DRUG TESTING IN THE WORKPLACE: A LEGISLATIVE PROPOSAL TO PROTECT PRIVACY

That the individual shall have full protection in person and property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.[1]

INTRODUCTION

The practice of employee testing is not a new phenomenon. In the past, employers used such testing in an attempt to ascertain an individual's intelligence, attitude, or honesty.[2] Today, the nature of employee testing has changed. It is now often used to determine behavorial rather than psychological aberrations. These tests include medical screening[3] for drug use. The use of such testing in the workplace, mainly in the form of urinalysis, has grown recently in response to increased drug use by employees at all levels.[4] This practice has brought the rights and interests of the parties involved into direct conflict. Employers view drug testing as enabling them to profitably manage their companies. By using testing to identify drug users, they claim that they are able to avoid the economic costs associated with drug abuse and thus protect their property interests.[5] Those subjected to such testing, however, challenge the practice as an invasion of their right to privacy and criticize the accuracy as well as interpretation of test results.

This note contends that all employees and prospective employees should be protected from the type of intrusion that results from drug testing. It first discusses the current use of drug testing in the workplace and the conflict of interests it engenders. It focuses primarily on the adverse effect of this practice upon both the employee's and prospective employee's right to privacy. After examining the legal origin and treatment of this right in both the

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
2. *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985, at 57. *See* Hurd, *The Use of the Polygraph in Screening Job Applicants*, 22 AM. BUS. L.J. 529 (1985). Silas, *Fit for the Job? Testing Grows—Gripes Too*, 70 A.B.A.J. 34 (1984); Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in Employment*, 21 SAN DIEGO L. REV. 295 (1984); Lester, Babcock, Cassissi & Brunetta, *Hiring Despite the Psychologist's Objections: An Evaluation of Police Officers*, 7 CRIM. JUST. & BEHAV. 41 (1980); Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1971-72).
3. " 'Medical Screening' may be defined as the process by which a workforce is selected and maintained by application of medical criteria." M. ROTHSTEIN, MEDICAL SCREENING OF WORKERS 9 (1984).
4. *See Battling the Enemy Within*, TIME, March 17, 1986, at 57; *Test Employees for Drug Use?*, U.S. NEWS & WORLD REP., March 17, 1986, at 58; *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985, at 57; Wall St. J., Aug. 8, 1985, at 6, col. 1; *The Executive Addict*, FORTUNE, June 24, 1985, at 24; N.Y. Times, Feb. 24, 1985, § 3, at 17, col. 2; *Taking Drugs on the Job*, NEWSWEEK, Aug. 22, 1983, at 52; *Drug Abuse on the Job of Growing Concern*, J. of Commerce, Aug. 10, 1983, § A, at 7, col. 3.
5. In the aggregate, the cost of drug abuse to American industry in terms of the lost productivity is estimated to be over $25 billion. RESEARCH TRIANGLE INSTITUTE, ECONOMIC COSTS TO SOCIETY OF ALCOHOL, DRUG ABUSE AND MENTAL ILLNESS: 1980, at 3 (1984)

private and public workplace, the note argues that the present legal response is inadequate because it only protects the privacy rights of public sector employees. It contends that this discrepancy cannot be justified and concludes that a legislative response is needed. Finally, the note proposes model provisions to guide legislators in their efforts to extend adequate protection to employees in the private workplace.

DRUG TESTING IN THE WORKPLACE

The use of illicit drugs has become "a commonplace part of American life."[6] The National Institute on Drug Abuse reports a steady increase in the number of people using drugs over the last twenty years.[7] Throughout this period, marijuana and cocaine have remained the most commonly abused controlled substances. A recent survey reports that an estimated fifty-six million Americans have tried marijuana, twenty million of whom are described as current users.[8] The same survey revealed that an estimated twenty-two million Americans have used cocaine, four million of whom are described as current users.[9] Consequently, the population segment that makes up much of America's workforce includes a large number of drug users.

The impact of this pattern of national drug use is felt throughout society, and the workplace is not immune.[10] The use of illicit drugs on the job has become "as common as the coffee break and is fast replacing alcoholism as a major problem in the workplace."[11] Public and private employers have responded to this problem by implementing medical screening programs to detect drug use.[12] The largest public employer to implement such a program is the United States military.[13] Although this program was previously

6. ADAMS, BLANKEN, FERGUSON, & REZNIKOV, OVERVIEW OF SELECTED DRUG TRENDS 1 (1985) (available from the National Institute on Drug Abuse).
7. *Id.*
8. *Id.* at 11. Among young adults (aged 18-25) both lifetime prevalence of use and current use decreased between 1979 and 1982. Such use among adults (aged 26 and older), however, "increased significantly" during the same period. NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL SURVEY ON DRUG ABUSE: MAIN FINDINGS 1982, at 7 (Reprinted 1984) [hereinafter cited as DRUG ABUSE SURVEY].
9. ADAMS, BLANKEN, FERGUSON & REZNIKOV, *supra* note 6, at 7. Between 1979 and 1982 cocaine use by young adults increased slightly, while use among adults nearly doubled. *See* DRUG ABUSE SURVEY, *supra* note 8, at 17-18.
10. Commentators suggest a direct correlation between the pattern of national drug use and the prevalence of drugs in the workplace. *See* Bensinger, *Drugs in the Workplace*, 60 HARV. BUS. REV. 48 (1982).
11. *Drug Abuse on the Job of Growing Concern*, *supra* note 4, at 7 (quoting the head of a corporate consulting firm specializing in employee drug abuse). A significant number of workers are estimated to use drugs, especially marijuana and cocaine, while on the job. The prevalence rate of using marijuana daily (ever) by labor force participants has been estimated to be as follows: 18.9% for males aged 18-19, 14.3% for females; 21.8% for males aged 20-24, 11% for females; and 12.5% for males aged 25-34, 4.5% for females. RESEARCH TRIANGLE INSTITUTE, *supra* note 5, at A-13. Likewise, the Cocaine National Help Line recently revealed that 75% of those calling in 1985 admitted that they had sometimes used cocaine while on the job, and 69% said that they regularly worked while under its influence. *Battling the Enemy Within*, *supra* note 4, at 53.
12. Despite the lack of specific statistical data, commentators agree that the use of medical screening for drug use in the workplace increases daily. *See, e.g.*, Bureau of Business Practices, DRUGS IN THE WORKPLACE 2 (1983) (available from Bureau of Business Practices, Waterford, CT); Schwartz & Hawks, *Laboratory Detection of Marijuana Use*, 254 J. A.M.A. 788 (1985).
13. The Navy, Army, Air Force, and Marines have conducted over six million drug tests in the past two years. It is significant to note that this extensive testing program, characterized by sloppy

restricted to military personnel, the Pentagon has announced plans to begin testing civilian employees holding "critical jobs."[14] Likewise, in 1985, the U.S. Drug Enforcement Administration became the first non-military public employer to announce plans to conduct urinalysis of all employees.[15] Such practices are likely to increase in light of a recent federal study encouraging employee drug testing as a means of curtailing drug trafficking by organized crime.[16]

The increasing popularity of drug testing is not restricted to the public sector.[17] Private sector employers known to have implemented such programs include Alcoa, AT&T, DuPont, Exxon, Federal Express, Ford Motor Company, General Motors, Greyhound Lines, IBM, Lockheed, Mobile, The New York Times, Northeast Utilities, Shearson Lehman, TWA, and United Airlines.[18] A recent survey of the Fortune 500 companies revealed that eighteen percent presently use urinalysis testing as a means of combating employee drug use, and an additional twenty percent plan to institute such programs in the next two years.[19] These tests are primarily used to

---

testing and paperwork, resulted in tens of thousands of false positives which officials now admit "wrecked" many military careers. United Press International, Aug. 26, 1984 (available on NEXIS).

14. The Associated Press, May 30, 1985 (available on NEXIS).

15. Campbell, *Random Drug Testing Spreads in America's Workplace*, The Hartford Courant, Mar. 12, 1986, § A, at 24, col. 1.

16. A recent report compiled by the President's Commission on Organized Crime proposed the use of widespread, random drug testing as a valuable weapon in its war against organized crime. The commission identified drug trafficking as the most widespread and lucrative organized crime activity in the United States. It categorized drug supply and demand as mutually dependent and recommended that both government and private sector employers initiate drug testing programs in an effort to curtail demand. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING AND ORGANIZED CRIME (1986). This recommendation was heavily criticized on Capitol Hill. Representative Peter Rodino (D- N.J.), chairman of the House Judiciary Committee and a member of the commission, stated: "While drug testing may be appropriate in certain circumstances and in certain industries, wholesale testing is unwarranted and raises serious civil liberty concerns." Chicago Tribune, Mar. 9, 1986, § 5, at 1, col. 1. Representative Charles Schumer (D-N.Y.) agreed: "Trying to stop organized crime's multimillion dollar drug business by creating a police state in federal office buildings would be virtually ineffective and would create one crime to stop another." *Battling the Enemy Within*, *supra* note 4, at 53. Also, in a letter to President Reagan, Representative Patricia Schroeder (D-Colo.), who heads a House civil service subcommittee, said: "The foolishness of the commission's approach is demonstrated by the fact that no one is proposing testing for off-duty use of the two most addictive and destructive drugs known to society—alcohol and tobacco." Chicago Tribune, Mar. 9, 1986, § 5, at 1, col. 1.

It is interesting to note that at a recent hearing concerning mandatory drug testing for all federal workers, the deputy executive director of the President's commission, Rodney Smith, refused to give a urine sample prior to testifying. He complained that he was not warned in advance and called the request "a cheap stunt." Such criticism is ironic, since under the commission's proposal federal workers would have no warning, and is indicative of the general public's response to such a request. Chicago Tribune, Mar. 19, 1986, § 1, at 10, col. 1.

17. The controversial practice of drug testing has recently been introduced in professional sports. For example, before the start of the 1986 season, the commissioner of professional baseball ordered random, unannounced drug tests for all employees under his control. This program, which would include minor league players and non-playing major league staff, was viewed as a thinly veiled attempt to pressure the major league players' union to encourage voluntary testing programs or include testing in player's contracts. Six months later, a survey of all 26 clubs indicated that little testing had actually been done. Nonetheless, an increasing number of clubs are attempting to include mandatory testing clauses in players' contracts. Bishop, *Drug Testing Comes to Work*, CALIF. LAW., Apr. 1986, at 29, 31; Smith, *Employee Drug Testing: Intrusive, Degrading*, PRIVACY J., May 1985, at 1.

18. *See Battling the Enemy Within*, *supra* note 4, at 57; Smith, *supra* note 17, at 1.

19. NOEL DUNIVANT & ASSOCIATES, DRUG TESTING IN MAJOR U.S. CORPORATIONS: A SURVEY OF THE FORTUNE 500 (1985) (available from Noel Dunivant & Associates, Raleigh, N.C.) [hereinaf-

detect the use of marijuana, cocaine, barbituates, and amphetamines.[20] Although the companies surveyed indicated that their programs were initiated in response to "incidences of drug use in the workplace and a concern for employee safety,"[21] those who advise them admit that they are largely motivated by financial considerations.[22]

Employers use drug testing to screen employees as well as job applicants for drug use. When used to screen employees, it is often administered randomly or restricted to situations where the employee's conduct indicates the possibility of drug use.[23] When drug testing is used as part of a pre-employment screening program, it normally serves a preventative function. It is implemented to protect employers from future problems by weeding out prospective employees who use drugs.[24] As a result, employers are unlikely to hire an applicant who tests positive. In contrast, when an employee is tested positive for drug use, the tests may result in firing, punishment, surveillance, and/or rehabilitative treatment.[25] In both situations, however, the employer's decision is likely to depend on such variables as the nature of the job, the extent of the financial investment involved in hiring and training, the source of funding for treatment, and the existence of any applicable state disability laws.[26]

---

ter cited as FORTUNE 500 SURVEY]. Although this report indicates that "most" of the companies surveyed "thought employee drug use constituted a problem," it is interesting to note the breakdown: only 5% thought it was a "significant" problem, 23% a "moderate" problem, 39% a "slight" problem, and 28% "no problem." *Id.* at 4.

Two other surveys also indicate the existence of drug testing in the private sector. A recent survey by the Bureau of Business Practices of a cross-section of the Fortune 500 companies revealed that 26% of the companies contacted had an urinalysis screening program in place and 11% said they were looking into starting one. Chicago Tribune, Dec. 1, 1985, § 7, at 22. Also, in a 1985 survey of its membership, the American Society for Personnel Administration reported that 44% of the 390 companies contacted had considered increasing the amount of testing done in the workplace. Twenty-six percent of these companies indicated they would add tests for drug and alcohol use. Presently, 17% of the companies screen applicants for drug use and 12% screen employees. American Society for Personnel Administration, Resource Survey No. 12 (1985) (available from ASPA, Alexandria, Va.).

20. FORTUNE 500 SURVEY, *supra* note 19, at 5.
21. *Id.* at 7.
22. In a recent interview, the president of a consulting firm that advises companies on establishing drug testing programs and a former administrator of the U.S. Drug Enforcement Administration admitted that from an employer's perspective drug testing is really "a bottom-line issue." Campbell, *supra* note 15, at 24.
23. Of the Fortune 500 companies surveyed, 80% indicated that they had programs which screened job applicants, 47% indicated that they tested employees following involvement in accidents, and 13% indicated that they subjected employees to random tests to discover drug use. FORTUNE 500 SURVEY, *supra* note 19, at 3-5. Of all these programs, the practice of random testing is the most controversial because it presumes that all the test subjects are guilty and may result in needlessly invading the privacy rights of innocent employees. This form of testing is increasing despite the advice of experts:

> For the large portion of the American workforce, where there is not an obvious safety risk or danger to other employees, random screening is probably not necessary . . . . [W]e try to convince people . . . that they can deal effectively with the problem without going to a random testing program.

Campbell, *supra* note 15, at 24 (quoting J. Michael Walsh, Chief of Clinical and Behavioral Pharmacology for the National Institute on Drug Abuse).

24. *See* L. DOGOLOFF & R. ANGAROLA, URINE TESTING IN THE WORKPLACE 11 (1985).
25. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. PSYCHOACTIVE DRUGS 305, 306 (1984).
26. Federal and state disability laws define "handicapped" as including individuals suffering from alcohol or drug addiction. These laws offer such employees additional protection in the workplace. *See infra* note 70.

DRUG TESTING: METHODS AND PROBLEMS

The most commonly used screening methods to determine employee drug use are enzyme immunoassay and radioimmunoassay.[27] These techniques are used to analyze urine samples for the presence of marijuana, cocaine, barbituates, amphetamine, phencyclidine (PCP), opiates (including heroin), benzodiazepine, and methaqualone.[28] While enzyme immunosassay may be used in the laboratory or at the workplace,[29] the radioimmunoassay is restricted to a laboratory setting because it uses radioactive materials.[30] Regardless of where the tests are performed, manufacturers recommend that all positive test results be confirmed by an alternative method in order to hedge against inaccurate results.[31] Preferably this method should be more sophisticated and at least as sensitive as the original screening test.[32]

Gas chromatography-mass spectrometry (GC/MS) is the most widely used method of confirming positive immunoassay test results.[33] Although GC/MS is the most accurate drug testing method available it is not used as an initial screening device because it is very costly and must be performed in a laboratory by highly trained technicians.[34] It costs an employer under five dollars to screen a urine sample with an immunoassay test[35] and between $50-100 to have it confirmed with GC/MS.[36] Because of the additional expense involved, employers do not always conduct confirmations to verify the "presumed positive test results" of immunoassay methods.[37] This reliance on initial screening techniques is criticized because these techniques can produce incorrect results. These false results fall into two categories: false-positives, which indicate that a person has taken a drug when he has not, and false-negatives, which indicate that a person has not taken a drug when he actually has. In the employment context, the possibility of false-positives are of primary concern because such test results are likely to pre-

27. L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 20. Both of these immunoassay techniques "utilize complex immunochemistry and the production of drug antibodies in interaction with enzymic detectors to reflect the presence of drugs." Morgan, *supra* note 25, at 308. In the enzyme immunoassay method the reaction causes a color change which can be measured by a device called a spectrophotometer. In the radioimmunoassay method, a low level of radiation is given off which is measured by a gamma counter. L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 21.
28. *See* L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 21.
29. A major manufacturer of the immunoassay technique markets it as a viable on site method because "it does not require specific licensed personnel, subjective interpretation of results, or special handling techniques and safety precautions." Morgan, *supra* note 25, at 306.
30. L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 21.
31. *Id.* at 21-22.
32. *Id.* at 22; Centers for Disease Control, *Urine Testing for Detection of Marijuana Use: An Advisory*, 32 MORBIDITY AND MORTALITY WEEKLY REP. 469, 470 (1983) [hereinafter cited as *CDC Advisory*].
33. *See* Schwartz & Hawks, *Laboratory Detection for Marijuana Use*, 254 J. A.M.A. 788, 790 (Aug. 1985).
34. *See id.*; L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 22.
35. *The Ruckus Over Medical Testing*, *supra* note 2, at 60 (quoting Dr. Joe Boone, chief of the Centers for Disease Control's clinical chemistry and toxicology section); Lewey, *Preemployment Qualitative Urine Toxicology Screening*, 25 J. OCCUP. MED. 57, 58 (1983). A survey of Fortune 500 companies reported an average fee for screenings of $18.19. FORTUNE 500 SURVEY, *supra* note 19, at 9.
36. Campbell, *supra* note 15 (quoting Dr. David J. Greenblatt, chief of clinical pharmacology at Tufts-New England Medical Center). A survey of Fortune 500 companies reported an average bulk-fee of $20.45 and the average single fee to be $34.49. FORTUNE 500 SURVEY, *supra* note 19, at 9.
37. *CDC Advisory*, *supra* note 32, at 470; *The Ruckus Over Medical Testing*, *supra* note 2, at 6.

cipitate in an unjustified action against a job applicant or employee.[38] Consequently, considerations of prudence and fairness should be paramount in determining acceptable levels of accuracy.[39]

False-positive immunoassay test results are usually attributable to operator error, poor procedures of laboratory quality control, and positive reactions due to the presence of other chemicals such as caffeine and over-the-counter cough and cold medications.[40] Although these factors are recognized and to a large degree correctable,[41] field tests conducted by the Centers for Disease Control reveal that they may be difficult to overcome. One field test monitored the drug screening programs of thirteen independent laboratories and found that some laboratories had a false-positive error rate of up to sixty percent.[42] It concluded that these laboratories suffered from "serious shortcomings" in quality control even though they knew they were being monitored.[43]

Even if laboratories are able to overcome the problems associated with false-positives, the application of drug testing to employee screening is still subject to criticism. A positive urine test only provides evidence that the individual ingested the detected drug.[44] It does not prove intoxication or impaired job performance at the time the specimen was taken.[45] Pharmacologists and chemists agree that evidence of drug use may appear in urine for several days or even weeks after ingestion.[46] For instance, a urine test for

38. Although a false-negative test result does not adversely affect the job applicant or employee, its occurrence demonstrates a functional weakness of the test, i.e. its inability to detect drug use. The Centers for Disease Control monitored the testing programs of 13 laboratories that screen commonly abused drugs. It revealed the following ranges of error rates: 0% to 100% for cocaine, 11% to 94% for barbituates, and 19% to 100% for amphetamines. Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985).

39. Even if the test used is highly accurate, the act of randomly screening a large group of individuals in order to discover a few guilty parties raises serious concerns. For instance, suppose a drug test with a 95% accuracy rate (i.e., one in every 20 tests results in a false-positive) is used to screen a large group of employees. Assuming less than one percent of these employees has actually used drugs, this "accurate" test will falsely accuse five employees for every true accusation. Wall St. J., Apr. 1, 1986, at 22, col. 3.

40. *See* Morgan, *supra* note 25, at 309-12; L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 22. The accuracy of drug testing is also criticized because positive test results may be caused by unintentional exposure to illicit drugs. For instance, a positive test result for marijuana use may result from the passive inhalation of marijuana smoke at a party or rock concert. Also, positive tests for cocaine can result from drinking certain herbal teas which contain small quantities of the drug. 4 EMPLOYEE REL. WEEKLY (BNA) 388 (Mar. 31, 1986).

41. *See* Morgan, *supra* note 25, at 309-12; L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 23; Schwartz & Hawks, *supra* note 33, at 790.

42. The report revealed the following false-positive error rates: barbituates, 0% to 6%; amphetamines, 0% to 37%; methadone, 0% to 66%; cocaine, 0% to 6%; codeine, 0% to 7%; and morphine, 0% to 10%. Hansen, Caudill & Boone, *supra* note 38, at 2382. Another field test monitored 64 commercial laboratories that used the most widely marketed immunoassy technique for screening marijuana. It reported "an incidence of 4% false-positive results," however, it did not determine the origin of the errors. *CDC Advisory*, *supra* note 32, at 469.

43. Hansen, Caudill, & Boone, *supra* note 38, at 2382-88.

44. *See CDC Advisory*, *supra* note 32, at 469-70; L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 22; Schwartz & Hawks, *supra* note 33, at 790-91.

45. The effects of drug use have not been correlated with specific concentrations of drug metabolites in urine specimens. *See* NATIONAL INSTITUTE ON DRUG ABUSE, Q & A, DETECTION OF DRUG USE BY URINALYSIS 13 (1986); McBay, *Cannabinoid Testing: Forensic and Analytical Aspects*, 23 LABORATORY MANAGEMENT 36, 63 (1985).

46. Many factors, other than the tests sensitivity, influence the amount of time drugs can be detected in urine samples. These include the type of drug used, the amount and purity of the drug, how often it is used, and the user's age, weight, and metabolism. *See CDC Advisory*, *supra* note 32, at 469-70; L.

marijuana can detect prior use for up to two weeks in the casual user and even longer in the chronic user.[47] Consequently, an individual may test positive for drug use without being impaired.

A CONFLICT OF INTERESTS

Employers perceive drug use by employees to be a serious problem. The typical drug user in today's workforce is estimated to be late three times as often as other employees, and is absent and requests time off twice as often.[48] In addition, he or she is estimated to request three times the normal level of sick benefits[49] and is far more likely to be involved in an accident or file a workmen's compensation claim.[50] Employers contend that such adverse consequences justify the use of drug testing as a preventative measure. Since employing a drug user may result in an economic loss, they claim that they have a right to know—i.e., to discover via testing—who is using drugs in the workplace. This knowledge is viewed as essential to the protection of their property interests. Employers also argue that drug testing enables them to protect the health and safety of all employees by the early detection of drug abuse problems and the prevention of drug related accidents.[51] Finally, they claim that it allows them to meet their civic duty by upholding community standards.[52]

Employers are not deterred by the fact that drug testing may result in unfairly depriving a number of qualified individuals of employment. They are more concerned with weeding out the "bad" employee than accurately identifying the good employee. Employers favor testing because it will al-

---

DOGOLOFF & R. ANGAROLA, *supra* note 24, at 22; Schwartz & Hawks, *supra* note 33, at 790-91. The following are ranges of time that various drugs can be detected after ingestion: cocaine, 24 to 48 hours; amphetamines, 48 to 72 hours; barbituates, 3 days to 3 weeks depending on the chemicals involved. Campbell, *supra* note 15, at 24 (information compiled from chemists at the National Institute on Drug Abuse, the Centers for Disease Control, and Tufts-New England Medical Center).

47. *See* CDC Advisory, *supra* note 32, at 469-70; L. DOGOLOFF & R. ANGAROLA, *supra* note 24, at 22; Schwartz & Hawks, *supra* note 33, at 790-91.

48. The typical drug user is estimated to be "late three times more often than fellow employees, requests early dismissal or time off during work 2.2 times more often, and has 2.5 times as many absences of eight days or more." *Taking Drugs on the Job, supra* note 4, at 57 (quoting a Miami-based drug consulting firm).

49. *Id.*

50. The typical drug user is estimated to be "five times more likely to file a workman's compensation claim, and is involved in accidents 3.6 times more often than other employees." *Id.*

51. The employer's legal responsibility for the protection of the employee originated at common law. Common law imposed the following duties upon the employer: The duty to (1) provide a safe place to work; (2) provide safe appliances, tools, and equipment for the work; (3) give warnings of dangers of which the employee might reasonably be expected to remain in ignorance; (4) provide a sufficient number of suitable fellow employees; and (5) promulgate and enforce rules for the conduct of employees that would make the work safe. This imposition of liability upon the employer has been largely preempted by the passage of workmen's compensation acts. These statutes establish a system of compulsory liability insurance which is based on social policy rather that tort. W. PROSSER & W. KEETON, THE LAW OF TORTS 568-77 (5th ed. 1984).

52. This is the weakest of the employer's arguments in support of drug testing. The police, not the employer, act as the legitimate law enforcement mechanism of society. When the employer discovers an illegal activity in the workplace, his "civic duty" is limited to notifying the police and cooperating with them as requested. Although it is illegal to possess or sell a controlled substance, it is not illegal to be under the influence of such a substance. As a result, the employer cannot justify employee drug testing as an extension of any "civic duty."

most certainly ensure a drug free workforce.[53] They defend its application to employee screening by claiming that the doctrine of employment at will gives them the authority to impose any conditions or restrictions upon the employment relationship so long as they do not violate an employment contract or statute specifically restricting this prerogative.[54]

Employers' use of drug testing as a means of protecting their interests and fulfilling their responsibilities comes into direct conflict with the interests of those they subject to the tests. This conflict extends beyond the previously discussed issues of accuracy and application of test results.[55] Both job applicants and employees view drug testing as repugnant to one's most basic concept of personal liberty. They argue that the process inverts the traditional presumption of innocence by, in effect, requiring them to prove that they are not guilty of using illegal drugs. Their most fervent objection, however, stems from their perception of the nature of the test itself. Both job applicants and employees view urinalysis as an intolerable intrusion which violates their right to privacy.

EMPLOYEE TESTING: AN INVASION OF PRIVACY?

A personal notion of a right to privacy pervades our society.[56] Most individuals believe that they are entitled to a certain degree of privacy in their daily affairs and that they should be able to decide for themselves the time and condition under which these aspects of their lives are made public. Unwarranted intrusions upon this right to be left alone are resented and seen as threatening the individual's sense of personal freedom and dignity.[57]

53. Reliance on drug testing alone is apt to lull the employer into a false sense of security. Any assurance provided by drug testing is at best temporary. Test results have not been shown to have any predictive value.

54. The employment at will doctrine dates back to the mid-19th century when courts began to view the employment relationship as one of contract rather than status. *See* Martin v. New York Life Insurance Co., 148 N.Y. 117, 42 N.E. 416 (1895) (the leading case giving birth to the "American rule"). "The relentless logic of the contract approach dictated the rule that the employee had only such rights as were expressly agreed to in his contract of employment—no more and no less." L. LARSON & P. BOROWSKY, UNJUST DISSMISSAL § 1.01 (1985). In 1908, the Supreme Court described this relationship: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it." Adair v. U.S., 208 U.S. 161 (1908).

In recent years the employment at will doctrine has been subject to a growing number of exceptions, both judicial and legislative. L. LARSON & P. BOROWSKY, UNJUST DISMISSAL § 1.01. Although many states still recognize this doctrine, "the trend to specific exceptions to the at-will rule will probably continue unabated, as courts and legislatures respond to perceived employer abuses." *Id.* at § 2-19. *See id.* at § 10.01-10.53 for a state-by-state analysis of current statutes and cases.

55. Job applicants and employees are justifiably disatisfied with the reported accuracy of drug testing results. They want the tests to be accurate every time in order to prevent unjust denial of employment. Test subjects also attack the inability of the tests to ascertain drug induced impairment. Consequently, they charge that test results are "being disastrously misinterpreted" and that they should provide the impetus for asking questions rather than the evidence on which to deprive someone of employment. Campbell, *supra* note 15, at 24.

56. The right to privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness to prove its existence. Any person of normal intellect recognizes at once that as to each individual member of society there are matters private and public. Each individual instinctively resents any encroachment upon this right.

Bednarik v. Bednarik, 16 A.2d. 80, 90 (N.J. Ch. 1940).

57. The leading case recognizing the existence of the right to privacy identified personal freedom ("liberty") as an essential element of the concept of privacy. Pavesich v. New England Life Insurance

In order to determine whether or not drug testing constitutes such an encroachment, its nature as well as the circumstances surrounding its administration must be examined.

Although testing for drug use is a relatively recent phenomenon, other forms of employment testing have raised similiar questions of propriety—most notably polygraph testing.[58] This form of testing is subject to the same criticism as drug testing: there is serious doubt as to its accuracy and it is generally viewed as an invasion of the test subject's privacy.[59] Nonetheless, polygraph testing is prevalent in the employment context[60] where, like drug testing, employers use it to detect undesirable behavior.[61] Despite repeated congressional efforts to ban the use of polygraphs in the private workplace, no federal legislation currently exists in this area.[62] Over one-half of the

---

Co., 122 Ga. 190, 195-96, 50 S.E. 68, 70 (1905). Since that time, the elements of personal freedom and dignity have been incorporated in many definitions of the right to privacy. *See, e.g.*, OFFICE OF SCIENCE AND TECHNOLOGY, OFFICE OF THE PRESIDENT, PRIVACY AND BEHAVIORAL RESEARCH 2 (1967) ("[t]he right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life. It is a right that is essential to insure dignity and freedom of self-determination"). *See also* Gavison, *Privacy and the Limits of the Law*, 89 YALE L. J. 421, 428-29, 438 (1980); D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY (1979); J. SHATTUCK, RIGHTS OF PRIVACY (1977); A. MILLER, THE ASSAULT ON PRIVACY 25 (1971); A. WESTIN, PRIVACY AND FREEDOM 7 (1967); Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1022-31 (1966); Bloustein, *Privacy as an Aspect of Human Diginity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971, 973 (1964).

58. The polygraph, or lie detector, measures the test subject's physiological responses to verbal questions. The test usually measures three different types of physiological responses: the rate and depth of respiration, blood pressure, and perspiration rate. It operates on the theory that the test subject's fear of detection, when responding deceptively, produces a measurable physiological reaction. OFFICE OF TECHNOLOGY AND ASSESSMENT, U.S. CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING 6, 11 (1983).

59. While an in-depth examination of polygraph testing is beyond the scope of this note, there is an extensive body of literature devoted specifically to this form of testing and its legal implications. *See generally* Hurd, *supra* note 2; Kleinmuntz, *Lie Detectors Fail to Tell Truth*, 3 HARV. BUS. REV. 36 (1985); Craig, *The Presidential Polygraph Order and the Fourth Amendment: Subjecting Federal Employees to Warrantless Searches*, 69 CORNELL L. REV. 896 (1984); Gardner, *supra* note 2; Nemeth, *Polygraph: Erosion of Privacy*, 21 FORENSIC SCI. INT'L 103 (1983); Nagle, *Polygraph in the Workplace*, 18 U. RICH. L. REV. 43 (1983); Lowe, *Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence*, 15 U.C.D. L. REV. 113 (1981); Falik, *The Lie Detector and the Right to Privacy*, 40 N.Y. ST. B.J. 102 (1968).

60. In 1982, more than one million job applicants and employees were subjected to polygraph examinations as a condition of employment. This marks a threefold increase since 1974 when approximately 300,000 tests were given. MACNEIL-LEHRER REPORT, CORPORATE LIE DETECTORS, Apr. 6, 1983, at 1.

61. Polygraph testing is primarily used to detect employee theft which is estimated to cost employers between $5 and $10 billion annually. *Id.*

62. A proposal to ban the use of polygraph testing in the private workplace is presently before both the House (H.R. 1524, 99th Cong., 1st Sess.) and the Senate (S. 1815, 99th Cong., 1st Sess.). The Senate bill was introduced a week after the House version and closely resembles it. Proponents of this legislation are motivated by a concern over the accuracy of the tests and a desire to protect employees from an unreasonable invasion of privacy. H. REP. NO. 146, 99th Cong., 1st Sess. 6-9 (1985). Congress has unsuccessfully sought to address this issue on 35 separate occasions in the past two decades: H.R. 5866, 98th Cong., 2d Sess.; H.R. 4681, 98th Cong., 2d Sess.; H.R. 4186, 98th Cong., 1st Sess.; H.R. 3687, 98th Cong., 1st Sess.; H.R. 2403, 98th Cong., 1st Sess.; H.R. 7416, 97th Cong., 2d Sess.; H.R. 3285, 97th Cong., 1st Sess.; H.R. 3194, 97th Cong., 1st Sess.; H.R. 3108, 97th Cong., 1st Sess.; H.R. 381, 97th Cong., 1st Sess.; H.R. 7361, 96th Cong., 2d Sess.; H.R. 7335, 96th Cong., 2d Sess.; H.R. 6697, 96th Cong., 2d Sess.; H.R. 6696, 96th Cong., 2d Cong., 2d Sess.; H.R. 6592, 96th Cong., 2d Sess.; H.R. 6591, 96th Cong., 2d Sess.; H.R. 6579, 96th Cong., 2d Sess.; H.R. 6575, 96th Cong., 2d Sess.; H.R. 6034, 96th Cong., 1st Sess., S. 854, 96th Cong., 1st Sess.; H.R. 3255, 96th Cong., 1st Sess.; H.R. 2349, 96th Cong., 1st Sess.; H.R. 9335, 95th Cong., 1st Sess.; S. 1845, 95th Cong., 1st Sess.; H.R. 4624, 95th Cong., 1st Sess.; H.R. 424

state legislatures, however, have enacted statutes limiting or prohibiting the use of polygraph testing by private and public employers.[63] Such widespread recognition of the need to regulate this type of testing indicates the value placed upon the rights of employees and the need to protect them. In addition, it provides a valuable source of insight into the legal implications of drug testing.

Employee drug testing, in the form of urinalysis, implicates the same privacy concerns raised by polygraph testing. The nature of polygraph testing is deemed intrusive because it is designed to override the will of the individual by analyzing involuntary physiological responses.[64] This same criticism applies to urinalysis because it also "interferes with a person's sense of personal autonomy and reserve" by penetrating the "inner domain"[65] and analyzing uncontrolled physiological responses.[66] In both processes, an intrusion results from the worker's inability to determine "when and under what conditions his thoughts, speech, and acts should be revealed to others."[67]

This intrusion is magnified by the test subject's lack of control over both the nature and amount of information extracted. In a polygraph examina-

---

95th Cong., 1st Sess.; H.R. 13191, 94th Cong., 2d Sess.; H.R. 9002, 94th Cong., 1st Sess.; S.1841, 94th Cong., 1st Sess.; H.R. 5438, 94th Cong., 1st Sess.; H.R. 5437, 94th Cong., 1st Sess.; H.R. 2596, 94th Cong., 1st Sess.; H.R. 564, 94th Cong., 1st Sess.; H.R. 17660, 93d Cong., 2d Sess.; S. 2836, 93d Cong., 1st Sess..

63. Nineteen states and the District of Columbia restrict the use of polygraph testing by employers. ALASKA STAT. § 23.10.037 (1972); CONN. GEN. STAT. § 31-51 (1977); DEL. CODE ANN. tit. 19, § 704 (1979); HAWAII REV. STAT. §§ 378-21, -22 (1976); IDAHO CODE §§ 44-903, -904 (1977); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1980); MD. ANN. CODE art. 100, § 95 (1979); MASS. GEN. LAWS ANN. ch. 149, § 19B (West Supp. 1981); MICH. COMP. LAWS § 37.203 (Supp. 1983); MINN. STAT. § 181.75 (1976); MONT. CODE ANN. § 39-2-304 (1981); NEB. REV. STAT. § 81-1932 (1980); N.J. STAT. ANN. § 2C:40A-1 (West 1981); OR. REV. STAT. § 659.225 (1979); 18 PA. CONST. STAT. ANN. § 7321 (Purdon 1973); R.I. GEN. LAWS §§ 28-6.1-1,.1-2 (1979); WASH. REV. CODE §§ 49.44.120-.130 (Supp. 1981); W. VA. CODE § 21-5-5b (1983); WIS. STAT. § 111.37 (1980 & Supp. 1982); D. C. CODE ANN. §§ 36-801 to -803 (1980).

Twenty-seven states regulate the use of polygraphs by requiring all examiners to be licensed. ALA. CODE §§ 34-25-1 to 34-25-36 (1975 & Supp. 1981); ARIZ. REV. STAT. ANN. §§ 32.2701-.2715 (1976 & Supp. 1981); ARK. STAT. ANN. §§ 71-2201 to -2225 (1979); CAL. BUS. & PROF. CODE §§ 9300-9321 (Deering 1983); FLA. STAT. ANN. §§ 493.561-.579 (West 1981); GA. CODE §§ 84-5001 to -5016 (1975); ILL. REV. STAT. ch. 111, §§ 2401-2432 (1978 & Cum. 1981); IND. CODE ANN. §§ 25-30-2-1 to -5 (Burns 1981); KY. REV. STAT. §§ 329.010-.990 (1977 & Supp. 1981); LA. REV. STAT. ANN. §§ 37:2831-:2854 (West 1980); ME. REV. STAT. ANN. tit. 32, §§ 7151-7169 (Supp. 1981); MICH. COMP. LAWS §§ 338.1701-.1729 (1970 & Supp. 1981); MISS. CODE ANN. §§ 73-29-1 to -47 (1973); MONT. CODE ANN. §§ 37-62-101 to 37-62-311 (1983); NEB. REV. STAT. §§ 81-1901 to -1936 (1980 & Supp. 1983); NEV. REV. STAT. §§ 648.005-.210 (1979); N.M. STAT. ANN. §§ 61-26-1 to -13 (1978); N.C. GEN. STAT. §§ 746-1 to -20 (1979); N.D. CENT. CODE §§ 43-31-01 to -17 (1978 & Supp. 1979); OKLA. STAT. tit. 59, §§ 1451-1476 (West Supp. 1980); S.C. CODE ANN. §§ 40-53-10 to 40-53-250 (Law. Co-op, 1976 & Supp. 1980); TENN CODE ANN. §§ 62-27-101 to -124 (1978 & Supp. 1982); TEX. STAT. ANN. art. 4413 (Vernon 1969 & Supp. 1973, 1981); UTAH CODE ANN. §§ 34.37-1 to -14 (1974 & Supp. 1979); VT. STAT. ANN. tit. 26, §§ 2901-2910 (Supp. 1981); VA. CODE §§ 54-916 to -922 (1978); W. VA. CODE §§ 21-5-5c, -5d (1983).

64. Hermann, *supra* note 2, at 128.

65. This argument has been used to describe why the use of the polygraph constitutes an invasion of privacy. *See* A. WESTIN, *supra* note 57, at 40.

66. *See supra* note 58.

67. The right to privacy has been defined as "the right of the individual to decide for himself, with only extraordinary exceptions in the interest of the whole society, when and under what conditions his thoughts, speech, and acts should be revealed to others." *Hearings on the Use of Polygraphs as "Lie Detectors" by the Fed. Gov't Before a Subcomm. of the House Comm. on Gov't Operations*, 88th Cong., 2d Sess., and 89th Cong., 1st Sess. 2 (1964-1965).

tion, the subject is asked a series of questions in an attempt to ferret out his attitudes and beliefs on a variety of issues.[68] Once the test has begun, he cannot refuse to answer a question, even if it is unrelated to the purpose for which he is being tested, because his silence elicits a physiological response that will be recorded and interpreted.[69] Likewise, when an individual subjected to drug testing relinquishes a urine sample he relinquishes total control over the disclosure of information contained therein. A urine sample contains a wealth of personal information. In addition to detecting drugs ingested, it reveals the individual's medical history of such afflictions as venereal disease, epilepsy, and schizophrenia, as well as his susceptibility to diseases such as heart attacks and sickle cell anemia.[70]

The individual has a strong privacy interest in this personal information. As a result, the means by which employers obtain it, as well as how they utilize it, is a matter of concern. Individuals view urination as a private act. They consider supervision of this act an affront to personal dignity. This personal notion of privacy was recently recognized in an action challenging a prison's employee drug testing program. A federal district court found that a person has a reasonable and legitimate expectation of privacy in the discharge and disposal of urine.[71] The court stated that "one does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination."[72] Consequently, the collection of urine in the workplace for purposes of drug testing, especially under direct supervision,[73] violates this expectation.

The employer's use of this information raises further privacy concerns. Because the tests can yield positive results days and even weeks after drug use, they in effect allow the employer to control the employee's off-duty behavior. It is questionable whether an employer's influence should extend beyond the workplace and dictate the employee's lifestyle. If the employer can fire a person for smoking marijuana on Saturday night, what prevents him from regulating such things as off-duty alcohol consumption or even sleeping habits in an effort to ensure that the employee works to his full capacity?

---

68. Hermann, *supra* note 2 at 154.

69. *Hearings on Polygraph Control and Civil Liberties Protection Act Before the Subcomm. on the Judiciary*, 95th Cong., 1st and 2nd Sess. 31, 249, 263 (1977-78).

70. *The Ruckus Over Medical Testing, supra* note 2, at 58. Federal and state laws prohibiting employment discrimination against "handicapped" individuals provide further support for regulating this type of information. The Federal Rehabilitation Act of 1973 defines handicapped as including individuals suffering from alcohol or drug addiction. The law protects these individuals unless their addiction prevents them from performing their job or they pose a threat to the safety of others. 29 U.S.C. § 701 *et seq.* (1982). *See* Davis v. Bucher, 451 F. Supp. 791 (D.C. Pa. 1978) (persons with histories of drug use are handicapped individuals); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D.C. Hawaii 1980) (protection of handicapped individuals capable of performing jobs). Forty-eight states have similar statutes prohibiting such practices. *Drugs at Work*, A.B.A.J., March 1, 1986, at 35.

71. McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985).

72. *Id.*

73. Manufacturers of immunoassay screening techniques suggest that urine samples be collected under direct supervision. This is to prevent the test subject from inducing a false-negative test result by adding an adulterant to his urine prior to collection. Schwartz & Hawks, *supra* note 33, at 790. The number of employers following this recommendation is not known.

Although urinalysis is inherently intrusive, an employee cannot establish an invasion of privacy if he has voluntarily consented to the test.[74] Under the employment at will doctrine, the employer contends that employees consent to any testing that may be required by accepting employment with the company.[75] Furthermore, employers argue that the employees' express consent to specific requests, as well as the signing of consent forms in advance, indicates a lack of coercion. Although it is true that "no one is sticking a catheter up their bladder,"[76] to categorically characterize such consent as voluntary ignores the reality of the situation. The nature of the employer-employee relationship coupled with the economic consequences of unemployment substantially diminish the voluntary element which is crucial to the concept of consent. "When the decision is between testing and employment, consent is far from free and voluntary."[77] As a result, the test subject's personal notion of privacy is violated. The lack of true consent, coupled with the intrusive nature of the process and its questionable reliability, threatens the individual's sense of personal freedom and dignity and encroaches upon his right to be left alone.

THE RIGHT TO PRIVACY: SOURCES OF LEGAL RECOGNITION AND PROTECTION

The individual's right to privacy has traditionally been recognized and protected by tort and constitutional law. The former applies to invasions resulting from the interaction of private individuals,[78] while the latter protects private individuals from invasions by the government and its agen-

74. Both tort and constitutional law recognize consent to the alleged offensive act as a legitimate defense. Tort cases reveal that consent, whether express or implied, to particular conduct will prevent that conduct from constituting an actionable invasion. *See* Hudson v. Craft, 33 Cal. 2d 654, 204 P.2d 1 (1948); Hart v. Geysel, 159 Wash. 632, 294 P. 570 (1930); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891); DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881). In constitutional challenges, courts have held that a search pursuant to voluntary consent, express or implied, does not violate the fourth amendment's prohibition against unreasonable search and seizures. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

75. *Cf.* Hermann, *supra* note 2, at 88.

76. *Ruckus Over Medical Testing, supra* note 2, at 58 (quoting Peter B. Bensinger, president of a consulting firm that advises companies in establishing drug testing programs, formerly an administrator of the U.S. Drug Enforcement Administration).

77. A. WESTIN, *supra* note 57, at 240. *See* Falick, *supra* note 59, at 109; State v. Community Distributors, Inc., 64 N.J. 479, 317 A.2d 697 (1974) (court found that, due to the employment relationship, an employee had "no realistic choice" when requested to submit to a polygraph test).

Granted, consent is a valid argument on the limited occasions where the employer and employee possess equal bargaining power. The process of collective bargaining in the unionized workplace is an example of such an occasion. Nineteen percent of all employed wage and salary workers are unionized. Adams, *Changing Employment Patterns of Organized Workers*, 108 MONTHLY LAB. REV. 25, 26 (1985). In situations where a collective bargaining agreement is in force, drug testing is recognized as a mandatory subject of collective bargaining. *See* Local 1900, International Brotherhood of Electrical Workers v. Potomac Electronic Power Company, No. 86-717, (D.C. Cir. March 18, 1986) (available on LEXIS and WESTLAW). As a result, the employer must bargain in good faith with the union prior to implementing a drug testing program. This requirment provides union members with the leverage needed to secure protection from the privacy threat posed by drug testing. They may, however, in the true meaning of the word voluntary, consent to such testing in exchange for some concession.

78. Tort law protects the individual from "private or civil wrongs or injury, other than breach of contract" by enforcing "legal duties which are owed to persons generally or to classes of persons." W. PROSSER & W. KEETON, *supra* note 51, at 1-6; BLACK'S LAW DICTIONARY 1335 (5th ed. 1979).

cies.[79] Although the source and scope of this protection differ, the nature of the privacy interest involved is the same.

Tort Law and the Private Sector

In a 1890 law review article, Samuel Warren and Louis Brandeis introduced the concept of a right to privacy within tort.[80] By tracing common law development, they identified the right to privacy as an independent, actionable interest. They concluded that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions should be communicated to others"[81] and summarized this as "the general right to be left alone."[82]

Today, courts have generally recognized four different forms of invasion of this right as being actionable:[83] (1) misappropriation of another's name or likeness;[84] (2) unreasonable intrusion upon the seclusion of another;[85] (3) unreasonable disclosure (publicity) of another's private affairs;[86] and (4) publicity that unreasonably places another in a false light before the

79. The Constitution limits the actions of the government, not those of private parties. In 1875, seven years after the passage of the fourteenth amendment prohibiting states from denying individual rights, the Supreme Court stated: "The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another." U.S. v. Cruikshank, 92 U.S. 542, 542-43 (1875). Eight years later, the Court said: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . The wrongful act of an individual is simply a private wrong, or a crime of that individual." Civil Rights Cases, 109 U.S. 3, 11 (1883). This doctrine of "state action" prevents the government, including its agencies and representatives, from violating the constitutional rights of private individuals. *See* Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U.L. REV. 893 (1984); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984).

80. Warren & Brandeis, *supra* note 1, at 193.

81. *Id.* at 198.

82. *Id.* at 193, 195, 205.

83. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977); W. PROSSER & W. KEETON, *supra* note 51, at 851. "The law of privacy comprises four distinct kinds of invasions of four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . .'to be let alone.'" Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392 (1960).

84. This was the first type of invasion of privacy to be recognized by the courts. *See* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) (publication of plaintiff's photo in a newspaper advertisement without plaintiff's consent).

85. *See* Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969) (appellants received copies of documents removed from appellee's office without authorization). In defining the tort of intrusion upon another's seclusion, the court stated:

> Unlike other types of invasion of privacy, intrusion does not involve . . . publication of the information obtained. The tort is completed with the obtaining of the information by improperly intrusive means. . . . We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the fourth amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the fourth amendment, should protect "people not places."

Id. at 704.

86. This tort applies to the giving of "publicity to a matter concerning the private life of another" which is "highly offensive to a reasonable person and is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (1977). *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime).

public.[87] The tort of unreasonable intrusion upon the seclusion of another is the one most likely to be implicated by employee drug testing.[88] Many recent federal[89] and state[90] court decisions have adopted the definition of this tort enunciated in section 652B of the Second Restatement of Torts: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[91] Although litigants have not expressly relied on section 652B, recent decisions indicate that employee testing may implicate this tort.[92]

Despite its potential applicability, section 652B has not yet been held to apply to employee testing. As a result, modern day tort law fails to adequately protect the employee's right to privacy. This inadequacy is not because the level of privacy tort once secured is no longer sufficient, but rather

87. *See* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) (plaintiffs alleged that article published in newspaper unreasonably placed their family in a false light before the public through its many inaccuracies and untruths).

88. Although this tort has not been specifically applied to employee testing, comment c of the Restatement is careful to point out that "[o]ther forms of [invasion] may still appear. . . . [N]othing in this chapter is intended to exclude the possibility of future developments in the tort law of privacy." RESTATEMENT (SECOND) OF TORTS § 652A, comment c (1977). Indeed, it was this "elasticity of our law" in the "application of existing priciples to a new state of facts" that made possible the development of this area of tort law. Warren & Brandeis, *supra* note 1, at 213.

89. *See* McSurely v. McCellan, 753 F.2d 88 (D.C. Cir. 1985); Wood v. Hustler Magazine, Inc., 736 F. 2d 1084 (5th Cir. 1984); Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983); Harbulak v. Suffolk County, 654 F.2d 194 (2d Cir. 1981).

90. *See* Anderson v. Fisher Broadcasting Companies, Inc., 300 Or. 452, 712 P.2d 803 (1986); Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 502 A.2d 1101 (Md. Ct. Spec. App. 1986); Werner v. Kliewer, 238 Kan. 289, 710 P.2d 1250 (1985); Chicarella v. Passant, 343 Pa. Super 330, 494 A.2d 1109 (Pa. Super Ct. 1985); Forsberg v. Housing Authority of City of Miami Beach, 455 So.2d 373 (Fla. 1984); N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 484 A.2d 729 (1984); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984); Venturi v. Savitt, Inc., 191 Conn. 588, 468 A.2d 933 (1983); Sofka v. Thal, 662 S.W.2d 502 (Mo. 1983); Harkey v. Abate, 131 Mich. App. 177, 346 N.W.2d 74 (1983); Sustin v. Fee, 69 Ohio St. 2d 143, 431 N.E.2d 992 (1982); Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982); Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981); Knight v. Penobscot Bay Medical Center, 420 A.2d 915 (Me. 1980); People v. Brown, 88 Cal. App. 3d 983, 151 Cal. Rptr. 749 (1979); Munley v. ISC Financial House, Inc., 584 P.2d 1336 (Okla. 1978).

91. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

92. In Satterfield v. Lockheed Missles and Space Co., Inc., 617 F. Supp. 1359 (D.S.C. 1985), an electronic missile technician submitted to a urinalysis test for drug use while undergoing an annual physical required as part of his employment. *Id.* at 1360. He tested positive for marijuana and was terminated. *Id.* The employee sued Lockheed claiming an invasion of privacy. In his complaint, however, he failed to specify the type of invasion on which his claim was based. *Id.* at 1369. While the court did not rule in the employee's favor, this case is significant because the court "presumed" that the plaintiff was alleging a "wrongful intrusion into his private activities." *Id.* at 1369-70.

Another indication of the applicability of the tort of intrusion upon seclusion to the type of invasion resulting from employee testing is O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986). In *O'Brien*, an employee was confronted by his employer with rumors that he had been seen using drugs while off-duty. Although the employee denied the rumors, the employer requested that he submit to a polygraph test because company policy prohibited drug use. *Id.* at 1070-71. The employee acquiesed and the test revealed that he had lied about his drug use. *Id.* at 1071. Following his termination, he sued his employer for an invasion of privacy.

The First Circuit upheld a special verdict which found the methods used by the employer to be highly offensive to a reasonable person and an invasion of privacy. *Id.* at 1071-72. Although the court did not expressly rely on § 652B, this case is significant because the court allowed the plaintiff to recover under a tort standard in an employee testing context. Furthermore, the type of invasion resulting from polygraph testing is analagous to that of drug testing in the form of urinalysis.

because that level is no longer secured in the face of scientific and technological advances such as drug testing.[93] Drug testing has raised the specter of invasions of privacy to a new and frightening level. "Our capacity to deal with the impact of this new technology depends in part, on the degree to which we can assimilate the threat it poses to the settled ways our legal institutions have developed for dealing with similiar threats in the past."[94] Although committed to protecting the individual's privacy interests, tort law has not yet responded to the new type of threat posed by drug testing. As a result, it cannot be currently relied upon to protect employees from this intrusive practice.

Constitutional Law and the Public Sector

Although the Constitution does not explicitly mention a right to privacy, courts have consistently implied such a right from the Bill of Rights by either reading several of its provisions together[95] or by interpreting the fourth amendment[96] as an individual safeguard of this right. The Supreme Court has identified two different types of privacy interests protected by the first approach—the individual's interest in avoiding disclosure of personal matters and his interest in making certain types of important decisions.[97] In the past, protection of these interests has been strictly limited to "matters relating to marriage, procreation, contraception, family relationships, and childrearing."[98] It is unlikely that courts will extend this protection to encompass the privacy interests of the employee subjected to drug testing. The Fifth Circuit has held that the right to possess or use marijuana in one's own home cannot be classified as a fundamental right protected by a constitutional zone of privacy.[99] If this approach does not recognize an individual

93. *See* Gavison, *supra* note 57, at 465; Bloustein, *supra* note 57, at 1006-07.
94. Bloustein, *supra* note 57, at 963.
95. The Supreme Court has found that the first, third, fourth, fifth and ninth amendments, taken collectively, establish a zone or penumbra in which privacy is protected from governmental invasion. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (state statute prohibiting the use, or counseling of others in the use, of contraceptives held unconstitutional).
96. The fourth amendment provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issuse, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment's prohibition of unreasonable search and seizures is not by its language limited to criminal contexts and has been held to apply to warrantless administrative searches. The Supreme Court has declared: "It is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (city ordinance permitting warrantless searches of apartment buildings by city housing inspectors held unconstitutional). The Court has defined this prohibition as protecting the individual's "interests in human dignity and privacy. . . ." Schmerber v. California, 384 U.S. 757, 769-70 (1966). *See* Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).
97. Whalen v. Roe, 429 U.S. 589, 588-600 (1977).
98. Paul v. Davis, 424 U.S. 693, 713 (1976) (plaintiff could not bring suit for constitutional invasion of privacy against a police chief who sent fliers to local merchants showing the plaintiff's photograph and falsely labeling him a shoplifter).
99. Louisiana Affiliate of the Nat'l Org. for the Reform of Marijuana Laws v. Guste, 380 F. Supp. 404, 409 (E.D. La. 1974), *aff'd*, 51 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975) (denied injunctive relief against Federal Controlled Substances Act and Louisiana Controlled Dangerous

as having a fundamental right to use drugs in his own home, it is not likely to recognize the existence of such a right in the workplace. Consequently, this approach is not apt to protect the individual's interest in avoiding disclosure of drug-related activities.

The courts have, however, viewed the fourth amendment as protecting the individual's interests in human dignity and privacy in the context of employee testing. The fourth amendment protects people from unreasonable search and seizures by the government. Courts have held that employee testing in the form of urinalysis[100] and blood analysis[101] constitutes a search within the meaning of the fourth amendment and have required public employers to comply with its prohibitions. Yet, fourth amendment protections are not absolute. For example, members of the military do not receive the same degree of constitutional protection as their civilian counterparts. They are deemed to have a diminished expectation of privacy due to the conditions peculiar to the military community and mission.[102] In all instances, once the requisite expectation of privacy is found to exist, the interest of the individual is balanced against the claim of the state and may be overridden by a compelling interest.[103]

The fourth amendment standard of reasonableness prevents public employers from subjecting civilian employees to drug testing on a purely subjective basis. In a recent case challenging the constitutionality of such testing, a federal district judge stated that even a generalized suspicion is not sufficient:

> No doubt most employers consider it undesirable for employees to use drugs, and would like . . . to identify any who use drugs . . . [and] there is no doubt that searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists). That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.[104]

Employee testing has, however, survived fourth amendment challenges when the employer has shown a compelling state interest—such as public

---

Substances Act insofar as they make the private use and possession of marijuana by adults a crime in Louisiana).

100. *See* Turner v. Fraternal Order of Police, no. 83-1213 (D.C. Cir. Nov. 13, 1985) (available on LEXIS and WESTLAW); Shoemaker v. Handel, No. 85-1770 (D. N.J. Sept. 9, 1985) (available on LEXIS and WESTLAW) McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); Allan v. City of Marietta, 601 F. Supp. 482, 488 (D. Georgia 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D. N.Y. 1984); Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert denied*, 429 U.S. 1029 (1976).

101. *See McDonell*, 612 F. Supp. at 1127; *Storms*, 600 F. Supp. at 1218; *Amalgamated*, 538 F.2d at 1267; *Schmerber*, 384 U.S. at 767.

102. *See* Parker v. Levy, 417 U.S. 733, 758 (1974) (delineating fourth amendment rights of military personnel). For fourth amendment purposes, civilian police officers have also been held to have a diminished expectation of privacy:

> While as a matter of degree we do not necessarily extend to the uniformed civilian services the same narrowly circumscribed expectation of privacy accorded to members of the military, the fact remains the police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations. So we recognize that, as is expected and accepted in the military, police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen.

Turner, No 83-1213, slip op.

103. *See Camara*, 387 U.S. at 534-35.

104. *McDonell*, 612 F. Supp. at 1130.

safety—as well as some form of reasonable basis for believing that the tests would produce evidence of individual drug use.[105] Under these circumstances, despite the employee's reasonable expectation of privacy, the search is justified as reasonable and therefore constitutional.[106]

Recently, in *Jones v. McKenzie*,[107] an employee drug testing program was held unconstitutional because the employer failed to establish a compelling state interest or a reasonable basis of particularized suspicion. In *Jones*, the Transportation Division of the District of Columbia school system enacted a drug testing program to enforce a policy prohibiting school personnel from "possessing, using or being under the influence of illicit drugs."[108] Pursuant to this program, it required the plaintiff, a school bus attendant, to submit to a urinalysis test even though it had no "particularized suspicion that she had ever used or was under the influence of drugs either on or off the premises."[109] The plaintiff tested positive, indicating the presence of marijuana, and was terminated.[110]

The plaintiff sued in federal district court alleging an unconstitutional invasion of privacy. The court distinguished the plaintiff's duties from those of the school bus driver and mechanic who were responsible for the operation and maintenance of the schoolbus.[111] As a "bus attendant," the court found that she had a reasonable expectation of privacy which was not diminished by public safety considerations.[112] In addition, the court stated that the Transportation Division could not administer a urinalysis test for drug use without "first establishing probable cause, based on specific objective facts, that she was using or under the influence of illicit drugs."[113] Because the Transportation Division did not fulfill these requirements, its

105. *See Turner*, No. 83-1213 (D.C. Cir. Nov. 13, 1985) (upholding a police department's drug testing program, which required a reasonable, objective basis of suspected drug use prior to testing, due to the state's interest in public safety); *Amalgamated*, 538 F.2d 1264 (upholding the testing of city bus drivers, following involvement in serious accidents or when suspected of drug or alcohol use, due to the state's interest in public safety); *McDonell*, 612 F. Supp. 1122 (despite a "weighty" state interest, Department of Correction's drug testing program held unconstitutional because administered pursuant to a "generalized suspicion"). *But see* Shoemaker v. Handel, No. 85-1770 (D. N.J. Sept. 9, 1985) (available on LEXIS and WESTLAW) (drug testing of jockeys by state Racing Commission upheld in absence of individual suspicion due to the state's interest in regulating horse racing).

106. The Supreme Court has held that warrantless searches "are per se unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). Drug testing appears to have emerged as an exception to the warrant requirement due to the fleeting nature of the evidence. *See Allan*, 601 F. Supp. at 489; *Amalgamated*, 538 F.2d at 1267 (citing *Schmerber*, 384 U.S. at 770-71). Some courts, however, have failed to even address this issue. *See* Jones v. McKenzie, No. 85-1624 (D.D.C. Feb. 25, 1986) (available on LEXIS and WESTLAW); *McDonell*, 612 F. Supp. 1122.

107. No. 85-1624 (D.D.C. Feb. 25, 1986) (available on LEXIS and WESTLAW).

108. *Id.*

109. As a "bus attendant" the plaintiff's duties were "to assist students as they got on and off the buses, particularly handicapped students who required someone to lift them on and off a bus and to observe them en route to and from school." *Id.*

110. Despite the warning of the manufacturer's label and a Food and Drug Administration report, the employer failed to confirm the positive test result with an alternative method. As a result, the court ruled that the test result could not be relied on as evidence to support the contention that the plaintiff had violated the employer's policy forbidding drug use. *Id.*

111. The court cited to *Amalgamated* which held that bus drivers could be subjected to drug testing due to a compelling state interest in public safety. *Id. See Amalgamated*, 538 F.2d at 1267.

112. *Jones*, No. 85-1624.

113. *Id.*

actions were held to have violated the plaintiff's fourth amendment right to privacy.[114]

The balancing approach required by the fourth amendment adequately protects the privacy interests of the public sector employee subjected to drug testing. In order to extend this protection to the private workplace it is necessary to establish "state action."[115] Commentators have suggested extending this doctrine to include large private corporations.[116] They argue that courts should not consider corporations as private phenomena due to their "direct and decisive impact upon the social, economic, and political life of the nation."[117] Consequently, they contend that the corporation, created and regulated by the state, should be held to the same constitutional standards applicable to the states.[118] It is unlikely that courts will be receptive to this argument, at least in the near future. Recently the Supreme Court indicated its reluctance to extend the doctrine of state action:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the court to respect the limits of their own power as directed against state governments and private interest. Whether this is good or bad policy, it is a fundamental fact of our political order.[119]

As a result of the limitations placed upon the application of this doctrine, employees in the private sector cannot rely on the prohibitions of the fourth amendment to protect them from the intrusive practice of drug testing.

---

114. *Id.*

115. *See supra* note 79.

116. Hermann, *supra* note 2, at 141-42, 148-49; Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Berle, *Constitutional Limitations on Corporate Activities—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

117. Professor Friedmann contends that:

> 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. The challenge to the contemporary lawyer is to translate the social transformation of these organizations from private associations to public organizations into legal terms.

Friedmann, *supra* note 116, at 176. This argument is buttressed by the fact that the size and influence of many corporations exceeds that of some states:

> Most large employers, and certainly most large corporate employers, are nothing more than mini-governments. Many have more income, more expenses, produce more goods, control more land and assets, and have more people subject to their jurisdiction than all the 13 colonies did 200 years ago. More than a few are larger, have bigger budgets and control more land and people than some individual states today. Some multinational corporations exceed the budgets, gross national product, assets and populations of entire countries.

R. SMITH, WORKRIGHTS 38-39 (1983). *See generally* A. WESTIN & S. SALISBURY, INDIVIDUAL RIGHTS IN THE CORPORATION, A READER ON EMPLOYEE RIGHTS (1980).

118. *See supra* note 116.

119. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982). In *Lugar*, a creditor's prejudgment attachment against a debtor's property, pursuant to a federal statute, was challenged as an unconstitutional deprivation of due process. The Court held that the defendant's joint activity with the court clerk and local sheriff in obtaining the writ of attachment constituted "state action." *Id.* at 937, 941-42.

RECOMMENDATIONS AND CONCLUSION

A Need For Legislation

Drug testing poses a threat to the privacy rights of all employees. Although the existence of the right to privacy is recognized by both society and its laws, the scope of its protection is inadequate. Our present legal system does not account for the fact that an employee's loss of personal freedom and dignity is the same whether his right to privacy is invaded by the government or by a private employer. Presently, workers in the private sector, in contrast to those in the public sector, may be subjected to randomly administered drug testing and denied employment as a result of its outcome. These workers, who comprise eighty-five percent of the nation's nonagricultural labor force,[120] are virtually without remedy due to the difficulty of establishing an actionable tort, the absence of "state action," and a lack of legislation in this area. Consequently, the privacy rights of the majority of the civilian working population are unprotected.

A legislative response is needed to fill the present gap in the legal system. Congress should take the steps necessary to protect the private sector employee by ensuring that his privacy interest receives the protection it merits. For reasons of uniformity, federal legislation would be optimal. The plight of polygraph proposals in Congress, however, demonstrates that such an attempt is likely to be futile.[121] Therefore, as in the area of polygraph testing, the states should take the initiative to regulate drug testing under their "police powers."[122]

Although both the employer's managerial prerogatives to control the workplace and the employee's right to privacy are based on legitimate interests and concerns, neither of these rights is absolute. The limits placed upon the employee's right to privacy are demonstrated in both tort[123] and constitutional[124] cases dealing with employee testing. The limits placed upon the employer's managerial prerogatives are evidenced by existing legislation, such as the Civil Rights Act of 1964,[125] the Rehabilitation Act of 1973,[126] child labor laws,[127] and laws establishing minimum wage.[128] This legisla-

120. Personick, *A Second Look at Industry Output and Employment Trends Through 1995*, MONTHLY LAB. REV., Nov. 1985, at 26, 28. As noted earlier, some of these employees may gain protection through collective bargaining. *See supra* note 77.

121. *See supra* note 62.

122. Under the Constitution, state governments (or their subsidiaries) are not creatures of limited, enumerated powers as is the federal government. States are recognized as having a general "police power," i.e., an inherent power to protect the health, safety, or general welfare of their residents. Any action taken pursuant to this power is valid under federal law unless it violates a specific limitation imposed by the Constitution. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 121 (2nd ed. 1983).

123. *See supra* note 92.

124. *See supra* notes 105, 107.

125. The Civil Rights Act of 1964 makes it unlawful for an employer "to refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982).

126. Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1982). See supra note 70.

127. The Fair Labor Standards Act prevents employers from "employing any oppressive child labor in commerce or in the production of goods for commerce." Fair Labor Standard Act, 29 U.S.C. § 212(c) (1982).

128. The Fair Labor Standards Act requires employers to pay a designated "minimum wage to all

tion tempers the employer's authority under the employment at will doctrine as well as his economic justifications. Although the employment at will doctrine once reigned supreme and the employer-employee relationship was considered untouchable,[129] today government regulation is commonplace and is not deterred by economic considerations.

In each of the above examples of government regulation an injustice was perceived and a policy determination was made to remedy it by expanding the law to meet the needs of society. Such a determination should be made in the case of employee drug testing for the following reasons: (1) it is an intrusive procedure that violates a person's dignity; (2) its process of obtaining information invades a person's privacy; (3) its results are not always accurate and their application in the employment context is questionable; (4) an inaccurate or misinterpreted test result may cause an unjustified dismissal or denial of employment as well as jeopardize future employment opportunities; and (5) current law does not adequately protect private sector employees from the adverse consequences of drug testing.

A Legislative Proposal: Recommended Provisions

Drug testing brings into conflict the legitimate interests and concerns of both the employer and those he subjects to such testing. Consequently, a total prohibition of such testing would seriously infringe upon the employer's rights, while allowing the area to remain unregulated would perpetuate the violation of present and prospective employees' rights. Legislation that strikes a balance between these competing interests, while preserving each to the greatest extent possible, is needed. The following model provisions seek to clarify the debated boundary between permissible and forbidden conduct by providing a balancing approach that is adaptable to varying factual scenarios. State legislatures should incorporate these suggestions as the key provisions of any legislation in this area.[130]

(1) The term "employee" includes any person working for salary or wages within the state.

(2) The term "employer" includes the state and all political subdivisions thereof, and any individual, firm, corporation, partnership, or other organization or group of persons however organized, located or doing business within the state, that employ personnel for salary or wages, or any person acting as an agent of such an organization.

Although the law recognizes the existence of the right to privacy in both the public and private sectors, the present protection it affords is inadequate. This definition includes both public and private employers in order

employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ." Fair Labor Standards Act, 29 U.S.C. § 206 (a) (1982).

129. *See supra* note 54.

130. These provisions are modeled, with some exceptions, after a San Francisco City Ordinance that regulates employee drug testing. This ordinance is the first, and remains the sole, piece of legislation enacted in this area. *See* San Francisco, Calif. Ordinance 527-85 (Dec. 2, 1985) (available at San Francisco City Hall, San Francisco, Calif.).

to rectify this discrepancy and to avoid the perpetuation of a double standard. The same privacy interest is implicated by drug testing in both the public and private sectors and therefore should receive adequate protection in each situation.

(3) The employer is prohibited from demanding, requiring, or requesting employees to submit to urinalysis or blood analysis as a condition of employment.

This provision addresses the coercive nature of the employer-employee relationship and the adverse effect it is likely to have on consent. It puts the employer and the employee on an equal footing in an effort to curtail the potential for abuse in the administration of such testing.

(4) The employer may require a specific employee to submit to urine or blood testing if the following conditions are met:

(a) the employer has a reasonable suspicion, based on specific, objective facts and reasonable inferences drawn from those facts in light of experience, that the employee's faculties are impaired on the job;[131] *and*
(b) the employee is in a position where such impairment affects his ability to safely perform his job; and
(c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested and confirmed (by an alternate method) by a state-licensed, independent laboratory testing facility and provides the employee with a reasonable opportunity to rebut or explain the results; and
(d) the employer ensures, to the extent feasible, that the tests only measure, and that its records only show or make use of, information regarding chemical substances in the body which are likely to affect the employee's ability to perform his job. And that prior to testing, the employer has set up a reasonable system of record keeping which will prevent chain of custody problems and ensure confidentiality of test results. All information acquired in the testing process is privileged and cannot be transferred to other employers or outside agencies.

When drug testing is used in an adversary situation, such as employee testing, the stakes are high and every opportunity to mitigate the resulting privacy invasion and ensure accuracy and fairness must be taken. In this context, the employer has made a conscious decision to act in a manner which is likely to result in violating the rights of another. Consequently, he must assume the responsibility of acting in a manner that will accommodate rather than jeopardize these rights. Accordingly, he is assigned the burden of proof and must demonstrate that his actions are well-founded.

Drug use becomes a legitimate concern of the employer when it impairs an employee's job performance. Current studies, however, show that testing alone cannot accurately determine impairment.[132] Consequently, an employer must combine test results with information from other sources to

131. The San Francisco Ordinance merely requires the employer to have "reasonable grounds to believe that an employee's faculties are impaired on the job." *See supra* note 129, at § 330A.5(a). The model provision modifies this standard in accordance with that adopted in *McDonell* in an attempt to make it more specific and easier to apply. *See McDonell*, 612 F. Supp. at 1130.

132. *See supra* notes 40-47.

justify a decision to deny employment based on drug use. This provision attempts to fill this gap by requiring the employer to objectively identify relevant indications of drug use prior to testing. In addition, it requires the employer to identify a legitimate safety concern prior to testing. Although this requirement significantly limits the employer's use of drug testing, it does not otherwise affect his response to suspected drug use in the workplace. This provision does not limit the employer's right to terminate or otherwise discipline the employee for violations of company policy.

(5) The employer is prohibited from requesting, requiring, or conducting random or company-wide urinalysis or blood analysis.

The mere possibility of discovering drug use is far too attenuated to justify the possible adverse consequences of drug testing. Such testing would violate the underlying purpose of the previous provision and destroy the balance of interests sought by this legislation.

(6) The employer is prohibited from demanding, requesting, or requiring prospective employees to submit to urinalysis or blood analysis.

At this point the individual has not accepted employment, therefore the balance must favor his privacy interests. The rationale underlying this provision is the same as that enunciated in the previous provision.

(7) Enforcement Provisions:

(a) Civil cause of action: Any person who violates or aids in the violation of any provision of this legislation is held liable to the person aggrieved for special and general damages, including attorney's fees and the cost of the action. In any action brought under this legislation alleging that an employer has committed a violation, the employer has the burden of proof to show that the requirements outlined in 4(a), (b), (c), and (d) have been satisfied.

(b) Injunctive relief: This legislation empowers any court of competent jurisdiction to enjoin any person who commits or proposes to commit an act in its violation. Standing to bring an action for injunctive relief is granted to any aggrieved person, any state, district or city attorney, or any collective bargaining agent who will fairly and adequately represent the interests of the protected class.

Conclusion

The use of drug testing in the workplace is increasing daily. The present legal response to this intrusive practice fails to adequately protect the privacy rights of job applicants and employees in the private sector. In the absence of legislation, neither employers nor the courts can be depended on to overcome this deficiency. Experience demonstrates that self-regulation by employers is unlikely, while the slow development of a uniform case law approach prevents a timely remedy. Consequently, failure to enact the type

of legislation proposed in this note will invite further violations of a deeply cherished and otherwise protected right.

*Charles E. Lindsey, Jr.**

* B.A., St. Michael's College, 1983; J.D. Candidate, Notre Dame Law School, 1987.