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Preserving Employee Rights During the War on Drugs

The media proclaims that drug abuse has infested every aspect of our society. Professional athletes endure public embarrassment while their brilliant, lucrative careers end abruptly in jail terms.[1] Allegations of prior drug use plague political campaigners.[2] Movie stars die of overdoses.[3] Drugs permeate our schools, homes and workplaces. While studies have shown that the use of illegal drugs by Americans has dropped significantly over the past few years,[4] Americans today feel drug abuse constitutes the nation's most important problem.[5]

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1. When the International Olympic Committee began testing amateur athletes for drugs, in 1983, 15 athletes tested positive and numerous more dropped out of the competition. Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*, 16 PEPPERDINE L. REV. 45, 45 (1988).

2. *See U.S. Agents Arrest Washington Mayor on Drug Charges*, N.Y. Times, Jan. 19, 1990, § 1, at 1, col. 1 (discussing the arrest of Mayor Marion S. Barry Jr. on a narcotics charge); *Mayor Barry Indicted on Charges of Possessing Cocaine and Lying*, N.Y. Times, Feb. 16, 1990, § 1, at 1, col. 2; *Pressure Building for Mayor Barry to Resign After Indictment*, N.Y. Times, Feb. 17, 1990, § 1, at 11, col. 2.

3. *See* Carlson, *John Belushi, 1949-1982: A Life that Guaranteed Death at an Early Age*, PEOPLE, Mar. 22, 1982, at 24 (discussing John Belushi's lethal overdose of cocaine and heroin).

4. 1989 NATIONAL DRUG CONTROL STRATEGY 1 (sent to Congress by President Bush on Sept. 5, 1989) [hereinafter DRUG CONTROL STRATEGY] (the use of illegal drugs has dropped 37% from 1985 to 1988). The statistics are from the ninth periodic National Household Survey on Drug Abuse conducted in 1988. *Id.* The two most commonly used illegal substances—marijuana and cocaine—are down 36% and 48% respectively. *Id.* According to Congress, approximately 37 million Americans used an illegal drug in 1988. Anti-Drug Abuse Act of 1988, 21 U.S.C.A. § 1502 note (1988). Twenty-three million Americans use drugs at least monthly. *Id.*

5. McQueen & Shribman, *Battle Against Drugs is Chief Issue Facing Nation, Americans Say*, Wall St. J., Sept. 22, 1989, at 1, col. 1 (according to a nationwide Wall Street Journal/ NBC News poll, 43% of the Americans polled feel drug abuse is the most important issue facing the Nation). A high 75% of persons polled have been touched personally by drugs. *Id.* The exposure of public figure drug abuse may have caused the widespread public concern regarding drug use. Kaplan & Williams, *Will Employees' Rights be the First Casualty of the*

Drug use awareness has led to fear for worker and public safety. To combat the problem of drug abuse in the work sector, drug testing is becoming a common practice in the public and the private work force.[6] Some public and private companies claim drug testing programs provide a deterrent against drug use by new job applicants, and reduce the work-related injuries of existing employees.[7] Economic concerns[8] also motivate employers to devise drug testing programs.[9]

Although most workers favor drug testing at their workplace,[10] testing poses a serious threat to a worker's right to privacy.[11] The California Constitution, unlike the United States Constitution, con-

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War on Drugs?, 36 U. KAN. L. REV. 755, 756 (1988). President Bush feels that the drug problem is the "gravest domestic threat" to our nation today. President's Address to the Nation on the National Drug Control Strategy, 25 WEEKLY COMP. PRES. DOC. 1304 (Sept. 11, 1989) [hereinafter Address to the Nation].

6. Alcoa, American Airlines, AT&T, Boeing, Boise Cascade, Dupont, Exxon, Federal Express, Ford Motor Company, General Motors, Greyhound Lines, IBM, Kidder, Peabody & Company, Lockhead, New York Times, Northeast Utilities, Smith Barney Upham Harris, Toyota, TWA, and United Airlines are a few of the private companies to implement a drug testing program. *See* Note, *Employee Drug Testing—Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832, 832 (1987); Comment, *Taking the Sting Out of Employee Drug Testing*, 8 HAMLINE J. PUB. L. & POL'Y 527, 528 (1987); Muczyk & Heshizer, *A Management Perspective on the Controlled Substance Testing Issue: Management's Newest Pandora's Box*, 2 J. L. HEALTH 27, 32 (1987-88). Public employee drug testing programs first started in the United States military when rumors indicated a high level of drug abuse. Comment, *supra*, at 528. Drug testing of public employees includes federally-regulated railroad employees and Customs Service employees. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989). *See also Oversight Hearing on Drug Testing in the Work Force: Hearings Before the Subcomm. on Employment Opportunities*, 100th Cong., 2d Sess. 11 (1988) [hereinafter *Hearings*] (according to a study conducted by the United States General Accounting Office, larger firms were more likely to conduct drug tests than smaller firms, and job applicants were tested more often than employees). The majority of firms conducting drug tests do so for cause, such as testing employees after an accident. *Id.* at 15.

7. *See* Lewis, *Drug Testing in the Workplace: Legal and Policy Implications for Employees and Employers*, 3 DET. C.L. REV. 699, 716 (1987). In 1985, one year after Pacific Gas & Electric of San Francisco implemented a drug testing program, serious work-related injuries dropped 40%. *Id.* From 1984 to 1987, the rate of job applicants testing positive for drugs dropped from 17% to 3%. *Id.* Within 18 months of instituting a drug testing program, DiSalvo (a trucking firm) noticed a decrease from 17% to 2% in employees testing positive. *Id.* at 717. Driving accidents were reduced by more than 20% in the same period. *Id. But see* Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 996 n.167 (1988) (stating that only eight out of 2,979 workplace injuries in the chemical industry were due to drugs).

8. *See* Comment, *supra* note 6, at 529 (economic concerns include absenteeism, injuries, property damage, employee theft, reduced quality of work, and the cost incurred in hiring and replacing employees).

9. *Id.*

10. McQueen & Shribman, *supra* note 5, at 1, col. 1 (stating that, of the workers questioned, 68% were in favor of drug testing at their workplace).

11. Lewis, *supra* note 7, at 730. Innocent employees sacrifice their rights in the effort to locate the guilty. *Id.* Violating the privacy of the innocent in order to find the guilty establishes a dangerous precedent. Capua v. City of Plainfield, 643 F. Supp. 1507, 1522 (D.N.J. 1986).

tains an express right to privacy.[12] California courts have ruled that the right to privacy protects many facets of a California citizen's life.[13]

Both the drug testing process and the test results invade an employee's right to privacy.[14] For instance, our society considers urination an extremely personal act.[15] However, the testing process usually requires that an employee urinate in the visual or aural presence of a monitor.[16] Drug testing can also infringe on the right to privacy by divulging an employee's use of legitimate medication, exposing private medical conditions,[17] and revealing conduct that occurred during off-duty hours.[18] Drug testing further infringes on a person's privacy by revealing past drug use, not just present impairment.[19]

To date, the California Supreme Court has not ruled on the constitutionality of drug testing current employees in the private work sector.[20] However, the United States Supreme Court recently ruled

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12. *See* CAL. CONST. art. I, § 1 (the California Constitution was amended in 1972 to include the right to privacy).

13. *See infra* text accompanying notes 147-259. *See generally* Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 351, 351-427 (1982) (discussing the need for courts to recognize a right to a private life within California's constitutional right to privacy). For instance, the right to privacy protects a professor against undercover investigation in his classroom, and protects tenure discussions in the University. *See infra* text accompanying notes 148-59, 179-84. Additionally, the right to privacy protects an individual's right to select with whom to live. *See infra* note 137 and accompanying text. A worker's right to privacy includes the right to date business competitors and to refuse an employer's mandatory polygraph testing. *See infra* text accompanying notes 185-207.

14. *See infra* text accompanying notes 279-90.

15. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1413 (1989) (stating that there are few activities in our society more personal than urination).

16. Under Executive Order 12,654, the employee may request to go behind a partition or in a stall with a monitor listening for sounds of urination. Kaplan & Williams, *supra* note 5, at 762. If the monitor suspects a problem with the sample, the monitor may watch the employee urinate. *Id. See infra* text accompanying notes 280-82 (discussing the use of monitors in drug testing programs).

17. The Washington D.C. Metropolitan Police Department tested female applicants' urine for pregnancy. Kaplan & Williams, *supra* note 5, at 758 n.14, *citing* Churchville, *Applicants for D.C. Police Secretly Tested for Pregnancy*, Wash. Post, Nov. 5, 1987, at A1, col. 1. *See infra* text accompanying note 284 (listing the medical conditions which urinalysis can reveal).

18. Kaplan & Williams, *supra* note 5, at 758. *See infra* text accompanying notes 287-90 (discussing the ability of urine tests to detect drug use which occurred during the weekends or evenings).

19. Palefsky, *Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance*, 11 NOVA L. REV. 669, 672 (1987) (arguing that the determination that drug testing fails to detect impairment should be enough to require less intrusive alternatives for detecting impairment, like reflex or response time tests). *See infra* text accompanying notes 287-88 (discussing the inability of urine tests to detect present impairment).

20. *But c.f.* Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1051, 264 Cal.

on the issue of federal employee drug testing.[21] The Supreme Court held that drug testing of certain federal employees does not violate the employee's federal constitutional right to be free from unreasonable searches and seizures.[22] These cases suggest a growing acceptance of drug testing by the Supreme Court. While the rulings by the Supreme Court are not controlling in deciding the constitutionality of drug testing in the private sector, the cases provide a useful analogy in determining the validity of privately conducted drug tests.[23]

The focus of this Comment is on whether drug testing current employees violates the employees' California constitutional right to privacy. Part I of this Comment discusses federal law regarding drug testing of public employees and then analyzes current court decisions defining the California state constitutional right to privacy.[24] Part II of this Comment explores the possible state constitutional ramifications of drug testing in the private work sector.[25] Finally, in Part III, this Comment offers a statutory solution for protecting the right to privacy without diminishing public safety or employee productivity.[26]

I. LEGAL BACKGROUND

A. Drug Problem

1. In General

Although many Americans have decreased their casual use of drugs, addiction to certain drugs, like crack,[27] has increased dramatically

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Rptr. 194, 206 (1989), *rev. denied*, Mar. 15, 1990 (holding that the employer's preemployment drug testing program did not violate the California constitutional right to privacy); *infra* notes 209-27 and accompanying text (discussing the *Wilkinson* case).

21. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989) (holding that it was reasonable to require warrantless drug and alcohol testing of railroad employees after an accident or for cause); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (holding that it was reasonable to require suspicionless drug testing of Customs agents seeking promotion into positions directly involved with drug interdiction or positions requiring the employee to carry a handgun).

22. *See infra* text accompanying notes 79-125 (discussing *Skinner v. Railway Labor Executives' Ass'n* and *National Treasury Employess Union v. Von Raab*).

23. *See infra* text accompanying notes 128-31 (discussing the use of the United States Supreme Court decisions in the private work force).

24. *See infra* notes 27-207 and accompanying text.

25. *See infra* notes 208-328 and accompanying text.

26. *See infra* notes 329-44 and accompanying text.

27. Crack, an inexpensive and extremely potent derivative of cocaine, is the most dangerous and quickly addictive drug known. DRUG CONTROL STRATEGY, *supra* note 4, at 3.

over the past few years.[28] The public's perception of drug use as a harmless pastime has changed to now regard drug use as a social, economic, and medical catastrophe.[29] Millions of Americans fear drugs and drug-related crime at home, at work, and in their schools.[30] Drug abuse is linked to increased crime, the spread of AIDS, severe health problems in newborns, and decreased productivity at work.[31]

Both federal and state governments are concerned about drug abuse.[32] In the Anti-Drug Abuse Act of 1988,[33] Congress declared a policy to create a drug-free America by 1995.[34] President Bush believes that police cannot solve the drug problem alone, but that every citizen, in every community, must fight against the illegal use of drugs.[35] The anti-drug campaign includes eradicating drug use in the schools and the workplace.[36] The Bush administration has outlined

28. *Id.* at 4. There has been a 28-fold increase in emergency room admissions involving smoked cocaine, or crack, since 1984. *Id.* at 3. More than six million Americans use cocaine at least monthly. Anti-Drug Abuse Act of 1988, 21 U.S.C.S. § 1502 note (1988). President Bush feels that crack is the most serious problem today. Address to the Nation, *supra* note 5, at 1304. In addition, drug use in certain cities has recently increased. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON GANGS AND DRUGS, 1989 Final Report 6 [hereinafter TASK FORCE]. In Oakland, from 1985 to 1987, the number of juveniles arrested on drug charges has more than doubled. *Id.* at 6. In Los Angeles County, cocaine-related deaths has increased by more than 200% since 1985. *Id.* at 7. In San Diego, from 82 to 87% of inmates tested positive for drugs. *Id.* at 12.

29. DRUG CONTROL STRATEGY, *supra* note 4, at 2. In the past few years, Americans became increasingly aware of the damage drugs cause. *Id.* at 48.

30. McQueen & Shribman, *supra* note 5. Americans are changing their lifestyle in response to the drug problem. *Id.* More people are inclined to double-bolt their doors, think twice about going out at night, and carefully evaluate with whom they associate. *Id.* Drug-related homicides continue to dramatically increase. DRUG CONTROL STRATEGY, *supra* note 4, at 1. The majority of robberies and half of the felony assaults are committed by young people who are drug users. *Id.* The number of drive-by shootings involving innocent bystanders continues to increase. *Id.*

31. DRUG CONTROL STRATEGY, *supra* note 4, at 1-2. Felony drug convictions are the single fastest and largest growing sector of federal prison population. *Id.* at 1. Intravenous drug use is the single largest source of spreading the AIDS virus, and as many as one-half of all AIDS deaths are drug-related. *Id.* The number of people admitted to emergency hospitals for drug-related injuries was up 121% between 1985 and 1988. *Id.* There are 200,000 or so babies born each year to mothers who use drugs. *Id.* at 2. *But see* Morgan, *The "Scientific Justification" for Urine Drug Testing*, 36 U. KAN. L. REV. 683, 685-88 (1988) (questioning the validity of the diminished productivity studies based on the reduced income of daily users of drugs).

32. *See infra* text accompanying notes 34-39, 56-74 (discussing concerns of the federal government); *infra* text accompanying notes 40-46 (discussing concerns of the state government).

33. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181-4545 (1988).

34. Anti-Drug Abuse Act of 1988, 21 U.S.C.S. § 1502 note (1988).

35. Letter to the Speaker of the House and the President of the Senate Transmitting the National Drug Control Strategy Report, 25 WEEKLY COMP. PRES. DOC. 1304 (Sept. 11, 1989) [hereinafter Letter to the Speaker] (part of the Introduction to the Bush Administration's 1989 National Drug Control Strategy for Congressional Consideration and Action). *See* Address to the Nation, *supra* note 5, at 1305 (stating that the war on drugs must extend to every workplace, school and home).

36. DRUG CONTROL STRATEGY, *supra* note 4, at 47-58. *See also* Address to the Nation, *supra* note 5, at 1305 (stating that the war on drugs must extend to every workplace, school and home).

drug-free workplace policies for the private sector.[37] The federal government is encouraging private employers to: (1) Develop a drug policy that sets out the action the employer will take if an employee uses illegal drugs; (2) set up an Employee Assistance Program,[38] or other devices, to help employees who use drugs; (3) train supervisors to recognize drug use in employees; and (4) provide a means for detecting drug abuse, including drug testing.[39]

To combat the drug abuse problem, the California state government has also devised policies to deter drug abuse.[40] The California state government believes, as does the federal government, that the drug problem is beyond its immediate control.[41] The California State Task Force on Gangs and Drugs (the Task Force) found that local police and sheriff's departments do not have sufficient resources to suppress drug crimes.[42] The Task Force recommended strict tactics for dealing with drug users in law enforcement, prosecution, corrections, and probation.[43] Furthermore, the Task Force proposed that the judicial, executive, and legislative branches of government establish a strict policy for dealing with drug offenders.[44] The Task Force

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37. DRUG CONTROL STRATEGY, *supra* note 4, at 57.

38. Corporations devised Employee Assistance Programs (EAP's) in the 1940's to identify and treat alcohol abusers. *Id.* at 56. Many of the EAP's now include treatment for illegal drug use. *Id.*

39. *Id.*

40. TASK FORCE, *supra* note 28, Final Report.

41. *See id.* at XV (discussing state problem with controlling drug abuse); Letter to the Speaker, *supra* note 35, at 1304 (describing federal problem with controlling drug abuse).

42. TASK FORCE, *supra* note 28, at XV.

43. *Id.* at 36-51. The Task Force recommended the following law enforcement changes: (1) Establish a specialized gang and narcotics enforcement unit; (2) provide ongoing training on methods of drug enforcement to officers; (3) implement an integral program including schools, corrections, and community organizations; (4) coordinate efforts with health inspectors to deter crack houses; (5) hire bilingual officers; (6) coordinate efforts with community groups to encourage victim/witness cooperation; (7) increase the number of officers to protect the community; and (8) establish a Serious Habitual Offender Program. *Id.* at 36-40. Additionally, the Task Force recommended the following prosecution changes: (1) Establish a system where one attorney handles the whole case; (2) provide a stricter penalty for first-time drug offenders; (3) provide training for specialized prosecution units; and (4) request no bail holds on drug offenders. *Id.* at 41-42. The Task Force recommended the following changes for corrections: (1) Maintain intelligence coordination between corrections and enforcement agencies; (2) house offenders in vacant unused military facilities to prevent overcrowding; (3) provide drug treatment programs within correctional institutions; and (4) change construction standards to allow quicker and cheaper facility construction. *Id.* at 43-46. The Task Force also recommended the following changes for probation: (1) Reduce the caseload of officers and focus on the gang drug-trafficking offender; (2) establish standardized parole conditions; (3) establish a centralized registry to maintain information of all probationers and parolees statewide; and (4) provide training on aspects and methods for supervising drug offenders. *Id.* at 47-51.

44. *Id.* at 51-79. The Task Force recommended the following judicial changes: (1) Educate judges on the unique aspects of drug cases; (2) establish regional courts so the judge may

recommended that businesses play a role in curtailing drug use by establishing "adopt a school" programs.[45] The Task Force did not address the question of employee drug testing.[46]

2. *Prevalence of Drug Testing in the Workplace*

Approximately one out of ten workers has decreased productivity due to drug abuse.[47] Employees who use drugs on the job cost American industry and business more than $60 billion a year in lost productivity and drug-related accidents.[48] In response to the growing effect drug abuse has had in the workplace, private industry began drug testing employees and job applicants.[49] In 1988, employers tested

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become aware of problems in a specific community; (3) establish specialized courts to hear only gang and drug cases; (4) require that drug offenders who violate parole return to the judge who sentenced them; (5) establish a night court so that juvenile offenders may attend with their parents; and (6) develop uniform standards for setting probation conditions. *Id.* at 51-54. The Task Force also recommended the following changes requiring executive action: (1) Establish a Statewide Narcotics Enforcement Coordination Task Force; (2) concentrate surveillance and reconnaissance efforts by the National Guard along the California-Mexico border; and (3) compile and organize data on gang-related activity using a computer-based information system. *Id.* at 54-58. Additionally, the Task Force recommended that the legislature enact the following: (1) A provision providing stricter treatment of juveniles who commit serious crimes; (2) a Racketeer Influenced and Corrupt Organization Act similar to the federal provision; (3) a stricter law for offenders who use weapons; (4) a recidivist statute for anyone under the influence of controlled substances; (5) a stricter penalty for distributing or manufacturing drugs near a school; (6) a limit on the court's discretion to provide probation to narcotics traffickers; (7) a prohibition against drug addicts or traffickers opting for a drug program instead of incarceration; (8) a requirement that parents pay for the cost of detaining their child within juvenile facilities; (9) an educational narcotics program for all inmates; (10) a statewide drug program for schools; and (11) a program testing all juveniles to determine "at risk" children. *Id.* at 58-79.

45. *Id.* at 94 (discussing the "adopt-a-school" program, where a business provides a school with equipment, additional financial resources, and expertise in the classrooms).

46. *See id.*

47. Anti-Drug Abuse Act of 1988, 21 U.S.C.S. § 1502 note. A third of the workers polled know someone at work who used illicit drugs in the past year. McQueen & Shribman, *supra* note 5, at 1, col. 1. It is estimated that as many as 10% to 23% of all workers abuse drugs on the job. Durkin, *Business Uses Tough Tactics to Curb Drugs*, 6 Business Journal 27, Oct. 2, 1989, at 19, col. 4.

48. DRUG CONTROL STRATEGY, *supra* note 4, at 2. *See also* Exec. Order No. 12,564, 3 C.F.R. 224, 225 (1986) (stating that federal employees who use drugs, either on or off duty, tend to have lower productivity, more absenteeism, and are less reliable than coworkers who do not use drugs). Anti-Drug Abuse Act of 1988, 21 U.S.C.S. § 1502 note (finding that drug users are involved in three times as many on-the-job accidents, are absent twice as often, and incur three times the sickness cost as non-drug users). *See* Note, *Drug Testing of Public and Private Employees in Alaska*, 5 ALASKA L. REV. 133, 133 (1988) (the cost to industry has been estimated as high as $100 billion a year). *But see Hearings*, *supra* note 6, at 67 (Arthur J. McBay, Ph.D., Chief Toxicologist at the University of North Carolina, contends that the drug abuse cost to society is no more than $11.6 billion).

49. Note, *supra* note 48, at 133 (finding that over half the Fortune 500 companies have

3.9 million job applicants for drugs.[50] Employers set up drug testing programs to improve workplace safety, increase productivity, stop illegal drug trafficking, and reduce medical costs.[51]

Still, some companies do not want to subject their employees to drug testing, preferring to handle problems that arise individually.[52] Employers' reasons for not testing employees include concerns about moral and ethical implications of the drug testing process, as well as concerns about employee opposition and legal implications.[53] In contrast, the federal government, as an employer, has not hesitated to require drug testing of federal employees.[54]

B. Drug Testing in the Public Work Sector

The acceptance of drug testing in the public workplace may be an indicator of whether drug testing in the private workplace is acceptable. The President, through Executive Order 12,654, and Congress, through the Drug-Free Workplace Act, have expressly encouraged

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instituted drug testing programs). IBM is one of many companies to implement a drug abuse detection program. DRUG CONTROL STRATEGY, *supra* note 4, at 57. IBM tests all job applicants and all employees in safety-sensitive positions for drugs. *Id.* If an employee shows a decline in work productivity, has unexplained absences, or exhibits erratic behavior, the supervisor may report these findings to the medical department. *Id.* The physician will determine whether a drug test is necessary. *Id.* If the test has a positive result, IBM assists the employee in a drug rehabilitation program. *Id.* In order to return to work, the employee must consent to periodic, unscheduled urine drug tests. *Id. See supra* note 6 and accompanying text (listing private companies who have implemented drug testing programs). Local 185 of the Construction and General Laborers' International Union of North America announced on September 14, 1989, an official endorsement of the hardline drug testing program called the Hoffman Project. Durkin, *supra* note 47, at 19, col. 4. The Hoffman Project entails testing all current employees, including the chief executive, and testing all job applicants. *Id. But see infra* text accompanying notes 104-25 (discussing *National Treasury Employees Union v. Von Raab* where the Court held that drug testing Customs agents who carry firearms or are involved in drug interdiction was constitutional, but testing those Customs agents who handle classified material was overbroad and therefore unconstitutional).

50. DRUG CONTROL STRATEGY, *supra* note 4, at 56 (finding that of those employees tested for drugs, 11.9% were positive).

51. GEN. ACCT. OFF., EMPLOYEE DRUG TESTING INFORMATION ON PRIVATE SECTOR PROGRAMS, at 3 (Mar. 1988). Larger firms are more likely to require drug testing of employees than smaller firms. *Id.* at 10 (36% of those companies with over 5000 employees have a drug testing program, whereas only 16% of those companies with less than 500 employees have a drug testing program).

52. Durkin, *supra* note 47, at 20, col. 3. Hewlett-Packard Co. and Raley's Inc. see no benefit to drug testing, although both companies have no tolerance of drug abuse in the workplace. *Id.*

53. GEN. ACCT. OFF., *supra* note 51, at 3 (discussing that some employers have also expressed concern that drug testing may not indicate job impairment).

54. *See infra* text accompanying notes 56-72 (discussing the support by federal government for drug testing in the workplace).

and supported drug testing in the public work sector, and in some instances, the private work sector.[55]

1. *Executive Order 12,564—Drug-Free Federal Workplace*

On September 15, 1986, President Reagan issued Executive Order 12,654, to be effective immediately, requiring all federal employees to refrain from the use of illegal drugs.[56] This Executive Order requires the head of each executive agency to devise a program for testing employees for drugs.[57] Drug testing is authorized: (1) For employees in sensitive positions;[58] (2) if there is a reasonable suspicion that any employee uses illegal drugs; (3) for employees involved in accidents or unsafe practices; or (4) for new job applicants.[59] Executive Order 12,654 accords privacy to the individual during the collection of urine, unless there is reason to believe the individual will tamper with the sample.[60]

The Senate, with House approval, enacted a bill that placed certain restrictions on funds for federal drug testing programs pursuant to Executive Order 12,654.[61] To receive funds, the Secretary of Health and Human Services (the Secretary) must certify that the drug testing program: (1) Was developed according to Executive Order 12,654; (2) complies with the scientific and technical guidelines set forth by the Department of Health and Human Services; and (3) complies

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55. *See infra* text accompanying notes 56-74 (discussing Executive Order 12,654 and the Drug-Free Workplace Act).

56. Exec. Order No. 12,564, 3 C.F.R. 224, 225 (1986). An executive order is an order issued by the President to implement a provision of the Constitution or a law. BLACK'S LAW DICTIONARY 511 (5th ed. 1979). President Bush has endorsed Executive Order 12,564 and would like to see it "aggressively" implemented as soon as possible. White House Fact Sheet on the National Drug Control Strategy, 25 WEEKLY COMP. PRES. DOC. 1309 (Sept. 11, 1989).

57. Exec. Order No. 12,564, 3 C.F.R. 224, 226 (1986).

58. The term sensitive position includes: (1) Any position which is designated sensitive, critical-sensitive, or noncritical-sensitive; (2) any employee who has access to classified information; (3) any individual who was appointed by the President; (4) any law enforcement officer; and (5) any position which the head of the agency determines involves law enforcement, national security, public safety or health, or positions which require a high degree of trust and confidence. *Id.* at 229.

59. *Id.* at 226 (stating that the agency head may test any employee who is undergoing, or has undergone, drug rehabilitation).

60. *Id.* at 226-27.

61. S. 416, 100th Cong., 1st Sess. § 503, 133 CONG. REC. H5986 (1987). *See* Barnes, Kinsey & Halpern, *A Question of America's Future Drug-Free or Not?*, 36 U. KAN. L. REV. 699, 722-23 (1988) (discussing the legislation following Executive Order 12,564). *See Reagan Administration Drug Testing Program: Recent Action in Congress*, 66 CONG. DIG. No. 5, at 137 (1987) (describing an amendment which Rep. Steny H. Hoyer introduced in an effort to stop drug testing of federal workers under the President's executive order).

with any other applicable law.[62] The Secretary must submit a detailed description of the drug testing criteria and procedure to Congress.[63] The description should include the justification for such criteria or procedure, the employment positions subject to random testing, and the nature, frequency, and type of drug testing proposed.[64] The purpose of the bill was to insure uniformity, reliability, and accuracy of testing, and to insure testing programs follow current law.[65]

2. *Drug-Free Workplace Act of 1988*

The federal government encouraged drug testing programs in both the public and private work sectors in the Drug-Free Workplace Act of 1988.[66] The Act provides a strong incentive for employers to provide and maintain a drug-free work environment.[67] Under the Act, a federal agency may only contract for property or services worth $25,000 or more with persons who provide a drug-free workplace.[68] Further, only persons who provide a drug-free workplace may receive grants from any federal agency.[69]

For a workplace to be considered drug-free, the employer must publish a statement for employees that prohibits drugs in the workplace.[70] The employer must also establish an awareness program to educate employees of the dangers of drugs.[71] The program should include the company's policy on drugs, and the penalties that will be imposed on any employee who abuses drugs.[72]

Although the Act does not require drug testing, companies seeking federal grants or contracts must prove the workplace is drug-free.[73]

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62. S. 416, 100th Cong., 1st Sess. § 503, 133 CONG. REC. H5986 (1987). *See* Barnes, Kinsey & Halpern, *supra* note 61, at 722 (requiring that the agency obtain certification of approval by the Department of Health and Human Services). The certification is then sent to Congress. *Id.*

63. S. 416, 100th Cong., 1st Sess. § 503, 133 CONG. REC. H5986 (1987).

64. *Id.*

65. *Id.*

66. Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-02 (1988) [hereinafter Drug-Free Workplace Act]. The Drug-Free Workplace Act of 1988 is a subpart of the Anti-Drug Abuse Act of 1988. *Id. See supra* notes 33-39 and accompanying text (discussing the Anti-Drug Abuse Act of 1988).

67. *See* Drug-Free Workplace Act, *supra* note 66, at §§ 701-02.

68. *Id.* at § 701.

69. *Id.* at § 702.

70. *Id.* at § 701 (stating that an employee may not possess, sell, or use illegal drugs in the workplace).

71. *Id.*

72. *Id.*

73. *See supra* text accompanying notes 68-72.

This Act affects any California business, public or private, that receives federal grants or enters into certain federal contracts.[74] The California state government has not enacted a similar statute, so there is no similar requirement for state contracts or grants.[75]

3. *Case Law*

The California Supreme Court has not decided whether drug testing in the private work sector violates a current employee's state constitutional right to privacy. However, state courts may look to federal court analysis in determining whether drug testing violates the state constitutional right of privacy.[76] Two recent United States Supreme Court decisions address the constitutionality of mandatory drug testing and thus provide guidelines for determining California policy.[77] The Supreme Court decisions discuss whether drug testing of certain federal employees violates the employees' fourth amendment rights.[78]

In *Skinner v. Railway Labor Executives' Association*,[79] the first of two recent United States Supreme Court decisions, the Court held that warrantless drug testing after a railroad accident, or for cause, was reasonable.[80] In *Skinner*, a labor organization brought action against the Secretary of Transportation to enjoin the enforcement of a Federal Railroad Administration (FRA) regulation requiring drug testing of certain railroad employees after accidents.[81] The labor

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74. *See supra* text accompanying notes 68-72.

75. *See* Drug-Free Workplace Act, *supra* note 66, at § 701 (referring to federal contracts of $25,000 or more); *id.* at § 702 (referring to federal grants).

76. 5 THE LABOR LAWYER 291, 344 (1989) (discussing, briefly, recent cases involving drug testing in the public work sector).

77. *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

78. *See infra* text accompanying notes 79-125.

79. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

80. *Id.* at 1422 (stating that there is no requirement of individualized suspicion after an accident). Testing for cause includes: (1) After an incident where the supervisor has reasonable suspicion that the incident resulted from the employee's act or omission; (2) where there is a specific rule violation such as speeding or running a signal; or (3) where there is reasonable suspicion that the employee is on drugs or under the influence of alcohol. *Id.* at 1409-10.

81. *Id.* at 1408-09. The FRA presented evidence showing that alcohol and drug abuse by railroad employees contributed significantly to railroad accidents. *Id.* at 1407-08 (from 1972 to 1983, 21 railway accidents, resulting in 25 fatalities and 61 injuries, involved alcohol or drugs as the probable cause or a significant factor). The railroad prohibited employees from possessing alcohol on the job, working while intoxicated, or drinking while on call for duty. *Id.* at 1407. These efforts were inadequate to curb the drug and alcohol problem. *Id.* In response to the substance abuse problem, the FRA introduced regulations in 1985 providing for drug testing of employees after an accident or for cause. *Id.* at 1408-09.

organization argued that drug testing violated an employee's fourth amendment right to be free from unreasonable searches and seizures.[82]

The Court found that the testing process, which included collecting a urine sample and testing it through chemical analysis, constituted a search under the fourth amendment.[83] The Court stated that in our society the act of passing urine is highly personal and private.[84] Additionally, the chemical analysis may reveal a variety of medical facts about the individual, including whether the employee is epileptic, diabetic, or pregnant.[85] Therefore, the Court determined that an employee's expectation of privacy in their urine was reasonable, and concluded that the testing constituted a search under the fourth amendment.[86]

After finding that drug testing constituted a search, the Court analyzed whether the search was reasonable.[87] The Court stated that normally a warrant, based on probable cause, assures that the search is reasonable.[88] However, in this case the essential purpose of a warrant, to protect against arbitrary acts by the government, was met by the railroad's standardized test, which involved a minimal amount of discretion by those in charge of the program.[89] Further, the Court found that requiring the railroad supervisors to obtain a warrant would frustrate the governmental purpose for the search.[90]

The Court then balanced the employee's fourth amendment rights with the governmental interest in public safety.[91] The Court stated

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82. *Id.* at 1410.
83. *Id.* at 1413.
84. *Id.*
85. *Id.*
86. *Id.* The fourth amendment grants "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV. The government has encouraged, endorsed, and participated in the drug testing of railway employees to such an extent as to implicate fourth amendment concerns. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1412 (1989).
87. *Skinner,* 109 S. Ct. at 1417.
88. *Id.* In limited circumstances, the Court will find a search reasonable despite the absence of probable cause. *Id.* In these cases, the individual privacy invasion is usually minimal, and the probable cause requirement would infringe on the governmental interest. *Id. See, e.g.,* Camara v. Municipal Court, 387 U.S. 523 (1967) (finding a search reasonable where the probable cause requirement would frustrate the governmental interest in inspecting houses for health reasons).
89. *Skinner,* 109 S. Ct. 1415-16. The Court reasoned that because the government encouraged and actively participated in the railroad's drug testing program, the acts implicated the government. *See id.* at 1412.
90. *Id.* at 1416. *See infra* text accompanying notes 98-102 (discussing the governmental purpose for the search). The railroad supervisors need to be able to sample an employee immediately after an accident or where there is suspicion of drug use. *Skinner,* 109 S. Ct. at 1416. If the railroad supervisors were required to obtain a warrant, there may no longer be any drugs or alcohol detectable in the urine. *Id.*
91. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1414 (1989).

that employees have restricted freedom of movement because they are not free to come and go as they please during working hours.[92] Therefore, the additional restriction required to obtain the urine sample is minimal.[93] Although the Court noted that requiring an employee to produce a urine sample raises privacy concerns not implicated in taking a blood or breath test, the Court found these privacy concerns abated because the FRA did not require direct observation of the employee producing the sample.[94] Normally, the Court noted, the collection occurs in a medical environment.[95] Also, the Court found the expectations of privacy by employees in a heavily regulated workplace, such as the railroad, less than that of employees in other workplaces.[96] The intrusion was minimal and, therefore, probable cause was not needed.[97]

The Court found a compelling governmental interest in protecting public safety by detecting impaired employees who may not show any signs of impairment.[98] Further, ensuring public safety requires that railroad employees be fit and in good health.[99] Drug use may impair the health and fitness of railroad employees.[100] In balancing the employee's rights and the compelling governmental interest in public safety, the Court found that the governmental interests outweighed the employee's privacy concerns.[101] Further, the Court found that the probable cause and warrant requirement would infringe on the important governmental interest of protecting safety, because by the time the railroad supervisors obtained a warrant, the employee's urine may no longer contain the drug metabolites.[102] Therefore, the Court held it was reasonable to require warrantless drug testing of employees after an accident or for cause.[103]

National Treasury Employees Union v. Von Raab[104] was the second of two recent Supreme Court cases discussing drug testing. In this case, the Court held that it was reasonable to require suspicionless

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92. *Id.* at 1417.
93. *Id.*
94. *Id.* at 1418.
95. *Id.* (requiring that the tests be performed by personnel unrelated to employer).
96. *Id.*
97. *Id.* at 1417.
98. *Id.* at 1419.
99. *Id.* (requiring periodic physical examinations of the train and engine employees).
100. *Id.* at 1407-08 (discussing the correlation between drug use of employees and railroad accidents).
101. *Id.* at 1421.
102. *Id.* at 1416, 1421.
103. *Id.* at 1422.
104. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

drug testing of Customs agents seeking promotion into positions directly involving drug interdiction, or positions requiring the agent to carry a firearm.[105] The union brought action against the Customs Service Commissioner to enjoin drug testing of Customs agents.[106] The union claimed drug testing violated the agent's fourth amendment right to be free from unreasonable searches.[107]

Customs' agents have direct contact with drug smugglers and, in 1987, seized almost nine billion dollars worth of drugs.[108] Although the commissioner thought that Customs agents were largely drug-free, the commissioner established a drug testing program intended to detect and deter possible drug users.[109] The categories of agents tested were those who applied for, or were working in, positions that: (1) Directly involved drug interdiction; (2) required carrying a firearm; or (3) handled classified material.[110]

As in *Skinner*, the Court found that the urine test used by the Customs Service constituted a search and must, therefore, meet the fourth amendment's requirement of reasonableness.[111] Unlike *Skinner*, where the governmental concern was public safety, the Customs Service established the drug testing program to deter drug use and to prevent the promotion of drug users into sensitive positions in the service.[112] As in *Skinner*, the Court found that this governmental interest presented justification for a warrantless search.[113]

In determining whether the suspicionless search was reasonable, the Court balanced the governmental interest with the agent's fourth amendment rights.[114] The Court found that because Customs agents work with drug smugglers and controlled substances, it is imperative that the Customs agents be physically fit and have impeccable integrity and judgment.[115] The Court noted that if a Customs agent was a drug user, the agent might help the importation of drugs by succumbing to bribes.[116] The public interest demands measures to bar

105. *Id.* at 1397 (failing to find that testing employees who handle classified material reasonable because the category is too broad and may include people who may not actually gain access to sensitive information).
106. *Id.* at 1389.
107. *Id.*
108. *Id.* at 1387.
109. *Id.* at 1387-88.
110. *Id.* at 1388.
111. *Id.* at 1390.
112. *Id.*
113. *Id.* at 1390-91.
114. *Id.* at 1393.
115. *Id.*
116. *Id.*

drug users from positions with the Customs Service that involve the interdiction of illegal drugs or that require the agent to carry firearms.[117]

As in *Skinner*, the Court found that the Customs agents have a diminished expectation of privacy because of the nature of their positions.[118] Customs agents involved in drug interdiction must expect their fitness and probity to be questioned.[119] The Customs agents who carry firearms should reasonably expect their judgment and dexterity to be tested.[120] The Court found that a Customs agent's rights did not outweigh the government's compelling interests in preventing drug importation and in safety.[121] Therefore, the Court concluded that drug testing of Customs agents involved with drug interdiction, and agents who carry firearms, is constitutional.[122]

Unlike the Customs agents who are directly involved in drug interdiction or the agents who carry firearms, the Court did not allow drug testing of Customs agents who handle classified material.[123] The commissioner argued that these agents have access to sensitive materials and, therefore, must be drug-free.[124] However, the Court found that the category was too broad and could include agents who actually have no access to sensitive materials.[125]

The Court in *Skinner* and *National Treasury Employees Union* discussed the United States constitutional right to be free from unreasonable searches and seizures, which contains an implied right to privacy.[126] Unlike the implied right to privacy in the United States

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117. *Id.*
118. *Id.* at 1394.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1397.
123. *Id.*
124. *Id.*
125. *Id.*
126. As early as *Olmstead v. United States,* Justice Brandeis, in a dissenting opinion, stated the importance of the right to be left alone from the government. Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting). Justice Brandeis stated that in order to protect citizens' beliefs, emotions, and thoughts, Americans must have the right to be left alone from governmental intrusion. *Id.* The implied right to privacy was first discussed in Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold,* the Court held that a Connecticut statute prohibiting the use or promotion of contraceptives violated the right to privacy guaranteed by the Constitution. *Griswold,* 381 U.S. at 485. In *Griswold,* the state brought action against Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, a licensed physician and professor at the Yale Medical School and Medical Director for the Planned Parenthood League Center, for providing married persons with contraceptive information in violation of the Connecticut statute. *Id.* at 480. The Court

Constitution, the California Constitution has an express right to privacy.[127]

C. California Constitutional Right to Privacy

The California Supreme Court has not yet ruled on whether drug testing in the private work sector violates a current employee's state constitutional right to privacy. The United States Supreme Court decisions in *Skinner*, *National Treasury Employees Union*, and *Griswold v. Connecticut*[128] may provide guidance for the California Supreme Court in deciding the constitutionality of drug testing in the private work sector.[129] The stance the Supreme Court took in *Skinner* and *National Treasury Employees Union* shows a trend towards acceptance of drug testing, at least in the public sector.[130] California courts may follow the trend and find drug testing of private employees constitutional. However, employees of private companies may claim that drug testing violates their California constitutional right to privacy.[131]

1. Right to Privacy Amendment

In 1972, by general election, voters amended the California Constitution to include the right to privacy.[132] The arguments in favor

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reasoned that the right to association is peripheral to the first amendment, and yet is necessary to give full meaning to the express rights of the first amendment. *Id.* at 483. *See* U.S. CONST. amend. I (providing for freedom of religion, speech, press, assembly and to petition the government). The Court then analogized the right to privacy in the fourth amendment to the right to association in the first amendment. *Griswold*, 381 U.S. at 483. The Court stated that the fourth amendment also implied a peripheral right to privacy. *Id.* at 485. *See* U.S. CONST. amend. IV (protecting against unreasonable searches and seizures of person, home, paper, and effects). The Court specifically found that the zone of privacy included the right to marital privacy. *Griswold,* 381 U.S. at 486.

127. *See* CAL. CONST. art I, § 1 (stating the right to privacy amendment).

128. 381 U.S. 479 (1965). *See supra* note 126 (discussing the *Griswold* case).

129. *See supra* text accompanying notes 79-127 (discussing *Skinner* and *National Treasury Employees Union*).

130. *See supra* text accompanying notes 79-127.

131. *See* CAL. CONST. art. 1, § 1 (stating the right to privacy in the California Constitution).

132. AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS, Proposition 11, Voter's pamphlet, page 26 (Nov. 7, 1972) [hereinafter Voter's pamphlet]. As re-written on Nov. 5, 1974, Article 1, section 1, of the California Constitution reads:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

CAL. CONST. art. I, § 1.

of the right to privacy amendment, as stated in the voter's pamphlet, indicated that the purpose of the amendment was to protect citizens from the collection of information by businesses and the government.[133] The proponents of the amendment expressed concern that governmental snooping and the ability of businesses to compile "cradle to grave" portfolios of citizens threatened traditional freedoms.[134] Fundamental to the right to privacy is the right to be left alone.[135] The right to privacy is not limited to state action, but protects persons against any violation of privacy by any person or business.[136] The right to privacy extends to citizens' homes, families, thoughts, emotions, expressions, personalities, freedom to associate and freedom of religion.[137]

The proponents for the amendment indicated that the right to privacy includes the right to prevent businesses or governmental bodies from collecting and stockpiling unnecessary information about citizens.[138] Further, the right to privacy includes the need to protect individuals from the misuse of information—information gathered for one purpose and used for another purpose, such as embarrassment.[139] Central to the personal and social freedom embodied in the right to privacy is the ability of citizens to control the distribution of personal information.[140] Where individuals cannot control this circulation of personal information, they lose the ability to control their personal lives.[141] Also, an individual unaware of the data collection is unable to correct inaccuracies.[142]

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133. Voter's pamphlet, *supra* note 132, at 26. With computerization, monitoring, and centralization, modern technology can eliminate an individual's privacy. *Id.* at 27. *See also* White v. Davis, 13 Cal. 3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975) (the primary purpose of the amendment is to protect people from the modern threat to personal privacy). *See infra* text accompanying notes 153-55 (discussing the purpose of the right to privacy amendment).

134. Voter's pamphlet, *supra* note 132, at 26.

135. *Id.* at 27.

136. *Id. See, e.g.,* Semore v. Pool, 217 Cal. App. 3d 1087, 1093-94, 266 Cal. Rptr. 280, 283 (1990) (discussing that the right to privacy may be invoked against a private employee); Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1043, 264 Cal. Rptr. 194, 200 (1989), *rev. denied,* Mar. 15, 1990 (stating that the right to privacy affords some protection from nongovernmental intrusion); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976) (discussing that the right to privacy affords protection from private action as well as state action).

137. Voter's pamphlet, *supra* note 132, at 27. *See also* Robbins v. Superior Court, 38 Cal. 3d 199, 213, 695 P.2d 695, 704, 211 Cal. Rptr. 398, 407 (1985) (discussing the right to privacy as including the right to choose the people one lives with and the right to associate with people of one's choice).

138. Voter's pamphlet, *supra* note 132, at 27.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (finding that a substantial amount of the information collected is done so secretly).

The proponents indicated in the voter's pamphlet that the right to privacy is vitally important to the fundamental rights guaranteed in the United States Constitution and the California Constitution.[143] However, the voter's pamphlet indicated that a compelling public need for the personal information may overcome the right to privacy.[144] Only where the availability of this personal information is clearly in the public interest should it remain part of the public records.[145] The arguments in favor of the right to privacy amendment, as contained in the voter's pamphlet, will help courts decipher the meaning and applicability of the right to privacy amendment.[146]

2. *California Case Law*

a. *Right to Privacy in Personal Information*

Several California cases have defined the scope of the state constitutional right to privacy in the collection and dispersion of personal information.[147] In *White v. Davis*,[148] the first of such cases, the California Supreme Court held that surveillance and data gathering by the police constituted a violation of the state constitutional right to privacy.[149] The plaintiff in *White*, a professor at the University of California at Los Angeles, brought action against Davis, the Chief of Police, under a right to privacy claim.[150] The police had conducted covert intelligence operations to gather information regarding White's

142. *Id.* (finding that a substantial amount of the information collected is done so secretly).
143. *Id.*
144. *Id.* One such compelling interest is the need to discover the truth in connection with legal proceedings. *See* El Dorado Sav. & Loan Ass'n v. Superior Court, 190 Cal. App. 3d 342, 345, 235 Cal. Rptr. 303, 304 (1987).
145. Voter's pamphlet, *supra* note 132, at 27.
146. California cases have recognized the usefulness of the voter's pamphlet in deciphering the meaning and applicability of amendments and legislative measures. *See, e.g.*, White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975); *In re* Quinn, 35 Cal. App. 3d 473, 483-86, 110 Cal. Rptr. 881, 887-89 (1973); Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 185, 93 P.2d 140, 143-44 (1939).
147. *See, e.g.*, White v. Davis, 13 Cal. 3d 757, 772-73, 533 P.2d 222, 232, 120 Cal. Rptr. 94, 104 (1975) (discussing the right to privacy in classroom discussions); Robbins v. Superior Court, 38 Cal. 3d 199, 213, 695 P.2d 695, 704, 211 Cal. Rptr. 398, 407 (1985) (expanding the right to privacy to include the right to chose with whom to live). *See infra* text accompanying notes 148-259 (discussing the development of the right to privacy in California).
148. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).
149. *Id.* at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106.
150. *Id.* at 761-62, 533 P.2d at 225, 120 Cal. Rptr. at 97 (claiming additional violations under the United States constitutional right to privacy, the first amendment protection of free speech, and the right of due process of law).

classroom discussions.[151] The police compiled the information and kept it on file at the police station.[152]

The court found that the principal interests protected by the right to privacy amendment are: (1) The secret gathering of personal information; (2) the unnecessary collecting and stockpiling of personal information by the government and businesses; (3) the improper use of information gathered for one purpose and used for another; and (4) the inability of individuals to check the accuracy of data collection.[153] The amendment does not prohibit the collection of data that can be justified by a compelling interest.[154] The court noted that the right to privacy amendment creates a legal and enforceable right for every Californian.[155]

In *White*, the court found that the police activities of covertly monitoring classroom discussions constituted the precise governmental snooping the right to privacy amendment guarded against.[156] The police were unable to state a legitimate use for the information gathered, which suggested that the data collection was unnecessary.[157] Therefore, the court found that the government had no compelling interest in the data collection.[158] The court remanded the case to allow the police an opportunity to present evidence of a compelling public interest in the information gathered.[159]

Following *White*, the Second District Court of Appeals, in *Franchise Tax Board v. Superior Court (Safeco),* [160] developed a test to determine if there has been a violation of the state constitutional right to privacy.[161] This test, although not formally adopted by the California Supreme Court, has been applied by the First District Court of Appeals.[162] The test outlined for determining a right to privacy violation is whether an unreasonable governmental intrusion

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151. *Id.* at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97 (providing that the activities monitored were not illegal).
152. *Id.*
153. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
154. *Id.*
155. *Id.*
156. *Id.* at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106.
157. *Id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.
158. *Id.*
159. *Id.* at 776, 533 P.2d at 234-35, 120 Cal. Rptr. at 106-07.
160. Franchise Tax Bd. v. Superior Court (Safeco Life Ins. Co.), 164 Cal. App. 3d 526, 210 Cal. Rptr. 695 (1985).
161. *Id.* at 540-41, 210 Cal. Rptr. at 703-04.
162. *See* Alarcon v. Murphy, 201 Cal. App. 3d 1, 5, 248 Cal. Rptr. 26, 30 (1988) (applying the test to a suspected murderer's expectation of privacy in the publicity surrounding the arrest).

violates a person's personal and reasonable expectation of privacy.[163] The court found it was unreasonable to expect privacy in interest payments from an insurance company to policyholders, where the company reports the information routinely to the Franchise Tax Board (FTB) and to the Internal Revenue Service.[164]

In *Franchise Tax Board*, a representative from the FTB requested a subpoena for records on the Safeco Life Single Premium Deferred Annuity Program.[165] The FTB wanted the names and addresses of Safeco policyholders to determine if the policyholders had complied with the income tax law.[166] Safeco argued that the subpoena violated the policyholders state constitutional right to privacy.[167]

The court found that the FTB had a duty to enforce the personal income tax law, which also required examining any data relevant for this purpose.[168] The court stated that the law requires the payor of interest to report such payments to the FTB and Internal Revenue Service.[169] Given the payor's reporting requirements, the recipients of interest do not have a reasonable expectation of privacy in this information.[170]

The reasoning in *Franchise Tax Board*, where the court found that policyholders have no reasonable expectation of privacy in certain financial statements, was similar to that of an earlier case, *Gunn v. California Employment Development Department*.[171] In *Gunn*, the court balanced the compelling governmental interest in obtaining personal information from unemployment insurance applicants, with the individual's right to privacy in her pregnancy.[172] The court found that the Employment Department had a legitimate interest in knowing whether an applicant for unemployment benefits was pregnant.[173] This interest outweighed the applicant's right to privacy in her pregnancy.[174]

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163. *Franchise Tax Bd.*, 164 Cal. App. 3d at 540-41, 210 Cal. Rptr. at 703-04. *See contra* Gerstein, *supra* note 13, at 385-427 (proposing that the right to privacy violation should be analyzed by a right to private life theory rather than the reasonable expectation of privacy theory).

164. *Franchise Tax Bd.*, 164 Cal. App. 3d at 541, 210 Cal. Rptr. at 704.

165. *Id.* at 534, 210 Cal. Rptr. at 699.

166. *Id.* at 533-34, 210 Cal. Rptr. at 699.

167. *Id.* at 534, 210 Cal. Rptr. at 699.

168. *Id.* at 536, 210 Cal. Rptr. at 701.

169. *Id.* at 541, 210 Cal. Rptr. at 704.

170. *Id.*

171. Gunn v. California Employment Dev. Dept., 94 Cal. App. 3d 658, 156 Cal. Rptr. 584 (1979).

172. *Id.*

173. *Id.* at 663-64, 156 Cal. Rptr. at 588.

174. *Id.* (the unemployment benefits are only available to those applicants who are both able and available to work).

In *Gunn*, an applicant for unemployment benefits refused to answer questions regarding her health and refused to admit her pregnancy.[175] Unlike *White*, where no legitimate purpose was stated for the information sought, the court in *Gunn* found a state interest in requiring personal information of the applicant when unemployment benefits are at issue.[176] The court found that the state has an interest in reserving unemployment benefits for those individuals who are able and available to work at the time they receive unemployment compensation.[177] A pregnancy will render the applicant unable or unavailable to work for a period of time, and therefore the state may require pregnancy information as a prerequisite for benefits.[178]

Finally, the right to privacy has been invoked in the unusual situation where an individual sought disclosure of his own personal information. In *Kahn v. Superior Court (Davies)*,[179] the court held that a candidate for tenure at Stanford University could not obtain information regarding the candidate's denial for tenure.[180] Professor Davies brought action to compel Professor Kahn, a tenure committee member, to disclose the reasons why the committee denied tenure to Davies at Stanford.[181] The compelling state interest presented in *Kahn* was the interest in ascertaining the truth in legal proceedings.[182] The committee based its claim for privacy on the pursuit of academic excellence, which they claimed would be undermined if the state breached the confidentiality of the selection process.[183] The court found the right to privacy of the tenure committee prevailed over Davies' interest in disclosure.[184]

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175. *Id.* at 661, 156 Cal. Rptr. at 586-87.
176. *Id.* at 663, 156 Cal. Rptr. at 588.
177. *Id.*
178. *Id.*
179. Kahn v. Superior Court (Davies), 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (1987).
180. *Id.* at 770, 233 Cal. Rptr. at 674.
181. *Id.* at 755-58, 233 Cal. Rptr. at 664-65.
182. *Id.* at 770, 233 Cal. Rptr. at 674. The courts have found that a right to privacy exists during the discovery procedure in trials, and have prevented discovery where the personal information sought is not directly related to the lawsuit, or where the discovery is not limited in scope. El Dorado Sav. & Loan Ass'n v. Superior Court, 190 Cal. App. 3d 342, 346, 235 Cal. Rptr. 303, 305 (1987). In *El Dorado Sav. & Loan Ass'n*, the court denied petitioner's motion for production of personnel records of other employees to prove the employer discriminated on the basis of sex and age. *Id.* at 342-46, 235 Cal. Rptr. at 303-05. In *Wood v. Superior Court (Savoca)*, the court restricted the scope of the subpoena to pertinent information from the patient's charts which showed the medication prescribed. Wood v. Superior Court, 166 Cal. App. 3d 1138, 1150, 212 Cal. Rptr. 811, 821 (1985).
183. *Kahn*, 188 Cal. App. 3d at 769, 233 Cal. Rptr. at 673.
184. *Id.* at 770, 233 Cal. Rptr. at 674. *See also* King v. Regents of University of California, 138 Cal. App. 3d 812, 819, 189 Cal. Rptr. 189, 194 (1982) (finding that the University's need for confidentiality outweighs the plaintiff's interest in the disclosure of the evaluator's names for tenure).

b. Right to Privacy in the Workplace

The right to privacy extends to both the public and private workplaces. In *Long Beach City Employees Association v. City of Long Beach*,[185] the California Supreme Court held that requiring public employees to undergo polygraph examinations intruded on their right to privacy.[186] In *Long Beach City Employees Association*, the city suspected that employees had stolen money from the city's boat launch ramp machines.[187] The city placed several hundred dollars of marked money in the machines, and within a five-day period $218 was missing.[188] When the criminal investigation failed to produce evidence, the city decided to subject several employees to a polygraph examination.[189]

The court found that polygraph examinations are designed to compel communication of personal thoughts and emotions both before and during the examination.[190] The court also stated that the polygraph examination deprives the employees of free will by: (1) Recording repressed feelings; (2) coercing employees to answer out of fear of appearing dishonest; (3) coercing employees to answer for fear of losing their jobs; and (4) recording employee's psychological reactions to questions even if the employee refuses to answer verbally.[191] Noting that the right to privacy protects a person's thoughts, emotions and expressions,[192] the court found that the intrusive nature of the polygraph examination inherently violates an employee's right to privacy.[193] The polygraph examination detects involuntary communication of thoughts and emotions beyond that of simple verbal

185. Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986).

186. *Id.* at 956, 719 P.2d at 672, 227 Cal. Rptr. at 102. In a concurring opinion, Chief Justice Bird argued that the court should have completed the analysis and found that a compelled polygraph test constitutes a violation of the person's right to privacy. *Id.* (Bird, C.J., concurring). In her opinion, the court found the polygraph test unconstitutional based on a violation of the state equal protection clause rather than the right to privacy. *Id.* at 958, 719 P.2d at 673, 227 Cal Rptr. at 103 (Bird, C.J., concurring).

187. *Id.* at 942, 719 P.2d at 662, 227 Cal. Rptr. at 92.

188. *Id.*

189. *Id.*

190. *Id.* at 944, 719 P.2d at 663, 227 Cal. Rptr. at 93. The examiner monitors the examinee's behavior even before the examination begins. *Id.* at 944, 719 P.2d at 664, 227 Cal. Rptr. at 94.

191. *Id.* at 946-47, 719 P.2d at 665, 227 Cal. Rptr. at 95.

192. *Id.* at 943, 719 P.2d at 663, 227 Cal. Rptr. at 93.

193. *Id.* at 948, 719 P.2d at 666, 227 Cal. Rptr. at 96.

interrogation.[194] The court thus expanded the right to privacy to protect employees from an employer's intrusive use of polygraph examinations to obtain information.[195]

Employees have also invoked the state constitutional right to privacy in the private work sector. In *Rulon-Miller v. International Business Machines Corp.*,[196] the court found that the employer violated the employee's right to privacy when he fired her for dating a business competitor.[197] In *Rulon-Miller*, the plaintiff had been a model employee for twelve years.[198] A supervisor confronted the plaintiff and instructed her that dating Matt Blum, a competitor's employee, presented a conflict of interest.[199] The supervisor told the plaintiff to stop dating Blum or she would lose her job.[200] Although the supervisor gave the plaintiff a week to think about the matter, he dismissed her the following day.[201]

The plaintiff brought suit against her employer for wrongful discharge and intentional infliction of emotional distress.[202] The plaintiff did not directly argue her constitutional right to privacy; instead, she relied on IBM's policy expressly stating that employees have a right to privacy in their personal lives.[203] However, the court noted that the right to privacy is an interest of fundamental concern in our society.[204] When IBM disregarded their own policy on an employee's right to privacy, this constituted an invasion of the plaintiff's right to privacy in her personal life.[205] The court found extreme and outrageous conduct since the employer knew the plaintiff had been dating the competitor, disregarded IBM's policy on personal matters,

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194. *Id.*
195. *Id.* at 956, 719 P.2d at 672, 227 Cal. Rptr. at 102.
196. Rulon-Miller v. International Business Machines Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).
197. *Id.* at 245-46, 255, 208 Cal. Rptr. at 528, 534. The employer was liable for intentional infliction of emotional distress and wrongful discharge as a result of the invasion of privacy. *See* Palefsky, *supra* note 19, at 673-74 (discussing other common law remedies in addition to the constitutional right to privacy).
198. *Rulon-Miller*, 162 Cal. App. 3d at 244-45, 208 Cal. Rptr. at 527-28.
199. *Id.* at 245, 208 Cal. Rptr. at 528.
200. *Id.* at 246, 208 Cal. Rptr. at 528.
201. *Id.* at 246, 208 Cal. Rptr. at 528-29.
202. *Id.* at 247, 208 Cal. Rptr. at 529.
203. *Id.* IBM's policy, reflected in a company memo, stated: "The line that separates an individual's on-the-job business life from his other life as a citizen is at times well-defined and at other times indistinct. But . . . managers in IBM must be able to recognize that line." *Id.* at 248, 208 Cal. Rptr. 530.
204. *Id.* at 255, 208 Cal. Rptr. at 534.
205. *Id.*

and did not allow her one week to think about the matter.[206] This violation of the employee's right to privacy constituted an intentional infliction of emotional distress.[207]

II. State Constitutional Ramifications

A. Drug Testing in the Private Work Sector in California

1. Cases

In California, there have only been a few cases claiming drug testing is a violation of the right to privacy.[208] Recently, in *Wilkinson v. Times Mirror Corp.*,[209] the First District Court of Appeals held that a private employer did not violate a job applicants' constitutional right to privacy by requiring preemployment drug testing.[210] In *Wilkinson*, the preemployment application procedure involved a written examination and several interviews.[211] Upon successfully passing the initial screening, the applicant was offered a job contingent on passing a medical examination.[212] The medical examination included a medical history, certain diagnostic tests, and urine collection for drug analysis.[213] After completing the tests, the medical clinic conducting the examination would send the employer a number rating of the job applicant.[214] The number rating would only indicate whether the job applicant was suitable for employment and would not specify which, if any, drugs the applicant had been taking.[215]

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206. *Id.*
207. *Id.* In finding the conduct extreme and outrageous, the court of appeals found that the trial court correctly awarded the plaintiff damages for intentional infliction of emotional distress. *Id.* at 255, 208 Cal. Rptr. at 535.
208. *See* Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), *rev. denied*, Mar. 15, 1990 (involving preemployment drug testing); Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990), *modified*, Mar. 23, 1990; Price v. Pacific Refining Co., No. 292,000 (Cal. Super. Ct. Mar. 11, 1988); Mora v. Minnesota Mining & Manufacturing Co., No. 942,330 (Cal. Super. Ct. Jan. 6, 1987).
209. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), *rev. denied*, Mar. 15, 1990.
210. *Id.* at 1037, 264 Cal. Rptr. at 196.
211. *Id.* at 1038, 264 Cal. Rptr. at 196.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*

In analyzing whether the drug testing program violated the job applicant's constitutional right to privacy, the First District Court of Appeals applied the reasonableness test.[216] The reasonableness test does not require the employer to show a compelling interest in the matter in question.[217] Rather, this test focuses on the severity of the intrusion involved.[218] This test allows some impact on the job applicants' right to privacy as long as the right is not substantially affected.[219] The court made a clear distinction between job applicants and current employees.[220] The court stated that applicants for employment should reasonably expect that they will be subjected to medical examinations.[221] A urinalysis is a routine part of a medical examination.[222] The court found that analyzing the urine samples for drugs and alcohol was only slightly more intrusive than the tests that were routinely conducted on the urine.[223] Further, the court found that the employer designed the procedures to maximize job applicants' privacy.[224] Additionally, the court found that private employers have considerable discretion when deciding what standards to set for hiring employees.[225] The employer has a legitimate interest in requiring that job applicants be drug and alcohol-free.[226] In applying the reasonableness standard, the court held that the employer did not violate the job applicants' constitutional right to privacy.[227]

In a case involving drug testing of current employees, the First District Court of Appeals reached a different conclusion.[228] In *Luck*

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216. *Id.* at 1047, 264 Cal. Rptr. at 203. *See* Schmidt v. Superior Court, 48 Cal. 3d 370, 256 Cal. Rptr. 750, 769 P.2d 932 (1989) (discussing the reasonableness test). *But see* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) (holding that an intrusion of the right to privacy was only justified if there was a compelling interest in the information); Franchise Tax Bd. v. Superior Court, 164 Cal. App. 3d 526, 540, 210 Cal. Rptr. 695, 703-04 (1985) (finding that a violation of the right to privacy occurred when a person's reasonable expectation of privacy was violated).

217. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1047, 264 Cal. Rptr. 194, 203 (1989), *rev. denied*, Mar. 15, 1990.

218. *Id.* at 1047-48, 264 Cal. Rptr. at 203.

219. *Id.* at 1047, 264 Cal. Rptr. at 203.

220. *Id.* at 1048, 264 Cal. Rptr. at 203.

221. *Id.* at 1048, 264 Cal. Rptr. at 204.

222. *Id.* at 1049, 264 Cal. Rptr. at 204.

223. *Id.*

224. *Id.* Only the number ratings, not the actual test results were sent to the employer. *Id.* The applicants were not observed while producing the samples and the samples were analyzed by a laboratory independent of the employer's company. *Id.*

225. *Id.* at 1051, 264 Cal. Rptr. at 205.

226. *Id.*

227. *Id.* at 1051, 264 Cal. Rptr. at 206.

228. Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990), *modified*, Mar. 23, 1990.

v. Southern Pacific Transportation,[229] the First District held that a mandatory drug testing program of all current employees violated certain employees' California constitutional right to privacy.[230] *Luck* involved a computer programmer employed by Southern Pacific who, while pregnant, refused to give a urine sample for drug testing.[231] Her refusal resulted in her termination.[232] Luck's job responsibilities entailed designing a computer system for data collection.[233] Luck, who did not operate the railroad, refused to give a urine sample because she believed it violated her personal rights.[234]

The First District Court of Appeals found that testing Luck was unnecessary to further the public interest in the safe operation and maintenance of the railroad, because she did not operate the railroad.[235] The court found that the collection and testing of urine is protected by the California constitutional right to privacy.[236] Unlike *Wilkinson*, which involved drug testing of job applicants, the court found that firing Luck for refusing to submit to drug testing substantially burdened her right to privacy.[237] Because of the heightened burden on an existing employees' right to privacy in refusing testing, compared with the burden on a job applicant, the Court of Appeals required that the employer show a compelling interest for the testing.[238] The court found that, as a matter of law, Southern Pacific's interest in safety did not justify drug testing employees, such as Luck, who were not in safety sensitive positions.[239]

In two superior court decisions, the constitutionality of drug testing in the private work sector was directly addressed.[240] In *Price v.*

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229. *Luck*, 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990).
230. *Id.* at 24, 267 Cal. Rptr. at 618.
231. *Id.* at 7, 8, 267 Cal. Rptr. at 620.
232. *Id.* at 8-9, 267 Cal. Rptr. at 621.
233. *Id.* at 8, 267 Cal. Rptr. at 621.
234. *Id.*
235. *Id.* at 23, 267 Cal. Rptr. at 631.
236. *Id.* at 17, 267 Cal. Rptr. at 627.
237. *Id.* at 24, 267 Cal. Rptr. at 632.
238. *Id.* at 20 n.14, 267 Cal. Rptr. at 629 n. 13.
239. *Id.* at 23, 267 Cal. Rptr. at 631. The court implies that if Luck had been in a safety-sensitive position, the mandatory drug testing program may have been justified. *Id.* However, in *Wood v. Superior Court* the court found that if there are two alternatives, both of which intrude on the right to privacy, the less intrusive means must be used. Wood v. Superior Court, 166 Cal. App. 3d 1138, 1148, 212 Cal. Rptr. 811, 820 (1985). Upon determining that an employee is in a safety-sensitive position, a court may analyze whether there are less intrusive means for detecting employee drug impairment. *See infra* notes 316-29 (discussing alternatives to drug testing).
240. *See* Price v. Pacific Refining Co., No. 292,000 (Cal. Super. Ct. Mar. 11, 1988); Mora v. Minnesota Mining & Manufacturing Co., No. 942,330 (Cal. Super. Ct. Jan. 6, 1987).

Pacific Refining Co.,[241] the court held that random drug testing of an employee was an unreasonable invasion of the employee's right to privacy.[242] In *Price*, the employer implemented a random drug testing program of all employees of an oil refinery company.[243] The drug testing was required for continued employment.[244] The program included direct observation while the employees produced a urine sample.[245] Further, the employer required the employees to disclose any private medical conditions that may affect the drug testing result.[246] The program required the employer to fire any employee who tested positive.[247]

The court balanced the employee's privacy interest with the employer's desire to protect public and employee safety.[248] The court found that the drug testing program was overbroad in subjecting all employees, regardless of position, to undergo the testing.[249] Further, the testing program afforded too much discretion to the managers to decide which employees to test and how the employees were to be tested.[250] The court found that without individualized suspicion of drug use, the testing program was an unreasonable intrusion on the employee's right to privacy under the California Constitution.[251]

In the second case, *Mora v. Minnesota Mining & Manufacturing Co.*,[252] the court also held that a random drug testing program violated an employee's right to privacy under the California Constitution.[253] In *Mora*, the employer devised a program that randomly selected twenty-five employees to be tested for drugs.[254] The employer provided certain safeguards to protect an employee's rights.[255] An employee who tested positive for drugs the first time would not be fired, for example, but would be referred to a drug rehabilitation

241. Price v. Pacific Refining Co., No. 292,000 (Cal. Super. Ct. Mar. 11, 1988).
242. *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 652 (1988).
243. *Id.*
244. *Id.* at 652 n.656.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 652.
249. *Id.* at 652 n.656.
250. *Id.*
251. *Id.* at 652.
252. Mora v. Minnesota Mining & Manufacturing Co., No. 942,330 (Cal. Super. Ct. Jan. 6, 1987).
253. Survey, *supra* note 242, at 652.
254. *Id.*
255. *Id.*

program.[256] If the employee tested positive for drugs a second time, the employee would be fired.[257]

Because the employer failed to convince the court that the drug testing program achieved the stated goal of reducing the drug problem at the plant, the court found that the employer's need to drug test employees was not compelling.[258] Therefore, the court found that the employee's privacy interest outweighed the employer's need for the program, and that the drug testing program was unconstitutional.[259]

2. *The San Francisco Ordinance*

In response to increased invasions of employees' privacy, San Francisco Supervisor Bill Maher sponsored an ordinance to protect employees' right to privacy in their personal lives.[260] By passing the Worker Privacy Ordinance in 1985, San Francisco expanded the California constitutional right to privacy to protect employees from drug testing.[261] The intent of the ordinance was to protect employees from unreasonable inquiry into personal information that is not directly related to job performance.[262]

The ordinance does not specifically address drug testing of new job applicants.[263] However, the ordinance does limit employers[264] from requiring drug testing of employees[265] for continued employ-

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256. *Id.*

257. *Id.*

258. *Id.* at 653.

259. *Id.*

260. Palefsky, *supra* note 19, at 674. Maher specifically referred to *Rulon-Miller v. International Business Machines Corp.* and *Luck v. Southern Pacific Transp. Co.* as the types of invasions requiring protection. *Id. See supra* notes 196-207, 229-39 and accompanying text (discussing the *Rulon-Miller* and *Luck* cases).

261. SAN FRANCISCO, CAL., POLICE CODE, art. 33A, § 3300A.5 (1985) [hereinafter POLICE CODE]. The San Francisco ordinance was the first legislation to protect employees from drug testing. Palefsky, *supra* note 19, at 669.

262. POLICE CODE, *supra* note 261, at § 3300A.1. The ordinance protects the employee from inquiry into conduct, associations, and activities which occur outside the workplace and are not directly related to actual job performance. *Id.* The ordinance was intended to provide citizens the full benefit of the California constitutional right to privacy. *Id.*

263. *See* Palefsky, *supra* note 19, at 678 (discussing an employer's difficulty in showing a compelling interest in determining applicants activities prior to employment).

264. Employers includes any firm, corporation, partnership, individual, or group of persons, doing business or located within the City and County of San Francisco. POLICE CODE, *supra* note 261, at § 3300A.1.

265. Employees include any person working within the City or County of San Francisco with the exception of uniformed employees of the police, sheriff's and fire departments, police dispatchers, and any persons operating emergency services vehicles. *See id.* at § 3300A.2(1).

ment.[266] The ordinance allows the employer to require a drug test only where (1) There is reasonable grounds for believing that the employee is impaired on the job; (2) the impairment presents a clear and present danger to the employee or others; (3) the employee is given an opportunity to have the sample tested in an independent laboratory; and (4) the employee is given an opportunity to explain positive results.[267] The analysis of the blood or urine is limited to only those substances that may impair the employee's ability to work safely.[268] The ordinance specifically prohibits random drug testing of employees.[269]

The San Francisco Ordinance was the first law protecting employees from drug testing in the workplace.[270] The ordinance reflects an awareness of the intrusive nature of drug testing and the need to provide employees with protection from unnecessary drug testing.[271] No other ordinance or law in California deals with the constitutionality of drug testing in the private work sector.[272]

B. Other States' Solutions to the Drug Testing Problem

Subsequent to San Francisco's Worker Privacy Ordinance, other states enacted laws which limit the use of drug testing in the workplace.[273] For example, Vermont enacted one of the most restrictive

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266. *See id.* at § 3300A.5. The ordinance also protects the employee's right to privacy regarding personal relationships. *Id.*

267. *Id.* The employer is required to pay for the independent test conducted by the employee. *Id.* Where the employee has alleged his rights have been violated, the employer will have the burden of proving the four requirements were met. *Id.*

268. *Id.*

269. *Id.* Random drug testing violates the fundamental premise of the "presumption of innocence." Palefsky, *supra* note 19, at 678.

270. Comment, *Drug Testing Legislation: What Are the States Doing?*, 36 U. KAN. L. REV. 919, 923 (1988).

271. *See* POLICE CODE, *supra* note 261, at § 3300A.5-.11.

272. In 1986 California was one of the first states to consider legislation regulating drug testing in the workplace, but the bill was not passed into law. McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1471-74 (1987) (discussing the employee drug testing bills which were introduced to the California legislature). The first bill, AB 1482, was introduced by Assembly Member Johan Klehs on March 6, 1985. *Id.* at 1471 n.84. On February 24, 1986, Assembly Members Klehs and Hauser introduced AB 4242. *Id.* at 1471 n.92. Following this, Klehs introduced AB 330 on January 21, 1987. *Id.*

273. *See* Hebert, *Private Sector Drug Testing: Employer Rights, Risks and Responsibilities*, 36 U. KAN. L. REV. 823, 828-39 (1988) (discussing current legislative restrictions on drug testing). *See, e.g.*, CONN. GEN. STAT. ANN. § 31.51x (a) (West Supp. 1989). In order to require an employee to submit to drug testing, the employer must have reasonable suspicion that the employee is under the influence of drugs and that the drug use could adversely affect job

laws in 1987, allowing drug testing only where there is probable cause to believe the employee is using or under the influence of drugs.[274] The Vermont statute allows drug testing of applicants only where the employer gives applicants written notice, and an offer of employment conditioned on a negative drug test result.[275] Utah has one of the least restrictive statutes.[276] The Utah statute allows drug testing of job applicants, individual tests based on suspicion of drug use, or random testing necessary to maintain security and productivity.[277] The Utah statute only requires that employees receive written notice of the drug testing policy.[278]

C. Additional Problems of Drug Testing

Drug testing can be both humiliating and degrading for employees.[279] Many companies that implement drug testing programs require the employees to urinate under the direct observation of a monitor.[280]

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performance. *Id.* For random drug testing, the employee must be in a high-risk or safety-sensitive occupation. *Id.* at § 31.51x (b). An Iowa statute prohibits an employer from requiring employee drug testing unless there is probable cause to believe that the safety of the employee or the public is at risk due to the drug abuse. IOWA CODE ANN. § 730.5 (3) (West Supp. 1989). The employer may require drug testing as part of a routine examination if certain conditions are met. *Id.* at § 730.5 (7). In Minnesota, a statute provides that an employer may only conduct random drug testing if the employee is in a safety-sensitive position, and may only conduct routine drug testing annually, or less frequently, and must provide the employee with two weeks notice. MINN. STAT. ANN. § 181.951 (West Supp. 1988). The statute allows testing based on reasonable suspicion, provided certain requirements are met. *Id.* Montana restricts employers to drug testing employees only where the faculties of the employee are impaired. MONT. CODE ANN. § 39-2-304(1)(c) (1989). The employer must provide a written policy of drug testing. *Id.* at § 39-2-304(2). In Rhode Island, a statute provides that an employer may only conduct drug testing of an employee if the employer has reasonable grounds to believe that the employee is using controlled substances, and the employee's impairment is affecting job performance. R.I. GEN. LAWS § 28-6.5-1 (A) (Supp. 1988). A Tennessee statute allows drug testing of security personnel for the Department of Correction if there is reasonable suspicion to believe that the employee's faculties are impaired, and the impairment presents a danger to the employee or others. TENN. CODE ANN. § 41-1-122 (a), (b) (Supp. 1989). In Utah, a statute provides that employers may conduct random tests where there is possible impairment, or a need to maintain public safety or productivity. UTAH CODE ANN. § 34-38-7 (2) (1988). A Vermont statute prohibits random testing of employees. VT. STAT. ANN. tit. 21, § 513 (b) (1987). Employees may be tested where there is probable cause to believe that the employee is using, or under the influence of, drugs. *Id.* at § 513 (c)(1).

274. VT. STAT. ANN. tit. 21, § 513 (c)(1) (1987).

275. *Id.* at § 512 (b).

276. UTAH CODE ANN. § 34-38-3, -7 (1988).

277. *Id.* at § 34-38-3, -7 (2).

278. *Id.* at § 34-38-7 (1).

279. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (discussing the humiliating aspects of drug testing). *See also* Note, *supra* note 48, at 133 (describing the situation where a school bus driver refused to undergo drug testing because of the humiliation involved in urinating in front of another person).

280. Note, *State Drug Testing Statutes: Legislative Attempts to Balance Privacy and*

While the monitor may ensure that the employee does not tamper with the sample,[281] requiring employees to urinate in the presence of a monitor is an extreme invasion of privacy.[282]

A further invasion occurs while analyzing the sample. Drug testing can allow the employer to determine if the employee is pregnant,[283] has diabetes, epilepsy, or many other conditions.[284] In addition, a positive drug test result requires the employee to disclose personal information—such as medications the employee takes, or medical conditions the employee has—to explain the positive result, or risk losing his or her job.[285] Employees have a significant interest in keeping their personal medical information private and employers have no legitimate reason to access this information.[286]

Furthermore, a positive drug test result may reflect off-duty drug use that may not rise to the level of abuse or render an employee dysfunctional.[287] Unlike the breathalyzer test for alcohol, urine drug tests are incapable of measuring the level of drugs currently in the employee's blood system.[288] For example, there is no scientific proof that marijuana or cocaine continue to impair beyond twenty-four hours after their use.[289] Yet certain drugs, such as marijuana, may test positive up to twenty days after consumption.[290]

Productivity, 14 J. CORP. L. 721, 736 n.118 (1989) *citing* C. CORNISH, DRUGS & ALCOHOL IN THE WORKPLACE § 1.08, at 37 (1988) (according to a study conducted by the American Management Association, 29% of the companies with a drug testing program require visual observation of the employees urinating).

281. Note, *supra* note 6, at 839. Sonnenstuhl & Trice, *Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace*, 11 NOVA L. REV. 709, 720 (1987) (stating various ways in which employees have tampered with the sampling procedure, even with a monitor present).

282. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (stating that urine testing involves one of the most private functions). *See also* Comment, *supra* note 6, at 534 (stating that supervising another person urinating violates the person's dignity).

283. Drug testing of a married person may violate the right to privacy surrounding the marital relationship by interfering with the couple's decision to have a child. *See Survey, supra* note 242, at 589-90.

284. Urine test analysis may reveal venereal disease, schizophrenia, manic depression, susceptibility to heart attacks or sickle cell anemia. *See* Comment, *supra* note 6, at 535; Note, *supra* note 7, at 972.

285. *See infra* text accompanying notes 294-96 (requiring employees to reveal over-the-counter medications that may account for positive results is highly intrusive).

286. *Capua* 643 F. Supp. at 1515.

287. Kaplan & Williams, *supra* note 5, at 774. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (stating that drug testing reveals off-duty information just as if the employer had directly observed the employee during off-duty hours).

288. Note, *supra* note 6, at 837. *See* Sonnenstuhl & Trice, *supra* note 281, at 721 (explaining that because urine is a waste product, the presence of metabolites from the drugs does not prove that the drug is still in the blood stream).

289. Kaplan & Williams, *supra* note 5, at 763 n.30 (1988) *citing* Morgan, *Carry-over Effects*

Another major concern in drug testing is the accuracy of the testing method.[291] Even the most reliable urine test analyses have significant false-positive results.[292] One method for analyzing the urine, radioimmunoassay, may have false-positive results as high as forty-three percent for cocaine.[293] Some over-the-counter medications, such as Contac™ and Sudafed,™ can produce a false-positive result for amphetamine use.[294] Additionally, cough medicines containing dextromethorphan can produce a false-positive result for morphine use, while amoxicillin can produce a false-positive result for cocaine.[295] Advil™ and Nuprin™ may be detected as marijuana.[296] Although employers should conduct a second test to confirm positive results, this is not always done because of the high cost involved.[297] Even

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of Marijuana, 144 AM. J. PSYCHIATRY 259, 259-60 (1987). Once the intoxicating effects have dissipated, the drug does not affect job performance. Kaplan & Williams, *supra* note 5, at 764. *But see* Barnes, Kinsey & Halpern, *supra* note 61, at 704-05 (a report by the Johns Hopkins University School of Medicine showed severe impairment of pilots 24 hours after marijuana use, and, according to Dr. Walsh, a director in the Department of Health and Human Services, cocaine may cause unpredictable episodes of acute psychotic behavior).

290. Panner & Christakis, *The Limits of Science in On-the-Job Drug Screening*, 16 HASTINGS CENTER REP. 7, 9 (1986). THC, an active ingredient in marijuana, may be found in the urine up to several weeks after use. Curtis, *Drug Abuse: A Westinghouse Corporate Perspective*, NAT'L INST. ON DRUG ABUSE, WORKPLACE DRUG ABUSE POLICY: CONSIDERATIONS AND EXPERIENCE IN THE BUSINESS COMMUNITY, at 84-85 (1989). On the other end of the spectrum is cocaine, which is metabolized quickly and, unless testing is done soon after use, will not be detected in the urine. *Id.* at 85.

291. *Hearings*, *supra* note 6, at 17. Urinalysis is the testing method used by the majority of companies who conduct drug testing of employees or job applicants. *Id.* at 14. The urine is first analyzed for drugs by a screening technique. *Id.* at 59. The most common screening techniques are: Enzyme immunoassay, radioimmunoassay, fluorescence immunoassay, and thin-layer chromatography. *Id. Reagan Administration Drug Testing Program: Testing Procedures*, 66 CONG. DIG. No. 5, at 160 (1987) (finding that the screening test costs between $10 and $25). Blood testing reveals more information than urine testing, but is more expensive. *Hearings*, *supra* note 6, at 67.

292. Panner & Christakis, *supra* note 290, at 8. *See infra* note 293 and accompanying text (stating the percentage of false-positives for various drugs). A false-positive occurs when the test result signifies that a person has taken a drug when in fact the person has not. Comment, *supra*, note 6, at 531. In 1984, the Air Force informed 6,500 air men that their positive drug test results may have been wrong. McGovern, *supra* note 272, at 1458. On the other hand, one blind study of drug screening laboratories revealed that the some laboratories had false-negatives as high as 100% for certain drugs. Sonnenstuhl & Trice, *supra* note 281, at 719-20. A false-negative is a finding by the laboratory that the urine does not contain drugs when, in fact, it does. *Id.* at 720.

293. Panner & Christakis, *supra* note 290, at 8. False-positives have been found as high as 21% for opiates, 51% for phencyclidine (PCP), and 42% for barbiturates. *Id.*

294. Comment, *supra* note 6, at 531.

295. *Id.*

296. Muczyk & Heshizer, *supra* note 6, at 29.

297. The most common methods for confirmation analysis are: Gas-liquid chromatography, high performance liquid chromatography, gas-chromatography coupled with mass spectroscopy, and special solid phase extraction thin-layer chromatography methods. *Hearings*, *supra* note 6, at 59. One author found that employers rarely conduct a confirmation test because of the high cost. Comment, *supra* note 6, at 530. The urine confirmation test costs between $100-200. *Id.* at 532. *See contra* Note, *supra* note 7, at 1002 (stating that almost all employers conduct confirmation tests).

with the combination of a screening analysis and a confirmation analysis, significant problems in the laboratory may occur that yield false-positives.[298]

D. Standards Governing Drug Testing

Despite the problems with drug testing, the Court in *Wilkinson* found that preemployment drug testing does not violate a job applicant's California constitutional right to privacy.[299] The constitutionality of drug testing of current employees in California should also be determined under established right to privacy principles.[300] A current employee seeking to prevent drug testing should first be required to prove that an invasion of the employee's legitimate right to privacy has occurred under the test enumerated in *Franchise Tax Board*.[301] Applying the test, the employee would be required to show that drug testing was an unreasonable intrusion of the employee's bodily integrity.[302] Further, the employee would have to show a reasonable expectation of privacy in his or her urine and the personal information urine contains.[303] In general, courts have recognized that individuals have a reasonable expectation of privacy in their bodily fluids.[304] In *Skinner*, the Court recognized that employees have a reasonable expectation of privacy in their urine.[305]

To overcome the employee's right to privacy, the employer must show a compelling public interest in drug testing.[306] Although the

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298. Panner & Christakis, *supra* note 290, at 9. A blind survey of various laboratories revealed that 66% of the results were false-positive even with the multi-level testing. *Id.*

299. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), *rev. denied*, Mar. 15, 1990.

300. *See generally* Barnard, *Legal Implications of Drug Testing in the Private Sector*, 2 J. L. HEALTH 67 (1987-88) (discussing the legal implications of employers who both test, and fail to test, employees for drugs). *See supra* text accompanying notes 148-259 (discussing the development of California's constitutional right to privacy).

301. *See supra* text accompanying notes 161-63.

302. *See supra* text accompanying notes 161-63.

303. *See supra* text accompanying notes 161-63.

304. *See supra* notes 83-86 and accompanying text; Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1413 (1989) (finding that the collection and testing of urine invades an individual's reasonable expectation of privacy); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986) (stating that individuals have a reasonable expectation of privacy in their bodily fluids and the personal information contained therein); Schmerber v. California, 384 U.S. 757, 767 (1966) (stating that a blood test constituted a search within the context of the fourth amendment); Barnes, Kinsey & Halpern, *supra* note 61, at 729 (discussing whether urinalysis is a reasonable search under the fourth amendment definition).

305. *Skinner*, 109 S. Ct. at 1413.

306. *See* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975).

public feels that drug abuse is a serious societal problem, studies have shown that drug use has declined in recent years.[307] Therefore, it is not legitimate for an employer to assume that drug use poses a significant problem in every workplace.

The employer who develops a drug testing program is likely to claim that testing is necessary to detect employee impairment and to ensure employee and public safety.[308] However, similar to the polygraph testing conducted in *Long Beach City Employees Association*, drug testing can reveal personal medical information that goes beyond detecting the level of impairment.[309] Further, employee drug testing does not necessarily ensure public safety. An employee may be impaired for other reasons, such as drowsiness, overwork, or psychological illnesses, which would not be detected by drug testing.[310] Therefore, where there is no suspicion that an employee is on drugs, as was the case in *Price*, the employer's compelling need to test does not outweigh the employee's right to privacy.[311] As in *Price*, without suspicion of drug use, the drug testing is an unreasonable invasion of the employee's right to privacy.[312] Therefore, the employer should be prohibited from testing an employee, where the employer has no suspicion that the employee uses drugs.

Mandatory drug testing should be allowed in certain limited circumstances. As in *Skinner*, the employer should be able to conduct drug testing of those employees involved in accidents.[313] When the employer has a generalized concern about drug abuse in the workplace and lacks individualized suspicion, there are many viable and less intrusive means, aside from drug testing, to detect employee impairment without violating the employee's right to privacy.[314]

E. Adequate and Less Intrusive Alternatives

Requiring an employee to undergo a skills test is one alternative to drug testing.[315] The skills test, similar in design to a roadside

307. *See supra* text accompanying notes 4 & 7.
308. *See supra* note 51 and accompanying text.
309. *See supra* note 284 and accompanying text.
310. Comment, *supra* note 6, at 533.
311. *See supra* text accompanying notes 248-51.
312. *See supra* text accompanying notes 248-51.
313. *See supra* text accompanying notes 79-103 (discussing the drug testing program in *Skinner v. Railway Labor Executives' Ass'n*).
314. *See infra* text accompanying notes 315-28 (discussing realistic alternatives to drug testing).
315. Palefsky, *supra* note 19, at 672.

sobriety test, could test an employee's physical dexterity. A reflex or response time test, or a hand-eye coordination test, could be specially designed to test job-related impairment.[316] Currently, some firms are using a skills test called the Critical Tracking Test, which, similar to a videotape game, requires the employee to use a dial to keep an electronic pointer from straying from the middle of a computer screen.[317] The computer records the employee's ability to respond to the computer's deviation and compares the responses against the employee's previous performances.[318] These skills tests are superior to urine tests because they provide the employer with immediate results, whereas a urine test may take a few days to analyze.[319] For employees in dangerous occupations, the skills test should be conducted on a routine basis.[320] The less intrusive skills test allows the employer to detect employee drug impairment without violating the employee's right to privacy in their bodily fluids.[321] In some types of employment, a skills test may be inadequate in detecting employee impairment, and in those limited situations, drug testing may be necessary.[322]

Another alternative to drug testing is an Employee Assistance Program (EAP).[323] With an EAP, the employer uses deteriorating job performance as a means of identifying employees who may be impaired by drug or alcohol use.[324] Many supervisors are aware of an employee's drug problem before it reaches the point of affecting job performance and can closely monitor the employee from that time forward.[325] The deterioration may be in the form of increased absenteeism, or reduced quantity or quality of work.[326] Although some employers may hesitate to implement a program requiring

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316. *Id.* (discussing alternatives to drug-testing).
317. Stevens, *Measuring Workplace Impairment*, N.Y. Times, Mar. 6, 1990, at B5, col. 1, B8, col. 4. The National Aeronautics and Space Administration and the Air Force first used the technique in the 1960s. *Id.* at B8, col. 4. Systems Technology, Inc., developed the technology, and Performance Factors, Inc., an Emeryville firm, is currently marketing the Critical Tracking Test. *Id.* The Old Town Trolley Tours (a tour bus company in San Diego), a gasoline delivery company, and an oil tanker company, are three companies in California currently using the critical tracking test. *Id.*
318. *Drug Testing Without the Bottle*, Sacramento Bee, Mar. 11, 1990, at 4, col. 1 (Forum).
319. Palefsky, *supra* note 19, at 672.
320. *See* Sonnenstuhl & Trice, *supra* note 281, at 729.
321. Kaplan & Williams, *supra* note 5, at 775.
322. *See infra* note 339 and accompanying text.
323. *See* Sonnenstuhl & Trice, *supra* note 281, at 711-18.
324. *Id.* at 713.
325. *Id.* at 715.
326. *Id.* at 713.

constant, close supervision, over a long period of time, some forms of drug impairment, like intoxication, the leading cause of dysfunction in the workplace, may be detected immediately by observation alone.[327] If the employer is not interested in assisting an employee identified through close supervision as being impaired by drug or alcohol use, the employer will have adequate grounds to fire the drug-using employee for other reasons, such as poor work performance, low productivity, or high absenteeism.[328]

III. PROPOSAL

The California legislature should protect employees in the private work sector from unnecessary and highly intrusive drug testing. Federal case and statutory law suggest a growing national acceptance of employee drug testing in the public workplace.[329] The federal government, by issuing Executive Order 12,654 and enacting the Drug-Free Workplace Act of 1988, expressly approves, encourages, and sometimes mandates drug testing in the public and private work sector.[330]

The California Supreme Court has not yet addressed the constitutionality of mandatory drug testing of private sector employees, leaving this area open for legislation.[331] I propose that the California legislature enact a statute to protect private work sector employees from individual testing when the employer has no reason to believe that the employee is impaired by drug use. The statute should require that the employer have an individualized, reasonable suspicion that the employee is impaired by drug use before the employer requires the employee to undergo a drug test.[332]

Similar to the San Francisco Worker's Privacy Ordinance, before conducting a drug test of a specific employee, the employer should be required to have reason to believe that the employee is using

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327. Kaplan & Williams, *supra* note 5, at 764, 771.

328. *See supra* notes 47-48 and accompanying text (discussing the effect of drug use on an employee's performance).

329. *See supra* text accompanying notes 56-125.

330. *See supra* text accompanying notes 56-74.

331. *But cf.* Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), *rev. denied*, Mar. 15, 1990 (ruling that preemployment drug testing is not a violation of the California constitutional right to privacy).

332. *See* Note, *supra* note 7, at 979 (finding that all state drug testing statutes, with the exception of Utah, require reasonable suspicion or probable cause before drug testing an individual employee).

drugs, and that the use is affecting the safety of the employee or others in the workplace.[333] The reason to believe or reasonable suspicion standard requires that a reasonable person in the employer's position would have believed that the employee was impaired by drug use.[334] The employer must present to the employee specific, objective facts, and rational inferences drawn from these facts, that the employee was impaired by drug use.[335] This standard provides the added benefit of ensuring that employers supervise their employees, which may help reduce drug use on the job.[336]

Similar to the Vermont statute that prohibits all random testing, the California statute should prohibit random testing in the absence of an individualized suspicion.[337] If the employer is concerned about the safety of others, the employer should institute a skills test to detect employee impairment.[338] An exception may be made when the employer can show that the skills tests are inadequate in detecting impairment and the employer shows a compelling, legitimate need for the drug testing.[339] In these limited situations, random drug testing may be permitted.

Although in *Wilkinson* the First District Court of Appeals ruled that drug testing a job applicant does not violate the California constitutional right to privacy, the California statute should not distinguish between new job applicants and employees.[340] By allowing

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333. Kaplan & Williams, *supra* note 5, at 760. Normally, some level of individualized suspicion, commonly probable cause, is required before a person is required to sacrifice personal privacy for the greater good. *Id.*

334. *See* Comment, *supra* note 6, at 543 (discussing the reasonable suspicion standard as applied to drug testing). *See also* Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451, 1490 (1986) (stating that the reasonable suspicion standard should apply to all employees, regardless of their occupation).

335. Comment, *supra* note 6, at 543. *See* Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560, 1569 (C.D. Cal. 1987) (stating that a reasonable suspicion is a suspicion based on specific objective and articulable facts and reasonable inferences derived from those facts).

336. *See* Note, *supra* note 7, at 994.

337. *See supra* note 273 and accompanying text (discussing the Virginia drug testing statute). *See also* Comment, *Drug Testing in the Workplace—Sacrificing Fundamental Rights in the War on Drugs*, 91 W. VA. L. REV. 1067, 1079 (1989) (discussing the evils of random drug testing of employees).

338. *See supra* text accompanying notes 315-28.

339. The positions must require split-second decision making and complex reactions. Kaplan & Williams, *supra* note 5, at 772. *See* Note, *supra* note 48, at 146 (discussing positions where drug testing should be allowed); Lewis, *supra* note 7, at 713 (stating that across the board testing is unreasonable unless the employees are in positions of safety). *See also* Note, *supra* note 6, at 846.

340. *But cf.* Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), *rev. denied*, Mar. 15, 1990; Lewis, *supra* note 7, at 730 (testing applicants is a logical first step in providing a drug-free workplace).

routine testing of job applicants, people will be inhibited from freely changing positions within the same company or moving to another company. Since an employer normally places newly hired employees on probation, the employer has ample time to observe the employee for possible drug use impairment.

Where there is individualized suspicion of drug use, or in the rare case where random drug testing is permitted, the employer should be required to give the employees written notice containing a detailed description of the program before implementing the drug testing program. The notice should clearly state the employees who will be affected by the program and outline the method and procedure to be used.[341] Further, the statute should prohibit the direct observation of an employee producing the urine specimen.[342] The employer may provide other means, rather than direct observation, to ensure the integrity of the sample. The employer may color the water in the sampling room, or frisk the employee for containers before sampling, to prevent the employee from diluting, or tampering with the sample.

The urine sample should be analyzed only for alcohol and illegal drugs that are known to impair employee performance. Any positive drug test result should be confirmed by an additional test at the employer's expense. The employer, in implementing the drug testing program, should be responsible for these additional costs. Before the employer takes any action on a positive drug test result, the employee should be given an opportunity to explain it. Once a drug test has been confirmed positive and there is no possible legitimate explanation for the result, the employer should consider allowing the employee to go through a treatment program.[343] Furthermore, all test results should be kept strictly confidential.

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341. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (stating that prior to implementing a drug testing program, the employees should be informed of the existence, methods, and procedure of the program, and the confidentiality protection provided).

342. *See, e.g.,* CONN. GEN. STAT. ANN. § 31.51w (b) (West Supp. 1989) (providing that the drug testing results be kept with the employee's other medical records and must be subject to privacy protection).

343. *See* Sonnenstuhl & Trice, *supra* note 281, at 731 (stating that the positive finding should be treated as any other regular discipline problem). *See* R.I. GEN. LAWS § 28-6.5-1 (C) (Supp. 1988) (requires that the employer have a rehabilitation program in effect before implementing a drug testing program). *See also* Morikawa & Hurtgen, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA. L. REV. 653, 654 (1987) (stating that of the firms who had drug testing programs in 1986, 41% required employees to undergo a treatment program if their drug test was positive); Comment, *Drug Testing of Private Employees*, 16 BALTIMORE L. REV. 552, 553 n.10 (1987) (stating that Northwestern Bell and Adolph Coors Brewing Co. offer company paid assistance programs for drug users).

Conclusion

Drug testing severely infringes on the employee's right to privacy in the workplace. Drug tests are unable to detect levels of impairment and therefore are ineffective in furthering an employer's goal of increasing productivity or protecting public safety. Although the United States Supreme Court has favored drug testing of public sector employees, the California legislature should step forward and protect private sector employees from the intrusiveness of drug testing. It is up to the legislature to protect the employee's rights from the mass hysteria involved in the war on drugs. As Judge Sarokin eloquently stated in *Capua v. City of Plainfield*, "in order to win the war against drugs, we must not sacrifice the life of the Constitution . . . ."[344]

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344. Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986).