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Unrestricted Private Employee Drug Testing Programs: An Invasion of the Worker's Right to Privacy

INTRODUCTION

Allan Bitwell,¹ a mid-level manager for a Fortune 500 company,² arrived at work one Monday morning recently and was told that all personnel in his department were required to provide urine samples immediately. Bitwell's company had notified its employees it had decided to institute a drug screening program³ as part of the firm's comprehensive plan of detecting and eliminating employee drug use.⁴ Unfortunately for Bitwell, an occasional week-

1. Bitwell is a hypothetical company officer for the purposes of this article. White-collar drug use recently has drawn increasing attention with the recognition that managers of many businesses are in an excellent position to hide drug use. Company officers can close their office doors and delegate assignments to co-workers. Among company officers at work, cocaine has become the drug of choice because the drug's "high" generates strong feelings of increased job skill and confidence. Moreover, cocaine use is more easily hidden to hide than, for example, marijuana since cocaine generally is snorted rather than smoked and has no discernible odor. Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52, 54.

2. To detect drug use, about one-quarter of the Fortune 500 companies presently require that job applicants submit to urinalysis. The first corporations to institute drug testing were aerospace companies, airlines and railroads. Businesses now requiring drug testing include such giants as AT&T, IBM, General Motors Corp., Ford Motor Co., Du Pont, Exxon, Lockheed, Shearson Lehman, Federal Express, United Airlines, TWA, Hoffman-La Roche, and the New York Times. These firms now require all job applicants to submit a urine sample, and allow random sweeps of certain classes of employees such as employees who do hazardous work or those who have been involved in accidents. While drug testing of all employees is rare, an additional 20% of Fortune 500 companies are expected, within twelve months, to implement at least some form of drug testing. Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, col. 1; Castro, *supra* note 1, at 52-61.

Spreading even more rapidly than the use of drug testing through urinalysis is the use of employee assistance programs (EAP's). These programs go beyond employee counseling programs to provide workers and their supervisors information about the risks of using drugs. The programs offer counseling to troubled workers and their families and direct them to intensive treatment facilities if needed. Many companies have set up toll-free numbers that workers and their families can call to get advice on their drug problems. Castro, *supra* note 1, at 57.

3. Those most often tested are job applicants. The Council on Marijuana and Health surveyed 35 companies and found 29% tested all job applicants and 26% tested employees under certain conditions. Drug tests were administered to nearly five million Americans in 1985. Stille, *supra* note 2, at 1, col. 1.

4. *Id.* Corporations view the new, inexpensive drug tests as the remedy for a host of problems: employee theft, absenteeism, rising health care costs, accidents, shoddy workmanship and low productivity. Studies have estimated that businesses lose up to three billion dollars a year due to employee drug use. *Id.* While alcohol is a powerful drug which

end cocaine user,⁵ he now faced termination either for refusing to submit to the test or for receiving a positive laboratory report.⁶ A quick call to his attorney revealed there was no realistic legal basis for refusing to take the test.⁷ The attorney also stated that any lawsuit brought against the firm in the event Bitwell was terminated likely would fail.⁸

Bitwell's situation is one that will be repeated with increasing regularity as more private companies attempt to deal with the problem of employee drug use.⁹ This developing trend has been documented by the media¹⁰ and has been spotlighted by proposals of league officials in various professional and amateur sports that athletes submit to random drug testing.¹¹

Unlike drug testing in the military¹² and for public employees,¹³

has contributed to these very significant problems, this Comment will focus only on the growing use of illegal drugs by employees.

5. See *supra* note 1. In the three year period between 1979 and 1982, one survey reported that cocaine use by those over the age of 26 had doubled. Cocaine use by well-known sports and entertainment figures has been well-publicized in recent years, no doubt contributing to the drug's allure and popularity.

On the down side, cocaine is addicting and can create serious physical and psychological problems. It can cause hypersensitivity, paranoia, hallucinations and reactions that can lead to suicide. The well-published deaths of comedian John Belushi, college basketball player Len Bias and NFL football player Don Rogers have also shown that cocaine can kill.

6. See *infra* note 22 for a discussion of the possibility of receiving a false positive report.

7. See *infra* notes 118-42 and accompanying text. An employee can always refuse to take the test, but the price for that refusal can include loss of job and accompanying stigma, embarrassment, and possible difficulties in finding new employment.

8. Several theories attempted have been unsuccessful including wrongful termination, retaliation, invasion of privacy, intentional infliction of emotional distress and breach of covenant of good faith and fair dealing. See *infra* text accompanying notes 118-42.

9. People over 40 tend to be more dependent on alcohol, while those under 40 tend to prefer the use of drugs. Marijuana use is more common among blue-collar workers, and cocaine is the drug of choice among white-collar workers. Linnquist, *Drugs Said Rampant in Every Industry*, San Diego Union, Nov. 30, 1985, at B-1, col. 4.

10. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42 (1985). "Over the last 20 years, employers in every industry have been forced to deal with . . . the tremendous increase in the use of drugs." *Id.* at 42. Surveys reveal that up to twenty-five percent of the workforce are substance abusers. See Stille, *supra* note 3, at 53.

11. One sport receiving considerable attention is major league baseball. Several teams have instituted testing plans which are voluntary and non-punitive. The Baltimore Orioles have used a plan which provides for administering up to six urinalysis tests to each ballplayer per year. Only the player, his agent and the testing physician know the results. The program is designed to identify those players who may need rehabilitation and the ballclub is not allowed to "sanction" a player if he needs treatment. Kreidler, *Padres Urge Drug Testing*, San Diego Union, Mar. 6, 1986, at C-1, col. 3. Similar voluntary plans have been adopted in other professional sports, as well as in sports at the college and high school level. Of course, an employee who voluntarily participates in a drug testing program waives his expectation of privacy.

12. Armed services drug testing resulted from a Department of Defense policy change that occurred on December 28, 1981, when the Deputy Secretary of Defense issued a memorandum which allowed evidence obtained by compulsory urinalysis to be used for

there is no case law precisley defining the scope of private drug testing.¹⁴ What is clear is that without statutory regulation similar to that prohibiting or limiting the use of polygraphs,¹⁵ private employers are free to impose whatever type of drug testing program they deem necessary.

Currently, a private employee's rights are quite limited. Fourth amendment protection against unreasonable search and seizure, as well as any constitutional right to privacy, only protects against intrusions by government employers¹⁶ and others where the employee can successfully invoke a "state action" argument.¹⁷ While private employees may have a tort remedy for invasion of privacy in most jurisdictions,¹⁸ this remedy does little to prevent employers from violating worker privacy in the first place. Moreover, as private employers make use of advanced Orwellian technology for various reasons, employees can expect a continuing erosion of

disciplinary action under the Uniform Code of Military Justice (UCMJ). In *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the U.S. Court of Military Appeals ruled that urine specimens are not included within protections accorded to service members by article 31 of the UCMJ and the fifth amendment. The court recognized the "disastrous effects occasioned by the wrongful use of narcotics on the health, morale and fitness for duty of persons in the armed forces." *Id.* at 78. The appellate court held that even when a service member uses drugs in private and while on extended leave, that use is service connected and therefore punishable. Moreover, a military order providing the means for compelling production of a urine specimen "is a reasonable procedure in the context of the military society." *Id.* at 83.

As a Naval officer between 1980 and 1984, the author can attest that drug tests following the 1981 drug test memorandum were frequent and exempted no one. This author can also attest that being ordered to urinate into a bottle with another man witnessing the operation from start to finish not only was humiliating and embarrassing, but also significantly affected this author's right to be let alone.

13. Public employees can be terminated for refusing to take a test when suspected drug usage jeopardizes the public agency's ability to carry out its statutory duties. See *infra* notes 61-104 and accompanying text. Though no courts have allowed a public entity to randomly test all employees, the Presidential Commission on Organized Crime has called for the mandatory drug testing of all federal employees and people hired by federal contractors. President Reagan and Attorney General Meese strongly support the recommendation. The presidents of both the National Federation of Federal Employees and the American Federation of Government Employees, who represent some 850,000 workers, have called the proposal a "witch hunt" and unconstitutional. Carmichael, *Drug Use Concerns, Individual Rights Collide on Capitol Hill*, San Diego Union, Apr. 6, 1986, at C-1, col. 1.

14. See *infra* notes 118-42 and accompanying text.

15. Twenty-one states prohibit employers from requiring that an individual submit to a polygraph examination as a condition of employment. Nine states prohibit an employer from even requesting that an applicant or employee submit to such an examination. Twenty-eight states have statutes requiring that examiners be licensed. Nagle, *The Polygraph in the Workplace*, 18 U. RICH L. REV. 43, 67 (1983).

16. See *infra* notes 61-104 and accompanying text.

17. See *infra* notes 105-17. See also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

18. See *infra* notes 51-59 and accompanying text.

their elusive "right" to privacy.¹⁹

Some contend that reducing drug abuse among employees whose work involves potential danger to themselves, other employees, or members of the public is an important societal goal.²⁰ However, others have argued that blanket company-wide drug testing is used as much for identifying non-conformists and company troublemakers as for eliminating drug abusers whose job performance is below average.²¹ Further, even if the drug tests are accurate,²² they penalize a one-time user the same as an addict.²³

19. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug into your wire whenever they wanted to.

G. ORWELL, 1984 3 (1949).

"During the late 1950's and early 1960's, the federal government devised a lie detection seat that [could] be used without the knowledge of the individual being examined. . . . The future may witness sensing devices implanted in the human body capable of transmitting data on psychological and physiological changes." Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 30 (1977) (footnote omitted). And, as if testing for drugs is not enough, genetic screening of prospective employees is already a reality. These tests are conducted ostensibly to determine if an individual carries a particular trait that might make him more susceptible to harm from certain chemicals present in the workplace. According to a 1982 survey of the nation's largest industries performed by the Congressional Office of Technology Assessment, "59 corporations said they would begin some form of genetic screening of their workers within the next five years; 17 said that they had previously used the procedure, and six said they used it currently." Goodrich, *Are Your Genes Right For Your Job?*, CAL. LAW., May 1983, at 24.

20. See *infra* notes 61-104 and accompanying text. Drug testing in these kinds of situations arguably serves an important safety function.

21. Civil libertarians fear that drug testing may become an easy way for management to terminate employees.

22. The actual testing of the urine sample opens up an extremely important issue since testing is not completely accurate. A positive reading labels the employee as a drug user which can ruin the worker's entire career whether the test was accurate or not. The most widely used urinalysis test is EMIT (Enzyme Multiplied Immunoassay Test) and is advertised as ninety-seven to ninety-nine percent accurate. The other commonly used test is the RIA (radioimmunoassay). The RIA's require the use of radioisotopes that emit radiation, and for that reason require the test be performed by a technician in a lab licensed to handle such materials. Maugh, *Drug Tests' Reliability is Limited, Experts Say*, L.A. Times, Oct. 27, 1986, Part I, at 20, col. 2. The manufacturer warns companies which use the test that no decision affecting an employee's career should be made without a backup test. A backup test is suggested because certain prescription medicines and over-the-counter drugs such as antihistamines, propanolamine (found in appetite suppressants), and ephedrine (found in many cough syrups) can yield positive results. However, even a backup test is unable to distinguish between morphine from one swallowed poppy seed and morphine that has been injected. *Id.* While many large corporations perform backup tests, a significant number do not to save the additional expense.

Another problem is that the quality level of the testing varies considerably among the largely unregulated private laboratories. In several studies, the error rates generally have fluctuated between three and twenty percent. In the biggest bungle so far, the Army admitted in 1984 that its laboratories had mishandled about half of the urine tests on 60,000 soldiers, and that hundreds of the soldiers received results from specimens that were not their own. Back in the private sector, alleged laboratory inaccuracies have spawned several lawsuits. See *infra* notes 141-42 and accompanying text; Stille, *supra* note 2, at 1, col. 1.

Civil libertarians argue that any possible benefits from the current state-of-the-art in drug detection can only be achieved at the expense of a much higher goal: freedom from unwarranted intrusions into the employee's private life.²⁴ This drug testing trend is especially intrusive for the vast majority of employees who have no union or arbitration protection.²⁵ Moreover, libertarians view drug testing as symptomatic of infringement upon a wide range of personal freedoms.²⁶

This Comment will discuss the concept of employee privacy in the context of private employment drug testing. First, the constitutional basis of the right to privacy, as well as the invasion of privacy tort, will be addressed.²⁷ Second, this Comment will examine the current state of public employee drug testing as the background for the private employee drug testing, and will include a discussion of state action which permits constitutional privacy arguments.²⁸ Third, this Comment will explore the current status of private employee drug testing, with particular emphasis on the analogy between drug and polygraph testing.²⁹ Finally, this Comment will propose a legislative solution which will limit and define the extent to which private employers may test their employees for drugs.³⁰

A contributing factor to test inaccuracy is the competitive bidding process that businesses often use to select the drug testing laboratory. The lowest bidder often is awarded the job, and must cut corners and compromise results to realize a profit. Stille, *supra* note 2, at 24, col. 4.

23. Drugs differ in the length of time they can be detected in the blood. Toxicologists have agreed on the following detection periods: amphetamines—two to four days; barbiturates—twelve hours to three weeks; cocaine—two to four days; heroin—two to four days; marijuana—three to ten days (occasional user) one to two months (regular user); methadone—two to four days; PCP—one to thirty days. Maugh, *supra* note 22, at 21, col. 2-3.

24. Some have viewed the boom in urinalysis testing as the "yellow peril" which forces citizens to prove their innocence of crimes they haven't been charged with. "What starts with little plastic cups ends in the urinalysis state." THE NEW REPUBLIC, Mar. 31, 1986, at 8.

It is generally recognized that for unionized workers, management's authority to develop and implement workplace rules is restrained by the terms of the collective bargaining agreement. Miller, *Worker Privacy and Collective Bargaining*, 33 LAB. L.J. 154 (1982).

25. See *infra* notes 180-95 and accompanying text.

26. Keisling, *The Case Against Privacy*, STUDENT LAW., Sept. 1984, at 27: The "right to privacy" has also been used to argue against all laws relating to the use and sale of heroin and other drugs, against laws that require the use of certain safety devices in automobiles, and against electronic scanning machines in supermarkets. Privacy advocates have also expressed concern about pay cable television since the billing process would enable outsiders to know what you're watching. . . .

27. See *infra* notes 31-60 and accompanying text.

28. See *infra* notes 61-117 and accompanying text.

29. See *infra* notes 118-95 and accompanying text.

30. See *infra* notes 196-231 and accompanying text.

I. THE RIGHT TO PRIVACY

To the private employee, freedom from intrusion into his off-work behavior may appear to be a constitutional right. As the hypothetical Allan Bitwell discovered, this is not necessarily so. Most employees facing a drug test as a condition of continued employment will find that there are few safeguards to temper incursions into their privacy.³¹

The courts and legal scholars have long struggled to define the scope of an individual's right to privacy.³² Both are still trying to develop a definition which adequately fulfills the needs of a society seeking both to protect individualism and to promote efficiency in government and business.³³

A specific guarantee of the right to personal privacy does not exist in the United States Constitution.³⁴ However, the right to privacy has been generally defined as:

The right to be let alone; the right of a person to be free from unwarranted publicity . . . [t]he right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses. It is said to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain, or malice.³⁵

In *Griswold v. State of Connecticut*,³⁶ the United States Supreme Court found "zones of privacy" to exist in the first,³⁷ third,³⁸

31. The common law of most states recognizes the concept of a right to privacy. States which do not recognize the right to privacy include Minnesota, Nevada, North Dakota, and Wyoming. Twenty-two states have at least a limited statutory recognition of the right to privacy. R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 17-18 (1981).

32. A typical definition of privacy is grounded in what privacy should achieve. The purposes of privacy include "the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society." Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980).

33. For an excellent discussion of the privacy issue, see A. WESTIN, *PRIVACY AND FREEDOM* (1967). Westin has defined privacy as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." *Id.* at 7.

34. *Roe v. Wade*, 410 U.S. 113, 152 (1973). "In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 . . . (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.*

35. BLACK'S LAW DICTIONARY 1075 (5th ed. 1979) (citations omitted).

36. 381 U.S. 479 (1965). *Griswold* was the landmark case striking down a Connecticut statute which forbade not only the use of contraceptives, but also aiding or counseling others in the use of contraceptives. *Griswold* is widely viewed as the first major modern case in which the Supreme Court used a substantive due process approach to protect the fundamental right of privacy. R. ROTUNDA, J. NOWAK AND J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.27 (1986).

37. "Congress shall make no law . . . prohibiting . . . the right of the people peacea-

fourth,³⁹ fifth,⁴⁰ and ninth,⁴¹ amendments. The Court stated that these “[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.”⁴² The Court later held in *Roe v. Wade* that the right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁴³ The Court determined that the right to privacy is “founded in the Fourteenth Amendment’s concept of personal liberty. . . .”⁴⁴

Four years after *Wade*, the Supreme Court noted that two basic interests are protected under the constitutional right to privacy; “[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”⁴⁵ These privacy rights, arising under substantive due process protections, have yet to be fully delineated by the Supreme Court.⁴⁶ However, based on privacy

bly to assemble. . . .” U.S. CONST. amend. I.

38. “No soldier shall, in time of peace be quartered in any house, without the consent of the Owner nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

39. “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.

40. “No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V.

41. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

42. *Griswold*, 381 U.S. at 484 (citation omitted).

43. *Roe v. Wade*, 410 U.S. 113, 153 (1973). This case extended the right to privacy found to exist in *Griswold* to the abortion issue. *Roe v. Wade* and its progeny have severely limited the state legislatures’ ability to regulate abortions.

44. *Id.*, 410 U.S. at 153. The Court stated, however, that the privacy right involved was not absolute but that the abortion decision is included in the right to privacy. The Court stated: “We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right must be considered against important state interests in regulation.” *Id.* at 154.

45. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). In *Whalen*, the Court found that although prescription drug users in New York had a privacy interest in not having the state gather information about their drug usage, this interest, under a “rational basis” standard, was outweighed by the state’s interest in gathering the data. The Court found that neither of the two privacy interests defined were materially impaired by the statute.

46. In general, the Supreme Court has protected privacy rights as they relate to traditional values such as family, marriage and procreation. R. ROTUNDA, J. NOWAK AND J. YOUNG, *supra* note 36, § 18.28. The Court has consistently applied a “strict scrutiny” test to these classes of fundamental rights which invalidates any state law limiting these rights unless the state can show a compelling state interest in the restriction. *Id.* In a recent case addressing the privacy issue, the Supreme Court has refused to extend the right of privacy to consensual homosexual sodomy. *Bowers v. Hardwick*, ___ U.S. ___, 106 S. Ct. 2841 (1986). In *Bowers*, the Supreme Court held in a 5-4 decision that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. The majority noted that none of the fundamental rights found in prior cases involving family relation-

decisions to date, strong arguments can be made that random drug screening programs violate the often quoted "right to be let alone," and that protections against random testing should exist in the *Griswold* privacy penumbra, particularly under the fourth and fifth amendments.⁴⁷ However, if the right to privacy is a protection under the Bill of Rights, then the employee must assert "state action" since these fundamental guarantees apply generally to the government, not to private employers.⁴⁸

Apart from the federal courts, the concept of privacy has been furthered and legitimized by numerous scholarly writings, grandfathered by the landmark article, *The Right to Privacy*, written by Samuel D. Warren and Louis D. Brandeis.⁴⁹ That article, which defined privacy as an independent right, "enjoys the unique distinction of having synthesized at one stroke a whole new category of legal rights and of having initiated a new field of jurisprudence."⁵⁰

Dean Prosser has further refined the privacy issue by defining four distinct torts arising from invasions of privacy.⁵¹ The type

ships, marriage or procreation "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ." *Id.* at ___, 106 S. Ct. at 2844. Further, the Court stated that its rationale applies even if the homosexual conduct occurs in the home: "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home." *Id.* at ___, 106 S. Ct. at 2846. However, in one of two dissents, Justice Blackmun attached special significance to the fact that the homosexual activity occurred in the defendant's own home.

"The right of the people to be secure in their . . . houses," expressly granted by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution." . . . Indeed, the right of an individual to conduct intimate relationships in the confines of his or her home seems to me to be the heart of the Constitution's protection of privacy.

Id. at ___, 106 S. Ct. at 2853.

For recent discussions on homosexual privacy issues, see generally Apasu-Gbotsu, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Note, *Bowers v. Hardwick: The Extension of the Right to Privacy to Private Consensual Homosexual Conduct*, 10 NOVA L.J. 175 (1985).

47. One federal court already has determined that urinalysis is a search within the meaning of the fourth amendment. See *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985). In *Griswold v. Connecticut*, the Court stated that the right against self-incrimination enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. 381 U.S. 479, 484 (1965). Employer drug testing would seem to violate that "zone of privacy" by forcing employees to incriminate themselves through production of their urine samples. In *McDonnell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1984), *aff'd*, 746 F.2d 785 (8th Cir. 1985), the court stated that a citizen has a reasonable expectation of privacy in the discharge and disposition of his urine.

48. See *infra* notes 105-17 and accompanying text.

49. 4 HARV. L. REV. 193 (1890).

50. 62 AM. JUR. 2D *Privacy* § 2 (1972).

51. Prosser, *Privacy*, 4 CAL. L. REV. 383 (1960).

most relevant to this Comment is the “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.”⁵² This right to privacy may be violated by the wrongful intrusion into one’s private activities if it is of “such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant. . . .”⁵³ Related to this invasion is the tort of public disclosure of embarrassing private facts about an individual.⁵⁴

In the drug testing case law available, the “invasion” torts described by Prosser have proved unsuccessful as causes of action.⁵⁵ Since most employers are not likely to publicize either test results or the reason behind an employee’s termination, the “publicizing of one’s private affairs” tort will not be of much help to the employee. Further, in at least one jurisdiction, if an employee bases his tort cause of action on “intrusion” alone without public disclosure, the burden is on the employee to prove a “blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation.”⁵⁶ Moreover, these causes of action, even if successful, are only compensatory on a case-by-case basis. On a company-wide level, these lawsuits likely will do little to curb the employer’s unrestrained ability to perform drug testing.⁵⁷

The majority of state courts have at least accepted that the right to privacy exists either by common law or through statute.⁵⁸ A growing trend towards the express recognition of a right to privacy is evidenced by individual states passing state constitutional amendments. Typical of these amendments is article I of the California Constitution which states that “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, hap-

52. *Id.* at 389. The other three can be described as: public disclosure of embarrassing facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. *Id.*

53. 62 AM. JUR. 2D *Privacy*, § 13 (1972) (footnote omitted).

54. *Id.* § 26. See discussion of *Satterfield v. Lockheed Missles Space Co., Inc.*, *infra* notes 123-33 and accompanying text.

55. How future cases will be decided, however, is difficult to predict at this time because of the very small number of cases decided thus far.

56. *Satterfield v. Lockheed Missles & Space, Inc.*, 617 F. Supp. 1359, 1370 (D.C. S.C. 1985). See *infra* note 132 and accompanying text.

57. See *infra* notes 123-42 and accompanying text.

58. Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3D 16, 32. Among the states that have passed constitutional amendments declaring a right of privacy are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Montana, South Carolina and Washington. Peck, *Extending the Constitutional Right To Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893, 897 n.25 (1984).

piness, and privacy.”⁵⁹ Similar to the federal constitutional right, however, state privacy statutes only restrict the actions of state and municipal employers. State action must be invoked before the right can be made applicable to a private employer.⁶⁰

A. Privacy and the Public Employee

Presently, case law on the validity of worker drug testing has come almost entirely from the public sector. This case law is useful in examining the privacy issue as background to the developing right to privacy theories in private employment. In particular, the right to privacy has been an intrinsic part of recent federal and state court analysis of the fourth amendment prohibition against unreasonable search and seizure.⁶¹

59. CAL. CONST. art. I, § 1. California voters added privacy as an inalienable right by constitutional amendment in November 1972. California courts have looked to the voter's brochure from that election to elicit the legislative intent behind the amendment. In *White v. Davis*, 13 Cal. 3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975), the California Supreme Court concluded that the right of privacy was designed primarily to guard against unnecessary government snooping and collection of records: “[T]he moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.” This passage was later quoted in *People v. Privitera*, 23 Cal. 3d 697, 709, 591 P.2d 919, 926, 153 Cal. Rptr. 431, 438 (1979), *cert. denied*, 444 U.S. 949 (1979), where, based on this narrow construction, the *Privitera* court held that the right to obtain drugs of unproven efficacy (in this case laetrile as a possible cancer cure) is not a fundamental privacy right.

Similarly, other California courts have held that there is no constitutionally protected right to engage in the use of illegal drugs even in one's home. *See People v. Davis*, 92 Cal. App. 3d 250, 154 Cal. Rptr. 817 (1979) (criminalization of the personal use and possession of cocaine in the home did not violate the individual's right to privacy); *Gillies v. Sacramento City Civil Serv. Bd.*, 99 Cal. App. 3d 417, 160 Cal. Rptr. 278 (1979) (dismissal of a police officer because of his expressed intention to use marijuana in the future as he had in the past did not violate his privacy rights); *Nat'l Org. for the Reform of Marijuana Laws v. Gain*, 100 Cal. App. 3d 586, 161 Cal. Rptr. 181 (1980) (right of privacy does not guarantee adult Californians the right to smoke marijuana in their homes). *But see Ravin v. State*, 537 P.2d 494 (Alaska 1975) where the Alaska constitutional privacy provision was held to protect the use of marijuana in the home in a personal, noncommercial context.

60. *See infra* notes 105-17 and accompanying text. However, California courts have held that the constitutional privacy provision is self-executing since the amendment was intended to “*extend various court decisions* on privacy to insure protection of our basic rights.” *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976). Since the measure was held to be self-executing, California courts have held that privacy is protected not only against state action, but also is considered an inalienable right which may not be violated by anyone. *See White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975); *Annenberg v. Southern Cal. Dist. Council of Laborers*, 38 Cal. App. 3d 637, 113 Cal. Rptr. 519 (1974). Thus, while the California right to privacy is a concept of undetermined parameters, the stage is set for a significant extension of the right to private employee in random drug testing, an area where there are several cases currently pending. *See infra* notes 134-42 and accompanying text.

61. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985). The *Allen* court noted that government employees do not surrender their fourth amendment rights merely because they go to work for the government. The court also noted that the government as an employer has the same rights as a private employer to oversee its employees and investi-

In *Allen v. City of Marietta*,⁶² government employees discharged for refusing to take a urinalysis test brought action against the city challenging their termination on the grounds that the city's use of the test was an unreasonable search in violation of the fourth amendment.⁶³ In *Allen*, the employer had confirmed through internal investigation that individuals who worked near high voltage wires were using marijuana on the job.⁶⁴ The district court first determined that urinalysis is a search within the meaning of the fourth amendment.⁶⁵ The court quoted a Supreme Court case that held that warrantless searches are "per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."⁶⁶ The *Allen* court's decision to allow the urinalysis in the absence of a warrant turned on an "exception" which involved "a balancing of the individual's expectation of privacy against the government's right as an employer (as opposed to the government's right as a law enforcer) to investigate employee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities."⁶⁷ Using this balancing approach in *Allen*, the court determined that the city had a right to make warrantless searches to determine whether employees were using drugs which would affect their ability to safely perform their work which involved hazardous materials. Thus, this search was not unreasonable.⁶⁸

In another case upholding drug testing, several jockeys filed suit

gate misconduct relevant to the worker's performance of duties. Thus, there has been a balancing of expectations and interests. See *infra* note 102 and accompanying text.

Outside the employer-employee context, the U.S. Supreme Court, in *California v. Ciraolo*, ___ U.S. ___, 106 S. Ct. 1809 (1986), *reh'g denied*, ___ U.S. ___, 106 S. Ct. 3320 (1986), has determined that aerial surveillance of an individual's property by police does not violate the fourth amendment. In *Ciraolo*, police obtained a search warrant following a tip that marijuana was growing in the defendant's backyard. The police secured an airplane and flew over the property at 1,000 feet and officers photographed marijuana plants there which were subsequently seized. The California Court of Appeal reversed the defendant's conviction for cultivation of marijuana, holding that the observation was an unlawful search, violating the fourth amendment. In a 5-4 decision, the United States Supreme Court held that while Ciraolo had manifested a subjective expectation of privacy, he had no reasonable expectation of privacy from aerial observations. The Court stated: "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at ___, 106 S. Ct. at 1813 (footnote omitted).

62. 601 F. Supp. 482 (N.D. Ga. 1985).

63. *Id.* at 485.

64. *Id.* at 484.

65. *Id.* at 489.

66. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)).

67. *Allen*, 601 F. Supp. at 489.

68. *Id.* at 491.

against the New Jersey Racing Commission.⁶⁹ The jockeys claimed that certain constitutional rights were violated by the Commission's alcohol and drug testing. Specifically, their main claim was that testing without individualized suspicion violated the fourth amendment.⁷⁰ The district court, however, held that the tests were not unconstitutional since the state had made a "sufficient and convincing showing of the need to conduct breathalyzer and urine tests in the absence of any individualized suspicion."⁷¹ This "need" was based on several factors: a) horse racing is one of a special class of unique industries which have been subject to pervasive and continuous regulation by the state, b) jockeys are licensed by the state and have received ample notice of the regulations, and c) the state has a vital interest in ensuring that horse races are safely and honestly run thus promoting the "integrity" of the industry.⁷² Further, even though the state characterized the tests as "random," the court found that they were administered neutrally, "with procedural safeguards substituting for the lack of individualized suspicion."⁷³ Thus the court stated:

[T]hey are not random in the sense that they allow the state steward unlimited discretion in selecting testees. . . . All jockeys are treated equally. The state's program requires *all* jockeys submit to breathalyzer tests. Further, every jockey participating in racing on a given evening has an equal chance of being selected to give a urine sample under the name drawing system. The state reserves the right solely to vary the total number of jockeys tested at each race meeting from three to five.⁷⁴

The court held that under these circumstances the tests did not violate the jockeys' right to freedom from unreasonable searches

69. Shoemaker v. Handel, 619 F. Supp. 1089 (D.C. N.J. 1985) *aff'd*, 795 F.2d 1136 (1986).

70. The jockeys also alleged that the regulations violated the due process clause and the equal protection clause of the fourteenth amendment. The court disagreed with both claims. As to due process, the court found that hearing provisions allowing the plaintiffs to challenge test results met the requirements set forth by the Supreme Court. On the equal protection claim, the court noted that since jockeys do not comprise a "suspect class" the state's testing program need only have a rational relation to legitimate state purposes. Further, the state's classification scheme was found to be rational and furthered the state's interest in maintaining the safety of the horse racing profession. *Id.* at 1104-05.

The plaintiffs also argued that the regulations violated their constitutional right to privacy, asserting that a) the Commission did not have sufficient justification to require the jockeys to disclose their use of medications; b) even if medication information could be required, there were inadequate safeguards to prevent against its unauthorized disclosure; and c) the test results were not protected by any confidentiality or disclosure guidelines, and that testing in a non-private setting was impermissible. The court found all three claims to be without merit. *Id.* at 1105-07.

71. *Id.* at 1102.

72. *Id.*

73. *Id.* at 1103.

74. *Id.*

and seizure.⁷⁵

In *New York Transit Authority v. Beazer*,⁷⁶ two former Transit Authority employees dismissed because they were receiving methadone treatments and two employment applicants refused employment for the same reason filed a class action suit against the transit authority.⁷⁷ They asked the Supreme Court to rule on a regulation which stated: " 'Employees must not use or have in their possession narcotics, tranquilizers, drugs . . . or paraphernalia . . . except with the written permission of the Medical Director, Chief Surgeon of the System.' "⁷⁸ The plaintiffs argued that such a rule was illegal under both the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964.⁷⁹

After concluding that the employees had failed to prove a violation of Title VII of the Civil Rights Act of 1964,⁸⁰ the Court addressed the constitutional claim that methadone users are entitled to be treated like other employees and applicants rather than like other narcotics users. Reversing the district court, the Supreme Court upheld the regulation stating that the special classification created by the rule served the general objectives of safety and efficiency and thus represented a policy choice rationally related to those goals.⁸¹ Both the majority opinion and the dissent drew a distinction between past alcohol or drug use as a handicap and present alcohol or drug use that affects job performance.⁸² Regarding the latter, the Supreme Court found no restriction on a public entity's authority to disqualify from employment those individuals who cannot perform their job adequately because of alcohol or drug abuse.⁸³

75. *Id.* at 1104.

76. 440 U.S. 568 (1979).

77. *Id.* at 576-77.

78. *Id.* at 572 (quoting Rule 11(b) of the Rules and Regulations of the Transit Authority).

79. *Beazer*. 440 U.S. at 577.

80. *Id.* at 587. The Court stated that statistics showing that 81% of the employees referred to the Transit Authority's medical director for suspected violation of the narcotics rule were either black or Hispanic, and that 63% of persons in New York City receiving methadone treatment were black or Hispanic might establish a weak prima facie case of discrimination. However, the Court stated that even if they did, they were "assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related.' The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." *Id.* (footnote omitted).

81. *Id.* at 592.

82. *Id.*

83. *Id.* at 593-94. The Court stated that the Transit Authority's blanket exclusion of persons who regularly use narcotic drugs, including methadone, did not violate the equal protection clause for failing to include more precise rules for methadone users who have

A similar result was reached in *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*.⁸⁴ In this case, a federal appeals judge ruled that an employee suspected of on-duty intoxication may be required to submit to a medical examination which includes blood or urine testing pursuant to agency rules.⁸⁵ The court based its holding on the fact that these tests were given in hospitals only to employees directly involved in serious accidents, or to those who were suspected of being under the influence of drugs or alcohol while on the job.⁸⁶ Thus, no random testing was involved or approved.

In these cases, the courts have thus expressly upheld testing of employees in the transportation or other hazardous industries or when the employees have been involved in accidents. However, in other public employment situations, courts have held that drug testing policies violate the fourth amendment unless there is a reasonable suspicion, based on objective facts and reasonable inferences, that the employee is either selling or using drugs in the workplace.⁸⁷

made rehabilitative progress.

84. 538 F.2d 1264 (7th Cir. 1976).

85. Here, a bus driver's union brought suit on behalf of the bus drivers. The relevant rules stated that "[u]se of illegal drugs is forbidden whether on or off duty" and that "[e]mployees suspected of being under the influence while on duty . . . may be required to take a blood and urinalysis test." *Id.* at 1266 (quoting Rule 10 of the Chicago Transit Authority Rule Book and Chicago Transit Authority General Bulletin G2-75).

86. The court stated the transit authority which enacted the drug testing rules had "a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine tests." Further, "the conditions under which the intrusion [was] made and the manner of taking the samples [were] reasonable." *Suscy*, 538 F.2d at 1267 (citations omitted).

But see Jones v. McKenzie, 628 F. Supp. 1500 (D. D.C. 1986). In this case, a school bus attendant was discharged for alleged marijuana use discovered by urinalysis testing implemented by her employer, the District of Columbia School System. The school system defended its drug testing program which allowed screening without probable cause or individual suspicion on public safety grounds, arguing the special public danger if their personnel who both operated and assisted in the operation of school buses were on drugs. The school system cited *Suscy* as authority for allowing the drug testing of bus drivers and mechanics on safety grounds. However, the *Jones* court stated that it did not follow that a school bus attendant should be required to submit to testing. Allowing such testing would be "equivalent to [testing] imposed by the military and more stringent than that so far found permissible for the police or for bus drivers in the absence of particularized probable cause." *Jones*, 628 F. Supp. at 1509. Thus, the court held that the individual's fourth amendment rights were violated and granted summary judgment in favor of the union. The court also established precedent that discharging an employee on the basis of a single, unconfirmed test (in this case an EMIT test) was arbitrary and capricious in violation of the Board of Education's own requirements. *See supra* note 22.

87. Selling or using drugs in the workplace are clearly the kinds of activities which should override the employee's right to privacy. Drug use in this context has the great potential of affecting production, morale and safety at all levels.

In *McDonnell v. Hunter*,⁸⁸ employees of the Iowa Department of Corrections filed suit challenging department policy permitting urinalysis testing of all correctional officers.⁸⁹ The lawsuit arose when prison officials informed McDonnell that he had been seen with persons suspected of drug trafficking. Officials then demanded that he submit to a urinalysis test. McDonnell refused and was fired.⁹⁰ The court of appeals affirmed the district court's preliminary injunction prohibiting the department from drug testing unless there was a "reasonable suspicion" the employee was on drugs.⁹¹ The court so ruled even though some employees had signed consent-to-search forms when they were hired.⁹² In reaching its decision, the court stated: "The violation of privacy in being subjected to the searches and tests in question is an irreparable harm that could reasonably be found to outweigh whatever increase in security the enforcement of the Department's policies might produce."⁹³

In *City of Palm Bay v. Bauman*,⁹⁴ the Fifth Court of Appeals of Florida also affirmed an injunction disallowing random urine testing of police officers and fire fighters on the ground such testing violated the fourth amendment.⁹⁵ The court noted that testing could, however, be performed during routine physical examinations.⁹⁶ Any other drug testing must involve "reasonable suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the police officer or fire fighter to have been on the job using, or after having recently

88. 746 F.2d 785 (8th Cir. 1984).

89. *Id.* at 786.

90. *Id.* Other plaintiffs in the suit were two female correctional officers who were told that the Department of Corrections planned to conduct strip searches, blood tests and urinalyses on Department employees and were asked to sign a form consenting to these tests. The women refused to sign the form and were told they would be subject to compelled searches even without the form. *Id.*

91. *Id.* The injunction prohibited strip searches, blood tests and urinalyses unless the searching officials had "a reasonable suspicion, based on specific objective facts and reasonable inferences, that the employee is smuggling contraband or under the influence of alcohol or a controlled substance." *Id.* at 787. The court also enjoined the warrantless search of employees' cars parked outside the prison grounds.

92. *Id.*

93. *Id.* However, the court of appeals expressly limited its inquiry to a determination of whether the district court abused its discretion in granting the preliminary injunction and did not reach the merits of the dispute: "[O]ur holding does not in any way affect the defendants' right to litigate the constitutionality of the disputed policies at the trial on the merits. . . ." *Id.* (footnote omitted).

94. 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).

95. *Id.* at 1323.

96. The court noted that police officers and fire fighters must expect to meet required minimum physical standards and that physical examinations conducted to insure that those standards are met should be reasonably expected even though urinalysis would be a part of the exam. *Id.* at 1324.

used, a controlled substance.’”⁹⁷ In reaching its decision that the city must have a “reasonable suspicion” that a particular employee has been using drugs, the court stated that “[w]hen the immediate end sought is weighed against the private right affected, the proposed search and seizure is constitutionally unreasonable.”⁹⁸ The court noted that the city’s reliance on *Suscy*⁹⁹ was misplaced since in that case no *random* drug testing was contemplated or allowed.

The law therefore appears settled that public employers may require applicants for employment and particular employees to be tested for drugs where those employees either are suspected of on-the-job drug usage affecting work performance or are suspected of selling contraband.¹⁰⁰ However, there is no authority for permitting the blanket testing of all federal, state, or city employees, or even a random screening for drug usage, unless the employee is involved in a dangerous or highly regulated occupation.¹⁰¹

The public employee’s right to privacy thus has been explicitly protected and strengthened by a deliberate “balancing” test under the fourth amendment.¹⁰² The public employee’s private life will not come under scrutiny unless there are facts tending to show a probability of on-the-job drug use which could impair the public entity’s ability to perform its duties.¹⁰³ Private employers should be required, by statute, to weigh similar privacy concerns before implementing any type of drug testing program to prevent unlimited intrusions into the urine or blood of their employees.¹⁰⁴ Such a statutory requirement is necessary for non-public employees

97. *Id.* at 1325 (quoting the ruling of the trial court). The appellate court modified the trial court’s judgment by deleting the requirement of “probable cause.” The court stated that the “federal courts which have considered this and analogous issues have held that the ‘reasonable suspicion standard’ (something less than probable cause) is the basis upon which this type of search can be justified. . . . We see no reason for imposing a stricter standard than that imposed by the federal courts. . . .” *Id.* at 1325-26 (footnote omitted).

98. *Id.* at 1325.

99. 538 F.2d 1264 (7th Cir. 1976).

100. See *supra* notes 62-99 and accompanying text.

101. See, e.g., discussion of *Shoemaker v. Handel*, *supra* notes 69-75 and accompanying text.

102. See, e.g., *Suscy*, 538 F.2d at 1267 (citations omitted). There, the court stated: “Whether the individual has a reasonable expectation of privacy and whether the intrusion is reasonable are determined by balancing the claims of the public against the interests of the individual.”

103. That police and fire departments require the utmost efficiency from their employees for the safety of the public is difficult to dispute. See *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985). These same considerations should apply to all public entities since proof of an employee’s voluntary on-the-job drug use should mean a forfeiture of any reasonable expectation of privacy.

104. This should be the focus of restrictive drug testing legislation. Private employees arguably deserve the same considerations and protections as public employees.

since they are unable to invoke the constitutional protections which public employees can use against the state.

B. State Action and the Private Employee

The right of privacy under the Bill of Rights and in state constitutional provisions restrict government employers and their agents from infringing on individual privacy rights, but do not restrict private employers or their agents from infringing privacy rights.¹⁰⁵ The requirement of state action makes the extension of protections accorded public employees to private employees difficult.¹⁰⁶

The Supreme Court recently determined that a four-part test should be used to determine whether a sufficiently close nexus between the state and the challenged action exists, so that the action of the private entity may be treated as the action of the state itself.¹⁰⁷ Without a finding of state action, a private employee is unable to use a constitutional right to privacy argument against a company's drug testing policy.¹⁰⁸

Under this nexus test, the courts must look at: 1) whether and to what extent the state subsidizes the actions of the private entity; 2) whether and to what extent the state regulates the private employer; 3) whether the private entity is performing a function which has been the exclusive prerogative of the state; and 4) whether a symbiotic relationship exists between the state and the private entity.¹⁰⁹ Further, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."¹¹⁰ Due to the relatively small number of private employers who would qualify under that state action test, few employees are allowed to raise constitutional privacy arguments. Some scholars have nevertheless argued that since private

105. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (citations omitted): "[T]he Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities." The fourteenth amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

106. *Rendell-Baker*, 457 U.S. at 837.

107. *Id.* at 839-43.

108. However, the private employee may be afforded right to privacy protections if the state of employment has its own state constitutional privacy provision. Lawsuits pending in California should help determine the application of such state privacy provisions to private employee drug testing. See *infra* notes 134-42 and accompanying text.

109. *Rendell-Baker*, 457 U.S. at 839-43.

110. *Id.* at 840 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

corporations perform a "public function" as part of society, the corporation should be held to the constitutional standards applicable against the state itself.¹¹¹ The extensive statutory and administrative law addressing labor, fair trade, consumer protection, and licensing is arguably indicative of state involvement in private employer activities.¹¹² Further, since corporations assert extensive influence over individuals and the economic life of society they, in effect, perform as government institutions.¹¹³ Additionally, failure of the state to correct an imbalance of power between corporate employers and employees could conceivably violate substantive due process rights, such as privacy, just as if state action had caused the same result.¹¹⁴

These considerations arguably support a contention that random drug testing by a private corporate employer violates a fundamental right to privacy, and constitutes an unreasonable search and seizure. However, no judicial decisions have addressed these arguments. While state action is a "developing doctrine of great

111. Friedman, *Corporate Power, Government By Private Groups, and the Law*, 57 COLUM. L. REV. 155, 176 (1957):

The corporate organizations of business and labor have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument. It is an undeniable fact of daily experience. . . . [W]e have to recognize that both business and labor currently exercise vast powers. First, they have power over the millions of men and women whose lives they largely control as employees or as members. Second, they exercise power more indirectly, though not less powerfully, over the unorganized citizens whose lives they largely control through standardized terms of contract, through price policy, through the tempo of production and the terms and conditions of labor. Lastly, they exercise control over the organized community, represented by the organs of State, in a multitude of ways. . . .

112. Hermann, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 148, (1971).

113. Friedman, *supra* note 111, at 176-77. Control is exercised by direct lobby pressures, control over the election and policies of the elected representatives of the peoples, control over the appointment of the judiciary in many States, and far-reaching control over the mass media of communication. In this sense, "government" or "law-making" by private groups is today an irreversible fact.

Id. at 176-77 (footnote omitted).

114. Hermann, *supra* note 112, at 149. For an excellent discussion of the relationship between corporation and *see* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952):

But, if there is [economic] power, accompanied by invasion of an individual right guaranteed by the Constitution, then it would seem that the mere enjoyment of a state corporate charter is sufficient justification for invoking operation of the Fourteenth and Fifteenth Amendments. It has steadily been held that "whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable."

Id. at 951-52 (quoting *Liggett Co. v. Lee*, 288 U.S. 517, 545 (1933)).

vitality,"¹¹⁵ extending constitutional privacy protections through this scheme is still a theory untested in the courts.¹¹⁶ Legislation at this time appears to be the best and most certain way of ensuring employee privacy protection from intrusive drug testing.¹¹⁷

II. TESTING AND THE PRIVATE EMPLOYEE

What, then, of the private employee (such as our hypothetical Allan Bitwell) facing a drug test without the benefit of any federal or state constitutional arguments? While drug testing through urinalysis is a fairly recent phenomenon in the private employment workplace,¹¹⁸ firms have utilized other drug testing measures for some time. These measures have included employee surveillance, searches, interrogation, blood-testing, and the use of polygraph tests.¹¹⁹ The employee's right to privacy in the face of these tests has been limited.¹²⁰

A. Private Drug Testing Case Law

Private employee lawsuits in the wake of job termination for either testing positive for drugs or refusing to take the test are rare.¹²¹ However, as testing becomes more widespread and as significant precedents are established, arguably the number of such lawsuits will increase. In the limited case law available, allegations of invasion of privacy have not been a successful employee cause of action against employers.¹²²

115. Hermann, *supra* note 112, at 142-43.

116. The framework for the theory is in place. It remains for the creative lawyer to make these arguments successfully in court.

117. Many commentators on the use of polygraphs have reached the same conclusion. "While there exists an analytic scheme for extending constitutional protections to the employee of a private entrepreneur, this would clearly require further development in the right of privacy as well as a significant extension of the scope of state action. Thus, it may be desirable . . . to provide legislative regulation. . . ." Hermann, *supra* note 112, at 149.

"The legislative remedy is the best way to eliminate the polygraph examination in employment, and is perhaps the only practical way to do so." Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35, 47 (1976) [hereinafter *Privacy: The Polygraph in Employment*].

118. See *supra* note 2.

119. Schacter and Geidt, *Controlling Workers' Substance Abuse*, Nat'l L.J., Nov. 11, 1985, at 20, col. 1.

120. Except for polygraph testing, these other measures, like random drug testing, are largely unregulated. However, if mishandled, legal issues that could arise include assault and battery, intentional infliction of emotional distress, false imprisonment and tortious invasion of privacy. *Id.* at 20, col. 3.

121. "To date, reported court decisions on the validity of drug testing have come mainly from the public sector where government entities, in their capacity as employers, are subject to the Fourth Amendment prohibition against unreasonable searches and seizures." *Id.* at 20, col. 1.

122. See *infra* notes 123-33 and accompanying text.

One of the first cases to decide the issue was *Satterfield v. Lockheed Missiles & Space Co., Inc.*¹²³ Satterfield was employed by Lockheed as an electronics missile technician and was required to have an annual physical as part of his employment.¹²⁴ Beginning in 1981, certain employees of the Lockheed facility in Charleston, South Carolina were required to have a urine drug screen for marijuana as part of their physical.¹²⁵ Satterfield's specimen tested positive and he was terminated in August 1981.¹²⁶ Satterfield and his wife brought suit alleging four causes of action, including invasion of privacy.¹²⁷

The federal district court stated that it was unsure on which of three grounds Satterfield was relying to assert the allegation of invasion of privacy.¹²⁸ The elements of this cause of action were described as

“(1) the unwarranted appropriation or exploitation of [Satterfield's] personality; or (2) the publicizing of [Satterfield's] private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into [Satterfield's] private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”¹²⁹

The court presumed Satterfield claimed either “publicizing of private affairs” or “intrusion into private activities” since “[c]learly . . . an unwarranted appropriation . . . of personalities is not involved.”¹³⁰ The court found no support for invasion of privacy under either theory.¹³¹ The court stated that there was no evidence indicating that Satterfield's termination was “publicized,” and further, “[w]hen a plaintiff bases an action for invasion of privacy on “intrusion” alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom”¹³² The dis-

123. 617 F. Supp. 1359 (D. S.C. 1985).

124. *Id.* at 1360.

125. *Id.*

126. *Id.* at 1360. After his specimen tested positive, a retest was performed which confirmed the positive result. See *supra* note 22 regarding the use of backup tests to confirm an initial positive test.

127. *Satterfield*, 617 F. Supp. at 1360. These causes of action were wrongful termination, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress, and invasion of privacy.

128. *Id.* at 1369.

129. *Id.* (quoting *Corder v. Champion Road Machinery International Corp.*, 283 S.C. 520, 525, 324 S.E.2d 79, 82 (S.C. Ct. App. 1984)).

130. *Satterfield*, 617 F. Supp. at 1369.

131. *Id.* at 1370.

132. *Id.* (quoting *Rycroft v. Gaddy*, 281 S.C. 119, 124-25, 314 S.E.2d 39, 43 (S.C. Ct. App. 1984) (citing *Shorter v. Retail Credit Co., Inc.* 251 F. Supp. 329 (D. S.C. 1966))).

strict court's rather superficial analysis points to judicial antagonism towards a privacy cause of action arising from intrusions occurring in the workplace. Whether any employee could carry the burden of showing a shocking disregard of his rights, and serious mental or physical injury or humiliation as the result of an employee drug testing program is questionable. Whether the court would have reached a different result if Satterfield's dismissal had resulted from a random drug screen is, of course, speculative but is quite unlikely based on the court's holding.¹³³

In another private employee drug testing case, *Luck v. Southern Pacific Transportation Company*,¹³⁴ the plaintiff, Luck, was a computer engineer for Southern Pacific in San Francisco who was told in July, 1985 that she was required to take a urinalysis test.¹³⁵ The test was part of a drug screening program instituted in 1984.¹³⁶ Luck refused to take the test and was fired.¹³⁷ She brought suit alleging four causes of action including invasion of privacy.¹³⁸ San Francisco subsequently passed an amendment to their municipal code prohibiting just this kind of random drug screening.¹³⁹ The impact this change in the code will have on Luck's case is yet to be decided.¹⁴⁰

In another suit brought against Southern Pacific, an office manager tested positive for cocaine in a random drug screen and was required by the company to undergo drug rehabilitation. The employee consistently maintained the results were inaccurate and took approximately twelve follow-up tests which were all negative. However, the employee was ordered to attend drug counseling sessions and to submit to regular testing. A superior court judge issued an injunction ending the testing which subsequently resulted in the employee's demotion.¹⁴¹ A second suit in the wake of that

133. Further case law is, of course, required before any judicial trends can be established. The wait should not be long.

134. No. 843230 (Cal. Super. Ct. S.F., filed Aug. 5, 1985).

135. *Stille*, *supra* note 2, at 22, col. 1. There was no individualized suspicion that Luck ever had used drugs on or off the job, and her job was unrelated to safety.

136. Southern Pacific claims that the drugs' tests have reduced their accident rate by 67% and reduced lost time and injuries by 25%. A company spokesman stated that the urinalysis tests were a minor intrusion similar to walking through an airport metal detector. *Id.*

137. Luck was particularly sensitive about the drug test since she was three months pregnant and was nervous about how that news might affect her job status. *Id.* at 22.

138. Schacter and Geidt, *supra* note 119, at 20, col. 1. Her other causes of action were wrongful termination in violation of public policy, retaliatory discharge for exercise of constitutional rights and intentional infliction of emotional distress.

139. *See infra* notes 211-19 and accompanying text. Southern Pacific was, of course, strongly opposed to the measure.

140. Also to be determined is what effect the California Constitution's guarantee of privacy will have on random drug testing such as this. *See supra* note 59.

141. *Stille*, *supra* note 2, at 24, col. 3.

demotion now is pending.¹⁴²

Case law of an employee's alleged tortious invasions of employees' privacy through drug screening is clearly in the formative stages. However, the related subject of employer polygraph (lie detector) use as it relates to the employee's right to privacy is well-documented and serves as a useful analogy to the use of random drug screening programs.

B. Polygraph Testing and Employee Privacy

Employers' use of polygraphs¹⁴³ has generated a substantial amount of case law,¹⁴⁴ statutory regulation,¹⁴⁵ and academic commentary.¹⁴⁶ About three quarters of the states have legislation concerning the use of polygraphs.¹⁴⁷ Federal legislation which would affect pre-employment polygraph use has been proposed many times but never enacted.¹⁴⁸ The critics of polygraph testing have argued that there is a loss of human dignity and individual rights associated with the use of polygraphs.¹⁴⁹ Following the *Roe v. Wade* decision in 1973, a federal district court judge in *U.S. v. Perkins*¹⁵⁰ stated:

There is a right of privacy guaranteed to citizens of this nation.

With the uncontrolled development of technological means

142. *Pettigrew v. Southern Pacific Transportation Co.*, No. 849343 (Cal. Super. Ct. S.F., filed Nov. 21, 1985).

143. "Polygraphs are also widely used by employers. Their use, however, has become increasingly controversial in recent years, due to concern about their reliability and their intrusion on employees' privacy and dignity." Schacter and Geidt, *supra* note 119, at 20, col. 3.

144. *See infra* notes 156-67 and accompanying text.

145. *See supra* note 15.

146. Recent articles include: Castagnera-Cain, *Defamation, Invasion of Privacy and Use of Lie Detectors in Employee Relations—An Overview*, 4 GLENDALE L. REV. 189 (1982); Hermann, *supra* note 112; Nagle, *supra* note 15; *Privacy: The Polygraph in Employment*, *supra* note 117; Comment, *The Polygraph and Pre-Employment Screening*, 13 HOUS. L. REV. 551 (1976); Note, *Lie Detectors in the Employment Context*, 35 LA. L. REV. 694 (1975).

147. *See supra* note 15.

148. Various federal regulatory schemes for polygraphs have been introduced over the last twenty years. Nagle, *supra* note 15, at 65. Advocates of such a measure say polygraphs have become vehicles for employee intimidation and for screening out employees with unacceptable political or social beliefs. On the other hand, opponents claim they are a vital employer weapon against employee theft and other crime. Opponents also argue the states and not the federal government should regulate polygraph use.

149. As a case in point, the Pentagon in November 1985 revealed instructional materials provided to military personnel being trained as polygraph examiners assessed sexual preferences, and religious and racial associations of their subjects. Among the questions excised: "Have you ever been a party to an abortion?" "Have you ever received sexual stimulation in a crowded area?" "Has any member of your family been an alcoholic?" "Have you ever consulted a psychiatrist?" San Diego Union, Dec. 15, 1985, sec. 1, col. 1.

150. 383 F. Supp. 922 (N.D. Ohio 1974).

whereby anyone can invade the privacy of another under virtually any condition, the essential need for protection of this prenumbral right becomes apparent. . . .

Of particular concern is the lie detector. Many courts and employers, frustrated with the old ways, have determined that such devices may properly be used to evaluate witnesses and employees. However, these devices are not fool-proof and they do constitute an invasion of privacy.¹⁵¹

In the states having restrictive legislation, only twenty-one have some form of a polygraph "ban" statute.¹⁵² These statutes are generally of two types: Some say that no employer shall request that an employee take the test,¹⁵³ others merely say that no employer shall demand or require such a test.¹⁵⁴ The courts uniformly have upheld the validity of both types of state statutes following various constitutional challenges by employers.¹⁵⁵

The validity of a "ban" statute was upheld against a constitutional attack in *State v. Century Camera, Inc.*¹⁵⁶ This case involved an action by the state against an employer and a security firm which had conducted polygraph examinations on employees. The Minnesota Supreme Court held that the state's "ban" statute was neither overbroad nor vague in violation of the first amendment, and did not constitute a deprivation of property without due process of law.¹⁵⁷ Among the substantial state interests justifying the legislation at issue was the protection of an employee's expectation of privacy.¹⁵⁸

In a more recent Minnesota case, a teller again brought an action against her bank employer for emotional disability arising out of the bank's request that she take a polygraph test.¹⁵⁹ The teller again relied on the state polygraph statute. In affirming an award of damages to the teller, the court emphasized the stated legislative concerns behind the statute which were "encouraging a harmonious atmosphere in employer-employee relations, protecting employees' expectations of privacy, discouraging practices which may demean an individual's dignity, protect employees from adverse inferences should they refuse the test, and avoid 'the coer-

151. *Id.* at 926 & n.1 (citation omitted).

152. Nagle, *supra* note 15, at 67. *See also*, Annotation, *Validity of Statute Prohibiting Employers from Suggesting or Requiring Polygraph or Similar Tests as Condition of Employment or Continued Employment*, 23 A.L.R. 4TH 187 (1982).

153. *See, e.g.*, MASS. GEN. LAWS ANN., ch. 149, § 19B (West Supp. 1986).

154. *See, e.g.*, MD. ANN. CODE art. 100, § 95 (Supp. 1986).

155. *See infra* notes 156-69 and accompanying text. *See also* Annotation, *supra* note 152.

156. 309 N.W.2d 735 (Minn. 1981).

157. *Id.* at 741, 745-46.

158. *Id.* at 743.

159. *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108 (Minn. Ct. App. 1985).

cive impact present in the solicitation.' ”¹⁶⁰

The Supreme Court of New Jersey similarly has upheld a state “ban” statute against a constitutional attack in *State v. Community Distributors, Inc.*¹⁶¹ The Supreme Court of New Jersey held there that a state statute prohibiting an employer from influencing, requesting, or requiring employees to take lie detector tests is constitutional. The court stated that in view of the psychological compulsion to take the test exerted on the employee, the tests were a condition of continued employment within the meaning of the statute.¹⁶² Regarding the constitutional argument, the court held that the statute did not deprive the employer of the ability to protect his property and thus did not deprive him of due process of law.¹⁶³

In upholding the constitutionality of these statutes, the courts have emphasized the underlying intent of the legislature in enacting these measures. The protection of worker privacy has been identified as a large part of that intent.¹⁶⁴

In a somewhat different case, *Nothdurft v. Ross*,¹⁶⁵ a New York court recently considered the claim of an accredited psychological stress examiner who challenged a state statute which prohibited

160. *Id.* at 111 (quoting *Century Camera*, 309 N.W.2d at 743).

161. 64 N.J. 479, 317 A.2d 697 (1974).

162. *Id.* at 485, 317 A.2d at 700.

163. *Id.* at 488-89, 317 A.2d at 702 (quoting *Lincoln Union v. Northwestern I. & M. Co.*, 335 U.S. 525, 536 (1949)): “[T]he due process clause of the Federal Constitution should not be construed to straitjacket state legislatures ‘when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.’ ”

164. In *Community Distributors*, the court noted the legislature in enacting the polygraph statute was very aware of the view of organized labor, in particular, that polygraphs represented “uncalled for if not unconstitutional breaches of the employees’ rights to personal privacy and to remain free from involuntary self-incrimination.” 64 N.J. at 484, 317 A.2d at 701 (citations omitted).

Also worth noting is that even in states which have no form of polygraph “ban” statute, courts have determined that polygraph examinations have invaded employee privacy. As an example, in the New Hampshire case of *O’Brien v. Papa Gino’s*, 121 L.R.R.M. (BNA) 2321 (1986), plaintiff O’Brien was confronted by a superior with rumors that he had been seen using drugs outside of work. O’Brien took a polygraph test and answered questions relating to his alleged drug use. When the examiner’s report indicated O’Brien was lying about his drug use he was fired. O’Brien then brought suit for wrongful discharge and invasion of privacy, claiming he was forced to take the test under the threat of losing his job. On the invasion of privacy claim, a jury found the defendant’s investigative techniques to be “highly offensive . . . and invasive of plaintiff’s privacy.” *Id.* at 2323. On appeal, the defendant employer claimed O’Brien’s right to privacy could not have been invaded because the company personnel manual forbade use of illegal drugs thereby giving the employer implied permission to make whatever investigations it deemed necessary. *Id.* The appeals court dismissed the claim noting that the jury’s finding of the examination as “highly offensive . . . and invasive of plaintiff’s privacy” indicated that the defendant had exceeded the scope of any consent O’Brien had arguably given by accepting employment. *Id.*

165. 104 Misc. 2d 898, 429 N.Y.S.2d 844 (1980) *aff’d*, 445 N.Y.S.2d 222 (1981).

stress examinations of employees or prospective employees.¹⁶⁶ The court held that the legislature had a right to enact the law on the rationale that such devices grossly invaded individual privacy.¹⁶⁷

Apparently, the courts have concluded that the state legislatures, in enacting these prohibitive statutes, weighed the advantages and disadvantages of the polygraph. The courts have found that the public welfare would be furthered by prohibiting polygraph use in the employment context. Moreover, courts have noted that legislation otherwise constitutional is not invalidated because it may cause hardship to particular employers.¹⁶⁸ As the court stated in *State v. Century Camera, Inc.*, the protection of the individual, including the individual's right to privacy, was a substantial state interest which justified polygraph legislation.¹⁶⁹

Legislative limitations on employer drug testing arguably could be justified by the same substantial state interests expressed in the polygraph legislation and cases. The legislative concerns about privacy expressed by the *Century Camera* court would be equally, if not more, applicable to a private employer's random drug testing program. A limiting statute on drug testing could also encourage "a harmonious atmosphere in employer-employee relations," would protect "employees' expectations of privacy," and would discourage "practices which may demean an individual's dignity."¹⁷⁰ For these reasons, constitutional challenges to legislation prohibiting drug testing will likely fail as such challenges failed in the polygraph context.

The many law review articles and other legal commentaries on employer use of polygraphs have, of course, all addressed the privacy issue.¹⁷¹ The focus of other commentaries in the polygraph area has been on a state or federal legislative remedy, based on the recognition that constitutional arguments are not available to

166. The plaintiff argued the statute created "an unwarranted distinction and arbitrary discrimination" against stress examiners and in effect denied him equal protection of the laws. *Id.* at 901, 429 N.Y.S.2d at 845.

167. The court stated: "The conclusion is inescapable that the legislature, in passing Article 20-B Labor Law, intended to protect an individual's right to privacy on the basis that such mechanisms grossly invade the privacy of an individual who is subjected to such device, often without his or her knowledge or consent." *Id.* at 901, 429 N.Y.S.2d at 846.

168. "Just as benefits to a private person or class do not invalidate legislation predominantly in the public interest, neither do apparent hardships imposed on a private person or a specific class invalidate legislation which benefits the public as a whole." *Id.* at 902, 429 N.Y.S.2d at 847.

169. 309 N.W.2d 735, 743 (Minn. 1981).

170. *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108, 111 (Minn. Ct. App. 1985). It is difficult to imagine a practice more demeaning than handing a full cup of urine to one's work supervisor.

171. See *supra* note 146.

the private employee absent state action.¹⁷²

The argument has been made that the “zones of privacy” recognized in *Griswold v. Connecticut*¹⁷³ are in “competition” in the employer-employee relationship. Thus, one author has stated that a competition exists between:

the employee’s privacy interest in keeping his personal affairs to himself, and the employer’s privacy interest in the internal affairs of his own business. Any balancing test, however, should be resolved in favor of the employee because of the economic power wielded over him by the employer, the employer’s arguable waiver over his right to privacy by advertising employment, as well as by the Court’s demonstrated unwillingness to protect employer privacy in the face of his violation of civil liberties.¹⁷⁴

The authors almost uniformly have called for a legislative remedy as the best and most practical means to protect employee privacy rights against polygraph testing.¹⁷⁵ Some of the considerations for this conclusion are that an employee would not sue his employer for invasion of privacy in most cases because it would jeopardize his job. Further, without a statute, a job applicant refused work because of a polygraph exam would be required to expend much time and money in the courts in an attempt to assert an intrusion of privacy cause of action.¹⁷⁶

The clear national trend is towards more state,¹⁷⁷ if not federal,¹⁷⁸ legislation curtailing the use of polygraphs. That drug testing legislation, now in its infancy,¹⁷⁹ should and will be enacted for the same right to privacy arguments articulated against polygraphs is predictable.

172. See *supra* notes 105-17 and accompanying text.

173. See *supra* notes 36-42 and accompanying text.

174. *Privacy: The Polygraph in Employment*, *supra* note 117, at 44 (footnotes omitted).

175. See, e.g., those articles listed *supra* note 117.

176. *Privacy: The Polygraph in Employment*, *supra* note 117, at 47.

177. Only eleven states neither restrict the use of polygraph testing nor require licensing of examiners. Nagle, *supra* note 15, at 67.

178. See *supra* note 148 and accompanying text.

179. At least four states are currently working on some type of drug testing legislation: California, Maryland, Maine and Oregon.

In November, 1985, the City of San Francisco passed a local ordinance prohibiting private employer random drug testing except where there is “reasonable grounds to believe that an employee’s faculties are impaired on the job; and . . . the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public . . .” and the employee has an opportunity to have the sample tested at an independent laboratory and to explain the results. SAN FRANCISCO CAL., POLICE CODE art. 33A, § 3300A.5 (1985) [hereinafter POLICE CODE]. See *infra* notes 211-19 and accompanying text.

C. Labor-Management Drug Testing Agreement

Employees subject to collective bargaining agreements which have no provisions for employer drug testing rights may have grounds for refusing to submit to such tests.¹⁸⁰ However, workers have been discharged by their employers in many cases following such refusals.¹⁸¹

Such actions have been most commonly reviewed by arbitrators from the perspective of whether the employee's refusal to submit to an exam, viewed independently or together with eye-witness testimony and other available evidence of drug involvement, constitutes the "just cause" required for discharge under most union contracts. Questions of privacy . . . are also invariably raised in connection with drug testing.¹⁸²

Scholars have recognized that there is a fundamental balancing of employer interests in the conduct of employees in the workplace against employee interests in his privacy and personal dignity.¹⁸³ However, the employer apparently holds most of the cards in the arbitration of employee disputes since it is generally acknowledged that "the employer is permitted by law and by contract to make such rules and regulations as are not inconsistent with the parties collective bargaining agreement . . . even though at times they may impinge on the employee's personal privacy."¹⁸⁴ Perhaps the best way to curtail employee drug tests is for an express agreement relating to drug testing to be included in the labor-management agreement.¹⁸⁵ Prior agreements have proved successful in preventing employer use of polygraphs.¹⁸⁶ Recently, drug testing agreements have also been made part of the bargaining process.

As an example, Teamster's President Jackie Presser and employer grievance committee chairman Arthur Bunte, Jr., reached an accord under the National Master Freight Agreement in 1984.¹⁸⁷ According to the agreement, an employer with reason to believe an employee is intoxicated may request blood and urine specimens. Moreover, an employee's refusal to give both specimens will constitute a presumption of drug intoxication.¹⁸⁸ Even with such express drug testing provisions, it appears that, to find

180. Susser, *supra* note 10, at 48.

181. *Id.*

182. *Id.*

183. ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS* 785 (4th ed. 1985).

184. Scheiber, *Tests and Questionnaires in the Labor-Management Relationship*, 20 *LAB. L.J.* 695, 697 (1969).

185. Drug testing agreements will likely become important bargaining chips in future labor negotiations.

186. *Privacy: The Polygraph in Employment*, *supra* note 117, at 38-39.

187. Susser, *supra* note 10, at 48.

188. *Id.*

the test proper, the arbitrator must be satisfied that the employees have been given warning of the test.¹⁸⁹

In *In re American Standard*,¹⁹⁰ an employer fired a worker who refused to take a drug test after other employees observed suspected drug-induced behavior.¹⁹¹ The arbitrator, in concluding the termination was proper, noted that the company policy against drug use was well known by the employee, that the employment contract gave management the right to require medical exams to determine fitness for work at any time, and that the employer reasonably believed that the grievant was, in fact, on drugs.¹⁹²

Labor-management agreements and arbitration may be a partial answer to limits on employer drug testing. However, this method has some substantial problems. First, arbitration is not usually a recourse for nonunion employees.¹⁹³ As has been noted, private employees without benefit of union membership have little privacy protection. Second, arbitration decisions are not binding beyond the particular case decided. Arbitrators are not mandated to follow particular precedents, though some decisions may establish plant or company-wide precedent.¹⁹⁴ Based on all of the foregoing considerations, the individual states should consider, and implement, legislation limiting private employer drug testing as the best way to protect the privacy rights of its citizens.¹⁹⁵

III. A PROPOSED LEGISLATIVE SOLUTION

Most would probably agree that the general increase in testing of all types is an indication that personal freedom is suffering more and more as a victim of technology.¹⁹⁶ Polygraph legislation, judicial criticism, and union antagonism toward polygraphs argua-

189. *Id.* For example, employers must give 30-60 days' notice of drug tests in connection with Department of Transportation examinations. *Id.*

190. 77 LA 1085 (1981) (Katz Arb.).

191. *Id.* at 1086-87.

192. *Id.* at 1087-88.

193. "The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement." ELKOURI AND ELKOURI, *supra* note 183, at 52. Moreover, while many states have some type of arbitration statute, most are general in nature and do not apply to labor arbitration. *Id.* at 39. Common law arbitration also provides very little support for executory agreements to arbitrate. *Id.* at 40.

194. *Id.* at 421-22.

195. Federal drug testing legislation would obviously provide the quickest and most effective way of providing privacy protections in the workplace. However, if polygraph legislation is any indication, congressional drug testing measures would face a very long wait. Polygraph legislation has been proposed during every session of congress since 1975. Nagle, *supra* note 15, at 65.

196. Urinalysis is only one of the more intrusive ways to search and detect drugs. Use of saliva and hair tests for drugs also are being used. THE NEW REPUBLIC, Mar. 31, 1986, at 7.

bly indicate that technology has overstepped its bounds and intruded on the individual's domain. As occurred with polygraph testing, employers' widespread use of drug testing by any method should be legislatively regulated for the same protective reasons.¹⁹⁷

In those states already imposing a ban on polygraph testing, this view is consonant with one of the principal purposes of such statutes, to prevent gross invasions of an employee's privacy.¹⁹⁸ Carrying the analogy a step further, prohibiting polygraph testing while allowing the employer to invade worker privacy to inspect bodily fluids makes little sense. Drug testing arguably is much more intrusive than polygraph testing.¹⁹⁹ Those states without any check on any type of employee testing should take a fresh look at the rapid growth of drug testing technology which is eroding the privacy of its citizens in an unprecedented way.

Admittedly, under some circumstances and for certain classes of employees, accurate drug testing²⁰⁰ would support a broad policy of protecting public health and safety.²⁰¹ As documented in the public employment sector, drug testing can be an important employer tool in safeguarding both employees and the public in inherently hazardous occupations.²⁰² Testing also can be useful where the employer has a legitimate reasonable suspicion that the employee is using or selling drugs in the workplace.²⁰³ However, an employer's decision to randomly test all workers for drugs should be expressly prohibited as being a violation of the right to privacy.²⁰⁴ There are some indications that employer drug testing limitations are a growing trend. As an example, the Department

197. Virtually all of the same arguments advanced against polygraphs can be made against random drug testing: Chronic unreliability, loss of personal liberties through invasion of privacy, and the possibility of the dissemination and availability of test results are most often mentioned.

198. See, e.g., *Nothdurft v. Ross*, 104 Misc.2d 898, 901, 429 N.Y.S.2d 844, 846 (1980) *aff'd*, 445 N.Y.S.2d 222 (1981).

199. Being forced to urinate into a cup on a semiregular basis unquestionably is a practice demeaning individual dignity and violating the employee's reasonable expectation of privacy.

200. See *supra* note 22 for accuracy problems inherent in drug testing.

201. See *supra* notes 62-104 and accompanying text.

202. See, e.g., *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985), discussed *supra* notes 62-68 and accompanying text.

203. See, e.g., *McDonnell v. Hunter*, 746 F.2d 785 (8th Cir. 1984), discussed *supra* notes 88-93 and accompanying text.

204. Random drug testing strikes at the heart of the "right to be let alone."

While some have asserted that people have nothing to fear unless they have something to hide, protection against unwarranted intrusions into personal matters means much more than safety from minor embarrassments, or even possible incrimination. Invasions of privacy have the potential to reveal one's associations, private enjoyments, or personal views. . . .

Peck, *supra* note 58, at 898.

of Defense (DoD) has implemented a civilian drug testing program²⁰⁵ which requires only employees or job applicants for positions designated as "critical jobs" to submit to urinalysis drug testing.²⁰⁶ The relevant "critical job" category for the private employer is "[j]obs involving protection of property or persons from harm."²⁰⁷ Further, the Directive allows testing only in the following circumstances:

- (1) Before appointment or selection.
- (2) Periodically after appointment or selection on the basis of neutral criteria.
- (3) When there is probable cause to believe that an employee is under the influence of a controlled substance while on duty.
- (4) In an examination authorized by the Department of Defense or the DoD Component regarding a mishap or safety investigation for the purpose of accident analysis and the development of countermeasures.²⁰⁸

Before the initial test can be given, however, each employee must be informed of the reasons for the urinalysis, the consequences of a positive result or refusal to cooperate, including adverse action, and the opportunity to submit supplemental medical documentation that might support the legitimate use of a specific drug.²⁰⁹ The DoD Directive recognizes protection of life, limb and national security as valid reasons for requiring drug testing and the accompanying implication that any privacy intrusion is outweighed by the overall benefits of such testing. The Directive also, however, clearly limits drug testing to certain classes of employees.²¹⁰

The City of San Francisco passed a landmark privacy protection law in November 1985.²¹¹ The law prohibits private employers²¹² from demanding, requiring, or requesting employees²¹³ to

205. Department of Defense Directive, No. 1010.9, April 8, 1985 (copy on file at California Western Law Review Offices).

206. *Id.* at ¶ D.

207. *Id.* at ¶ F.1.c.(3).

208. *Id.* at ¶ F.2.a.

209. *Id.* at ¶ F.2.b.

210. *Id.* at ¶ F.2.a.

211. POLICE CODE, *supra* note 179. This article is entitled "Prohibition of Employer Interference with Employee Relationships and Activities and Regulation of Employer Drug Testing of Employees." The ordinance, introduced by Supervisor Bill Maher, passed 9-1. Stated Supervisor Maher: "This is one of these bills that hits you viscerally. . . . Some people feel you've got to crack down on drug use, others feel that random drug testing is outrageous. I think it's outrageous to line up people without any suspicion that they're using drugs and order them to take tests or their career is finished." City Mayor Dianne Feinstein opposed the measure saying drug use is "greatly increasing and creating major problems" and warned it sends "a tacit message" about permitting drug use at work. San Diego Union, Nov. 28, 1985, at A-3, col. 3.

212.

"Employer" shall mean the City and County of San Francisco, any individual,

take any type of random blood, urine, or encephalographic test as a condition of continued employment.²¹⁴ The bill, vigorously opposed by Southern Pacific Transportation Company,²¹⁵ among others, identifies the strong policy concerns behind the measure:

It is the public policy of the City and County of San Francisco that all citizens enjoy the full benefit of the right to privacy in the workplace guaranteed to them by Article 1, Section 1 of the California Constitution. It is the purpose of this Article to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities.²¹⁶

Under this law, employers will be allowed to require specific employees to submit to blood or urine testing only when:

- (a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and
- (b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and
- (c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/testing facility [sic] and provides the employee with a reasonable opportunity to rebut or explain the results.²¹⁷

San Francisco thus has recognized that the employee's right to privacy must be protected to help maintain the balance between that right and the employer's right to run his business as he sees fit. By requiring "reasonable grounds" and a "clear and present danger," San Francisco's ordinance affords private employees the same protections that public employees currently enjoy.²¹⁸ Fur-

firm, corporation, partnership, or other organization or group of persons however organized, located or doing business within the City and County of San Francisco, that employs personnel for salary or wages, or any person acting as an agent of such an organization.

POLICE CODE, *supra* note 179, § 3300A.2(3).

213.

"Employee" shall mean any person working for salary or wages within the City and County of San Francisco, other than members of the uniformed ranks of the police, sheriff's and fire departments, police department communication dispatchers, and any persons operating emergency service vehicles for the City and County of San Francisco.

Id. § 3300A.2(1).

214. *Id.* § 3300A.5.

215. Southern Pacific has argued that random drug testing "represents a legitimate business interest and is consistent with a public policy that prohibits the use of illegal drugs and encourages [employee] rehabilitation." Bishop, *Drug Testing Comes to Work*, CAL. LAW., Apr. 1986, at 28, 31.

216. POLICE CODE, *supra* note 179, § 3300A.1.

217. *Id.* at § 3300A.5.

218. See *supra* notes 61-103 and accompanying text for a discussion of cases establishing public employees' rights regarding drug testing.

ther, by requiring the employer to provide tested workers a reasonable opportunity to "rebut or explain" test results, the City has ensured that fourteenth amendment due process requirements will also be satisfied by private employers.²¹⁹

While San Francisco is in the vanguard of privacy protection lawmaking, other cities and states around the nation soon may follow.²²⁰ The states should enact measures substantively similar to the one adopted by San Francisco. This would avoid problems of piecemeal municipal legislation while giving employees immediate protection from random drug screening programs. These measures would help protect the fundamental right to privacy found by the Supreme Court to exist in the United States Constitution.²²¹ More specifically, drug testing legislation would affirm the individual's "right to be let alone,"²²² "the individual interest in avoiding disclosure of personal matters,"²²³ and the general concept of "personal liberty" founded in the fourteenth amendment.²²⁴ Indeed, in the states that have already passed state constitutional amendments expressly recognizing the right to privacy,²²⁵ drug testing legislation is an element essential to that guaranty.

The policy concerns of the right to privacy are pervasive. The mandate for the states is clear. The time for legislation is now.

CONCLUSION

If the right to privacy is to continue to exist in any significant way, there must be explicit protections. The individual's right to privacy and right to be left alone from unwarranted intrusions into his private life must be safeguarded. As we approach the twenty-first century, George Orwell's vision of a world without privacy becomes all too possible with each new technological advancement. Unlimited drug testing by private employers is one

219. The important rationale behind due process is to prevent inaccurate and wrong decisions. In the drug testing context, the effect of a wrong decision by an employer can obviously have a devastating effect on the employee, as well as potentially damaging effects on company morale. At a minimum, the employee should have notice and a hearing before his supervisors before termination. This presumes, of course, that the employee is aware that a drug testing program has been implemented.

220. Lawmakers in California, Maine, Maryland and Oregon currently are working on statewide drug testing measures. Castro, *supra* note 1, at 59.

221. Whether it exists under either a penumbra of constitutional rights as in *Griswold*, or under the fourteenth amendment's concept of personal liberty described in *Roe v. Wade*, the right to privacy is now unequivocally based in the Constitution. The extent of that right is still an open question. See *supra* notes 32-48 and accompanying text.

222. See *supra* note 35.

223. *Whalen v. Roe*, 429 U.S. 589, 598 (1977).

224. *Roe v. Wade*, 410 U.S. 113, 115 (1973).

225. See *supra* note 31.

step too far towards that possibility.

What are the options? Judicial recognition of state action to allow federal constitutional privacy arguments against private employers affords at best limited protection to the majority of the workforce.²²⁶ The existing case law appears to cut against employee use of a tortious invasion of privacy argument, and any relief through the courts would be compensatory, not injunctive.²²⁷ Labor-management drug testing agreements have offered privacy protections²²⁸ but they do not help nonunion workers who constitute the vast majority of workers.²²⁹ Legislation, such as that enacted by San Francisco, is the best and most effective way to protect employee privacy by putting specific limitations on drug testing and by eliminating random sweeps.²³⁰ Through legislation requiring reasonable suspicion at a minimum, states will ensure that off-the-job activity remains within the individual's private domain unless the activity adversely impacts on job performance or safety.²³¹

Each state must do what is best for its citizens. State legislation defining the scope of private employer drug testing should be part of that mandate. Without it, the private employee faces a bleak future of further encroachments on an already eroded "zone of privacy."

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226. *See supra* notes 105-17 and accompanying text.

227. *See supra* notes 123-42 and accompanying text.

228. *See supra* notes 180-94 and accompanying text.

229. In 1984, union workers comprised 18.8% of the total full-time work force. This was down from 20.1% in 1983. STATISTICAL ABSTRACT OF THE UNITED STATES 1986 424 (106th ed. 1985).

230. *See supra* notes 211-19 and accompanying text.

231. In this way, the private employee would be afforded the same protections which currently exist in the public sector.