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APPLICANT TESTING FOR DRUG USE: A POLICY AND LEGAL INQUIRY

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I. INTRODUCTION

From the time employer drug testing first became a major legal and public policy question in the early 1980's, employers have perceived across-the-board screening of job applicants¹ for drug use as legally "safe." This perception has become a self-fulfilling prophecy in the courts,² yet it runs directly contrary to the trend toward recognizing limits on the permissible testing of existing employees. A growing number of courts, legislatures, and commentators are joining the consensus that privacy concerns require that the testing of incumbent employees be limited by the dangerousness or sensitivity of the job, or by reasonable suspicion.³

Although courts have been willing to balance the privacy rights of existing employees against the interests of employers,⁴ they

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1. The term "applicant testing" is used throughout this Article to describe screening of job applicants for drug use. It is actually a misnomer. Due largely to cost, employers do not test job applicants until they tentatively select them for employment. Although applicants are often given notice that they will be subject to urinalysis at the time they apply for the job, the test is actually administered as the final step in the employment process. See A SUBSTANCE ABUSE TESTING ACT § 6(e) task force commentary at 25 (Task Force on the Drug-Free Workplace, Institute of Bill of Rights Law, Proposed Official Draft 1991) [hereinafter PROPOSAL].

2. See *Fowler v. New York City Dep't of Sanitation*, 704 F. Supp. 1264 (S.D.N.Y. 1989); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989).

3. *Policeman's Benevolent Ass'n v. Washington Township*, 850 F.2d 133 (3d Cir. 1988) (authorizing random testing of the entire police force); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (allowing random testing of employees in nuclear power plants); *Caruso v. Ward*, 530 N.E.2d 850 (N.Y. 1989) (allowing random testing of a special police unit); see Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), reprinted in 5 U.S.C. § 7311 (1988). Nevertheless, employment in a particular kind of job is no guarantee that testing will be upheld. *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (holding that testing on basis of reasonable suspicion is acceptable, but compulsory testing without suspicion is unreasonable); see *Fraternal Order of Police v. City of Newark*, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987) (holding the random testing of police officers unreasonable).

4. With government workers, the individual's privacy interest is balanced against the

generally have been unsympathetic to the parallel privacy claims of applicants.⁵

For the most part, the distinction between applicants and employees in the drug-testing context is based on the view that job applicants have less to lose than incumbent employees.⁶ Given notice that a job for which they have applied requires drug screening, applicants have a simple choice: either to check their privacy rights at the door, or to find another door to knock on.⁷

The distinction between applicants and incumbent employees is wrong. It conflicts with virtually all major labor legislation passed since the Depression;⁸ it devalues the right of privacy; and it is a giant step back to the right-privilege distinction—the notion that affirmative rights, such as the right of privacy, are contingent upon property rights, such as the rights that come with possessing a job.⁹

This Article considers the genesis of the distinction between employees and applicants in the context of drug testing and critiques the arguments supporting the distinction. It argues that to the extent our society is willing to recognize the strong, protected privacy interests that drug testing implicates, privacy interests should be protected equally for job applicants as well as incumbents. If privacy rights are already protected—as they

governmental interest. *See, e.g.,* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding postaccident testing of railroad operating employees); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (testing of department of corrections' employees may not be arbitrary or discriminatory).

5. Although there is clearly a pattern in the cases affording employees greater legal protection against drug testing than applicants, the law is largely in flux and disarray as to how much protection employees should receive. *See* Rodney A. Smolla, *Introduction to PROPOSAL*, *supra* note 1, at 7. As evidence of the current confusion, the pace of judicial decisions and subsequent reversals is accelerating. *See, e.g.,* *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (holding applicant-testing program constitutional), *petition for cert. filed sub nom. Willner v. Barr*, 60 U.S.L.W. 3208 (U.S. Sept. 12, 1991) (No. 91-448); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir.) (striking down mandatory urinalysis of fire fighters on department-wide basis when no reasonable suspicion of drug use existed), *vacated and reh'g en banc granted*, 861 F.2d 1388 (6th Cir. 1988).

6. *See* discussion *infra* part VI.A.2.

7. *See* *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Ct. App. 1989) ("Simply put, applicants . . . have a choice, they may consent to the limited invasion of their privacy . . . or may decline both the test and the conditional offer of employment.").

8. *See, e.g.,* National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988) (extending protection to applicants as well as employees).

9. *See generally* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982) (identifying the entitlement doctrine in procedural due process analysis as a modern manifestation of the right-privilege distinction); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (arguing that Justice Holmes' concept of privilege is no longer viable).

are under the United States Constitution and the constitutions of many states—the courts should interpret those privacy protections to apply equally to employees and applicants. If no privacy protections exist and the legislatures consider enacting them, the protections for applicants and employees should be the same.

The right of privacy is comparatively new and undefined.¹⁰ Congress has yet to enact any comprehensive scheme that recognizes and protects private sector employees' expectations of privacy against infringement by their employers.¹¹ Privacy has yet to be accorded the level of protection given to other "affirmative rights" affecting employees and job applicants, such as the right to be free from discrimination, the right to a minimum wage, and the right to engage in collective bargaining.¹² Changes in technology give both government and private sector employers a greater technical capacity to invade privacy. Given the strength of the basic American belief that individuals have a "right to be let alone,"¹³ and given our revulsion to the image of men and women governed by machines—whether in the novel *1984* or in the film *2001: A Space Odyssey*—inevitably the protection of the privacy of "the average man or woman" will eventually graduate to first-class status as a protected interest in American law.

10. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977) (outlining the constitutional right of privacy); *White v. Davis*, 533 P.2d 222, 232-35 (Cal. 1975) (discussing the right to privacy provided by the California Constitution).

11. The Fourth Amendment, which provides the broadest protections, applies only to state action. Despite the heavy involvement of the federal government in encouraging private employers to use drug testing, Fourth Amendment challenges to drug testing have generally been limited to government workers. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987); *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986).

A few states—most notably California—have filled this "privacy" gap. Article I, § 1 of the California Constitution ensures the right of privacy of all California residents against intrusion both by government and private actors. CAL. CONST. art. I, § 1. Other states and cities have enacted legislation specifically addressing drug testing, but most private sector employees—whether incumbents or applicants—have virtually no protection against unwarranted invasions of privacy. For that reason, private sector employers in most states have little to fear in across-the-board testing of employees, much less applicants.

12. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a firm may not make partnership decisions on the basis of sex); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (granting employees the right to bring action in federal district court under the minimum wage provision of the Fair Labor Standards Act); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (holding that employer could not prohibit employees from organizing). But see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to extend the right of privacy).

13. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

In the short term, however, significant threats to the right of privacy in the employment area are taking hold and gaining ground. These threats include integrity testing, psychological testing,¹⁴ genetic testing, intelligence testing, pupillary reaction testing, and a variety of "surveillance" techniques.¹⁵

The distinctions established with respect to drug testing will have a lasting impact on the evolution and vitality of the right of privacy. We should ask ourselves the fundamental question *now*: should the protection of the right of privacy really turn on whether a person is fortunate enough to hold a job?

II. THE DISTINCTION AND ITS JUSTIFICATIONS

In the few years since the development of the enzyme multiplied immunoassay technique (EMIT) test and the enormous proliferation of preemployment drug-screening programs, the distinction between the rights of applicants and incumbent employees has become remarkably well entrenched.¹⁶ A number of legislatures have codified the distinction.¹⁷

14. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (upholding employers' rights regarding psychological aptitude tests).

15. See Charles B. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977) (arguing that surreptitious surveillance techniques invade workers' privacy).

16. See, e.g., *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 630 n.14 (Ct. App.), cert. denied, 111 S. Ct. 344 (1990); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989); KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE* 300 (1987) ("Employers have greater latitude with job applicants than with present employees."); IRA MICHAEL SHEPARD ET AL., *WORKPLACE PRIVACY: EMPLOYEE TESTING, SURVEILLANCE, WRONGFUL DISCHARGE AND OTHER AREAS OF VULNERABILITY* 78 (1989) ("Testing of job applicants for substance abuse poses fewer problems than testing employees. No serious legal challenge to the right of private employers to test applicants for drugs has been decided by the courts."). See generally ROBERT P. DECRESCE ET AL., *DRUG TESTING IN THE WORKPLACE* 10 (1989) ("When drug testing is confined to job applicants, as opposed to current employees, employers face fewer legal challenges."); 3 M. KIRBY WILCOX, *CALIFORNIA EMPLOYMENT LAW* § 50.43[1][a][iii] (1990) (commenting on *Wilkinson*).

17. Laurel A. Mousseau & Ellen Raim, *Drug Testing in the Private Sector: Current State of the Law*, 4 *EMPLOYMENT TESTING* 681 (1990). Seventeen states have drug testing statutes: California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, North Carolina, Oregon, Rhode Island, South Dakota, Utah, and Vermont. *Id.* at 685. In addition, five municipalities have passed drug testing laws: Atlanta, Berkeley, Boulder, Houston, and San Francisco. *Id.* Although most of these statutes and ordinances also regulate preemployment testing, a majority do not significantly limit an employer's ability to test all applicants, subject to meeting certain procedural requirements. Notably, two of the more restrictive laws, those of Atlanta and San Francisco, limit employee testing to "reasonable grounds," but do not regulate applicant testing. *Id.* On the other hand, Houston and Montana limit employee and

Generally, the justifications for the distinction between the rights of applicants and incumbent employees fall into three categories. The primary justification rests on the theory that because applicants have notice that a particular job will require urinalysis, they are free simply not to apply.¹⁸ Presumably, applicants differ from employees in this regard because applicants arguably have less invested in any particular prospective job than incumbent employees. By contrast, incumbent employees may have a substantial investment in and reliance on their current job. Particularly after having worked at a job for a period of time, they may have mortgages, car payments, and other obligations.

The precise relevance of the notion that applicants have less invested in a particular job is unclear. Some courts and commentators have suggested that the lesser interest means that the applicants' privacy interest is more easily outweighed by the employer's interest in safety, productivity, or another justification for drug testing.¹⁹ Others have suggested that the privacy interest itself is lessened because the applicants receive notice.²⁰

A variant of this argument is that employers have greater latitude to demand that prospective employees waive their privacy rights as a condition of employment. Few would argue that an employer could demand that an incumbent employee who did not have notice that urinalysis would be a condition of her employment had freely waived her privacy rights when faced with the choice of submitting to the test or losing her job. The argument, however, has greater force for applicants. Assuming employers provide adequate notice—and notice appears to be an irreducible minimum that both courts and legislatures have required to uphold drug testing²¹—one may argue that, by applying

applicant testing to certain sensitive or dangerous jobs. *Id.*

The Institute of Bill of Rights Law Task Force on the Drug-Free Workplace divided evenly on the issue of preemployment testing, and it finally offered two alternative legislative solutions: one allowed applicant testing, while the other prohibited applicant testing except in situations in which testing would be permitted for employers in that job category. See PROPOSAL, *supra* note 1, at 24.

18. See *Wilkinson*, 264 Cal. Rptr. 194 (construing article I, § 1 of the California Constitution, which applies equally to actions by government, business, and private actors). For a discussion of *Wilkinson*, see *infra* notes 160-72 and accompanying text.

19. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding that public safety and national security concerns justify testing of customs agents applying for promotion to certain positions).

20. *Wilkinson*, 264 Cal. Rptr. at 204.

21. Notice, however, may be deemed inherent if one is in a "regulated" industry. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad operating employees); *Von Raab*, 489 U.S. 656 (customs agents).

for the job, the applicants implicitly accept that drug testing is a requirement.²² The applicants are free to choose not to have their privacy invaded; they may walk away.²³ Viewed in this light, drug testing differs little from any condition of employment that employers may choose to impose, such as a requirement that employees be available to work overtime or submit to a preemployment physical.

A second category of argument supporting the distinction between applicants and employees is that the employers' interest in testing applicants—especially applicants for dangerous or sensitive jobs—is greater than for testing incumbent employees.²⁴ Employers may observe the work performance and conduct of incumbent employees. They therefore have less intrusive ways of determining whether an employee has a drug problem. Alternatively, employers may not even need to make this determination; they may dismiss employees for poor work performance.

Of course, employers have the same ability to assess the performance of job applicants after they hire the applicants, but employers have much to lose by hiring employees with drug problems. Absenteeism, tardiness, poor morale, poor productivity, disruptiveness, mistakes, poor judgment, accidents, workers' compensation claims, and other problems are frequently linked to drug use.²⁵ These problems may cost employers money and damage the morale of other employees even if the job is not dangerous or sensitive. Before they can dismiss the employee, employers may be required by law or contractual arrangement to permit or even to pay for drug rehabilitation.²⁶ In addition, firing employees takes time and resources, and, in the postwrongful discharge world, requires documentation and progressive discipline. Testing incumbent employees for drug use risks lawsuits,²⁷ and

22. See *Wilkinson*, 264 Cal. Rptr. at 204.

23. The Article refers to this argument as the "notice/waiver" argument.

24. The Article refers to this argument as the "employer's interest" argument.

25. Mark J. Barnes et al., *A Question of America's Future: Drug-Free or Not?*, 36 KAN. L. REV. 699, 705-06 (1988).

26. Courts have supported the removal of federal employees in positions involving public health, safety, law enforcement, and national security due to off-duty drug use. *Id.* at 742 n.228. Some states, however, forbid discharge unless the employee refuses to undergo treatment. See, e.g., VT. STAT. ANN. tit. 21, § 513(c)(3) (1987).

27. See *Houston Belt & Terminal Ry. Co. v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. 1977) (allowing plaintiff to recover damages when employer falsely stated that plaintiff was fired for drug abuse). An employer may conduct an internal investigation, however, without being liable for defamation. *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985).

accusing employees of drug use without sufficient evidence virtually assures lawsuits. Finally, even after employees are dismissed, the cost of the employers' unemployment insurance premiums may be increased. For these reasons, employers argue that their interest in preemployment screening is higher.

Finally, a central underlying rationale for across-the-board applicant testing is that private employers are furthering the "war on drugs" by using the workplace as a "choke hold." Across-the-board screening of applicants makes it more difficult for drug users to get jobs and therefore deters drug use.

Both of the previous arguments favoring across-the-board applicant testing—the notice/waiver argument and the enhanced employer's interest argument—are legally more palatable than this final rationale.²⁸ However, it is difficult to ignore the fact that the final rationale may well be the true reason underlying many, if not most, across-the-board applicant testing programs.

III. THE APPLICANT-EMPLOYEE DISTINCTION IN OTHER CONTEXTS

A. *From Lochner to Loudermill*

The distinction between applicants and incumbent employees has its historical roots in the "*Lochner*"²⁹ era—from about the turn of the century until the mid-1930's. During this era, the Supreme Court struck down a wide variety of labor legislation by claiming that the legislation impaired freedom to contract.³⁰ Among the legislation invalidated were minimum wage laws,³¹

28. Even the government appears to avoid this argument in court. Nevertheless, at least one federal district court has adopted the argument. In *Jevic v. Coca Cola Bottling Co.*, 5 Individual Empl. Rts. Cas. (BNA) 765 (D.N.J. 1990), a federal district court judge noted, in considering a private employer's across-the-board preemployment drug screening program:

[T]he Court finds nothing offensive in the subject procedure, either to the law or principles of public policy The Court notes that illegal drugs exact an enormous toll on the health and continued economic vitality of this nation. The Government has in fact declared a war on drugs and is vigorously prosecuting all drug offenses [sic]. The Court does not accept plaintiff's invitation to shield their use by creating amorphous legal rights. On the contrary, it sanctions the efforts of the private sector to combat drug use

Id. at 766.

29. See *Lochner v. New York*, 198 U.S. 45 (1905) (emphasizing the liberty to contract between an employer and employee).

30. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 238-45 (1989).

31. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

laws prohibiting "yellow dog contracts" which required workers to refrain from union membership as a condition of employment,³² laws establishing maximum working hours,³³ and other similar legislation.³⁴

Although the holdings in these cases did not distinguish expressly between applicants and employees, they were based on the central underlying thesis of the distinction: employers should be free to demand a waiver of substantive rights as a condition of employment.³⁵ The conclusions reached in the *Lochner*-era cases also share a central fault: they ignore the imbalance in the bargaining relationship between employers and employees and the limited "freedom" many applicants may have to make choices.³⁶ Both are based on what Professor Laurence Tribe refers to as a "misguided understanding of what liberty actually require[s] in the industrial age."³⁷

By 1937, the *Lochner* model had collapsed.³⁸ One of the most notable advances in the post-*Lochner* era has been the development of a set of "substantive" constitutional and statutory rights

32. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

33. See *Lochner*, 198 U.S. 45. But see *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state legislation regulating the number of hours women could work).

34. See *Charles Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923) (striking down state laws requiring compulsory arbitration for private businesses).

35. This thesis is described by Professor Tribe's summary of Justice Pitney's opinion in *Coppage v. Kansas*:

Restriction of freedom to contract for personal employment, he explained, was a "substantial impairment of liberty" which was "as essential to the laborer as to the capitalist, to the poor as to the rich," since only by bartering their employment could poor laborers begin to acquire property. The right to join a union was a right that a worker should be able to bargain away if it was to his or her advantage. Liberty of contract could be incidentally impaired by statutes in the aid of the general public welfare . . . but not to redress so-called inequalities of bargaining power, which were "but the normal and inevitable result" of the exercise of the right to contract itself.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 572 (2d ed. 1988) (citations omitted). The *Lochner*-style approach to regulation of labor did not go uncriticized at the time. Justices Harlan, White, Day, and Holmes were vigorous dissenters in *Lochner*. See *Lochner*, 198 U.S. at 65 (Harlan, White, and Day, JJ., dissenting); *id.* at 74 (Holmes, J., dissenting). Learned Hand was also a fierce critic. See Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908).

36. See HALL, *supra* note 30, at 241-43.

37. TRIBE, *supra* note 35, at 769.

38. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (expressing the Supreme Court's deference to legislative economic judgment); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (sustaining constitutionality of Washington's minimum wage law for women).

that are not dependent on contract, such as the right to be free from discrimination and retaliation and rights of accommodation, collective bargaining, minimum wage, and privacy.³⁹

A second major development in labor law in the post-*Lochner* era is the development of "new property"—the notion that government employees have a property right in continued employment when state law has placed limitations on their dismissal.⁴⁰ Such employees are entitled to procedural due process before they may be dismissed.⁴¹ Although the "property right" analysis has been confined to the public sector, as a practical matter, the rise of "wrongful discharge" litigation in the private sector has essentially followed the approach of the procedural due process cases—extending protections against dismissals without cause based on the employer's policies and longevity of employment.⁴²

Strikingly, these models of substantive and procedural rights lead in opposite directions for the purposes of our current inquiry.⁴³ The substantive rights model generally does not distinguish between applicants and employees, and, with very few exceptions, substantive rights cannot be waived as a condition of employment.⁴⁴ On the other hand, the procedural rights model generally is applied only to incumbent employees, because only

39. For the purposes of this Article, such rights will be referred to as "substantive rights." Substantive rights are directed toward a specific activity which either the employees and applicants have a right to engage in, or the employers are prohibited from engaging in. Such rights are recognized, for example, in major labor and civil rights acts. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988); Civil Rights Act of 1964, 42 U.S.C. § 2000a to 2000h-6 (1988).

40. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

41. *Id.* at 751-52.

42. The distinction between substantive and procedural rights is crude. Undeniably, there is a substantive component to procedural due process, for it recognizes the substantive right of employees to be free from arbitrary treatment. *See, e.g.*, *Pugh v. See's Candies*, 171 Cal. Rptr. 917, 922 n.11 (Ct. App. 1981) (requiring notice and hearing before denying claimant's substantive rights). A clear majority of jurisdictions have modified or created exceptions to the terminable-at-will principle. *See* William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 887 n.6. Of course, the rights of private sector employees remain far more limited than the rights of public sector employees. The terminable-at-will rule remains the norm in private sector employment. *See* *Garcia v. Aetna Fin. Co.*, 752 F.2d 488 (9th Cir. 1984); *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. 1981).

43. This is particularly striking because commentators have generally viewed the substantive rights model—and particularly the doctrine of "unconstitutional conditions"—as a precursor to the elimination of the right-privilege distinction and the "new property" cases as the achievement of that goal. *See* Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321 (1990).

44. *See infra* text accompanying notes 52-73.

they may develop a "property interest" in their employment.⁴⁵

Procedural rights are thus conceptualized as creatures of the "rules and understandings"⁴⁶ created by the employer. They are usually understood as part of the "job package" accepted by the employee under hire. A private employer is thus free to condition employment on an express agreement that the employee is terminable at will,⁴⁷ and a public employer is free not to create a property interest at all, by simply not creating the expectations that limit dismissal to just cause.⁴⁸

In all likelihood, this latter model of procedural rights has given rise to the notion that the rights of applicants and incumbent employees differ significantly with respect to drug testing. Ironically, the growth of these protections against discharge has also encouraged employers to screen employees aggressively before hiring.⁴⁹

45. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972) (stating that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security interests that a person has already acquired in specific benefits."); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (applying property rights to those who have clear "entitlement to continued employment" (emphasis added)); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985) (holding that a state statute clearly gave employees a property right in continued employment); *Greenholtz v. Inmates of the Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979) (denying that inmates have a property interest in obtaining early parole). But cf. *Bishop v. Wood*, 426 U.S. 341 (1976) (holding that for cause firing of police officer did not violate officer's due process rights). See generally Michael J. Higgins, Comment, *California Wrongful Discharge Law and the Public Employee*, 23 U.C. DAVIS L. REV. 117 (1989) (describing remedies available to public employees claiming wrongful discharge).

46. *Perry*, 408 U.S. at 602.

47. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

48. *Roth*, 408 U.S. at 567 & n.4; *TRIBE*, *supra* note 35, at 686; Smolla, *supra* note 43, at 361-62; Higgins, *supra* note 45, at 122.

Although commentators have criticized the decision of the courts to distinguish between those employees who have already acquired rights and those who are applying for those rights, see, e.g., *TRIBE*, *supra* note 35, at 690 nn.36-37, in the employment procedural due process context, the distinction makes a certain amount of sense. Unlike the substantive rights cases, which prohibit or protect specific conduct, the due process/wrongful discharge cases protect against a far broader category of mischief—arbitrariness. If the cases extended beyond situations in which the employer had agreed not to act in an arbitrary manner, the entire doctrine of employment-at-will would be eliminated, and every hiring decision would be subject to judicial scrutiny. Although commentators have described the employment-at-will doctrine as anachronistic, see Gregory A. Naylor, *Employment at Will: The Decay of an Anachronistic Shield for Employers?*, 33 *DRAKE L. REV.* 113 (1983), no court or legislature has been willing to eliminate all at-will employment, even in the public sector. Additionally, no one even suggests that absent a proscribed basis of decision such as discrimination, employers have a broad legal obligation to justify their selection of one applicant for employment over another.

49. See *supra* text accompanying notes 25-27.

Although the distinction between applicants and employees is based on the procedural due process/wrongful discharge model, the right of privacy is a substantive right. As discussed below, substantive rights generally are not dependent on the existence of "property interests" and do not distinguish between employees and applicants.⁵⁰ Employers are generally not free to demand the waiver of such rights as a condition of employment.⁵¹

B. Substantive Rights

1. Public Employees and Unconstitutional Conditions

Many of the substantive rights of public employees stem directly from the Constitution.⁵² In this admittedly limited context, courts have rejected the notion that because the government is under no obligation to hire an applicant, employment may be made contingent on the waiver of a constitutional right.⁵³ This is generally referred to as the doctrine of unconstitutional conditions.⁵⁴

The doctrine of unconstitutional conditions has been applied to applicants for employment in numerous contexts. In *Torcaso v. Watkins*,⁵⁵ for example, the Supreme Court held that the State of Maryland could not refuse a commission for notary public on the ground that the applicant refused to declare his belief in God.⁵⁶ The State argued, in terms eerily foreshadowing the arguments made by the proponents of across-the-board applicant testing, "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."⁵⁷

50. See *supra* text accompanying notes 8-9.

51. See *infra* text accompanying notes 52-73.

52. U.S. CONST. amends. I-X, XIV.

53. See *Elrod v. Burns*, 427 U.S. 347 (1976) (preventing a sheriff from firing employees because of their political affiliation).

54. *Van Alstyne*, *supra* note 9, at 1447-49 (addressing the unconstitutionality of conditions when recognized constitutional rights are at stake).

55. 367 U.S. 488 (1961).

56. *Id.*

57. *Id.* at 495 (quoting *Torcaso v. Watkins*, 162 A.2d 438, 442 (Md. 1960)). Similarly, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court struck down a state law prohibiting the employment of members of various "subversive" organizations, including the Communist party. The Court quoted with approval the Second Circuit's observation that, "the theory that public employment which may be denied altogether may be

The clearest application of the doctrine of unconstitutional conditions to job applicants came in a case decided by the Supreme Court only last Term, *Rutan v. Republican Party*.⁵⁸ *Rutan* expressly held that the protections against discharge on the basis of political patronage announced in *Elrod v. Burns*⁵⁹ and *Branti v. Finkel*⁶⁰ extend to job applicants. In doing so, it reversed the Seventh Circuit's conclusion that hiring decisions based on patronage were permissible because "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job."⁶¹

The Court rejected the central basis of the Seventh Circuit's decision—that "only those employment decisions that are the 'substantial equivalent of a dismissal' violate a public employee's rights under the first amendment"—because it "fail[ed] to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform

subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Id.* at 605-06 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)). It also expressly disapproved of an earlier case, *Adler v. Board of Education*, 342 U.S. 485 (1952), which had sustained the constitutionality of the law. *Keyishian*, 385 U.S. at 595. The Court quoted at length the "major premise" of *Adler*, which also bears an uncanny resemblance to the arguments made in favor of across-the-board applicant testing:

Teachers, the Court said in *Adler*, "may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." The Court also stated that a teacher denied employment because of membership in a listed organization "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice."

Keyishian, 385 U.S. at 605 (citations omitted) (quoting *Adler*, 342 U.S. at 492, 493); see also *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking down loyalty oath that was prerequisite to public employment).

58. 110 S. Ct. 2729 (1990).

59. 427 U.S. 347 (1976) (holding that employees threatened with discharge because of their partisan affiliation or nonaffiliation have a claim under the First and Fourteenth Amendments).

60. 445 U.S. 507 (1980) (holding that the First and Fourteenth Amendments protect employees from discharge based on their political beliefs).

61. *Rutan*, 110 S. Ct. at 2739 (quoting *Rutan v. Republican Party*, 868 F.2d 943, 954 (7th Cir. 1989)). The Seventh Circuit was not the only circuit to reach a similar conclusion. See, e.g., *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988) (holding that an unfavorable action taken against an employee because of her political affiliation may be the basis of a claim under 42 U.S.C. § 1983 (1982)); *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987) (allowing "discipline" based on political affiliation); *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980) (holding similar to that of the Seventh Circuit).

their beliefs and associations to some state-selected orthodoxy.”⁶² As Justice Brennan explained:

A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.⁶³

Rutan provides strong support for the notion that applicants and employees should be treated the same with respect to drug testing.

On the opposite side of the coin, however, is *Wygant v. Jackson Board of Education*.⁶⁴ In *Wygant*, the Supreme Court held that a provision of a collective-bargaining agreement designed to protect the effects of an affirmative action hiring policy violated the Fourteenth Amendment.⁶⁵ The provision had the effect of protecting some minority teachers from layoff while more senior nonminority teachers were laid off.⁶⁶ In the course of its discussion, the plurality in *Wygant* was forced to distinguish cases in which the Court had approved affirmative action hiring plans, in particular, *Steelworkers v. Weber*.⁶⁷ The Court observed:

Significantly, none of the cases discussed above involved layoffs. . . . We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. . . . In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable

62. *Rutan*, 110 S. Ct. at 2737.

63. *Id.* at 2738. Drawing a distinction between procedural due process and the issues at stake in *Rutan*, the Court noted that “[t]he First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate, or not to believe and not associate.” *Id.* at 2737-38. The Court also rejected the concern that extending *Elrod* and *Branti* to applicants “would open state employment to excessive interference by the federal judiciary.” *Id.* at 2737 n.8.

64. 476 U.S. 267 (1986).

65. *Id.* at 283-84.

66. *Id.* at 271.

67. 443 U.S. 193 (1979). As the plurality in *Wygant* noted, *Weber* involved a private affirmative action plan, and therefore was based on Title VII of the Civil Rights Act of 1964, rather than equal protection. *Wygant*, 476 U.S. at 282 n.9.

extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.⁶⁸

The Court went on to discuss the significance of employees' expectations regarding seniority, concluding that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."⁶⁹

Whether *Rutan* or *Wygant* is more closely analogous to the preemployment drug-testing context is a complex question. In *Rutan*, the Supreme Court specifically rejected the Seventh Circuit's reliance on *Wygant* as a basis for distinguishing patronage hiring from dismissal based on patronage.⁷⁰ The Court reasoned that the plurality in *Wygant* was concerned with "identifying the least harsh means of remedying past wrongs."⁷¹

By contrast, in *Rutan*, the Constitution flatly prohibited the conduct engaged in by the government. The Court thus observed:

It is unnecessary here to consider whether not being hired is less burdensome than being discharged because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights.⁷²

The discussion in *Rutan* suggests a major distinction between drug testing and the logic used in *Wygant*. In *Wygant*, the Court addressed the conflict of two compelling interests—the need to remedy past discrimination and the prohibitions on discrimination against nonminorities—both arising under the Equal Protection Clause. In this respect, *Wygant* is unique, for it deals with the distinction between employees and applicants when two substantive rights conflict. In that limited context, the Court held quite

68. *Wygant*, 476 U.S. at 282-83.

69. *Id.* at 283.

70. *Rutan v. Republican Party*, 110 S. Ct. 2729, 2739 (1990).

71. *Id.*

72. *Id.*

logically that current employees enjoy greater protection of their rights than applicants. When it comes to *across-the-board* applicant testing, however, privacy is the *only* compelling interest implicated. Employers cannot claim a similarly compelling interest.⁷³

2. *Private Employees—Statutory Rights*

The cases discussed in the previous section pertain exclusively to public sector employees and applicants. Although the logic of these cases and statutes is not limited to the public sector, the question remains whether the rights of private sector employees and applicants should be analyzed differently.⁷⁴

Most federal laws prohibiting employment discrimination protect the substantive rights of both applicants and employees.⁷⁵ With very minor exceptions, courts and lawmakers have rejected suggestions that these protections may be waived as a condition of employment.⁷⁶ Those few statutes that treat applicants and employees differently usually do so because they address issues that can arise only after employment.⁷⁷ Even those statutes generally extend protections to applicants in all situations in which an employer might discriminate against the applicant based on the exercise of rights under the statute.⁷⁸

Not surprisingly, the Fair Labor Standards Act of 1938 (FLSA)⁷⁹ does not cover applicants, because it deals with pay for current employees. However, the central minimum wage and overtime provisions cannot traditionally be waived as a condition of em-

73. This Article does not suggest that when a compelling interest is present, the employer should be prohibited from testing. The issue with respect to across-the-board testing arises because, unless the entire workforce of an employer is engaged in hazardous or otherwise sensitive duties, by definition there is not a compelling interest.

74. Significantly, at least one California court has already refused to apply the logic underlying the unconstitutional conditions doctrine to private employers in the drug-testing context, despite the fact that the right of privacy is in the California Constitution and applies directly to private actors. *See Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989).

75. *See infra* notes 82-88, 92-94 and accompanying text.

76. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985); *see also* National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (1988); Americans with Disabilities Act, 42 U.S.C.A. §§ 12,101-12,213 (West Supp. 1991).

77. *See infra* note 80-81 and accompanying text.

78. *See infra* notes 82-88 and accompanying text.

79. 29 U.S.C.S. §§ 201-219 (Law. Co-op. 1975 & Supp. 1991).

ployment or otherwise.⁸⁰ These protections apply even when employees knowingly and voluntarily seek to decline the FLSA protections.⁸¹

The National Labor Relations Act (NLRA)⁸² also seems to deal primarily with the rights of incumbent employees.⁸³ In *Phelps Dodge Corp. v. NLRB*,⁸⁴ however, the Supreme Court held that an employer violated Section 8(3) of the Act⁸⁵ by refusing to hire job applicants who were union members.⁸⁶ The NLRB and courts subsequently have held that the broad definition of "employee" contained in Section 2(3) protects members of the working class generally.⁸⁷ The Eighth Circuit held, "[a]n applicant is . . . treated as an employee within the meaning of [Section 2(3)] of the Act defining an employee and [Section 8(3)] proscrib[ing] 'discrimination in regard to hire.'"⁸⁸

Certain rights have been held subject to waiver in the context of a collective-bargaining agreement.⁸⁹ At least until recently, however, courts have limited such bargained waivers to situations in which the nature of the right protected by statute is primarily a "collective" as opposed to "individual" right.⁹⁰

80. See, e.g., *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739-40 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944).

81. *Alamo Found.*, 471 U.S. at 302. See generally H.R. REP. NO. 221, 101st Cong., 1st Sess. 5-6 (1989) (relating congressional and judicial reasoning for the nonwaivable nature of FLSA rights and explaining qualifications to nonwaivability).

82. 29 U.S.C. §§ 151-169 (1988).

83. See generally 29 U.S.C. § 151 (stating the policy of the NLRA). The NLRA focuses on the right of employees to organize.

84. 313 U.S. 177 (1941).

85. Pub. L. No. 198, 49 Stat. 449, 452 (codified at 29 U.S.C. § 158(a)(3)).

86. *Phelps Dodge*, 313 U.S. at 185.

87. 49 Stat. 449, 450 (codified at 29 U.S.C. § 152(a)); see, e.g., *Reliance Ins. Cos. v. NLRB*, 415 F.2d 1, 6 (8th Cir. 1969); *Giant Food Mkts. Inc.*, 241 N.L.R.B. 727 (1979).

88. *Reliance Ins.*, 415 F.2d at 6 (citing *Phelps Dodge*, 313 U.S. at 191-93). Similar protection is provided expressly in the Federal Labor-Management and Employee Relations Act, 5 U.S.C. §§ 7101-7135 (1988). See *Nelson v. Piedmont Aviation*, 750 F.2d 1234, 1236-37 (4th Cir. 1984). Notably, the definition of "employee" in the Railway Labor Act, 45 U.S.C. §§ 151-188 (1988), does not cover applicants. See *id.* § 151. Section 2(3) of the NLRA, however, specifically excludes employees subject to the Railway Labor Act—therefore, if not covered by Railway Act, employees fall under the NLRA.

89. See, e.g., *Fournelle v. NLRB*, 670 F.2d 331, 335 (D.C. Cir. 1982) (noting that certain rights under § 7 of the NLRA, such as the right to engage in strikes during the contract term, may be waived in a collective-bargaining agreement).

90. In the leading case on point, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that rights granted to employees as individuals under Title VII of the Civil Rights Act of 1964 may not be waived through collective bargaining. *Id.* at 51-52. Distinguishing cases in which the Court permitted waivers of statutory rights

For the most part, the above statutes were passed and interpreted in an era more favorable to employees' substantive rights. For this reason, Congress' recent passage of the Employee Polygraph Protection Act of 1988 (Polygraph Act)⁹¹ is particularly notable.

By its terms, the Polygraph Act applies to both applicants and employees,⁹² and states that it is intended "to prevent the denial of *employment opportunities* by prohibiting the use of lie detectors

through collective bargaining, the Court observed:

[S]tatutory rights related to collective activity, such as the right to strike . . . are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.

Id.

The Supreme Court reached the same conclusion in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), regarding the minimum wage guarantees of FLSA. *Id.* at 739-41. There the Court observed:

In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*, the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive "[a] fair day's pay for a fair day's work"

Id. at 739.

In a similar vein, courts have concluded that certain rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988), cannot be waived through collective bargaining. *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 227-28 (3d Cir. 1989); *EEOC v. County of Calumet*, 686 F.2d 1249, 1256-57 (7th Cir. 1982). *But see Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (employee may waive judicial forum of ADEA claim in employment application).

Disturbingly, however, at least two recent decisions of the United States Court of Appeals for the Ninth Circuit have held that under § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141-197 (1988), collective-bargaining agreements may preempt the right of privacy provided by state law. *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1268 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991); *Utility Workers Local No. 246 v. Southern Cal. Edison Co.*, 852 F.2d 1083, 1087 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). In reaching this conclusion, the Ninth Circuit expressly rejected the notion that "the California right to privacy is not negotiable and cannot be affected by a collective bargaining agreement." *Stikes*, 914 F.2d at 1270.

These cases suggest an ominous trend toward the erosion of the privacy rights of incumbent employees. Significantly, however, they involve the waiver of rights through a collective-bargaining process. In this respect, they bear little similarity to the issue here—the waiver of rights by individual applicants as a condition of employment. In a collective-bargaining context, far greater equality of bargaining power exists. Even so, it is difficult to escape the irony that, if this trend continues, unionized employees will have significantly fewer rights than their unorganized counterparts.

91. 29 U.S.C. §§ 2001-2009 (1988).

92. *Id.* § 2001(2) ("The term 'employer' includes any person acting . . . in the interest of an employer in relation to an employee or prospective employee.").

by employers involved in or affecting interstate commerce."⁹³ The House Report on the Act indicates that a particular target of the Polygraph Act was preemployment screening which, the report indicates, was the most common use of lie detector tests in industry.⁹⁴

The Polygraph Act's inclusion of applicants is particularly significant for two reasons. First, as with drug testing, one of the primary concerns regarding the use of lie detectors in employment is the invasion of privacy.⁹⁵ Numerous commentators⁹⁶ and the California Supreme Court⁹⁷ have analyzed the privacy implications of lie detectors. Although Congress' primary motivation for enacting the Polygraph Act was undeniably the inaccuracy of lie detectors, were it not for the *intrusiveness* of lie detectors, it seems unlikely Congress would have acted to bar virtually *all* uses of lie detectors in employment.

Second, most of the arguments made for distinguishing pre-employment and postemployment use of drug testing apply equally to the use of lie detectors. After notification that a lie detector test is a condition of employment, prospective employees are free to apply elsewhere. Moreover, employers have argued that banning lie detector use will inhibit their ability to ferret out dishonest employees⁹⁸ and will result in the loss of billions of dollars.⁹⁹

The Polygraph Act is also notable for its very stringent prohibitions on waiver. The Act generally prohibits employers from even *suggesting* that employees or prospective employees submit

93. H.R. REP. NO. 208, 100th Cong., 1st Sess. 1 (1987) (emphasis added).

94. *Id.* at 3-4.

95. *See id.* at 8 ("These tests, used by employers in pre-employment and random on-the-job screening, are not used just to detect deception, but are often used to gain personal information about applicants' thoughts and attitudes.").

96. *See, e.g.,* Lee M. Burkey, *Privacy, Property and the Polygraph*, 18 LAB. L.J. 79 (1967); Charles B. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977); Paul Falick, *Lie Detectors and the Right to Privacy*, 40 N.Y. ST. B.J. 102 (1968); Donald H. J. Hermann III, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1971); Armondo M. Menocal III & James McDonald Williams, Editorial Note, *Lie Detectors in Private Employment: A Proposal for Balancing Interests*, 33 GEO. WASH. L. REV. 932 (1965).

97. *See* Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 663-66 (Cal. 1986).

98. *See* H.R. REP. NO. 208, 100th Cong., 1st Sess. 15 (1987) (minority views of Reps. Steve Bartlett, Dick Armey, Harris W. Fawell, and Cass Ballenger).

99. *Id.*

to lie detector tests.¹⁰⁰ It also contains express language prohibiting waivers.¹⁰¹

In sum, virtually every major piece of federal labor legislation provides protections for job applicants. In addition, with the notable exception of collective-bargaining agreements under the NLRA, employers generally are not free to demand the waiver of substantive employee and applicant protections as a condition of employment.

C. Distinctions

Based on analogies to other areas of constitutional and labor law, the above analysis suggests that little support or precedent exists for the distinction between employees and applicants in the area of substantive rights. Substantive rights are not viewed as dependent on property interests and, except in very limited circumstances, cannot be waived freely.

The right of privacy, of course, has not generally been accorded the same level of legal protection as, for example, the right to be free from discrimination.¹⁰² The right of privacy is not abso-

100. 29 U.S.C. § 2002(1) (1988).

101. Section 2005(d) of the Act provides: "The rights and procedures provided by this chapter may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreement agreed to and signed by the parties to the pending action or complaint under this chapter." *Id.* § 2005(d).

The 1990 amendments to the ADEA, 29 U.S.C.S. §§ 621-634 (Law. Co-op. Supp. 1991), are also significant. The issue underlying the ADEA amendments arose when the Equal Employment Opportunity Commission (EEOC) issued a rule that permitted waiver of rights under the ADEA, provided that such waiver was "knowing and voluntary" and not in exchange for consideration that included employee benefits to which the employee was already entitled. EEOC Administrative Exemptions, 29 C.F.R. § 1627.16(c)(1) (1990). Following issuance of this rule, Congress acted to suspend its implementation in 1989.

The 1990 amendments prohibit waivers of rights or claims arising after the date the waiver is executed and require that any waiver be "in exchange for consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C.S. § 626(f)(1) (Law. Co-op. Supp. 1991). The amendments also set specific criteria for a knowing and voluntary waiver, including (1) that the waiver be written clearly; (2) that it specifically refer to rights arising under the ADEA; (3) that the individual be advised in writing to consult an attorney; and (4) that the individual be given a specified period to consider the waiver agreement. *Id.*

These amendments fall short of the 1989 proposal entitled the Age Discrimination in Employment Waiver Protection Act of 1989. *See* H.R. REP. No. 221, 101st Cong., 1st Sess. 1-2 (1989). That legislation would have flatly prohibited waivers, except as settlements of specific, individual, bona fide claims of discrimination against the employer. *See id.* at 1.

102. *Compare* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to recognize a fundamental right of privacy for consensual adult homosexual activity) *with* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (striking down on equal protection grounds gender based distinctions in admission to state nursing school).

lute.¹⁰³ It differs somewhat from other rights because the level of protection must necessarily vary based on the extent of the intrusion.¹⁰⁴ The degree of privacy invasions varies greatly—from obtaining employees' home telephone numbers on one side of the spectrum, to strip searches and genetic testing on the other. Because the level of intrusion varies, any standard for assessing the permissibility of the intrusion must also vary.

Moreover, unlike many other employment rights, privacy is dependent on a balance between the interests of employers and employees. Unlike discrimination, for example, employers legitimately need to obtain information about employees—a fact that, in one way or another, interferes with the employees' privacy.

In addition, the invasions required by employers may be more or less tailored to the employers' legitimate purposes. Reference checks, for example, are narrowly tailored to determine an applicant's performance on a prior job, which, presumably, is highly correlated with the likelihood of success with new employers. Drug testing, on the other hand, tests both on- and off-duty conduct.

Finally, much depends on the level of protection that the right of privacy is ultimately accorded. Under the California Constitution, most courts agree that a "compelling interest" standard is applied, and that the "less intrusive alternative test" must be met as well.¹⁰⁵ Under the Fourth Amendment, a balancing test applies in the drug testing area that appears to give equal weight to the employers' and employees' interests.¹⁰⁶ Even that test, however, has the effect of limiting drug testing to high risk or sensitive situations, although it is certainly less stringent than tests applied in areas such as discrimination. For these reasons, the standards and distinctions developed in other areas of labor and constitutional law, although instructive, cannot be applied mechanically.

103. See, e.g., *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841, 2847 (1990) (reiterating the opinion of the lower court); *Florida Star v. B.J.F.*, 491 U.S. 524, 530-33 (1989); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 463-64 (1983) (O'Connor, J., dissenting).

104. See, e.g., *Cruzan*, 110 S. Ct. at 2847; *Florida Star*, 491 U.S. at 537-40.

105. See, e.g., *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975); *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225, 232 (Cal. 1970).

106. For the use of a balancing test in other Fourth Amendment contexts, see *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1967).

IV. FOURTH AMENDMENT CASE LAW—THE APPLICANT-EMPLOYEE DISTINCTION REJECTED

The leading Fourth Amendment cases on drug testing are *Skinner v. Railway Labor Executives' Association*¹⁰⁷ and *National Treasury Employees Union v. Von Raab*,¹⁰⁸ which have been analyzed elsewhere.¹⁰⁹ For present purposes, it suffices to recognize that both cases permit drug testing when the intrusion serves "special governmental needs, beyond the normal need for law enforcement,"¹¹⁰ but only when the government's interest in drug testing outweighs the individual's privacy expectations. In *Skinner*, the Court upheld postaccident testing of railroad employees.¹¹¹ In *Von Raab*, a sharply divided Court upheld one-time testing of Customs Service employees seeking transfer or promotion to positions within the Service that involved drug interdiction or required them to carry firearms or handle classified materials.¹¹² The Court in *Von Raab* focused primarily on the government's "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."¹¹³

Although rarely viewed in this light, *Von Raab* involves a subspecies of applicant testing—testing only current employees seeking promotion and transfer. Yet, little in the opinion suggests that the Court relied on the distinction between applicants and incumbents in reaching its conclusion. The Court speaks of the employees' privacy interest in terms that ignore the distinction between employees and applicants.¹¹⁴

107. 489 U.S. 602 (1989).

108. 489 U.S. 656 (1989).

109. See, e.g., Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549 (1990); Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159 (1990); Harlin Ray Dean, Jr., Note, *National Treasury Employees Union v. Von Raab: The Fourth Amendment Hangs in the Balance*, 68 N.C. L. REV. 389 (1990); Philippa M. Guthrie, Note, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579 (1991).

110. *Von Raab*, 489 U.S. at 665 (citing *Skinner*); *Skinner*, 489 U.S. at 619 (stating "special needs, beyond the normal need for law enforcement").

111. *Skinner*, 489 U.S. at 633.

112. *Von Raab*, 489 U.S. at 677.

113. *Id.* at 670.

114. For example, the Court observed:

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy. . . . Unlike most private

The Court's sole recognition of a distinction between applicants and incumbents is relegated to a footnote in which the Court asserted that the procedures established by the Customs Service for "collection and analysis of the [urine] samples . . . significantly minimize the program's intrusion on privacy interests."¹¹⁵ One of the six minimizing factors the Court cited is that "[o]nly employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions."¹¹⁶

In sum, although the Court in *Von Raab* apparently viewed the fact that only applicants for promotion or transfer are tested as evidence that the Custom Service's plan was designed to minimize the intrusion on employees' privacy interests, it attached little significance to this distinction for other purposes.

Less than four months after the *Von Raab* decision, the United States Court of Appeals for the District of Columbia struck down a broad plan to conduct random drug tests of incumbent Department of Justice (DOJ) employees holding "sensitive" positions.¹¹⁷ In a carefully reasoned opinion, Chief Judge Wald discussed whether *Von Raab* could be distinguished on the ground that, under the program at issue in *Von Raab*, "an individual's obligation to undergo testing [could] be triggered only by her own decision to alter her status within the [Customs] Service."¹¹⁸ The court in *Harmon* observed that although "a coherent theory might be constructed which would make this fundamental distinction . . . [,] the Supreme Court has not encouraged the construction

citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. . . . Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

Id. at 672 (citations omitted).

115. *Id.* at 672 n.2.

116. *Id.* The other five factors were: (1) advance notice; (2) no direct observation of the act of urination; (3) samples examined only for specified drugs; (4) combined use of EMIT and GC/MS tests, enhancing accuracy; and (5) no required disclosure of personal medical information unless test is positive. *Id.*; see also *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990).

117. *Harmon*, 878 F.2d at 491-96.

118. *Id.* at 489.

of such a theory.”¹¹⁹ The court concluded that although the distinction between random testing and the applicant testing in *Von Raab* “is a *relevant* consideration; and, in a particularly close case, it is possible that this factor would tip the scales,”¹²⁰ the distinction did not require the court “to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.”¹²¹

Since the decisions in *Von Raab* and *Harmon*, a number of courts have concluded that applicant testing is subject to the same limitations as other forms of testing and may be performed only on applicants for dangerous, highly sensitive, or law enforcement jobs.¹²²

Most notable among these decisions is Judge Gesell’s opinion in *Willner v. Thornburgh*,¹²³ in which the D.C. District Court held that the DOJ’s applicant-testing program violated the Fourth Amendment. The United States Court of Appeals for the District of Columbia recently reversed Judge Gesell’s decision by a two-to-one vote.¹²⁴ Judge Gesell’s opinion, however, is worthy of careful consideration because of the persuasiveness of its argument.

The plaintiff in that case, an attorney, sought an injunction barring the DOJ from requiring him to undergo a urine test after he had tentatively been accepted for employment by the Antitrust Division.¹²⁵ Under the testing plan, the Antitrust Division required every individual tentatively selected for employment to submit a urine sample as a condition of employment.¹²⁶

In support of the prescreening test program, the DOJ argued that (1) “an individual can avoid testing by withdrawing his application when notified of the testing requirement;”¹²⁷ (2) “the expectation of privacy and resulting invasion of privacy are less than that . . . of an existing employee singled out for random

119. *Id.*

120. *Id.*

121. *Id.*

122. See, e.g., *Georgia Ass’n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990); *American Postal Workers Union v. Frank*, 725 F. Supp. 87 (D. Mass. 1989). But see *Transportation Inst. v. United States Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989).

123. 738 F. Supp. 1 (D.D.C. 1990), *vacated*, 928 F.2d 1185 (D.C. Cir. 1991), *petition for cert. filed sub nom. Willner v. Barr*, 60 U.S.L.W. 3208 (U.S. Sept. 12, 1991) (No. 91-448).

124. *Willner*, 928 F.2d 1185.

125. *Willner*, 738 F. Supp. at 1.

126. *Id.* at 2.

127. *Id.* at 3.

testing;"¹²⁸ and (3) "the need for drug-testing of applicants is enhanced by the reduced opportunity to observe these individuals as compared to existing employees."¹²⁹

Relying principally on *Harmon*, Judge Gesell rejected each of these arguments.¹³⁰ As to the argument that applicants have a reduced expectation of privacy because they are informed in advance of the testing requirement and may withdraw their application, the court concluded that an unreasonable search cannot be made reasonable by the applicant's consent, if that consent is a prerequisite to employment.¹³¹

Judge Gesell also rejected the DOJ's argument that it had a stronger interest in testing applicants because it lacked the opportunity to observe applicants.¹³² Although conceding, based on *Harmon*, that this was "'one element to be weighed in the balance,'" ¹³³ the court noted that DOJ attorneys work in traditional office environments in which employers can observe them and that the attorneys are subject to an extremely thorough background investigation before hiring.¹³⁴ The court concluded, "[s]urely this process is as likely to uncover any applicant reasonably suspected of having a drug problem as presumably occurs in a traditional office setting."¹³⁵

On appeal, two members of the District of Columbia Circuit Court panel concluded, over a strong dissent, that urine tests of applicants for positions as attorneys at the DOJ do not constitute unreasonable searches under the Fourth Amendment. The panel first determined that the "'Fourth Amendment intrusion serve[d] special governmental needs, beyond the normal need for law enforcement.'" ¹³⁶ Balancing the extent of the privacy intrusion against the government's needs, the court concluded that the applicant's privacy rights were significantly diminished because: (1) under DOJ procedures, the urination process was not wit-

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 4 (citing *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987)).

132. *Id.* at 5.

133. *Id.* (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990)).

134. *Id.*

135. *Id.*

136. *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C. Cir. 1991), *petition for cert. filed sub nom. Willner v. Barr*, 60 U.S.L.W. 3208 (U.S. Sept. 12, 1991) (No. 91-448) (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)).

nessed; (2) the applicant had already consented to an extensive FBI investigation of his background; (3) the applicant had advance notice and was not "compelled to seek a job at the Department of Justice"; and (4) applicant drug testing is common in the private sector, which, the opinion suggests, "is some indication of what expectations of privacy 'society is prepared to accept as "reasonable."'"¹³⁷ These points, the court ruled, weakened the privacy interests of applicants to such an extent that they were outweighed by the government's economic interest in compiling pertinent information predicting how an applicant will perform before expending time and money to train him.¹³⁸

The dissent, on the other hand, observed that the majority holding is inconsistent with the principles established in *Von Raab*, *Skinner*, and *Harmon*.¹³⁹ First, the dissent noted that previous Fourth Amendment cases have required that there be a nexus between the duties of the employee and the harm the government seeks to avert. Yet the majority opinion "fails even to consider the relationship between the duties of a Justice Department antitrust lawyer and the threat that lawyer could pose if drug-impaired."¹⁴⁰ Whatever the distinction between applicants and employees, the dissent observed, those differences "affect privacy expectations and not the link required between an employee's duties and the dangers posed by his drug use."¹⁴¹

The dissent also asserted that the majority in *Willner* gave undue weight to notice as diminishing privacy expectations, noting: "The same factor was present in *Von Raab*, but the Court there attributed little, if any significance to it, merely identifying it in a footnote, without elaboration, as affecting the employees' privacy expectations."¹⁴²

Finally, the dissent rejected as "potentially dangerous" the majority's reliance on the prevalence of private sector applicant testing as "the yardstick by which we measure the government's compliance with constitutional mandates."¹⁴³ "The protections the Constitution provides against arbitrary government action," the dissent remarked, "will quickly evaporate if courts adopt, as the

137. *Id.* at 1189-92 (Harlan, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)).

138. *Id.* at 1192-93.

139. *Id.* at 1194-95 (Henderson, C.J., dissenting).

140. *Id.* at 1195.

141. *Id.* at 1195 n.2.

142. *Id.* at 1198 (footnote omitted).

143. *Id.*

benchmark of fourth amendment reasonableness, the conduct of private entities."¹⁴⁴

Although it purports to follow the standards set out in *Von Raab*, *Skinner*, and *Harmon*, the result reached by the *Willner* majority is sharply at odds with those cases, as well as the weight of other Fourth Amendment precedent. More distressing than the weight given to the notice/waiver rationale as lessening applicants' privacy interest is the court's failure to articulate *any* coherent interest on the government's side of the scale. The majority relies solely on general statistics linking drug use with accidents and absenteeism, and the observation that, unlike current employees, applicants cannot be observed on the job. Although the *Willner* majority does not say so, it is difficult to imagine any applicant testing program that would be found to be "unreasonable" under the formulation of the circuit court's opinion in *Willner*.¹⁴⁵

Significantly, despite the circuit court's decision in *Willner*, however, at least two district courts have reached a result similar to that reached by Judge Gesell.¹⁴⁶ In *Georgia Association of Educators v. Harris*,¹⁴⁷ the court invalidated a Georgia law mandating, among other things, that all applicants for state employment submit to a preemployment drug test.¹⁴⁸ Relying on *Von Raab* and *Harmon*, the court held that Georgia's "generalized governmental interest in maintaining a drug-free workplace" was insufficient to outweigh the applicants' privacy interests.¹⁴⁹ The court stated:

The court finds it difficult to even begin applying [the *Von Raab*] balancing test . . . because defendants have failed to specifically identify any governmental interest that is sufficiently compelling to justify testing *all* job applicants. . . . [D]efendants remain oblivious to *Von Raab's* (and indeed, the

144. *Id.* at 1199; see also *id.* at 1199 n.6.

145. The circuit court decision also contains an unusually candid statement of a principle that has undoubtedly influenced the development of the law in this area: that the prevalence of across-the-board applicant testing in the private sector is itself a justification for the refusal to recognize privacy rights implicated by drug testing. *Id.* at 1191. This principle underscores the self-fulfilling nature of privacy invasions in general, and of applicant drug testing in particular.

146. See *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990); *United States Postal Workers Union v. Frank*, 725 F. Supp. 87, 90 (D. Mass. 1989).

147. 749 F. Supp. 1110.

148. *Id.* at 1114.

149. *Id.*

Fourth Amendment's) requirement that it connect its interest in testing to the particular job duties of the applicants it wishes to test.¹⁵⁰

The court declined to rule specifically on the defendants' contention that job applicants have "a diminished expectation of privacy under the fourth amendment as compared to existing employees," because defendants had failed to articulate a substantial governmental interest in testing all applicants.¹⁵¹

Another across-the-board testing program was rejected in *United States Postal Workers Union v. Frank*.¹⁵² In that case, the Postal Service imposed a requirement that all applicants for career employment with the Postal Service in Boston submit to urinalysis solely for research purposes to evaluate the correlation between preemployment drug testing and job performance.¹⁵³ The court specifically observed that "review of the law, albeit scanty, on the distinction between prospective employees and current employees does not convince me that job applicants should be accorded lesser fourth amendment protections."¹⁵⁴

150. *Id.*

151. *Id.*

152. 725 F. Supp. 87, 90 (D. Mass. 1989).

153. *Id.* at 88.

154. *Id.* at 90. This is not to say that other courts have found no distinction between applicant and employee drug testing. As noted, *Harmon v. Thornburgh* suggests that the difference between applicant testing and employee testing might be enough to tip the balance in a close case. 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). Other cases echo similar sentiments. In at least one case involving crewmen on vessels registered in the United States, a court concluded that the difference *was* sufficient to tip the balance. See *Transportation Inst. v. United States Coast Guard*, 727 F. Supp. 649 (D.D.C. 1989).

In *Transportation Institute*, the court evaluated Coast Guard regulations requiring drug tests of private citizens employed on United States flag vessels. *Id.* at 651. The court held that the random testing requirements for employees were overbroad. *Id.* at 658. The court, however, upheld the testing of applicants on the ground that applicants' privacy rights are "significantly diminished." *Id.* at 654 (citing *Harmon*, 878 F.2d at 489). In particular, the court observed: (1) preemployment testing requires testing on only one occasion, *id.* at 654; (2) physical examinations and drug testing are already widespread employment practices in the maritime industry, *id.* at 655; and (3) "pre-employment testing involves none of the employer discretion that is necessarily present in post-accident, for-cause, and random testing, since almost all prospective crewmembers are tested," *id.*

Significantly, however, *Transportation Institute* did not involve across-the-board testing. See *id.* at 651. All those tested were crewmen aboard boats, in a highly regulated industry in which the government contended (and plaintiffs largely conceded) that all personnel were responsible for safety-related functions in emergencies. *Id.* at 656. This situation is significantly different from one involving the testing of office workers.

Finally, at least one circuit has rejected squarely the "waiver" rationale in the context of a Fourth Amendment challenge to drug testing.¹⁵⁵ In *National Federation of Federal Employees v. Weinberger*,¹⁵⁶ the D.C. Circuit Court held that "a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment."¹⁵⁷

In sum, courts that have considered applicant testing in the Fourth Amendment context since the *Von Raab* decision have generally (1) applied the same standards to applicant and employee testing and, as a result of that application, (2) have rejected across-the-board applicant testing programs.¹⁵⁸

V. STATE DRUG-TESTING CASES AND STATUTES

Despite the lack of support for the distinction between applicants and employees in other substantive rights contexts, in the private sector, few cases or statutes provide any significant protection against across-the-board testing of job applicants.

That courts have failed to recognize such limitations is not entirely surprising because, for the most part, legislatures have yet to recognize the privacy interests of private sector employees. Most state and local legislatures have imposed only minor procedural limitations on applicant or employee testing. Although these protections apply often to both employees and applicants, they provide no basis for challenging the testing itself. A few jurisdictions, including the City and County of San Francisco, have strictly regulated employee testing but imposed no restrictions whatever on applicant testing.¹⁵⁹

155. See *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).

156. *Id.*

157. *Id.* at 943.

158. The District of Columbia Circuit Court opinion in *Willner*, although purporting to be based on the same legal standards as the other cases cited, in fact would represent a very significant broadening of permissible applicant testing programs under the Fourth Amendment if it is allowed to stand and is followed by other courts.

159. The regulations currently in force in San Francisco provide:

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

SEC. 3300A.2. DEFINITIONS. (1) Employee shall mean any person working

When no significant protections exist for employees or applicants subject to testing, employees have resorted to wrongful discharge claims as a means of litigating drug-testing challenges.

for salary or wages within the City and County of San Francisco, other than members of the uniformed ranks of the police, sheriff's and fire departments, police department communication dispatchers, and any persons operating emergency service vehicles for the City and County of San Francisco.

....
(3) Employer shall mean the City and County of San Francisco, any individual, firm, corporation, partnership, or other organization or group of persons however organized, located or doing business within the City and County of San Francisco, that employs personnel for salary or wages, or any person acting as an agent of such an organization.

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

(a) The employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and

(b) The employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

(c) The employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

In conducting those tests designed to identify the presence of chemical substances in the body, and not prohibited by this Section, the employer shall ensure to the extent feasible that the test only measures and that its records only show or make use of information regarding chemical substances in the body which are likely to affect the ability of the employee to perform safely his or her duties while on the job.

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

In any action brought under this Article alleging that the employer had violated this Section, the employer shall have the burden of providing that the requirements of Subsections (a), (b) and (c) as stated above have been satisfied.

SEC. 3300 A.6. MEDICAL SCREENING FOR EXPOSURE TO TOXIC SUBSTANCES. Nothing in this Article shall prevent any employer from conducting medical screening, with the express written consent of the employees, to monitor exposure to toxic or other unhealthy substances in the workplace or in the performance of their job responsibilities. Any such screenings or tests must be limited to the specified substances expressly identified in the employee consent form.

SEC. 3300A.7. PROHIBITING USE OF INTOXICATING SUBSTANCES DURING WORKING HOURS; DISCIPLINE FOR BEING UNDER THE INFLUENCE OF INTOXICATING SUBSTANCES DURING WORKING

As a result, in some jurisdictions, employees may have somewhat greater protections than applicants—but this result is not based on any distinction related to privacy rights.

One state court decision, however, is particularly worth noting. In California, where a broad state constitutional right of privacy exists, the sole court decision addressing the issue of applicant testing, the case of *Wilkinson v. Times Mirror Corp.*,¹⁶⁰ held that applicants are entitled to significantly less privacy protection than incumbent employees.¹⁶¹

In *Wilkinson*, the California Court of Appeal upheld employer Matthew Bender's requirement that all applicants who received a conditional offer of employment submit to a physical examination that included drug screening.¹⁶² Despite considerable authority to the contrary, the court declined to apply a "compelling interest" standard to Matthew Bender's testing program, observing that "not every act which has some impact on personal privacy invokes the protections of the state's Constitution and requires [a compelling interest] justification."¹⁶³ Instead, the court determined that "the operative question is whether the challenged conduct is reasonable."¹⁶⁴

In determining reasonableness, the court observed that

[T]he most important factor in our analysis is that plaintiffs are applicants for employment, not employees, either public or

HOURS. Nothing in this Article shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours, or restrict an employer's ability to discipline employees for being under the influence of intoxicating substances during work hours.

SEC. 3300A.8. ENFORCEMENT. (a) Any aggrieved person may enforce the provisions of this Article by means of a civil action. Any person who violates any of the provisions of this Article or who aids in the violation of this Article shall be liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of action.

(b) Injunction.

(1) Any person who commits, or proposes to commit, an act in violation of this Article may be enjoined therefrom by any court of competent jurisdiction.

(2) An action for injunctive relief under this subsection may be brought by any aggrieved person, by the District Attorney, or by the City Attorney, or by any person or entity which will fairly and adequately represent the interest of the protected class.

SAN FRANCISCO, CAL., POLICE CODE art. 33A (1985) (emphasis added) (code history information omitted).

160. 264 Cal. Rptr. 194 (Ct. App. 1989).

161. *See id.* at 203.

162. *Id.* at 203-04.

163. *Id.* at 202.

164. *Id.* at 203.

private. Any individual who chooses to seek employment necessarily also chooses to disclose certain personal information to prospective employers, such as employment and educational history, and to allow the prospective employer to verify that information. As applicants for employment with Matthew Bender, when plaintiffs were asked to consent to drug and alcohol screening as a condition of an offer of employment, they were in effect asked to disclose voluntarily the personal information which might be revealed by that screening.¹⁶⁵

The court then suggested three factors that minimized the intrusiveness of Matthew Bender's program.¹⁶⁶ First, the court asserted that California equal employment laws authorize private employers to condition an offer of employment on the results of a physical examination to determine fitness.¹⁶⁷ Because urinalysis is ordinarily a routine part of any physical examination, the court reasoned that applicants should have anticipated "that diagnostic test."¹⁶⁸ Second, Matthew Bender's policy was to specifically inform a job applicant that a job offer was conditioned on the applicant's consent to a drug test.¹⁶⁹ Next, the testing and confidentiality procedures were designed to minimize intrusion.¹⁷⁰

Finally, the court observed:

Simply put, applicants for jobs at Matthew Bender have a choice; they may consent to the limited invasion of their privacy resulting from the testing, or may decline both the test and the conditional offer of employment. Applicants . . . who choose not to consent to the test, are not foreclosed by Matthew Bender's policy from seeking other employment.¹⁷¹

165. *Id.*

166. *Id.* at 204.

167. *Id.*

168. *Id.* at 203.

169. *Id.*

170. *Id.* Specifically, (1) persons unrelated to the employer collected samples in a medical environment during a preemployment physical; (2) no one observed applicants while they furnished samples; (3) no pregnancy tests were required; (4) medical history and results were kept confidential; (5) the employer was not provided with the information in the medical history file; (6) the employer was informed only if applicants were not recommended for employment, which did not necessarily mean that those applicants tested positive for drugs; (7) applicants given an unsatisfactory rating were entitled to know what portion of the test they failed and to challenge the results; and (8) applicants who rated unsatisfactory could reapply after six months. *Id.*

171. *Id.* at 204. The court in *Wilkinson* also expressly rejected the plaintiffs' reliance on the California cases decided on the basis of unconstitutional conditions. Citing *Utility Workers, Local No. 246 v. Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988),

Wilkinson is the purest statement to date of the argument that an applicant may be given the choice between "consenting" to drug testing or seeking another job.¹⁷²

VI. THE FLAWS OF APPLICANT TESTING

As discussed in Part II, three primary rationales have been espoused for distinguishing between applicants and incumbent employees in the drug-testing context: (1) the privacy interest of applicants is lesser or may be more readily waived as a condition of employment because they have notice and may choose to "walk away;" (2) the employers' interest in testing applicants is greater; and (3) broad applicant testing deters drug use and therefore assists in the war on drugs. None of these hold up under close legal or policy examination.

A. *Just Walk Away—Attacking the Notice/Waiver Rationale*

The notice/waiver rationale is actually a constellation of various legal theories and factual assumptions. One argument is that applicants' privacy interests are diminished relative to the interests of incumbent employees because the applicants have notice that they will be subject to testing. A related but slightly

cert. denied, 489 U.S. 1078 (1989), one of the recent decisions holding that drug testing may be negotiated in a collective-bargaining agreement, the court in *Wilkinson* concluded that the unconstitutional conditions doctrine does not apply to drug testing by a private person or entity. *Wilkinson*, 264 Cal. Rptr. at 205.

Only a few months after the *Wilkinson* decision, another appellate panel reached the opposite conclusion in a case involving across-the-board employee testing. In *Luck v. Southern Pacific Transportation Co.*, 267 Cal. Rptr. 618 (Ct. App.), *cert. denied*, 111 S. Ct. 344 (1990), the California Court of Appeal upheld a nearly half-million dollar jury verdict against Southern Pacific, based upon the termination of a computer programmer for refusal to submit to a random drug test. *Id.* at 621. Affirming the jury's verdict on a contractual claim founded on the right of privacy, the court concluded that the compelling interest test applied and that the defendant had not established a compelling interest. *Id.* at 629-32.

Read together, *Luck* and *Wilkinson* suggest that, at least under the California right of privacy, applicant testing is subject to significantly less scrutiny than employee testing. However, it is difficult to read too much into these cases because the analysis in *Luck* indicates that the court did not rely on the distinction between applicants and employees as a basis for applying the compelling interest test. The holding in *Luck*, as well as a more recent case involving college athletes in which drug testing was permanently enjoined, *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402 (Ct. App.), *review granted*, 801 P.2d 1070 (Cal. 1990), leave open the possibility that another panel of the court of appeal may yet apply the compelling interest standard to applicant drug screening.

172. *Wilkinson*, 264 Cal. Rptr. at 204.

different argument is that although the applicants' privacy interests may not vary, their interest in *employment* is lesser. Both of these approaches assume that the applicants' interests are balanced against the employers' interests, and that the applicants' interests are sufficiently weakened by one or both factors so as to be outweighed by the employers' interest in across-the-board testing.

Yet a third approach is "waiver." This approach recognizes that the applicants' lesser interest in employment does not fit neatly into the balancing scheme because the balance is between the applicants' *privacy interest* and the employers' interest. Instead, this approach relies on the theory that the applicants' lesser interest in employment means they may be given the choice of surrendering that limited interest or surrendering their privacy interest. The relevance of the applicants' presumably "small" interest in any particular employment is that, for a waiver to be valid, at a minimum it must be "voluntary." Therefore, presumably, the applicants' interest in employment is so speculative and slight that being forced to give it up as a condition of waiver does not render the waiver involuntary.

Underlying all three of these approaches are a variety of factual assumptions: the assumption that applicants in fact have little interest in, or need for, particular jobs; the assumption that jobs are comparatively easy to find; the assumption that not all employers in a particular industry or field will demand a similar invasion as a condition of employment; and the assumption that applicants understand and have been informed of their rights and can intelligently weigh their alternatives.

To paraphrase Justice Scalia's dissent in *Von Raab*, looking to the theories underlying the notice/waiver rationale, there is much that is true that is not obviously relevant. Looking to the factual assumptions, there is much that is relevant that is not obviously true.¹⁷³

1. *Privacy Interests Do Not Vary*

Some courts and commentators have sought to distinguish applicants and employees with regard to the waiver rationale by asserting that applicants have a lesser privacy interest.¹⁷⁴ At

173. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 682 (1989) (Scalia, J., dissenting).

174. See discussion *infra* part VI.A.3.

first blush, this argument is difficult to fathom. Both the Fourth Amendment and California cases establish that drug testing is a significant invasion of personal privacy. Courts and commentators analyzing the issue have generally focused on three types of invasion: (1) the physical invasion inherent in the taking of the sample—particularly if observed;¹⁷⁵ (2) the invasion that results from analyzing the contents of one's body and drawing inferences about that individual's behavior from that information;¹⁷⁶ and (3) the invasion resulting from the employee or applicant's need to explain the use of legal drugs.¹⁷⁷ Each of these invasions is identical for employees and applicants.

Some have argued that although the applicants' objective privacy expectations are the same as the employees' expectations, the applicants' subjective expectation of privacy is diminished by advance notice before applying.¹⁷⁸ Although this kind of analysis

175. Although some have suggested that the act of obtaining the sample is minimally intrusive, the overwhelming majority of courts, including the United States Supreme Court, has rejected this argument. In *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Supreme Court quoted the Fifth Circuit's opinion in *Von Raab*:

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."

Id. at 617 (quoting *Von Raab*, 816 F.2d at 175); see also *id.* at 626 ("procedures . . . which require employees to perform an excretory function [are] traditionally shielded by great privacy"); *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1312 (7th Cir. 1988) ("In our society, it is expected that urination be performed in private, that urine be disposed of in private and that the act, if mentioned at all, be described in euphemistic terms.").

176. See, e.g., *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987) ("Because drug tests often furnish information about employee activities occurring outside of working hours, such tests may provide . . . a periscope through which [testers] can peer into an individual's behavior in her private life, even in her own home."), *vacated*, 490 U.S. 1001 (1989); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986) ("[u]rine testing involves one of the most private of functions").

177. See, e.g., *Bangert v. Hodel*, 705 F. Supp. 643, 649 (D.D.C. 1989) ("The problem [with drug testing] . . . is that the urinalysis test picks up not merely illegal drugs but also legal ones, and an employee faced with such findings will have to explain to the Department's officers the possibly intimate details of his legitimate drug-taking and the underlying illness or illnesses.").

178. See *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987) ("Advance notice of the employer's condition . . . may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy."); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) ("the pervasive regulation of the industry . . . reduced the justifiable privacy expectation"); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 202 (2d Cir. 1984) ("based upon the nature of their place of employment and the notice provided . . . [the employees'] subjective expectations necessarily were diminished significantly").

has long been used under the Fourth Amendment, it has limited utility in the context of drug testing and other bodily invasions. As the California Supreme Court observed, "[a]s a general rule, the state cannot curtail a person's right of privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations."¹⁷⁹ The court noted that "[p]rivacy is not safe if a search or intrusion can be justified merely by proof that the state announced its intention in advance. . . . '[S]uch a concept would sanction an erosion of the Fourth Amendment by the simple and expedient device of its universal violation.'"¹⁸⁰ If an individual's expectation of privacy in his own body could be reduced by notice, the right of privacy would be virtually meaningless.

Finally, as *Von Raab*, *Harmon*, and *Willner* suggest, at most these factors may tip the balance in a close case. They certainly do not, in themselves, form a basis upon which testing may be justified. Put another way, one cannot argue that an invasion of privacy is justified simply because the invasion could have been worse.

2. *The Applicants' Interest in Employment*

Arguably, the interest of applicants in employment is less than that of incumbent employees. This argument presents three primary difficulties. First, employers do not test mere applicants—they test people who have conditional offers of employment. Second, as a factual matter, these conditional hires may have a very great stake in the job for which they are applying, though

179. *DeLancie v. Superior Court*, 647 P.2d 142, 148 n.11 (Cal. 1982) (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974); Paul C. Giannelli & Francis A. Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1060 (1976)); see also *Willner v. Thornburgh*, 928 F.2d 1185, 1189-90 (D.C. Cir. 1991), *petition for cert. filed sub nom. Willner v. Barr*, 60 U.S.L.W. 3208 (U.S. Sept. 12, 1991) (No. 91-448).

180. *DeLancie*, 647 P.2d at 149 (quoting *People v. Hyde*, 524 P.2d 830, 833 n.4 (Cal. 1974)); see also *O'Connor v. Ortega*, 480 U.S. 709 (1987) in which the Court stated:

An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence or outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address.

Id. at 716.

perhaps less than that of incumbent employees. Third, even to the extent some difference may exist in the stakes of applicants and employees, the relevance of this distinction to the legal analysis is questionable.

a. The Value of Employment

Most employers do not test all applicants for employment because the cost would be enormous and entirely unnecessary. Instead, employers generally make a tentative selection of applicants and make an offer of employment contingent on passing a drug test. Thus, by the time the applicants are required to decide between taking the test and preserving their privacy, they have a great deal more at stake than mere initial applicants do. They are giving up a job in hand. It is very difficult to distinguish these applicants in terms of their interest in the job from probationary employees who have worked for six months.¹⁸¹

Courts, legislatures, and commentators have long recognized the importance of employment—not just *continued* employment but also *prospective* employment. The Supreme Court has “frequently recognized the severity of depriving a person of the means of livelihood.”¹⁸² Indeed, that concern underlies many of the cases cited in the previous section, including especially *Rutan*.¹⁸³ As Justice Douglas observed:

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, “A man has a right to be employed, to be trusted, to be loved, to be revered.” It does many men little good to stay alive and free and propertied, if they cannot work. To work means to

181. Some, but not all employers, seek to mitigate this problem by giving all applicants notice that a drug test will be required at the time of their initial application. A few employers even obtain written consent to perform the test at the time of the initial application. These procedures are laudable, but do not change the fact that, at the time they actually undergo the test, applicants have more than a speculative interest in the job they are seeking. *But see supra* notes 19-21 and accompanying text.

182. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (citing *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969).

183. *Rutan v. Republican Party*, 110 S. Ct. 2729 (1990); *see also supra* notes 40-45 and accompanying text.

eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb.¹⁸⁴

Even without the impediment of retaining an attachment to one's privacy rights, jobs do not always grow on trees. Unemployment rates exist and are particularly high for minorities and youths. They are also particularly high in certain industries and among individuals with specialized skills. *Rutan*, for example, recognized that the government is the primary employer for many occupations.¹⁸⁵ This problem is exacerbated by the fact that applicant drug screening has become routine in entire industries, such as the defense industry. Even employers in such industries who initially opposed drug testing have been forced to test for fear that they will end up with all the drug users that their competitors have already screened out.¹⁸⁶

Moreover, people who are handicapped by their youth, old age, educational level, minority status, or who have skills that are specific to certain industries, may not be able to find other jobs easily, if at all. What they are forced to give up in exchange for their privacy may be very significant.

"Recreational users," at least, can stop using drugs, give up their privacy rights, and get a job. But what about individuals who have serious drug problems? These people already suffer from a serious disadvantage in the job market—a disadvantage that receives at least limited protection in federal handicap law.¹⁸⁷

184. *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). In a similar vein, one labor scholar has observed:

[I]n a modern industrialized economy employment is central to one's existence and dignity. One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work.

Gould, *supra* note 42, at 892.

185. *Rutan*, 110 S. Ct. at 2738; see also *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 599 (Cal. 1979) ("the injurious effect of arbitrary exclusion . . . loom[s] significantly larger in the case of a monopolistic or quasi-monopolistic public utility").

186. Certain private employers are also being forced to implement drug testing in order to continue to serve government contracts for the Departments of Defense and Transportation, pursuant to the Drug-Free Workplace Act, 41 U.S.C. §§ 701-707 (1988).

187. See 29 U.S.C. § 706(8)(B) (1988) which excludes from the definition of handicapped under §§ 793 and 794 "any individual who is an alcoholic or drug abuser whose *current* use of alcohol or drugs prevents such individual from performing the duties of the job in question." (emphasis added). A number of courts have viewed this section as providing limited protection to alcoholics and drug addicts. See, e.g., *School Bd. v. Arline*, 480 U.S. 273, 285 n.14 (1987) (noting that Congress did not exclude all alcoholics and drug abusers

For these individuals, drug screening operates to the disadvantage of a "class of persons . . . already subject to disadvantages not shared by the remainder of the community."¹⁸⁸ Increased drug testing will create a further disadvantage for those people: "ineligibility for employment in a major sector of the economy."¹⁸⁹

Applicants have a very significant stake in the jobs for which they have been tentatively selected. Whether that stake is greater or lesser than the stake of incumbent employees depends on the circumstances of each individual case. Many incumbent employees would have a far easier time finding another job than many who are unemployed. Moreover, many who are employed have sufficient assets and protections, such as unemployment insurance, to sustain them until they find another job. It certainly cannot be said categorically that applicants, particularly those who have been tentatively selected for employment, have a lesser stake in any particular employment.

b. The Relevance of the Employment Interest

Even if a significant difference between applicants and employees existed in terms of their stake in any particular job, it is unclear how this stake plays a role in the legal analysis. If one applies the Fourth Amendment balancing test delineated in *Von Raab* and *Skinner*, the interest to be weighed on the employees' side of the scale is the "interference with individual liberty that results [from the drug test],"¹⁹⁰ not the job the applicant must give up to preserve her rights. If one applies the compelling interest test used in most of the California cases, the employer must establish that the value accruing to the public "manifestly outweigh[s] any resulting impairment of constitu-

from the definition of handicapped); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (determining that plaintiff's alcoholism did not "militate against [the] finding that he is an 'otherwise qualified handicapped individual'"); *Nisperos v. Buck*, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) (holding that a rehabilitated drug or alcohol abuser is a protected handicapped person); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 600 (S.D.N.Y. 1988) (construing federal law to protect rehabilitated drug and alcohol abusers and those seeking rehabilitation); see also Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12,114(a) (West Supp. 1991) (excluding an individual "engaging in the illegal use of drugs" from the definition of "qualified individual with a disability").

188. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (striking down a Civil Service Commission ban on alien employment as deprivation of a liberty interest).

189. *Id.*

190. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989); accord *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) ("[g]overnment's compelling interests outweigh privacy concerns").

tional rights”¹⁹¹—in other words, the impairment of privacy rights. Indeed, even the court in *Wilkinson*, which held that the most important factor in its analysis was that the plaintiffs were applicants, defined its “test” as whether “[the employer’s] request [to drug test] so substantially burden[ed] plaintiffs’ *right of privacy* that the request was constitutionally . . . impermissible.”¹⁹² None of these tests focus on how much the plaintiff must give up in exchange for privacy.

3. *Waiver As Condition of Employment—A Contradiction in Terms?*

Should employers be permitted to demand as a condition of employment that applicants “waive” any privacy protections which may apply to drug testing? The discussion in Parts III and IV suggests that permitting such a waiver of a substantive right would be anomalous. Indeed, virtually no other substantive right regarding employment, whether provided by the Constitution or by federal statute, is subject to routine waiver in the preemployment context. The discussion in Parts II and VI.A.1-2 suggests that in the Fourth Amendment context, courts, including the Supreme Court, have declined to adopt the waiver analysis.

Arguably, the right of privacy may be distinguished from other rights in employment. Unlike other employment rights, it is frequently suggested that the right of privacy may be waived. In almost every context in which the right of privacy is recognized, courts have accepted some form of consent or waiver. Examples include: physical examinations,¹⁹³ discovery of personal information in court cases,¹⁹⁴ personnel records,¹⁹⁵ employment references,¹⁹⁶ insurance applications,¹⁹⁷ Fourth Amendment

191. *Bagley v. Washington Township Hosp. Dist.*, 421 P.2d 409, 415 (Cal. 1966); *accord Hill v. National Collegiate Athletic Ass’n*, 273 Cal. Rptr. 402, 416-17, 422 (Ct. App.), *review granted*, 801 P.2d 1070 (Cal. 1990).

192. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 203 (Ct. App. 1989) (emphasis added).

193. *See, e.g., Jennings v. Minco Technology Labs, Inc.*, 785 S.W.2d 497, 502 (Tex. Ct. App. 1989).

194. *See, e.g., Davis v. Ross*, 107 F.R.D. 326, 279 (S.D.N.Y. 1985).

195. *See, e.g., Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986).

196. *See, e.g., Littman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984).

197. *See, e.g., Lawrence v. Connecticut Mut. Life Ins. Co.*, 91 F.2d 381, 383 (6th Cir. 1937).

rights,¹⁹⁸ Fifth Amendment rights,¹⁹⁹ tortious invasions of the right of privacy,²⁰⁰ and tortious and criminal trespass, to name only a few.

This point, however, may reflect a confusion between the concepts of consent and waiver. Employees are frequently asked to consent to various intrusions on their privacy interests; but the question for present purposes is not whether applicants or employees may *consent* to an invasion, but whether employers may *require* that the right of privacy be *waived* when a job hangs in the balance. The answer to this question should be no.

Few suggest that a waiver can be valid when incumbent employees are faced with the choice of losing their jobs or taking a drug test. The issue is whether applicants differ in some relevant way.

As discussed, the interests of employees and applicants do not differ significantly. The privacy interests of each are equal. Although advance notice may diminish the intrusiveness of drug testing, it does not in any way diminish the privacy right. Applicants' interests in a particular job, though not "vested," may also be very great. This is especially true if employment is scarce for individuals with particular skills; if the individual is a member of a group that suffers from high unemployment such as the young, the handicapped, and minorities; or if the individual suffers from other handicaps such as drug addiction, poor education, illiteracy, or lack of job skills.

The Supreme Court recognizes the "individual's 'core' common law 'liberty' interest in freedom to follow a chosen profession."²⁰¹ Few rights are more important and few needs greater than the right and need of employment. To recognize that employees also have a significant right of privacy with respect to their employers is to recognize that the power of employers over their employees has limits. It is also to recognize that because of the imbalance in bargaining power between employers and employees, the state must step in to protect that right.²⁰²

198. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

199. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

200. See generally Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R.3d 16 (1974) (discussing the circumstances under which a right to sue in tort for invasion of privacy may be waived or lost).

201. *TRIBE*, *supra* note 35, at 705-06.

202. The inequality of bargaining power between an applicant and an employer was one of the motivations underlying some of this country's most fundamental labor legislation, including the NLRA and the FLSA. As Senator Wagner observed when he

Both courts and legislatures have implicitly recognized that to permit the waiver of a substantive right as a condition of employment—whether preemployment or postemployment—is to make that right virtually meaningless.²⁰³ As recently as two years ago, Congress rejected such waivers in the employee polygraph context;²⁰⁴ as recently as last year, the Supreme Court rejected it in the context of political patronage.²⁰⁵ Most important for current purposes, the Supreme Court in *Von Raab* eschewed an obvious opportunity to employ the waiver theory in the very context addressed here.

Arguably, the position rejecting waivers proves too much. After all, few would argue that an applicant should not be required to sign a release authorizing a prospective employer to check into her previous employment. However, rejecting the notion of waiver does not mean that all intrusions are prohibited.

Privacy rights are subject to balancing. There are greater and lesser invasions, there are greater and lesser justifications for invasions, and there are more and less precisely tailored invasions. This balancing scheme is the appropriate means for determining permissible and prohibited invasions. With respect to

introduced the Labor Disputes Act (a predecessor to the NLRA) in March 1934: "We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization. . . ." 78 CONG. REC. 3679 (1934), quoted in Peter Phillips, Comment, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.L. SCH. L. REV. 793, 798 (1986).

When such inequality of bargaining power exists, resulting agreements have been held to be unduly oppressive or unconscionable "contracts of adhesion." See, e.g., *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981) ("standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it") (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961)); *In re Cross & Brown Co.*, 167 N.Y.S.2d 573 (App. Div. 1957) (holding invalid a provision in employment contract that provided that any dispute be arbitrated before the employer).

Such inequality of bargaining power may also invalidate "exculpatory clauses" releasing parties from tort liability. See, e.g., *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (invalidating hospital admission form releasing hospital from future liability for negligence); *Henriouille v. Marin Ventures, Inc.*, 573 P.2d 465, 469 & n.7 (Cal. 1978) (deeming invalid a residential rental agreement exculpating landlord from liability for injury due to negligence, based on "severe shortage of low-cost housing"). Note that *Henriouille* also provides an excellent list of other jurisdictions holding such clauses in residential rental agreements invalid. See *Henriouille*, 573 P.2d at 469-70; see also CAL. CIV. CODE § 1668 (West 1985) (making exculpatory contracts unlawful).

203. See *supra* notes 58-63, 100-01 and accompanying text.

204. See *supra* notes 100-02 and accompanying text.

205. See *supra* notes 58-63 and accompanying text.

employment references, for example, the employer has a strong interest in obtaining such references, and the applicant has a comparatively minor privacy interest. The employer's interest is also very narrowly tailored. Under any reasonable balancing test, the employer's interest in obtaining references will prevail.

Rejecting "waiver" does not mean rejecting "consent." Once the employer shows that the balance tips in its favor, it means only that the employer is free to condition employment on the applicant's agreement to submit to the invasion. "Consent" remains important because a process must be created to ensure that, even if the employer's interest outweighs that of the applicant, the applicant is informed of her rights and is given the choice of either submitting to the invasion or withdrawing her application. Consent, however, should be permitted only when the privacy invasion is reasonable—that is, when the employer's interest outweighs that of the applicant.²⁰⁶ Consent should thus be legally enforceable only when justified by its own utility analysis.²⁰⁷

Even if one were to permit waivers of the right of privacy, every court that has considered such waivers has required some form of inquiry to assure that the waiver is legitimate.²⁰⁸ In other areas of law, rules have evolved to test whether a waiver or consent is clear and unmistakable,²⁰⁹ voluntary,²¹⁰ knowing and intelligent,²¹¹ and in writing.²¹²

206. See *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987).

207. The California courts, for example, permit the conditioning of a constitutional right only upon a showing that the utility of imposing the condition manifestly outweighs the resulting impairment of constitutional rights, and that less intrusive alternatives are unavailable. See *Bagley v. Washington Township Hosp. Dist.*, 421 P.2d 409, 414-15 (Cal. 1966).

208. See *supra* notes 201-02 and accompanying text.

209. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waiver of statutorily protected rights).

210. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (consent to a police search).

211. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of right to counsel).

212. See, e.g., *United States v. Cochran*, 770 F.2d 850 (9th Cir. 1985) (waiver of right to jury trial pursuant to the Federal Rules of Criminal Procedure). Different areas of law have spawned different standards of greater and lesser difficulty. Even within criminal law, entirely different tests apply to waiver of different rights. See generally William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989) (arguing that the actual intended beneficiary of constitutional rights in the criminal context is not the defendant but rather innocent third parties, and that varying waiver standards resulted from the relative inability to separate these third party rights from the defendant's rights). The differences between the standards do not appear to be based upon any rational balance of the relative importance of the rights waived, but rather upon the historical evolution of case law in each discrete area.

In most instances, any waiver or consent to drug testing by job applicants would meet *none* of the tests articulated in other areas. Far from being clear and unmistakable, applicants generally do not even know that they are waiving rights. Frequently, "waivers" are not in writing. Even those that are in writing do not generally refer to the California constitutional right of privacy, for example. Indeed, even when "consent" is in writing, there is generally no indication that the applicants are waiving their rights.

Nor could such waiver or consent be described as knowing and intelligent. Many job applicants are not legally sophisticated. They are often unaware of their legal rights. They know little about urinalysis as far as what they will be required to do; what monitoring they will be subject to; how their test results will be reported, interpreted, and used; the extent to which confidentiality will be assured; and so on.

Finally, for the reasons discussed above, the waiver may not be truly voluntary because employers generally enjoy an enormous bargaining advantage over applicants. That the applicants may freely waive their right of privacy when the penalty for refusal is the loss of a job is, at best, a legal fiction.²¹³

B. The Employer's Interest

The second category of argument supporting across-the-board applicant drug testing—and the distinction between applicant and employee drug testing—is the assertion that the *employers'* interest in testing applicants is greater. This argument is unpersuasive.

Initially, it must be noted that, in at least two respects, employers *do* have a greater incentive to test applicants as opposed to incumbent employees. As a practical matter, it is very difficult for employers to obtain accurate information about the personal habits and problems of job applicants. They may

213. A number of courts have concluded that loss of employment opportunities does not constitute duress. *See, e.g., Jevic v. Coca Cola Bottling Co.*, 5 Individual Empl. Rts. Cas. (BNA) 765, 772 (D.N.J. 1990) (holding that job offer conditioned on drug test results was not coercive); *Stewart v. Pantry, Inc.*, 715 F. Supp. 1361, 1366 (W.D. Kan. 1988) (requiring employees to take polygraph does not constitute duress); *Foley v. Polaroid Corp.*, 508 N.E.2d 72, 77 (Mass. 1987) (holding that threat of discharge from employment does not constitute false imprisonment). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 121 (5th ed. 1984) (discussing consent given under duress). Although this approach may be sound in a contractual or tort setting, it simply does not make sense when dealing with a substantive right.

obtain limited (and often unreliable) information about performance from a job reference, credit history, or driving record, but such information is of little utility. By contrast, employers have a relatively nonintrusive means of observing the problems of incumbent employees in noncritical positions—they simply observe them. In addition, as discussed in Part II, the consequences of hiring an applicant with a drug problem are potentially severe. Many legal and financial benefits accrue to applicants immediately upon hire.²¹⁴

Neither of these arguments constitute a legally acceptable justification for distinguishing applicant and employee testing. First, the arguments are circular. They are based on the premise that, because greater legal protections arise upon hiring, employers should have greater freedom to invade privacy before hiring. That the courts and legislatures have chosen to provide greater protections for employees may be a practical reason to perform testing at the preemployment stage, but it will not suffice as a policy rationale for the distinction.²¹⁵

Second, the employers' primary interest in across-the-board testing of all applicants is economic. Mere economic interests, however, should not be sufficient to overcome the interests in vindicating human dignity embodied in the right of privacy. Indeed, almost without exception, Fourth Amendment cases considering drug testing have rejected purely economic justifications for drug testing.²¹⁶

Third, even with respect to economic interests, little empirical evidence links the results of preemployment screening to job performance. For example, a recent article in the *Journal of the American Medical Association* noted that in light of the widespread use of preemployment testing, "it is surprising that, to

214. See *supra* notes 26-27 and accompanying text.

215. Such logic sadly confirms the accuracy of Justice Black's prediction in *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which he stated that the "inevitable result" of the requirement of hearings before government benefits may be terminated "will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility." *Id.* at 279 (Black, J., dissenting). The result, Justice Black suggested, would be that "many will never get on the rolls, or at least . . . will remain destitute during the lengthy proceedings followed to determine initial eligibility." *Id.*; see also *TRIBE*, *supra* note 35, at 690 n.37. As in *Goldberg*, to permit the greater protections and benefits accorded employees to diminish the rights and protections of applicants may be a logical result, but it plainly is not one that the law should sanction.

216. See, e.g., *Willner v. Thornburgh*, 928 F.2d 1185, 1192-93 (D.C. Cir. 1991) (purporting to consider several noneconomic interests), *petition for cert. filed sub nom. Willner v. Barr*, 60 U.S.L.W. 3208 (U.S. Sept. 12, 1991) (No. 91-448). But see *id.* at 1196 (Henderson, J., dissenting) (claiming economic interests were actually the "sole interest on the government's side of the scale").

our knowledge, only one previous peer reviewed report has addressed the efficacy of preemployment drug screening in predicting employment outcome."²¹⁷ Although the study did find some relationship between drug use and injuries, accidents, and absenteeism, the authors concluded that their findings "suggest that many of the claims cited to justify preemployment drug screening have been exaggerated."²¹⁸

Finally, the purported economic interests of employers are undercut by the fact that most employers lack a coherent scheme for detecting other potential problems in their applicant pool. Few employers, for example, require applicants to undergo complete physicals, which might reveal other conditions and problems that could lead to accidents or absenteeism.²¹⁹ Few screen for alcohol, cigarette, or legal drug use. Many do not even check references thoroughly. In addition, few employers who use drug screening examine their equipment and work process for hazards nearly as aggressively as they screen their employees for drug use.

VII. CONCLUSION

Lurking beneath the entire applicant-testing controversy is a motive for applicant testing that often goes either understated, or completely unstated: screening job applicants and denying jobs to drug users is an effective means of assisting in the "war on drugs." The lack of consistency by employers in testing for other potential applicant problems is telling evidence that assisting in the "war on drugs" is the real agenda.

The Institute of Bill of Rights Law Task Force correctly rejected this rationale as an acceptable basis for drug testing. Labor law has long rejected the notion that the employer may act as a policeman with respect to his work force. An employer does not become, as a result of the employment relationship, the "guardian of the employee's every personal action and does not exercise parental control."²²⁰ Off-duty conduct is not a basis for

217. Craig Zwerling et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639, 2639 (1990).

218. *Id.* at 2643.

219. To some extent, of course, refusal to hire based on other physical conditions would be prohibited by handicap and workers' compensation laws.

220. Janet Maleson Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659, 686 (1979).

employer discipline except when the conduct "‘has an adverse effect on the company’s business or reputation, the morale and well-being of other employees, or the employee’s ability to perform his regular duties.’" ²²¹

The government’s attempt to encourage private employers to use their workplaces to stop illegal drug use is truly a dangerous precedent. Private sector employers have enormous power over their employees—power not subject to constitutional constraints. ²²²

Finally, from a policy perspective, depriving drug users of employment is hardly the most effective social response to drug abuse. No empirical study suggests that unemployment discourages drug use or that employment encourages use. Common sense and everyday experience suggests the contrary—that serious drug use and addiction is more common among the unemployed. Moreover, denying employment to drug users also denies users medical insurance, employee assistance programs, and other resources that may help overcome drug problems. Denying employment to drug users also puts more pressure on the very few government programs that exist to help addicts. Indeed, by encouraging preemployment drug screening, the government, at a minimum, has eliminated two major attributes of employment that may provide meaningful help in the war on drugs: the financial resources of private industry and the positive psychological effect of employment. ²²³

The right of privacy is a human constant that does not change with the formal legal niceties of vested "property interests." Distinctions between the privacy interests of applicants and employees are not supported by history, current laws in analogous

221. *Id.* at 709 (quoting *In re Wheaton Indus.*, 64 Lab. Arb. Rep. (BNA) 826, 828 (1975) (Kerrison, Arb.)); see also FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 656-58 (4th ed. 1985) (discussing conduct away from the job as the basis for discharge or discipline).

222. The government has aided and abetted the exploitation of this power through such seemingly innocuous and toothless legislation as the Drug-Free Workplace Act, 41 U.S.C. §§ 701-707 (1988). With this legislation the government attempted to evade the Fourth Amendment by the simple artifice of encouraging but not mandating private actors to serve as policemen. This may avoid the difficulties associated with state action that would be triggered by mandatory testing—though a persuasive argument may also be made that searches encouraged by the government do constitute state action.

223. Advocates of the choke hold theory might claim that applicant testing is most effective in scaring away casual users rather than addicts. Presumably, nonaddicted drug users will be deterred from drug use at least as long as necessary to pass a preemployment screen. This short term deterrence is of little practical value, however, except as a test of addiction.

areas, or policy. On the contrary, the recognition of such distinctions sets a very dangerous precedent, treating applicants fundamentally different from employees on matters in which their interests and rights should be deemed the same, and embarking on a path in which those without the "property" of existing employment have fewer substantive protections than those with such property.