UIC Law Review

Volume 20 | Issue 4 Article 8

Summer 1987

Public-Sector Employer Drug Testing Programs: Has Big Brother Finally Arrived, 20 J. Marshall L. Rev. 769 (1987)

Edward E. Westphal

PUBLIC-SECTOR EMPLOYER DRUG TESTING PROGRAMS: HAS BIG BROTHER FINALLY ARRIVED?

Drug abuse is a national concern.[1] The use of drugs, including alcohol,[2] controlled substances,[3] and prescription medications,[4] perme-

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1. *See* Thomas, *America' Crusade*, TIMES, Sept. 15, 1986, at 60, for a general discussion of the problem of drug abuse in America. *See also* Griffin, *Schools Fail to Scare, Teach or Bully Away Drugs*, Chicago Tribune, Sept. 22, 1986, § 1, at 1, col. 3, for a discussion the pervasiveness of drugs in the schools.

2. *See generally* B. WOLMAN, CLINICAL DIAGNOSIS OF MENTAL DISORDERS: A HANDBOOK 624-5 (1978). B. WOLMAN, THE THERAPIST'S HANDBOOK 443-50 (1976), for a discussion of the symptomology and treatment of alcoholism.

3. The Controlled Substances Act (CSA) 21 U.S.C. § 812 (1970) describes the criteria which place a substance on one of the five schedules.

In placing a drug or other substance on one of the schedules, the Drug Enforcement Agency and the Department of Health, Education and Welfare must consider eight factors:

1. The drug or other substance's actual or relative potential for abuse;
2. Scientific evidence of its known pharmacalogical effects, e.g., whether a drug has a hallucinogenic effect;
3. The state of current scientific knowledge regarding the drug or other substance;
4. Its history and current patterns of abuse, including social, economic, and ecological factors;
5. The scope, duration, and significance of abuse, e.g., whether it is widespread or a passing fad;
6. What, if any, risk there is to public health;
7. Its psychic or physiological dependence liability, i.e., whether the drug is physically addictive or psychologically habit forming;
8. Whether the substance is an immediate precursor of a substance already controlled. *Id.* § 811.

The most common drugs of abuse are divided into five categories: (1) narcotics, (2) depressants, (3) stimulants, (4) hallucinogens, and (5) cannabis. UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION DRUGS OF ABUSE, 11-53 (1986). The term narcotic usually refers to opium, opium deriviatives, or synthetic substitutes. *Id.* at 12. Most narcotics have a medical use in the United States. *Id.*

Abusers build up tolerance for narcotics, requiring larger doses to obtain the desired effects. *Id.* Narcotics cause physical and psychological dependence. *Id.* When the drug is no longer present in the body, withdrawal symptoms occur. *Id.* Initial withdrawal symptoms, appearing eight to twelve hours after the last dose, are watery eyes, runny nose, yawning and excessive perspiration. *Id.* As the withdrawal syndrome progresses, the individual experiences restlessness, irritability, goose flesh, tremors, yawning, and severe sneezing. *Id.* The most severe symptoms are: a feeling of weakness and possible suicidal depression, accompanied by nausea and vomiting, stomach cramps and diarrhea, elevated heart rate and blood pressure, chills alternating with flushed skin and excessive sweating, pain in the bones, extremities and back muscles, as well as muscle spasms and kicking movements. *Id.* The symptoms dissipate in seven to ten days. *Id.*

The second category of controlled substances consists of depressants. *Id.* When taken as prescribed by a physician, depressants are a medically effective remedy for relief of anxiety, tension and insomnia. *Id.* If taken in excess, depressants produce

ates all aspects of the American culture.[5] Drug dependence has emerged as the dark side of the American character.[6] Recent public opinion polls indicate that before the summer of 1986 ended, the problem of drug abuse surpassed economic problems and the threat of war as the nation's number one concern.[7] "The War on Drugs" is a regular feature on television news stories and in newspaper headlines.[8] America's recent preoccupation with drug abuse now centers

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effects similar to the effects of alcohol. *Id.*

Like alcohol, depressants produce effects which vary from individual to individual and from time to time in the same person. *Id.* Abusers develop rapid tolerance, which leads to physiological and psychological dependence. *Id.* Withdrawal from high doses of depressants is a medical emergency more serious than that of any other drug withdrawal. *Id.* The patient improves, however, after detoxification. *Id.* Within 24 hours after the last dose, minor withdrawal symptoms appear which include anxiety and agitation, loss of appetite, nausea, vomiting, increased heart rate, excessive sweating, tremulousness, and stomach cramps. *Id.* The third category of controlled substances is stimulants. *Id.* at 37. The two most common stimulants in our culture are nicotine and caffeine. *Id.* Neither drug is a controlled substance. *Id.* More potent stimulants are controlled, because of the risk of producing physical and psychological dependence. *Id.* Taken in moderation, stimulants relieve fatique and increase alertness. Taken in higher doses, stimulants produce excitation, euphoria, increased heart rate and blood pressure, insomnia, and loss of appetite. *Id.* The abuser rapidly develops tolerance to stimulants.

After immediate withdrawal from stimulants, the abuser experiences depression, apathy, fatigue, and insomnia, up to 20 hours per day. *Id.* These symptoms may persist for several days. *Id.* Impaired perception, thought disorder, anxiety, and suicidal ideation may persist for weeks or even months. *Id.* The fourth category of controlled substances is hallucinogens. Natural and synthetic hallucinogens excite the nervous system, distorting the perception of objective reality. *Id.* at 49. Large doses of hallucinogenic drugs produce delusions and visual hallucinations. *Id.* Depersonalization and depression may occur, leading to suicidal ideation. *Id.*

Although no withdrawal syndrome has been documented, abusers frequently report fragmentary, recurrent episodes of the psychedelic effects. *Id.* These episodes are called "flashbacks." *Id.* Hallucinogenics do not produce physical dependence. *Id.* They can produce psychological dependence. *Id.*

The last category, cannabis, including marijuana and hashish, grows in most tropical and temperate climates on earth. *Id.* at 45. Usually smoked, the effects are felt within minutes and may last up to three hours. *Id.* Abusers report restlessness, a sense of well-being, increased hunger, and increased sensory perception. *Id. But see* Rhein, *Here Comes Prescription Pot*, BUS. WK., June 25, 1985, at 109 (FDA licensed a drug company to manufacture THC to combat nausea caused by cancer chemotherapy).

4. Prescription medications are controlled substances prescribed by physicians. *See, e.g.*, COOLEY, FAMILY MEDICAL GUIDE, 894 (1973) (barbituates most commonly prescribed controlled substance).

5. Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPLOYEE REL. J. 422 (1985).

6. Thomas, *supra* note 1, at 60. The Chicago Tribune stated that 65% of children addicted to drugs or alcohol learned the habit from an older family member. Chicago Tribune, Sept. 23, 1986, § 1, at 1, col. 6. A study by the University of Michigan found that one-third of all children in the United States live in a home where an older family member is a drug addict or alcoholic. *Id.*

7. Thomas, *supra* note 1, at 61. *See also* Page, *From Apathy to Frenzied Activism*, Chicago Tribune, Sept. 21, 1986, § 5, at 3, col. 3 (drug abuse at the top of the national agenda after the cocaine related deaths of two famous athletes).

8. Thomas, *supra* note 1, at 61.

upon the insidiousness of "crack"[9] and the perception that drugs have spread into the workplace and into the neighborhood.[10] There is, however, disagreement concerning drug abuse. Some experts contend that drug use is declining or has at least stabilized for certain drugs.[11] One expert stated that the cocaine epidemic has peaked and that the use of other drugs is declining significantly.[12] This comment discusses drug abuse in the workplace, and examines the implementation of drug tests and the drug testing industry. The comment then addresses the constitutional issues involved when government employers require their employees to take mandatory drug tests. The comment discusses a fourteenth amendment issue involving the determination of whether employees refusing to submit to drug tests, or testing positive for controlled substances, are deprived of due process of the law. In addition, a fourth amendment issue concerning whether a government employer's mass and random drug testing constitutes an illegal search and seizure will be discussed. The comment concludes with suggestions intended to balance a government employer's need for the implementation of a drug testing program against an employee's constitutional rights.

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9. *Id.* First imported from the Bahamas around 1983, crack is a highly potent form of cocaine that can transform a pleasure seeker into an addict. *Id.* at 63. This drug is cocaine, boiled down into chrystalline balls. *Id.* The cocaine makes a crackling sound when heated. *Id.* The user then smokes the balls. *Id.* Many physicians believe that cocaine is the most addictive popular drug existing, and crack is, by far, the most addictive of all. *Id.* Negative side effects include depression and inability to sleep, which can lead to deep depression and paranoia. *Id.*

10. It is estimated that 300,000 children and adolescents use drugs and alcohol to the extent that it interferes with daily living. Griffin, *Recognition First Step on Long Road Back*, Chicago Tribune, Sept. 24, 1986, § 1 at 1, 14 col. 3. The number of patients under 18 years old who are admitted for drug abuse and alcoholism treatment in Illinois residential or outpatient programs increased from 3,804 in 1982 to 5,404 in 1985. *Id.*

11. Thomas, *supra* note 1, at 62. One agency believes that the peak rate of drug usage occurred in the late 1970's. Chicago Tribune, Sept. 21, 1986, § 5, at 1, col. 1. Increased peer pressure and a heightened awareness of the physical risks involved in drug abuse contributed to the decline. *Id.* Furthermore, youthful problems dissipate as the population ages and, therefore, drug abuse declines. *Id.*

The University of Michigan's Institute of Social Research conducted a survey of 16,000 seniors who graduated in June, 1985. In 1975, 9% of surveyed seniors had tried cocaine. By 1985, 17.5% of seniors had tried it. Griffin, *Drug Program Pulls a Kid From the Brink*, Chicago Tribune, Sept. 21, 1986, § 1 at 10, col. 3. The survey indicated that 92% have used alcohol. *See also* McNulty, *Drug War Finds Enemy In Retreat*, Chicago Tribune, Sept. 21, 1986, § 5, at 1, col. 1 (decline in marijuana use among high school seniors from 11% in 1978 to 5% in 1985).

12. Thomas, *supra* note 1, at 61. "The trend since 1979 is that people are backing off. In almost all classes of drugs, abuse among younger people has diminished. When you get that kind of change in attitude on the part of youth, it's obvious that drug use is going to decline." *Id.* at 62.

In 1978, ten percent of all high school seniors smoked marijuana every day. *Id.* Currently the percentage is five. *Id.* Heroin is used by half a million people, which is about the same number as 15 years ago. *Id.* Although 22 million Americans have tried cocaine, 4.3 million are current users; a number which has remained constant since 1979. *Id.*

I. DRUG ABUSE IN THE WORKPLACE

Drugs have moved from the ghetto to the workplace.[13] Drug abuse on the job results in morale problems, injuries, illness, termination of employment and even death.[14] Employers are concerned with economic loss due to tardiness, absenteeism, property damage, lost productivity, quality-control problems, increased health insurance costs, increased worker's compensation costs, employee theft, and costs related to replacing terminated employees and training new ones.[15] Employee drug abuse costs the American economy an estimated $25 billion annually in lost productivity.[16] The government estimates the economic costs from lost productivity, absenteeism, and higher accident rates at $33 billion annually.[17] In controlling drug abuse, employers have traditionally imposed disciplinary measures on employees who are convicted of drug-related crimes or who are visibly intoxicated while on duty.[18] Seeking more effective measures, many employers recently shifted emphasis from traditional disciplinary measures to preventive detection of employee substance abuse.[19] Employers found that disciplining employees after serious problems arise does not sufficiently protect economic or societal interests.[20]

Private business and governmental agencies are increasingly initiating employee drug testing programs.[21] In the last four years, the

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13. *Id.*

14. *Id. See* Geidt, *Drug and Alcohol Abuse in the Workplace: Balancing Employer and Employee and Rights*; 11 EMPLOYEE REL. J. 181 (1985).

15. Geidt, *supra* note 14, at 181.

16. *See How Drugs Sap the Nation's Strength*, U.S. NEWS AND WORLD REPORT, May 16, 1983, 55, (drug abuse costs the economy $25 billion annually due to slowed productivity, absenteeism and irrational decisions); *Taking Drugs on the Job*, NEWSWEEK, Aug. 22, 1983, 55, 55 (economic costs due to lost productivity, medical expenses and crime are 25.8 billion annually).

17. Thomas, *supra* note 1, at 63.

18. Rothstein, *supra* note 5, at 422.

19. *Id.* In the military, before mass drug testing, 27% of 20,000 personnel admitted that they had used drugs during the previous 30 days. *Battle Strategies*, TIME, Sept. 15, 1986, at 69. [hereinafter *Battle Strategies*]. In 1985, the figure dropped to 9%. *Id.* In the civilian sector, 72% of individuals surveyed in a recent New York Times/CBS News poll stated that they would be willing to be tested. *Id.*

20. *Battle Strategies*, *supra* note 19, at 69. *See* Englade, *Who's Hired and Who's Fired*, 114 STUDENT LAWYER, Apr. 1986, 20, 22 (drug abusers have three and one half times as many accidents on the job, this costs employers three times as much in medical benefits).

21. *See* Thomas, *supra* note 1, at 62; Rothstein, *supra* note 5, at 423. Englade, *supra* note 20, at 22. The National Collegiate Athletic Association (NCAA) announced a drug testing program where some athletes will be tested because they finished with high scores, played the most time or won events. Chicago Tribune, Sept. 25, 1986, § 4, at 1, col. 5. Other athletes will be tested at random. *Id.* Officials will conduct the tests both before and after athletic events. *Id.* For example, before and after each football bowl game, officials will test a total of 36 players: 22 with the most playing time and 14 selected at random. *Id.* If a player is found to have used banned

implementation of employee drug screening programs increased dramatically.[22] Some experts predict that within five years, drug screening will be a prerequisite for obtaining any type of employment.[23]

Although the economic consequences of alcohol abuse are much greater,[24] employers have focused upon the detection of illicit drug usage.[25] The two most popular drug screening programs implemented are mass programs and random programs.[26] A mass drug screening program is one where all employees are tested, regardless

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drugs, such as marijuana, cocaine, heroin, or anabolic steriods, the team's win will be vacated. *Id.*

22. Chapman, *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985, at 57-58; Rothstein, *supra* note 5, at 423; Englade, *supra* note 21, at 22. Thomas, *supra* note 1, at 62. In 1982, ten percent of Fortune 500 companies used drug screening urinalysis for job applicants and employees. Chapman, *supra*, at 57. By 1985, twenty-five percent of the companies used testing. *Id.* Currently, approximately one-third of the Fortune 500 companies require drug screening for applicants and employees. Thomas, *supra* note 1, at 62.

23. Rothstein, *supra* note 5, at 423.

24. Employers are increasingly utilizing novel investigative techniques in order to detect and control employee substance abuse. In addition to blood and urine tests, such techniques include polygraph administration, random searches, video surveillance, undercover personnel, and trained dogs. *See, e.g.*, *Taking Drugs on the Job*, NEWSWEEK, Aug. 22, 1983, at 52-60; *Getting In Touch on Worker Abuse of Drugs and Alcohol*, U.S. NEWS AND WORLD REPORT, Dec. 5, 1983, at 85.

In examining the issue of employee substance abuse, research indicates that most on-the-job fatalities and injuries are alcohol related. Chicago Tribune, Sept. 21, 1986, § 5, at 1, 4, col. 1. Alcohol related accidents are greater in frequency than accidents related to all illicit substances combined. *Id.* Despite the statistics, employers have focused their efforts upon detection of employees' illicit drug usage. Alcohol, combined with another drug, was the most frequently identified drug emergency cited in hospital emergency room cases. *Id.*

In 1985, New York City officially reported 137 cocaine-related deaths, out of 670 drug-related deaths. Chicago Tribune, Sept. 21, 1986, § 5, at 1, 4 col. 1. In 1985, 563 people died from cocaine abuse. *Id.* The Chicago Tribune reported 613 cocaine related deaths. This number is minute compared with the 98,186 deaths attributed to alcohol in 1980, and the 300,000 attributed to tobacco annually. National Center for Health Statistics study stated the 1983 health care costs for drug abuse were $59.7 billion while alcohol abuse costs were $116.7 billion. Thomas, *supra* note 1, at 64; Chicago Tribune, Sept. 21, 1986, § 5, at 1, 4 col. 1.

25. *Id.* In Burka v. New York City Transit Auth., 110 F.R.D. 595 (S.D.N.Y. 1986), the public-sector employer instituted a urinalysis drug testing program in the following circumstances: (1) following an extended absence or suspension; (2) as part of a routine, periodic physical examination; (3) as part of a physical examination for promotion; (4) when directed by a supervisor or manager following an incident that occurs while on duty; (5) at any time, if a controlled substance was identified in a prior test and (6) when a supervisor or manager has reason to believe that an employee is impaired as a result of drug use. *Id.* at 599.

Employees have challenged the program on fourth amendment, privacy, and due process grounds. *Id.* at 600. The court has not decided the merits of this case. *Id.* The purpose of this proceeding was a motion to intervene. *Id.* The court found that the class contained a number of subclasses which were either drug users or non-drug users. *Id.* at 602. The court held that no class representation can adequately represent claims of the subclass and allowed the employee who was suspended to intervene. *Id.* at 603, 608.

26. *See* Rothstein, *supra* note 5, at 423. *See also* Rust, *Drug Testing: The Legal Dilemma*, 72 A.B.A.J. 50, 51 (1986) for a discussion of mass and random drug tests.

of their job classification.[27] A random drug screening program is one in which certain employees are randomly selected to submit urine samples.[28]

Mass and random drug screening programs are popular for three reasons. First, controlled substance metabolites can be detected in the body for a much longer period of time than alcohol metabolites.[29] Government employers, therefore, can more readily detect employee drug abuse, as opposed to employee alcohol abuse.[30] Second, possession of a controlled substance is illegal.[31] Third, the social stigma attached to drug use is greater than the social stigma attached to alcohol use.[32] Employers argue that the consequences of on-the-job substance abuse are so severe that they justify intrusion into the employee's constitutionally protected privacy interests.[33] When considering certain job classifications for drug screening, employers argue that the law should favor public safety.[34] Employers further contend that individual privacy interests do not outweigh public safety interests.[35]

In the face of rising employee concern, legal challenges, and increasing controversy surrounding the introduction of drug testing programs, one prominent expert[36] has attempted to reconcile both

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27. Rothstein, *supra* note 5, at 423.

28. *Id.*

29. *Id.* Controlled substance metabolites are organic compounds stored in body fat and eliminated through the urine. *Id.*

30. Cannabinoid metabolites can be detected in the urine within one hour after ingestion. *See* Schwartz and Flawks, *Laboratory Detection of Marijuana Use*, 254 J.A.M.A. 788, 788-89 (1985). The concentration level falls below detectable levels within two to five days. *Id.* at 788-89. Concentration levels, however, may remain high enough to be detected for up to 10 days after ingestion. *Id.* at 789. *See also* Hayes-Albion Corp. 76 LAB. ARB. 1005 (1981) (Kahn, Arb.); Gen. Felt Indus., Inc., 74 LAB. ARB. 972 (1979) (Carnes, Arb.). *See generally* Geidt, *supra* note 14, at 1969, for a discussion of cases where arbitrators upheld employer disciplinary measures against employees who drank on the job, reported to work intoxicated, or allowed work attendance or job performance to suffer as a result of alcohol problems.

31. Rothstein, *supra* note 5, at 423.

32. *Id.*

33. *See id.* at 433; Lehr and Middlebrooks, *Workplace Privacy Issues and Employer Screening Policies*, 11 EMPLOYEE REL. J. 407, 407-12 (1985); *infra* notes 91-150 and accompanying text.

34. Rothstein, *supra* note 5, at 425.

35. *See infra* notes 65-80 and accompanying text.

36. Mark Rothstein is a professor of law and adjunct professor of medicine at West Virginia University. *See* Rothstein, *supra* note 5, at 422. Rothstein argues that adoption of his criterion consists of a rational compromise between two extreme views. *Id.* at 425. One extreme is those people who believe all workers should be screened because (1) illicit substance abuse is illegal and could lead to an arrest; (2) an employee's need for extra money to purchase drugs may cause that employee to engage in crime, such as theft; (3) drug screening deters employee substance abuse. *Id.*

The other extreme consists of those people who believe that no worker should be screened. *Id.* at 425-26. This belief is justified on privacy grounds. *See infra* notes 74-87 and accompanying text. These individuals assert that employees have constitu-

employer and employee concerns.[37] When deciding whether to introduce a drug screening program, the employers' need for drug screening outweighs the individual employee's privacy interests[38] if intoxicated employees pose a substantial danger[39] to themselves, to others, or to property while on duty.

II. Drug Tests and the Testing Industry

The general public's concern with drug abuse and the public-sector employer's concern with protecting public safety are only two factors accounting for the rapid expansion of the drug testing industry today.[40] Another factor is the drug testing industry's introduction of fast and inexpensive drug tests.[41] Test manufacturers market their testing products as portable, fast, cheap and accurate.[42] Critics,

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tionally protected interest in their bodily fluids. *Id.* Employees posses a reasonable and legitimate expectation of privacy in their bodily fluids. *Id.* Government employers, therefore, cannot intrude upon this privacy interest without violating the employee's fourth amendment rights. *Id.*

37. Rothstein, *supra* note 5, at 425.

38. *Id.*

39. Substantial danger criterion allows employers to discipline or discharge any employee in any job classification who is intoxicated, suspected of being intoxicated, or is involved in an accident and shows a positive result after a drug screen. *Id.* For example, a drug screening program may be appropriate for airline pilots but not for clerical workers. *Id.* Employers should routinely screen employees in "critical" or "safety specific" job classifications. *Id.* Employers, however, should not test employees in other job classifications where employees do not pose a threat to public safety. *Id.*

40. Drug testing has become a $100 million a year business. Chapman, *The Ruckus Over Medical Testing*, Fortune, August 19, 1985, at 57, 62. An estimated $73 million was expended in the world-wide drug testing market in 1985. Sellers, *positive Results For Drug Test Sales*, Insight, Jan. 12, 1987, at 44. That figure is expected to grow to $200 million by 1990. Compu Chem Laboratories, Inc., an environmental testing firm with a drug testing unit, experienced a growth in total revenue from $8 million in 1983, to $7.9 million in 1984, and $13.6 million in 1985. *Id.* Compu Chem services 22 of the top 250 Fortune 500 companies. *Id.*

41. *See* Englade, *supra* note 20, at 22. A new product developed by Keystone Diagnostic KDI Quick Test of Columbus, Md., is a chemically treated paper that changes colors when exposed to urine sample containing drugs. Seller, *supra* note 40, at 45.

42. *See* Rothstein, *supra* note 5, at 426. The Enzyme Multiplied Immonoassay Technique (EMIT) is designed to detect THC and other cannabinoid metabolites. The system utilizes a cutoff limit to differentiate positive from negative samples based upon concentration levels of the metabolites. Two tests are commercially available. The EMIT-st (sing test) contains a compact spectrophotometer suitable for small laboratory and office use. The EMIT d.a.u. (drugs of abuse in urine) was designed for higher volume laboratory use.

The system works in the following manner. THC metabolites become chemically attached to an enzyme. The enzyme-labeled drug then becomes attached chemically to an antibody against the drug, which reduces the activity of the enzyme. This activity level is then measured. The test does not measure concentration levels in the urine, but enzyme activity which correlates with concentration levels. Schwartz and Haws, *Laboratory Detection of Marijuana Use*, 254 J.A.M.A. 788 (1985). Lyva's EMIT process drug test costs a minimum of $15.00 to administer. Seller, *supra* note 40, at 44.

however, dispute the claims of drug test manufacturers and question the accuracy of the products.[43] Recently developed saliva tests and brain wave tests to detect substance abuse were marketed without proof of their accuracy.[44] Marijuana intoxication tests have been found so sensitive that an individual's passive inhalation of marijuana smoke may indicate a positive test result if the cut-off limit is set too low.[45]

Between 1972 and 1981, the Centers for Disease Control[46] conducted a blind study of thirteen laboratories examining the reliability of screening urine for drugs.[47] The researchers studied two error

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43. Englade, *supra* note 20, at 22-23. The plaintiffs in Shield Club v. City of Cleveland, 647 F. Supp. 274 (N.D. Ohio 1986), challenged the positive results of EMIT assays, radio immuno assays, and gas chromatography/mass spectometry confirmation tests which were administered to police cadets. *Id.* at 276. The plaintiffs advanced the novel argument that the positive results were racially discriminatory. *Id.* at 277. The plaintiffs supported their argument with an affidavit from a toxicologist which stated that melanin, a bodily substance that creates skin color, closely resembles the composition of cannabinoids when excreted in the urine. *Id.* Since certain minorities possess more melanin, their urinalysis drug tests are more likely to turn up positive. *Id.* The court denied the toxicologist access to the defendant city's drug test data during discovery because the toxicologist produced no data or evidence to support the validity of his hypothesis. *Id.* at 283-85.

For a debate concerning the validity and reliability of urinalysis drug tests and polygraph tests, see Lykken, *The Validity of Tests: Caveat Emptor*, 27 JURIMETRICS 263 (1987); Raskin and Kircher, *The Validity of Lykken's Criticisms: Fact or Fancy?*, 27 JURIMETRICS 271 (1987); Lykken, *Reply to Raskin and Kircher*, 27 JURIMETRICS 278 (1987).

44. Rothstein, *supra* note 5, at 426.

45. Five healthy volunteers who never smoked marijuana were exposed to cannabis smoke in a small, closed car for 30 minutes. Moreland, Bugge, Skuterud, Steen, Wethe, Kjeldsen, *Cannabinoids in Blood Urine After Passive Inhalation of Cannibis Smoke*, 30 J. FORENSIC SCI. 997 (1985). Other subjects smoked marijuana or hashish cigarettes while the experimental subjects passively inhaled the smoke. *Id.* The THC concentrations in the cigarettes were controlled. *Id.* at 998.

The researchers analyzed the subjects' blood samples by gas chromatographylmass spectrometry (GC/MS), with the cutoff limit set at 0.5 ng/ml. *Id.* at 998. Blood and urine samples were analyzed by a radioimmunoassay (RIA) technique, with the cutoff limit set at 13 ng/ml. *Id.* The researchers analyzed urine specimens using the EMIT test kit. *Id.*

Although there was some individual variation, the results indicated the presence of THC in blood samples and the presence of cannabinoid metabolites in the blood and urine of the passive inhalers. *Id.* at 1000. Examining the EMIT analysis, the researchers found positive values for three days following passive inhalation. The study concluded that the presence of cannabinoid metabolites in blood or urine does not unequivocally prove that the subject was actively smoking marijuana. *Id. See also* Zeidenberg, Bourdon, and Nahas, *Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites*, 134 AM. J. PSYCHIATRY 76 (1977) (cannabinoids detected in urine of one nonsmoker living with five active marijuana smokers). *But see* Perez-Reyes, DiGuiseppi, Mason, and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 CLINICAL PHARMACOLOGY AND THERAPEUTICS 36 (1983) (78 of 80 urine samples from passive inhalation subjects tested negative for cannabinoids);

46. The Centers for Disease Control is an agency of the Department of Health and Human Services.

47. Hansen, Caudill, and Boone, *Crisis in Drug Testing*, 253 J.A.M.A. 2382

rates.[48] The first rate measured false positives, where test results indicated that targeted drugs were present in the urine sample when the sample was actually drug free.[49] The second rate measured false negatives, where test results indicated no presence of the targeted drug when the sample actually contained the targeted drug.[50]

Because laboratories test drug samples under controlled conditions,[51] the high error rate for laboratory drug test raises serious questions regarding the accuracy of drug screens in the uncontrolled environment of the workplace. Test results may be rendered virtually useless[52] due to improper administration of the test, contamination, mishandling or sabotage.[53]

In addition to the inaccuracy and unreliability of drug test results, public-sector drug screening programs raise significant legal issues. Constitutional challenges to drug-screening programs are raised concerning of whether public sector drug test programs violate the fourth and fourteenth amendments.

III. Fourteenth Amendment Issues

A. *Procedural Due Process*

The fourteenth amendment procedural due process clause protects individuals from intrusive state action.[54] For an individual em-

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(1985).

48. *Id.* at 2383-84.

49. *Id.* Cold medicines such as Contact and Sudafed can create false positives for amphetamines, cough medicines such as dextromethorphan can create false positives for morphine use, and the prescription antibiotic amoxicillin, can create false positives for cocaine use. Rust, *supra* note 36, at 51.

50. The error rates were: amphetamines, 0-37% false positives, 19-100% false negatives; barbiturates, 0-6% false positives, 11-94% false negatives; cocaine, 0-6% false positives, 0-100% false negatives; codeine, 0-7% false positives, 0-100% false negatives; methadone, 0-66% false positives, 0-33% false negatives; morphine, 0-10% false positives, 5-100% false negatives. *Hansen, supra* note 47, at 2383-84.

51. *See, e.g.*, Schwartz, Hayden, and Riddile, *Laboratory Detection of Marijuana Use*, 139 Am. J. of Disease in Children 1093 (1985), for a discussion of experimental laboratory methodology.

52. *See*, Rothstein, *supra* note 5, at 27, for a satirical view of workplace drug tests.

53. *Id.*

54. The relevant part of the fourteenth amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Initially, the Supreme Court strictly interpreted state action. *See* The Civil Rights Cases, 109 U.S. 3 (1883). The Supreme Court later expanded the state action concept to include racial discrimination. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); *See also* J. Nowak, R. Rotunda, and J. Young, Constitutional Law (1983); Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960), for a discussion

ployee to establish a fourteenth amendment claim, an employer's invasion must be considered state action. Individuals are entitled to adequate notice and hearing before the government deprives them of rights or interests to which they have a "legitimate claim of entitlement."[55] Individuals have legitimate claims of entitlement to property rights.[56] Because employment is a property right,[57] employees are entitled to adequate notice and hearing before the public sector employer can terminate employment.[58] Termination without notice and hearing would be an arbitrary and capricious deprivation of an employee's property interest.[59]

Once entitlement to due process is established, courts must consider the appropriate type and amount of procedural protection.[60] In *Matthews v. Eldridge*,[61] the Supreme Court balanced three factors to determine the type and amount of procedural due process necessary to satisfy the fourteenth amendment. The first factor was the nature of the private interest affected.[62] The second factor was the risk that the actual governmental procedures would be employed erroneously, depriving an individual of his interest, as well as the probable value of additional safeguards.[63] The third factor was the governmental interest.[64] *Jones v. McKenzie*,[65] a federal district court case illustrates the interplay of these factors.

In *Jones*, a school bus attendant was terminated after a single,

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of the state action requirement.

55. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (legitimate claims of entitlement protect property rights).

56. *Id.*

57. *Id.* at 576-78 (professor's property interest in his employment defined by his appointment). *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1491 (1985) (school district employees possessed property interest in their continued employment). *See also* Closen, Connor, Kaufman, and Wojcik, *Aids: Testing Democracy - Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 890 (1986) (employees have legitimate claims to property rights, such as a job). The Supreme Court, in Perry v. Sinderman, stated: "A person's interest in a benefit is a 'property' interest for due process pruposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit." 408 U.S. 598, 601. (1979). A contract, statute, ordinance, or employer policy may entitle an employee to procedural due process. Closen, *supra*, at 889.

58. Jones v. McKenzie, 628 F. Supp. 1500, 1507 (D.D.C. 1986).

59. *Id.* at 1504.

60. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("once it is determined that due process applies, the question remains what process is due"); Johnson v. United States, 628 F.2d 187, 194 (D.C. Cir. 1980) (determining what process is due depends on weighing the benefit the person is deprived of, the need for efficient governmental action, and procedural safeguards present). *See generally* J. NOWAK, *supra* note 54, 554-78, for a discussion of the procedures required by due process.

61. 424 U.S. 319 (1976).

62. *Id.* at 335.

63. *Id.*

64. *Id.*

65. 628 F. Supp. 1500 (D.D.C 1986).

unconfirmed urinalysis drug test indicated marijuana use.[66] The court reasoned that the employee had a property interest in her job.[67] The court held that termination of the attendant without a proper hearing was, therefore, an arbitrary and capricious deprivation of the employee's property interest in her job.[68]

As evidenced in *Jones*, a government employer drug screening program has direct effects on an employee's private rights, affecting the employee's property interest in his/her employment. Government employers who implement drug screening programs may capriciously and arbitrarily deprive employees of the property interest in their jobs if they terminate employees whose test results indicate an unconfirmed false positive. The government does, however, have a substantial interest in maintaining a safe and secure work environment for employees. Balancing the nature of the employee's due process rights and the risk of governmental procedures unconstitutionally depriving the employee of these rights leads to one conclusion. An employer cannot arbitrarily or capriciously deprive a public-sector employee of his job without fulfilling the due process requirements of notice and fair hearing mandated by the fourteenth amendment.

B. *Substantive Due Process*

The plaintiff in *Jones v. McKenzie*[69] also raised a substantive due process argument. The court, however, decided the case on procedural due process grounds and did not consider the merits of the substantive due process contentions. The substantive due process question, therefore, remains to be litigated.

The separation of powers doctrine allows a government employer to act or implement rules and regulations with "minimal" judicial scrutiny.[70] The government employer's action, however, must be "rationally related" to a "legitimate" public purpose.[71] If the gov-

66. *Id.* at 1503. The employee argued that the employer's termination, without a hearing, was arbitrary and capricious and in violation of her constitutional rights guaranteed by the fourth, fifth, and fourteenth amendments. *Id.* at 1501.

67. *Id.* at 1507.

68. *Id.* at 1507-08. The court reasoned that termination based upon a single, unconfirmed, positive urinalysis was irrational. *Id.* at 1506. The court said that additional corroboration was necessary to confirm the results. *Id.* at 1507. The court also stated that the employee's discharge without a pre-termination hearing deprived her of due process rights. *Id.* At a minimum, due process requires that, before termination, the adversarial process between employer and employee must determine that the employee is the subject of a positive test and that the positive test was appropriately confirmed. *Id.* at 1506. For a description of the *Jones* case, *see Drug Test Limits*, 72 A.B.A.J. 87 (1986).

69. 628 F. Supp. 1500 (D.D.C. 1986).

70. *See* J. NOWAK, *supra* note 54, at 443-53; Closen, *supra* note 57, at 891-92.

71. J. NOWAK, *supra* note 54, at 443; *See* Closen, *supra* note 57, at 891.

ernment employer's action infringes upon an employee's fundamental rights, the employer must justify the infringement as "necessary" to serving "compelling" governmental interest.[72]

Public-sector employers argue that although drug testing infringes upon employee rights such as privacy and employment, the testing is necessary to serve the "compelling" governmental interests of employee safety and public safety. Employees counter that other methods, such as performance tests, are the appropriate means to serve the legitimate public purposes of employee safety and public safety. The argument yet to be litigated is whether mass and random drug tests violate the fourteenth amendment's substantive due process requirement.

IV. Mass and Random Drug Screening Programs Violate Fourth Amendment Protections Against Illegal Searches and Seizures

An employer's fulfillment of due process requirements does not settle the controversy. The most cogent argument an employee can raise against mandatory mass or random urinalysis drug testing is that such programs are a search and seizure in violation of fourth amendment rights.[73] Courts, however, have provided little guidance

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72. *See* J. Nowak, *supra* note 54, at 443-52. *See also* Closen, *supra* note 57, at 892. The Supreme Court has held that the rights to employment, education, and housing are not fundmental rights. *See* Plyer v. Doe, 457 U.S. 202, 218 (1982). *Id.*

73. The fourth amendment to the United States Constitution 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 issue, 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.

Leslie Johnson, Director of Public Information of the American Civil Liberties Unions, stated emphatically that drug screening is an invasion of privacy. Telephone interview with Leslie Johnson, Director of Public Information of the American Civil Liberties Union (Sept. 16, 1986). Drug tests may reveal things which an employer has no right to know. *Id.* For example, the results may indicate whether an employee is pregnant or has a venereal disease. *Id.*

Furthermore, the results of the drug tests do not necessarily correlate with job performance. *Id.* An employee who takes drugs over the weekend may not be impaired in his/her job performance, even though trace amounts of the substance may be detected in the urine. *Id.* Since Americans are innocent until proven guilty, employers should be required to show that the employee was intoxicated on duty or that job performance was impaired. *Id.* The fourth amendment protects against unreasonable searches and seizures. Probable cause, therefore, is the standard required before implementation of drug testing. *Id.*

The American Civil Liberties Union (ACLU) issues a pamphlet which describes mass and random urinalysis drug testing as a violation of fourth amendment rights. *American Civil Liberties Union, Drug Testing in the Workplace* (1986). The ACLU contends that employees have a right to be left alone and that the tests can disclose numerous details concerning an individual's private life. *Id.* The ACLU further attacked the tests' reliability and their inability to measure impairment or intoxication.

to employees in establishing a consistent standard of fourth amendment protection. An examination of the fourth amendment and of recent cases illustrates this point.

The fourth amendment protects an individual from unreasonable state intrusions.[74] Courts weigh the government's need to search and seize against the individual's expectation of privacy in the area searched and in the items seized.[75] Courts engage in this balancing to determine whether the individual actually possesses a reasonable expectation of privacy and whether the governmental intrusions are justified.[76]

Fourth amendment protection extends only to those areas where an individual has a "legitimate expectation of privacy."[77] A legitimate expectation of privacy encompasses more than an individ-

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Id. The ACLU asserted that three conditions must be met before employers may test employees for drugs:

1. The employer has reason to believe that the employee's faculties are impaired on the job;
2. The employee's impairment presents danger to his own safety or the safety of others;
3. The employer gives the employee the opportunity, at the employer's expense, to have the sample tested by an independent laboratory and gives the employee an opportunity to rebut or explain the results.

Id.

74. United States v. Chadwick, 433 U.S. 1, 7 (1977) (individual has a reasonable expectation of privacy in invaded place); Terry v. Ohio, 392 U.S. 1, 9 (1968) (fourth amendment protects person, places and things from unreasonable searches where an individual has a reasonable expectation of privacy); Schmerber v. California, 384 U.S. 1826, 1834 (1966) (fourth amendment protects individual privacy and dignity from unwarranted state intrusion); Wolf v. Colorado, 338 U.S. 25, 27 (1949) (core of fourth amendment is security of privacy against arbitrary state intrusion); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (1985) (fourth amendment protects people, places and things from state invasion where individual has reasonable expectation of privacy); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1007 (D.C. App. 1985) (reasonable expectation of privacy protects against unreasonable state intrusions). *See also* Bell v. Wolfish, 441 U.S. 520, 558-59 (1979) (prisoners still retain some reasonable expectation of privacy).

75. Bell v. Wolfish, 441 U.S. 520, 559 (1979) (need for particular search balanced against invasion of personal rights); Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (need for particular search balanced against invasion of personal rights); Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.C.N.J. 1985) (test of reasonableness balances need of seizure against personal rights); (courts weigh need to seize against invasion seizure entails). *See* Oliver v. United States, 239 F.2d 818, 821 *cert. dismissed*, 353 U.S. 952 (1957) (whether the seizure is fundamentally unfair or unreasonable when balanced against the affected private right).

76. Bell v. Wolfish, 441 U.S. 520, 559 (1979); Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985). *See generally* J. NOWAK, *supra* note 54, at 734-64, for a general discussion of constitutionally protected privacy rights.

77. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan said: "[T]here is a two-fold requirement, first that a person have established an actual subjective expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id. See* Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Chadwick, 443 U.S. 1, 7 (1977); United States v. White, 401 U.S. 745, 752 (1971); Shoemaker v. Handel, 619 F. Supp. 1089, 1098-99 (D.N.J. 1985).

ual's subjective privacy expectation.[78] The expectations are defined by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.[79] For example, a burglar breaking into a victim's home has a subjective expectation of privacy,[80] but the law does not recognize this expectation as legitimate or reasonable.[81] Conversely, a property owner has a legally recognized expectation of privacy in his property, allowing him to exclude others from his property.[82]

The context in which the privacy right is asserted shapes the individual's privacy expectation.[83] What is considered a reasonable expectation of privacy in one context may not be considered reasonable in another.[84] In reference to the public- sector employment context, the Reagan Administration contends that government employees in "sensitive" or "critical" positions should submit to drug tests.[85] This assumes that employees in these job classifications do not have a reasonable expectation of privacy in regard to disposing of urine. To fully understand the significance of this assertion, the issue of whether urinalysis, within the context of public employer drug testing, constitutes a search and seizure must be examined.

Public-sector employers who require employees to submit to mandatory urinalysis drug tests are conducting searches as defined under the fourth amendment. In *Schmerber v. California*,[86] the United States Supreme Court held that compulsory administration of a blood test upon an unwilling subject fell within the purview of the fourth amendment.[87] The Court held that such a test clearly constituted a search for fourth amendment purposes.[88] Using the *Schmerber* analysis, other courts have held that breathalyzer tests are searches for fourth amendment purposes.[89] Finally, courts ex-

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78. Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (privacy shaped by asserted context); Terry v. Ohio, 392 U.S. 1, 9 (1968)("specific content and incidents of [fourth amendent rights] must be shaped by the context in which [they are] asserted"); United States v. Thomas, 729 F.2d 120, 123-24 (2nd Cir. 1984) (privacy shaped by asserted context); Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir 1975) (privacy interests shaped by context in which they are asserted); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1007 (D.C. App. 1985) (privacy interests shaped by context in which they are asserted).
84. *Committee for G.I. Rights*, 518 F.2d at 476 ("what is reasonable in one context may not be reasonable in another"); *Turner*, 500 A.2d at 1007 (reasonableness of privacy expectations varies with the context).
85. Thomas, *supra* note 1, at 60.
86. 384 U.S. 757 (1966).
87. *Id.* at 767.
88. *Id.*
89. *See, e.g.*, State v. Locke, 418 A.2d 843 (R.I. 1980) (taking blood, breath, and

tended the *Schmerber* reasoning, holding that urinalysis drug tests constitute fourth amendment searches.[90]

The United States Supreme Court, in *Coolidge v. New Hampshire*,[91] held that warrantless searches are unreasonable per se under the fourth amendment unless conducted under a few specific and well-delineated circumstances.[92] Public-sector employers who require mandatory urinalysis drug tests for employees or prospective employees do not possess search warrants. An employee has grounds to challenge a public sector employer's mass or random drug screening program as a unreasonable per se warrantless search.

Government employers who implement mass or random urinalysis drug screening programs are also conducting warrantless searches for fourth amendment purposes. In reaction to increased absenteeism, poor work performance, and safety problems related to drug abuse, employers justify administration of the urinalysis drug tests as necessary to enhance employee productivity and safety. Additionally, employers believe that drug screening will deter employee drug usage.[93]

In *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*,[94] a union challenged an employer's rule requiring bus drivers to submit to blood and urine tests when they are involved in a serious accident, are suspected of being intoxicated on duty, or are under the influence of narcotics.[95] When faced with the employees' fourteenth amendment challenge, the seventh circuit held that a

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urine samples is fourth amendment search and seizure); State v. Berker, 120 R.I. 849, 391 A.2d 107 (1978) (breathalyzer examination constitutes fourth amendment search).

90. Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986) (taking urine and testing it for drugs is a search); Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985) (urinalysis is a fourth amendment search); Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1985) (urinalysis testing for use of controlled substances is a fourth amendment search); Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984)(litigants agreed urinalysis was a fourth amendment search). *See* Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976) (union argued deprivation of fourth amendment rights for making bus drivers submit to urinalysis); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985) (urinalysis drug tests violate fourth amendment without reasonable suspicion); Davis v. District of Columbia, 247 A.2d 417 (D.C. 1968) (urinalysis without cause violates fourth amendment); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985) (urine testing of police and firefighters warranted under reasonable suspicion standard).

91. 403 U.S. 443 (1971).

92. *Id.* at 455. The court stated that "[t]he exceptions are 'jealously and carefully drawn', and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." *Id.*

93. Applicants with traces of drugs in their urine will not be hired. Englade, *supra* note 20, at 21-22. Employees who test positive for drug usage are disciplined by suspension or firing.

94. 538 F.2d 1264 (7th Cir. 1976).

95. *Id.* at 1265-66.

government employer must only show that the rule is reasonable.[96]

In examining the fourth amendment issue in *Suscy*, the court held that probable cause existed and no warrant was necessary when public interest justified the employer's intrusion.[97] In this decision, the court redefined probable cause to include suspicion, when public safety interests were balanced against individual privacy interests. The court arbitrarily expanded the scope of probable cause without defining the limits of the concept. Thus, the court abrogated the employees' legitimate fourth and fourteenth amendment rights and created a vacuum, where no uniform guidelines or standards exist.

In *Allen v. City of Marietta*[98] the United States District Court for the Northern District of Georgia balanced the employee's legitimate expectation of privacy against the government's right to oversee the employees and to investigate misconduct, and concluded that urinalysis drug tests are not unreasonable searches in violation

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96. *Id.* at 1266. In turning to the fourth amendment issue, the court examined whether the bus driver had a reasonable expectation of privacy. *Id.* at 1267. The court balanced this claim against the public's interest and decided that a government agency can place reasonable conditions on public employment. *Id.* The court said that the employer had a paramount interest in protecting the public and that, under the circumstances stated in the rules, the bus drivers had no reasonable expectation of privacy in regard to submitting blood and urine samples. *Id.*

97. *Id.* In holding that the employer's rules complied with fourth amendment standards, the court stated, "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse. *Id.* Employees who do not comply with the employer's rules may be terminated. *Id.*

98. 601 F. Supp. 482 (N.D. Ga. 1985). In this case, six former employees sued the city after being terminated. *Id.* at 484. A city official received reports from various sources that certain employees were using drugs on the job. *Id.* The official believed because of the hazardous type of employment, on the job substance abuse constituted a significant threat to employee and public safety. *Id.*

After an undercover investigation, the city official informed the six employees that they would be terminated unless they submitted to urinalysis drug testing. *Id.* All of the employees tested positive for marijuana metabolites. *Id.* The city subsequently terminated all six employees. *Id.* at 484-85.

In the ensuing litigation, the employees asserted that the urinalysis constituted an unreasonable search and seizure in violation of fourth amendment rights. *Id.* at 485. The employees were not granted a hearing before termination. The employees also asserted that the termination was an arbitrary and capricious deprivation of their employment property interest, in violation of due process rights guaranteed by the fourteenth amendment. *Id.*

Examining the search and seizure issue, the court applied the *Schmerber* analysis and noted that expulsion of urine is qualitatively different from the extraction of blood. *Id.* at 488. The court then noted cases which extended the *Schmerber* analysis to include breathlyzer tests and urine tests. *Id.* at 488-89. Based on the findings of other courts, the *Allen* court held that urinalysis is a fourth amendment search. *Id.* at 489.

The court then sought to determine whether the search was unreasonable. *Id.* at 489-90. The court noted that the government employer, in utilizing a urinalysis drug test, conducted a warrantless search. *Id.* at 489. The court examined cases which decided the warrantless search issue. *Id.* at 489-90.

of fourth amendment rights.[99] The court cited two factors in determining that the searches were reasonable: (1) the urinalysis was conducted in an employment context and had no law enforcement purpose, and (2) the city had a right to conduct warrantless searches because the employees were engaged in hazardous work, where on-the-job substance abuse could adversely affect employee and public safety.[100]

In *Allen*, the employer took reasonable steps to investigate the allegations of employee misconduct. The employer gathered enough evidence constituting probable cause before the employees were required to submit to urinalysis drug testing. The court correctly noted that the employer did not violate the employee's fourth amendment rights. The court, however, failed to articulate a drug test standard to guide future litigants.

Similarly, in *McDonell v. Hunter*,[101] the district court held unconstitutional an Iowa Department of Corrections policy which required employees to submit to searches of their vehicles and persons, including blood tests and urinalysis.[102] Evaluating the reasonableness of the seizure in the place of employment context[103] the court held that the administration's intrusions are only justified by reasonable suspicion, based on objective facts, that the employees were engaging in substance abuse.[104] In this case, the court concluded that no reasonable suspicion existed.[105]

The *McDonell* court established reasonable suspicion as a constitutional guideline for government employers investigating employee misconduct. The court found that probable cause was an inappropriate standard because it applies only to criminal proceedings. The court held that employers who institute drug testing upon mere suspicion or no grounds at all are violating the employees' fourth amendment rights. Reasonable suspicion, therefore,

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99. *Id.* at 491.

100. *Allen*, 601 F. Supp. at 491. The court then considered whether the employees were denied procedural due process rights guaranteed by the fourteenth amendment. *Id.* After determining that the employees had a property interest in their jobs, the court reasoned that they could not be deprived of employment without due process. *Id.* Following the firing, the employees were offered a post-termination review by the pension board. *Id.* at 493. Each employee received a notice citing the reason for termination and a list of witnesses prepared to testify against them. *Id.* The court concluded that these procedures were sufficient to satisfy the due process requirements of notice and opportunity to be heard. *Id.* at 494.

101. 612 F. Supp. 1122 (D.C. Iowa 1985), *modified*, 809 F.2d 1302 (1987). (the court of appeals permitted testing that is performed "uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.")

102. *Id.* at 1131.

103. *Id.* at 1128.

104. *Id.* at 1130.

105. *Id.* at 1131.

is a logical, constitutionally sound standard which fills the vacuum between probable cause and mere suspicion.

In *Shoemaker v. Handel*,[106] the court essentially weighed the legitimate governmental interest in maintaining the integrity of the horse racing industry and ensuring the safety of the participants against the jockey's legitimate expectations of privacy.[107] The court concluded that the jockeys have a diminished expectation of privacy because the state heavily regulates the racing industry.[108] The court held that the jockeys must submit to the tests because the reasonable suspicion standard did not apply.[109]

The court distinguished its holding in *Shoemaker* from the holding in *McDonell*.[110] The court noted that in *McDonell*, the government's objective was to discover drug smuggling.[111] The court considered this objective an attentuated goal.[112] *Shoemaker*, on the other hand, involved an industry which the state regulated.[113]

The court in *Shoemaker* reached an erroneous conclusion. The "attentuated" goal referred to in *McDonell* is virtually the same goal as the drug testing program goal in *Shoemaker*: to eliminate drug abuse. The regulation of an industry does not supply a rational basis justifying violation of an employee's fourth amendment rights.

In *McDonell*, prison employees' rights were the focus of the litigation. Prisons are also subject to regulation, yet the *McDonell* court established reasonable suspicion as an appropriate standard before employers can conduct searches. Two other cases illustrate the establishment of the reasonable suspicion standard for employees in regulated job classifications.

In *Turner v. Fraternal Order of Police*,[114] the Court of Appeals for the District of Columbia found that individuals possess different expectations of privacy depending upon the context in which the expectations are asserted.[115] The *Turner* court adopted the reasonable

106. 619 F. Supp. 1089 (D.N.J. 1985).
107. *Id.* at 1100.
108. *Id.* at 1102.
109. *Id.* at 1102-03.
110. For a discussion of *McDonell* and *Shoemaker*, see Feerick, *Employees Rights and Substance Abuse*, 195 N.Y.L.J., Feb. 7, 1986, at 1, col. 1.
111. Shoemaker v. Handel, 619 F. Supp. 1089, 1102-03 (D.C.N.J. 1985).
112. *Id.*
113. *Id.* The court then examined the privacy issue which the jockeys raised. *Id.* at 1105-07. The court noted that individuals have an interest in avoiding the disclosure of personal matters. *Id.* at 1106. The Racing Commission, the court stated, ensured that the jockey's breathalyzer and urine test records would remain confidential and would ultimately be destroyed. *Id.* at 1107.
114. 500 A.2d 1005 (D.C. App. 1985).
115. *Id.* at 1007-08. The Chief of Police issued a special order directed at eliminating drug abuse on the Department. *Id.* at 1006. The order provided that any Department official could order any member of the police force to submit to urinalysis

suspicion standard for a job classification that is public safety related and critical. In balancing employer and employee interests, the court reached a rational, constitutionally sound compromise. The reasonable suspicion standard for specific job classifications, such as police officers, not only provides guidance for employers seeking to implement drug testing programs, but also provides fourth amendment protection against unreasonable searches and seizures to employees.

In *City of Palm Bay v. Bauman*,[116] a Florida appellate court reversed the trial court's finding that probable cause must be established before employers could require employees to submit urine samples.[117] The court found this standard too strict.[118] The more appropriate standard, the court held, was the reasonable suspicion standard.[119] The reasonable suspicion test requires employers to justify urinalysis drug testing by identifying specific objective facts and the rational inferences which may be drawn from those facts, leading employers to believe that employees are engaging in drug

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based upon a suspicion of drug abuse. *Id.* The order also provided that the Department could terminate any member who refused to submit a urine sample for drug testing. *Id.* The Department used the EMIT Cannabinoid assay, which detects the presence of the psychoactive chemical that produces the intoxicating effect. *Id.* at 1006 n.2. The test can detect the presence of the chemical for a period of seven or more days after use. *Id.*

One Department member, and the Fraternal Order of Police (FOP), the Department's union, filed a complaint, seeking an injuction against urinalysis drug testing. *Id.* at 1006. The trial court granted a preliminary injunction. *Id.* In finding for the plaintiffs, the trial court held that the order violated the Department member's fourth and fifth amendment rights. *Id.* at 1006-07.

On the police chief's appeal, the court considered whether the fourth amendment allowed the Department to force police officers, suspected of drug abuse, to submit to urinalysis drug testing. *Id.* at 1007. In addressing this issue, the court initially considered whether police officers have a legitimate expectation of privacy in their person which outweighs the Department's need for intrusion upon that privacy in order to advance the goals of public and Departmental safety. *Id.* The court cited the holding in Committee for G.I. Right v. Calloway, 518 F.2d 463 (D.C. Cir. 1975) as an example. *Id.* at 1007-08. The court noted that, because of conditions peculiar to the military and the nature of its mission, military personnel, therefore, have less fourth amendment protection than civilians. *Id.*

116. 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

117. *Id.* at 1325-26. The city appealed a final judgment which permanently enjoined it from conducting random urinalysis drug tests of police officers and firefighters. *Id.* at 1323. The trial court held that the drug tests constituted an unreasonable search and seizure, in violation of the employees' fourth amendment rights. *Id.* at 1325. The court stated that the probable cause must exist before the city would require urinalysis drug tests of employees. *Id.*

118. *Id.* at 1325. Due to the hazardous nature of the police officers' and firefighters' work, the court said that the city had a right to develop a policy forbidding substance abuse. *Id.* at 1326. The city's concern is genuine because of the potential danger to the employee and the public which exists if the employee uses illicit drugs. *Id.* This policy could prohibit drug use at any time, whether the use is on or off the job. *Id.*

119. *Id.*

abuse.[120]

The *City of Palm Bay* court also adopted the reasonable suspicion standard for employees in critical or safety related job classifications. The court not only adopted this standard, but also elaborated upon the concept in order to provide more guidance to employers wishing to establish drug testing programs. Employers, therefore, will be able to protect both their own interests and the public's interests without unduly infringing employees' fourth amendment rights.

The district court in *Capua v. City of Plainfield*[121] utilized the reasonable suspicion standard to hold that mass urinalysis drug screening of fire fighters and police was an unreasonable violation of fourth amendment rights.[122] The court said that a public sector employer's reasonable suspicion must be based upon specific facts and upon all reasonable inferences drawn from those facts.[123] These facts must then be individualized to an employee targeted for a search.[124] Without such individualized suspicion, the court held, the fourth amendment could not protect employees from arbitrary governmental intrusion.[125]

The *Capua* court reached a correct, constitutionally sound decision in holding that the city's mass urinalysis drug testing program was an unreasonable intrusion upon employees' privacy interest. The court added the concept of individualized suspicion to the reasonable suspicion standard. A public sector employer thus, may justifiably test an employee manifesting objective symptomology of on the job drug use.

In *Lovvorn v. City of Chattanooga*,[126] the district court held

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120. *Id.* The court explained that reasonable suspicion is less than probable cause, but more than mere suspicion. *Id.* Reasonable suspicion must have factual support in the surrounding circumstances. *Id.* Reasonable suspicion requires further investigation. *Id.* Where reasonable suspicion exists, urinalysis is an appropriate investigating tool. *Id.* For a discussion of *City of Palm Bay, Drug Testing: Reasonable Suspicion Required*, 72 A.B.A.J. 20 (1986).

121. 643 F. Supp. 1507 (D.N.J. 1986).

122. *Id.* at 1517.

123. *Id.*

124. *Id.* The court determined that a "reasonable" search and seizure is defined by the context of the search. *Id.* at 1513. The drug testing program subjected employees to a high degree of bodily intrusion without any specific facts or information that any employee had been taking drugs. *Id.* at 1514-16. The court stated that "[t]he 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." *Id.* at 1517. Since firefighters and police are under constant observation by superiors and co-workers, the court reasoned that an individualized, reasonable suspicion could be established by manifestation of symptoms. *Id.* at 1518.

125. *Id.* at 1517. The court also found that the mass urinalysis drug testing programs infringed upon the employees' constitutionally protected liberty and property interests because the employees were deprived of due process. *Id.* at 1521.

126. 647 F. Supp. 875 (E.D. Tenn. 1986).

that the employer must have reasonable suspicion that a urinalysis drug test will provide evidence that a firefighter is using illegal drugs.[127] The court said that reasonableness is determined by balancing the employer's need to search against the employee's reasonable or legitimate expectation of privacy.[128] The court found that the state had a compelling interest in drug testing.[129] When balanced against the employee's privacy interests, however, the court held that the employer's interest was limited and therefore the employer must have an individualized suspicion that an employee is ingesting illicit drugs.[130] The court defined this individualized suspicion as "reasonable suspicion."[131]

In *Penny v. Kennedy*,[132] the companion case to *Louvorn*, police officers sought an injunction preventing the Commissioner of Fire and Police from conducting a mass urinalysis drug testing program.[133] The court found, on facts similar to *Louvorn*, that the city had no reasonable suspicion to justify conducting the drug test program.[134] The court referred to the reasoning in *Louvorn* to explain its decision.[135]

In *Louvorn* and *Penny*, the court used precedent[136] to reach a reasonable, constitutionally sound decision. The court also used *Capua*'s[137] concept of individualized suspicion to define reasonable suspicion. This individualized, reasonable suspicion standard, when linked to objective facts which a public-sector employer possesses, provides adequate constitutional safeguards to protect both society's safety interests and employees' privacy interests.

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127. *Id.* at 880. The court also determined that firefighters have property interests in their jobs and liberty interests in their reputations which cannot be taken without due process. *Id.* at 883.

128. *Id.* at 879.

129. *Id.* Since firefighters engage in hazardous work and must be able to make snap decisions and react quickly, the city has compelling interest in having drug-free firefighters. *Id.*

130. *Id.* at 880. The court noted that the city did not possess any objective facts about any individual employees, such as deficient job performance or physical or mental deficiencies, in order to establish a reasonable suspicion of illicit drug usage. *Id.* at 882.

131. *Id.* at 880.

132. 648 F. Supp. 815 (E.D. Tenn. 1986).

133. *Id.* at 816.

134. *Id.* at 817.

135. *Id.*

136. In reaching its decision, the court relied specifically upon the holdings in Capua v. The City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985), Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985), City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985), Patchogue-Medford Congress of Teachers v. Bd of Educ., 505 N.Y.S.2d 888 (N.Y. App. Div. 1986); Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y. Sup. Ct. 1986).

137. 643 F. Supp. 1507 (D.N.J. 1986).

In *National Treasury Employees Union v. Von Raab*,[138] the district court concluded that a proposed urinalysis drug testing program for employees seeking promotion was an unreasonable and wholly unconstitutional search and seizure.[139] The court noted that the United States Customs Service lacked probable cause, or even reasonable suspicion, to conduct "dragnet" searches and seizures.[140] The court, therefore, held that the drug testing program violated employees' fourth amendment rights, unconstitutionally interfered with employees' penumbral rights of privacy, and violated fifth amendment protections against self-incrimination.[141]

After considering the fourth amendment issue, the court correctly held that the public-sector employer's drug testing program constituted a fourth amendment search and seizure, violating the employees' legitimate expectations of privacy. The court, enjoining the drug testing program on privacy and fifth amendment grounds, went further than other courts, which have held such programs unconstitutional solely on fourth amendment grounds. Because penumbral rights of privacy and fifth amendment self-incrimination issues in drug testing cases are largely unlitigated, it is unlikely that other courts will follow the *Von Raab* court's reasoning.

A Proposed Drug Testing Standard for Public-Sector Employees

As the previously-discussed cases demonstrate, the context in which an individual asserts a reasonable expectation of privacy is the crucial factor that courts consider when determining the degree of fourth amendment protection. To date, courts have held that jockeys, military personnel, and government employees in hazardous work, or in work directly related to public safety, possess diminished expectations of privacy regarding urinalysis drug testing. In the various rulings, however, courts have not formulated consistent or rational standards applicable in a variety of contexts and circumstances. As a result of balancing employers' interests and public interests against employees' interests, the courts have arbitrarily drawn lines between fourth amendment protection and an employer's right to intrude upon an employee's privacy.

As indicated in *McDonell*,[142] *Turner*[143] *City of Palm Bay*,[144]

138. 649 F. Supp. 380 (E.D. La. 1986), *modified*, 808 F.2d 1051 (1981).
139. *Id.* at 387.
140. *Id.* Although the court found the employer's interest in a drug-free work place and work force legitimate, the court found the means used to reach this goal violated employees' fourth amendment rights. *Id.*
141. *Id.* at 387-89.
142. 612 F. Supp. 1122 (D. Iowa 1985).
143. 500 A.2d 1005 (D.C. App. 1985).

Capua,[145] *Lovvorn*,[146] *Penny*,[147] and *Von Raab*,[148] public-sector employers can develop a drug-testing policy that will withstand constitutional scrutiny in the courts. Initially, government employers must delineate the goals and purposes which a drug testing program will serve. The primary purpose of urinalysis drug testing is to protect the health of the employees and the public.[149] Regulations of the Food and Drug Administration and criminal laws against drugs prove that the state has a legitimate interest in protecting public health.

Government employers promulgate many rules for the express purpose of protecting employee and public safety. A urinalysis drug testing program is a logical extension of these safety rules. Any drug testing program should contain a written statement of goals and objectives which clearly and explicitly state that the drug testing program was enacted to protect employee and public health.

In developing a drug testing policy which will survive the fourteenth amendment, public sector employers must adopt standards which are "rationally related" to legitimate state objectives.[150] Primarily, this means that drug testing policies must provide sanctions only against those employees who are found to be using drugs which adversely affect job performance, and which, in turn, adversely affect employee or public safety.

A standardized testing procedure is the second attribute of a drug testing policy which would withstand fourteenth amendment scrutiny.[151] The testing procedure should be standardized, raising an employee's expectation that urinalysis drug testing will occur only when an employer has a reasonable suspicion that employees in "sensitive" or safety related jobs are using drugs that affect their job performance. The reasonable suspicion standard for employees in "critical" or safety-related job classifications provides the employee with fourth amendment protection preventing employers from conducting unreasonable searches and seizures. The reasonable suspicion standard requires more than mere suspicion. Government employers must have some factual basis for requiring urinalysis. Adoption of the reasonable suspicion standard in this context would prevent employers from engaging in substance abuse "fishing

144. 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).
145. 643 F. Supp. 1507 (D.N.J. 1986).
146. 647 F. Supp. 875 (E.D. Tenn. 1986).
147. 648 F. Supp. 815 (E.D. Tenn. 1986).
148. 649 F. Supp. 380 (E.D. La. 1986).
149. *See supra* notes 16-38 and accompanying text.
150. *See supra* notes 69-72 and accompanying text, for a discussion of substantive due process.
151. *See supra* notes 40-53 and accompanying test, for a discussion of drug test reliability.

expeditions."[152]

The probable cause standard is appropriate for public-sector employees who are not in "critical" or safety-related job classifications. As the *Allen*[153] court stated, "Government employees do not surrender their fourth amendment rights merely because they go to work for the government. They have as much of a right to be free from warrantless government searches as any other citizens."[154] Requiring a lesser drug test standard for these employees would unconstitutionally violate their fourth amendment rights.

In addition to fourth amendment challenges, the drug testing policy must provide minimal procedural safeguards before government employers impose sanctions. Mass and random urinalysis drug testing may result in inaccuracies in isolated circumstances. Employees should be allowed to challenge the results or produce evidence explaining why they were using certain drugs. Certain drugs used by employees may be necessary for valid medical reasons and should not be sanctioned.

The government employers' discretion regarding the imposition of penalties should also be reduced in a drug testing policy. Because the policy primarily protects employee and public health, sanctioning guidelines consistent with this goal should be included in the policy. The policy should require first-time offenders to undergo drug treatment, rather than termination.[155] By concentrating on rehabilitation, as opposed to punishment, the sanctioning approach would attempt to help the employee. Subsequent violations should be dealt with in a progressively harsh manner, culminating in termination. Such a graduated sanctioning approach is both sensible and constitutionally sound.

Finally, a constitutionally sound drug testing policy should not infringe upon an employee's right to privacy. Employers should require each employee to sign a drug testing consent form. The consent form should fully apprise the employee of the prohibited drugs, the test methodology, and the possible sanctions for violation of the anti-drug policy. The consent form's purpose is twofold. First, it protects employers from possible liability. Second, it protects employees by fully informing them of the anti-drug policy in detail.

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152. A "fishing expedition" is when an employer searches for drug abuse among employees without any grounds.

153. 601 F. Supp. 482 (N.D. Ga. 1985).

154. *Id.* at 491.

155. *See* Marmo, *Alcoholism, Drug Addiction, and Mental Illness: The Use of Rehabilitative Remedies in Arbitration*, 32 LAB. L.J. 491 (1981) (advocating utilization of rehabilitation rather than punitive measures in arbitration).

CONCLUSION

Substance abuse in America is of critical concern to all citizens. The impact of drug abuse in the workplace is tremendous in terms of economic and societal costs. The occasional use of illicit drugs on the job is especially dangerous for employees in "critical" or safety-related job classifications. Public-sector employers have acknowledged this potential danger by instituting mass and random drug testing programs.

These drug testing programs, however, raise certain constitutional issues. Courts have held that the context in which an employee asserts a legitimate expectation of privacy must be balanced against the employer's interests and societal interests. The result has been an inconsistent application of fourth amendment protections. Drug testing policy raises special problems which require courts to adopt consistent standards so that employees may know in advance the extent of their fourth amendment protections. Government employers should be aware of these problems. They should implement drug testing programs which reflect fairness toward employees and which are constitutionally sound.

Edward E. Westphal