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## Drug Testing in the Nonunionized Workplace: Search and Seizure, Procedural Due Process, and Maine's Drug-Testing Statute

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# DRUG TESTING IN THE NONUNIONIZED WORKPLACE: SEARCH AND SEIZURE, PROCEDURAL DUE PROCESS, AND MAINE'S DRUG-TESTING STATUTE

## INTRODUCTION

As former President Reagan stated in Executive Order No. 12,564, "[d]rug use is having serious adverse effects upon a significant proportion of the national work force . . . ."<sup>1</sup> One survey by the National Institute on Drug Abuse found that between ten and twenty-three percent of all employees use drugs at work.<sup>2</sup> The Institute has also reported that twenty million Americans use marijuana and four million use cocaine.<sup>3</sup> In addition, ninety percent of those using cocaine do so during work hours, and approximately half of those users buy and sell cocaine at work.<sup>4</sup>

The costs to industry in lost productivity due to drugs are equally staggering. Employee drug and alcohol abuse resulted in an estimated \$100 billion in lost productivity in 1986.<sup>5</sup> Furthermore, employees with drug or alcohol abuse problems have an absentee rate sixteen times greater than the average employee, and an accident rate which is four times greater.<sup>6</sup> Even when impaired workers are not absent from work, their work potential is only sixty-seven percent of the work potential of unimpaired workers.<sup>7</sup>

To combat the drug problem, former President Reagan issued Executive Order 12,564 calling for a "drug-free federal workplace."<sup>8</sup> This order authorized the implementation of drug testing in the public sector. The private sector, however, has also responded to the nation's drug problem. Fifty percent of the Fortune 500 companies

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1. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C. § 7301 (1988).

2. Comment, *Employee Drug Testing—Issues Facing Private Sector Employees*, 65 N.C.L. REV. 832 (1987) (citation omitted).

3. *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 558 (1988) (citation omitted) [hereinafter *Survey*].

4. Comment, *supra* note 2.

5. *Id.* But see Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PRR. L. REV. 201, 203 ("It is estimated that employee drug use costs the nation \$33 billion per year in lost productivity and accident-related costs, and in other, lesser respects including increased health care costs, shoddy workmanship and employee theft.") (citing Nat'l L.J. Apr. 7, 1986, at 1, col. 2).

6. Miller, *supra* note 5, at 203-204 (citation omitted).

7. *Survey*, *supra* note 3, at 558 (citation omitted).

8. Exec. Order No. 12,564, C.F.R. 224 (1987), *reprinted in* 5 U.S.C. § 7301 app. at 133-35.

conduct drug testing,<sup>9</sup> and as the problem grows, more companies, both large and small, can be expected to follow.

Society should encourage both public and private employers to implement drug-testing programs. Such programs can be used to detect employees with drug abuse problems, thus avoiding the potential threat that such employees pose to themselves, their coworkers, and the public at large. Furthermore, if drug abuse on the job can be reduced, employee productivity will be strengthened.<sup>10</sup> Any drug-testing policy, however, should seek to balance the interests of employers in having a safe workplace and maximum productivity and the interests of employees in protecting their individual rights.

Those opposing the implementation of drug testing in the workplace have raised a number of constitutional challenges.<sup>11</sup> This Comment focuses specifically on the fourth amendment and the procedural due process provisions of the fifth and fourteenth amendments as they are implicated in drug-testing programs.<sup>12</sup> After briefly outlining the limitations to these constitutional challenges, the Comment provides a general overview of the fourth amendment. It then specifically discusses the fourth amendment and how it applies to drug testing in the nonunionized workplace.<sup>13</sup> The Comment also provides a general overview of the procedural due process provisions of the fifth and fourteenth amendments, followed by a discussion of how these provisions relate to nonunionized employee drug testing. It then analyzes, compares, and contrasts Maine's drug-testing statute with the standards and procedures for drug testing established by courts faced with fourth amendment and procedural due process

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9. *Survey, supra* note 3, at 561 (citation omitted).

10. Drug-testing programs should also provide employees with the help they need so that they can return to the workforce when they are ready. In this way, the programs can recognize the problem and be a part of the solution.

11. The most frequent constitutional challenges to drug testing include the claim that it violates the right against unlawful searches and seizures under the fourth amendment, the right against self-incrimination under the fifth amendment, the penumbral right to privacy under the fourteenth amendment, and the right to substantive and procedural due process.

12. The Comment analyzes the fourth and fourteenth amendments of the *federal* Constitution and not the *state* constitutions. As Justice Brennan stated, "I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor." Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

13. The employers' power to test *unionized* workers for drug use may be limited by collective bargaining agreements and the National Labor Relations Act (29 U.S.C. §§ 151-69 (1982)). This Comment only addresses unionized workers to the extent that they make constitutional challenges to drug-testing programs. It does not seek to discuss the National Labor Relations Act or collective bargaining agreements in the drug-testing process.

challenges to drug-testing programs. A comparison will also be made between the Maine statute and the drug-testing statutes of other states.

The Comment concludes that the recently enacted Maine drug-testing statute is a step in the right direction because it seeks to balance the interests of employers with those of employees. The statute, however, falls short of its goal. Although the requirements for applicant drug testing and for random drug testing under limited circumstances represent an appropriate balancing of interests, the probable cause standard for employee drug testing and the cursory treatment of the procedural due process rights of employees are in need of revision. A balancing of interests between employers and the public on one hand and between employers and employees on the other suggests that a less stringent standard than probable cause is required. Furthermore, if employees are given the opportunity to appeal and contest the accuracy of test results, the statute should provide minimum requirements for procedural due process. Since the Maine drug-testing statute seeks to extend the constitutional protections enjoyed by public employees to private employees, the statute should more closely reflect the standards and procedures established by courts faced with federal constitutional challenges to drug-testing programs.

#### I. THE LIMITATIONS OF THE CONSTITUTIONAL CHALLENGES

The Constitution places affirmative obligations on federal, state, and local governmental employers.<sup>14</sup> The rights of private employees in the workplace are protected by neither federal nor state constitutions.<sup>15</sup> As stated in *United States v. Lamar*,<sup>16</sup> "if a search is conducted . . . for purely private reasons, it does not fall within the protective ambit of the Fourth Amendment."<sup>17</sup> Similarly, the Supreme Court in *Shelley v. Kraemer*<sup>18</sup> held that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."<sup>19</sup> Therefore, the discussion in this Comment of the fourth amendment's search and seizure provisions and the fifth and fourteenth amendments' procedural due process provisions gen-

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14. *Survey*, *supra* note 3, at 567 (citing *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

15. *Development in the Law—The Constitutional Issues of Drug Testing in the Workplace*, 23 WILLIAMETTE L. REV. 553, 554 (1987) [hereinafter *Development in the Law*].

16. 545 F.2d 488 (5th Cir. 1977).

17. *Id.* at 490.

18. 334 U.S. 1 (1948).

19. *Id.* at 13.

erally applies only to governmental employees.

If, however, "a sufficient nexus exists between the actions of the private employer and a governmental entity,"<sup>20</sup> the constitutional limitations will apply. The determination of whether or not there is a sufficient nexus depends upon the facts and circumstances of each case.<sup>21</sup> There are, however, three theories upon which a sufficient nexus may be established: the government function theory, the entanglement theory, and the coercive state action theory.<sup>22</sup>

The government function theory is best illustrated in *Evans v. Newton*.<sup>23</sup> There, a United States Senator executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which was to be used as a park by members of the white race only. The city enforced the policy of segregation for a number of years, but then began allowing blacks to use the park. A Georgia state court accepted the resignation of the city as trustee and appointed three new individuals (who would enforce the policy of segregation).<sup>24</sup> Although this judgment was upheld by the Georgia Supreme Court, the Supreme Court of the United States reversed. It held that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."<sup>25</sup>

In *Burton v. Wilmington Parking Authority*,<sup>26</sup> the Supreme Court applied the entanglement theory in finding that a restaurant operated by a private owner under lease in a building financed by public funds was an agency of the state of Delaware. Thus, when the restaurant excluded a black person, solely on account of race, it was subject to constitutional limitations.<sup>27</sup> The Court held that state responsibility necessarily followed upon "state participation through any arrangement, management, funds or property."<sup>28</sup>

In contrast to the *Burton* case, the Supreme Court in *Blum v. Yaretsky*<sup>29</sup> applied the coercive state action theory. It held that medicaid recipients who sought to challenge their transfers to other

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20. *Survey, supra* note 3, at 567.

21. *See* *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974) ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required . . .").

22. *Survey, supra* note 3, at 568.

23. 382 U.S. 296 (1966).

24. *Id.* at 297-98.

25. *Id.* at 299.

26. 365 U.S. 715 (1961).

27. *Id.* at 726.

28. *Id.* at 722 (quoting *Cooper v. Aaron*, 358 U.S. 1, 4 (1958)).

29. 457 U.S. 991 (1982).

facilities on the grounds that there was a lack of notice under the fourteenth amendment failed to establish state action in the decisions of the nursing home.<sup>30</sup> The Court found that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."<sup>31</sup> In sum, the state must have "compelled the act."<sup>32</sup>

If employees in the private sector can show that the tests of any of these three theories are met, then the constitutional protections of the fourth, fifth, and fourteenth amendments will be available to challenge a drug-testing policy. If, on the other hand, employees are unable to establish such a theory, their only recourse will be to state law, and, in very limited circumstances, to state constitutions.<sup>33</sup>

## II. THE FOURTH AMENDMENT: AN OVERVIEW

The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>34</sup>

Before one can launch into an inquiry of whether or not there has been a violation of the fourth amendment when a search is conducted, one must first determine whether the individual is entitled to the protection of the amendment. In order to make this determination, the court must decide whether there was a "legitimate expectation of privacy" when the search was carried out.<sup>35</sup> In *Katz v. United States*,<sup>36</sup> Justice Harlan's concurring opinion explains the Court's two-fold requirements for finding an expectation of privacy. First, the person must have an actual or subjective expectation of privacy. Second, this expectation must be one that society is pre-

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30. *Id.* at 1012.

31. *Id.* at 1004. *See also Development in the Law, supra* note 15, at 555 ("Therefore, if an employee can show that the state, in any substantial way, actively encourages or commands the deprivation of the employee's constitutional rights, the private employee may argue deprivation of individual rights based on the [coercive] state action doctrine.")

32. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

33. *See infra* notes 181-281 and accompanying text.

34. U.S. CONST. amend. IV. The fourth amendment is made applicable to the states through the due process clause of the fourteenth amendment.

35. *Miller, supra* note 5, at 213.

36. 389 U.S. 347 (1967).

pared to recognize as reasonable.<sup>37</sup>

In applying this test, it is important to note that not all individuals have the same expectation of privacy. As a result, not all enjoy the same degree of fourth amendment protection.<sup>38</sup> There are, for example, significant differences in the rights of military and non-military personnel.<sup>39</sup>

Once the expectation of privacy has been established, the fourth amendment applies. Thereafter, a governmental intrusion of sufficient magnitude is deemed a search and seizure within the meaning of the fourth amendment. In *United States v. Jacobsen*,<sup>40</sup> the Supreme Court stated that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."<sup>41</sup> Furthermore, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."<sup>42</sup>

The final step in the fourth amendment analysis is for the court to decide whether a search meets the fourth amendment's "ultimate dictate of reasonableness."<sup>43</sup> The test of reasonableness requires a balancing of interests between the governmental need for a particular search and the "invasion of personal rights that the search entails."<sup>44</sup> Factors to be considered include the scope of the search, the manner in which it is conducted, the justification for its initiation, and the place the search occurs.<sup>45</sup>

Traditionally, for a reasonable search, courts have required that a warrant be issued upon probable cause.<sup>46</sup> Courts, however, have dispensed with the warrant requirement when "it is likely to frustrate the governmental purpose behind the search."<sup>47</sup> Similarly, probable cause is not an "indispensable component" of reasonableness in every case.<sup>48</sup> If probable cause is not required, some less stringent

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37. *Id.* at 361. At least one commentator has concluded that the two-fold requirement of *Katz* has been superseded in *Hudson v. Palmer*, 468 U.S. 517 (1984). See Miller, *supra* note 5, at 213 & n.50. In *Hudson*, the Supreme Court applied only the objective factor of the two-fold requirement, disregarding the individual's subjective expectation of privacy. *Hudson v. Palmer*, 468 U.S. at 525.

38. *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1007-1008 (D.C. 1985).

39. *Development in the Law*, *supra* note 14, at 557.

40. 446 U.S. 109 (1984).

41. *Id.* at 113 (citation omitted). See also *United States v. Place*, 462 U.S. 696, 716 (1983).

42. *United States v. Jacobsen*, 466 U.S. at 113.

43. Miller, *supra* note 5, at 213.

44. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

45. *Id.*

46. See *supra* note 34.

47. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967); Miller, *supra* note 5, at 215. Warrants are also dispensed with when a valid arrest is made pursuant to exigent circumstances. See *United States v. Watson*, 423 U.S. 411 (1976).

48. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390

standard, such as individualized suspicion, can be used.

### III. DRUG TESTING AND THE FOURTH AMENDMENT<sup>40</sup>

#### A. *Drug Testing as a Search*

One of the most frequently raised constitutional challenges to drug testing in the nonunionized workplace is that it constitutes a search and seizure within the meaning of the fourth amendment. *Schmerber v. California*<sup>50</sup> was one of the first cases to explore the fourth amendment protection against bodily intrusions. The petitioner, Schmerber, was convicted in Los Angeles Municipal Court for driving under the influence of alcohol—a criminal offense. He was arrested at a hospital after being involved in an automobile accident, and police directed that a blood sample be withdrawn by a physician. The sample showed that the petitioner was intoxicated, and this evidence was used to convict him. The petitioner appealed his conviction upon a number of different grounds, one of which included a violation of his fourth amendment rights.<sup>51</sup>

Writing for the majority, Justice Brennan clearly stated that “[i]t could not reasonably be argued . . . that the administration of the blood test . . . was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of ‘persons’ . . . within the meaning of that Amendment.”<sup>52</sup> After assuring that the petitioner had a reasonable expectation of privacy, the Court concluded that the search was reasonable because a “clear likelihood” that the evidence would be found existed.<sup>53</sup> Further-

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(1989).

49. Although blood and breath tests are available to employers who test employees for drugs, the preferred method of drug testing is urinalysis. *Survey, supra* note 3, at 559 n.23 (citation omitted). The most popular method of urinalysis is enzyme multiplied immunoassay technique (EMIT). This method is inexpensive, has a short analysis time, and can detect a wide range of drugs. *Id.* at 563. The scientific principles behind the test, however, are quite complicated. A reagent is produced by combining an antibody with an antigen, which serves as an indicator. The antibody and the indicator undergo a chemical reaction in which the indicator binds to the antibody. After the reagent is created, urine is introduced into the mixture. If a drug metabolite is present in the urine, the metabolite will displace the indicator and bind to the antibody. *Id.* at 563 n.45 (quoting Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 *AM. BUS. L.J.*, 309, 311-12 (1986)).

Because the EMIT test has the disadvantage of being error prone and producing “false positives,” it is generally used for preliminary screenings only. *Id.* at 563-64. Thus, it should be followed by the analytical method that experts find the most accurate: gas chromatography/mass spectrometry (GC/MS). *Id.* at 565. This test uses a mass spectrum technique producing a pattern unique to each drug. *Id.* at 565 n.55 (citation omitted).

50. 384 U.S. 757 (1966).

51. *Id.* at 759.

52. *Id.* at 767.

53. See *supra* notes 35-39 and accompanying text.



more, no warrant was necessary because of the exigency of the situation.<sup>54</sup>

When the issue of whether urinalysis constituted a search and seizure was raised, courts relied upon *Schmerber* to support the conclusion that such testing fell within the ambits of the fourth amendment. In *Capua v. City of Plainfield*,<sup>55</sup> city fire fighters brought an action challenging mass urine testing for drug abuse on the grounds that it violated the fourth amendment.<sup>56</sup> The district court, in reaching the conclusion that such testing did constitute a search and seizure, first addressed the individual's expectation of privacy. It stated that "[o]ne's anatomy is draped with constitutional protection."<sup>57</sup> As a result, "[c]ourts have clearly established that individuals retain an expectation of privacy and a right to be free from government intrusion in the integrity of their own bodies."<sup>58</sup> Furthermore, each individual "has a reasonable expectation of privacy in the personal 'information' bodily fluids contain."<sup>59</sup> For these reasons, the governmental taking of urine was deemed the equivalent of withdrawing blood in *Schmerber*.<sup>60</sup> As such, it constituted a search and seizure.<sup>61</sup>

In *Skinner v. Railway Labor Executives Association*,<sup>62</sup> railway labor organizations sought to enjoin the Federal Railroad Administration's drug and alcohol testing of railroad employees.<sup>63</sup> The Supreme Court, like the district court in *Capua*, addressed the issue of whether drug testing constituted a search and seizure. The Court found that chemical analysis of urine can reveal a number of private medical facts, such as whether an individual is epileptic, pregnant,

54. *Schmerber v. California*, 384 U.S. at 770-71. *Cf. Winston v. Lee*, 470 U.S. 753 (1985) (A surgical operation to remove a bullet from a robbery suspect was an unreasonable search and seizure.).

55. 643 F. Supp. 1507 (D.N.J. 1986).

56. *Id.* at 1512.

57. *Id.* at 1513 (quoting *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978)).

58. *Id.* (citing *Schmerber v. California*, 384 U.S. 757 (1966)).

59. *Id.* See also *Taylor v. O'Grady*, 669 F. Supp. 1422, 1435 (N.D. Ill. 1987) ("[A]n employee must be deemed to have a fairly strong expectation of privacy in the act of urination and in the urine itself."). *But see Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1011 (D.C. 1985) (Nebeker, J., concurring) ("An individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain.").

60. It is true, however, that although urine testing is the constitutional equivalent of blood testing, it is not a direct parallel. Blood testing involves a forced *penetration* of the body tissues, while urine testing involves a forced *extraction* of body fluids.

61. See *Taylor v. O'Grady*, 669 F. Supp. at 1435 ("The very purpose of the urine testing program . . . is to make sure an employee's urine is seized . . .").

62. 109 S. Ct. 1402 (1989). Although *Skinner* dealt with a labor organization, the challenges to the drug-testing program raised constitutional issues. Therefore, the case is relevant for the purposes of this Comment. See *infra* notes 93 & 106.

63. *Id.* at 1410.

or diabetic.<sup>64</sup> Such testing, therefore, implicated individual privacy interests.<sup>65</sup>

In taking the analysis one step further, however, the Court held that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . ." <sup>66</sup> In fact, "[t]here are few activities in our society more personal or private than the passing of urine."<sup>67</sup>

## B. *The Reasonableness of Drug Testing*

### 1. *The Warrant*

The application of the fourth amendment to a particular situation only begins the analysis into the standards governing searches and seizures.<sup>68</sup> The standards governing the reasonableness of drug testing as a search and seizure are also instrumental to the inquiry. As discussed earlier,<sup>69</sup> a search ordinarily must be carried out pursuant to a warrant. This requirement, however, can be dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."<sup>70</sup> The issue, therefore, is whether drug testing justifies dispensing with the warrant requirement.

In *Allen v. City of Marietta*,<sup>71</sup> the plaintiffs, all governmental employees of the Marietta Board of Lights and Water or of the City of Marietta, worked around high voltage power lines. Each was suspected of smoking marijuana on the job. They were given the opportunity to resign, but none of them did so. As a result, each plaintiff was advised that he would be fired unless he submitted to urine testing. All of the plaintiffs elected to take the test. The test results were all positive, and each employee was eventually dismissed. The plaintiffs filed suit claiming, among other things, a deprivation of their fourth amendment rights.<sup>72</sup>

The district court, after noting that the urine tests were administered without obtaining a warrant, stated that "[o]ne of the exceptions to the warrant requirement which appears to have emerged is a class of cases involving searches of government employees."<sup>73</sup> The cases involved a balancing of the individuals' expectation of privacy

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64. *Id.* at 1413.

65. *Id.*

66. *Id.*

67. *Id.* (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989)).

68. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

69. See *supra* notes 46-47 and accompanying text.

70. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). See *supra* note 47 and accompanying text.

71. 601 F. Supp. 482 (N.D. Ga. 1985).

72. *Id.* at 484-85.

73. *Id.* at 489 and cases cited therein.

against the government's right, as an employer, to investigate employee misconduct when it was directly related to the employees' performance of their duties.<sup>74</sup> Although the governmental employees did not surrender their fourth amendment rights simply because they worked for the government, the government's right to discover and prevent employee misconduct was such that the employees could not really claim an expectation of privacy from these searches.<sup>75</sup> Thus the city had "a right to make warrantless searches of its employees *for the purpose of determining whether they [were] using or abusing drugs which would affect their ability to perform safely their work with hazardous materials.*"<sup>76</sup>

Whether the district court in *Allen* would have decided the case in the same way if the employees did not work with hazardous materials is a matter of speculation. Arguably, the government's need to prevent drug abuse would not have been as great if the jobs had not dealt with hazardous materials, since the risk of serious accidents on the job would not have been as likely. By contrast, when employees work with hazardous materials, there is a greater risk of harm to employees and the public. Thus the need to prevent drug abuse is greater when the working conditions are dangerous.

*Skinner v. Railway Labor Executives Association*,<sup>77</sup> however, suggests that working with hazardous materials is not central to the question.<sup>78</sup> In *Skinner*, the Supreme Court stated that "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring" that searches "are not the random or arbitrary acts of government agents."<sup>79</sup> Furthermore, a warrant provides "the detached scrutiny of a neutral magistrate" who makes certain that the intrusion is necessary.<sup>80</sup> Since the urine testing procedures were "narrowly and specifically" defined by the Federal Railroad Administration and "standardized" in nature,<sup>81</sup> there was no need for a

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74. *Id.*

75. *Id.* at 491.

76. *Id.* (emphasis added).

77. 109 S. Ct. 1402 (1989). For a synopsis of the facts of *Skinner*, see *supra* note 63 and accompanying text.

78. *Skinner* involved "hazardous materials" to the extent that a locomotive can become a lethal weapon when used inappropriately. Although working with hazardous materials is not central to the issue of the warrant requirement, it bears heavily on the issue of whether or not individualized suspicion is required. See *infra* notes 98-117 and accompanying text.

79. *Id.* at 1415.

80. *Id.*

81. *Id.* The drug tests were administered upon the occurrence of specified events, such as after a major train accident. They also could have been administered after any reportable accident if the employee's supervisor had "reasonable suspicion" that the employee's acts contributed to the accident. In addition, tests could have been administered even though no accident had taken place if certain conditions were met. *Id.* at 1408-10.

neutral magistrate to evaluate the situation. In addition, one of the purposes of the drug-testing program was to measure whether drugs were in the bloodstream when a specified event (e.g. an accident) occurred. The warrant requirement was likely to frustrate this purpose because during the time it would take to obtain a warrant, drugs and alcohol would be eliminated from the bloodstream at a constant rate. Thus, under the circumstances in *Skinner*, the Court found that a warrant was unnecessary.<sup>82</sup>

This, however, is not to say that warrants are never required in order to establish the reasonableness of a drug-testing search. Whether or not a search is reasonable depends upon "the context within which [the] search takes place."<sup>83</sup> A case-by-case analysis is, therefore, required. If, however, the tests are specifically defined and standardized, and if the warrant requirement is likely to frustrate the effectiveness of testing, *Skinner* suggests that no warrant is necessary.

## 2. Probable Cause, Reasonable Suspicion, and Random Testing

Even if a warrant is not necessary in a particular case, the search normally must be based upon "'probable cause' to believe that a violation of the law has occurred."<sup>84</sup> Probable cause, however, is not an "irreducible requirement of a valid search."<sup>85</sup> When a balancing of the governmental and individual interests suggests that the public interest will best be served by a standard of reasonableness that falls short of probable cause, the Supreme Court has "not hesitated to adopt such a standard."<sup>86</sup>

Drug testing is one example of a search and seizure that can be conducted pursuant to a less stringent standard than probable cause. In *Louvorn v. City of Chattanooga*,<sup>87</sup> fire fighters brought ac-

82. *Id.* at 1415-16.

83. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

84. *Id.* at 340. According to BLACK'S LAW DICTIONARY,

[Probable cause refers to] [r]easonable grounds for belief that a person should be . . . searched. Probable cause exists where the facts and circumstances would warrant a person of reasonable caution to believe that an offense was or is being committed.

. . .

Probable cause for search and seizure with or without search warrant involves probabilities which are not technical but factual and practical considerations of every day life upon which reasonable and prudent men act, and essence of probable cause is reasonable ground for belief of guilt.

BLACK'S LAW DICTIONARY 1081 (5th ed. 1979) (citing *Commonwealth v. Stewart*, 358 Mass. 747, 267 N.E.2d 213 (1971); *Paula v. State*, 188 So. 2d 388, 390 (Fla. App. 1966)).

85. *New Jersey v. T.L.O.*, 469 U.S. at 340.

86. *Id.* at 341. For a general discussion of probable cause see *supra* notes 46-48 and accompanying text.

87. 647 F. Supp. 875 (E.D. Tenn. 1986).

tion against the city, the city board of commissioners, and the fire chief asking that urine tests be enjoined and that declaratory judgment be entered finding the proposed tests unconstitutional. The plaintiffs claimed relief under various amendments to the Constitution, including the fourth amendment.<sup>88</sup> The court, in considering the reasonableness of the drug-testing search, held that although the fire fighters did not surrender their subjective expectations of privacy when they became city employees, the community could demand that they give up some part of their privacy interests to advance the community's interests.<sup>89</sup> Thus, while probable cause would not be required to conduct the tests, the balancing of the city's interest with that of the fire fighters' required "some quantum of individualized suspicion" before the tests could be administered. This quantum of suspicion was referred to as "reasonable suspicion."<sup>90</sup> Reasonable suspicion usually requires that there be "some articulable basis for suspecting that the employee [is] using illegal drugs."<sup>91</sup> Since the city was unable to point to any objective facts, such as deficient job performance, to support the drug testing program, the standard of reasonable suspicion was deemed unsatisfied, and the testing procedure was held to be unconstitutional.<sup>92</sup>

Similarly, the defendants' drug-testing program in *Patchogue-Medford Congress of Teachers v. Board of Education*<sup>93</sup> was found unconstitutional because tests were conducted without reasonable suspicion. All probationary teachers of the Patchogue-Medford School District were required to submit to a urinalysis examination even though there was no indication of drug use.<sup>94</sup> The court of ap-

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88. *Id.* at 876-77.

89. *Id.* at 880.

90. *Id.*

91. *Id.* at 881. See also *Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . ."); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. 1985) (The standard of "suspected" drug use does not grant the governmental employer "carte blanche to order testing on a purely subjective basis."). The terms "individualized suspicion" and "reasonable suspicion" are used interchangeably. It is important to note that "reasonable suspicion" is not the same as "reasonable grounds" to believe an infringement is taking place. "Reasonable suspicion" is based on some articulable basis rather than on hard and fast grounds for belief. For example, deficient job performance will constitute "reasonable suspicion," but something like the smell of alcohol on the employee's breath or the signs commonly associated with drug abuse will constitute "reasonable grounds" for drug testing.

92. *Lovvorn v. City of Chattanooga*, 647 F. Supp. at 882.

93. 510 N.E.2d 325 (N.Y. 1987). Although *Patchogue-Medford Congress of Teachers* dealt with a teachers' union, the union's claim was constitutional in nature. The National Labor Relations Act and collective bargaining agreements were not implicated. This case is, therefore, relevant for the purposes of this Comment. See *supra* note 61. See *infra* note 106.

94. *Id.* at 326. Drug testing conducted in the absence of individualized suspicion is commonly referred to as "random drug testing."

peals noted that the purpose behind having reasonable searches was to protect the public's interest in maintaining the privacy, dignity, and security of its members.<sup>95</sup> Thus random searches conducted without reasonable suspicion were to be closely scrutinized, and only permitted "when the privacy interests implicated [were] minimal, the government's interest [was] substantial, and safeguards [were] provided to insure that the individual's reasonable expectation of privacy [was] not subjected to unregulated discretion."<sup>96</sup> Since ordering a person to produce urine for inspection was no less offensive than requiring the individual to empty his pockets and produce a report containing the results of the urine tests, the privacy interests of the teachers were *not* minimal.<sup>97</sup> Thus, having failed to comply with one of the necessary factors indicated above, the Board of Education violated the teachers' rights, and the tests were prohibited.

### 3. Closely Regulated Industries

Although random drug testing is difficult to achieve constitutionally, under the factors outlined in *Patchogue-Medford*, it is not impossible. In fact, in a number of situations, random drug testing is allowed. The Supreme Court in *Skinner v. Railway Labor Executives Association*<sup>98</sup> faced the issue of drug testing in the federally regulated railroad industry. The Court noted that individualized suspicion, like probable cause, was not a "constitutional floor, below which a search must be presumed unreasonable."<sup>99</sup> It then concluded that the intrusion involved in urine testing was minimal<sup>100</sup> and that the government's interest in preventing the "hazardous conduct" of operating under the influence would be jeopardized by requiring a standard of individualized suspicion.<sup>101</sup>

In justifying its conclusion, the Court stated that the intrusiveness of the testing procedure was reduced because employees were not required to furnish samples under the direct observation of a monitor. In fact, the samples were collected in an atmosphere akin to a physical examination. Furthermore, the privacy expectations of the employees were diminished by their participation in an industry

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95. *Id.* at 331.

96. *Id.* (citation omitted). See also *Taylor v. O'Grady*, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987) ("[E]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests are 'minimal.'").

97. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 510 N.E.2d at 330.

98. 109 S. Ct. 1402 (1989).

99. *Id.* at 1417.

100. *Id.* The testing involved in this case included not only urine tests, but also breath tests. For the purposes of this Comment, only the urine tests are relevant, for as the Court noted, breath tests are less intrusive than urine tests. *Id.* If, therefore, the urine tests are reasonable, the breath tests are, by implication, also reasonable.

101. *Id.* at 1421.

"regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."<sup>102</sup>

In addition, the government's interest in testing without individualized suspicion was "compelling" because the employees subject to the tests "discharge[d] duties fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences."<sup>103</sup> The railroad employees could cause serious injury to others *before* any signs of impairment became noticeable.<sup>104</sup> Therefore, a requirement of individualized suspicion would interfere with an employer's ability to locate drug use before a potential tragic event. As a result, the absence of individualized suspicion did not violate the employees' expectations of privacy.<sup>105</sup>

Similarly, in *National Treasury Employees Union v. Von Raab*,<sup>106</sup> a union of federal employees and a union official brought suit challenging the drug-testing program of the United States Customs Service. The program required urine specimens of all employees applying for promotion to positions involving drug interdiction where the employees had to carry firearms or handle classified material.<sup>107</sup> The tests were conducted in the absence of any degree of suspicion. In addressing this issue, the Supreme Court stated that in certain limited circumstances, the government's need to discover latent conditions or prevent their development was compelling enough to justify intrusion absent individualized suspicion.<sup>108</sup>

The Court then applied this principle to the case at hand. It held that the government's need to conduct suspicionless searches outweighed the privacy interests of the employees because the government had a "compelling interest in ensuring that front-line interdiction personnel [were] physically fit, and [had] unimpeachable integrity and judgment."<sup>109</sup> Public interest also demanded effective measures to prevent the promotion of drug users to firearm-carrying positions.<sup>110</sup> Furthermore, Customs Service employees had a dimin-

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102. *Id.* at 1418. The Court, however, stated: "We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern." *Id.* at 1418-19.

103. *Id.* at 1419.

104. *Id.*

105. *Id.* at 1421.

106. 109 S. Ct. 1384 (1989). *Von Raab*, like *Skinner* and *Patchogue-Medford Congress of Teachers*, involved a union. Since the union's challenge to the drug-testing program was constitutional in nature, the case is relevant for purposes of this Comment. See *supra* notes 62 & 93.

107. *Id.* at 1388.

108. *Id.* at 1392.

109. *Id.* at 1393.

110. *Id.* The Court noted that a drug user's indifference to the Customs Service's basic mission of drug interdiction, or his complicity with those importing drugs, could "facilitate importation of sizable drug shipments or apprehension of dangerous

ished expectation of privacy because they could expect an inquiry into their physical fitness and condition.<sup>111</sup> In sum, the employees were heavily regulated. Thus the tests were found reasonable under the fourth amendment.<sup>112</sup>

In contrast to the federally regulated railroad industry in *Skinner* and the federal regulation of Customs Service employees in *Von Raab, Shoemaker v. Handel*<sup>113</sup> involved the state-regulated horse racing industry. Jockeys brought action challenging the New Jersey State Racing Commission regulations providing for administration of breath tests and random urinalysis.<sup>114</sup> One of the claims was that the tests violated the jockeys' fourth amendment rights.

In addressing the standard of individualized suspicion, the district court found that the state had made a sufficient showing of the need for conducting the test. First, the court recognized that the horse racing industry was a unique class of industry subject to state regulation. Second, the jockeys were licensed by the state and had received notice of the implementation of these tests. Although notice and licensure did not serve as a waiver of fourth amendment rights, they were factors to be considered in balancing the jockeys' interests with those of the state. Finally, the state had a vital interest in ensuring that the horse racing industry was run honestly and safely and that the public viewed the industry in this way.<sup>115</sup> The court also found that the jockeys were not subject to the unfettered discretion of those administering the tests because all names were selected by drawing.<sup>116</sup> Those administering the test could not inject their prejudices into the selection process.

The jockeys' expectations of privacy were minimized by notice and licensure, while the state had a compelling need to test for drugs. In addition, those administering the tests did not have unlimited discretion. As a result, the court found that the state's interest outweighed the interests of the jockeys. The tests did not violate the fourth amendment reasonableness standard.<sup>117</sup>

In sum, although drug testing constitutes a search and seizure

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criminals." *Id.*

111. *Id.* at 1394.

112. *Id.* at 1396.

113. 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986).

114. For details of the breath and urine tests, *see id.* at 1093-95.

115. *Id.* at 1102.

116. *Id.* at 1103.

117. *Id.* at 1104. *See also* *Policeman's Benevolent Ass'n v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (Random drug testing of police officers was found constitutional because of intense governmental regulation of industry.); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (Random drug testing of nuclear power plant employees clearly falls within the *Shoemaker* exception to the individualized suspicion standard.); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987) (Random drug testing of bus drivers and maintenance workers is unreasonable under the fourth amendment.).



within the meaning of the fourth amendment, many of the traditional prerequisites have been abandoned. A warrant is not necessary when testing employees for drugs. In addition, probable cause has been largely replaced with the less stringent standard of reasonable suspicion. When employees work in hazardous positions, however, even reasonable suspicion may not be necessary. Drug testing is new to the concept of search and seizure and courts have applied the fourth amendment in a realistic way rather than rigidly enforcing the warrant and probable cause requirements.

#### IV. PROCEDURAL DUE PROCESS: AN OVERVIEW<sup>118</sup>

The due process rights of federal employees are derived from the fifth amendment, whereas the due process rights of state and local government employees stem from the fourteenth amendment.<sup>119</sup> The right to procedural due process acts as "an institutional check on arbitrary governmental action by imposing procedural limitations on the government's power to deprive citizens of protected interests."<sup>120</sup>

As noted by the Supreme Court in *Board of Regents v. Roth*,<sup>121</sup> "to determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."<sup>122</sup> The Court has made clear that *property* interests protected by the fourteenth amendment extend beyond ownership of real estate, chattels, or money.<sup>123</sup> Similarly, the Court has required due process protection of liberty beyond the formal constraints of the criminal process.<sup>124</sup> In sum, a property interest in public employment may arise if there is an "expectation of tenure" in the position.<sup>125</sup> In other words, there must be

118. Because an individual who is deprived of a liberty interest due to arbitrary and capricious governmental actions may claim a denial of the right to substantive due process, employees may resort to such a claim in the area of drug-testing. If the drug-testing program is "so unreliable as to constitute arbitrary and capricious conduct," the employer has violated the right to substantive due process. See *Survey*, *supra* note 3, at 607. This Comment, however, analyzes only procedural due process because this claim is more frequently raised.

119. See *Survey*, *supra* note 3, at 594. The fifth amendment reads, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without the due process of law . . ." U.S. CONST. amend. V. The fourteenth amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV sec. 1.

120. *Survey*, *supra* note 3, at 595.

121. 408 U.S. 564 (1972).

122. *Id.* at 570-71 (citation omitted).

123. *Id.* at 571-72.

124. *Id.*

125. See Comment, *Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623, 1636-37 (1987) [hereinafter, Comment, *Due Process Constraints*] (citing Board

a "legitimate claim of entitlement" to the job.<sup>120</sup> Furthermore, public employees may claim a liberty interest in the position held. If a termination decision is carried out in such a way as to damage the employees' reputation, liberty interests are adversely affected and the due process provisions apply.<sup>127</sup>

If employees legitimately claim a deprivation of property or liberty interests in their employment, thus implicating the due process clause, the next step is to determine what process is due. As the Supreme Court noted in *Cleveland Board of Education v. Loudermill*,<sup>128</sup> "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"<sup>120</sup> Tenured employees have a right "to oral or written notice of the charges against [them], an explanation of the employer's evidence, and an opportunity to present [their] side of the story."<sup>130</sup>

The right to a hearing is granted in all cases. It does not depend on a demonstration of success.<sup>131</sup> This hearing, however, need not be elaborate. The formality and procedural requirements may be different in each case depending on the interests involved and the substance of subsequent proceedings.<sup>132</sup> In *Matthews v. Eldridge*,<sup>133</sup> the Supreme Court outlined three factors to consider in determining the process due to individuals in these hearings. First, the privacy interests that will be affected by the hearing must be identified. Second, the risk of an erroneous deprivation of these interests under the procedures used, and the value of substitute procedures, must be determined. Third, the government's interest, including fiscal and administrative concerns that additional or substitute proceedings may require, must be considered.<sup>134</sup> Generally speaking, a full evidentiary hearing is not required.<sup>135</sup> In fact, the Supreme Court has had a ten-

of *Regents v. Roth*, 408 U.S. 564, 577-79 (1972); *Perry v. Sindermann*, 403 U.S. 593, 599-601 (1972)).

126. See *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985).

127. See Comment, *Due Process Constraints*, *supra* note 125, at 1639. "The Supreme Court has recognized that marking a citizen with a 'badge of infamy' infringes her liberty and thus implicates the due process clause." *Id.* at 1638 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). The author also notes that there may be another constitutionally protected interest in employment. Depriving employees of jobs impairs their ability to enjoy life, which implicates the "life" interest in the due process clause. This position has not gained judicial acceptance. *Id.* at 1639.

128. 470 U.S. 532 (1985).

129. *Id.* at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

130. *Id.* at 546.

131. *Id.* at 544 (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)).

132. *Id.* at 545 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)).

133. 424 U.S. 319 (1976).

134. *Id.* at 334-35.

135. *Id.* at 343.

gency to find relatively minimal pretermination proceedings constitutionally adequate.<sup>136</sup>

## V. DRUG TESTING AND PROCEDURAL DUE PROCESS

### A. *Property Interests*

Although drug testing programs most frequently spawn fourth amendment litigation, employees' rights to procedural due process have also been raised in a number of cases. In *Allen v. City of Marietta*,<sup>137</sup> the plaintiffs, employees of the Board of Lights and Water and of the City of Marietta, were fired for smoking marijuana on the job.<sup>138</sup> In addition to their fourth amendment claim, the employees maintained that their rights to procedural due process had been violated. In analyzing the city's employment policies, the district court held that the employees had property interests in their jobs. Hence, they were entitled to due process before termination. In this case due process mandated that the employees could only be discharged for cause shown.<sup>139</sup>

Although the employees were not given notice and an opportunity to be heard prior to their dismissal, they were given an adequate post-termination proceeding, which, as the plaintiffs conceded, cured any prior defect.<sup>140</sup> The post-termination proceeding was before the Pension Board of the Board of Lights and Water. Each plaintiff was given a reason for dismissal (drug use on the job) and a list of witnesses expected to testify at the hearing. The plaintiffs also received a brief synopsis of the witnesses' expected testimony. In addition, the plaintiffs' counsel was allowed to cross-examine witnesses and produce witnesses who would testify in favor of the plaintiffs.<sup>141</sup> The court found that the two essential elements of procedural due process, notice and an opportunity to be heard, were satisfied.<sup>142</sup>

In contrast to *Allen*, procedural protections were found to be completely lacking in *Capua v. City of Plainfield*.<sup>143</sup> The district court

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136. Comment, *Due Process Constraints*, *supra* note 125, at 1641 (citing *Schweiker v. McClure*, 456 U.S. 188 (1982) and *Schall v. Martin*, 467 U.S. 253 (1984)).

137. 601 F. Supp. 482 (N.D. Ga. 1985).

138. For a detailed discussion of the facts of *Allen* and the employees' claim of a fourth amendment violation through a warrantless search, *see supra* notes 71-76 and accompanying text.

139. *Allen v. City of Marietta*, 601 F. Supp. at 492-93.

140. *Id.* at 493-94.

141. *Id.*

142. *Id.* at 494. Furthermore, plaintiffs failed to exhaust their avenues of administrative review by not appealing to the Marietta City Council. Accordingly, the district court had no jurisdiction to hear the appeal. *Id.*

143. 643 F. Supp. 1507 (D.N.J. 1986). For a detailed discussion of the facts of *Capua* and a discussion of the reasonable expectation under the fourth amendment, *see supra* notes 55-60 and accompanying text.

found that the plaintiffs, city fire fighters, were "endowed with constitutionally protected interests in their tenure pursuant to the New Jersey statutory scheme governing municipal fire fighters."<sup>144</sup> The statutory scheme granted the plaintiffs a property interest in their jobs.<sup>145</sup>

The court found that both the testing procedure and the procedure for dismissal of employees were defective. The employees had no notice of the testing procedure, no opportunity to voice objections in a hearing, and no chance to evaluate and review their test results. Furthermore, the employer did not give employees who tested positive written notice of the charges against them until after their termination.<sup>146</sup>

### B. Liberty Interests

As previously stated,<sup>147</sup> termination of employees may violate protected liberty interests if, in conjunction with the dismissal, damage is done to the individuals' reputations. The Supreme Court confronted this issue in *Paul v. Davis*,<sup>148</sup> where a photograph of the respondent, along with his name, was included in a flier distributed to local merchants in Louisville, Kentucky. The flier explicitly stated that the photographs and names corresponded to "active shoplifters" in the area. Although the respondent had been charged with shoplifting, the charges were dismissed after the circulation of the flier.<sup>149</sup> The respondent brought suit against the Chief of Police (who distributed the fliers) claiming a "violation of rights guaranteed . . . by the Constitution of the United States."<sup>150</sup> Although the district court found no such violation, the court of appeals reversed, concluding that the respondent's claim alleged facts that constituted a denial of due process.<sup>151</sup>

The Supreme Court stated that "[t]he words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above

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144. *Id.* at 1520.

145. *Id.* The district court also noted that the plaintiffs had a liberty and property interest in their individual reputations, and in their honor and integrity. *Id.*

146. *Id.* at 1521. *See also* *Jones v. McKenzie*, 628 F. Supp. 1500, 1507 (D.D.C. 1986) (denial of a hearing to a school bus attendant who was discharged for drug use violated the constitutional right to procedural due process), *rev'd in part and vacated in part on other grounds*, 833 F.2d 335 (D.C. Cir. 1986). *Compare* *Shoemaker v. Handel*, 619 F. Supp. 1089, 1104-1105 (D.N.J. 1985), *aff'd* 795 F.2d 1136 (3d Cir. 1986) (procedure for the dismissal of jockeys who tested positive for drug use met all constitutional and statutory safeguards inherent in procedural due process).

147. *See supra* note 127 and accompanying text.

148. 424 U.S. 693 (1976).

149. *Id.* at 695-96.

150. *Id.* at 696.

151. *Id.* at 697.

other interests that may be protected by state law."<sup>152</sup> Reputation alone, therefore, was not sufficient to invoke the protection of the due process clause without an "accompanying loss of government employment."<sup>153</sup> Since the respondent could not claim a loss of employment, the interest asserted in his reputation was neither liberty nor property under the fourteenth amendment.<sup>154</sup> This was true regardless of how seriously the circulating flier harmed his reputation.<sup>155</sup>

A similar issue was raised in *Mosrie v. Barry*.<sup>156</sup> The case involved a police officer's complaint that a transfer of employment, along with public criticism of his previous job performance, damaged his reputation, thus implicating his liberty interest under the due process clause.<sup>157</sup> The Court of Appeals for the District of Columbia held that the harms suffered by the appellant did not satisfy the requirements of *Paul*. In order for a claim of defamation to give rise to a right to procedural due process, the court stated that there must also be "a discharge from government employment or at least a demotion in rank and pay."<sup>158</sup> Since the appellant was simply transferred, and not discharged, the court found that it would be inconsistent with the *Paul* requirement of loss of employment to find a deprivation of a liberty interest in this case.<sup>159</sup> Furthermore, the court noted that the appellant not only retained his job, but also his rank and pay. Although there was a loss of promotion potential and job responsibility, the appellant had no legal claim to these because of the employer's broad discretion in employee transfers.<sup>160</sup> As a result, the appellant was not deprived of a liberty interest.

Although the claim of a deprivation of a liberty interest has not received a great deal of attention in drug-testing cases, some courts have addressed the issue. In *Capua v. City of Plainfield*,<sup>161</sup> the district court found that city fire fighters, in addition to their property interest in employment, also had a liberty interest in "their individual reputations, and in the honor and integrity of their good

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152. *Id.* at 701.

153. *Id.* at 706.

154. *Id.* at 712.

155. *Id.*

156. 718 F.2d 1151 (D.C. Cir. 1983).

157. *Id.* at 1156-57. Although *Mosrie* also claimed a deprivation of a property interest at the district court level, this issue was not before the District of Columbia Circuit on appeal. *Id.* at 1157.

158. *Id.* at 1161.

159. *Id.*

160. *Id.* at 1161-62.

161. 643 F. Supp. 1507 (D.N.J. 1986). For a detailed discussion of the facts of *Capua* and an analysis of reasonable expectation of privacy under the fourth amendment, see *supra* notes 55-61 and accompanying text. For a discussion of *Capua* and protected property interests, see *supra* notes 143-46 and accompanying text.

names."<sup>162</sup> Thus, after the plaintiffs had been terminated for drug use, their liberty interests could not be "arbitrarily or capriciously infringed by government officials."<sup>163</sup> On the contrary, the discharged employees were entitled to due process of law. In reaching its conclusion, the district court cited *Paul*.<sup>164</sup> Although the court did not explain how *Capua* satisfied the *Paul* requirements, a close analysis of *Capua* reveals that there was at least potential harm to the discharged employees' reputations when they were charged with drug use. Furthermore, the potentially damaging information was accompanied by loss of employment.

Similarly, in *Louvorn v. City of Chattanooga*,<sup>165</sup> fire fighters brought action seeking to enjoin the city's drug-testing policy. In addition to other constitutional claims, the plaintiffs argued that the tests violated their rights under the fourteenth amendment.<sup>166</sup> The district court found that the plaintiffs had both a property interest and a liberty interest which could not be taken without due process.<sup>167</sup> The liberty interest in *Louvorn*, like that in *Capua*, was an interest in "their reputation" or "integrity."<sup>168</sup> Although *Louvorn* made no mention of the *Paul* case, it is clear that the fire fighters had a liberty interest in their reputations and that a dismissal for drug use would damage this reputation. Thus, under *Paul*, the due process clause would be implicated. The court recognized that discharged employees were entitled to due process, and held that the procedures used by the city were appropriate.<sup>169</sup>

### C. Proposed Minimum Requirements for Procedural Due Process

When the due process clause is implicated, procedural requirements may vary from case to case depending on the facts and circumstances.<sup>170</sup> When employers establish drug-testing programs, however, they should comply with a number of minimum procedural requirements. The end result of such compliance will benefit employers by reducing the likelihood of lawsuits, while at the same time benefiting employees by protecting their rights under the fourteenth amendment.

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162. *Id.* at 1520.

163. *Id.* at 1520-21.

164. *Id.* at 1521.

165. 647 F. Supp. 875 (E.D. Tenn. 1986). For a detailed discussion of the facts of *Louvorn* and an analysis of individualized suspicion under the fourth amendment, see *supra* notes 87-92 and accompanying text.

166. *Id.* at 877.

167. *Id.* at 883.

168. *Id.*

169. *Id.* For an analysis of a situation not involving drug testing where a deprivation of a liberty interest in reputation was established, see *Doe v. United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985).

170. See *supra* note 132 and accompanying text.

Since drug-testing methods tend to be inaccurate,<sup>171</sup> employees should be granted a hearing which allows for the presentation of evidence on their behalf before termination. At the very least, employees should have the opportunity "to show the absence of on-the-job impairment."<sup>172</sup> Furthermore, there is judicial support for requiring employers to preserve the urine specimen for employees to have it retested, if they so choose.<sup>173</sup> In addition to the opportunity to retest, employees should be given the chance to evaluate whether proper laboratory techniques were used in testing the specimen.<sup>174</sup> The standard of proof at the hearing should be relatively high. "The special nature of the government-individual relationship means that the government must act with a higher degree of certainty . . . when it deprives a citizen of a state-created interest."<sup>175</sup> Although drug testing is used to determine whether employees have used drugs in the past, due process also requires a showing that employees will continue to use drugs in the future, thus constituting a threat to the employers' interests.<sup>176</sup> Proof of drug use may raise a presumption of continued abuse. If so, employees should be given the opportunity to rebut this presumption.<sup>177</sup>

One technique which protects both the employers' interests in having a productive work force and the employees' interests in continued employment is the use of employee assistance programs (EAPs). Such programs provide employees with counseling and drug rehabilitation opportunities. Instead of firing employees with drug abuse problems, employees are required to seek therapy. After successful completion of the program, employees are rehired and resume their previous duties. In this way, employers retain experienced personnel and employees are not forced into unemployment.<sup>178</sup> Although state legislation can make an EAP option mandatory, there appears to be no constitutional requirement for establishing these programs. The due process clause requires only notice and an opportunity to be heard.<sup>179</sup> There is, however, always the possibility that the Supreme Court, when presented with such an issue, would opt for an expansive reading of the due process

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171. See generally note 49 (The EMIT test tends to be inaccurate and should always be confirmed by a second, more accurate GC/MS test.).

172. Comment, *Due Process Constraints*, *supra* note 125, at 1651. It is, however, important to remember that a full evidentiary hearing is not required. See *supra* note 135 and accompanying text.

173. *Id.* (citing *Banks v. FAA*, 687 F.2d 92, 95 (5th Cir. 1982)).

174. *Id.* at 1653. Such an evaluation can be made by inquiring into the testing procedure through the cross-examination of the laboratory director.

175. *Id.* at 1651-52.

176. *Id.* at 1653.

177. *Id.*

178. *Id.* at 1653-54.

179. *Id.* at 1654.

clause, thus making the EAPs a requirement of due process.<sup>180</sup>

## VI. DRUG TESTING IN MAINE

### A. *State Constitutions and Statutes*

This Comment, up to this point, has focused on the laws surrounding drug testing of public employees, and, in limited circumstances, of private employees who are able to establish a "sufficient nexus" between private employers and a governmental entity.<sup>181</sup> Private, nonunionized employees who are unable to establish the appropriate nexus, however, constitute the majority of the national workforce.<sup>182</sup> Since these employees do not enjoy the same protection as public employees under the Constitution of the United States, they must look elsewhere for protection in challenging drug-testing programs. One source of protection may be the constitution of the state where the individual is employed. In order for the state constitution to be of any help, however, it must apply to private, as well as governmental, entities. Although ten state constitutions expressly provide for a right of privacy,<sup>183</sup> only the Constitution of California has been interpreted to protect individuals from both private and governmental entities.<sup>184</sup> The Constitution of the State of Maine, like the majority of other states, applies only to governmental entities. As stated in the preamble to the Maine Constitution: "We the people of Maine . . . do agree to form ourselves into a free and independent State, by the style and title of the *State of Maine*, and do ordain and establish the following Constitution *for the government of the same*."<sup>185</sup> Private employees in Maine, therefore, are unable to invoke the protection of the state constitution in challenging drug-testing programs.

Until recently, this meant that such employees had no recourse whatsoever—they were forced to endure the drug-testing programs of their employers. The Maine State Legislature, however, responded to the problem by drafting a number of bills designed to prohibit drug testing altogether or to limit its applicability.<sup>186</sup> After a long battle between the Legislature and the Governor, and be-

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180. *Id.* Judging from the Supreme Court's past behavior, however, this seems unlikely. As noted earlier, the Supreme Court has had a tendency to find minimal pretermination proceedings constitutionally adequate. *See id.* at 1641.

181. *See supra* notes 20-33 and accompanying text.

182. *Survey, supra* note 3, at 650.

183. The ten states are: Arizona, Florida, Louisiana, South Carolina, Washington, Alaska, California, Hawaii, Illinois, and Montana. *Id.* at 651.

184. *Id.*

185. ME. CONST. preamble (emphasis added).

186. Among the bills drafted were the following: L.D. 105 (113th Legis. 1987); L.D. 156 (113th Legis. 1987); L.D. 1400 (113th Legis. 1987); L.D. 1788 (113th Legis. 1987); L.D. 1870 (113th Legis. 1987); L.D. 1871 (113th Legis. 1987); L.D. 2589 (113th Legis. 1988); L.D. 537 (114th Legis. 1989).



tween the legislative members themselves, a compromise was finally reached. On July 1, 1989, Legislative Document (L.D.) 833,<sup>187</sup> An Act Relating to Drug Testing, was passed by both the Maine Senate and House of Representatives.<sup>188</sup> Six days later, the Governor signed the bill into law.<sup>189</sup> The law, however, was subsequently amended by L.D. 2049<sup>190</sup> which was given gubernatorial approval on April 17, 1990. Since L.D. 2049 contained an "emergency clause" in its preamble, the amendments took effect immediately upon approval.<sup>191</sup>

The drug-testing statute fills the gap created by the Maine Constitution—that is, it provides protection for private employees who are subjected to drug testing programs. As noted in L.D. 833, "[a]lthough recognizing that constitutional protections do not extend to the private sphere, it is manifest that all individuals retain certain rights to their personal privacy which may not be infringed upon without substantial justification."<sup>192</sup> Since unrestricted workplace drug-testing policies "pose grave risks of unduly infringing upon the privacy rights of employees," the statute restricts the testing procedures and requires the institution of specific program guidelines.<sup>193</sup> The statute attempts to accomplish this goal by requiring, in part, that all employers who wish to establish a drug-testing program develop a written policy providing, at a minimum, for "[t]he procedure and consequences of an employee's voluntary admission of a substance abuse problem and any available assistance, including the availability and procedure of the employer's employee assistance program."<sup>194</sup> If substance abuse testing may oc-

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187. L.D. 833 (114th Legis. 1989).

188. Legis. Rec. S-1393, H-1179 (1989). The Act was codified as ME. REV. STAT. ANN. tit. 26, §§ 681-90 (Supp. 1989-1990) (enacted by P.L. 1989, ch. 536, §§ 1-2).

189. It went into effect on January 1, 1990. See ME. REV. STAT. ANN. tit. 26, § 690(2), (Supp. 1989-1990).

190. L.D. 2049 (114th Legis. 1990).

191. These amendments were enacted by P.L. 1990, ch. 832, §§ 1-13. It should also be noted that another minor amendment to the drug-testing statute (not discussed in the body of this Comment) was entitled "An Act to Amend the Implementation Date of the Drug Testing Laws" (P.L. 1990, ch. 604, §§ 1-3).

Acts of the Legislature normally do not become effective until 90 days after adjournment. An exception, however, applies in the case of "emergencies," where the Act may become effective immediately upon approval.

192. L.D. 833, Statement of Fact (114th Legis. 1989). It is, however, important to note that the statute applies to public, as well as private, employees and employers. "Employer" is defined as "any person, partnership, corporation, association or other legal entity, *public or private*, that employs one or more employees." ME. REV. STAT. ANN. tit. 26, § 682(3) (Supp. 1989-1990) (emphasis added). "Employee" is defined as "a person who is permitted, required or directed by *any employer* to engage in any employment for consideration of direct gain or profit." *Id.* § 682(2) (emphasis added). Nonetheless, the major reason for enacting the statute was to protect private employees.

193. L.D. 833, Statement of Fact (114th Legis. 1989).

194. ME. REV. STAT. ANN. tit. 26, § 683(2)(A) (Supp. 1989-1990).

cur, the written policy must describe which positions, if any, will be subject to drug testing (including any positions subject to random drug testing), the procedures for the collection and storage of samples, the chain of custody of the samples sufficient to prevent tampering, the substances to be tested for, the cutoff levels for tests, the consequences of a confirmed positive test result, the consequences of a refusal to submit to testing, the opportunities for rehabilitation following a confirmed positive result, a procedure to appeal and contest the accuracy of the tests, and any other matters required by rules adopted by the Department of Labor.<sup>195</sup>

Each policy must be submitted to the Department of Labor for its review.<sup>196</sup> Where the policy does not comply with the statute, the Department cannot approve it. The employer, however, will be notified of the defective areas and will be given a chance to rectify the policy.<sup>197</sup> If the employer makes the appropriate adjustments, approval will then be granted.

## B. Imposition of Drug Testing

### 1. The Warrant Requirement?

Although one of the purposes of the Maine drug-testing statute is to protect the privacy interests of employees from undue invasion,<sup>198</sup> the statute does not require the employer to obtain a warrant prior to testing applicants and employees for drugs. This policy is consistent with the laws governing drug testing of public employees. The purpose of the warrant requirement is to protect individuals against the arbitrary acts of government agents and to ensure that any intrusion is necessary. In a situation where the testing procedures are narrowly and specifically defined and standardized in nature, the need for a warrant is drastically reduced.<sup>199</sup>

### 2. Probable Cause

The Maine statute allows for drug testing of both applicants and employees. The testing of such individuals, however, is not left to the discretion of the employers.<sup>200</sup> On the contrary, the statute sharply limits the conditions under which testing may occur. With respect to applicants, the statute provides that the employer "may require, request or suggest" that an applicant undergo drug testing only if the applicant has been offered a position with the employer or has been offered a position on a roster of eligibility from which

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195. *Id.* § 683(2)(B-L) (Supp. 1989-1990).

196. *Id.* § 683(2)(L).

197. *Id.* § 686(1).

198. *Id.* § 681(1)(A).

199. See *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1415 (1989); *supra* text accompanying note 81.

200. See ME. REV. STAT. ANN. tit. 26, § 681(2) (Supp. 1989-1990).

employees will be chosen.<sup>201</sup> In contrast to the drug testing of applicants, employers may "require, request or suggest" that employees submit to testing only if the employer has *probable cause*.<sup>202</sup> The determination of whether probable cause exists is to be made by supervisory personnel, a licensed physician or nurse, or the employer's security personnel.<sup>203</sup> The person or persons making this determination must state, in writing, the facts upon which the determination is made, and employees shall receive a copy of the statement.<sup>204</sup>

The employer is not required to have probable cause when testing applicants for drugs. L.D. 833 notes that "[t]his was done to reflect the fact that applicants are voluntarily seeking employment from an employer with full knowledge that they may be subjected to a substance abuse test."<sup>205</sup> This position is in harmony with generally accepted fourth amendment principles. As one article states, "a reasonably performed pre-employment drug test does not violate any state or federal statute or any common law doctrine."<sup>206</sup> Since Maine's statute prevents unnecessary "fishing expeditions"<sup>207</sup> by requiring the employer to offer an employee a job or a position on a roster of eligibility prior to drug testing, it provides the applicant with more protection than is generally required.

Probable cause testing of employees, however, is not in harmony with generally accepted principles of public employee drug testing. As discussed earlier,<sup>208</sup> probable cause is not an "irreducible require-

201. *Id.* § 684(1). The number of persons on the roster cannot exceed the number of applicants hired by the employer in the preceding six months. Furthermore, the offer of employment or the offer of a position on the roster of eligibility may be conditioned on the applicant receiving a negative test result. *Id.* § 684.

202. *Id.* § 684(2). Section 682(6) provides a definition for probable cause:

"Probable cause" means a reasonable ground for belief in the existence of facts that induce a person to believe that an employee may be under the influence of a substance of abuse, provided that the existence of probable cause may not be based exclusively on any of the following:

A. Information received from an anonymous informant;

B. Any information tending to indicate that an employee may have possessed or used a substance of abuse off duty, except when the employee is observed possessing or ingesting any substance of abuse either while on the employer's premises or in the proximity of the employer's premises during or immediately before the employee's working hours; or

C. A single work-related accident.

Although probable cause drug testing is the general standard, it is important to note that random drug testing is allowed under very limited circumstances. *See id.* § 684(3); *infra* notes 212-20 and accompanying text.

203. ME. REV. STAT. ANN. tit. 26, § 684(2)(A) (Supp. 1989-1990).

204. *Id.* § 684(2)(B).

205. L.D. 833, Statement of Fact (114th Legis. 1989).

206. *Development in the Law, supra* note 15, at 599-600.

207. L.D. 833, Statement of Fact (114th Legis. 1989).

208. *See* notes 84-97 and accompanying text.

ment of a valid search."<sup>209</sup> In fact, when the community's interest in ensuring a drug-free workplace outweighs the individual's expectation of privacy, courts have consistently allowed drug testing pursuant to a less stringent standard than probable cause, such as reasonable or individualized suspicion.<sup>210</sup>

Maine's decision to require probable cause before drug testing was, by no means, the result of oversight on the part of the Legislature. Probable cause was a compromise between two polarized groups. One group favored a very stringent standard while the other group believed that random testing was adequate. After proposing a number of bills on the subject, the two groups ultimately agreed upon the probable cause standard.<sup>211</sup>

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209. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

210. See, e.g., *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985). See also *supra* notes 84 and 91 for the definitions of reasonable suspicion and probable cause.

211. One of the earliest bills on drug testing, L.D. 1400 (113th Legis. 1987), proposed a very strict standard. Although the bill stated that the employer must have probable cause to test the employees for drugs, it was the bill's requirements to establish probable cause that set it apart from the standard ultimately adopted. According to L.D. 1400, supervisory personnel made the determination of probable cause *in the first instance*. If the employee disputed the existence of probable cause, the urine sample could be taken, but no test could be performed until after the existence of probable cause was confirmed by a review panel. The employee had the burden of proving that probable cause did not exist. After the hearing, if the panel determined that probable cause did not exist, the sample was to be disposed of without testing. If, however, the determination of probable cause was upheld, testing would be conducted. *Id.* § 1 (proposing ME. REV. STAT. ANN. tit. 26, § 683(7)(A)(B) for enactment). The effect of this provision was to grant the employee an appeal process before any determination as to the presence or absence of drugs in the employee's urine sample had been made. The supporters of probable cause, in the context of L.D. 1400, felt that the standard ensured that "those who are breaking the law will have to face drug testing." Legis. Rec. S-670 (1st Reg. Sess. 1987) (statement of Sen. Dutremble). The standard did not single out innocent employees. The bill's opponents, however, believed that employees using drugs on the job were threatening the lives of their coworkers, and that these coworkers "would gladly say, yes I will have the test, but keep me safe from those who are abusing their rights." *Id.* S-505 (statement of Sen. Sewall). As a result, the opponents believed that the right to randomly test for drugs should be preserved. Some opponents, however, were only interested in random testing in safety-sensitive positions. Nonetheless, these people still were opposed to probable cause testing absent random testings in specified instances. Furthermore, Governor McKernan, in his letter to the Legislature vetoing the bill, stated that the bill was "flawed in certain specific areas." Legis. Rec. S-646 (1987). One of the areas mentioned was that the bill set forth such complicated procedures for testing, laboratory certification, rulemaking, and internal arbitration panels that the cost alone would deter employers from instituting drug-testing programs altogether. *Id.* Although the Governor did not specifically single out the probable cause review panel, such a panel fell within the realm of "procedures for testing" and "arbitration panels" mentioned in his letter. Governor McKernan's veto was sustained. Legis. Rec. S-672 (1987).

In L.D. 1870 (113th Legis. 1987), a bill subsequent to L.D. 1400, employers were

### 3. *Random Drug Testing*

The issue of random drug testing inevitably arises whenever the appropriate standard for drug testing is debated. In the public sector, random testing is allowed under limited circumstances.<sup>212</sup> When public employees work in closely regulated industries, their privacy expectations are diminished. This, added to a compelling governmental interest in testing for drugs, often influences the court's finding that random searches are reasonable under the circumstances.<sup>213</sup> Examples of closely regulated industries include the federally regulated railroad industry,<sup>214</sup> the horse racing industry,<sup>215</sup> and the nuclear power industry.<sup>216</sup>

Although the Maine drug-testing statute adopts probable cause as the standard for testing employees, it also allows for random testing under very limited circumstances. When the employee "works in a position the nature of which would create an unreasonable threat to the health or safety of the public or the employee's co-workers if the employee were under the influence of a substance of abuse," random testing is permitted.<sup>217</sup> In addition, the statute expressly states that the requirements of random testing must be construed narrowly.<sup>218</sup> As a result, the Maine statute mirrors the law governing random drug testing of public employees in that such testing is allowed only

not required to have probable cause prior to drug testing. The only limitation on the employer was that testing had to be done in compliance with the employer's written policy. *Id.* § 1 (proposing ME. REV. STAT. ANN. tit. 26, § 684(2) for enactment). The written policy was to be developed in consultation with the employees. *Id.*, Statement of Fact. Interestingly, the Senate's amendment to L.D. 1870 proposed a probable cause standard very similar to the standard in the current statute. Sen. Amend. B to L.D. 1870, No. S-226, § 2 (113th Legis. 1987) (proposing ME. REV. STAT. ANN. tit. 26, § 684(2) for enactment). The bill, however, was indefinitely postponed. Legis. Rec. H-1185, S-1229 (1987).

The opposite poles represented by L.D. 1400 and L.D. 1870 ultimately resulted in a compromise on the issue of probable cause. In L.D. 833, probable cause testing was adopted, but the review procedure proposed in L.D. 1400 was excluded. L.D. 833, § 684(2) (114th Legis. 1989); ME. REV. STAT. ANN. tit. 26, § 684(2) (Supp. 1989-1990). Although clearly a less stringent standard than had originally been proposed, the probable cause requirement adopted in Maine is more rigid than the standard applied by courts faced with federal constitutional challenges to drug testing. Since, at the time of this Comment, there have been no cases involving the statute, it is difficult to predict how strictly the courts will apply the probable cause standard.

212. See *supra* note 96 and accompanying text.

213. See *supra* notes 98-117 and accompanying text.

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

215. See *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986).

216. *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988).

217. ME. REV. STAT. ANN. tit. 26, § 684(3)(B) (Supp. 1989-1990). Random testing is also allowed when the employer and employee have bargained for such testing in a collective bargaining agreement. *Id.* § 684(3)(A).

218. *Id.* § 684(3)(B). Until cases are generated in this area, it will be difficult to predict just how narrowly the courts will interpret this section.

in a limited number of cases.<sup>219</sup> The inclusion of random drug testing in the statute, however, came about only after bitter struggle and heated debate. A compromise was needed, and the end result was limited use of random testing.<sup>220</sup>

In contrast to its heavy emphasis on individual privacy rights, however, the Maine statute has relatively little to say concerning the process due to employees terminated for drug use. According to the statute, employers "may use a confirmed positive result . . . as a factor in" discharging employees, disciplining employees, or changing the employees' work assignments.<sup>221</sup> Before any such action may be taken, however, employers must provide employees with an opportunity to participate in a rehabilitation program.<sup>222</sup> Although the statute does not specifically state that employees who are termi-

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219. Although the state statute adopts the general philosophy of random testing of public employees, it does have limitations. For example, the statute does not apply to nuclear electrical generating facilities and their employees (including independent contractors and employees of independent contractors who are working at the nuclear plant). Furthermore, the statute does not apply to employees who are subject to substance abuse testing under any federal law or regulation or under rules of the Maine Department of Public Safety that incorporate any federal laws or regulations relating to drug testing for motor carriers. *Id.* § 681(8).

220. In L.D. 1400 (113th Legis. 1987) the employer was allowed to randomly test only after an employee had received a confirmed positive result and if the employee chose not to undergo rehabilitation. Although the employer could not randomly test employees participating in a rehabilitation program, such testing could be conducted by the treatment provider. *Id.* § 1 (proposing ME REV. STAT. ANN. tit. 26, § 683(8) for enactment). Many legislators, however, were opposed to such a limited approach to random testing. Senator Donald Collins suggested that random testing should be allowed for those employees working in safety-sensitive positions. Legis. Rec. S-501 (1987). This view was reiterated by Senator Thomas Perkins who stated that the solution to drug testing boils down to either random testing in sensitive areas or probable cause testing. "[I]f you wait for probable cause it may be too late." *Id.* at S-506. In vetoing the bill, Governor McKernan expressly stated that by requiring probable cause testing of all employees, the bill failed "to recognize a difference between employees whose jobs affect directly the safety of fellow employees or the general public and those employees who do not hold safety sensitive positions." Legis. Rec. S-646 (1987). Governor McKernan vetoed L.D. 1788 (113th Legis. 1987) on the same grounds. See Legis. Rec. H-1154 (1987).

Standing firm on their convictions, however, the opponents of random drug testing introduced a subsequent bill which sought to prohibit random testing altogether. L.D. 1871 (113th Legis. 1987). The bill was to be submitted to the voters of Maine according to a statutory referendum procedure. *Id.* § 2. Although the bill passed in both the House and Senate, the Governor again exercised his veto power because, in his view, "the nature of L.D. 1871 [made] it an inappropriate issue for the legislature to put before the people of Maine in a referendum vote . . ." Legis. Rec. S-1346 (1987).

Recognizing Governor McKernan's ardent belief in random testing for safety-sensitive positions, and his effective use of the veto, the opponents of random testing ultimately admitted defeat. When L.D. 833 was introduced, it allowed for random testing of employees in safety-sensitive positions. The random testing provisions became a part of Maine's drug-testing statute, and they have not been modified or amended.

221. ME REV. STAT. ANN. tit. 26, § 685(2)(A) (Supp. 1989-1990).

222. *Id.* § 685(2)(B).

nated for drug use are entitled to notice and an opportunity to be heard, title 26, section 683 of the Maine Revised Statutes requires that the employers' written policies set up "[a] procedure under which an employee or applicant who receives a confirmed positive result may appeal and contest the accuracy of that result."<sup>223</sup> In addition, another section of the statute provides that at the request of employees or applicants, employers shall, at the time the urine sample is taken, segregate a portion of that sample for the employees' or applicants' own testing.<sup>224</sup> Although not stated in the language of the statute, such a provision could only be useful to employees when the accuracy of the test result is appealed.

The Maine statute tracks the law governing drug testing of public employees in that the employees are entitled to procedural due process prior to termination. The statute requires that the written policy include procedures to appeal and contest the accuracy of a result, and the policy must be provided to each employee.<sup>225</sup> Nonetheless, the procedural guidelines are relatively scant. Since the Department of Labor reviews each written policy and has the power to accept or reject it,<sup>226</sup> the determination of how complete a hearing the employee will receive ultimately depends on the Department's judgment. Until the Department has approved enough policies to establish a pattern of what procedure is required, it is impossible to predict how close the procedure will be to that expected by courts faced with a procedural due process challenge to a drug-testing program.<sup>227</sup>

## VII. COMPARISON TO OTHER STATE STATUTES

Although the concept of drug testing in Maine is relatively new, on a national scale it is not a novel idea. A number of states have passed statutes within the last three years, including Connecticut, Iowa, Minnesota, Montana, Rhode Island, Utah, and Vermont.<sup>228</sup>

223. ME. REV. STAT. ANN. tit. 26, § 683(2)(K) (Supp. 1989-1990). This provision remained unchanged throughout the numerous drug-testing bills proposed. *See, e.g.*, L.D. 1400, § 1 (113th Legis. 1987) (proposing ME. REV. STAT. ANN. tit. 26, § 683(2)(M) for enactment); L.D. 1788, § 1 (113th Legis. 1987) (proposing ME. REV. STAT. ANN. tit. 26, § 683(2)(L) for enactment); L.D. 1870, § 1 (113th Legis. 1987) (proposing ME. REV. STAT. ANN. tit. 26, § 683(2)(L) for enactment); L.D. 2589, § 1 (113th Legis. 1988) (proposing ME. REV. STAT. ANN. tit. 26, § 683(2)(L) for enactment). There was, as a result, no significant debate on procedural due process.

224. ME. REV. STAT. ANN. tit. 26, § 683(5)(A) (Supp. 1989-1990).

225. *Id.* § 683(3).

226. *Id.* § 686.

227. At the time this Comment was written, no program had been approved by the Department of Labor.

228. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 31-51t to 31-51aa (West Supp. 1990); IOWA CODE ANN. § 730.5 (West Supp. 1990); MINN. STAT. ANN. §§ 181.950-957 (West Supp. 1990); MONT. CODE ANN. § 39-2-304 (1989); R.I. GEN. LAWS § 28-6.5-1 (Supp. 1989); UTAH CODE ANN. § 34-38-1 to 34-38-15 (1988); VT. STAT. ANN. tit. 21, §§ 511-

The Minnesota and Vermont statutes, like Maine's drug-testing law, apply to both public and private employers.<sup>229</sup> On the other hand, the statutes of Connecticut and Utah expressly exclude public employers.<sup>230</sup> The statutes of Iowa, Montana, and Rhode Island, however, do not include or exclude public employers. Iowa and Rhode Island use the term "employer," without providing any definition.<sup>231</sup> By the same token, Montana uses the words "person, firm, corporation, or other business entity or representative thereof" without further clarification.<sup>232</sup>

Although Maine's drug-testing statute and the statutes of other states differ in scope, none of the statutes require a warrant prior to drug testing. The majority of these statutes do, however, require employers to provide all employees subject to drug testing with a copy of the written policy outlining the drug-testing procedures.<sup>233</sup> As a result, although employees do not have the protection of the warrant requirement, they do have notice of "the place to be searched, and the . . . things [i.e. urine] to be seized."<sup>234</sup>

Maine's probable cause requirement is more stringent than the standard applied by courts faced with federal constitutional challenges to drug testing. Just as the Maine Legislature was divided over the appropriate standard to apply, other states have had differing views. Both Iowa and Vermont require employers to have probable cause to believe that employees are using drugs on the job prior to drug testing.<sup>235</sup> In addition, although Rhode Island and Montana

520 (1987). See also *Survey*, *supra* note 3, at 654 & n.667.

229. ME. REV. STAT. ANN. tit. 26, § 682(3) (Supp. 1989-1990); MINN. STAT. ANN. § 181.950(7) (West Supp. 1990); VT. STAT. ANN. tit. 21, § 511(6) (1987).

230. CONN. GEN. STAT. ANN. § 31-51t(2) (West Supp. 1990); UTAH CODE ANN. § 34-38-2(3) (1988).

231. See, e.g., R.I. GEN. LAWS § 28-6.5-1(A) (Supp. 1989); IOWA CODE ANN. § 730.5(2) (West Supp. 1990).

232. See, e.g., MONT. CODE ANN. § 39-2-304(1) (1989). This statute, however, may imply that only private employers are included because the terms "person, firm, corporation, or other business entity or representative" are usually associated with the private sector.

233. See, e.g., MINN. STAT. ANN. § 181.952(2) (West Supp. 1990) ("An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy . . ."); MONT. CODE ANN. § 39-2-304(2) (1989) ("Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other business entity or its representative shall adopt a written testing procedure and make it available to all persons subject to testing."); UTAH CODE ANN. § 34-38-7(1) (1988) ("Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees."); VT. STAT. ANN. tit. 21, § 514(2) (1987) ("The employer shall provide all persons tested with a written policy that identifies the circumstances under which persons may be required to submit to drug tests . . .").

234. U.S. CONST. amend. IV.

235. IOWA CODE ANN. § 730.5(3)(a) (West Supp. 1990); VT. STAT. ANN. tit. 21, §



do not expressly require employers to have probable cause prior to testing, these states have standards which approximate Maine's probable cause standard. The Maine statute defines probable cause, in relevant part, to mean "a *reasonable ground for belief* in the existence of facts that induce a person to believe that an employee may be under the influence of a substance of abuse . . . ." <sup>236</sup> The Rhode Island statute requires employers to have "*reasonable grounds to believe . . . that the employee's use of controlled substances is impairing his or her ability to perform his or her job . . . .*" <sup>237</sup> Similarly, the Montana statute requires that employers have "*reason to believe that the employee's faculties are impaired . . . .*" <sup>238</sup> The remaining states have less stringent requirements. Connecticut and Minnesota have standards of "reasonable suspicion," <sup>239</sup> while Utah has no standard at all. Employers may test employees on any basis. <sup>240</sup>

In contrast to the appropriate drug-testing standard, random drug testing has produced more uniformity among the states. Montana, Rhode Island, and Vermont prohibit random testing under all circumstances, except when such testing is mandated by federal law or regulation. <sup>241</sup> On the other hand, Connecticut and Minnesota prohibit random testing generally, except when employees work in safety-sensitive positions. <sup>242</sup> Iowa also goes beyond the Montana, Rhode Island, and Vermont statutes by permitting pre-employment random testing of correctional officers and by allowing such testing in order to determine whether employees are eligible to receive workers' compensation. <sup>243</sup> The Maine statute is similar in nature to the Connecticut and Minnesota statutes because it allows for random testing when the employee's position "would create an unreasonable threat to the health or safety of the public or the employee's coworkers if the employee were under the influence of a substance of abuse." <sup>244</sup> Only Utah permits random testing without limitation. <sup>245</sup>

513(c)(1) (1987). In contrast to the Maine statute, however, neither the Iowa nor Vermont statute defines probable cause. For Maine's definition, see *supra* note 202.

236. ME. REV. STAT. ANN. tit. 26, § 682(6) (Supp. 1989-1990) (emphasis added). See *supra* note 202.

237. R.I. GEN. LAWS § 28-6.5-1(A) (Supp. 1989) (emphasis added).

238. MONT. CODE ANN. § 39-2-304(c) (1989) (emphasis added).

239. CONN. GEN. STAT. § 31-51x(a) (West Supp. 1990); MINN. STAT. ANN. § 181.951(5) (West Supp. 1990). The Minnesota statute defines "reasonable suspicion" as "a basis for forming a belief based on specific facts and rational inferences drawn from those facts." *Id.* § 181.950(12).

240. UTAH CODE ANN. § 34-38-3 (1988). See *Survey, supra* note 3, at 656.

241. MONT. CODE ANN. § 39-2-304(c) (1989); R.I. GEN. LAWS § 28-6.5-1(H) (Supp. 1989); VT. STAT. ANN. tit. 21, § 513(b) (1987).

242. CONN. GEN. STAT. § 31-51x(b) (West Supp. 1990); MINN. STAT. ANN. § 181.951(4) (West Supp. 1990).

243. IOWA CODE ANN. § 730.5(2) (West Supp. 1990).

244. ME. REV. STAT. ANN. tit. 26, § 684(3) (Supp. 1989-1990).

In contrast to its emphasis on probable cause and random drug testing, the Maine statute devotes much less energy to the requirements of procedural due process.<sup>246</sup> Employees in Maine are given the opportunity to appeal and contest the accuracy of the test results.<sup>247</sup> Like Maine's statute, Iowa, Minnesota, Montana, Rhode Island, and Vermont statutes all provide the employee with some form of appeal, but none of the statutes outline the minimum requirements of procedural due process.<sup>248</sup>

#### VIII. CRITICAL ANALYSIS OF THE MAINE DRUG TESTING STATUTE

Prior to the adoption of the Maine drug-testing statute, private employers had broad discretion to institute drug-testing programs. Private employees had no recourse to the federal or state constitutions, because they protect only public employees.<sup>249</sup> They could only challenge such programs on common law grounds.<sup>250</sup> With the adoption of the statute, employers' discretion was limited, thus protecting employees' privacy interests. For this reason, the statute is a step in the right direction. A comparison of the Maine drug-testing statute to the standards established by courts dealing with federal constitutional challenges to drug testing and to the statutes of other states, shows that some provisions of the Maine statute correctly balance the employers' and employees' interests. Other provisions, by contrast, go too far, and some do not go far enough.

The absence of a warrant requirement for the implementation of

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245. UTAH CODE ANN. § 34-38-3 (1988). This section provides that "[i]t is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol . . . as a condition of hiring or continued employment." Since the section provides no limitation on random testing, and since there is no limitation found in any other provision, it is clear that random testing is permitted in Utah.

246. See *supra* notes 221-27 and accompanying text.

247. ME. REV. STAT. ANN. tit. 26, § 683(2)(K) (Supp. 1989-1990).

248. IOWA CODE ANN. § 730.5(3)(e) (West Supp. 1990) ("An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test."); MINN. STAT. ANN. § 181.952(5)-(6) (West Supp. 1990) (An employer's written policy must include information concerning "the right of an employee or job applicant to explain a positive test result on a confirmatory test . . . and any other appeal procedures available."); MONT. CODE ANN. § 39-2-304(3) (1989) ("The person tested must be given the opportunity to rebut or explain the results" of the drug tests.); R.I. GEN. LAWS § 28-6.5-1(F) (Supp. 1989) (The employer must provide the employee "with a reasonable opportunity to rebut or explain the results."); VT. STAT. ANN. tit. 21, § 515(a) & (b) (1987) ("An employer shall provide an employee or applicant who has a positive test result an informal meeting to explain the results . . ." The employee shall then be given the opportunity to test a portion of the original sample at an independent laboratory.).

249. See *supra* text accompanying note 15.

250. Some of the more frequent common law challenges to drug testing programs include: wrongful discharge, invasion of privacy, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. See *Survey, supra* note 3, at 658.

drug-testing programs in Maine is appropriate. As argued earlier,<sup>251</sup> where testing procedures are narrowly defined and standardized in nature, the need for a warrant is reduced because there is less opportunity for employers to act in an arbitrary manner. The drug-testing procedures which must be followed in Maine are described at length in the drug-testing statute.<sup>252</sup> In addition to submitting the mandatory written policy to the Department of Labor for approval, employers must give employees a copy of the policy at least thirty days before any portion of the written policy applicable to the employees takes effect. By the same token, if an employer wishes to test an applicant for drug use, the employer must provide the applicant with a copy of the policy before administering the test.<sup>253</sup> The statute also requires that drug testing be done "in a qualified testing laboratory,"<sup>254</sup> with positive screening tests being followed by confirmation tests.<sup>255</sup> The drug-testing report of the laboratory cannot disclose "the presence or absence of evidence of any physical or mental condition" or of any substances other than the specific substances employers requested to be identified.<sup>256</sup>

Furthermore, if a warrant were required before employers could test employees for drugs, it would "frustrate the purpose behind the search"<sup>257</sup> by causing delays. Such delays in the detection of drug abuse may result in serious injury to the abusing parties or their coworkers. Neither result is acceptable, and both stand as strong support for the absence of a warrant requirement.

The statute's policy of allowing applicants to be tested for drugs without any standard of proof<sup>258</sup> correctly balances the privacy interests of applicants with the interests of employers in having a safe workplace and productive workforce. Applicants seek employment

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251. See *supra* note 199 and accompanying text.

252. ME. REV. STAT. ANN. tit. 26, § 683 (Supp. 1989-1990).

253. *Id.* § 683(3).

254. *Id.* § 683(6).

255. *Id.* § 683(7). A "screening test" is defined as "an initial substance abuse test performed through the use of immunoassay technology, or a test technology of similar or greater accuracy and reliability . . . which is used as a preliminary step in detecting the presence of substances of abuse." *Id.* § 682(7)(A). A "confirmation test" is "a 2nd substance abuse test, performed through the use of gas chromatography-mass spectrometry, that is used to verify the presence of a substance of abuse . . ." *Id.* § 682(7)(A)(B).

256. *Id.* § 683(8)(A)(4).

257. Cf. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967); note 70 and accompanying text (The warrant requirement can be dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.").

258. The standardless drug testing of *applicants* should not be confused with the drug testing of *employees* which, in Maine, requires a standard of probable cause. Compare ME. REV. STAT. ANN. tit. 26, § 684(1)(A) & (B) (Supp. 1989-1990) with ME. REV. STAT. ANN. tit. 26, § 684(2)(A) & (B) (Supp. 1989-1990).

with full knowledge that they may be subjected to drug tests. If they object to such testing as an invasion of privacy, they need only refrain from submitting an application with the particular employer involved. If they decide to apply, their privacy interests are protected to the extent that no tests will be conducted until they have been offered employment or a position on a roster of eligibility.<sup>259</sup> In this way, employers are assured that the potential employee is drug-free and applicants are not subjected to an involuntary invasion of privacy.

Probable cause testing of employees, however, involves an overly stringent standard. As stated by the Supreme Court, probable cause is not an "irreducible requirement of a valid search."<sup>260</sup> In the public sector, where the balancing of governmental and individual interests suggests that the public interest will be best served by a standard that falls short of probable cause, courts have responded by adopting a standard of reasonable or individualized suspicion.<sup>261</sup> In the private sector, the interests of private employers must be balanced against the interests of private employees. Employers want a safe workplace and productive workforce. Employee drug use on the job, however, frustrates this interest. Drug use at work leads to billions of dollars in lost productivity each year, and because the work potential of employees under the influence of drugs is sharply reduced,<sup>262</sup> shoddy workmanship and defective products are the result.<sup>263</sup>

Ultimately, the public as a whole suffers. It is the consumer who is forced to endure poor service and low quality products. Such defective workmanship may also jeopardize the public's health and safety since serious injury can be caused by malfunctioning consumer products. Furthermore, losses incurred by businesses suffering from low productivity will be passed on to the consumer through higher prices. Thus a balancing of the need for a safe and productive workplace with the privacy rights of employees suggests that the public or societal interest will best be served by a standard lower than probable cause. This standard is reasonable suspicion.

There is no reason why privacy rights of private employees should be given greater protection than privacy rights of public employees when both public and private employees work under similar circumstances. Public employees are forced to give up part of their privacy

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259. ME. REV. STAT. ANN. tit. 26, § 684(1)(A) & (B) (Supp. 1989-1990). See *supra* note 201 and accompanying text.

260. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). See *supra* note 85 and accompanying text.

261. *New Jersey v. T.L.O.*, 469 U.S. at 341. See *supra* note 86 and accompanying text.

262. See *supra* notes 5-7 and accompanying text.

263. For a discussion of probable cause versus reasonable suspicion, see note 91.

rights to advance the interests of the community. The same reasoning can be applied to private employees. The community has an interest in a safe and productive private workforce. It is the duty of each private employee not to jeopardize this interest. When the community interest is balanced against the interest of the individual private employee, the community's interest should prevail. Therefore, drug testing should be allowed on the basis of reasonable suspicion. Both Connecticut and Minnesota have adopted this standard.<sup>264</sup> The Maine Legislature should be encouraged to follow their lead.

A standard such as reasonable suspicion would allow the employer to test the employee for drugs before drug use on the job reaches its acute stages. In sum, "if you wait for probable cause it may be too late."<sup>265</sup> This, however, is not to say that employees completely surrender their privacy rights when they enter the work force. By requiring a standard of reasonable suspicion, employers are not given unbridled discretion to test employees for drugs. On the contrary, "some quantum of individualized suspicion"<sup>266</sup> is required before a test can be administered.

Random drug testing is, of course, the exception to the probable cause requirement in Maine. Where employees work in positions in which drug use would create an unreasonable risk to the health and safety of the public (or to the employees' coworkers) random testing is allowed.<sup>267</sup> Although this provision created a firestorm of debate,<sup>268</sup> its inclusion in the statute is appropriate. In situations where there is unreasonable risk, a momentary lapse of attention can lead to disaster. Since damage may occur before *any* signs of drug use manifest themselves, reasonable suspicion would not be an effective tool. The privacy interests of individuals are outweighed by the need to protect the health and safety of the public and to ensure that there is a safe environment in which to work.<sup>269</sup> Random testing

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264. See CONN. GEN. STAT. ANN. § 31-51x(a) (West Supp. 1990); MINN. STAT. ANN. § 181.951(5) (West Supp. 1990).

265. Legis. Rec. S-506 (1987) (statement of Sen. Perkins), *supra* note 220. For a definition of probable cause, see *supra* note 84. For a definition of reasonable suspicion, see *supra* note 91 and accompanying text.

266. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 880 (E.D. Tenn. 1986). If, however, the risk to the public becomes "unreasonable," random drug testing should be allowed. See *infra* notes 267-69 and accompanying text.

267. ME. REV. STAT. ANN. tit. 26, § 684(3)(B) (Supp. 1989).

268. See *supra* note 220.

269. This aspect of Maine's drug-testing statute is consistent with the standards established by courts faced with federal constitutional challenges. See *supra* notes 98-117 and accompanying text. It is also consistent with the statutes of Connecticut and Minnesota. See *supra* note 242 and accompanying text.

Montana, Rhode Island, and Vermont prohibit random testing under all circumstances, except when such testing is mandated by federal law or regulation. See *supra* note 241 and accompanying text. When the interests of society are weighed against

should not, however, be used as a means to avoid the standard of reasonable suspicion. If the risk is not *unreasonable*, the privacy interests of employees should outweigh the interests of employers and the public, and the standard of reasonable suspicion should be employed.<sup>270</sup>

Although the provisions of the Maine statute make an admirable attempt to protect the private employee from unreasonable drug tests, they provide much less guidance on the issue of procedural due process. Employers' written policies must contain a procedure by which employees and applicants can appeal and contest the accuracy of results.<sup>271</sup> This policy, in turn, is subject to review by the Department of Labor.<sup>272</sup> One specific requirement, however, is that employees must be able to have a urine sample tested independently.<sup>273</sup> Such evidence can then be used to appeal and contest the accuracy of test results. In addition, the statute requires that all employers with over twenty full-time employees have a functioning employee assistance program to provide an opportunity for rehabilitation to employees with drug problems.<sup>274</sup> Employees may not be dismissed after having received a confirmed positive test result unless an opportunity to attend such a program has been refused.<sup>275</sup> Beyond this, however, the statute offers little guidance. It contains no mention of the formalities of the procedures due. There is no indication of whether a full evidentiary hearing is required, and there is no provision for the testimony and cross-examination of witnesses.

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the privacy interests of individuals, however, the decision to allow random testing under limited circumstances in Maine is valid and well reasoned.

270. See *supra* notes 260-61 and accompanying text.

271. ME. REV. STAT. ANN. tit. 26, § 683(2)(K) (Supp. 1989-1990).

272. *Id.* § 686.

273. *Id.* § 683(5). This requirement has been proposed by at least one commentator as one of the minimum requirements for procedural due process. See Comment, *Due Process Constraints*, *supra* note 125, at 1651 (citing *Banks v. FAA*, 687 F.2d 92, 95 (5th Cir. 1982)).

274. ME. REV. STAT. ANN. tit. 26, § 683(1) (Supp. 1989-1990). Some commentators have suggested that employee assistance programs should be a requirement of procedural due process. See, e.g., Comment, *Due Process Constraints*, *supra* note 125, at 1654.

275. ME. REV. STAT. ANN. tit. 26, § 685(2)(B) & (C) (Supp. 1989-1990). If employees choose to participate in rehabilitation programs, there are two options. First, if employers have a program which offers counseling or rehabilitation therapy, employees may choose to enter the program at the employers' expense. If, however, the employers' programs do not offer such services, employees may choose to participate in a public or private rehabilitation program, in which case the expenses shall be divided between employers and employees if employers have more than twenty full-time workers. If the costs are covered by a group health insurance plan, the insurance shall cover the costs. Except to the extent that the expenses are covered by insurance, employers with fewer than twenty full-time employees are not responsible for any costs of rehabilitation under any public or private programs. *Id.* § 685(2)(C)(1)(a)(b).

Until the Department reviews enough policies to establish how lenient or strict procedures should be, employers are left with no indication of what procedural foundation their policies should have.<sup>276</sup> Employers will be encouraged to implement the least expensive and most informal proceedings available in hopes that the Department will approve the policy without greater procedural requirements. If this occurs, the employee will be at a disadvantage. Having been accused of drug use on the job, the opportunity to contest the results will be limited. If the Department does not accept such policies, it will lead to frustration and delay as policies are written, submitted, and rejected. Thus the statute should at least provide some basic guidelines that explain the minimum procedural due process requirements for hearings.

The minimum requirements for appealing and contesting the accuracy of drug test results should include a hearing where evidence can be presented on employees' behalf.<sup>277</sup> Employees should be given the opportunity to show the absence of on-the-job impairment. Witnesses should be allowed to testify for the employees, and the employees should be allowed to cross-examine adverse witnesses.<sup>278</sup> In addition, those who requested that a portion of the urine sample be set aside for independent testing should have the chance to introduce the independent test results at the hearing. The hearing should also establish whether the laboratory techniques used in testing the urine sample were adequate. This can be accomplished by allowing employees (preferably through counsel) to question laboratory directors on testing procedures and to compare such testimony with the views of experts in the field. In this way, employees are given the "opportunity to present [their] side of the story."<sup>279</sup>

The determination of employee drug use should be made by a neutral panel selected by the particular employers and employees

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276. The Department of Labor has outlined the requirements for the written substance abuse policies of employers, but it has not expanded on the statutory mandate of a procedure to appeal and contest the accuracy of test results. See Maine Dep't of Labor—Bureau of Labor Standards: Rules Relating to Substance Abuse Testing § 3(A)(4)(d)(vii) (1989).

277. As stated earlier, the formality and procedural requirements may be different in each case depending on the interests involved. See *supra* note 132 and accompanying text. Since the interests that employees have in their employment are the basis of their livelihood, the procedural suggestions made in the accompanying text are the bare minimum below which employers cannot go. More formal and elaborate procedures, however, may be instituted by employers.

278. At all stages of the hearing, employees should be allowed to have lawyers present to ensure that rights are protected. The cost of having an attorney should be borne by the employees. If employers were required to pay for the entire cost of the hearing, it is doubtful whether any employer would institute a drug-testing program. The costs of having a program would outweigh any benefit derived from it.

279. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

involved.<sup>280</sup> If employees are found to have used drugs on the job, the statutory policy of giving employees the option of attending an employee assistance program should be retained. This will benefit employees by allowing for rehabilitation and a return to work as soon as possible. It will also benefit employers who will not have to hire and retrain permanent replacements each time an employee is found to have used drugs on the job. If the employees refuse to attend a rehabilitation program, employers should be allowed to fire the uncooperative parties.

If these procedural requirements were added to the Maine drug-testing statute, it would be the most comprehensive state drug-testing statute with respect to procedural guarantees. Although other states which have adopted drug-testing statutes also include the right to an appeal, none of them clearly outlines what process is due.<sup>281</sup> Maine would be a pioneer in this field. If, however, the Legislature was serious about protecting the privacy interests of employees when it adopted the statute, it should also be serious about providing minimum procedural guidelines.

#### CONCLUSION

Drug testing of employees in the nonunionized workplace is a controversial topic because it involves a balancing of interests between employers, employees, and the general public. Employers and the public at large are interested in a safe workplace and maximum productivity. Employees, on the other hand, are more concerned with their privacy rights and expectations. In attempting to balance the scales, due regard must be given to the interests of each party. Thus a compromise is necessary. In the public sector, this has meant that drug testing may be conducted with a standard that falls short of probable cause without violating the constitutional rights of employees. In fact, if the government's interest is compelling, random testing may be allowed. In all cases, such testing requires that employees testing positive for drugs be given notice and an opportunity to be heard before termination. Since the constitutional protections do not extend to private employees, in most cases the only recourse is

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280. Perhaps a panel of three or five could be adopted with the employers and employees involved each choosing one of the three or two of the five members of the panel. The remaining member could then be chosen from a list of candidates agreed upon by the employers and employees. The problem of having these formalities is the expense of the procedure. Many smaller employers would not have the money to finance such a hearing. As a result, they would probably refrain from instituting drug-testing programs. If, however, procedures are to be consistent for all employees, hearings should be allowed in all cases. To accommodate smaller employers, the size of the panel could be reduced to one or two managers or supervisors of the business (who have been agreed upon by the employers and employees). The details of the hearing for smaller employers would have to be hammered out in the legislature.

281. See *supra* note 248 and accompanying text.



to state statutes. Prior to the adoption of the Maine drug-testing statute, employees futilely argued that their privacy rights were being trampled upon by the implementation of workplace substance abuse testing. With no statutory restrictions, the employers clearly had the upper hand in implementing such policies.

With the adoption of the Maine statute, however, the Maine Legislature sought to protect the privacy rights of both public and private employees. In a sense, the statute is an attempt to extend the constitutional protections enjoyed by public employees to employees in the private sector. As a result, the decisions of courts faced with constitutional challenges to drug testing should have been used as guidelines in drafting the statute. In analyzing the statute, however, a number of important variations are evident. On the one hand, requiring employers to have probable cause, as opposed to reasonable or individualized suspicion, prior to drug testing frustrates their interest in having a safe and productive workplace because employees under the influence of drugs can do a great deal of damage prior to establishment of probable cause. On the other hand, by failing to outline the requirements for procedural due process, the statute leaves the determination of procedural requirements to the Department of Labor. Thus the policy will be developed in an ad hoc fashion as the Department accepts or rejects written proposals. This will encourage employers to institute the most inexpensive and informal proceedings possible in hopes that the policy will receive approval despite its cursory treatment of procedural due process. This, in turn, may lead to delay as the Department rejects the proposals and the employers are required to resubmit them. Although the statute is a step in the right direction, further revision is necessary before an equitable solution to the drug testing problem is developed.

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