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Coming Up Dirty: Drug Testing at the Work Place

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1987]

“COMING UP DIRTY”: DRUG TESTING
AT THE WORK PLACE

TERRY A. HALBERT*

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I. INTRODUCTION

Barbara Luck worked for Southern Pacific Transportation Company in their San Francisco office as a computer programmer.¹ Over her more than six years of employment, her employer

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Other articles by Professor Halbert include *The First Amendment in the Workplace: An Analysis & Call For Reform*, 17 SETON HALL L. REV. 42 (1987) and *The Cost of Scruples: A Call For Common Law Protection for the Professional Whistleblower*, 10 NOVA L.J. 1 (1985).

1. See *Luck v. Southern Pac. Transp. Co.*, C 84-3-230 (Calif. Super. Ct., S.F. Cty. 1986) The facts of the case were taken from memoranda filed in the *Luck*

had repeatedly complimented her on excellent work. She worked at a desk; none of her duties involved the actual operation of trains.

On the morning of July 11, 1985, without notice of any kind, Ms. Luck was told by her superiors to sign a medical consent form, to go into a company bathroom, to urinate into a bottle and to give the bottle to a company nurse. She was told that her urine sample would be tested for the presence of drugs, alcohol or medication.

Apart from the fact that she was three and one-half months pregnant at the time, and had told very few people at work, Ms. Luck claimed she had nothing to hide. Yet she was unwilling to sign the consent form because she believed Southern Pacific's demands were unjustifiable and in violation of her personal rights. When she refused to be tested, she was fired.

Urinalysis drug testing of employees has lately become very popular, and appears to be on the increase.² As of this writing, statistics indicate that an estimated four to five million people undergo such screening each year.³ The U.S. military, which began its program in 1981 conducts about half of the total tests administered in this country;⁴ many public employees are subjected to them;⁵ and President Reagan's Commission on Organized Crime

litigation. See Memorandum in opposition to Defendant's Demurrer, Luck v. Southern Pac. Transp. Co., C 84-3-230 (Calif. Super. Ct., S.F. Cty. 1986). On October 30, 1987, the jury ordered Southern Pacific to pay Ms. Luck \$484,000.

2. Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employees and Workers*, 8 NAT'L L.J. 29, April 7, 1986, at 1, col. 1. For example, drug screening is being conducted by one fourth of the leading U.S. industrial companies. *Id.* Twenty-five percent of all Fortune 500 companies employ some form of drug testing program. *Id.* at 23, col. 3.

Nearly one third of the "Fortune 500" companies used some form of drug testing in 1985. Marty, Miller, Cohn, Raine & Canoll, *Trying to Say No*, NEWSWEEK, Aug. 11, 1986, at 17 (hereinafter "Marty"). The U.S. Chamber of Commerce estimated that more than half of the Fortune 500 companies will have drug screening programs in place by the end of 1987. *Drug Tests Are Often Unreliable*, *Health Official Tells House Panel*, The Philadelphia Inquirer, June 11, 1987, at 2, col. 1.

3. Stille, *supra* note 2, at 24, col. 1.

4. *Id.* at 1, col. 1.

5. *Id.* at 22, col. 1. For example, in May of 1986 the Boston police commissioner called for mandatory testing of all officers. And since January 1985, job applicants at the U.S. postal service in Philadelphia have been screened by urinalysis. According to Jim Burke, president of the American Postal Workers' Union in Philadelphia, 500 prospective employees have already been rejected on the basis of their test results. See *Alcohol and Drug Testing, A Workshop on Invasion of Privacy*, sponsored by Philaposh and the Workers' Rights Law Project, Philadelphia, May 22, 1986. For a detailed discussion of the intrusiveness

recently called for testing of all federal workers.⁶ But urinalysis is hardly confined to government employment; nearly one third of the Fortune 500 companies use testing programs of some kind.⁷

According to the United States Chamber of Commerce, substance abuse by workers cost employers some \$60 billion a year and is clearly an enormous problem.⁸ What is considerably less clear is whether urinalysis makes sense as a mechanism for weeding out drug-abusing workers. This article focuses on the testing of personnel like Barbara Luck, who are non-unionized, private employees. The article presents only a topical survey of certain issues central to a thorough resolution of the thorny and sensitive problem of drug testing at the workplace, including the present forms of legal resistance available to workers under the common law, potential avenues of constitutional redress⁹ and a more focused survey of the competing, yet often overlapping interests of employers, employees and the general public. Finally, the outline of a legislative scheme is suggested which would best serve the strongest of these interests.

II. POTENTIAL REDRESS FOR EMPLOYEES AT COMMON LAW

How might the common law provide redress for employees who feel that they have been legally injured by submission to

of drug testing techniques and potential constitutional issues, see *infra* notes 45-97 and accompanying text.

6. For a discussion of the recommendations of the President's Commission on the use of drug testing in the workplace, see *Panel Members Say They Weren't Given Final Report*, N.Y. Times, March 6, 1986, at 1, col. 1; *Crime Panel Head Qualifies Support For Drug Testing*, Wall St. J., March 5, 1986, at 12, col. 2; *U.S. Panel Urges Testing Workers For Use of Drugs*, N.Y. Times, March 4, 1986, at 1, col. 1; Kaufman, *The Battle Over Drug Testing*, N.Y. Times, Oct. 19, 1986 (Magazine), at 92 (authored by Irving R. Kaufman, a judge on the United States Court of Appeals for the Second Circuit who also served as chairman of the President's Commission on Organized Crime). See also *Reagan Administration Drug Testing Program Pro & Con*, CONG. DIG. 131 (May 1987).

7. Stille, *supra* note 2, at 23, col. 1. For example, aerospace companies, airlines and railroads were the first members of the corporate community to institute drug testing of their employees. *Id.* They were joined next by AT&T, IBM, General Motors, Ford and DuPont. *Id.*

8. Such figures reflect lost productivity, higher health insurance and workers' compensation costs, the expense of replacing and training new employees, property damage and theft of property. *Id.*

9. Although constitutional restrictions are mainly effective against governmental, as opposed to private employers, the article does survey this body of law and the possibility of constitutional attacks on drug testing by private employees is briefly entertained. For a discussion of these issues, see *infra* notes 45-97 and accompanying text. For a related discussion of potential protections for employees under state constitutions, see *infra* notes 98-110 and accompanying text.

urinalysis? The common law evolves in response to cultural and economic forces, but very slowly, in part because of the effects of *stare decisis* and the unwillingness of most judges to second guess legislative intent. Nevertheless, the common law does provide aggrieved employees with several possible causes of action. The following discussion briefly catalogues several potential tort actions available to the employee along with some observations concerning the difficulty of succeeding under current common law doctrine.

A. Defamation

A defamation action might lie for an employee whose reputation was stigmatized by a mistaken indication of drug use—the so-called “false positive.” For example in *Houston Belt & Terminal Ry. & Co. v. Wherry*,¹⁰ Joe Wherry sued his former boss for libel, alleging that he had been branded as a recovering heroin addict because of test results which (mistakenly) recorded a trace of methadone in his system.¹¹ An award of \$150,000 in compensatory damages and \$50,000 in punitive was affirmed on appeal.¹² It should be noted, however, that an action in defamation can only be brought *after* a test has been administered and *after* the employee has already been wrongfully labelled by the false result. Furthermore, an employee must show that the employee communicated the inaccurate test results to at least one other person, besides the worker.¹³ And employers may argue in defense that they had an interest, namely, identifying substance-abusers in their employ.¹⁴ For these reasons, the success of a defamation suit in the context of employee drug testing appears to be limited to situations in which employee records (containing inaccuracies or lies) are passed on to third parties such as creditors, or insurance companies, or other employers.¹⁵

10. 548 S.W.2d 743 (Tex. Civ. App. 1976), *appeal dismissed*, 434 U.S. 962 (1977). The railroad issued a written report indicating the false results of Wherry's urinalysis test after an accident in which Wherry was involved. *Id.* at 745. In his suit against the railroad, Wherry's recovery was grounded on evidence that the railroad had knowingly published false statements which implied that Wherry was a drug addict. *Id.* at 755.

11. *Id.* at 745.

12. *See id.*

13. W. PROSSER, *THE LAW OF TORTS*, § 113, at 797 (5th ed. 1984) (“[S]ince the interest protected is that of reputation, it is essential to tort liability . . . that the defamation be communicated to someone other than the person defamed.”).

14. Lehr & Middlebrooks, *Workplace Privacy Issues and Employer Screening Policies*, 11 EMP. REL. L.J. 407 (1985-86).

15. *See Note, Privacy Rights in Medical Records*, 13 FORDHAM URB. L.J. 165,

B. *Invasion of Privacy*

Unlike defamation, an employer's statements need not be false in order to trigger the tort of invasion of privacy. However, other restrictive criteria make the privacy tort a difficult action to sustain for the employee ordered to undergo urinalysis.

Of the four torts¹⁶ subsumed under invasion of privacy, two might apply here: intrusion¹⁷ and public disclosure of private facts.¹⁸ Intrusion involves moving in on another person's solitude in a manner considered highly offensive. Courts have used reasoning similar to that underlying the tort of intrusion to enjoin unauthorized prying into a plaintiff's bank account,¹⁹ and to block compulsory blood testing.²⁰ In intrusion cases courts focus on two main factors: (1) the obnoxiousness of the means used to intrude, i.e., whether it is an accepted means of ascertaining relevant information, and (2) the defendant's reason for intruding.²¹

179 (1985). Analogous to the use of defamation in drug testing situations is its use in cases involving disclosure of sensitive medical records. *Id.* In such cases, the focus of the defamation action is on the disclosure of confidential records and not on the records themselves. *Id.*; see also Duffy, *Privacy vs. Disclosure: Balancing Employee and Employer Rights*, 7 EMP. REL. L.J. 594, 599 (1982). Professor Duffy notes that, although the threat of litigating a defamation action causes concern among employers, the tort affords little actual protection for employee privacy, since employers have a qualified privilege to divulge information, in good faith, in response to legitimate inquiry. Duffy, *supra*, at 599 (citing W. PROSSER, THE LAW OF TORTS § 106 at 737 (4th ed. 1971)).

16. See RESTATEMENT (SECOND) OF TORTS, § 652B-E (1977) (Intrusion upon Seclusion, Appropriation of Name or Likeness, Publicity Placing Person in False Light and Publicity Given to Private Life).

17. *Id.* at § 652B. Section 652B provides:

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.

Id.

18. *Id.* at § 652D. Section 652D provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Id.

19. See *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34, 36 (1929) (intrusion into plaintiffs' bank records enjoined on theory that records are property rights deserving of protection from intrusive disclosure); *Zimmerman v. Wilson*, 105 F.2d 583, 584 (3d Cir. 1939) (intrusion into tax records for no demonstrable cause was enjoined in part, as invasion of "the natural law of privacy").

20. *Bednarik v. Bednarik*, 18 N.J. Misc. 633, 16 A.2d 80 (1940) (subjecting wife and child to blood test against their will would violate right of personal privacy).

21. See PROSSER, *supra* note 11, § 117, at 856.

In the typical drug testing scenario, most urine samples are taken under uniform, regulated conditions, and the purpose for the testing is important. Therefore, it is unlikely that the procedure would be characterized as intrusive in the above sense.

As for the tort of disclosure, communication of the information must be public, not private.²² In other words, unless the results of urinalysis were posted on a bulletin board or announced to a group of employees, this cause of action would be flawed. Perhaps an even greater obstacle, the Second Restatement of Torts, makes legitimate public interest in the information disclosed a viable defense to the *prima facie* case.²³

Both forms of invasion of privacy are vulnerable to the claim that the employee *consented* to the test. Arguably, though, there can be no genuine consent between employer and employee given the power the former has over the latter. An analogous point was made by the New Jersey Supreme Court in *State v. Community Distributors, Inc.*²⁴ *Community Distributors* was a criminal case against a company that gave lie-detector tests to its employees after obtaining the employees' signed consent.²⁵ Although state law made submission to a polygraph test as a condition of employment a criminal offense, the company argued that it had acted with the voluntary cooperation of its workers.²⁶ Nevertheless, the court held that such a submission was an invasion of privacy²⁷ finding no "assurance of true voluntariness [because of] economic compulsion."²⁸ An even more far reaching result was reached by the Florida District Court of Appeals in *City of Palm*

22. *Id.*

23. RESTATEMENT (SECOND) OF TORTS § 652D comment d; see *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 426 U.S. 998, *on remand* 424 F.Supp. 1286 (S.D. Cal. 1976) (privilege to disclose extends to all matters customarily regarded as news).

24. 64 N.J. 479, 317 A.2d 697 (1974). Plaintiff employees were asked to sign consent forms which stated that the employees were not forced to take a lie detector test as a condition of employment. *Id.* at 481, 317 A.2d at 698. Based upon the test results, some of the employees were dismissed. *Id.* The state charged the employer with violating a New Jersey statute which forbid employers from requiring lie detector tests as a condition of employment. *Id.* at 482, 317 A.2d at 698. Notwithstanding the signed consent forms, the New Jersey Supreme Court held that because employees would view the test as a condition of employment, *Community Distributors* had violated the state statute. *Id.*, 317 A.2d at 698.

25. *Id.* at 481, 317 A.2d at 698.

26. *Id.* at 482, 317 A.2d at 698.

27. *Id.* at 489, 317 A.2d at 702.

28. *Id.* at 484, 317 A.2d at 699.

Bay v. Bauman.²⁹ In reviewing an injunction requiring the city to refrain from random drug testing of its police officers and firefighters, the court held that random urinalysis was unconstitutional.³⁰ Such random testing absent a reasonable suspicion of drug abuse was held to violate the individual's fourth amendment expectation of privacy in the "discharge and disposition of his urine."³¹ The court also noted that the signing of a "notice" under threat of disciplinary action made the employees' "consent" merely illusory.³²

C. *Wrongful Dismissal*

A potential path of redress for the employee who is fired for refusing to submit to urinalysis may be an action for wrongful dismissal. However, the circumscribed scope of this tort presents certain limitations. In the absence of a contract expressly stating the length of employment, the general rule is that an employee can be fired at any time for any reason. This is the doctrine of "employment-at-will."³³ Some 65% of American workers are presently at its mercy,³⁴ but it has come under increasing attack in the last few decades.³⁵

One sign of the assault on the doctrine is the gradual recognition of a cause of action for wrongful discharge where the firing

29. 475 So. 2d 1322, 1324 (Fla. App. 1985).

30. *Id.* at 1325.

31. *Id.* at 1324.

32. *Id.* at 1324-25.

33. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). For an overview of the development of the employment-at-will doctrine, see H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4 (2d ed. 1987).

34. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, n.2 (1980) (noting that approximately 60% of American workers are hired on an at will basis, 22% are unionized and 15% are federal or state employees).

35. See, e.g., Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410-13 (1967); Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 315-18 (1971); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484-91 (1976); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 780-85 (1977); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1942-47 (1983); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1446-54 (1975); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal In Aid of Professional Ethics*, 28 VAND. L. REV. 805, 822-29 (1975).

of an employee violates a clear public policy. The difficulty lies in defining public policy, "the unruly horse of the law."

Public policy is sometimes based on the existence of a statute that concerns employment-related issues. For example, it is illegal to force an employee (or a prospective employee) to take a polygraph test in Pennsylvania.³⁶ Thus, in *Perks v. Firestone*,³⁷ a worker who was fired for refusing to submit to a polygraph test, successfully brought a wrongful discharge claim, because the court had no trouble identifying a connection with a clearly ascertained public policy.³⁸ If legislation existed forbidding drug testing as a condition of employment, wrongful dismissal could become a viable remedy for employees who are fired for refusing to submit to urinalysis. At this writing, however, no state has enacted such legislation. Only California is considering legislation on the subject, and its proposal would merely regulate, not prohibit drug testing at the workplace.³⁹

Another interesting potential source of public policy is the federal Constitution. What if termination of an employee (or a failure to hire) contravenes important rights attaching to the employee under the Constitution itself? In 1983, the United States Court of Appeals for the Third Circuit dealt with this issue in *Novosel v. Nationwide Insurance Co.*⁴⁰ In *Novosel* a regional manager was fired for refusing to lobby in favor of the No-Fault Reform bill.⁴¹ The Third Circuit panel was unanimous: the employee's refusal was based on his political beliefs, and therefore, his discharge from the company violated public policy as expressed in the federal and state first amendments, namely, the employee's first amendment freedom to lobby or not as he chooses.⁴² This

36. 18 PA. CONS. STAT. ANN. § 7321. Eleven other jurisdictions have enacted such prohibitions. Hartsfield, *Polygraphs*, 36 LAB. L.J. 817, 832-34 (Nov. 1985). For a list of statutes regulating the use of polygraph testing by employers, see *id.*

37. 611 F.2d 1363 (3d Cir. 1979).

38. *Id.* at 1364-65. Interestingly, the *Parks* court, in discussing the policy behind the Pennsylvania polygraph test statute referred to in the New Jersey Supreme Court's decision in *State v. Community Distributors Inc.* *Id.* at 1365-66 (citing *State v. Community Distrib., Inc.*, 64 N.J. 479, 317 A.2d 697 (1974)). The policy behind eschewing such tests as conditions of employment involves a lack of inherent accuracy, inadequate procedural safeguards in interpreting results and lack of assurance regarding the true voluntariness of consenting employee. *Id.*

39. Marty, *supra* note 2.

40. 721 F.2d 894 (3d Cir. 1983).

41. *Id.* at 896.

42. *Id.* at 900.

case is somewhat unique in its recognition of a constitutional basis for the public policy exception where a *private* employer was the defendant. The Third Circuit made *indirect* use of constitutional principle, channeling the first amendment through the public policy exception to vitiate in a particular instance, the employment-at-will doctrine. But, as Judge Becker pointed out in his dissent from the court's denial of a re-hearing en banc, there was no discernible government involvement—no state action—in *Novosel*.⁴³ As appealing a possibility as this may be, authority supporting the public policy approach to wrongful dismissal actions is sparse.⁴⁴

III. AVENUES OF POTENTIAL CONSTITUTIONAL REDRESS

A. *Public Employees*

The fourth amendment's prohibition against unreasonable search and seizure may provide an appropriate method of challenging urinalysis drug testing under certain circumstances.⁴⁵ However, there are considerable problems with this approach.

The United States Supreme Court has not yet considered a case involving urine sample evidence, but it has dealt with "body fluid" searches under the fourth amendment as applied to the states under the due process clause of the fourteenth amendment. The extremes in analysis are perhaps best shown by *Rochin v. California*⁴⁶ and *Schmerber v. California*.⁴⁷ In *Rochin*, police broke into the defendant's bedroom just in time to see him swallow capsules which they suspected contained illegal drugs.⁴⁸ He was taken to a hospital and had his stomach pumped.⁴⁹ The United States Supreme Court reversed his conviction, finding that the search contravened the dictates of the due process clause of the four-

43. *Id.* at 903. (J., Becker, dissenting)

44. See H. PERRITT, *supra* note 33, § 5.12, at 268 n.96 (survey of jurisdictions which have considered the possibility of public policy tort recovery based on constitutional rights).

45. For a discussion of the fourth amendment as a constitutional basis for challenging drug testing, see McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1460-66 (1987); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward A General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 212-15 (1986).

46. 342 U.S. 165 (1952) (stomach pumping to obtain evidence of illegal drugs violated due process clause of fourth amendment).

47. 384 U.S. 757 (1966) (blood test to obtain evidence of intoxication held reasonable search).

48. *Rochin*, 342 U.S. at 166.

49. *Id.*

teenth amendment.⁵⁰ The Court said:

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.⁵¹

Later, in *Schmerber*, a blood sample was taken from a defendant charged with drunk driving.⁵² In *Schmerber*, however, although the petitioner claimed a fourth amendment violation, the search was held to be “reasonable” under the circumstances.⁵³ In so holding, the United States Supreme Court considered (1) the justification for initiating the blood test and (2) the test itself—whether or not it was reliable, unduly risky or traumatic, and the manner in which it was conducted.⁵⁴ Specifically, the Court noted that *Schmerber* had crossed the road and driven into a tree on the way home from a tavern.⁵⁵ The blood test was administered in a hospital, in a reasonable fashion.⁵⁶ Moreover, since alcohol metabolizes so quickly there was really no time for the police to get a warrant, and, under these facts, none was necessary. The Court did state, however, that

the interests of human dignity and privacy which the fourth amendment protects forbid any such intrusions (beneath the body's surface) on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found,

50. *Id.* at 176.

51. *Id.* at 172.

52. *Schmerber*, 384 U.S. at 758.

53. *Id.* at 759.

54. *Id.* at 770-71.

55. *Id.* at 758.

56. *Id.*

these fundamental interests require law officers to suffer the risk that such evidence may disappear.⁵⁷

Where does urine testing fit along the spectrum of body search possibilities? Unlike the stomach contents of *Rochin* or the blood of *Schmerber*, urine is a substance which is discharged regularly by the human organism. Could it be said, therefore, that a person has no "reasonable expectation of privacy in the content of his urine?" If that were so, urine testing would not be a "search" and would not trigger the fourth amendment. For example, a person can have no "reasonable expectation of privacy" in such items as his voice exemplar,⁵⁸ his handwriting,⁵⁹ or his fingerprints.⁶⁰ How similar to these kinds of samplings is urinalysis? The federal district court in *McDonell v. Hunter*⁶¹ concluded there is very little similarity at all. Acknowledging that no intrusion into the body is necessary to seize urine, the court nevertheless recognized that

urine is discharged . . . under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. 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 and physiological secrets it holds, except as part of a medical examination.⁶²

57. *Id.* at 769-70; *cf.* *People v. Williams*, 192 Colo. 249, 257-59, 557 P.2d 399, 405-07 (1976) (citing *Schmerber* to support proposition that blood and urine testing of arrestees will not pass constitutional muster unless there is clear indication that desired evidence will result).

58. *United States v. Dionisio*, 410 U.S. 1, 15 (1973).

59. *United States v. Mara*, 410 U.S. 19, 21 (1973).

60. *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

61. 612 F. Supp. 1122 (D.C. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

62. *McDonell*, 612 F. Supp. at 1127. *McDonell* raises the question of whether one can assert reasonable expectation of privacy when a public employer has announced that urinalysis will be, or might be, conducted. In *Smith v. Maryland*, the Supreme Court held that a defendant had no reasonable expectation of privacy in a list of numbers dialed from his telephone (garnered by police by use of a pen register) since he must have known that the telephone company had access to such information. 422 U.S. 735, 745 (1979). Similarly, in *United States v. Miller*, it was held that defendant's bank records were not entitled to privacy protection since the bank's employees had access to them. 425 U.S. 435, 443 (1976). Arguing from the reasoning in *Smith* and *Miller*, a public employer could assert that the announced existence of its testing policy removed from its workers any legitimate expectation of privacy in the chemical composition of their urine.

The *McDonell* court followed this reasoning through and categorized urinalysis as a search under the fourth amendment.⁶³

Assuming that urine testing is a search, is it “unreasonable” and, therefore, unconstitutional? The few courts that have considered this issue have treated it variously.⁶⁴ In *Allen v. City of Marietta*,⁶⁵ employees who worked with high voltage electricity were suspected of being drug abusers, and the employer hired a detective to observe them.⁶⁶ After a two-year investigation, six suspected employees were told either to resign or submit to urinalysis.⁶⁷ They opted to be tested, tested positive, and were fired.⁶⁸ The searches were held to be reasonable.⁶⁹ Applying a balancing test, the court found that the employer’s legitimate concern with the employees’ behavior was so relevant to job performance as to weigh more heavily than the workers’ expectation of privacy.⁷⁰

Similarly, in *Division 241 Amalgamated Transit Union v. Suscy*,⁷¹ a 1976 Seventh Circuit case, a bus driver’s union challenged a transit authority’s requirement that the drivers submit to blood and urine tests after being involved in a serious accident or when suspected of being under the influence of drugs or alcohol.⁷² Again, balancing the workers’ privacy interest against the transit authority’s interest in protecting public safety, the rules were ad-

63. *McDonell*, 612 F. Supp. at 1127.

64. The first wave of cases has been decided at the district court level, and a few have reached the circuit courts. For an updated list of relevant decisions, see Joseph, *Fourth Amendment Implications of Public Sector Workplace Drugtesting*, 11 NOVA L. REV. 605, 641, n.114 (1986-87).

65. 601 F.Supp. 482 (N.D. Ga. 1985).

66. *Id.* at 484.

67. *Id.*

68. *Id.*

69. *Id.* at 495.

70. *Id.* at 488-91. The court invoked an exception to the warrant requirement for searches of government employees. *Id.* at 489. It balanced the employees’ privacy expectations against the asserted justifications for searching, noting that the government was not acting in its role as law enforcer, but as employer, with the right to conduct investigations of work-related misconduct by its employees. *Id.* at 491. Consequently, employees, knowing their employer had such investigatory rights, had lowered privacy expectations. *Id.* This was the same analysis used in *O’Connor v. Ortega*, in which the United States Supreme Court held that the search of a public employee’s office should be judged by a reasonableness standard, requiring neither a warrant, nor probable cause. *Id.* at 1497 (citing *O’Connor v. Ortega*, 107 S.Ct. 1492 (1987)). Noting that the inception and scope of such a search must be reasonable, the Court characterized the government’s interest in an efficient workplace and the employees’ lowered privacy expectations as “far less than those found at home.” *Id.* at 1502.

71. 538 F.2d 1264 (7th Cir.), *cert. denied*, 420 U.S. 1029 (1976).

72. *Id.* at 1265-66.

judged reasonable under the fourth amendment.⁷³ Specifically, the court noted that the tests were performed in hospitals, and only on particular employees.⁷⁴

The cases discussed above involved testing of particular employees, who either behaved suspiciously or had previously been involved in an accident. *Random* drug testing raises additional issues.

In a few cases, random testing has been held to be unreasonable. For example, in *Capua v. City of Plainfield*,⁷⁵ a New Jersey municipality carried out mandatory, surprise drug testing of its entire fire fighting force.⁷⁶ Federal district Judge Sarokin found that the municipality's actions violated the fourth amendment since it had no "reasonable suspicion" of any of the 103 firefighters before it began the testing.⁷⁷ Judge Sarokin described in some detail the rather repugnant method involved: after employees had been awakened at 7:00 a.m. one morning, they were locked in the fire station and ordered to give urine specimens while under observation by bonded testing agents.⁷⁸ The court stated: "The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest."⁷⁹

Other courts have agreed that random testing of police and firefighters,⁸⁰ of school bus attendants,⁸¹ and of probationary school teachers⁸² would be unreasonable in the absence of some form of particularized suspicion. While these cases seem to indicate an emerging trend, some recent circuit court decisions stand outside of it, and may even represent a counter-trend.

Random testing was upheld by the United States Court of

73. *Id.* at 1266-67.

74. *Id.* at 1267.

75. 643 F. Supp. 1507 (D.N.J. 1986).

76. *Id.* at 1511.

77. *Id.* at 1516.

78. *Id.* at 1511.

79. *Id.* at 1517.

80. *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) (upholding testing for police officers by construing regulation to require reasonable suspicion of drug use); *City v. Bauman*, 475 So. 2d 1322 (Fla. App. 1985).

81. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986).

82. *Patchoque-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986), *aff'd*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

Appeals for the Third Circuit in 1986 in *Shoemaker v. Handel*⁸³. There, jockeys challenged regulations of the New Jersey State Racing Commission which required them to undergo drug testing at the track.⁸⁴ The court described the horse racing industry as “highly regulated,” a fact which necessarily reduced the jockeys’ legitimate expectations of privacy.⁸⁵ It also identified a strong state interest “in assuring the public of the integrity of the persons engaged in the . . . industry. Public confidence forms the foundation for the success of an industry based on wagering.”⁸⁶ In addition, the tests themselves were carefully regulated to avoid false positives, to avoid wrongful disclosure of results, and to give the jockeys a mechanism for appealing those results.⁸⁷

A fairly elaborate set of procedural safeguards evidently made a favorable impression on the Fifth Circuit in *National Treasury Employees v. Von Raab*, decided on April 22, 1987.⁸⁸ Reversing the district court, Judge Rubin found that random testing of customs service employees was reasonable under the fourth amendment.⁸⁹ He described in detail the manner in which this program

83. 795 F.2d 1136 (3d. Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

84. *Id.* at 1137.

85. *Id.* at 1141.

86. *Id.* at 1141-42. What does the court mean by “honest?” Is it referring to the public’s interest in keeping horse racing free from organized crime? Is it suggesting that jockeys who use drugs are jockeys who deal with organized crime or who can be bought by organized crime? Such a series of suppositions would seem to be irrationally strung together. In order to rig a race, several, if not most of the jockeys would have to be blackmailed—an incredible scenario. The suggestion is reminiscent of Baseball Commissioner Ueberroth’s recent justification for proposed compulsory drug testing of all major league players as reported in the *New Yorker*:

Mr. Ueberroth had also raised the spectre of cocaine—afflicted players being blackmailed by their underworld suppliers and presumably forced to throw games at the behest of crooked gamblers, but this scare seems to have expired from unlikelihood; fixing the 1919 World Series required the mob to bribe seven or eight doltish, vastly underpaid members of the Chicago White Sox, and even that trick almost misfired.

Angell, *Reflections: Three Cheers For Keith*, THE NEW YORKER, May 5, 1986, at 55.

87. *Shoemaker*, 795 F.2d at 1138-40. The holding in *Shoemaker* appears to rest on its unique context; that of legalized gambling. *See id.* Similarly, in *McDonnell v. Hunter*, the Eighth Circuit permitted random testing of prison guards who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons. 809 F.2d 1302, 1308 (8th Cir. 1987). In that case, the court evaluated blanket testing in a setting in which the state’s interest in safeguarding prison security, was particularly strong. *Id.* Indeed, other courts have upheld random tests of prisoners. *See, e.g.*, *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986); *Storms v. Coughlin*, 600 F. Supp. 1214 (S.D.N.Y. 1984).

88. 816 F.2d 170 (5th Cir. 1987).

89. *Id.* at 173.

was executed⁹⁰—it was almost gentle in comparison to *Capua*. Positive samples were doublechecked and could be independently tested at a laboratory of the employee's choice, for example.⁹¹ Only workers tentatively selected for certain sensitive jobs—those that directly involved the interdiction of smuggling, the carrying of a firearm, or access to classified information—would be tested.⁹² Balancing the need for the search against its invasiveness, Judge Rubin stated that, although “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the [F]ourth [A]mendment imposes no irreducible requirement of such suspicion.”⁹³

Shoemaker, Von Raab, and McDonell v. Hunter, an Eighth Circuit decision involving the random testing of prison guards,⁹⁴ point to a developing willingness to allow random drug testing in specific contexts in which the public's interest in a drug-free workplace is particularly strong. In the wake of such tragic events as the January 4, 1987 Amtrak-Conrail collision, which killed sixteen people, and after which two Conrail crewmen tested positive for marijuana,⁹⁵ there is more and more pressure to use urinalysis as a preventative measure. On March 10, 1987, for example, a bill that would require random testing of aviation, rail, trucking and bus company employees was approved by the Senate Commerce Committee.⁹⁶ It would not be surprising if the judiciary responded along similar lines, by increasing the number of contexts in which mass testing would be permitted, in the interest of public safety.⁹⁷

B. *State Constitutions As a Source of Protection for Employees*

The federal constitutional attack on drug testing is severely limited by the state action requirement. When private employers

90. *Id.* at 174.

91. *Id.*

92. *Id.* at 173-74.

93. *Id.* at 176 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)).

94. *McDonell*, 809 F.2d 1302 (8th Cir. 1987).

95. See *Amtrak Official Says He Was Wrong to Let Crew In Crash Delay Drug Tests*, *The Philadelphia Inquirer*, April 3, 1987, at 2, col. 1.

96. *Panel Votes Transport-Industry Drug Tests*, *The Philadelphia Inquirer*, March 11, 1987, at 3, col. 2.

97. See, e.g., *Rushton v. Nebraska Pub. Power*, No. CV 86-L308 (D. Neb. Feb. 23, 1986)(random drug testing permitted of nuclear plant employees); *National Assoc. of Air Traffic Specialists v. Dole*, 2 IER Cases 68 (D. Alaska 1987) (random drug testing of air traffic controllers permitted).

institute such programs, they do not violate the Constitution, since it only restricts *governmental* activity.

A fascinating, though underused, end-run around this limitation does exist. While the federal judiciary interprets the federal constitution to set minimum standards for American citizens' civil rights, state courts are free to interpret state constitutions more expansively, giving state citizens more rights. In some contexts, this freedom has led state courts to do away with the state action requirement, and to make private entities cleave to constitutional standards.⁹⁸

The so-called "fundamental right to privacy" under the federal Constitution, encompassing the right of married couples to have access to birth control⁹⁹ and a woman's right to abortion,¹⁰⁰ has been perceived by the Supreme Court only in a "penumbra" surrounding the first, third, fourth, fifth, ninth and fourteenth amendments.¹⁰¹ Ten state constitutions have expressly protected the privacy right. For example, the privacy provisions of the constitutions of Alaska, Montana and California are not expressly limited to protection from government interference.¹⁰² However, Alaska's provision has been interpreted to restrict only governmental intrusion,¹⁰³ and Montana's privacy provision, at one time applicable to private defendants,¹⁰⁴ has recently been restricted

98. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). For cases preventing private abridgement of first amendment rights using the state constitutional route, see, e.g., *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when centers are privately owned.), *aff'd*, 447 U.S. 74 (1980); *State v. Schmid*, 84 N.J. 535, 542-45, 423 A.2d 615, 626-28 (1980) (protecting distribution of pamphlets on campus of Princeton University, private university, under New Jersey state constitution) *Cf. Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1143 (2d Cir. 1973) (first amendment not readily met in case of private educational institution); *Cologne v. Westfarms Assoc.*, 37 Conn. Supp. 90, 110-17, 442 A.2d 471, 477-82 (1982) (Connecticut constitution protects shopping center solicitations from private interference); *Alderwood v. Washington Env't. Council*, 96 Wash. 2d 230, 239-43, 635 P.2d 108, 114-16 (1981) (using state constitution to protect persons signing initiatives from interference by private owner of shopping center).

99. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

101. *Griswold*, 381 U.S. at 484.

102. See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. 2 § 8; CAL. CONST. art. I § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. 1, § 5; ILL. CONST. art. 1, § 5, 12; LA. CONST. art. 1, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. 4, § 10; WASH. CONST. art. 1, § 7.

103. *Allred v. State*, 554 P.2d 411, 416 (Alaska 1976).

104. See, e.g., *State v. Hyem*, 630 P.2d 202 (Mont. 1981) (two private individuals and one real estate agent); *State v. Van Haele*, 199 Mont. 522, 649 P.2d

by a state action requirement.¹⁰⁵

California is another story. In *White v. Davis*,¹⁰⁶ Judge Trobriner used the state privacy provision to label police surveillance of UCLA classrooms unconstitutional.¹⁰⁷ Although in that case there certainly was *government* involvement, Judge Trobriner quoted from the election brochure drafted by proponents of California's article 1, section 1 (a form of legislative history), which focused on the individual's interest in "[p]revent[ing] government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us."¹⁰⁸ In another case, the same statutory provision was actually directed at private wrongdoing, where a group of doctors had allegedly waged a campaign of harrasment against an abortion clinic.¹⁰⁹

This is one of several tacks that Barbara Luck, the plaintiff in the case against Southern Pacific, successfully took. She argued that random testing of employees in non-safety-related jobs amounts to the "collecting and stockpiling of unnecessary information" that the California constitution aims to prevent.¹¹⁰

IV. "CONSTITUTIONALIZING" THE CORPORATION AS AN UNTAPPED SOURCE OF EMPLOYEE PROTECTION

An argument can be made that the public/private distinction is increasingly inappropriate, given the tremendous power that is wielded by large corporations in American society.¹¹¹ That these giants have enormous political and social influence is a fact that

1311 (1982) (storage company managers); *State v. Helfrich*, 183 Mont. 484, 600 P.2d 816 (1979)(neighbor); *State v. Brecht*, 157 Mont. 204, 485 P.2d 47 (1971) (sister).

105. *State v. Long*, 700 P.2d 153, 156 (Mont. 1985) (reversing previously articulated rule applying state constitutional privacy provision to private individuals and now requiring state action).

106. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

107. *Id.* at 773-77, 533 P.2d at 232-35, 120 Cal. Rptr. at 104-06.

108. *Id.* at 774, 533 P.2d at 233-34, 120 Cal. Rptr. at 105. (emphasis added).

109. *Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y*, 557 F. Supp. 1190, 1202 (E.D. Cal. 1983).

110. Memorandum in Opposition to Defendant's Demurrer, at 15. *Luck v. Southern Pac. Transp. Co.*, C 84-3-230 (1986).

111. For an excellent series of articles on the public/private distinction in American jurisprudence, see *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289-1608 (1982) including Klare, *The Public/Private Distinction in Labor Law*, *Id.* at 1361-75; Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?* *Id.* at 1445-48.

has been noted and analyzed for decades.¹¹² Some commentators have¹¹³ viewed large corporations as quasi-governments, but governments with a difference: corporations are basically unaccountable to their constituents, i.e., their shareholders. As one scholar put it: “The official doctrine that the corporate directors are responsible to the stockholders is so irrelevant as to be ridiculous. The directors are, if reality is considered, effectively responsible to management and management tends to be self-perpetuating.”¹¹⁴ Whereas the power of government is constitutionally limited by a system of checks and balances, by the doctrine of federalism, by the Bill of Rights, and by the electoral process, the power of private industry is, in the opinion of many, unchecked and unresponsive to either its shareholders or to the general public.¹¹⁵

As long ago as 1876, the United States Supreme Court acknowledged that there might be reason to curb corporate behavior where it was “affected with a public interest,” as when it upheld rate regulation of grain storage warehouses that were a virtual monopoly.¹¹⁶ However, this particular route to control of private enterprise was not developed much further by the Court.¹¹⁷ Instead, it moved full-tilt into the period known as the *Lochner*-era, during which legislative attempts to limit the power of private industry were often struck down as violations of substantive due process.¹¹⁸

In fact, as the courts backed off, the ownership of productive power in America grew increasingly concentrated. From 1880 to 1920, because of such devices as vertical and horizontal corporate expansion, merger, and the use of trusts and holding companies,

112. See, e.g., A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); R. BRADY, *BUSINESS AS A SYSTEM OF POWER* (1943); R. HARRISON, *PLURALISM AND CORPORATISM: THE POLITICAL EVOLUTION OF MODERN DEMOCRACIES* (1980); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); A. MILLER, *THE MODERN CORPORATE STATE* (1976); R. NADER & M. GREEN, *CORPORATE POWER IN AMERICA* (1973).

113. G. MCCONNELL, *supra* note 112, at 250 (quoting A. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 51 (1954)).

114. Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 *HASTINGS L.J.* 1287 (1979).

115. *Id.* at 1318-20.

116. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

117. See, e.g., *The Railroad Comm'n Cases*, 116 U.S. 307 (1886) (reaffirming *Munn*, upholding state regulation of railroad tariffs).

118. The archetypical case was *Lochner v. New York*, 198 U.S. 45 (1905). During the period between 1897 and 1937 the Court was often willing to invalidate economic regulation of private industry by means of the due process clause.

there was a rapid consolidation of corporate power.¹¹⁹ By 1937, 394 corporations, or less than one-tenth of 1% of all corporations reporting for federal tax purposes, owned about 45% of all corporate assets.¹²⁰ At the same time, the proportion of Americans dependent on wages from these companies grew. Between 1860 and 1920, for instance, non-agricultural employment rose from 41% to 73% of all gainful employment.¹²¹ And a higher and higher percentage of people worked for the few largest companies. By 1980, over 4.6 million workers, or nearly 28.7% of all "Fortune 500" employees had jobs with the top twenty "Fortune 500" manufacturers.¹²² In 1980, the largest 200 industrial firms accounted for more than 60% of all U.S. industrial assets; the share of the largest 0.2% of those was 73%.¹²³

The authors of the Bill of Rights could not have foreseen the gigantism of corporations today. They lived in a society freshly victimized by overintrusive government, and the document they produced is therefore infused with laissez-faire philosophy.¹²⁴ Restrictions on government vis-a-vis the press, criminal suspects, or individual expression of political and religious beliefs are just a few of the ways in which the Constitution clearly aims at minimizing the effect of concentrated power on individual Americans. If the Founding Fathers could witness Barbara Luck's termination by Southern Pacific, they might wish the event to have constitutional repercussions. Arguably, they might consider that the case hinged upon whether or not Southern Pacific exercised overbearing power, and not whether that power was characterized as public or private.

There are those who believe that the only meaningful response to the power of private industry in our society is to "constitutionalize" large corporations—in other words, to make "state

119. See A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 285-376 (1977).

120. TEMPORARY NATIONAL ECONOMIC COMMISSION ON THE CONCENTRATION OF ECONOMIC POWER IN THE UNITED STATES, 77TH CONG., 1ST SESS., FINAL REPORT OF THE EXECUTIVE SECRETARY 169 (Comm. Print 1941).

121. E. KIRKLAND, *A HISTORY OF AMERICAN ECONOMIC LIFE* 484 (3d ed. 1951).

122. Hayes, *Twenty Five Years of Change in the Fortune 500*, *FORTUNE*, May 5, 1980, at 88, 94 (chart).

123. W. MUELLER, *THE CELLAR-KEFAUVER ACT: THE FIRST 27 YEARS*, H.R. Doc. No. 243, 96th Cong., 1st Sess. 76 (1979).

124. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1051-72 (1984); see also Fallon, *A Constructive Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189, 1227 n.189 (1987) (summarizing Ackerman's view that framers were partial to laissez-faire notions).

action" obsolete and to hold industry accountable to the principles embodied in the Bill of Rights.¹²⁵ While this approach may seem attractively simple, it is clearly not likely to be adopted soon, if ever, by the elected representatives of the American people.

V. POLICY CONCERNS

A. *Reliability of Testing Methods*

Both employers and employees share the same concern: whether or not urinalysis is a *reliable* means of uncovering drug use. Employees, of course, worry over the accuracy of drug testing, since they may be hired or fired on the basis of the test results. Employers are also interested in test-reliability since they do not want their time and money wasted on ferreting out and punishing innocent workers only to spend more time and money on replacing them.

There are many serious problems with the reliability of such tests. Certain over-the-counter drugs may register false positives. Urine samples taken from people using the familiar cold remedies Contac or Sudafed have indicated the use of amphetamines. The pain relievers Datril and Advil have shown up as marijuana, and cough syrups containing dextromethorphan may register opiate traces. Some prescription drugs can also produce such false positives.¹²⁶ A person with the disease lupus (in remission) might test positive for amphetamines; a person who had ingested poppyseeds just before urinalysis could appear to have opium in his system. Worse still, research indicates that "passive inhalation" can register positive test results. In other words, a person could test as a marijuana user, not because he actually smoked the drug, but because he had been present at a concert, a party, or on a bus where marijuana was smoked.¹²⁷

125. See A. BERLE, TWENTIETH CENTURY AMERICAN CAPITALISM (1954) and his THREE FACES OF POWER, (1967); see also Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960).

126. Marty, *supra* note 2, at 50 (quoting Kerry Shannon, marketing director of Bio-Analytical Technologies); Stille, *supra* note 2, at 23, col. 1.

127. Alcohol and Drug Testing, A Workshop on Invasion of Privacy, sponsored by Philaposh and the Workers' Rights Law Project, Philadelphia, May 22, 1986 (statement of Karen Detamore, attorney). While serving as a panelist at the Philadelphia Workshop, Ms. Detamore described an instance in which a person in the Coast Guard whose job it was to confiscate smuggled drugs had evidently tested positive due to touching them frequently, and was subsequently discharged. *Id.*; see also Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J.A.M.A. 2382 (1985); Zeidenberg, Bourdon & Nahas, *Marijuana Intoxication by*

How often are these mistakes made? The testing laboratories assert that the most commonly used procedures are 95-99% accurate. At best, then, the industry itself admits to an inaccuracy rate of 1%. But since four to five million people are tested each year this means that 40,000 to 50,000 people must be falsely accused each year.¹²⁸ And a study by Northwestern University found that 25% of all EMIT (Enzyme Multiplied Immunoassay Test) positives were actually false positives.¹²⁹ This darkens the picture considerably: The EMIT is one of the more popular varieties of drug tests, since it is relatively inexpensive. EMIT and similar procedures cost about \$5 for initial test results. A confirmation or double-check test costs about \$80.

Even more sinister is the possibility that drug testing may be racially discriminatory.¹³⁰ The skin pigment melanin, which is present in urine in fragmentary form, is chemically similar to THC (tetrahydrocannabinol), the active ingredient in marijuana. According to James Woodford, a forensic chemist and consultant to the U.S. Public Health Service, melanin also "acts as a sponge," by soaking up chemicals in the body similar to THC. Everyone has some melanin, but blacks and Hispanics have more than whites. Woodford suggests that, especially in laboratories which use very low readings of what appears to be marijuana—ten billionths of a gram—to conclude that a person uses the drug, results are skewed against dark-skinned people.¹³¹

Passive Inhalation: Documentation by Detection of Urinary Metabolites, 134 AM. J. PSYCHIATRY 76 (1977); *Passive Inhalation of Marijuana Smoke*, 250 J.A.M.A. 898 (1983) (letter to the editor).

128. Stille, *supra* note 2, at 24, col. 1. (quoting Kevin V. Zeese of the National Organization for Reform of Marijuana Laws).

129. Marty, *supra* note 2, at 50. Perhaps most telling are the results of a 1987 study performed by the National Institute on Drug Abuse, which found that 20% of 50 laboratories tested reported the presence of drugs in urine specimens when no drugs were in fact, present. These mistakes were made *even though each laboratory had been warned in advance* that its incompetence was about to be evaluated by the federal government. *Labs Err on Drug Test, Study Finds*, The Philadelphia Inquirer, April 8, 1987, at A3, col. 1. The urinalysis industry is booming—it is a \$100 million a year business, soon to be \$200 million annually and so it is becoming increasingly competitive. *Id.* Laboratories are under increasing pressure to cut corners in order to cut prices. Marty, *supra* note 2, at 24-25. At present, there is no federal or state regulation of nonmedical drug-use testing facilities, their personnel, or their performance. Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415, 532 (1986-87).

130. Marty, *supra* note 2, at 23; *see also* Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMP. REL. L.J. 422, 426 (1985-86). Evidently, there is a more accurate urine testing method available, but it costs approximately \$500, making it very unlikely that employers will choose to use it. Angell, *supra* note 65, at 56.

131. The Philadelphia Inquirer, April 9, 1986. If urinalysis does have a

B. *Employer Interests in Conducting Drug Testing Programs*

Even assuming that urine testing is reliable, or could be hedged with enough procedural safeguards (the right to appeal, to have an independent test, etc.) to compensate for its unreliability how well does it serve the employer's concerns?

One of these concerns is that drug-using employees have an unusually great need for money, and will be more prone to steal than other employees. The problem of employee theft is far from imaginary: it costs employers between forty and fifty billion dollars a year.¹³² But if worker theft is the disease, is urine testing for drugs the best cure? There is a virtually unlimited number of circumstances that might cause a person to need extra money. Suppose an employee has a disabled dependent, or a few too many credit card debts.¹³³ Urinalysis is obviously no solution for these theft problems.

"disparate impact" on certain racial or ethnic groups, it may violate Title VII of the Civil Rights Act of 1964, which bars discrimination by any employer of more than 25 workers. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971). For example, in the sports context, many black athletes have expressed fears that submission to drug testing will be made compulsory in certain contracts with direct discriminatory intent. Angell, *supra*, note 86 at 56. But see *Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986) (concluding that melanin theory is not supported by evidence and is too speculative).

132. Stack, *Polygraphs and Privacy*, 59 FLA. B.J. 19 (June 1985). According to this article, 40% of all employees steal office supplies, while 75% of those handling money steal some of it. *Id.*

133. Or should an employer have the right to gather such information as a condition of employment? Surely the most efficient way to weed out dishonest employees is to test them for the trait they all must share: dishonesty. That is the reason for the use of polygraph testing in the workplace. Yet the use of polygraphs in the workplace, while perhaps the most direct solution to the problem, has created problems of its own, including legal ones, for many of the same reasons plaguing the analogous use of urinalysis. Concerns over employee privacy and test unreliability have led to litigation under the National Labor Relations Act, the common law, civil rights laws and the constitution. See, e.g., *Ramirez v. City*, 678 F.2d 751 (8th Cir. 1982) (Title VII action); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 838 (1980) (wrongful discharge action recognized); *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108 (Minn. Ct. App. 1985) (suit for emotional distress). Polygraph testing is regulated or banned by legislation in 41 states, and in March of last year, the House of Representatives passed a Polygraph Protection Act which would forbid private employers from polygraphing most current or prospective employees. Conservative Republican Orrin Hatch and liberal Democrat Ted Kennedy introduced similar legislation in the Senate in April of 1986 which means that it is probable that federal law restricting the use of lie-detector tests in private employment will exist in the very near future. See Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in Employment*, 21 SAN DIEGO L. REV. 295 (1984); Hartfield, *Polygraphs*, 36 LAB. L.J. 817 (1985); Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1971).

Employers claim that they need to know about an employee's drug use for safety's sake: the public safety, the safety of other employees, even the safety of the drug-abusing worker. They are understandably concerned about the concomitant costs of accidents on the job which become their costs, one way or the other. Substance abusers file five times as many worker's compensation claims as non-using employees, for instance.¹³⁴ They are more likely to be involved in accidents and their employers are more likely to be held vicariously liable for the resulting damages.¹³⁵ In one case, a machine operator was discovered to be drunk at work and told to go home early.¹³⁶ On the way home, he was involved in a car accident in which he and several other people were killed.¹³⁷ The company was found negligent—not vicariously liable, but directly negligent—for sending a highly intoxicated individual out on the road.¹³⁸

Management is legitimately concerned about the costs of drug-related behavior, but does urinalysis adequately address those concerns? Research shows that there are more alcohol-related accidents than accidents caused by *all* illegal substances combined.¹³⁹ In light of the fact that urinalysis can turn up evidence that the test subject smoked one marijuana cigarette as many as eighty-one days earlier, but cannot produce evidence of alcohol ingested just one-half day earlier,¹⁴⁰ the test appears to be less finely-tuned to the desired end than employers need it to be. Even so, urinalysis will uncover "users," and statistics do indicate that such individuals are more accident prone than their fellow workers. Perhaps it is just as simple as that.

Or is it? Even assuming a strong link between job safety and drug abuse, is it truly in an employer's best interest to initiate a urinalysis test program? There are those who believe that it is not.¹⁴¹ To operate a business productively, employers need

134. Geidt, *Drug and Alcohol Abuse in the Workplace: Balancing Employer and Employee Rights*, 11 EMP. REL. L.J. 181, 191 (1985).

135. In addition, such workers have greater health care needs, higher rates of absenteeism, and are more likely to require discipline. Lehr, *supra* note 14, at 85-86.

136. *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 310 (Tex. 1983).

137. *Id.*

138. *Id.* at 315.

139. Rothstein, *supra* note 129, at 423 n.2.

140. Cocaine is flushed out of the body within two-to-three days. Stille, *supra* note 2, at 24 col. 1 (quoting Professor Dubrowski, forensic toxicologist at the University of Oklahoma).

141. A National Institute of Justice study on employee theft shows that employers who display respect for their employees' rights and do not administer lie

healthy employee morale; a workforce which wants to cooperate with management, not only for monetary reasons, but also out of some sense of shared goals. This intangible, but essential ingredient, "team spirit," will be severely undercut if workers are expected to urinate into bottles on demand.

C. *Countervailing Employee Interests*

Employees object to compulsory urinalysis mainly because they consider it an invasion of privacy. Their complaint has two aspects: (1) the process itself is humiliating to endure and (2) test results tell more about an individual's life than employers need to know.¹⁴²

Being ordered to produce a urine specimen is not equivalent to, for example, being ordered to empty one's pockets, or being ordered to submit to fingerprinting. It has an especially embarrassing and dehumanizing edge to it. It forces a person to disclose some facet of his or her private life in a way that involves the "private parts." Roger Angell wrote in the *New Yorker* recently: "Racehorses have their urine tested, to be sure, but, as one All-Star American League infielder put it to me last fall, 'I am not a horse.'"¹⁴³

That must have been Rodney Smith's first reaction when he refused to supply a urine sample to a congressional subcommittee recently. This was a rather ironic situation: Mr. Smith, executive director of the President's Commission on Organized Crime, was a supporter of proposed legislation that would make drug testing without any warning, mandatory for federal employees. When

detector tests have a lower theft rate than those who do administer such tests. 738 LAB. LAW REP., April 11, 1986, at 16. During the floor debate of the Polygraph Protection Act, Rep. Jeffords stated:

I have . . . been . . . telling business and unions alike that we cannot afford to waste our time, energy and resources on disputes, and that we must work more as a team . . . Do polygraphs have any place in this drive for labor—management cooperation? The question answers itself. Of course they do not. A workplace run on fear will run fearfully.

270 LAB. LAW REP., April 14, 1986, at 31. How much less does urine testing have any place in today's workplace!

142. Stille, *supra* note 2, at 22, col. 1, reporting the following:

"A simple thing like urine can tell you a lot," says Dr. Harold M. Bates, a chemist with Metpath Laboratories of Teterboro, N.J., which performs drug test analyses. It can tell a company whether an employee is being treated for a heart condition, manic-depression, epilepsy, diabetes, or schizophrenia.

Id.; see also McDonell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987).

143. Angell, *supra* note 65, at 56.

the subcommittee chairperson was about to begin questioning, he told Smith: "The chair will require you to go to the men's room under the direct observation of a male member of the subcommittee staff to urinate in this specimen bottle."¹⁴⁴ A plastic container was then placed on the witness table¹⁴⁵ and when Smith angrily refused to cooperate, complaining that he had had no notice, the chairman graciously stated "I thank you for very eloquently proving the point that we have set out to prove."¹⁴⁶

Naturally, employees are also concerned about the way drug testing inevitably divulges so much extraneous information about a person's life to an employer. For example, a test can reveal, among other things, whether or not a worker is pregnant, is taking medication for a heart condition, for asthma, for diabetes, or for manic depression. It is a powerful tool for prying into a worker's off-duty behavior, and while the use of drugs on the job is admittedly a very serious problem, employees argue that the decisions they make regarding drugs during non-working hours are *not* their bosses' business.

Privacy is not just a matter of minimizing the amount of information known about a person, but also involves *control* over that information. And so employees worry that the confidentiality of test results is not guaranteed. Will they become part of a permanent, computerized file, accessible to any number of important and powerful strangers? Could a worker be blacklisted because of a false positive, and never know why his or her career was stagnating? These are hardly far-fetched or paranoid possibilities. The combination of forced drug testing and late twentieth century technology makes these concerns very real. As Professor Bloustein wrote: "The fear that a private life may be turned into a public spectacle is greatly enhanced when the lurid facts have been reduced to key punches or blips on a magnetic tape accessible, perhaps, to any clerk who can throw the appropriate switch."¹⁴⁷

D. *The Public Interest*

The debate over drug testing is not just between workers and employers. Very important societal interests are also at stake.

144. The Philadelphia Inquirer, March 19, 1986.

145. *Id.*

146. *Id.*

147. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1006 (1964).

For instance, there is no doubt that drug abuse at the workplace represents a tremendous drain of human and financial resources.¹⁴⁸ There is, on the other hand, a need to maintain reasonably good relations between labor and management. To the extent that the American workforce is antagonistic and alienated there is also a serious drain on resources, and mandatory urinalysis will only worsen the problem.

American society in general has an overwhelming interest in maintaining itself as a system in which individuals enjoy a considerable degree of freedom to pursue personal goals. Compulsory urine testing undercuts this interest, by radically diminishing the privacy expectations of millions of American workers, and by contributing to a general atmosphere of diminished privacy throughout the country.

What is so essential about a sense of privacy? Alan Westin, in *PRIVACY AND FREEDOM*, categorizes the functions of individual privacy: personal autonomy (the need to avoid being controlled wholly by others), emotional release (the need to express one's relaxed self, the "chance to lay (one's) mask aside"), self-evaluation (the opportunity to process, by oneself, the flood of information one experiences, to "repossess" oneself) and limited and protected communication (control over forced self-disclosure).¹⁴⁹ While recognizing that individual privacy cannot be guaranteed as an absolute right, he writes: "Just as a social balance favoring disclosure and surveillance over privacy is a functional necessity for totalitarian systems, so a balance that ensures strong citadels of individual . . . privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies."¹⁵⁰ There are scholars who insist, moreover, that privacy must be protected as a necessary precondition to much that is considered basic human activity. As Professor Fried puts it:

[Privacy] is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations, rather, without privacy they are simply inconceivable . . . privacy is the necessary atmosphere for these attitudes and actions, as oxy-

148. For a discussion of the financial burdens associated with drug testing, see *supra* notes 8 & 126-40 and accompanying text.

149. A. WESTIN, *PRIVACY AND FREEDOM*, 32-39 (1967).

150. *Id.* at 24.

gen is for combustion.¹⁵¹

The right to privacy, then, cannot be viewed simply as a matter of assuring certain specific preferences, such as the right of married couples to use birth control, or the right of a woman to choose abortion. It is more than just a "penumbra" hovering somewhere in the vicinity of the Bill of Rights. It is not to be contained in the neat tort pigeonholes of intrusion, disclosure, false light and appropriation. The law, lumbering rather clumsily behind technological change and our best hopes for a free society, must catch up to our rightful and essential need for privacy.

VI. RECOMMENDED LEGISLATIVE SOLUTIONS

This writer's first choice would be to outlaw urinalysis drug testing in the workplace. If employers must examine their workers to determine whether or not they are drug abusers, let them take saliva samples, but only from employees for whom they have evidence of impaired job performance. Marijuana is held in the saliva from six to eight hours after it has been smoked. The saliva test, administered in this fashion, would be well-tailored to detecting intoxicated workers, and would be far less corrosive of personal dignity than urinalysis. It is at present recommended by the Maryland ACLU in the form of a model bill.¹⁵²

If urinalysis drug testing must exist, let it be regulated. Both the circumstances that trigger the testing, and the testing procedure itself, must be controlled. Employees should be tested only after employers have documented job-site performance problems. Random testing, or testing on the basis of a rumor, or a mere hunch, should be forbidden. This would insure that urinalysis would be kept closely tied to its supposed purpose—discovering substance abusers at the workplace—and would avoid a dragnet operation, or an atmosphere in which every worker is treated as if he were guilty until proven innocent. Such safeguards would also make it more difficult for employers to use urinalysis discriminatorily, picking out test subjects because of their politics, their interests in union organizing, or their skin color, for instance.¹⁵³

151. Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968); see also Bloustein, *supra* note 146, at 1000-07; Gerstein, *California's Constitutional Right to Privacy: The Development and Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 414 (1984).

152. Stille, *supra* note 2, at 24, col. 1.

153. At the Philadelphia Workshop on Invasion of Privacy in May 1986, Mark Cohen, Chairperson of the Pennsylvania House Labor Relations Commit-

It would also eliminate pre-employment urinalysis screening. Of course, employers would still be able to screen workers by such traditional methods as careful interviews and reference checks. They would still have access to information about a prospective employee's work history. What would be denied them would be a "scientific" device for measuring character, when it may well be that the best measure of human character is human character. Employers could continue to use their own instincts, and those of their trusted subordinates, in deciding who to hire.

Drug testing laboratories should be licensed (no civilian labs are so licensed as of this writing),¹⁵⁴ and tests performed only by those that are certified. Employees should have the right to an independent confirmation of positive test results, or perhaps the right to a re-test. Provisions like these would minimize the consequences of false positives.

There must be confidentiality safeguards. Negative test results should be immediately destroyed, since the mere fact of having been tested will carry its share of stigma.

VII. CONCLUSION

No one denies that America has a sickness—drug use—and no one denies that the American workplace, like the American home or American city streets, is the scene of much drug abuse. But let the cure be laws that take aim at the cause, as well as the symptoms, of the disease. Rehabilitation and therapy programs begin to point in the direction of preventative treatment. Employers that use urinalysis should be directed to institute and/or make use of such programs, giving their employees who test positive a chance to get the monkey off their backs.

tee, expressed concern that union organizers or members might be victimized by retaliatory drug testing. Workshop, *supra* note 5 (statement of Mark Cohen). In addition, black athletes have articulated similar concerns. For a discussion of these concerns, see *supra* note 131.

In April of 1986 the Georgia ACLU filed a complaint on behalf of four workers at Georgia Power Company who had frequently reported safety violations at the plant to the Nuclear Regulatory Commission. In their complaint, the workers claimed that a "hotline" system for reporting worker drug abuse had been used by their employer to retaliate against them. Hudner, *Urine Testing for Drugs*, 11 NOVA L. REV. 553, 557-58, (1986-87).

154. See Workshop, *supra* note 5 (statement of Karen Detamore).