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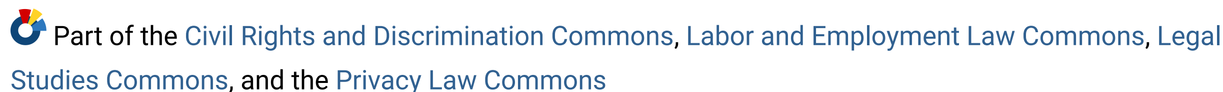
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Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing

Pauline T. Kim[*]

I. INTRODUCTION

The latter half of the twentieth century saw a marked shift in the form of legal regulation of the workplace. At mid-century, unions were at the height of their power in terms of membership and bargaining strength. The dominant legal model for governing workplace relations was the one put into place by the Wagner Act in 1935,[1] a model promoting collective bargaining. Since then, however, union strength has steadily eroded, and with it, collectively bargained agreements as a source of rights for workers.[2] Paralleling this decline has been the growth of government mandates creating rights in the individual worker.[3]

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* Professor, Washington University School of Law, St. Louis. I would like to thank the Louisiana Law Review for organizing and sponsoring this symposium on workplace privacy. I benefited greatly from the comments I received at the symposium. Earlier incarnations of this Comment were presented at faculty workshops at Washington University School of Law, Vanderbilt University Law School, and the Law and Society Association's annual meeting. I am grateful for the helpful comments of participants at each of those venues, as well as those of Marion Crain and Margo Schlanger. Valuable research assistance was provided by Tom Clark and Jason Retter.

1. 29 U.S.C. §§ 151-69 (1935).

2. Union membership in the United States has declined steadily since the mid-1950's. In 1950, 31.6% of the total workforce and 34.6% of the private sector workforce were union members. By 2004, those figures had declined to 12.5% and 7.9% respectively. The Labor Research Association, *Union Membership: Overall (1948-2004)* and *Union Membership: Private Sector (1948-2004)*, *available at* http://www.laborresearch.org/econ_stats.php (last visited May 6, 2006).

3. For example, Congress has enacted laws prohibiting certain forms of discrimination. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000); Americans with Disabilities Act, 42 U.S.C. § 12101 (2000); Age Discrimination in Employment Act, 29 U.S.C. § 621 (2000); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000) (regulating employer provision of pensions and other fringe benefits); Occupational Safety and Health Act, 29 U.S.C. § 651 (2000) (establishing basic safety standards in the workplace); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2000) (requiring the provision of unpaid family and medical leave to certain workers). In addition, state courts and legislatures have recognized or enacted a variety of other legal rights protecting the individual employee against perceived overreaching by the employer.

This shift—from collective bargaining to individual employee rights as the primary source of legal regulation—has been both applauded and decried by observers and legal scholars. Some commentators have argued that the shift is a positive one, claiming that government mandated minimum standards more reliably protect workers' interests while avoiding the inefficiencies and costs of granting monopoly status to unions.[4] Others lament the decline of collective bargaining, asserting that unions are necessary for effective protection of individual workers' interests and arguing that the participatory governance ideals inherent in the scheme of collective bargaining have independent value.[5]

This Comment asks what difference it makes to think about workers' rights under a collective as opposed to an individual rights model in a particular context: that of protecting employee privacy. More specifically, it undertakes an examination of the range of disputes between employers and employees over workplace drug testing in the late 1980's and the 1990's, focusing on the differences between cases brought with union involvement and those brought by individual workers acting alone. In doing so, it asks how collective forms of disputing about drug testing differed from individual approaches, and whether these differences affected the ability of workers to assert and protect their interests in personal privacy.

The law review literature has focused primarily on the legality of workplace drug testing, emphasizing a handful of highly salient cases. This Comment takes a different approach. It looks beyond the major cases to a broader range of disputes about drug testing. The purpose of this Comment is not to argue for or against the legality of drug testing, but rather to understand how collective approaches to contesting employer policies looked different from individual rights based claims. The examination here is exploratory rather than definitive, as it is based primarily on publicly available court and National Labor Relations Board (NLRB) decisions, which may not be representative of all disputes.[6] What it suggests is that unions were far more likely than individual litigants to bring broad-based challenges intended to

4. Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. Chi. L. Rev. 1012 (1984).

5. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575 (1992).

6. *See* Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 Law & Soc'y Rev. 1133 (1990).

benefit the workforce as a whole; however, their ability and willingness to do so appeared to depend heavily on both the legal and the bargaining environment. Over time, union-initiated challenges increasingly focused on the application of drug testing policies to particular workers rather than class-wide challenges. Union involvement also influenced how these challenges were framed in legal terms. Disputes channeled through the collective bargaining system emphasized workers' interests in job security, while an individual rights approach more often framed the issue in dignitary terms, alleging claims such as invasion of privacy, defamation or intentional infliction of emotional distress. And although individual litigants occasionally obtained damage awards, they primarily brought after-the-fact challenges to the implementation of drug testing policies rather than seeking prospective, class-wide relief.

II. THE EXPANSION OF WORKPLACE DRUG TESTING

Drug testing provides a useful case study for exploring the differences between collective and individual approaches to protecting employee privacy because its implementation followed a fairly clear trajectory. Prior to the mid-1980's, employee drug testing was a non-issue because only a trivial proportion of the workforce was subjected to such testing.[7] Then, with President Ronald Reagan's announced War on Drugs in the mid-1980's, the use of urinalysis drug testing in the employment setting exploded. In 1986, President Reagan issued Executive Order No. 12564, declaring a "drug-free federal workplace" and directing the head of each federal agency to "develop a plan for achieving the objective of a drug-free workplace" and to "establish a program to test for the use of illegal drugs by employees in sensitive positions."[8] Within a short period of time, drug testing became a standard feature of federal government employment. Following President Reagan's Executive Order, the use of drug testing in the private sector also expanded rapidly. In 1987, 21.5% of major U.S. firms surveyed reported that they conducted some form of employee

7. The technology permitting drug testing of urine and other bodily fluids existed in the early 1970's, but its use was mostly confined to the forensic and medical contexts. Under the Influence?: Drugs and the American Work Force 178 (Jacques Normand, Richard O. Lempert & Charles P. O'Brien eds., 1994). The United States armed forces first began to implement large-scale drug testing beginning in the 1970's and the practice spread to private industry in the 1980's. *Id.*

8. 5 U.S.C. §§ 7301(1), 7301(2)(a) (1986).

drug testing.[9] This figure trended steadily upward, reaching a peak of 81.1% of large firms surveyed in 1996.[10] Some of these firms were compelled to adopt drug testing programs because of new federal regulations mandating testing in industries such as railroads and trucking. Many others began to implement drug testing programs voluntarily, moved by the example of the federal government or the exhortation of political leaders.

The dramatic expansion of drug testing in the workplace did not occur without controversy. The growth of urinalysis testing of employees provoked both legal challenges and critical commentary. Critics of workplace drug testing framed their concerns primarily in terms of the threat to personal privacy and autonomy, identifying a number of ways in which the process of urinalysis drug testing infringed upon workers' interests.[11] First, they argued that the process of collecting urine samples implicates workers' interest in their bodily privacy. As observed by Charles Fried, "the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem."[12] Because of concerns about adulterated samples, some testing protocols call for monitoring or direct observation of the act of urination, a requirement that obviously increases the intrusiveness of the procedure.

Second, drug testing may infringe workers' interests in maintaining the privacy of sensitive medical information. Because the metabolites of certain prescription or over-the-counter drugs are similar to those produced by illegal drug use, those tested are typically asked to list all medications taken in the recent past to assist the testing personnel in interpreting the results of a positive

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9. American Management Association, 1996 AMA Survey: Workplace Drug Testing and Drug Abuse Policies 1 (1996).

10. *Id.* Subsequent AMA surveys suggest that testing by major U.S. firms declined after 2001. *See* American Management Association, 2001 AMA Survey on Workplace Testing: Medical Testing (2001).

11. *See, e.g.*, Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 Chi.-Kent L. Rev. 221 (1996); Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 Wm. & Mary L. Rev. 95 (1991); Jonathan V. Holtzman, *Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 Wm. & Mary L. Rev. 47 (1991); Kevin B. Zeese, *Drug Testing Here to Stay?*, 12 Geo. Mason L. Rev. 545 (1990); Heidi P. Mallory, Note, *Fourth Amendment – the "Reasonableness" of Suspicionless Drug Testing of Railroad Employees*, 80 J. Crim. L. & Criminology 1052, 1080 (1990); Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. Rev. 1286, 1333 (1989).

12. Charles Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968).

drug screen.[13] Such disclosures, as well as the chemical testing itself, may reveal a great deal of information about the health and medical condition of an individual. The employee's interest in controlling sensitive medical information may also be implicated if the employer or testing laboratory does not maintain adequate control over the information in order to maintain its confidentiality. Finally, drug testing may reveal information about an employee's off-duty activities. Urinalysis testing detects drug metabolites—biochemical products produced by the body in response to certain substances—that remain present in the body well past the time of exposure.[14] As a result, an individual may test positive for certain drugs days or even weeks after exposure, long after any psychoactive effects have disappeared.

Workplace drug testing raised other concerns beyond privacy for employees and their advocates. Much of the early debate focused on the accuracy of the tests and how positive results should be interpreted. Commentators pointed out that the validity of test results might be compromised by sample adulteration or poor laboratory quality, and that false positives were inevitable.[15] The problem of false positives is exacerbated when the base rate of actual positives in the tested population is low—as is likely when employees in a largely drug-free workplace are tested randomly rather than on the basis of individualized suspicion.[16] Moreover, positive test results require interpretation. The presence of drug metabolites might indicate illegal drug use or exposure to a legal substance that produces similar metabolites in the body. And a positive result does not indicate when and how much of a drug was ingested or whether the individual was impaired.[17] The implementation of these policies also raised concerns about increased employer power. Because drug testing is a coercive procedure that can be used to justify discharge, an employer could deploy it in a manner that discriminates against disfavored groups, including racial minorities or union activists, or that simply discourages workers from speaking out about workplace concerns. Thus, employees had an interest in influencing how positive results would be interpreted and what consequences would follow from

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13. *See* Edward M. Chen, Pauline T. Kim & John M. True, *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 Geo. Mason L. Rev. 651, 673 (1990).

14. *See id.* at 674.

15. *See, e.g.*, *id.* at 679; Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 Harv. J.L. & Tech. 65 (1991).

16. Chen, et al, *supra* note 13 at 688-89.

17. *See* Under the Influence?, *supra* note 7, at 193.

such a result—for example, whether termination is automatic or employees are afforded an opportunity for retesting, and whether an individual's past work history is relevant in determining the sanction.

Of course, employers who adopted drug testing policies believed they were justified in doing so, arguing that testing ensured workplace safety, promoted productivity and deterred illegal drug use, and that these legitimate interests outweighed any resulting burden on employees' rights.[18] The purpose of this Comment is not to revisit the extensive debates about whether or under what conditions employee drug testing is constitutional or fair to workers, or whether it constitutes a wise policy. Instead, it takes as a starting point the fact that workplace drug testing was highly contested at the outset, and examines how employee concerns about its implementation played out in formal legal disputes.

III. CONTESTING WORKPLACE DRUG TESTING

A. The Leading Cases

In the mid-1980's, as employers began implementation of drug testing programs, employees or their representatives instituted a number of court cases challenging these policies. Because much of the early testing was undertaken by public employers, or as the result of federal mandates, the early cases most often raised constitutional challenges, alleging that the testing violated workers' Fourth Amendment rights to be free from unreasonable searches. This early litigation produced mixed results regarding the constitutionality of workplace drug testing; however, courts generally agreed that the testing implicated important privacy interests.[19] Some courts emphasized the intrusiveness of urine

18. *See, e.g.*, Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 Geo. Mason L. Rev. 491 (1990); Kenneth B. Noble, *Issue and Debate: Should Employers Be Able to Test for Drug Use?*, N.Y. Times, Apr. 17, 1986, at B7 ("Employers argue that drug-using employees often develop medical problems that can result in increased use of sick leave and health benefits and, ultimately, high insurance premiums.").

19. *See, e.g.*, Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), *amended by* 878 F.2d 1476 (D.C. Cir. 1989) (citing cases and agreeing that mandatory urinalysis is a "search" implicating the Fourth Amendment because it entails government action that infringes a "reasonable expectation of privacy"); Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1542-43 (6th Cir.), *vacated by* 861 F.2d 1388 (6th Cir. 1988) (finding strong privacy interests in act of urinating and in information that can be gleaned from urine analysis); Capua v.

tests, which required monitoring or even directly observing the act of urination.[20] Other courts emphasized the potential for revealing information about employees' off-duty activities. For example, the District of Columbia Circuit found that urinalysis testing "may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home."[21] Similarly, a district court judge in 1986 characterized urinalysis as a "form of surveillance" which "reports on a person's off-duty activities just as surely as someone had been present and watching."[22] Although agreeing that urinalysis drug testing constituted a "search" implicating the Fourth Amendment, courts disagreed over how to balance employer interests in testing against employee interests in privacy.

Then, in 1989, the Supreme Court decided two high profile cases—*Skinner v. Railway Labor Executives' Association*[23] and *National Treasury Employees Union v. Von Raab*[24]—that directly addressed the constitutionality of drug tests under the Fourth Amendment. *Skinner* involved a challenge to the constitutionality of regulations promulgated by the Federal Railroad Administration (FRA) requiring drug and alcohol testing of railroad employees involved in a major train accident.[25] *Von Raab* addressed the United States Customs Service's policy of requiring all employees transferred or promoted to certain positions to undergo urinalysis drug tests.[26] Covered positions included those directly involved in drug interdiction, those requiring the incumbent to carry firearms, and those that entailed handling of "classified" material.[27]

The Supreme Court in *Skinner* unambiguously recognized that the drug tests implicated significant privacy interests. It held that both the physical intrusion entailed in obtaining a blood sample,

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City of Plainfeld, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (finding that "urine testing involves one of the most private functions").

20. *See, e.g.*, *Lovvorn*, 846 F.2d at 1542-43; Nat'l Treasury Employee Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656, 109 S. Ct. 1384 (1989).

21. *Jones*, 833 F.2d at 340.

22. *Capua*, 643 F. Supp. at 1511.

23. 489 U.S. 602, 109 S. Ct. 1402 (1989).

24. 489 U.S. 656, 109 S. Ct. 1384 (1989).

25. 489 U.S. at 609, 109 S. Ct. at 1409. The regulations also authorized, but did not require, railroads to conduct breath or urine tests in the event of specified rule violations or upon the "reasonable suspicion" of a supervisor that an employee was impaired due to drug or alcohol use. *Id.* at 611, 109 S. Ct. at 1410.

26. 489 U.S. at 660-61, 109 S. Ct. at 1388.

27. *Id.*

and the visual or aural monitoring of the act of urination required under the regulations infringed "expectations of privacy that society has long recognized as reasonable."[28] Because testing bodily fluids "can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic," the Court found that the ensuing chemical analysis constituted a further invasion of privacy, and concluded that these intrusions "must be deemed searches under the Fourth Amendment."[29] The Court noted, however, that the Fourth Amendment proscribes only *unreasonable* searches and seizures. Emphasizing the safety-sensitive nature of the railroad workers' jobs and the pervasive regulation of the railroad industry to ensure safety, the Court held that the government's "compelling" interest in testing without individualized suspicion outweighed the workers' interests in privacy.[30] The Court reached a similar conclusion in *Von Raab*, referring to a "veritable national crisis" caused by the smuggling of illegal drugs, and finding that the Government had a compelling interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[31]

Although upholding the testing in large part, the Supreme Court unambiguously framed the debate over drug testing as implicating privacy interests. Quoting a Fifth Circuit opinion, the Court described the burden imposed by the sample collection process:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it

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28. *Skinner,* 489 U.S. at 617, 109 S. Ct. at 1413.

29. *Id.*

30. *Id.* at 633, 109 S. Ct. at 1422.

31. 489 U.S. at 668, 670, 109 S. Ct. at 1392-93. The Court also held that the government had a legitimate safety interest in preventing the promotion of drug users to positions requiring the carrying of firearms. It concluded that the privacy interests of drug-interdiction personnel and those who carry firearms on the job were outweighed by the government's interests "in safety and in the integrity of our border." *Id.* at 672, 109 S. Ct. at 1394. The Court, however, remanded the issue of the reasonableness of testing employees who handle classified materials. Although agreeing that the government has a compelling interest in protecting "truly sensitive information," the Court expressed skepticism that all the employees subject to testing under this rationale in fact had access to such information. *Id.* at 677-78, 109 S. Ct. at 1397. Categories of employees to be tested included "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney," "Baggage Clerk," "Co-op Student," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger." *Id.* at 678, 109 S. Ct. at 1397. The Court therefore remanded the case to the Court of Appeals to determine whether the category of employees was too broadly defined. *Id.*

> 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.[32]

In addition to bodily privacy, the *Skinner* court found that the revelation of "a host of private medical facts about an employee" through chemical analysis of urine also constituted a "search" under the Fourth Amendment.[33] The dissenting Justices in particular emphasized the dignitary harms threatened by urinalysis testing. In his dissent in *Skinner*, Justice Thurgood Marshall decried the "mass governmental intrusions upon the integrity of the human body that the majority allows to become reality," arguing that the decision will ultimately "reduce the privacy all citizens may enjoy."[34] Justice Antonin Scalia, dissenting in *Von Raab*, found urinalysis drug testing to be "a type of search particularly destructive of privacy and offensive to personal dignity."[35] Given the absence of any evidence of drug use among Customs Service employees, he concluded that the Customs Service testing program was "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[36]

Despite the clear recognition of a privacy interest in *Skinner* and *Von Raab*, those decisions made it more difficult for workers to challenge drug testing policies under the Fourth Amendment by accepting as compelling justifications the employers' asserted interests in safety in *Skinner* and in the "integrity" of the Customs Service in *Von Raab*. Prior to those decisions, published federal courts of appeals' decisions addressing Fourth Amendment challenges to workplace drug testing were evenly split.[37] By

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32. *Skinner*, 489 U.S. at 617, 109 S. Ct. at 1413 (citing Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656, 109 S. Ct. 1384 (1989)).

33. *Id.*

34. *Id.* at 655, 109 S. Ct. at 1433 (Marshall, J., dissenting).

35. 489 U.S. at 680, 109 S. Ct. at 1398 (Scalia, J., dissenting).

36. *Id.* at 681, 109 S. Ct. at 1399.

37. Courts of appeals found the employer's testing policies constitutional in Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656, 109 S. Ct. 1384 (1989); Policemen's Benevolent Ass'n v. Township of Washington, 850 F.2d 133 (3d Cir. 1988); and Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987), *amended by* 878 F.2d 1476 (D.C. Cir. 1989). Courts of appeals upheld employee challenges to such policies in Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir.), *vacated by* 861 F.2d 1388 (6th Cir. 1988); Penny v. Kennedy, 846 F.2d 1563 (6th Cir.), *vacated by* 862 F.2d 567 (6th Cir. 1988); and Ry. Labor Exec. Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988) *rev'd*, 489 U.S. 602, 109 S. Ct. 1402 (1989).

contrast, in the years following the Court's decisions in *Skinner* and *Von Raab*, the courts of appeals overwhelmingly upheld government drug policies in the face of Fourth Amendment challenges.[38]

B. A More Systematic Look at the Cases

Despite the considerable attention they received, *Skinner* and *Von Raab* were not representative of the bulk of legal disputes over employer drug testing. Those cases sought class-wide, injunctive relief based on a Fourth Amendment challenge. Most drug testing disputes, however, involved individual workers impacted by their employer's mandatory testing policies. Moreover, the constitutional claims raised in *Skinner* and *Von Raab* were not generally available to workers in the private sector.[39] Private employees who wanted to challenge drug testing policies had to rely on common law or statutory claims, and if they were unionized, the remedies available through the collective bargaining system.

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38. For example, in all eight reported courts of appeals' decisions in 1989 which followed *Skinner* and *Von Raab* and involved broad Fourth Amendment challenges to employer drug testing policies, the employer prevailed on appeal, either outright or because the appellate court significantly narrowed the scope of an injunction issued by the district court in the case. *See* Nat'l Treasury Employees Union v. Bush, 891 F.2d 99 (5th Cir. 1989) (rejecting challenge to constitutionality of executive order mandating random urinalysis drug testing of federal workers in sensitive positions); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (vacating as overbroad an injunction issued by the district court enjoining mandatory drug testing of correctional officers); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (holding mandatory, suspicionless drug testing of Department of Transportation employees constitutional); Transp. Workers Union v. SEPTA, 884 F.2d 709 (3d Cir. 1989) (upholding constitutionality of random testing of transportation employees); Nat'l Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) (vacating in part lower court injunction barring mandatory drug testing of Army's civilian employees); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (holding constitutional random drug testing of civilian employees at chemical weapons plant); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (modifying injunction to permit random drug testing of certain Department of Justice employees); Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989) (upholding police department's random drug testing rule). Similar results persisted throughout the 1990's.

39. An exception exists when a private party acts "as an instrument or agent" of the government. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402 (1989). For example, in *Skinner*, the drug testing at tissue was conducted by private railroads, but it occurred with the Government's encouragement, endorsement, and participation such that the Fourth Amendment protections applied. *Id.*

This section examines the range of legal disputes surrounding drug testing, regardless of the legal theory relied on. It considers both court cases and NLRB cases involving disputes over workplace drug testing policies, asking whether cases initiated by unions differed from individual suits in terms of how the employee interests are framed and what relief was sought. In terms of relief, some cases primarily involved disputes over the application of an employer's drug testing policy to a particular individual or handful of individuals. Such cases sought reinstatement or damages as remedies for the affected workers, but did little for other employees in the workforce. Other cases explicitly sought declaratory and injunctive relief on behalf of a group of workers, requesting that a court find a particular testing policy unlawful and enjoin its implementation. If granted, such relief would affect the conditions of employment of the entire workforce, or category of workers subject to testing, not merely the individuals who brought the suit.

Importantly, this distinction between cases seeking individual relief and those raising workforce-wide challenges did not necessarily coincide with the presence or participation of a union in the litigation. Individual litigants sometimes brought suits seeking class-wide prospective relief against employer-mandated drug tests, and unions often represented individual members challenging the application of a drug testing policy to them. The following sections discuss the types of legal challenges observed in union and non-union settings.

1. The Union Setting

When unions were involved, they brought both cases seeking class-wide relief *and* those raising only individual claims of harm. Suits involving workforce-wide challenges were comprised of two main types. Many, like *Skinner* and *Von Raab*, involved prospective challenges to enjoin implementation of drug testing programs on the grounds that they violated the Fourth Amendment. Other cases sought to force employers to bargain with the union or to submit disputes over drug testing to arbitration prior to implementation.[40] Unions also brought a considerable number of individual grievances challenging the application of drug testing policies. These disputes typically involved an individual employee

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40. *See, e.g.*, Consolidated Rail Corp., 491 U.S. 299, 109 S. Ct. 2477 (1989); United Steelworkers v. ASARCO, Inc., 970 F.2d 1448 (5th Cir. 1992); Oil, Chemical & Atomic Workers Int'l. Union v. Amoco Oil Co., 885 F.2d 697 (10th Cir. 1989).

terminated after refusing to take a drug test or testing positive.[41] The union pursued a grievance on behalf of the worker, claiming that the discharge violated the "just cause" provision of the collective bargaining agreement.

Over time, the types of legal challenges brought by unions appear to have shifted considerably. In the earlier years—from the mid 1980's to early 1990's—workforce-wide challenges dominated the federal court litigation in which unions were involved. Over time, however, disputes brought on behalf of individual union members appear to have become much more numerous. For example, from 1986 to 1990, out of thirty-two publicly available federal appeals court decisions involving workplace drug testing challenges by unions, twenty-seven involved workforce-wide claims seeking to enjoin implementation of employer drug testing policies or to compel employers to bargain over the issue. Among similar cases reported from 1996 to 2000, in only three of nineteen such suits sought any kind of broad relief—the rest involved the individual grievances of one or a handful of union members.

Of course, examining only publicly available courts of appeals decisions runs the risk of presenting a distorted picture of the actual pattern of disputes.[42] Cases may settle before a formal opinion is issued, or the parties may decide not to appeal. It is plausible, however, that unions shifted their emphasis from workforce-wide to individual cases over this period of time. In the 1980's, the issue of drug testing was a novel one and the very purpose of the early cases was to establish some legal precedent regarding the permissibility of drug testing. As more courts issued decisions and the law become more settled, lawsuits would be less necessary to resolve disputes over the permissible scope of drug testing. In addition, a reduced emphasis on class challenges would be a rational response on the part of unions to signals from the federal courts about their receptivity to broad policy challenges to employer drug testing policies. As discussed above, following *Skinner* and *Von Raab*, the federal courts of appeals became noticeably less sympathetic to Fourth Amendment challenges to workplace drug testing policies.

In addition, as testing policies became more common, greater numbers of workers were tested and more opportunities existed for individual disputes to arise. In the context of a collective bargaining agreement, most individual disputes are unlikely to

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41. *See, e.g.,* Local 238 v. Cargill, Inc., 66 F.3d 988 (8th Cir. 1995); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5th Cir. 1998).

42. *See* Siegelman & Donohue, *supra* note 6.

produce a judicial opinion or even result in a formal court filing. These claims would initially be processed through the non-public grievance arbitration system established by the collective bargaining agreement. The vast majority of such disputes would be resolved somewhere along the way through this system, and only in rare instances would either party seek review of an arbitration decision in court. The fact that a number of individual grievances are reported in federal appeals court decisions in the 1990's suggests the existence of a much larger number of such individual disputes that never reached the courts. Thus, although the precise proportions are uncertain, an actual shift in emphasis from workforce-wide challenges to the processing of individual disputes likely occurred in the union context.

Looking at litigated court cases, however, omits another important form of potential collective resistance to employer-mandated drug testing. In many workplaces, the issue of drug testing was addressed primarily through the collective bargaining process rather than litigation. In *Johnson-Bateman*, decided in 1989, the NLRB ruled that drug and alcohol testing is a mandatory subject of bargaining, and that therefore implementation of such a program by an employer without first bargaining with the union is an unfair labor practice.[43] The NLRB found that a newly-imposed requirement of drug and alcohol testing for employees who required medical treatment for on-the-job injuries was plainly "germane to the working environment" and that the union had not waived its right to bargain over such a change. Thus, the collective bargaining process at least offered the *potential* for workers to raise objections on a collective basis to employer-imposed drug testing policies, and to address issues such as which workers would be subject to testing, how and when tests would be conducted, and what consequences would follow a positive result.

How unions *actually* dealt with the issue of drug testing in the negotiation process is clearly important for understanding collective approaches to protecting employee privacy; however, exploring that question is beyond the scope of this Comment. Whether or not unions succeeded in protecting workers' privacy interests when negotiating contracts, it is clear that the collective bargaining process affected the way in which disputes over drug testing were framed. In finding that drug and alcohol testing was germane to the working environment, the NLRB in *Johnson-Bateman* emphasized workers' economic interests. The NLRB characterized the testing policy as a substantial change in the "mode of the investigation" and "the character of proof on which

43. 295 N.L.R.B. 180 (1989).

an employee's job security might depend."[44] Thus, the NLRB's decision that drug and alcohol testing is a mandatory subject of bargaining turned on its finding that such testing has "potentially serious implications"[45] for employee's *job security*. Nowhere in *Johnson-Bateman* does the NLRB mention the concept of privacy or suggest that employer-mandated testing threatens any dignitary interests distinct from workers' interests in retaining their jobs. Other court and NLRB cases addressing the duty to bargain over drug testing policies also speak in terms of job security, not privacy.[46]

Similarly, individual grievances processed under collective bargaining agreements focused on protecting job security, rather than redressing any dignitary harm resulting from invasive testing practices. These grievances typically challenged discipline or discharge imposed after-the-fact—that is, after a worker had tested positive or refused to submit to testing—and sought restoration of the affected worker's job status through remedies of reinstatement and back pay. Often, the outcome of the grievance turned on such issues as whether the employer followed the procedures laid out in an agreed-upon testing policy, whether the chain of custody over the tested sample was broken, or whether a refusal to provide a sample was justified under certain circumstances. These cases tended *not* to address such issues as the intrusiveness of the procedures or whether a worker suffered dignitary harm. This lack of attention to workers' privacy and dignitary interests is consistent with the fact that arbitrators rarely award money damages to workers except to compensate for lost wages.[47] The effect, however, was to frame individual worker grievances about drug testing, like the bargaining issue, in terms of job security rather than privacy.

2. *Individual Cases*

Apart from the cases initiated by unions, workers acting alone or with a few others also brought a substantial number of challenges to workplace drug testing policies. Although individual employees occasionally brought actions seeking to enjoin testing

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44. *Id.* at 183.
45. *Id.* at 184.
46. *See, e.g.*, Intrepid Museum Found., Inc., 335 N.L.R.B. 1 (2001); Tocco, Inc., 323 N.L.R.B. 480 (1997).
47. Clyde W. Summers, *Individualism, Collectivism, and Autonomy in American Labor Law*, 5 Emp. Rts. & Emp. Pol'y J. 453 (2001).

for an entire category of workers,[48] the overwhelming majority of these suits sought only individual relief. Most often, as with the individual grievances pursued by unions, individual employees filed suit only *after* they had suffered some job detriment as a result of the implementation of a drug testing policy—for example, discharge for testing positive or refusing to submit to testing. These suits typically sought compensatory and sometimes punitive damages in addition to reinstatement or recovery of lost wages.

The individual challenges advanced a variety of legal theories. Public employees often sought damages on the theory that the particular test they were subjected to violated their Fourth Amendment or Due Process rights—for example, on the ground that the employer lacked reasonable suspicion that the worker had used illegal drugs, or that the worker had not been afforded a hearing prior to termination.[49] In the private sector, employees relied primarily on common law theories to challenge adverse employment actions.[50] Some directly challenged the intrusion entailed by testing policies, relying on the common law tort of invasion of privacy,[51] which imposes liability for an "unreasonable intrusion upon the seclusion of another" that is "highly offensive to a reasonable person."[52] Intrusion on seclusion claims were often accompanied by other claims focusing on dignitary harms such as defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. Because virtually all of the cases involved discharges, the employees also relied on theories suggesting limitations on the employer's right to terminate

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48. *See, e.g.*, Stigile v. Clinton, 110 F.3d 801 (D.C. Cir. 1997); Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991); Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir.), *vacated by* 861 F.2d 1388 (6th Cir. 1988); Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. App. 1989).

49. *See, e.g.*, Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994); Ford v. Dowd, 931 F.2d 1286 (8th Cir. 1991); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988).

50. Some employees brought claims alleging that drug testing was administered in a manner that discriminated on the basis of race or disability. *See, e.g.*, Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221 (10th Cir. 1997); Anderson v. Lewis Rail Serv. Co., 868 F.2d 774 (5th Cir. 1989); Chaney v. S. Ry. Co., 847 F.2d 718 (11th Cir. 1988). In a few states, workers were able to rely on state constitutional privacy protections. *See, e.g.*, Webster v. Motorola, Inc., 637 N.E.2d 203 (Mass. 1994); Luck v. S. Pac. Transp. Co., 267 Cal. Rptr. 618 (Cal. App. 1990); Semore v. Pool, 266 Cal. Rptr 280 (Cal. App. 1990).

51. *See, e.g.*, Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989); Jennings v. Ninco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. App. 1989).

52. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652B (1977).

the employment. Thus, individual plaintiffs often alleged that their employer's actions breached a contract providing job security or promising to respect their privacy, or that they had been discharged in violation of public policy.[53]

Because of the common law presumption that employment for an indefinite period is on an "at-will" basis,[54] the employee discharged as a result of a drug testing policy faced an uphill battle. Very few workers in the private sector have contracts specifying a term of employment or guaranteeing job security. Unlike union employees who are typically protected by the collective bargaining agreement against discharge without "just cause," the non-union employee had fewer bases on which to challenge their employer's actions. Under a just cause standard, the employer's right to discipline is limited to work-related conduct and must be proportional to the offense in light of the worker's past history.[55] Thus, a unionized worker discharged for a positive drug test could argue that it did not reveal any on-the-job impairment or that discharge was an excessive penalty given a long history of satisfactory work performance. In the absence of a contractual limitation on the employer's right to discharge without cause, however, those arguments were simply unavailable to the non-union private sector employee. As a result, suits by non-union employees tended to focus on the dignitary harms threatened by drug testing, rather than the fairness of the penalty. One common argument was that discharges based on a drug testing policy fell within an exception to the at-will rule because they violated the public policy protecting employees' rights to privacy and freedom from unreasonable searches.[56] Similarly, claims of breach of the implied covenant of good faith and fair dealing were often premised on the argument that employer testing that violated employee privacy constituted a bad faith breach.[57] Thus, even the contract and wrongful discharge claims of non-union employees were often framed in terms of privacy interests.

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53. *See, e.g.*, Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992); Gilmore v. Enogex, Inc., 878 P.2d 360 (Okla. 1994); *Hennessey*, 609 A.2d 11; *Luedtke*, 768 P.2d 1123; *Luck*, 267 Cal. Rptr. 618.

54. For a more complete discussion of the at-will rule, see Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105 (1997) *and* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. Ill. L. Rev. 447 (1999).

55. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594 (1985).

56. *See, e.g.*, cases cited *supra* note 53.

57. *See, e.g.*, *Luedtke*, 768 P.2d 1123; *Luck*, 267 Cal. Rptr. 618.

In a small handful of cases, individual employees achieved some notable victories. In *Luck v. Southern Pacific Transportation Co.*,[58] a California state court of appeal upheld a jury verdict for the plaintiff, a computer programmer terminated for refusing to submit to suspicionless drug testing. The jury had rejected the employer's argument that Luck's job was "safety-sensitive" and awarded her damages. Agreeing with this factual conclusion, the court of appeal upheld the verdict on the grounds that Southern Pacific's attempt to invade Luck's privacy was unjustified.[59] In another case, a drilling rig employee discharged after testing positive for marijuana was awarded damages on the grounds that direct observation of the act of urination by a representative of the defendant violated the plaintiff's right to privacy and caused him emotional distress.[60] Despite the success of these plaintiffs in obtaining damages for dignitary harms, their experience was quite atypical. In the overwhelming majority of individual challenges to employer drug testing, courts ruled in favor of the employer, typically relying on the right to terminate at-will or finding that the employee's privacy interests were outweighed by the employer's interest in testing.[61]

IV. ASSESSING COLLECTIVE V. INDIVIDUAL APPROACHES TO PROTECTING EMPLOYEE PRIVACY

What can this examination of legal disputes over drug testing tell us about the possibilities and limitations of collective as compared with individual approaches to protecting employee privacy? Before attempting to sketch out an answer to that question, a few caveats are necessary. First, this study focuses on publicly available court opinions and NLRB decisions, and hence,

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58. 267 Cal. Rptr. 618.

59. *Id.* at 633. For a more detailed discussion of the case and its legal theories, see Pauline T. Kim, The Story of *Luck v. Southern Pacific Transportation*: The Struggle to Protect Employee Privacy, *in* Employment Law Stories (Foundation Press, forthcoming 2006).

60. *See* Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988).

61. *See, e.g.*, Rushing v. Hershey Chocolate-Memphis, No. 99-5802, 2000 WL 1597849 (6th Cir. 2000); Anderson v. Exxon Coal U.S.A., Inc., No. 96-8032, 1997 WL 157378 (10th Cir. 1997); Mares v. Conagra Poultry Co., 1992 U.S. App. LEXIS 19806 (10th Cir. 1992); Baggs v. Eagle-Picher Indus., Inc., 957 F.2d 268 (6th Cir. 1992); Horne v. J.W. Gibson Well Serv. Co., 894 F.2d 1194 (10th Cir. 1990); Frye v. IBP, Inc., 15 F. Supp. 2d 1032 (D. Kan. 1998); Hart v. Seven Resorts Inc., 947 P.2d 846 (Ariz. 1997); Stein v. Davidson Hotel Co., 945 S.W.2d 714 (Tenn. 1997); Gilmore v. Enogex, Inc., 878 P.2d 360 (Okla. 1994); Roe v. Quality Transp. Serv., 838 P.2d 128 (Wash. App. 1992); Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. App. 1989).

only on disputes that have resulted in some kind of formal resolution. As discussed above, much of the resistance to workplace drug testing is not visible through an examination of public disputes. Unions may contest particular policies through the process of private negotiation, seeking to influence the form that a particular testing program takes, rather than in engaging in high profile, high stakes litigation. Similarly, individual workers may resist employer-mandated drug testing not by filing suit, but by engaging in strategies to "beat" the tests, exiting the workplace, or avoiding employers that require testing. A different sort of study is necessary to fully understand these forms of resistance, both collective and individual.

Another important caveat recognizes that the form taken by formal legal disputes is significantly constrained and shaped by existing law. Workers who wished to contest the implementation of drug testing in the workplace did not have an unlimited array of theories on which to draw; rather, their arguments were limited and channeled by existing legal doctrines. For example, non-union employees in the private sector had to rely primarily on common law doctrines such as breach of contract or the tort of intrusion on seclusion, which in many ways were ill-fitting doctrines to address the core privacy concerns raised by drug testing policies. Similarly, union challenges to employer drug testing policies were significantly constrained by existing law governing the collective bargaining process. Finally, it is important to remember that the litigation over workplace drug testing described here took place in a specific social context. The 1980's and 1990's were characterized by a steady decline in union strength, particularly in the private sector, and an increasingly conservative federal judiciary. Thus, examining the experience with drug testing disputes only shows how collective and individual approaches actually played out in a particular legal and social context. In another context—for example, one with a more robust theory of privacy rights, or with different mechanisms for advancing collective worker interests—the outcomes observed might be quite different.

With those caveats in mind, some tentative observations about collective versus individual approaches to protecting employee privacy rights are possible. Although privacy has traditionally been characterized as a personal right, a number of considerations suggest that workplace privacy raises collective concerns. First, the legal protection of privacy typically depends upon existing norms, which reflect collective values and social practices. For example, in applying the Fourth Amendment prohibition against unreasonable searches, courts first ask whether a person had a

"legitimate expectation of privacy" intruded upon by the government search.[62] Cases addressing common law invasion of privacy claims often undertake a similar inquiry.[63] Determining the legitimacy of an employee's expectation of privacy often turns not only on general social norms, but also on the actual practices of that workplace. Thus, an individual employee's claim may well rise or fall depending upon the level of privacy afforded other employees in the same workplace or industry.

In the employment context, employees' interest in privacy might also be thought of as a type of "local public good." Some forms of protection—for example, freedom from video surveillance—are classic "non-excludable goods" in that *all* employees will avoid the intrusiveness of such surveillance if the employer agrees to forgo it, regardless of whether the particular worker would bargain for such a benefit. In theory, drug testing differs in that particular workers could be included or excluded from a testing program, depending upon individual agreements reached with the employer. As a practical matter, however, the utility of drug testing policies (excepting perhaps those based solely on reasonable suspicion) depends upon their application to workers as a class. Given the costs of establishing and implementing such policies, employers are unlikely to bargain for different testing rules for individual employees. Moreover, from the employee's perspective, individual bargaining about privacy in general and drug testing in particular is difficult to imagine, given the enormous signaling problems raised for an individual worker acting alone in objecting to a drug testing policy. To the extent that employee privacy rights have characteristics of a "local public good," individual bargaining is likely to be inefficient.

If it is difficult for the individual to act alone, how does the presence of a union affect the ability of workers to resist unwarranted intrusions of privacy? As seen from the examination of court cases above, unions played an important role in the early workforce-wide challenges to drug testing policies. Unions initiated suit in *Skinner* and *Von Raab*, the two cases in which the Supreme Court first addressed the constitutionality of workplace drug testing, as well as the overwhelming majority of early workforce-wide challenges to drug testing policies. Many of these cases directly asserted the privacy rights of workers, thereby forcing courts to assess the justifications for policies invading those rights. Thus, unions appear to offer at least the possibility of mobilizing a collective response to threats to employee privacy.

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62. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987).
63. *See, e.g.*, K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. App. 1984).

In addition to court challenges, unions might seek to protect their members' privacy through the bargaining process. The extent to which unions *actually* asserted workers' privacy and dignitary interests through bargaining is unclear. At least some unions appear to have vigorously opposed drug testing policies, seeking to force employers to bargain or arbitrate before implementing or expanding such programs.[64] Others appear to have acquiesced in employer testing initiatives with little discussion.[65]

The mixed responses of unions likely reflected some level of ambivalence among their members. In 1989, John Gilliom conducted a survey of over 800 skilled workers who were members of a particular union local, and reported that 45% of the respondents wanted their union to oppose testing, 43% wanted the union to support it and 12% were undecided.[66] Because the sample of workers surveyed was limited to a particular union, it is difficult to know to what extent the results accurately represent the views of workers generally. Undoubtedly, workers' views will be influenced by the particulars of their situation: the nature of their work, whether it involves significant safety risks, and any past history of drug and alcohol related problems at their workplace. However, the fact that the members of a particular union could be so divided over a subject clearly "germane to the working environment" raises questions about the possibility of addressing privacy concerns collectively. Perhaps it is incoherent to conceive of privacy rights in collective terms if the harm experienced as a result of an intrusion is wholly idiosyncratic. More practically, union leaders face a dilemma if its own members are deeply divided on an issue like drug testing, as any course of action they pursue will create dissatisfaction among a substantial number of

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64. See, e.g., Oil, Chemical & Atomic Workers Int'l Union v. Phillips 66 Co., 976 F.2d 277 (5th Cir. 1992); United Steelworkers of America v. ASARCO, Inc., 970 F.2d 1448 (5th Cir. 1992); Niagara Hooker Employees Union v. Occidental Chemical Corp., 935 F.2d 1370 (2nd Cir. 1991); Local Union 733 v. Ingalls Shipbuilding Division, 906 F.2d 149 (5th Cir. 1990).

65. For example, in *Luecke v. Schnucks Markets, Inc.*, 85 F.3d 356 (8th Cir. 1996) an employee brought a defamation claim based on his employer's communications regarding a drug test. The plaintiff, a union member, had been asked to submit to testing under the employer's drug and alcohol policy after he was injured at work. The policy had been "unilaterally adopted" by the employer under a management rights clause, and, despite the fact that it called for employees to disrobe completely in order to give a urine sample, it appears that the union never attempted to protect its members privacy interests by bargaining over the terms of the policy.

66. John Gilliom, Surveillance, Privacy, and the Law: Employee Drug Testing and the Politics of Social Control 65 (2d ed. 1996).

their members.[67] In such a situation, and especially in an era of declining union strength, a rational strategy for union leadership might be to bargain for procedural protections to avoid arbitrary application of drug testing policies rather than opposing the scope of testing or resisting any implementation at all.

According to Gilliom, the reasons given by the survey respondents for their opinions suggest the significance of rights discourse. He found that concern about privacy was by far the most common reason given among those who opposed drug testing.[68] Moreover, agreement with statements that employee drug testing invades privacy and violates constitutional rights strongly correlated with a respondent's opinion that the union should oppose testing.[69] Concerns about the accuracy of drug testing, while widespread, had a much weaker correlation with a respondent's opinion that the union ought to oppose workplace testing.[70] Ironically, the union response to drug testing over time came to emphasize the latter concerns more than the former. As discussed above, the types of court cases with union involvement appears to have shifted from high profile suits challenging the legitimacy of government and employer policies to defending the rights of individual workers subjected to such policies. While likely reflecting a rational response on the part of unions to signals from the courts, this shift in emphasis transformed the discourse surrounding challenges to workplace drug testing. The early workforce-wide cases spoke in terms of basic human dignity and fundamental rights, asking what types of interests were sufficiently weighty to justify burdening these important rights. By contrast, the later cases hardly speak at all in terms of privacy or dignity. Rather, they focus on compliance with procedural safeguards and the protection of the material interests, for example jobs and wages, of their members. Workers who felt aggrieved because of the *manner* in which a test was administered, or by the intrusiveness of the test itself, could not recover damages for dignitary harms, and those who suffered no tangible job loss were essentially remediless under the collective bargaining system. Thus, although the presence of a union undoubtedly insured that its members received procedural protections they otherwise might not have had and likely worked to check the worst abuses, collective

67. *Id.* at 153, n.5.

68. *Id.* at 67. Gilliom reported that out of the 297 respondents who opposed drug testing and explained their reasons, 48% cited concerns over privacy, 36% felt testing violated a legal right or entitlement, and 28% and 13% respectively, were concerned about error and harassment. *Id.*

69. *Id.* at 80, Tbl. 4.

70. *Id.*

resistance to mandatory drug testing became routinized over time, focusing on consistent application of the rules, rather than on protecting the dignitary and privacy interests of workers.

What about an individual rights model for protecting employee privacy? As discussed above, individual litigants, in the absence of a union, are less likely to bring suit seeking workforce-wide relief. In addition, individual litigants are unlikely to seek any sort of *prospective* relief. The vast majority of individual suits involve after-the-fact challenges to a workplace drug testing policy. The typical plaintiff has suffered some sort of job-related detriment such as discipline or termination as a result of a testing policy, and seeks compensation for her individual losses. Given the incentives confronting the individual worker, this observation is not surprising. An employee acting alone has little incentive to step forward to challenge a proposed policy, even if she perceives it as intrusive and degrading. If she were to do so, she bears all the risk, not only of the costs of litigation, but also of incurring her employer's displeasure, while any potential benefits of challenging an employer's policies would accrue to her co-workers as well. The incentives are reversed, however, once a worker has suffered a job loss as a result of a workplace drug test. At that point, she risks very little by advancing a legal claim that an employer's testing policy violates her privacy rights, and, if she succeeds, she could potentially recover significant damages. Thus, individual employees typically advance privacy claims challenging workplace drug testing policies only after suffering a job loss.

Although the cost-benefit calculus of litigation may look more attractive to the individual worker after termination, raising the policy and dignitary concerns that motivate resistance to workplace drug testing is significantly more difficult in after-the-fact challenges. Despite the very real possibility that chemical testing of urine will produce false positives, the worker fired for failing a drug test suffers from an implicit presumption of guilt. And where procedural safeguards such as ensuring sample integrity and permitting split samples are not in place, it is impossible for the worker to establish that a false positive has occurred in her case. Regardless of the accuracy of the result in a particular case, the purpose of bringing suit is typically to challenge the underlying policy by arguing that the intrusiveness of the drug testing policy outweighs any legitimate interest the employer has in testing. Although the worker who tests positive has the greatest incentive to bring the challenge, the fact that she *did* test positive will tend to weight any assessment in favor of the employer's position—after all, the test has "caught" a drug user.

The worker fired for refusing to submit to drug testing also faces difficulties. Although not tainted by a positive test result, her resistance to taking the test naturally raises questions about her motivation. Under both the Fourth Amendment and the common law tort of invasion of privacy, the question whether an individual has a reasonable expectation of privacy is crucial. Making the case that a particular testing protocol invades reasonable expectations of privacy is more difficult if the employee acts alone, while the rest of her co-workers submit to the test. Of course, it is possible that none of the other employees has any objection to the testing, and that the worker has no legitimate expectation of privacy in that particular context. However, given the enormous signaling problems faced by individual workers who object to drug testing, acquiescence cannot necessarily be taken as evidence that the employees had no legitimate expectation of privacy in the absence of a collective mechanism for raising privacy concerns.

Despite these difficulties, an individual rights approach to protecting employee privacy has at least one distinct advantage over collective challenges, at least under the current legal regime for collective bargaining. The individual privacy claim, asserting tort theories or violation of constitutional rights, brings with it the possibility of significant damages. As noted above, under collective bargaining agreements arbitrators generally do not award damages to redress dignitary harms. Thus, a worker fired for failing or refusing to take a drug test can grieve the discharge and seek reinstatement. However, the worker subjected to demeaning testing conditions who subsequently tested negative cannot get any meaningful remedy for the dignitary harm suffered under the current grievance arbitration system. Judging from published court opinions, individual privacy claims rarely succeed; nevertheless, the threat of legal liability for invasion of employee privacy may more effectively discourage unreasonably intrusive testing practices than the risks posed by individual grievances under a collective bargaining regime that offers no remedy for dignitary harm.

V. TRADEOFFS BETWEEN THE TWO APPROACHES

The examination undertaken here suggests that collective and individual approaches to protecting employee privacy do indeed differ in terms of how disputes are framed and the nature of the relief afforded. Given those differences, one might argue that collective and individual approaches to protecting employee privacy should be viewed as complementary, not competing. Unions may facilitate broad-based prospective challenges—either

through legal or bargaining processes—to potentially invasive employer policies, as well as ensuring that any such policies are not implemented in an arbitrary manner. At the same time, individual privacy rights play a distinct role by providing redress when individuals suffer dignitary harms, not merely job detriments, through invasive employer practices.

The relationship between collective and individual rights, however, is more complicated, both as a positive and normative matter. Here, I only sketch out the relevant issues and leave a fuller treatment for future work. In terms of positive law, the Supreme Court has interpreted § 301 of the Labor Management Relations Act[71] to require preemption of a state law claim if its resolution "depends upon the meaning of a collective-bargaining agreement."[72] Thus, individual claims of invasion of privacy are potentially preempted if the plaintiff is a union member. In the early 1990's courts interpreted § 301 broadly, leading Katherine Stone to conclude that individual privacy challenges to employer drug testing are nearly always preempted in the union context.[73] More recently, a couple of courts have found state law privacy claims *not* to be preempted, concluding that the mere fact that the plaintiffs were unionized did not mean that their claims required interpretation of the collective bargaining agreement.[74] As a matter of decisional law, then, the manner in which individual privacy rights interact with collectively bargained agreements remains unsettled.

Examining the relationship between collective and individual rights at work raises a deeper question as well—namely, whether and in what circumstances unions should be permitted to waive the individual rights of their members. When considering employee privacy rights, the question is particularly difficult. As Steven Willborn argues elsewhere in this symposium, the notion of consent is integral to understanding privacy.[75] Privacy rights

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71. 29 U.S.C. § 185(a) (1982). Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States." *Id.*

72. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06, 108 S. Ct. 1877, 1881 (1988).

73. Stone, *supra* note 5, at 606-07. Stone reported that her survey of recent preemption cases "reveals a very broad tendency for courts to preempt unionized workers' state law claims," and identified "unlawful drug testing claims" as one of the areas in which individual employee claims are "almost always preempted." *Id.* at 607.

74. *See* Kline v. Security Guards, Inc., 386 F.3d 246 (3d Cir. 2004); Cramer v. Consolidated Freightways Inc., 255 F.3d 683 (9th Cir. 2001).

75. Steven L. Willborn, *Consenting Employees: Workplace Privacy and the Role of Consent*, 66 La. L. Rev. __ (2006).

protect human dignity and autonomy by granting to the individual control over whether and under what circumstances others may access the "territories of the self."[76] Intrusions that are freely consented to do not inflict dignitary harm, and thus, the law generally recognizes consent as a defense to a claim of invasion of privacy. In the workplace, however, reliance on consent to determine the rights of the parties is troubling. Inequality of bargaining power and dissatisfaction with the substantive outcomes that result from individual bargaining have long been concerns in the employment context—concerns that have motivated direct regulation of such matters as minimum wages, overtime pay, workplace health and safety and how pensions are funded. These same concerns raise doubts about the "voluntariness" of individual waivers of privacy rights, particularly when an employee stands to lose a substantial investment in a particular job by refusing to consent to privacy intrusions by an employer.[77]

But what if a *union* consents on behalf of its members to employer testing or surveillance practices that might otherwise be viewed as intrusive? Should such an agreement extinguish the privacy claims of its members, even those who strenuously disagree with the tradeoff made by the union? Or, to put the question differently, should the privacy claims of union members be determined solely by reference to the collective bargaining agreement or do broader social norms remain relevant to determining workers' reasonable expectations of privacy?[78] On the one hand, the very institution of collective bargaining entails displacement of individual preferences on the theory that worker interests are protected by the greater bargaining leverage available when workers act collectively. Moreover, unions offer the possibility of mediating the conflict between the employer's interests in monitoring or testing and the employees' interest in privacy in a way that takes account of relevant local conditions, such as the safety risk involved in the work and any past history (or lack thereof) of substance abuse or performance problems. Marion Crain has argued that the collective bargaining system

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76. Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 Ohio St. L.J. 671, 696 (1996).

77. *Id.* at 715-20.

78. This is the normative question which underlines the issue of whether § 301 preempts state law privacy claims. *See, e.g.*, *Kline*, 386 F.3d 246 (determining whether the plaintiffs had a reasonable expectation of privacy did not require interpreting the collective bargaining agreement; their justifiable expectations could be determined "simply by considering the conduct [of defendant] and the facts and circumstances of [the] workplace").

offers a "preferable, more flexible method[] of accommodating conflicting interests on the drug-testing question," one that may even be more effective in eliminating workplace drug use.[79] In a similar vein, Stewart Schwab has argued that permitting unions to broker individual employment rights may benefit both unions and their members, at least in certain contexts.[80] On the other hand, permitting unions to waive individual privacy rights runs the risk that unions will not accurately represent the preferences of their members, or, more to the point, union leadership may act to advance its own interests at the expense of the interests of individual members. Whether in fact unions and their members gain when unions act as brokers of their members' employment rights depends on whether they get anything when they give up those rights. Thus, it would be useful to know if unions succeeded in extracting any value in exchange for the agreeing to mandatory drug testing programs in the late 1980's and 1990's.

VI. CONCLUSION

Although the issue of drug testing may be largely settled as a legal matter, conflicts between employers' exercise of control in the workplace and employees' interests in privacy and autonomy recur constantly. New technologies offer an increasing number of ways to monitor worker activities both on and off the job, and the incentives for employers to use these technologies are significant. Studying the pattern of legal disputes over workplace drug testing is a first step in understanding how collective approaches differ from cases in which privacy claims are framed purely in individual terms. The preliminary exploration in this Comment suggests that individual privacy rights are not mere substitutes for collective mechanisms that aggregate worker interests. However, deciding how collective and individual rights *should* be coordinated raises difficult questions requiring further study, including more empirical work to better understand the tradeoffs involved. The significance of this inquiry is underscored by the recent trend of falling union density in the private sector. As that particular form of collective voice declines, it is important to understand what is lost, and perhaps, to begin the process of re-imaging how privacy

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[81]. *See*, Crain, *supra* note 11, at 1343.

80. Stewart Schwab, The Union as Broker of Employment Rights 8-9 (unpublished manuscript) (on file with author). Schwab argues that employee privacy claims are one type of dispute which it may make sense to channel into the grievance/arbitration system and away from the courts. *Id.*

and other worker interests might best be protected under alternative regimes.