Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California

Patricia A. Hunter

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol19/iss4/13
YOUR URINE OR YOUR JOB: IS PRIVATE EMPLOYEE
DRUG URINALYSIS CONSTITUTIONAL IN
CALIFORNIA?

I. INTRODUCTION

Recently, the use of mandatory drug testing of employees by urinalysis has been a prevalent media topic.\(^1\) An estimated twenty percent of Fortune 1000 companies require drug testing of job applicants and/or current employees who are suspected of drug use,\(^2\) while approximately twenty-five percent of Fortune 500 companies require such testing.\(^3\) One


\(^3\) Lacayo, *Putting Them All to the Test*, TIME, Oct. 21, 1985, at 61.
need not be a lawyer or legal scholar to understand the arguments reported in newspapers, magazines and on television.\(^4\) Supporters of employee drug testing argue that the tests will help eliminate the serious drug problems affecting employment and society in general.\(^5\) Critics contend that testing violates the employee's right to privacy,\(^6\) tests are inaccurate\(^7\) and cannot distinguish between drugs recently ingested and

---

4. Recently, however, employee drug testing has received serious attention from legal writers. For example, the April 1986 issue of *Student Lawyer* included an extensive article regarding employee drug testing touching on many issues discussed in this Comment. En- glade, *Who's Hired and Who's Fired*, *STUDENT LAWYER*, Apr. 1986, at 20. The article extends the discussion to the legal implications involved in "genetic screening." *Id.* at 27. The article states that

[o]ne of the more troubling aspects of the sudden proliferation of urine testing across the country is the prospect that drug screening may be only the tip of the iceberg. . . . [U]rinalysis may be just the beginning of a new generation of government and industry-sponsored exams designed to predict everything from the likelihood an individual will develop an ulcer to the possibility he or she will come down with cancer. *Id.* at 26.

Similarly, *The National Law Journal*’s April 7, 1986 lengthy cover story addressed the "dramatic collision between the rights of employers and workers." Stille, *Drug Testing: The Scene is Set For a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat’l L.J., Apr. 7, 1986, at 1, col. 1. The article notes that critics cite instances of testing abuse and challenge both the reliability and constitutionality of the tests. Critics predict that such testing will "ruin the careers of tens of thousands of innocent people and trample the civil liberties of millions more." *Id.* at 1, col. 2.

5. See, e.g., Lacayo, *supra* note 3, at 61 ("Supporters of testing in general argue that it is justified by pressing requirements of public health and safety."); Westin, *Drug Testing vs. Employee Privacy: Long Struggle for Fairness Lies Ahead*, L.A. Times, Feb. 10, 1986, pt. II, at 5, col. 1 ("Employers say that they face rising levels of accidents and impaired performance from millions of employees—and executives—who face the job behavior is affected by drug and alcohol abuse."); Stein, *S.F Votes to Ban Random Drug Tests in Workplace*, L.A. Times, Nov. 19, 1985, pt. I, at 3, col. 4 (San Francisco ordinance banning random drug testing is "disgraceful" because it appears to condone drug use (citing Quentin Kopp, San Francisco Supervisor)); Press, *First the Lie Detector, Then the Chemicals: Is there a Right to Privacy in the Private Sector?*, NEWSWEEK, Jan. 27, 1986, at 56 ("How can employers guarantee a safe and secure operation and at the same time not infringe on the privacy rights of their (for the most part) innocent workers? The problem is real; drug use has spread to every occupation."); Goldman, *supra* note 2, at 1, col. 6 ("Baseball's reputation is at stake and it is our responsibility . . . to stop this menace before more damage is done . . . .") (quoting Peter Ueberroth).

6. See, e.g., Omestad, *supra* note 2, at 6, col. 1 ("Critics contend that the [drug testing program at 3M] violates privacy rights granted in the California Constitution . . . ."); Westin, *supra* note 5, at 5, col. 1 ("[T]hese tests measure the lingering presence of substances that employees usually have consumed in their private lives, not on the job."); Matier, *S.F Bans Random Drug Tests*, S. F. Examiner, Nov. 13, 1985, at A-1, col. 4, A-18, col. 3 (The purpose of San Francisco's newly enacted municipal code banning random employee drug testing was "to ensure workers a certain amount of dignity and personal privacy.") (quoting Bill Maher, San Francisco Supervisor).

7. See, e.g., Stein, *supra* note 5, at 18, col. 3 ("Opponents of the tests . . . note that it is not uncommon for the tests to record 'false positives'—that is, to detect a trace of, perhaps, herbal tea and identify it as marijuana." *See infra* notes 46-54 and accompanying text. Oppo-
drugs ingested weeks before.\footnote{See, e.g., Lacayo, supra note 3, at 61 (fact that urinalysis can indicate drug use a week or more after it has taken place indicates the test's inappropriateness, because "how people spend their time away from work is a private matter" (quoting Alan Westin, Columbia University professor)); The Many Tests for Drug Abuse, supra note 2, at F-17, col. 3 (Legal experts contend that drug tests are "an unconstitutional attempt on the part of corporations to control employees' behavior at home—particularly since they can yield positive results days and even weeks after drug use."); Uelmen, Employee Drug Tests on Collision Course with Privacy, L.A. Herald Examiner, Mar. 23, 1986, Comment, at F-1, col. 5 (Marijuana can be detected as long as 30 days after use).} The intrusiveness of the tests becomes clear to some only when confronted by a specimen bottle and a demand for urine. This was exemplified by the reaction of Rodney Smith, deputy executive director of the President's Commission on Organized Crime, when he was told to give a urine sample before he would be allowed to testify before the House Post Office and Civil Service Human Resources Subcommittee about making such tests mandatory for all federal workers. Mr. Smith was told that "[t]he chair will require you to go to the men's room under the direct observation of a male member of the subcommittee staff to urinate in this specimen bottle."\footnote{Drug Test Advocate Refuses to Be Tested, L.A. Times, Mar. 19, 1986, pt. I, at 10, col. 1.} Mr. Smith angrily complained that the subcommittee embarrassed him and did not warn him. He was then reminded that the presidential commission's proposal would similarly not provide warning to federal workers.\footnote{Id. at 10, col. 1-2 (citing statement by Chairman Gary L. Ackerman).}

On an intuitive level, it makes sense to do everything possible to end drug abuse in our society. However, both the United States Constitution and the California Constitution limit what can be done to accomplish this end. Society cannot do "everything possible" to end drug use,\footnote{In a recent district court case that dealt with urinalysis of government employees, the court discussed the limitations on government as follows: No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens . . . would help the employer discover drug use and other useful informa-}
more than it can do "everything possible" to end crime. For example, the government could not authorize random searches of individuals' homes even though such searches would occasionally yield weapons or drugs. The fourth amendment to the United States Constitution protects individuals from unreasonable intrusion by government. The California Constitution extends this protection by limiting intrusion by anyone, including business interests, to circumstances where there is a compelling public interest. A California Supreme Court case which discussed California's constitutional right to privacy stated "that 'both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right to privacy guaranteed by these constitutional provisions be respected.'" Recently, a proposed bill which would have subjected virtually every private employee in California to yearly random testing was denounced at a "hostile Senate hearing" as "unnecessary, unconstitutional and un-American." The proposal was ultimately dropped by its author, Senator John Seymour.

This Comment will interpret the limits that California's explicit constitutional right to privacy places on a private employer who demands a urine test from an employee. There is federal case law that identifies an

12. The fourth amendment to the United States Constitution, see infra note 76, on its face limits the ability of government to prevent crime. The probable cause requirement explicitly limits the government's ability to search a person even to prevent a crime. For example, in Delaware v. Prouse, 440 U.S. 648, 648 (1979), a policeman found marijuana in a driver's car. If government could do anything possible to prevent crime, this evidence could have been used against the defendant. However, because the officer did not have a valid reason to stop the defendant, such as a traffic violation or other suspicious activity, the evidence was suppressed. 

13. See infra text accompanying notes 230-44.


17. Id.
employee's right to be free from unreasonable drug testing by government as protected by the fourth amendment. These federal cases are utilized to develop a method to determine the reasonableness and constitutionality under the California Constitution of a private employer requiring mandatory employee drug urinalysis.

The proposed method will discuss the "reasonableness" of employee drug testing by addressing the limits of employers' "legitimate concern," and whether such tests properly address this concern. Urinalysis may not be appropriate because the tests do not indicate intoxication at the time of testing and are known to be inaccurate. If an employee's activities during his or her own free time are not a legitimate concern of business, then utilizing a test that cannot prove impairment at work is an unreasonable invasion of privacy. A substantial amount of case law and other authority dealing with drugs and the workplace indicate that employees should be terminated or disciplined only if drug use affects their job. As one commentator put it, there is a "well-accepted principle that what employees do on their own time and off the employer's premises are generally not the employer's concern."23

II. THE URINE TEST COMMONLY USED TO DETECT EMPLOYEE DRUG USE

In 1980, the Syva Company of Palo Alto, California (Syva) introduced an inexpensive test to detect traces of marijuana in urine. The Emit Cannabinoid Assay (Emit Test) greatly simplified and lowered the cost of urinalysis drug testing. This inexpensive, easily administered test makes large scale testing practical and convenient in many con-

18. See infra notes 79-190 and accompanying text.
19. See infra notes 39-45 and accompanying text.
20. See infra notes 46-57 and accompanying text.
21. See infra text accompanying note 45. For a complete discussion of urinalysis' inability to prove intoxication at the time of testing, see supra notes 29-45 and accompanying text.
22. See infra notes 260-81 and accompanying text.
25. See SYVA COMPANY, MARIJUANA AND THE EMIT CANNABINOID ASSAY (June 1981) [hereinafter cited as SYVA REPORT].
texts,\textsuperscript{27} including employment. Commercial introduction of the Emit Test sparked the emerging emphasis on drug testing in employment.\textsuperscript{28}

\textbf{A. The Emit Test}

A primary feature of the portable Emit Test is that non-technical personnel may perform the test without the need for laboratory analysis.\textsuperscript{29} Emit Test results are available within minutes of testing,\textsuperscript{30} and unlike other methods of testing,\textsuperscript{31} Emit does not require specialized instruments or highly trained operators.\textsuperscript{32}

The test must identify a certain amount of tetrahydrocannabinal (THC)\textsuperscript{33} metabolites\textsuperscript{34} in the urine to show a positive result.\textsuperscript{35} Syva reported that although the Emit Test does not determine the concentration of THC in one's body, a positive result is a strong indication that the individual has been exposed\textsuperscript{36} to cannabinoids.\textsuperscript{37} A Syva report indicated that the Emit Test was ninety-five percent accurate in a controlled setting.\textsuperscript{38} Metabolites can be detected in the urine long after the impair-
ment, or the "high," from the marijuana has ceased. Syva clearly warns that the Emit Test does not determine a correlation between the degree of psychoactive effect (the actual "high") and the concentration of metabolites in the urine.

One reason that it is impossible to correlate the amount of metabolites excreted with actual intoxication is that individual factors affect the amount of THC metabolites excreted in urine. For example, THC has been shown to convert to metabolites faster in chronic users than in infrequent users. Syva notes that factors such as body weight, stress, menstrual cycle, diet and other physical and psychological factors may cause erratic increases or decreases in the excretion rate in individuals. Therefore, the number of metabolites present in urine may be the same in a person who smoked marijuana just prior to testing and a person who smoked days or weeks earlier, depending upon one's metabolic rate. In other words, an individual with a certain number of metabolites may still be adversely affected by marijuana, while a second person with the same

quality controlled environment. Such care is not necessarily taken with actual use. See supra notes 55-57 and accompanying text.

See also *The Many Tests for Drug Abuse*, supra note 2, at F-17, col. 3, which noted that Syva claims a 95% accuracy rate, but that "many doctors disagree." Dr. David Greenblatt, Chief of Clinical Pharmacology at Tufts New England Medical Center, stated that "[f]alse positives can range up to 25 percent or higher" and that "[t]he test is essentially worthless." *Id.*

39. After 72 hours of marijuana intake, about 40%-50% of the THC in the initial dose is converted to metabolites and is excreted in feces and urine. It is believed that the remaining 50%-60% of the THC is distributed throughout the body and stored by various fatty tissues. The THC will find its way into the bloodstream over an estimated 7 to 36 days and eventually will convert to metabolites and will be excreted. *SYVA REPORT*, supra note 25, at 2; *see Zeese*, supra note 24, at 26 (citation omitted). One study indicated that six chronic marijuana users, after supervised abstinence, showed a "positive" test result for marijuana. *Id.* This fact does not indicate that the users were "high" for 36 days, but merely that the THC metabolites which indicate recent drug use were excreted for that period. *Id.*

The maximum psychoactive effect after smoking marijuana is estimated to occur within 20 to 30 minutes after smoking and lasts for about 90 to 120 minutes. The maximum psychoactive effect after eating marijuana is estimated to occur within two to three hours. *SYVA REPORT*, supra note 25, at 1.

40. *Id.* at 2. Ann Burton, technical consultant in Syva's technical service department, confirmed that the information in the early (1980-1981) *Drugs of Abuse Series* put out by Syva is still accurate today. She specifically confirmed that the urine tests do not and are not expected to measure intoxication at the time of testing. Instead, the test determines whether the person tested "recently" used the drug. Telephone interview with Ann Burton, Syva Co. (Nov. 15, 1985).


42. *Id.*

43. *Id.*
number of metabolites has long been unaffected. The Syva report concludes that the assay of THC metabolites in urine is “useful only as an indicator of recent use of marijuana and not as a measure of intoxication.”

B. Inaccuracy

1. False positives

A major concern regarding the accuracy of urinalysis drug testing is what is commonly called “false positives.” A false positive is a positive test result which occurs even though the person tested has never used the drug. Estimates of false positives in urine testing range from one percent, 44. The Syva Company lists six factors that may affect the amount of THC metabolites that are excreted in urine:

1. THC has been shown to be metabolized (converted to metabolites) more rapidly in chronic (frequent) users than in infrequent users.

2. In controlled smoking studies, frequent users of marijuana often show initial levels (in blood as well as in urine) of THC metabolites that are greater than the highest levels obtained by relatively infrequent users.

3. Absorption and distribution of THC throughout the body is different for each person. Thus, the rate of conversion to metabolites (and the subsequent excretion of these metabolites) of the THC that is stored in fatty tissue will vary for different individuals. It is not yet known whether factors such as body weight, stress, the menstrual cycle, diet or other physical or psychological influences can cause erratic increases and decreases in the excretion rate in any given individual.

4. The method of administration (smoking or eating) does not appear to affect excretion of metabolites.

5. The volume of urine differs throughout the day for any individual. When the total volume is greater, for instance as a result of drinking large quantities of liquid, the concentration of a given component can become diluted. Thus, assuming that the same amount of THC metabolites are present in the urine of two different individuals, the person with the greatest total volume of urine will exhibit an apparently lower concentration of metabolites. Conversely, if an individual has retained urine for an extended period of time, for instance, during sleep, the urine concentration of the various components may be higher in a sample taken from the first urination in the morning than a sample taken from a urination later in the day. This fact may also affect the apparent concentration of THC metabolites in random urine collections over a 24-hour day.

6. The kidney functions as one of the body’s “filters.” It removes waste from body fluids and deposits the waste in the urine for excretion. When the kidney’s ability to filter is impaired (by disease, for instance), the wastes are not removed as promptly as they would be in healthy individuals. . . . An individual may exhibit an erratic urinary excretion pattern of a given waste product such as THC metabolites, for example.

SYVA REPORT, supra note 25, at 3-4 (emphasis in original) (citations omitted).

45. Id. at 4. There is no method of urinalysis available to determine actual intoxication at the time of testing and none is expected. Telephone interview with Ann Burton, Technical Serv. Dep’t, Syva Co. (Nov. 15, 1985). There is evidence that blood or plasma samples may be better indicators of actual intoxication at the time of testing. Hawks, supra note 26, at 5; see also Zeese, supra note 24, at 28 (citation omitted).
claimed by Syva, to one hundred percent, claimed by others.46

One way that a false positive is said to occur is through passive inhalation of marijuana by a non-smoker.47 This passive inhalation results in a positive test.48 Another type of false positive occurs when the test detects substances that the human body naturally produces and mistakenly interprets those substances as drugs. For example, the Emit Test may detect a liver enzyme, malate dehydrogenase, which can be created by conditions including kidney tumors, kidney trauma or infection, liver disorders or bladder infections. This enzyme may cause a positive test result.49 Similarly, according to a chemist who frequently testifies in drug abuse cases, a pigment in dark-skinned people breaks down into chemical fragments similar to those in marijuana and can lead to wrongful accusations of marijuana use based on inaccurate urine tests.50 Still another means of creating a false positive is through "cross-reactivity." Cross-reactivity means that substances ingested, other than the drug tested for, will show up as if they were that drug.51 Among the substances suspected of creating cross-reactivity with the Emit Test is aspirin.52 Common, non-medicinal substances may also create cross-reactivity. For example, the urine test of two military medical interns showed positive for morphine. It turned out that the "positive" result was created by poppyseeds from the bagels they had eaten in the hospital cafeteria.53 Herbal tea has also been found to create false positives.54

2. Improper handling

Another threat to the accuracy of a urinalysis drug test is the problem of mishandling and misdiagnosing the tests. With the relatively simple urine tests such as Emit, which can be and are used on a massive scale, the ease of the test itself causes problems. The use of non-technical personnel to administer the test sometimes encourages improper test-

46. See Press, supra note 5, at 57; see generally supra note 7 and accompanying text.
47. See supra note 36.
48. Id.
49. Zeese, supra note 24, at 28 (citing S. CLARK, J. TURNER & R. BAS-TIANI, SYVA CO.; EMIT CANNABINOID ASSAY: CLINICAL STUDY NO. 74 SUMMARY REPORT (1980) (Mr. Zeese based his conclusion on this Clinical Study)).
52. Id. Substances which are said to create false-positives include: aspirin, amphetamine, amitriptyline, benzocyclenecgonine, diazepam, meperidine, methaqualone, morphine, phencyclidine, propoxyphene and secoberbital. Id. (citing S. CLARK, J. TURNER & R. BAS-TIANI, supra note 49, at 22-24).
53. Harris, supra note 27, at 3, col. 2.
54. Stein, supra note 5, at 18, col. 3.
One expert stated that "[n]o method, regardless of how simple, can substitute for technical experience when an analysis carries significant consequences for the individual being tested."

Even in situations where urine is tested by qualified laboratories, there is a tremendous potential for error. In the military, where the majority of past urinalysis drug testing has been conducted, an estimated 60,000 to 70,000 people were given the right to appeal disciplinary actions because there were documentation problems at the laboratories that analyzed their drug tests.

3. Confirmation

The manufacturer of the Emit Test itself stated that "confirmation . . . of any positive [test] result is essential." It recommends that a positive result be confirmed by a method other than the Emit Test.

The need for confirmation of a positive Emit result was recognized and discussed in Storms v. Coughlin, a federal case regarding the constitutionality of urinalysis of prison inmates. The court accepted a state trial court's finding that medical evidence did not show that the Emit Test had been generally accepted by experts as producing a reliable positive result "in the absence of independent confirmation." The state court had enjoined use of Emit Test results in prison disciplinary hearings "unless accompanied by evidence that the positive result was confirmed by an alternate method of analysis.

The Storms court also quoted a Syva release which stated, "because there are many variables that affect ordinary drug levels, . . . results should be confirmed by . . . an alternative equally sensitive analytical method when loss of rights or other corrective action is contemplated."

The Storms court found that merely having a second officer adminis-

---

55. Hawks, supra note 26, at 6.
56. Id. Similarly, when Syva discussed its test's 95%-99% accuracy rate, it emphasized that results were based on administration in a quality controlled environment. See supra note 38.
57. Harris, supra note 27, at 3, col. 3.
58. SYVA REPORT, supra note 25, at 17.
59. A primary characteristic of a confirmation test should be that it is a non-immunological method; the Emit Test is an immunological method. Zeese, supra note 24, at 27. Explaining these confirmation techniques in more detail is beyond the scope of this Comment. For further explanation, see id.
63. Id. at 1222 (quoting an affidavit of an expert with a doctorate in biophysics).
ter a second Emit Test to an inmate who tested positive in a previous Emit Test was not a sufficient protection. The court stated that "[w]hile this precaution will correct for human error in the testing process, it will not affect machine-generated error. Only testing by a different method can do that."64

III. EXISTING LAW REGARDING DRUG TESTING IN EMPLOYMENT

A. California

California currently has no case or statutory law regarding urinalysis of employees.65 There is a proposed amendment to the Labor Code pending in the California Assembly that would regulate employment drug testing.66 Assembly Bill 1482 would put limited restraints on employers who use medical testing to detect employee drug use. The proposal includes a requirement that employers inform all employees and job applicants of the company's drug testing policy and that employees must receive advance notice that such testing may be a routine part of his or her employment. In addition, employees would have the right to choose the doctor or laboratory which would administer the test, and any test would have to be administered within forty-eight hours of the employer's request.67

San Francisco recently amended its Municipal Code to prohibit em-

64. Id. at 1225 (emphasis added).
65. A Legislative Counsel's Digest comment on a proposed Assembly Bill which would limit drug testing by urinalysis in the workplace begins with the statement, "[e]xisting law does not specifically regulate the medical testing of employees to detect the presence of drugs." Cal. A.B. No. 1482, 1985-86 Reg. Sess. (1985). This assembly bill was introduced by Assembly Member Klehs.
66. Cal. A.B. 1482 was introduced March 6, 1985, and amended June 13, 1985 by Assembly Member Klehs. See infra note 67.
67. The proposal reads as follows:

SECTION 1. Section 432.4 is added to the Labor Code, to read:

432.4. (a) Every private employer shall inform all employees and applicants for employment of the employer's policy regarding drug use and medical testing of employees to detect the presence of drugs.

(b) Every employee shall receive advance notice that medical testing to detect the presence of drugs may be a routine part of his or her employment before the employer may require medical testing of employees to detect the presence of drugs.

(c) Each employee has the right to choose his or her own physician, laboratory, clinic, or hospital to administer medical tests to detect the presence of drugs. The costs of the testing are the responsibility of the employer.

(d) The medical tests to detect the presence of drugs shall be administered within 48 hours after the employer requests an employee to take the tests.

(e) Any employer who violates this section is guilty of a misdemeanor punishable by a fine of five hundred dollars ($500).

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new
ployer drug testing of employees. This ordinance, the first of its kind in the country, is based on California's constitutional right to privacy. Drafted by Supervisor Bill Maher, this ordinance passed by a 9-1 vote of the San Francisco Board of Supervisors. Supervisor Maher stated that the "whole purpose of the law is to ensure workers a certain amount of dignity and personal privacy." A bill was recently proposed and immediately "shelved," which if passed would have subjected most workers in California to random drug testing and would have pre-empted San Francisco's ordinance. The author of the bill, Senator John Seymour, ultimately dropped the propo-

crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.


68. The amendment states, in pertinent part:

Sec. 3300A.1 POLICY. It is the public policy of the City and County of San Francisco that all citizens enjoy the full benefit of the right to privacy in the workplace guaranteed to them by Article 1, Section 1 of the California Constitution. It is the purpose of this Article to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities.

Sec. 3300A.5 EMPLOYER PROHIBITED FROM TESTING OF EMPLOYEES. No employer may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to blood or urine testing if:

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

SAN FRANCISCO, CAL., POLICE CODE ch. 8, art. 33A (1985).

Additionally the amendment states that in conducting those tests designed to identify the presence of chemical substances in the body, the employer shall ensure to the extent feasible that the test only measure, and that its records only show or make use of, information regarding chemical substances in the body which are likely to affect the employee's ability to safely perform his or her duties while on the job. Id.

Under no circumstances may employers request, require or conduct random or company-wide blood, urine or encephalographic testing. Id.


70. SAN FRANCISCO, CAL., POLICE CODE ch. 8, art. 33A, § 3300A.1 (1985); see supra note 68.

71. Matier, supra note 6, at A-1, col. 2.

72. Id.

73. Id. at A-1, col. 3, A-18, col. 3 (quoting Supervisor Maher).

sal, "ending a hostile Senate hearing during which the measure was denounced as unnecessary, 'unconstitutional and un-American.'"  

B. Federal Law on Drug Testing of Employees: Search and Seizure Analysis

The fourth amendment to the United States Constitution is the starting point for analyzing cases that deal with drug testing of government employees. Fourth amendment standards determine whether testing is constitutional in a given situation. The law is well settled that the fourth amendment protects people from unreasonable searches of the person and those things in which he or she has a reasonable expectation of privacy. Whether the individual’s expectation of privacy and the state’s intrusion are reasonable is determined by balancing the public interest against the individual’s interest.

1. Is urinalysis testing a search: What constitutes a reasonable expectation of privacy?

   a. Schmerber v. California

   A United States Supreme Court case, Schmerber v. California, was the forerunner of current law which labels urinalysis a search and seizure. The Schmerber Court noted that the purpose of the fourth amendment was to "protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber was the first Supreme Court case dealing with state intrusion into the human body. The Schmerber Court held that a blood sample taken from a defendant to determine intoxication was a search under the fourth amendment. The Court

75. Id. at 28, col. 3.
76. The fourth amendment states:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   U.S. CONST. amend. IV.
79. 384 U.S. 757 (1966). In Schmerber, a policeman smelled liquor on the defendant's breath and noticed other symptoms of intoxication. After placing the defendant under arrest, the policeman directed a doctor to take a blood sample despite the defendant's refusal to consent to the test upon the advice of counsel. Id.
80. Id. at 767.
81. Id. at 767-68.
82. Id. at 767. The Court found that the compulsory administration of blood tests did not
emphasized the fourth amendment language that individuals have a right to be secure in their "persons," and held that such testing clearly constituted a search within the meaning of the fourth amendment. The Court further stated that with regard to "searches involving intrusions beyond the body's surface," a "clear indication that in fact [the incriminating] evidence will be found" is required. The Court realized that the "clear indication" standard brought with it the risk that the evidence sought might ultimately be lost. The reason there is a risk of total loss is that alcohol ingested, the evidence sought in Schmerber, quickly leaves the body and can no longer be detected. Without a "clear indication" that the alcohol will be found, no test may be administered and any evidence available will be lost.

In analyzing the reasonableness of the warrantless blood test, the Schmerber Court considered the following factors:

(1) the level of likelihood that intoxication would be found;
(2) the exigency created by the metabolism of blood alcohol;
(3) the reliability of the test performed;
(4) the response of the person tested to the process of blood extraction; and
(5) the manner of blood extraction.

b. applying Schmerber to urinalysis cases

i. is there a reasonable expectation of privacy?

In Storms v. Coughlin a federal district court applied the Schmerber rationale to determine whether random drug urinalysis of New York State prison inmates was constitutional. The Storms court recognized Schmerber's characterization of blood extraction as generally involving "virtually no risk, trauma, or pain." Storms also noted that Schmerber...
differentiated this type of search from traditional searches of clothing or possessions because blood extraction is more intrusive. The Storms court found that urinalysis is also more intrusive than traditional types of searches. Quoting Schmerber, the Storms court reasoned that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid [searches involving intrusion beyond the body’s surface] on the mere chance that desired evidence might be obtained." Relying on Schmerber, the Storms court found urinalysis analogous to blood testing. In doing so, the Storms court stated, "[a]lthough [urinalysis] involves no forced penetration of body tissues, as does a blood test, it does involve the involuntary extraction of body fluids. In that sense, if not literally, it is an ‘intrusion beyond the body’s surface.’ ” Storms held that urine tests, which in many respects are more private than blood tests, were entitled to at least the level of scrutiny given blood tests—the level being a “clear indication that in fact such evidence [of drugs] will be found.”

The Schmerber standard for determining a reasonable expectation of privacy governs situations involving drug testing of employees. In McDonell v. Hunter, an employee urinalysis case, the court recognized that urine is generally discharged and disposed under circumstances where an individual has a “reasonable and legitimate expectation of pri-

90. Id. (citing Schmerber, 384 U.S. at 769-70).
91. Id. (quoting Schmerber, 384 U.S. at 769-70).
92. Id.
93. Id. (quoting Schmerber, 384 U.S. at 769). Body cavity searches also require a clear indication that evidence will be found. Id. at 1219.
94. Id.
95. See id. (citing Schmerber, 384 U.S. at 770). The Storms court, however, held that the “clear indication” standard cannot apply to prison inmates because of the special security needs of a prison. Id. The court also found that the likelihood of finding drugs through testing of inmates is high enough to find “cause”—albeit of a lower level of cause than is required under a normal standard. Id. at 1220.
96. See Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1985) (for facts of Shoemaker, see infra text accompanying notes 135-36); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (for facts of McDonell, see infra text accompanying notes 154-55); Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985) (for facts of Allen, see infra text accompanying notes 117-22). It has been suggested that urinalysis is not unreasonable when the results are used pursuant to the employer’s policy and not for criminal investigation. See Allen, 601 F. Supp. at 491. This contention is meritless. See Shoemaker, 619 F. Supp. at 1097-98 (citing Camara v. Municipal Court, 387 U.S. 523, 530 (1967)), and McDonell, 612 F. Supp. at 1127 (citing Camara v. Municipal Court, 387 U.S. at 530) for the principle that people are always protected by the fourth amendment, not just when they are under criminal investigation.
97. 612 F. Supp. 1122 (S.D. Iowa 1985) (random drug urinalysis violated prison employees’ fourth amendment right to be free from unreasonable search and seizure). For further discussion, see infra notes 154-69 and accompanying text.
Like Storms, the McDonell court recognized the distinction between blood tests, where an actual intrusion into the body is required, and urinalysis, where the fluid is routinely discharged. The McDonell court similarly found a reasonable expectation of privacy with respect to urinalysis. The McDonell court also discussed a person's privacy interest in terms of the private information his or her body fluids contained. Not only was taking the urine an invasion of privacy, but analyzing the "personal physiological secrets it holds" constituted a similar invasion. Schmerber governs because, as noted earlier, searches involving intrusions beyond the body's surface are an affront to human dignity and privacy. This kind of search is protected by the fourth amendment because it is considered extremely intrusive.

It is generally accepted, after Schmerber, that persons have a reasonable expectation of privacy to be free from bodily intrusions. Because it is understood that individuals have a privacy interest when their urine is being seized, courts generally focus on whether the government's policy of drug testing was reasonable in light of that expectation.

ii. defining the reasonableness standard for urinalysis by government: using the Schmerber factors as a guide

Only unreasonable searches are prohibited by the fourth amendment. Therefore, under the fourth amendment analysis, courts must determine whether government drug testing by urinalysis was reasonable in a given situation. Reasonableness is determined by weighing the individual's expectation of privacy against the government's interest in testing employees for drugs.

Current federal case law does not define a clear test for when employee drug testing is reasonable and therefore constitutional. None of

98. Id. at 1127. See also infra text accompanying notes 139-41.
99. Id.
100. Id.
101. Id.
102. Schmerber, 384 U.S. at 769-70.
103. Id.
104. After Schmerber, it seems everyone has an expectation of privacy to be free from bodily intrusions. The question then becomes: what government interests override their expectations of privacy?
105. Carroll v. United States, 267 U.S. 132, 147 (1925); see supra note 76 for text of fourth amendment.
the employee drug testing cases expressly apply the Schmerber analysis. However, in an attempt to create a coherent approach to determine when employee drug testing is constitutional under the United States Constitution, this Comment categorizes the “reasonableness” elements discussed in the urinalysis cases into the Schmerber categories previously listed.\textsuperscript{107} This Comment will later utilize this approach as a guideline to determine when urinalysis of private employees is reasonable under the California Constitution.\textsuperscript{108}

The earliest federal case involving the urinalysis of employees was \textit{Division 241 Amalgamated Transit Union v. Suscy}.\textsuperscript{109} In \textit{Suscy}, a bus drivers union, on behalf of 5500 bus operators and other Chicago Transit Authority (CTA) employees, brought suit against CTA officials alleging that certain rules regarding employee drug testing were unconstitutional.\textsuperscript{110} The union asked the court to hold the rules invalid under the fourth and fourteenth amendments. In response, the court stated that the CTA only had to prove that its rule was reasonable. If the rule was reasonable, a governmental agency could place various conditions on employment, such as urinalysis to detect drugs.\textsuperscript{111}

The \textit{Suscy} court balanced the workers’ expectation to be free from blood and urine drug testing against the CTA’s interest in protecting the public by ensuring that bus and train operators performed their jobs safely.\textsuperscript{112} The court held that the CTA’s “paramount interest” of protecting the public outweighed the employees’ expectation of privacy.\textsuperscript{113} The court stated that the safety of mass transit riders “certainly” outweighs an individual’s interest in refusing to disclose information regarding intoxication.\textsuperscript{114}

The \textit{Suscy} court buttressed the reasonableness argument by emphasizing the procedural protections given employees. These safeguards included the CTA’s requirements that, before requesting a test, operating employees be either directly involved in a serious accident or suspected of being under the influence of drugs or liquor. Even then, testing could only be performed if two supervisory employees agreed that it was necessary. This requirement satisfied the Schmerber factor which required a

\textsuperscript{107} See above note 87 and accompanying text for a discussion of the Schmerber factors.

\textsuperscript{108} See infra notes 287-314 and accompanying text.

\textsuperscript{109} 538 F.2d 1264 (7th Cir.), \textit{cert. denied}, 429 U.S. 1029 (1976).

\textsuperscript{110} \textit{Id.} at 1265-66.

\textsuperscript{111} \textit{Id.} at 1267.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} The \textit{Suscy} court did not articulate why an employee had an expectation of privacy; the expectation was assumed. See supra text accompanying notes 96 & 102-03.

\textsuperscript{114} \textit{Id.}
high likelihood that a test would in fact discover intoxication. The Suscy court also emphasized that the tests were only performed in hospitals, a factor indicating that the manner of testing was reasonable—\textit{Schmerber} factor number five. The testing of CTA employees was not random—probable cause was necessary before the employee was required to take a test.\textsuperscript{115} Thus, with the exception of the "reliability of the test" factor,\textsuperscript{116} the Suscy court applied the equivalent of the reasonableness factors of \textit{Schmerber} to the urinalysis procedure at issue.

All other cases involving governmental urinalysis of employees were district court cases decided in 1985. The first of these cases was \textit{Allen v. City of Marietta}.\textsuperscript{117} In \textit{Allen}, plaintiffs were employed by the Electrical Division of the Board of Lights and Power and worked around high voltage electric wires.\textsuperscript{118} There were reports of drug usage by employees and there were a large number of Board employee injuries. Management believed that because of the extremely hazardous nature of the work, drug usage on the job threatened the safety of both employees and the public. To determine which employees were using drugs on the job, an undercover agent was planted in the electrical distribution division. The agent kept detailed records of who he saw smoking marijuana and when these instances occurred. Based on this information, management felt that it had accumulated enough evidence to terminate certain employees. These employees were given the opportunity to submit to a urine test or be fired. The employees then submitted to the test, which showed marijuana present in all of the employees' systems.\textsuperscript{119} The employees were all fired; however, it was not clear whether they were fired because of the positive urine tests or the prior information regarding drug use.\textsuperscript{120} At a Pension Board hearing, established for employee grievances, the plaintiffs were confronted by and were allowed to cross-examine witnesses. The Pension Board unanimously found that the Board of Lights and Power had cause for its decision to terminate the plaintiffs.\textsuperscript{121}

The plaintiffs in \textit{Allen} then brought the case to federal court, asserting that the urine tests performed by their employer were unreasonable searches and seizures under the fourth and fourteenth amendments.\textsuperscript{122}

\textsuperscript{115} \textit{Id.}
\textsuperscript{116} See \textit{supra} note 87 and accompanying text for a discussion of the \textit{Schmerber} factors.
\textsuperscript{118} \textit{Id.} at 484.
\textsuperscript{119} \textit{Id.} Marijuana can remain in the body a month after ingestion. See \textit{supra} notes 39-45 and accompanying text for further discussion of this point.
\textsuperscript{120} \textit{Allen}, \textit{601 F. Supp.} at 484-85.
\textsuperscript{121} \textit{Id.} at 486.
\textsuperscript{122} \textit{Id.}
The *Allen* court examined the reasonableness of the search, concluding that under the circumstances presented testing was reasonable. Reasonableness was found in part because the tests were administered strictly in an employment context as part of the government's legitimate inquiry into the use of drugs by employees engaged in hazardous jobs.

The court found that the government has the right, as an employer, to investigate employee misconduct which is *directly relevant* to job performance. The *Allen* court summarized the governmental intrusion into employees' privacy as follows:

Government employees do not surrender their fourth amendment rights merely because they go to work for the government. They have as much of a right to be free from warrantless government searches as any other citizens. At the same time, however, the government has the *same right* as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's *performance* of his duties.

The court in *Allen* held that the city had the right to conduct warrantless searches, in the form of urinalysis, of employees engaged in hazardous work to determine whether the employee used or abused drugs which would affect his or her ability to perform work safely. The *Allen* court relied heavily on the status of the parties, namely the employee-employer relationship, to find the drug test reasonable. This analysis is faulty. The suggestion that a lower standard is acceptable where the government acts as employer rather than as law enforcer has been expressly rejected in other cases. The *Allen* court should have placed less emphasis on the employment nature of the search and more emphasis on the state's valid interest of safety, which was the approach

---

123. The court's attempt to downplay the intrusiveness of the search was based on the fact that the search was in the employment rather than criminal context. *Id.* at 491. This distinction, however, is not valid. People are protected by the fourth amendment in all situations, not just when they are under criminal investigation. *See supra* note 96.


125. The *Allen* court distinguished the government's right as an employer from its right as a law enforcer. *Id.* at 489 (citations omitted). *But see supra* note 96.

126. *Allen*, 601 F. Supp. at 491 (emphasis added). This Comment addresses what "right" private employers in California actually possess. The court in *Allen* did not discuss what this right is. It simply said that the government has the "same right" as private employers. This Comment defines a private employer's right to conduct urinalysis by analogy to cases involving government employment. *See infra* notes 247-316 and accompanying text. This approach is used because there is no state case or statutory law on point. *See supra* note 65 and accompanying text.


128. *Id.*

129. *See supra* notes 96 & 123 and accompanying text.
of the *Suscy* court.\(^{130}\) Instead, the *Allen* court merely alluded to the important state interest by discussing the extreme hazard involved in working around high voltage wires.\(^{131}\) The *Allen* court should have concluded that the government test was reasonable by balancing the employees' reasonable expectation of privacy against the government's legitimate interest in safety. The court fully discussed the employees' expectation of privacy regarding drug tests,\(^{132}\) but did not apply the appropriate balancing test. The *Allen* facts are parallel to *Suscy* in that reasonableness in both cases was buttressed by procedural safeguards\(^{133}\)—the fifth factor of the *Schmerber* reasonableness test.

Despite the faulty analysis, three factors that were considered by the *Allen* court indicate that the tests were in fact reasonable. First, the tests were not random.\(^{134}\) Second, the workers were involved in extremely hazardous activity, a factor which strengthens the government's interest. Third, there were procedural safeguards.

Another district court case, *Shoemaker v. Handel*,\(^{135}\) addressed the constitutionality of random blood and urine drug testing of horse racing jockeys. The plaintiff jockeys alleged that a regulation created by the New Jersey Racing Commission\(^{136}\) violated their fourth amendment rights to be free from unreasonable searches and seizures. The regulation in part allowed the State Steward to require a jockey to submit to a post-race urine test.\(^{137}\) Unlike the testing in *Suscy* and *Allen*, the drug testing in *Shoemaker* was random. That is, no individual suspicion or probable cause was required before a jockey was required to submit to a test.\(^{138}\) The *Shoemaker* court acknowledged the fourth amendment implications, and found that urine tests are "essentially indistinguishable from blood tests which have been held by the Supreme Court to 'plainly constitute searches of "persons," and depend antecedently upon the seizures of "persons," within the meaning of that Amendment.'"\(^{139}\) The court fur-

---

130. *Suscy*, 538 F.2d at 1264. See supra notes 112-14 and accompanying text.
132. Id. at 488-89.
133. See supra text accompanying note 115 for a discussion of the procedural safeguards involved in *Suscy*.
134. Whether the evidence in *Allen* showed that there was a clear indication of intoxication, as required by *Schmerber*, is a question of fact. See supra note 87 and accompanying text.
136. The New Jersey Racing Commission, established by the New Jersey State Legislature, was given broad powers, including: jurisdiction over anyone, including persons, partnerships, associations, or corporations, who conducts horse racing for any "stake, purse or reward" in New Jersey. See id. at 1093 n.3.
137. Id. at 1094.
138. Id. at 1097.
139. Id. at 1098 (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)).
ther found that both forms of testing involve "the forced extraction of bodily fluids—albeit by different means," and that "urine searches implicate the interests in human dignity and privacy found to be at stake in Schmerber." However, the court stated that random tests without probable cause are not a per se violation of the fourth amendment. The Shoemaker court found a jockey's expectation of privacy diminished due to the highly regulated nature of the industry. The gambling industry is noted as being pervasively regulated in order to minimize the "criminal influence to which it is so prone."

The Shoemaker court found that the requirement of individualized suspicion was not absolute but that, in the situations where the balance of interests preclude "some quantum of individualized suspicion," other safeguards are necessary to ensure that intrusion into the tested person's expectation of privacy is not "subject to the discretion of the official in the field." The court thus seemed to apply a modified Schmerber-type test. The Shoemaker court's analysis differs greatly from Schmerber in one major respect—the court in Shoemaker did not require a clear indication that intoxication would be found, as mandated by Schmerber. However, the Shoemaker court did discuss and rely upon factors similar to the other four Schmerber factors. The court only omitted the "likelihood drugs will be found" requirement if the other requirements adequately prevent unfettered discretion and minimize the intrusion into an individual's privacy interest.

The Shoemaker court raised, but then essentially ignored, the issue that urine tests are unable to distinguish present intoxication from intoxication.

140. Id. (citing Storms v. Coughlin, 600 F. Supp 1214, 1218 (S.D.N.Y. 1984)).
141. Id.
142. Id. at 1098-1102. The court noted that "[t]he danger of clandestine and dishonest activity inherent in the business of horseracing has been well recognized." Id. at 1100 (quoting Delguidice v. New Jersey Racing Comm'n, 100 N.J. 79, 90, 494 A.2d 1007, 1012 (1985)).
144. Id. at 1100.
145. Id. at 1101 (citation omitted).
146. See supra note 87 and accompanying text.
147. Shoemaker, 619 F. Supp. at 1101. Among the procedural safeguards presented in Shoemaker were: (1) "neutral" administration of the tests, giving each jockey an equal chance of being chosen, but see Storms v. Coughlin, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984) (discussing problems associated with "random" selection); (2) sufficient guard against "false positives," Shoemaker, 619 F. Supp. at 1104, but see supra notes 46-54 and accompanying text; and (3) jockey's ability to request a hearing to challenge the test results or any penalties. Shoemaker, 619 F. Supp at 1104.
cation during off-racetrack hours. The court incorrectly addressed this problem by stating that the government had sufficiently protected against "false positives." As discussed earlier, the inability to determine present intoxication and the threat of "false positives" are two different inquiries.

As in Suscy and Allen, safety was a major concern of the Shoemaker court. The Shoemaker court said that "the state has a vital interest in ensuring that horse races are safely and honestly run and that the public perceives them as so." The safety interest thus promotes the integrity of horse racing as well as reduces the risk of serious injury to jockeys. It appears that the random drug testing was allowed because the court found that individuals involved with horse racing have a lowered expectation of privacy, not because the government's interest is as great or greater than an individual's normal expectation of privacy.

The third district court case in this area is McDonell v. Hunter. In McDonell, employees of the Iowa Department of Corrections brought suit claiming the Department's policy that prison employees submit to random drug urinalysis, breathalizer and blood tests upon the request of Department officials was unconstitutional. The plaintiffs sought relief on the grounds that such testing violated their fourth amendment rights as

---

148. Shoemaker, 619 F. Supp. at 1104. The tests are not designed to detect present intoxication. See supra notes 39-45 and accompanying text for an explanation of what urinalysis is able to detect.


150. See supra notes 39-46 and accompanying text. One deals with accuracy, the other with what the tests are able to detect.


152. Id.

153. Id. The court stated that "[t]he risk of serious injury is apparent, given the speed and closeness with which large numbers of horses run during a race. Even the slightest decrease in alertness and reflex ability increases the danger of accidents, including multiple horse and jockey accidents causing grave injury and death." Id.

The Shoemaker court distinguished its case from McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), where the court struck down random urine testing of prison employees. See infra notes 154-69 and accompanying text for discussion. The Shoemaker court found that one major difference was that the harm in Shoemaker was "real—not attenuated." 619 F. Supp. at 1102. Another distinction relied on was that "horseracing is one of a special class of relatively unique industries which have been subject to pervasive and continuous regulation by the state." Id. See also supra note 142 and accompanying text. Quoting a New Jersey Supreme Court decision that discussed the similarity between horse racing, casino gambling and liquor, the Shoemaker court stated that "[t]he legislative power to regulate such a "nonessential and inherently dangerous commodity" . . . has been said to be almost without limit." Id. at 1099 (quoting In re Application of Boardwalk Regency Casino Corp. for a Casino License, 180 N.J. Super. 324, 341, 434 A.2d 1111, 1120 (App. Div. 1981)).

well as their right to privacy.155

The court in McDonell, unlike Allen,156 held that there was no difference between a governmental search for employment purposes and a search for criminal purposes.157 The McDonell court stated that “[a]ll of us are protected by the Fourth Amendment all of the time, not just when police suspect us of criminal conduct.”158 The McDonell court held that although urine is “routinely discharged from the body” and requires no actual intrusion as does blood extraction, the circumstances under which urine is discharged are circumstances where a person “certainly has a reasonable and legitimate expectation of privacy.”159

In discussing the Correction Department’s interest in conducting drug tests, the McDonell court recognized every employer’s general desire to eliminate drugs from the workplace160 and discussed the specific interest of a prison.161 The Correction Department’s purpose for requiring urinalysis of employees was to identify drug smugglers and users because “it is undesirable” to have drug users working in a correctional institution, even if the users do not smuggle drugs to inmates.162

The McDonell court balanced the prison employees’ reasonable and legitimate expectation of privacy against the government’s interest, and held that the purpose of identifying drug users and smugglers is not a sufficient reason for a general policy requiring random blood and urine samples from prison employees. The court concluded that the Department’s random testing policy violated the correction employees’ fourth amendment rights.163 If there had been a reasonable suspicion based on

155. Id. at 1125.
156. Allen, 601 F. Supp. at 489-90; see supra notes 125-26 and accompanying text.
158. McDonell, 612 F. Supp. at 1127; see supra note 96 and accompanying text.
159. McDonell, 612 F. Supp. at 1127. The court emphasized that drug testing by urinalysis is in fact a substantial intrusion into an individual’s privacy:

There is no question that one’s person . . . [is a place] where one has a reasonable or legitimate expectation of privacy . . . . Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds . . . . One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

Id. (footnote omitted).
160. Id. at 1130.
161. Id. at 1128. The court found that “[a]lthough the preservation of security and order within the prison in [sic] unquestionably a weighty state interest, prison officials are not unlimited in ferreting out contraband.” Id.
162. Id. at 1130.
163. Id.
objective facts that an employee was under the influence of drugs while at work, it is likely that the McDonell court would have held the testing constitutional.\footnote{164} The court said that demanding a urine, breath or blood specimen to test for drugs from an employee who enters the prison is acceptable if there is a “reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts . . . that the employee is then under the influence of alcoholic beverages or controlled substances.”\footnote{165} This would fall under factor one of the Schmerber test.\footnote{166} The court also indicated the importance of procedural safeguards and standards necessary to make a urinalysis policy reasonable.\footnote{167} Clear standards and procedures are necessary to avoid tests at an employer’s “unfettered discretion.”\footnote{168}

In the context of discussing other means for protecting against employee drug smuggling, the McDonell court noted that the state could and should carefully screen and investigate the background of employment applicants. It also suggested that if on a particular day an employee is the object of mere suspicion, the employee could be told to leave for that day, and therefore not have any contact with inmates.\footnote{169}

The following discussion summarizes the Schmerber test discussed above and how the cited urinalysis cases applied the various Schmerber factors.\footnote{170} The first requirement, which looks to “the likelihood that intoxication would be found,” required a “clear indication that in fact . . . evidence will be found.”\footnote{171} This is dealt with either implicitly or explicitly in all of the urinalysis cases discussed in this Comment. The McDonell court found that this requirement was not met because the testing was random. Therefore, testing was an unreasonable search and seizure.\footnote{172} In Shoemaker, the random testing policy admittedly failed to meet the standard, but the court distinguished the unique nature of the horse racing industry from the usual facts which require as a prerequisite “some quantum of individualized suspicion.”\footnote{173} The facts of Allen and Suscy indicate that there was at least some degree of suspicion that intox-
ication would be found—the tests were certainly not random. Storms v. Coughlin, which dealt with drug testing of inmates rather than employees, found that the standard was necessarily lower for inmates because of the special security needs of a prison, as well as the increased likelihood that an inmate would be intoxicated.

The second Schmerber reasonableness factor was the “exigency created by the metabolism of alcohol,” because of the blood alcohol’s rapid decline following ingestion. This factor was not directly discussed in the cited urinalysis cases, perhaps because drugs, especially marijuana, do not leave the body very quickly and may be detected by a urine test for up to thirty-six days. This fact indicates that a warrantless urine test is not reasonable.

The third factor, “reliability of the test,” was discussed at length only in Storms. There, the court noted many of the problems regarding the Emit Test, including that it does not indicate intoxication at the time of testing, and the threat of “false positives.” Shoemaker also recognized that urine tests are not designed to indicate intoxication at the time of testing, but rather only recent use. As discussed earlier, the Shoemaker court did not make a very convincing showing that this prob-

543, 560-61 (1976)). See supra note 153 and accompanying text for discussion of how the Shoemaker court distinguished the Shoemaker facts from McDonell.

174. In Suscy, an employee either had to be involved in a serious accident or be under suspicion of actual intoxication before a test was administered. Additionally, two supervisors had to agree the testing was necessary. Suscy, 538 F.2d at 1267. Similarly, in Allen, the tested employees were actually observed smoking marijuana. 601 F. Supp. 482, 484 (N.D. Ga. 1985).

175. Storms, 600 F. Supp. at 1218.

176. Id. at 1220. The Storms court took judicial notice of the fact that drug use among prisoners in America is a serious, disruptive problem. Therefore, it found that the likelihood that any inmate picked at random was under the influence of intoxicating drugs was very high. Id. at 1220. See supra note 95. However, the court emphasized that strong procedural safeguards were required for various reasons. One reason was to ensure accurate tests. See 600 F. Supp. at 1221-22, discussing the serious weakness of Emit Test. The Storms court required that any positive test be confirmed by an alternate method. Id. at 1221. Another reason was to avoid use of tests to harass inmates. The court recognized this potential for abuse, and required that random selection of inmates for urinalysis be conducted by a method not prone to the conscious or subconscious selection by prison employees. The court enjoined the prison from drawing inmates’ name cards because it unnecessarily exposed inmates to the risk of harassment. Id. at 1223.

177. See supra note 87 and accompanying text.

178. See supra notes 39-45 and accompanying text.

179. 600 F. Supp. at 1221-22.

180. Id. at 1222. See also supra notes 39-45 and accompanying text for a detailed discussion of the Emit Test’s shortcomings in this area.

181. 600 F. Supp at 1221-22. See also supra notes 46-54 and accompanying text.

182. See supra note 148 and accompanying text.
lem was remedied. 183

The fourth Schmerber factor was the "defendant's response to the process of blood extraction." 184 This was not at issue in the cases cited in this Comment—possibly because urinalysis is not considered to produce any particular anxiety other than the recognized invasion into the individual's privacy. A different finding might result where the person tested is forced to urinate in front of another to ensure reliability. 185

The fifth element is of major importance in deciding whether a urine test was reasonable. This element was "the manner in which the test was done." 186 Shoemaker suggested this was extremely important because individualized suspicion was not required in that case. 187 Suscy and Allen both discussed procedures that weighed in favor of the reasonableness of testing. 188 In Suscy, the court stated that "the conditions under which the intrusion is made and the manner of taking the samples are reasonable." 189 Procedural protections included the requirements that tests be given only to operating employees directly involved in a serious accident or suspected of being intoxicated and that they be given only if two supervisory employees agreed that the test was needed. The court also noted that since the tests were performed in a hospital, this constituted a reasonable procedure. 190 In Allen, procedural safeguards included the right to appeal the finding as well as the right to cross-examine witnesses. 191

One factor which was not relevant to Schmerber, and therefore not among the Schmerber reasonableness factors, was balancing the threat to worker and public safety posed by a drug debilitated employee. This safety factor is relevant to the reasonableness of a search and seizure of an employee's body fluid, because it increases the strength of the employer's interest in conducting the test. Suscy, Allen and Shoemaker all based the reasonableness and importance of conducting the urine test on the extreme hazards that could result from the worker's impairment. 192

The federal employee urinalysis cases to date have not expressly relied on the Schmerber factors, nor have any cases applied all the factors.

183. See supra notes 149-50 and accompanying text.
184. See supra note 87 and accompanying text.
185. See infra note 317 and accompanying text.
186. See supra text accompanying note 87.
187. 619 F. Supp. at 1101; see supra notes 138-47 and accompanying text.
188. See supra text accompanying notes 115 & 121.
189. Suscy, 538 F.2d at 1267.
190. Id.
192. See supra note 106 and accompanying text.
However, as indicated earlier, these cases have applied the factors in varying degrees. The proposal section of this Comment will use these factors, as outlined above, to help create a test to determine when urinalysis of private employees is constitutional under the right to privacy provided in the California Constitution. All employees, whether public or private, deserve and expect privacy in their lives. This must be strenuously protected, particularly when something as vital as one's job is at stake. Thus, the federal analysis provides a useful analogy for the California test of constitutionality.

IV. CALIFORNIA'S CONSTITUTIONAL RIGHT TO PRIVACY

The California Constitution explicitly guarantees the right to privacy.\(^{193}\) The first judicial interpretation of this right to privacy occurred in *White v. Davis*.\(^{194}\) In *White*, the California Supreme Court discussed the police practice of enrolling officers as students in a major university for the purpose of compiling police dossiers on students and professors. The court held that this practice created, among other things,\(^{195}\) a prima facie violation of the plaintiff's explicit right to privacy under the right to privacy amendment to the constitution.\(^{196}\)

The *White* court explained that there was a need for the *explicit* constitutional right to privacy even though courts had consistently given a broad reading to the *implicit* right to privacy.\(^{197}\) The court reasoned that the increased threat to privacy posed by surveillance and data collection in contemporary society necessitated such a provision.\(^{198}\) Cases decided after *White* dealing with the state constitutional right to privacy said the new constitutional right did more than restate an already existing right; instead, it was intended to expand the right already set forth in prior court decisions.\(^{199}\)

---

193. Article I, section 1 of the California Constitution provides: "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 (emphasis added).


195. The *White* court found that the police practice violated freedom of speech and assembly as well as the state constitutional right to privacy. 13 Cal. 3d at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.

196. Id.

197. Id. at 773-74, 533 P.2d at 233, 120 Cal. Rptr. at 105.

198. Id. at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.

199. See Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 841-42 (1976). The *Porten* court stated that "[t]he elevation of the right to be free from invasion of privacy to constitutional stature was apparently intended to be an expansion of the privacy right." Id. The court also quoted the voter pamphlet language that "'[t]his simple
The White court and the courts that followed had little legislative guidance to aid their interpretation of the new constitutional provision. Therefore, the courts relied heavily on the ballot argument included in the election brochure which favored the adoption of Proposition Eleven, which was to add the right to privacy to the California Constitution. This ballot argument was essentially the only legislative history available.

The language of the ballot argument has been adopted in California right to privacy cases. White quoted the ballot argument's statement that "[a]lter present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian." White also emphasized the ballot argument's conclusion that "[t]he right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is a compelling public need. . . ." The ballot argument further explained that "[t]he right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose."
This respect for privacy has been strengthened and better defined in the years since White. California courts continue to stress that the right to privacy is a fundamental right guaranteed to all by article I, section 1.\textsuperscript{205} They acknowledge that the California Constitution requires weighing a compelling state interest against the individual privacy interest to determine if the privacy right may be invaded.\textsuperscript{206} Even when a compelling state interest is found to outweigh a privacy interest, the courts have found that the California Constitution requires that the intrusion be necessary and narrowly tailored to achieve the goal.\textsuperscript{207}

The scope of the constitutional right to privacy has certainly not been exhausted. The California Supreme Court in \textit{City of Santa Barbara v. Adamson}\textsuperscript{208} stated that "the general concept of privacy relates . . . to

\begin{itemize}
\item \textsuperscript{205} \textit{See, e.g., City of Santa Barbara v. Adamson}, 27 Cal. 3d 123, 130, 610 P.2d 436, 439, 164 Cal. Rptr. 539, 542 (1980) (reaffirming \textit{White}, which stated that the "right of privacy is the right to be left alone. It is a \textit{fundamental and compelling interest}." (quoting \textit{White}, 13 Cal. 3d at 774-75, 533 P.2d at 233-34, 120 Cal. Rptr. at 105-06) (emphasis added in \textit{Santa Barbara})); \textit{Rulon-Miller v. IBM}, 162 Cal. App. 3d 241, 255, 208 Cal. Rptr. 524, 534 (1984) (citing \textit{City of San Francisco v. Superior Court}, 125 Cal. App. 3d 879, 882, 178 Cal. Rptr. 435, 437 (1981)) (right to privacy is "unquestionably a 'fundamental interest of our society'"). See \textit{supra} notes 273-74 and accompanying text for discussion of \textit{Rulon-Miller}.
\item \textsuperscript{206} \textit{See, e.g., City of Santa Barbara v. Adamson}, 27 Cal. 3d 123, 130, 610 P.2d 436, 439, 164 Cal. Rptr. 539, 542 (1980); \textit{San Francisco v. Superior Court}, 125 Cal. App. 3d 879, 882-83, 178 Cal. Rptr. 435, 437 ("[W]hen the [compelling interest] conflicts with the constitutional right of privacy, there should be a 'careful balancing' of the 'compelling public need' . . . against the 'fundamental right of privacy.' "); \textit{Jones v. Superior Court}, 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981). \textit{Jones} involved the right to privacy regarding information of obstetrical-gynecological history sought by defendants in a case involving a mother's ingestion of diethylstilbestrol (DES) during pregnancy. The court in \textit{Jones} held that when there is an intrusion upon a constitutionally protected area of privacy, a court must balance the individual's rights against a compelling state interest. \textit{Id.} at 550, 174 Cal. Rptr. at 157-58 (citations omitted).
\item \textsuperscript{207} \textit{See, e.g., City of Santa Barbara v. Adamson}, 27 Cal. 3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980); \textit{Wood v. Superior Court}, 166 Cal. App. 3d 1138, 212 Cal. Rptr. 811 (1985). In \textit{Wood}, the court held that the means to achieve the compelling interest must be unavoidable. If alternative means will achieve the desired result while minimizing the intrusion into privacy, those means must be adopted. The \textit{Wood} court held that mere convenience of means or cost will not satisfy this requirement, because this would make expediency and not a compelling interest the overriding value. In \textit{Reynaud v. Superior Court}, the court stated:
\begin{quote}
While the right of privacy is not absolute, it is well established that the propriety of any governmental intrusion upon the right will depend upon the showing that the intrusion was justified by a state need which was compelling not only in the abstract but also when weighed against the privacy rights of the individual and that the \textit{scope of the intrusion was no greater than could be justified by the states' need in all circumstances}.
\end{quote}
\textsuperscript{138} Cal. App. 3d 1, 7-8, 187 Cal. Rptr. 660, 664 (1982).
\item \textsuperscript{208} \textit{27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).}
\end{itemize}
an enormously broad and diverse field of personal action and belief.\textsuperscript{209} and that there is a "wide variety of contexts in which the constitutional [right to] privacy analysis has been employed."\textsuperscript{210} This is because the nature of "privacy" requires a case by case analysis of whether a person has a reasonable expectation of privacy and whether a compelling interest outweighs that right. The basic test in California to determine a privacy violation is whether a person's "personal and objectively" reasonable expectation of privacy has been infringed upon.\textsuperscript{211} Among the protected areas recognized thus far are: the right to be free from surveillance and data collection;\textsuperscript{212} the right to live with whomever one pleases;\textsuperscript{213} the right to be free from the gathering of private records;\textsuperscript{214} the right of an employee to be free from discipline for off-work activity not affecting his or her job;\textsuperscript{215} and the right to be left alone with respect

\begin{itemize}
  \item \textsuperscript{209} \textit{Id.} at 129, 610 P.2d at 439, 164 Cal. Rptr. at 542 (quoting \textit{White}, 13 Cal. 3d at 773-74, 533 P.2d at 233, 120 Cal. Rptr. at 105).
  \item \textsuperscript{210} \textit{Id.} (quoting \textit{White}, 13 Cal. 3d at 773-74 n.10, 533 P.2d at 233 n.10, 120 Cal. Rptr. at 105 n.10).
  \item \textsuperscript{211} \textit{See People ex rel. Franchise Tax Bd. v. Superior Court,} 164 Cal. App. 3d 526, 540-41, 210 Cal. Rptr. 695, 703-04 (1985); \textit{Armenta v. Superior Court,} 61 Cal. App. 3d 584, 588, 132 Cal. Rptr. 586, 588 (1976) ("The basic test of whether there has been a violation [of California's constitutional right to privacy] is if a person's personal and objectively reasonable expectation of privacy has been infringed by unreasonable governmental intrusion.").
  \item \textsuperscript{212} Privacy and surveillance were the primary targets at which the constitutional amendment was aimed. \textit{See White,} 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105. "Although the full contours of the new constitutional provision have as yet not even tentatively been sketched, we have concluded that the surveillance and data gathering activities challenged in this case do fall within the aegis of" article I, § 1 of the California Constitution. \textit{Id.} \textit{See supra} text accompanying note 195 for a discussion of \textit{White}.
  \item \textsuperscript{213} \textit{See Santa Barbara v. Adamson,} 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980). In \textit{Santa Barbara,} the City of Santa Barbara passed a zoning ordinance that limited the number of unrelated people who could live together in a house. The court relied on the voter pamphlet's statement that the right to privacy extends to one's home. \textit{Id.} at 130, 610 P.2d at 439, 164 Cal. Rptr. at 542. \textit{See supra} text accompanying notes 200-04 for a discussion of the ballot argument. The \textit{Santa Barbara} court quoted the dissent in a United States Supreme Court case which held that an ordinance similar to the one in \textit{Santa Barbara} did not violate the United States Constitution: "[t]he choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others—introduces deeply personal considerations . . . . That decision surely falls within the ambit of the right to privacy protected by the Constitution." 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3 (quoting \textit{Village of Belle Terre v. Boraas,} 416 U.S. 1, 16 (1974) (Marshall, J., dissenting)).
  \item \textsuperscript{214} \textit{See Burrows v. Superior Court,} 13 Cal. 3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974) (police could not obtain plaintiff's bank statement without warrant because bank customers have reasonable expectation that statements will be used only for internal banking matters); \textit{People v. McKunes,} 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975) (using same approach to prohibit police from obtaining records of defendant's telephone calls from phone company).
\end{itemize}
to what people generally consider private—including going to the restroom, which was the subject of People v. Triggs.216 In Triggs, the California Supreme Court recognized that “private parts and bodily functions” are considered intensely private by everyone.217

One commentator, in an article defining and explaining California’s constitutional right to privacy,218 discussed the “right to bodily integrity.”219 He stated that “any search of the body that is aimed at disclosing . . . aspect[s] of private life, or that involves the ‘private parts,’” invades privacy because “the intensity of their connection with our private lives makes any imposed disclosure of them a potential invasion of private life itself.”220 The author cited People v. Scott221 as an example of this principle.222 In Scott, a compelled examination involving the massage of the prostate gland to disclose venereal disease was found to be a clear invasion of privacy.223 The court held that such a procedure required especially strong justification because it involved “the most intimate of bodily functions, traditionally and universally regarded as private.”224

In another case dealing with the privacy right to bodily integrity, Jones v. Superior Court,225 the court stated that “[t]he individual’s right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones.”226 The court further stated that “a person’s gastro-intestinal tract is as much entitled to privacy . . . as is that person’s bank account, the contents of his library or his membership in the NAACP.”227 The court concluded that “the specie of privacy here sought to be invaded

216. 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973), disapproved on other grounds, People v. Lilienthal, 22 Cal. 3d 891, 587 P.2d 706, 150 Cal. Rptr. 910 (1978). In Triggs, the court held that the police practice of clandestine observation of doorless public restroom stalls was a “search” and violated the defendant’s reasonable expectation of privacy. Id. at 891, 506 P.2d at 236, 106 Cal. Rptr. at 412. The court stated that “[t]he expectation of privacy a person has when he enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacked a door.” Id.

217. Id. at 893, 506 P.2d at 238, 106 Cal. Rptr. at 414.


219. See id. at 416-17.

220. Id. at 417.

221. 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978).

222. Gerstein, supra note 218, at 417 & n.196 (citing Scott, 21 Cal. 3d at 294, 578 P.2d at 128, 145 Cal. Rptr. at 881).

223. Scott, 21 Cal. 3d at 294, 578 P.2d at 128, 145 Cal. Rptr. at 881.

224. Id.


226. Id. at 549, 174 Cal. Rptr. at 157.

227. Id.
falls squarely within the protected ambit, the expressed objectives of article I, section 1.\textsuperscript{228}

These cases indicate the value California courts place on the right to privacy where bodily integrity is at issue. Courts have not yet expressly dealt with urinalysis under California's constitution. However, it is not difficult to assume that urinalysis is an intrusion that requires an especially strong justification because it involves intimate bodily functions, traditionally and universally regarded as private.\textsuperscript{229}

Some state constitutions differ from the federal constitution in that they offer protection from intrusions by private parties, as well as the government.\textsuperscript{230} The California Constitution differs in this respect.\textsuperscript{231}

Although \textit{White} dealt with an individual's right to privacy against government invasion, it clearly referred to protection against business, as well.\textsuperscript{232} A year after \textit{White}, California took the next step in \textit{Porten v. University of San Francisco},\textsuperscript{233} where the court of appeal decided a suit against a private business on the basis of a violation of the right to privacy under the California Constitution.\textsuperscript{234} \textit{Porten} involved a university that promised to keep plaintiff's grades confidential but allegedly disclosed the grades to the State Scholarship and Loan Association.\textsuperscript{235} The \textit{Porten} court explained that California's constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians.\textsuperscript{236} \textit{Porten} is a landmark decision because it applied the rationale from the right to privacy ballot argument, that "[p]rivacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone."\textsuperscript{237} The \textit{Porten} court also noted that the ballot argument referred to "'effective restraints on the information activities of government and business.'"\textsuperscript{238}

Since \textit{Porten}, California courts have consistently held that a person has a cause of action against anyone—not just the government—who in-

\textsuperscript{228} Id. (emphasis added).
\textsuperscript{229} See infra text accompanying note 297.
\textsuperscript{231} See infra notes 131-42 and accompanying text.
\textsuperscript{232} See \textit{White}, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.
\textsuperscript{233} 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 827, 134 Cal. Rptr. at 840.
\textsuperscript{236} Id. at 829, 134 Cal. Rptr. at 842 (citing \textit{White}, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106).
\textsuperscript{237} Id. (citing \textit{CALIFORNIA VOTER PAMPHLET, supra} note 201, at 27) (emphasis added).
\textsuperscript{238} Id. at 829 n.2, 134 Cal. Rptr. at 842 n.2 (quoting \textit{CALIFORNIA VOTER PAMPHLET, supra} note 201, at 26 (emphasis in original)).
vades his or her privacy. In Chico Feminist Women's Health Center v. Butte Glenn Medical Society, the court stated that California's right to privacy provides a sweeping protection against interference with all personal privacy rights and emphasized that such privacy rights included protection against actions by private parties.

In a recent case, Rulon-Miller v. IBM, a California court found that a private business, IBM, violated an employee's reasonable expectation of privacy when it terminated her for activity unrelated to her job. The court in Rulon-Miller found the violation so atrocious that the jury award of $100,000 in compensatory damages and $200,000 in punitive damages was upheld.

V. PROPOSAL: DEFINING THE LIMITS THE CALIFORNIA CONSTITUTION PUTS ON PRIVATE EMPLOYERS REQUIRING EMPLOYEE URINALYSIS

A. Balancing the Interests

Similar to the fourth amendment of the United States Constitution, California's constitutional right to privacy requires a balancing test to determine when an individual's privacy interest is outweighed by a compelling state interest. While the federal courts have addressed this issue under the United States Constitution, the California constitutional privacy implications of employee drug testing have not yet been addressed. This Comment uses the fourth amendment case law, as defined earlier, to help define when a private employer in California may constitutionally demand a urine test from an employee.

241. Id. at 1203.
244. Rulon-Miller, 162 Cal. App. 3d at 255, 208 Cal. Rptr. at 534.
246. See supra note 65 and accompanying text.
247. See generally supra notes 79-192.
1. The employee's interest

Urine testing must initially be deemed a "privacy issue" and included among the areas California already recognizes as warranting a right to privacy analysis. As federal case law and common sense indicate, compelled urinalysis constitutes a substantial intrusion into a person's right to privacy. There is usually nothing more private to a person than his or her own body and the physiological information it holds. This expectation of privacy applies with equal force to all individuals, including private employees. California law recognizes that procedures involving "intimate . . . bodily functions, traditionally and universally regarded as private," require especially strong justification. Thus, by analogy, it is not difficult to conclude that urinalysis is an area where private employees have a substantial personal privacy interest—an interest that deserves constitutional protection under the California Constitution.

2. The employer's interest

Once the privacy interest is acknowledged, the next issue is determining when a private employer may override an employee's privacy interest by requiring a drug test. The California Constitution protects a person's right to privacy from intrusions by government and business unless a compelling public interest demands otherwise. In addition, the means to achieve the compelling interest must be necessary and narrowly tailored. California courts thus far have given a broad, practical reading to this right. California statutory law currently prohibits a private employer from requiring another "test," the polygraph, similarly intrudes substantially on an employee's private life.

248. See generally supra notes 79-191 and accompanying text.
249. People v. Scott, 21 Cal. 3d 284, 284, 578 P.2d 123, 128, 145 Cal. Rptr. 876, 881 (1978). See also supra notes 216-17 and accompanying text for further discussion of Scott and other California cases recognizing bodily invasions as especially intrusive.
250. See supra text accompanying note 204.
251. See supra note 207 and accompanying text.
252. See supra notes 210-28 and accompanying text.
253. Private employers in California are prohibited by statute from using polygraph tests. CAL. LAB. CODE § 432.2 (West 1971 & West Supp. 1986). Polygraph tests are similar to drug tests by urinalysis in two respects. First, the purpose of both tests is to find out information about the employee or prospective employee which might indicate undesirable traits, such as drug use. Second, both tests are unreliable.

Critics of the use of the polygraph for truth verification in employment have recognized the intrusiveness into workers' lives, and that these tests can be dehumanizing. Gardner, Wiretapping the Mind: A Call to Regulate Truth Verification in Employment, 21 SAN DIEGO L. REV. 295, 305-06 (1983-84) (citing Hermann, Privacy, the Prospective Employee, and Employ-
Employers certainly have an interest in job productivity and safety. However, for drug testing to be constitutionally permissible, the employer's interest must be compelling. When the privacy interest involves the employee's body or bodily functions, as with urinalysis, the compelling interest requirement is heightened. In such a case, the California Constitution requires that the employer have an "especially strong" justification for invading the employee's privacy. This is similar to the heightened standard that the federal constitution gives to intrusions beyond the body's surface, as enunciated in Schmerber v. California. The Schmerber Court compared searches beyond the body's surface to traditional searches, such as searches of clothing or possessions, and found the former type of search more intrusive. Federal courts have explicitly held that urine testing is an intrusion beyond the body's surface.

a. what is a legitimate employer interest?

This Comment proposes that one way to determine whether urinalysis effectuates a compelling interest is to first define the scope of an employer's legitimate interest. It is widely recognized that an employer's legitimate interest extends only to employee conduct that affects his or her job. Any intrusion into an employee's personal life is in itself a violation of the employee's constitutional right to privacy when his or her job is not affected.

For example, the arbitrator in Texas Utilities Generating Co. narrowly interpreted the rule prohibiting drug use on company property to find for the employee. The arbitrator found that although the
employee was driving on company premises when drugs were found, he was not driving in the capacity of an employee—the employee was not on his way to work, was not on working hours, and his presence on the property was unrelated to his employment. Because the employee was not acting “in the capacity of an employee,” the arbitrator held that the company representatives had no right to require him to submit to drug testing. The arbitrator added that under these circumstances, the employer had no more right to make the employee submit to drug testing than if he was found smoking marijuana away from the company on his own time. This case indicates that an employer’s legitimate concern regarding employee drug use does not extend to use away from work.

Some arbitrators hold that the illegality of drug use is not a legitimate concern of business. The concern should be the effect on work. For example, both drugs and alcohol have a similarly debilitating effect on employees and both cause the same basic safety concerns. Thus, although alcohol and drug use are technically different, the company’s interest in controlling them is the same. This approach was adopted in the arbitration case of Mallinckrodt, Inc., where employees were terminated because they were found smoking “a single joint” during a break. The arbitrator held that the termination was improper for two reasons. First, the arbitrator found that this drug use did not threaten harm to employees, to others or to property. Second, the arbitrator found too much disparity between the company’s treatment of alcohol and drug users. The arbitrator emphasized the similar effect on work performance rather than the legality of the substance used.

264. Id.
265. Id.
266. Id.
267. These arbitrators ruled that employers are not justified in treating drug users more harshly than they do alcohol users. See Susser, Legal Issues Raised by Drugs in the Workplace, 36 Lab. L.J. 42, 43-45 (1985).
269. 80 Lab. Arb. (BNA) 1261 (May 15, 1983) (Seidman, Arb.).
270. Id. at 1266.
271. The arbitrator stated that “alcoholism is still the Nation’s #1 drug problem . . . . If the case is to be viewed as concerned primarily as the Company’s need to protect itself against impairment of performance at the workplace, it seems no question that alcohol is at least on par with marijuana . . . .” Id. (discussing Umpire Decision N-69 (Valtin, Ump.) (matter between UAW and General Motors Corp.) (citation omitted by arbitrator)). In Mallinckrodt, employees received short disciplinary layoffs for violating the no drinking policy but were terminated for violating the no marijuana policy. Id. at 1264-65.
272. Id. at 1266 (discussing Umpire Decision N-69 (Valtin, Ump.) (matter between UAW and General Motors Corp.) (citation omitted by arbitrator)).
Certain company policies also recognize that an employer has no concern with an employee's private life. The case of Rulon-Miller v. IBM provides an excellent example. IBM had a written policy which protected a worker's right to privacy for all off-duty activity not affecting his or her job. In Rulon-Miller, a California court held that IBM's liability for invading its employee's right to privacy stemmed in part from its own policy which expressly withdrew any company interest in employee off-duty conduct which did not affect work. Once IBM recognized its employees' right to privacy in their personal lives, it could not then terminate employment based on those same private matters. This case is particularly relevant because it applied the California constitutional right to privacy to rebuke an employer's interference with an employee's private life.

Federal courts, when discussing urine testing, also refer to an employer's interest in the actual effect on job performance. For example, in Allen v. City of Marietta, which upheld employee drug testing, the court explicitly stated that an employer's legitimate concern is only with drug use "directly relevant to the employee's [job] performance." In McDonell v. Hunter, where the court struck down a policy of randomly testing prison employees, the court stated that urine testing would be acceptable if there were a "reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts . . . that the employee is then under the influence of alcoholic beverages or controlled substances." In Shoemaker v. Handel, the court also recognized the problem that urinalysis is unable to indicate actual intoxication

---

274. Rulon-Miller based her claim on an IBM policy which provided in part:

We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal.

... IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy. This idea should never be compromised easily or quickly.

Id. at 249, 208 Cal. Rptr. at 530 (quoting internal IBM memorandum written by Tom Watson, Jr., former Chairman of IBM) (emphasis added).

275. See supra note 274 for pertinent text of IBM policy.
277. Id. at 489 (emphasis added).
278. 612 F. Supp. 1122 (S.D. Iowa 1985); see supra notes 154-69 and accompanying text for a discussion of McDonell.
279. Id. at 1130 (emphasis added).
while at work.\textsuperscript{280}

A recent source supporting the proposition that an employer's legitimate concern is only with conduct that directly affects the employee while on the job is the municipal ordinance enacted in San Francisco in November 1985. This ordinance not only prohibits random drug testing of employees, but also protects employee privacy regarding "off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities."\textsuperscript{281}

This Comment adopts this view. It suggests that employees' activity conducted on their own time is their personal concern. Under California constitutional standards such off-work activity is not a compelling concern of employers.

The question then becomes does urinalysis for drugs inform an employer that an employee was intoxicated while on the job? In other words, is urinalysis an effective tool for carrying out a legitimate employer interest, not to mention a compelling interest? As stated earlier, due to their inherent limitations, the urine tests cannot be designed to determine intoxication at the time of testing.\textsuperscript{282} What they are designed to detect is recent use.\textsuperscript{283} This means that even an accurate test that correctly shows drug use may only be telling an employer that the employee smoked marijuana within the last month—perhaps while on vacation or over the weekend. In any event, the intoxication, which lasts a matter of hours,\textsuperscript{284} may no longer exist.

Since the tests do not confirm that an employee is under the influence while at work, they do not further employers' legitimate interest in their employees' performance while at work. If the results of an employee's test are not within the scope of an employer's legitimate interest, it follows that there can be no compelling interest in obtaining that information.\textsuperscript{285}

\textsuperscript{280} 619 F. Supp. 1089, 1104 (D.N.J. 1985); see supra notes 148-50 and accompanying text.
\textsuperscript{281} SAN FRANCISCO, CAL., POLICE CODE ch. 8, art. 33A (1985); see supra note 68 and accompanying text for text of the ordinance.
\textsuperscript{282} See supra notes 39-45 and accompanying text.
\textsuperscript{283} See supra notes 39-45 and accompanying text.
\textsuperscript{284} See supra note 39 and accompanying text.
\textsuperscript{285} See supra note 39 and accompanying text.
\textsuperscript{286} Another serious problem with relying on urine tests to detect drug use is inaccuracy. Incorrect positive readings—false positives—are considered extremely common. See supra note 7. For example, ordinary substances, such as aspirin and herbal tea, sometimes create false positives. See text accompanying notes 52 & 54. See generally supra notes 46-54 and accompanying text. This is a frightening possibility when something as vital as one's job is on the line.
b. what is a compelling employer interest?

Like California’s constitutional right to privacy, the fourth amendment protects an individual's privacy interest against all but compelling interests. All federal courts that upheld employee urinalysis emphasized that the jobs performed were highly dangerous, such as public bus driving, working with high voltage wires and horse racing. This Comment proposes that one of the only interests, if not the only interest, compelling enough to override an employees’ right to privacy is that of avoiding a substantial threat to the safety of employees or of the public.

B. Other Reasonableness Factors

The propriety of a urine test is not based solely on the compelling interest of worker and public safety. Other protections are required to ensure an individual’s right to privacy is not unnecessarily or unreasonably violated. Schmerber v. California and its progeny recognized that under the United States Constitution certain reasonableness factors must be weighed to determine the constitutionality of a compelled body fluid test. Three of the Schmerber factors are particularly relevant to whether a compelled urine test is reasonable: (1) the likelihood drugs will be found; (2) the reliability of the test; and (3) the manner of testing.

The likelihood that drugs will be found is of utmost importance.
The Schmerber Court found that "searches involving intrusions beyond the body's surface" require a "clear indication that in fact [drugs] will be found."296 The employer must actually believe that the employee is intoxicated before conducting a urine test. Under this standard, employers should never require random testing.

Even where the activity is dangerous, a person should not be required to take a drug test unless there are reasonable, objective facts indicating that that worker is intoxicated while on the job.297 Any legitimate interest the employer has in detecting drugs affecting a person's work is not promoted by implementing drug tests which are at best only able to detect recent use. A proper application of this first Schmerber factor would require evaluating the existence of reasonable objective, corroborating facts that indicate employee drug use while at work. Both the Allen v. City of Marietta298 court and the Division 241 Amalgamated Transit Union v. Suscy299 court discussed the objective facts leading to the urine tests at issue. The McDonell v. Hunter300 court also mentioned that a finding of "reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts . . . that the employee is then under the influence of . . . controlled substances" might be acceptable.301

As recognized in McDonell, a general desire for a drug-free environment—even in a prison—is not compelling enough to allow random drug testing of employees.302 If it were enough, employers might next be allowed to inspect the home of an apparently law abiding employee "just in case" drugs might be found which could be brought into the workplace, or they might be allowed to "bug" the employee's home or telephone to make sure that the individual is not involved in illegal activity that could affect the employee's work or safety.

296. 384 U.S. at 769-70 (emphasis added); see supra text accompanying note 85.
297. An employer's legitimate interest is limited to activity that actually affects an employee's work. See supra notes 259-81 and accompanying text. Requiring a "great likelihood drugs will be found" provides some protection against the problem outlined above, see supra notes 39-45 and accompanying text, regarding the test's inability to indicate intoxication while on the job—the only area where an employer has any legitimate interest.
298. 601 F. Supp. 482 (N.D. Ga. 1985); see supra text accompanying note 119.
299. 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); see supra text accompanying note 115.
301. McDonell, 612 F. Supp. at 1130.
302. Id. at 1130. See also People v. Triggs, 8 Cal. 3d 884, 892, 506 P.2d 232, 237, 106 Cal. Rptr. 408, 413 (1973), where the California Supreme Court recognized that both the United States and California Constitutions make it "emphatically clear" that the right to privacy must be respected even at the expense of efficient law enforcement. See also supra notes 216-17 and accompanying text.
In order for an employer to be able to administer a mandatory drug test, there must at least be good reason to believe that the employee is intoxicated at work. An employer can take many steps less intrusive than random drug testing to ensure safety.\footnote{303} As recognized in \textit{McDonnell}, careful screening of job applicants is one legitimate way for employers to protect this interest.

The second relevant \textit{Schmerber} factor focuses on the test's reliability. Urinalysis for drugs is severely criticized for its inaccuracy.\footnote{304} One reason is that the tests can detect substances such as herbal tea and aspirin and mistake them for drugs.\footnote{305} Also, improper handling by non-technical personnel causes inaccurate results.\footnote{306} Another problem arises because a non-smoker's test can show positive merely because he or she passively inhaled the marijuana smoke of another.\footnote{307} At minimum, to satisfy the reliability factor, a confirmation test should always be instituted after a positive urinalysis.\footnote{308}

Finally, the third factor—the manner of testing—should also be carefully scrutinized when determining whether a person's privacy has been unreasonably invaded. This is necessary to prevent errors in testing procedure as well as to decrease the possibility of humiliation and harassment of the employee. Examples of what constitutes a reasonable manner include: testing conducted in a hospital by trained personnel,\footnote{309} confirmation of a positive test by an alternate means,\footnote{310} the right to appeal the finding,\footnote{311} the right to face any witnesses\footnote{312} and documented evidence of why the employee was suspected of drug use.\footnote{313} Without these standards to protect employees, employers have too great an opportunity to harass employees\footnote{314} and to intrude into the employee's private
C. Is Testing the Least Restrictive Means of Achieving an Employer's Goal?

The California Constitution requires that justified intrusions utilize the least intrusive method available to further the “compelling interest.” Therefore, even if a compelling interest can be established, under this requirement drug testing generally should not be allowed. Presumably, if an employer has the objective facts which this Comment suggests are needed for a constitutional urine test, that information alone would constitute grounds to terminate, discipline or provide drug counseling for the employee—even without the test. A person’s outward inability to safely and properly fulfill his or her employment obligation alone should be grounds for employer action without conducting the drug test. If an employee is not fulfilling his or her employment obligations because of an inability to perform—for drug-related or other reasons—the employer should be able to take action based on that information alone.

VI. Conclusion

Combatting drug abuse in the workplace is a noble goal. However, the California Constitution requires that any invasion of privacy by government or business entities be necessary to achieve a compelling interest. Dealing with employee drug use by requiring all employees—innocent as well as guilty, suspected as well as not suspected, janitors as well as nuclear power plant employees—to submit to drug urinalysis sweeps too broadly.

Individuals need judicial protection from both government and business entities. Both entities are able to exert peculiar and forceful control over individuals. This control can leave those individuals vulnerable to unreasonable, unnecessary and humiliating affronts to their personal dignity and sovereignty. Mandatory urinalysis has the potential to cause

Williams found that singling out older employees for testing was particularly odd because younger persons are usually considered more likely to use drugs. Telephone interview with Gary Williams, Southern California ACLU (Mar. 31, 1986). See Storms v. Coughlin, 600 F. Supp. 1214, 1223 (S.D.N.Y. 1984).

315. See supra note 207 and accompanying text.

316. If a company wants to promote a drug-free environment, it can provide lectures and other information as well as treatment for employees who voluntarily admit to a problem or who, confronted with a problem, consent to be treated. For example, Commonwealth Edison Co. provided its employees with a “comprehensive awareness” program giving health and safety information on drugs. See Bensinger, Drugs in the Workplace, HARV. BUS. REV., Nov.-Dec. 1982, at 48, 49.
such an affront. Without judicial protection, government entities can force a person to submit to an unreasonable search by threatening fines or jail. Similarly, an employer can invade an employee's constitutional right to privacy by threatening termination—"your urine or your job." More often than not, in such a circumstance, an employee is not in the position to protect his or her own privacy right. When an employee faced with mandated urinalysis comes to the court seeking protection under the California Constitution, the court must fulfill its duty to prevent unwarranted invasions of privacy.

Compelled employee drug testing by urinalysis is only constitutional when (1) there is a clear and substantial threat to safety, (2) it is clear that the employee is impaired while on the job, and (3) procedural safeguards are provided so that the employee is not unduly harassed or incorrectly pegged as a drug user.

The fundamental right to privacy is more than a legal term of art to a person who is asked to urinate in a bottle—often in front of another person to ensure reliability. For some it is easy to rationalize a privacy violation when it affects someone else, but for the person tested, urinalysis can be a degrading and embarrassing invasion of privacy. It is not constitutional, nor is it fair, to condition employment on a test that substantially intrudes on privacy and is so often inaccurate.

Patricia A. Hunter*

317. A recent case involving Rodney Smith, deputy executive director of the President's Commission on Organized Crime illustrates this point. Mr. Smith was told that he himself would be required to provide a urine sample before testifying as to why urinalysis should be required for all federal employees. He was told by the Chairman of the House Post Office and Civil Service human resources subcommittee to "go to the men's room under the direct observation of a male member of the subcommittee staff to urinate in [a] specimen bottle." Drug Test Advocate Refuses to be Tested, L.A. Times, Mar. 19, 1986, pt. I, at 10, col. 1 (quoting Gary L. Ackerman). He was then handed the bottle. Smith refused to comply and later angrily complained that he was not warned and that the subcommittee embarrassed him before television cameras. Id. at 10, col. 2. It was pointed out that under the presidential commission's proposal, federal workers would also have no warning before the administration of a mandatory urine test. Id. Smith complained that the hearings were "'serious matters,'" and that Congress had no right to demand drug tests without probable cause or reasonable suspicion that the test was needed. Id. at 10, col. 3.

The embarrassment and humiliation caused by urinalysis was recently recognized in the student drug testing context. Englade, supra note 4, at 26. The court found that "'[r]equiring teenage students to disrobe from the waist down while an adult official . . . watches the student urinate in the open into a tube is an excessive intrusion of a student's legitimate expectation of privacy.'" Id. (citations omitted).

* The author wishes to thank Gary Williams, Ellen Greenstone and Norm Beal for the suggestions, information and support they contributed to this Comment.