONS RECRUITMENT, (Aug. 24, 2023), <https://generationsrecruitment.com/the-right-to-disconnect-finding-the-optimal-balance-between-work-and-life/>.

60. *Id.*

61. Ginger Christ, *In the US, Companies May Lead the 'Right to Disconnect' Movement, Leaders Say*, HRDIVE, (Mar. 18, 2024), <https://www.hrdive.com/news/us-companies-right-to-disconnect-movement/710600/>.

62. *Id.*

63. Keane, *supra* note 36.

64. Corrie Pelc, *Can Overwork Kill You?*, MED. NEWS TODAY, (May 26, 2022), <https://www.medicalnewstoday.com/articles/can-overwork-kill-you>.

65. Wood and Shine, *supra* note 53.

66. *Id.*

not end once the pandemic came somewhat under control.⁶⁷ There were notable differences based on occupation: for education, insurance, finance, and management, over fifty percent of these occupations took advantage of teleworking.⁶⁸ In contrast, food and agricultural services had under ten percent of employees teleworking.⁶⁹ Those who did benefit from remote work found better work-life balance, with sixty-four percent stating that “it’s easier now for them to balance work with their personal life.”⁷⁰ This same question can and should be asked as it pertains to the right to disconnect: how does the right to disconnect negatively impact certain fields of work, namely medicine, law, law enforcement, etc.? Scholars note that though this is “obviously coming from a well-intentioned place of wanting people to disconnect from their work, there are certain groups where that’s not going to be a suitable mechanism for them.”⁷¹

Importantly, some questions need to be asked about the right to disconnect. Simply because the right exists, does not mean that it is real. In Belgium, their right to disconnect law passed in February of 2022, which allowed civil servants not to be required to be “being permanently on-call”, though notably, “out-of-hours contact is permissible in exceptional circumstances.”⁷²

Moreover, there is an ability to negotiate via contract with regard to employment contracts; in the United States, people have a lot of say when it comes to labor, and they have the option to negotiate for terms they find important or beneficial for themselves.⁷³ The United States is a negotiation-based state, where parties can negotiate for the type of contract, meaning whether it is an at-will contract, they can discuss the terms and conditions, a notice period, and more.⁷⁴

67. U.S. BUREAU OF LAB. STAT., *Telework During the COVID-19 Pandemic: Estimates Using the 2021 Business Response Survey*, <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm> (last accessed Mar. 20, 2024).

68. *Id.*

69. *Id.*

70. Kim Parker, Juliana Menasce Horowitz, Rachel Minkin, *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR., (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/>.

71. Keane, *supra* note 36.

72. Wood and Shine, *supra* note 53.

73. *8 Tips for Negotiating Employment Contracts*, MORGAN MCKINLEY, <https://www.morganmckinley.com/article/8-tips-you-should-remember-when-negotiating-your-employment-contract> (last accessed Mar. 22, 2024).

74. John L. Sander, *Employment Contracts*, L&E GLOB., (Aug. 29, 2023), <https://leglobal.law/countries/usa/employment-law/employment-law-overview-usa/02-employment->

III. ANALYSIS: WOULD A RIGHT TO DISCONNECT BE CONSTITUTIONAL IN THE UNITED STATES?

Some people define part of the American Dream as their job, success, wealth, and prestige.⁷⁵ Robert Doar, the president of the American Enterprise Institute stated this concept perfectly: “[w]ork is one of the foundations of the American life. Almost always, being employed and earning income gives individuals the opportunity, responsibility, and community they need to flourish. The broader importance of work can’t be overstated.”⁷⁶ The United States has not taken any legislative initiative toward a Right to Disconnect bill or concept, and there is likely a constitutional reason for that.⁷⁷ First, the United States is a very negotiation-heavy country where people have the freedom to express their desires through contract, which can aid in molding the job to what they feel appropriate.⁷⁸ Colleges and Universities advise their students and alumni on best practices to negotiate a job offer into something the individual deems appropriate and acceptable. For example, American University’s “Negotiation Game” site advises to never under settle and to be prepared with an offer you feel is competitive for you.⁷⁹ President and CEO of Workplace Options, Alan King, believes that an initiative resembling of the right to disconnect in the United States would likely be led by organizations individually, rather than through governmental intervention.⁸⁰ California, Washington, and New York City have pondered this right to disconnect, but “the U.S. doesn’t have any such legislation on the books.”⁸¹ Moreover, King articulates how these are merely “rights to disconnect; they are not forced disconnections,” in that the burden in this initiative is placed on both the employer and employee to ensure this ‘disconnect’ occurs.⁸²

contracts/#:~:text=Whether%20the%20employment%20relationship%20is,governing%20the%20employment%20relationship%20.

75. Robert Bird and Frank Newport, *What Determines How Americans Perceive Their Social Class?*, GALLUP, (Feb. 27, 2017), <https://news.gallup.com/opinion/polling-matters/204497/determines-americans-perceive-social-class.aspx>. Smith, *supra* note 5.

76. Robert Doar, *Work is Essential to the American Dream*, AEI, (May 4, 2023), <https://www.aei.org/opportunity-social-mobility/work-is-essential-to-the-american-dream/#:~:text=Work%20is%20one%20of%20the,work%20can%27t%20be%20overstated.>

77. Christ, *supra* note 61.

78. *8 Tips for Negotiating Employment Contracts*, *supra* note 73; Sander, *supra* note 74.

79. *The Negotiation Game*, AM. U., <https://www.american.edu/careercenter/salary-negotiation.cfm> (last visited Mar. 18, 2024).

80. Christ, *supra* note 61.

81. *Id.*

82. *Id.*

This issue has already been addressed, broadly speaking, before the Supreme Court in the United States.⁸³ In *Lochner v. New York*, the Court held that restricting individuals' work hours is unconstitutional as a violation of the freedom of contract, which essentially reversed the *Slaughterhouse* cases, where the Fourteenth Amendment did not limit the states' ability; *Lochner* went the opposite way.⁸⁴ *Lochner* has since been overturned, and largely criticized since its time, regarded as a case that could "probably win the prize" for being one of the United States Supreme Court's worst decisions.⁸⁵ A New York bakeshop law was enacted to attempt to limit the hours worked in a particular industry, where the Supreme Court held that the government cannot tell people how much they can and cannot work.⁸⁶ Many Americans were upset with this decision, as they believed this was something the government could have stepped in. Samuel Bagenstos stated "the courts presumed that employers and employees had equal power in the labor market" during the *Lochner* era.⁸⁷ This case was overturned in *West Coast Hotel v. Parrish*, whereby the Court held that there can be "some regulation of the labor market," but there are always governmental limitations on the ability to enforce that.⁸⁸ These two cases are examples of the government taking a more narrow approach. The United States government did not feel compelled to apply a right to disconnect generally, or recognize what occurs outside of the workday, they simply stated what the work day would consist of. The Courts had too narrow of a viewpoint which "undercut the protections that legislatures have sought to give workers."⁸⁹ The key to this argument is that people often believe the government has the ability to limit or regulate working hours, but sometimes, the decision should simply be up to the companies or the states.⁹⁰

83. *Lochner v. N.Y.*, 198 U.S. 45, 45 (Apr. 17, 1905).

84. *Id.*

85. David A. Strauss, WHY WAS LOCHNER WRONG?, 70 CHI. L. REV. 373, 373 (2003), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5175&context=uclrev#:~:text=This%C%20too%2C%20was%20a%20prominent,contract%20lacks%20any%20constitutional%20roots.>

86. See generally, *Lochner*, 198 U.S. 45.

87. Samuel Bagenstos, *Lochner* Presumption of Equal Power Lives in Labor Law and Undermines Constitutional, Statutory, and Common Law Workplace Protections, ECON. POL'Y INST., (Oct. 7, 2020), <https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/>.

88. Alex McBride, *Supreme Court History Capitalism and Conflict, Landmark Cases*, THIRTEEN PBS, (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_lochner.html.

89. Bagenstos, *supra* note 87.

90. Christ, *supra* note 61.

As we see through labor unions in the United States, the same negotiation standards apply.⁹¹ Per the National Labor Relations Board, “[y]our union and employer must bargain in good faith about wages, hours, and other terms and conditions of employment until they agree on a labor contract or reach a stand-off or ‘impasse.’”⁹² This process is referred to as “collective bargaining,” where employees, via unions, negotiate factors of their employment contract to ensure they receive everything integral to them: hours, pay, work-life balance, environment, policies, and other similar terms.⁹³ In America, many individual companies have threatened or held labor strikes as a way to motivate their employers to provide better working conditions, pay, and overall work-life balance.⁹⁴ These companies include UPS, United Airlines, Delta Airlines, and Boeing, who all took action following COVID-19’s impacts on the workforce.⁹⁵ These strikes have seemingly been successful, as UPS, for example, “ratified a massive five-year labor deal that includes big wage increases and other improvements to work rules and schedules.”⁹⁶ This movement is not only in regard to better financial incentives, but to also improve their quality of life and work-life balance in light of the pandemic.⁹⁷

The United States has not formally moved to adopt any right to disconnect legislation.⁹⁸ New York City’s Councilman Rafael Espinal brought forth a bill similar to the right to disconnect in 2018, suggesting that employees should not have to handle their emails outside of working hours; however, this bill fell stagnant in 2019.⁹⁹ It seems as though American employees and employers are more likely to handle this

91. *About NLRB, Collective Bargaining Rights*, N.L.R.B. <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/collective-bargaining-rights#> (last accessed Mar. 18, 2024).

92. *Id.*

93. AFL-CIO, *Collective Bargaining*, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining>, (last accessed Mar. 20, 2024); NAT’L LAB. REL. BD., *Rights During Union Organization*, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-rights-during-union-organizing> (last accessed Mar. 20, 2024).

94. Michael Wayland and Leslie Josephs, *Labor Unions Are Pushing Hard for Double-Digit Raises and Better Hours. Many Are Winning*, CNBC, (Aug. 27, 2023, 7:00 AM), <https://www.cnbc.com/2023/08/27/labor-unions-winning-better-pay-hours.html>.

95. *Id.*

96. *Id.*

97. *Id.*

98. Christ, *supra* note 61.

99. Aye Moah, *Our 24/7 Work Culture Is Unsustainable. We Need a Right to Disconnect*, FAST CO., (Feb. 21, 2024), <https://www.fastcompany.com/91026922/our-24-7-work-culture-is-unsustainable-we-need-a-right-to-disconnect>.

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overworking issue intra-company rather than through government regulation and implementation.¹⁰⁰

America is a culture where to the extent that we believe people can accomplish a goal, they do so privately rather than through government regulation, mirroring King's idea that this movement is organizationally focused.¹⁰¹ Some believe this legislation is "a band-aid, not a cultural shift," symbolizing that this overworking issue may be a problem that should be handled by employers individually rather than via government intervention.¹⁰²

IV. THE REALITY OF A *SUPPOSED* 'RIGHT' TO DISCONNECT

The question I present to you is: Is the right to disconnect real or is it something that people should establish for themselves based on the occupation they choose? The issue with the right to disconnect is that it does not mean the same thing to each person, each occupation, each place, each employer, or to each employee. This legislation varies by jurisdiction, where it's drafted, and some locations have yet to even consider implementing such legislation.¹⁰³ It is hard to simply "switch off" such that people can disconnect, specifically within companies with an international basis spanning over several time zones, per John Lamphiere, the regional Vice President of EMEA and APAC for ActiveCampaign.¹⁰⁴ He emphasized that within this 'right' to disconnect, it is integral that employees receive "latitude to work in a way that suits them."¹⁰⁵ The Founder of Futureheads, Kaler Pilgrim, noted that simply restricting emails or other technical solutions will not address the greater issue of overworking.¹⁰⁶ She noted how schedule-send emails can be a benefit rather than bombarding coworkers at night, but in scope, it feels grander than this.¹⁰⁷ Is the way Volkswagen suspended their email function overnight too harsh?¹⁰⁸ Scholars note that there is good intention behind

100. Wayland and Josephs, *supra* note 94.

101. Christ, *supra* note 61.

102. Nadine Malek, *Right to Disconnect Laws: Are They Coming to the US?*, PRODOSCORE, (Nov. 8, 2022), <https://www.prodoscore.com/blog/right-to-disconnect-laws-are-they-coming-to-the-us/>.

103. Stefano de Luca Tamajo, *The Right to Disconnect Around the World*, LEXOLOGY, (Aug. 11, 2023), <https://www.lexology.com/library/detail.aspx?g=eac8c40a-a0a4-4167-b467-2699014e8599>.

104. Keane, *supra* note 36.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

these implementations, but that this “one-size-fits-all policy . . . can be potentially detrimental as they don’t consider the flexibility that some people may want or need.”¹⁰⁹ A lecturer at the U.K.’s University of Sussex, Emma Russel, commented that, “if we want to encourage a more inclusive and diverse workforce then it’s [about] trying to be mindful about the needs of those different groups.”¹¹⁰ One news outlet went so far so to say that there is a “fundamental right to disconnect” for employees, and it is a right that should be protected by Parliament.¹¹¹ The issue with this alleged right, is that in its application, it is unfair.¹¹² It is not possible to have a law that properly applies as it was intended that is fair to workers, fair to employers, and equally applied amongst any and all areas of labor.¹¹³

The right to disconnect, in theory, is great; it would be amazing if people didn’t have to work all the time, but is this an issue where government implication is *really* necessary? Is there such a thing as a *right* to disconnect? Typically, people view their *rights* as their fundamental rights lodged within their nation’s constitution.¹¹⁴ This concept of seeking governmental intervention is not new, nor is it unfamiliar. In American politics, we often see people voice their concerns about something that is bothering them, and therefore they seek government help; an example of this is the economy.¹¹⁵

In the right to disconnect’s application, it falls short as it is too general.¹¹⁶ In Belgium, as explained above, the downside is that this right is only applied to employers who have more than twenty employees and

109. *Id.*

110. *Id.*

111. EUROPEAN PARLIAMENT, *Parliament Wants to Ensure the Right to Disconnect from Work*, EUROREPORTER, (Aug. 11, 2022), <https://www.eureporter.co/economy/employment/2022/08/11/parliament-wants-to-ensure-the-right-to-disconnect-from-work/>.

112. Keane, *supra* note 36.

113. Ope Akanbi, *Who is in Charge of Giving Workers the Right to Disconnect? It’s Complicated*, FAST CO., (Nov. 27, 2021), <https://www.fastcompany.com/90698791/who-is-in-charge-of-giving-workers-the-right-to-disconnect-its-complicated>.

114. THE WHITE HOUSE, *The Constitution*, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/>; CONSTITUTE PROJECT, *France 1958 (rev. 2008)*, https://www.constituteproject.org/constitution/France_2008 (last accessed Mar. 18, 2024); CONSTITUTE PROJECT, *Belgium 1831 (rev. 2014)*, https://www.constituteproject.org/constitution/Belgium_2014 (last accessed Mar. 18, 2024).

115. Christopher Rugaber and A. P., *Americans Are Upset About Surviving a Pandemic and Paying for the Privilege: ‘They Want These Prices to be Back Where They Were’*, FORTUNE, (Nov. 19, 2023, 9:18 AM), <https://fortune.com/2023/11/19/why-americans-angry-pissed-about-economy-inflation-prices-pandemic-deflation/>.

116. Malek, *supra* note 102.

it only applies to certain sectors of employment.¹¹⁷ The main issue, per legal advisor within the social politics and well-being at work department, Hugues Ghenne, is that this right “lacks clarity and guarantees” and that “[i]t’s a bit unclear for the company what they have to do.”¹¹⁸ This directive was intended to incentivize “worker empowerment,” and to protect employees from repercussions.¹¹⁹ The central arguments are that this ‘right’ is too general, and that it is not the same on its surface as it is in its application, falling short of addressing the overarching issue of overworking.¹²⁰ Professor David Doorery of York University believes “the terminology of a ‘right’ to disconnect is misleading since the change in law did not bring any new rights for employees.”¹²¹

The goal that motivated this directive was that people are overworked, but I pose the question: was performing such work a personal decision? In real life, the problem is far deeper than simply having the government impose a right to disconnect.¹²² Each occupation bares its own complications, requirements, and expectations, and a blanket ‘right to disconnect’ is not a miracle reform that people hoped it would be.¹²³ As evident in the Belgium case study, it is not being implemented in the way employees had hoped: it’s failing to protect certain groups, smaller employers, and there are circumstances in which the right to disconnect can, in theory, be overridden by decision making employees higher up when deemed necessary.¹²⁴

The issue with the right to disconnect is that it is not a problem that a generalized governmental directive can solve.¹²⁵ The topic is merely discussed in abstract form, thus once people attempt to solidify what

117. Ketrin Jochecová, *Not Everyone Can Disconnect with Belgium’s Right to Disconnect*, POLITICO, (May 13, 2023, 5:20 PM), <https://www.politico.eu/article/not-everyone-can-disconnect-with-belgiums-right-to-disconnect/>.

118. *Id.*

119. EURO. PUB. SERV. UNION, *Right to Disconnect: Implement the EU Social Partners Agreement in Central Government Administrations*, <https://www.epsu.org/article/right-disconnect-implement-eu-social-partners-agreement-central-government-administrations> (last accessed Mar. 19, 2024).

120. Ope Akanbi, *The Right to Disconnect: Why Legislation Doesn’t Address the Real Problems with Work*, GOVERNING, (Nov. 21, 2021), <https://www.governing.com/work/right-to-disconnect-legislation-doesnt-address-real-problems-with-work>.

121. Victoria Frickle, *The ‘Right to Disconnect’: A Toothless Tiger Protecting Mental Health*, MCGILL BUS. L. PLATFORM, (Apr. 1, 2023), <https://www.mcgill.ca/business-law/article/right-disconnect-toothless-tiger-protecting-mental-health>.

122. Malek, *supra* note 102.

123. *Id.*

124. Jochecová, *supra* note 117.

125. Malek, *supra* note 102.

exactly this right is, it becomes far more limited in its implementation, and people likely would then realize this is not something they actually want; there needs to be more definition in the legislation.¹²⁶ Many times, *rights* have a negative connotation to them, as it is a governmental restriction that limits a person's ability to do something, act in some way, or express their freedom. Here, employees are seeking what many would consider a positive right, which in some cases, directly contradicts the meaning of a governmentally imposed 'right.'¹²⁷ The right to disconnect, in theory, benefits everyone by providing a privilege or bonus for workers whose employers properly enforce the right to disconnect, but what about employees who want to work while they technically are not on the clock? Will they feel too confined by this new legislation?

From a public policy perspective, individual employees have the right to choose what type of employment to seek out, and that decision determines whether they will be entitled to a right to disconnect. A waitress at a restaurant, for example, technically has the right to disconnect as soon as she leaves the restaurant; work does not follow her home. Many people in the world have opted into careers where this *right* is not realistic. Alternatively, if that person simply changed occupations, they would no longer be faced with the long hours or the pressure of the field that is bothering them. There is always the option to change career paths, negotiate a contract differently, or state your expectations in the new job, and decide at that point whether the commitment is something you are able to handle and properly fulfill; the right to disconnect is not "uniform."¹²⁸ Additionally, when the government imposes "strict rules, it negates the flexibility because it can't be both," revealing how flexibility is crucial in the workforce.¹²⁹ Certain employees appreciate doing things at certain times, in a specific manner, etc., and as Russel emphasized, "[i]f we want to encourage a more inclusive and diverse workforce then it's [about] trying to be mindful about the needs of those different groups."¹³⁰

The reality of this implication is that if the right to disconnect became a more narrowly focused concept, many people may not appreciate being confined by governmental interference.¹³¹ One article

126. *Id.*

127. *Understanding the Difference Between Positive and Negative Rights*, ALA. POL'Y INST., <https://alabamapolicy.org/wp-content/uploads/2020/11/GTI-Brief-Positive-Negative-Rights-1-1.pdf>, (last accessed Mar. 20, 2024).

128. Akanbi, *supra* note 113.

129. Keane, *supra* note 36.

130. *Id.*

131. Malek, *supra* note 102.

mentions several positives, contrasted with several negatives of the right to disconnect, namely: the positives include setting boundaries, improving mental health, enhancing productivity, alleviating burnout, while the negatives include productivity challenges, maintaining flexibility, changing the culture of the workplace, and more.¹³² Further, an employee who follows the working hour limitations bears the risk of being overlooked for a promotion if a fellow co-worker uses their time off, demonstrating the inequality in application.¹³³ This movement, per King, is about a company's culture, and comes down to boundary setting within the company during such a technologically advanced time.¹³⁴

The global issue with the right to disconnect, is that employees believe to some extent that this is a collective action problem that the government of individual nations needs to solve. Employees want a world where they're not forced to keep working and feel "on the clock," but a world where once they go home for the day, that's the end of their day.¹³⁵ For many people, though, that is when the concept of the "second-shift" kicks in, namely the time when a mother finishes her professional, full-time job for the day, and as soon as she gets home, her parenting and home duties begin, meaning that even aside from the physical employment, the mother is never "off."¹³⁶ Sometimes, collective action problems are something that the government has the ability to solve: for example, smoking on airplanes.¹³⁷ Many airplane travelers were opposed to smoking aboard aircrafts as it posed health risks, but the airlines did not want to "alienate a segment of their customer base," so the government slowly stepped in to regulate this, by first separating a non-smoking and smoking airline cabin, then later, by fully outlawing smoking on

132. Brendan Burke, *7 Challenges in Implementing a Right to Disconnect Policy*, BOOMERANG, (Sept. 26, 2023), <https://blog.boomerangapp.com/2023/09/right-to-disconnect-policy-challenges/>.

133. Frickle, *supra* note 121.

134. Christ, *supra* note 61.

135. M. Burke, *supra* note 8.

136. Lexi Herrick, *The True Damage of Second-Shift Motherhood*, HUFFPOST, (Oct. 1, 2015, 3:43 PM), https://www.huffpost.com/entry/the-true-damage-of-second_b_8224148#:~:text=us%20an%20email.-,The%20concept%20of%20second%2Dshift%20motherhood%20is%20not%20a%20new,being%20a%20full%2Dtime%20mom.

137. Thomas Pallini, *It's Been 20 Years Since Smoking Was Completely Banned on All US Flights. Here's How Smoking on Planes Went from Normal to Banned.*, BUS. INSIDER, (Mar. 8, 2020), <https://www.businessinsider.com/when-did-smoking-get-banned-on-planes-in-the-us-2020-2>; FEDERAL REGISTRAR: THE DAILY JOURNAL OF THE UNITED STATES GOVERNMENT, *Smoking Aboard Aircraft*, <https://www.federalregister.gov/documents/2000/06/09/00-14480/smoking-aboard-aircraft> (last accessed Mar. 20, 2024).

airplanes.¹³⁸ This movement was prompted by the Association of Flight Attendants Union, for which it took years for the government to intervene and slowly pass legislation forbidding smoking aboard an aircraft.¹³⁹

The right to disconnect sounds amazing in the abstract, but once it is more concrete and focused, it becomes extraordinarily difficult to implement. There are practical reasons for this, but the deeper issue is that the right to disconnect is not the problem solver that employees are hoping it will be. If employees looked deeper into this issue, they would realize that this solution may not work in the way they had hoped. This issue of overworking and feeling attached to work constantly is something that the government may not be best suited to handle, as is evident in the way American companies have faced this issue, through individual labor strikes and collective bargaining within companies to motivate the employer, or through collective bargaining as it pertains to labor unions.¹⁴⁰

In summary, the pitfall with the right to disconnect includes its “application, enforceability, and the effect on flexibility and autonomy.”¹⁴¹ First, the right is not uniform in its application as it varies between occupations and individuals, but, moreover, it does not impose “an obligation to disconnect,” just merely the right.¹⁴² The issue with that is it is unclear where the burden lies, and often times, it then becomes the employee’s hardship to overcome.¹⁴³ Second, because there is no obligation, often times, the employers do not face repercussions for failing to abide by the right to disconnect.¹⁴⁴ Lastly, there appears to be a direct conflict between flexibility and the right to disconnect, meaning, that when the employers dictate the times that an employee can be online or conducting work, that limits the employee’s freedom to feel any sense of flexibility during their working period, especially given technological advancements and the ability an employee could have to conduct work at the best times for themselves.¹⁴⁵ In trying to achieve this solution, employees and employers need to precisely pinpoint the issue such that a

138. Mark Finlay, *On This Day in 1990 Smoking Was Banned on US Domestic Flights of Less than 6 Hours*, SIMPLE FLYING, (Feb. 25, 2023), <https://simpleflying.com/us-domestic-flights-smoking-ban-anniversary/>.

139. Joe Sharkey, *What Flying Was Like Before the Smoke Cleared*, N.Y. TIMES, (Feb. 23, 2015), <https://www.nytimes.com/2015/02/24/business/what-airlines-were-like-before-the-smoke-cleared.html>.

140. AFL-CIO, *supra* note 93.

141. M. Burke, *supra* note 8.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

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remedy can be obtained, specifically, a remedy that is applied more equitably and fairly to everyone involved. In conclusion, this right to disconnect is not as grand as it appears on its face, and likely is not what many employees and employers had hoped for in obtaining this governmental intervention and legislation.