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Meeting the Challenge to Privacy Rights by Employer Drug Testing:
The Right of Nondisclosure

Robert C. Clothier III†

Employers, including the federal government, are increasingly using mandatory urinalysis testing to detect and deter employee drug use.¹ In response, employees are raising a variety of constitutional defenses to prevent the intrusions caused by urinalysis.² These defenses include the constitutional right of privacy, but the indefinite character of privacy rights and the Supreme Court's uncertain treatment of privacy claims³ makes privacy arguments quite problematic.

The broadly-termed right of privacy has several aspects, a critical one being the right of nondisclosure. This right protects the individual's interest in keeping private certain sensitive, personal information that the individual may reasonably expect to remain private.⁴ This comment will argue that the right to nondisclosure is implicated by employers' mandatory drug testing programs and, with only narrow exceptions, should render such programs unconstitutional.

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¹ Tia Schneider Denenberg and R. V. Denenberg, Alcohol and Drugs 18 (1983). "Drug use," as used in this Comment in its discussion of testing programs, refers only to the use and misuse of narcotic substances, such as marijuana and cocaine. Although alcohol abuse is also a significant drug-related workplace issue, it has been a recognized workplace problem for many years. In contrast, drug abuse in the workplace has become widespread only in recent decades. Id. This Comment is also limited to discussion of mandatory urinalysis testing, though its conclusions may be applicable to other advanced forms of testing as considered herein.
² Litigants cite the Fourth Amendment in particular. See note 29. One should note that even potential constitutional protection in this context is available only to employees whose employer is a state actor. See Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); and Shelley v. Kraemer, 334 U.S. 1 (1948). This Comment will address only claims by employees of state actors and will use the term "government" to denote an employer who qualifies as a state actor.
The Court has exhibited considerable hesitation in addressing the right of privacy because the right lacks clear textual support in the Constitution. To the extent that the Court has accepted the right, it has rooted it in the Due Process Clause of the Fourteenth Amendment, largely because more specific constitutional provisions have proven ineffective in protecting individuals from threats to their privacy rights, especially those posed by technological developments.

New technologies have given the government greater access to private information as well as increased capacity to store and manipulate such information, creating threats unforeseen by the Framers. The Court's responsiveness to these needs, however, has generated apprehensive visions of a new era of substantive due process, a concern that the Court evidently shared in its recent decision in *Bowers v. Hardwick*. Such fears, however, overlook the Court's constitutional duty, which survives the demise of traditional substantive due process analysis, to protect individual liberties from excessive governmental intrusion, whatever its stated purpose.

Drug testing is a significant invasion of personal privacy and it implicates the right of nondisclosure, something which courts have failed to recognize. Given the vast potential for harm, the government must demonstrate an interest sufficient to justify testing before it may overcome the right of nondisclosure. In some situations, such as where public safety is at stake, testing may be justified as part of the government's regulatory functions. But where

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6 The archetypical example of this view was the Court's decision in *Lochner v. N.Y.*, 198 U.S. 45 (1905). During this period, the Court gave little deference to legislative or executive acts concerning social or economic issues and sustained a law only where the state showed a compelling justification. See also *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); and *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).


8 Admittedly, most courts that have examined drug testing have concentrated on its Fourth Amendment implications. Nevertheless, they routinely dismiss privacy claims appended to these actions. See, for example, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), cert. granted 108 S. Ct. 1072 (1988).
the government as an employer seeks to test its workforce for primarily economic interests, these are probably insufficient to justify such severe intrusions into the lives of employees. Moreover, the government’s justifications are weakened by the existence of alternative methods to reduce job impairment caused by drug abuse.

This Comment has three parts. Part I explores the development of the right of privacy and the origins of the right of nondisclosure. Part II establishes the parameters of the nondisclosure right and concludes that mandatory urinalysis testing fully implicates the right. Part III considers the strength of governmental justifications for testing, using the balancing methodology applicable to claims of constitutional rights in this context.

I. THE RIGHT OF PRIVACY

A. Jurisprudential Background

The "right to privacy" evolved to protect individual autonomy and limit the reach of state power into individual lives. The notion of privacy advances autonomy because it presumes a sphere of personal decision-making that is insulated from external control. Constitutional protection of privacy also preserves the concept of limited government, which has "always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen."10

Introduced in 1890 in an influential article by Samuel D. Warren and Louis D. Brandeis,11 the notion of a right to privacy gradu-

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9 The right of privacy has its critics. See, for example, Catharine MacKinnon, Feminism Unmodified 97 (1987) ("[T]he law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives. In feminist terms, [the right of privacy operates] as a means of subordinating women's collective needs to the imperatives of male supremacy"); John Hart Ely, The Wages of Crying Wolf, 82 Yale L.J. 920, 947 (1973) ("[Roe and the right of privacy] is bad because it is bad constitutional law, or rather because it is not constitutional and gives almost no sense of an obligation to try to be"); and Richard A. Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 214 ("The objection [to the privacy cases] is ... that they have no basis in any meaningful conception of privacy or in any provision of the Constitution").

10 Thomas I. Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 229 (1965). Emerson asserts that the distinction between the public and private sectors under limited government "marks the difference between a democratic and a totalitarian society." Whereas the absolute state asserts an "[u]ltimate and pervasive control of the individual," a democratic state "safeguards the private sector" and so maintains "the dignity and integrity of the individual" from the "forces of a technological age." Id. The right of privacy, then, is far from a new constitutional concept. On the contrary, it is intrinsic to our democratic form of government.

11 Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193,
ally gained acceptance in constitutional law, initially in dissenting opinions by Justice Brandeis in *Olmstead v. United States* and by Justice Douglas in *Poe v. Ullman*. The right was constitutionally enshrined in two landmark cases, *Griswold v. Connecticut* and *Roe v. Wade*. Drawing from the prior dissenting opinions, the Court established that the due process clause recognizes and protects a right of personal privacy.

There is a severe tension, however, between the Court's desire to protect individual liberties from government intrusion and its return to notions of substantive due process. This tension has had two important jurisprudential consequences: The Court has been unable to define either the right itself or its constitutional status.

That the Court would be unable to give the right of privacy any reasonably clear definition is not surprising, but its lack of interest in trying is nevertheless troubling. Warren and later-Justice Brandeis initially conceded that "no fixed formula can be used," because the right demands an "elasticity" to take into account "the varying circumstances of each case." Similarly, the Court's methodology indicates little sustained effort to explore the parameters of the right. In both *Griswold* and *Roe*, the Court failed to explain how zones of privacy are derived from penumbras of express constitutional rights and how these zones are defined. In-

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195 & 211 (1890) (criticizing intrusions by the press into the personal lives of individuals and advocating the protection of the "inviolate personality" of each person within a "general right to be let alone").

18 277 U.S. 438 (1928) (Brandeis, dissenting). In *Olmstead*, the Court held that the wiretapping of private telephone conversations did not constitute an unlawful search and seizure under the Fourth Amendment because it did not amount to a physical intrusion. Justice Brandeis, however, dissented, arguing that such wiretapping violated a constitutional right of privacy. Justice Brandeis believed that the framework of the Fourth and Fifth Amendments "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Id. at 478.

13 367 U.S. 497 (1961) (Douglas, dissenting). *Poe* concerned a Connecticut statute prohibiting the use of contraceptives. The Court, however, held that the record disclosed no justiciable question because the plaintiffs failed to show that the statute would be enforced against them. Justice Douglas disagreed and reached the merits of the case, claiming that a right of privacy "emanates from the totality of the constitutional scheme under which we live," id. at 521, and is protected by the due process clause of the Fourteenth Amendment.


15 410 U.S. 113 (cited in note 3). The *Roe* Court held unconstitutional a Texas statute outlawing abortion.

16 *Griswold*, 381 U.S. at 484; and *Roe*, 410 U.S. at 153.

17 *Bowers* evinces the court's recognition of this tension, but does not purport to resolve it. 92 L. Ed.2d at 140 (cited in note 3). See note 6 and accompanying text.

18 Warren and Brandeis, 4 Harv. L. Rev. at 215 (cited in note 11).
stead, the Court simply concluded that the decisions to use contraceptives and to abort a pregnancy fall into one of these zones. This conclusory approach has given rise to considerable uncertainty and interpretive conflict.

Even if the right were defined, the Court's hesitance to identify the constitutional status of the right of privacy makes its application difficult. The Court has left unclear whether it is a fundamental right which may be defeated only by a compelling state interest or is a right subject to a straightforward balancing test by which the Court weighs state and individual interests.

B. Privacy and Technology

Technological development of the ability to marshal, store and manipulate information about individuals presents today's most significant threat to individual privacy rights. If the scope and rate of these advances were not unforeseen by the Framers, they were at least not explicitly addressed in the Constitution and the Bill of Rights. Despite its uncertain treatment, the Supreme

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19 In Roe, the Court stated that "[t]his right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," without analyzing how it came to that conclusion. Id. at 153. The Court must have been satisfied to obfuscate the issue, for it stated merely that it "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." 410 U.S. at 152 (emphasis added).


21 In both Poe and Griswold, Justice Douglas seemingly rejected the possibility that this right could be offset by any state interests. Justice Goldberg, however, emphasized in Griswold that the right of privacy was a qualified one which could be defeated by a showing of a compelling state interest. Griswold, 381 U.S. at 496 (cited in note 3) (Goldberg, concurring). In Roe, the Court indicated that the right of privacy was a fundamental constitutional right, overcome only by a compelling state interest where no less restrictive government alternatives exist. Roe, 410 U.S. at 153-54 (cited in note 3). Part III (A) discusses rights analysis and balancing methodology in the context of the right of nondisclosure.

22 Some scholars and jurists have argued that this justifies the use of broader methods of constitutional interpretation. This organic view of the Constitution remains vibrant in the legal culture, at least regarding individual liberties. See Helen Garfield, Privacy, Abortion and Judicial Review, 61 Wash. L. Rev. 293, 338-51 (1986). For an application of this view with respect to other constitutional provisions, see, for example, Witherspoon v. Illinois, 391 U.S. 510 (1968). In determining what constitutes cruel and unusual punishment under the Eighth Amendment, the Court in Witherspoon stated that:

[O]ne of the most important functions any jury can perform in making such a selection [of who should receive the death penalty] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'

Court has increasingly relied on the right of privacy to restrict public scrutiny into fundamental issues of individual conscience and choice.\textsuperscript{23}

Warren and Brandeis recognized that a right of privacy was tenuously linked to precedent but asserted that the law must reflect changing social conditions.\textsuperscript{24} Brandeis extended this notion to constitutional law in his \textit{Olmstead} dissent. Fearing that the "progress of science"\textsuperscript{25} would allow "subtler and more far-reaching means of invading privacy,"\textsuperscript{26} he argued that "[c]lauses guaranteeing to the individual protection against specific abuses of power . . . must have a . . . capacity of adapting to a changing world."\textsuperscript{27}

Scholars have expressed similar concern over the threats to privacy created by modern technology:

\begin{quote}
[T]he framers established a libertarian equilibrium among the competing values of privacy, disclosure and
\end{quote}

\textsuperscript{23} The Court has relied upon the right in cases where other constitutional provisions and doctrines protected the individual interest at stake, which demonstrates its particularly keen concern with protecting privacy. See, for example, \textit{Loving v. Commonwealth of Virginia}, 388 U.S. 1, 12 (holding alternatively that a state statute banning miscegenation (1) infringed on the freedom to marry, a form of the right of privacy, in violation of the due process clause of the Fourteenth Amendment and (2) was an unconstitutional racial classification under the due process and equal protection clauses of the Fourteenth Amendment); \textit{Eisenstadt v. Baird}, 405 U.S. 438, 453-54 (1972) (holding alternatively that a state statute forbidding the distribution of contraceptives to single unmarried persons violated (1) the right of privacy of the individual in "the decision whether or not to bear or beget a child," and (2) the equal protection clause, in that it outlawed distribution to "unmarried but not to married persons"); \textit{Stanley v. Georgia}, 394 U.S. 557, 564 (1969) (holding alternatively that a state statute making the private possession of obscene material a crime violated (1) the right of privacy because one is "free, except in very limited circumstances, from unwanted government intrusion into one's privacy," and (2) the "right to receive information and ideas, regardless of their social worth").

Several commentators have disputed the import of these cases. Some argue that they "exemplify the Court's restrictive, although activist interpretation of the right of privacy." Comment, The Supreme Court Refused to Expand the Right of Privacy to Include Homosexual Sodomy in \textit{Bowers v. Hardwick}, 14 Pepperdine L. Rev. 313, 317 (1987). Others assert that these cases do not stand for the protection of privacy interests at all. See Ely, 82 Yale L.J. at 931 (cited in note 9).

\textsuperscript{24} "Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, [must] grow to meet the demands of society." Warren and Brandeis, 4 Harv. L. Rev. at 193 (cited in note 11).

\textsuperscript{25} \textit{Olmstead}, 277 U.S. at 474 (cited in note 12).

\textsuperscript{26} Id. at 473.

\textsuperscript{27} Id. at 472. Consistent with this view, Justice Brandeis criticized vehemently the "unduly literal construction" of the Fourth Amendment taken by the Court in \textit{Olmstead}. \textit{Olmstead}, 277 U.S. at 476. He urged that its protection is "much broader in scope" and must include a "right to be let alone." Id. at 478. See also Poe, 367 U.S. at 551 (cited in note 13) (Harlan, dissenting) ("A principle, to be vital, must be capable of wider application than the mischief which gave it birth") (quoting \textit{Weems v. U.S.}, 217 U.S. 349, 373 (1910)).
surveillance. This balance was based on the technological realities of eighteenth century life . . . Since World War Two, . . . a series of scientific and technological advances has taken place that threatens the classic equilibrium of privacy, disclosure, and surveillance.28

Employer drug testing programs, and the technology which makes them possible, severely impinge upon the privacy interests of individuals. These interests have not received sufficient protection by other constitutional provisions such as the Fourth Amendment.29 Technological development raises two concerns relevant to employer drug testing. First, the government is increasingly able to obtain access to formerly private information.30 Second, the government is better able to store and manipulate this information, either for its own use or for the use of other parties to whom it grants access.31 These advances have "made it either impossible or


29 In the employer testing context, the Fourth Amendment has provided little protection for privacy interests. See Von Raab, 816 F.2d 170 (cited in note 8); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987); Rushton v. Nebraska Public Power, 653 F. Supp. 1510 (D. Neb. 1987); and Smith v. White, 666 F. Supp. 1085 (E.D. Tenn. 1987). This has resulted primarily from the federal judiciary's assault on the Fourth Amendment's probable cause requirement.

30 This type of technology ranges from the telephone wiretapping at issue in Olmstead to urinalysis used in employer testing. Both cases involve new ways the government can gather additional information concerning individuals.

31 Developments in computer technology have altered fundamentally the government's ability to handle vast amounts of information . . . . Computers can transfer and assemble information anywhere in the world in microseconds. More ominously, their storage capabilities prolong radically and artificially the life of information, which makes the threat of disclosure and misuse as permanent as the record themselves.


Another commentator emphasized what this technology could mean in the future: Even though the dire prophesies of George Orwell's 1984 and Aldous Huxley's Brave New World have not been completely realized, we have come close enough to justify concern. We do not yet have Orwell's omnipresent telescreen, but techniques of surveillance are proliferating, and the collection of personal data in computer memory banks is mushrooming. The threat to privacy and autonomy is real enough to underline the need for protective measures to ensure that Orwell's vi-
extremely costly for individuals to protect the same level of privacy that was once enjoyed.”

II. THE RIGHT OF NONDISCLOSURE AND EMPLOYER TESTING

The problems posed by the government’s capacity to retrieve and store information finally elicited a response from the Supreme Court in the 1970s. In both Whalen v. Roe and Nixon v. Administrator of General Services, the Court recognized an individual’s constitutional right of nondisclosure. In the process, the Court refined its treatment of privacy rights by explaining that the right historically has encompassed “at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”

The latter interest mentioned by the Court—decisional privacy—is threatened by governmental interference in the individual’s freedom to make basic choices about his future, with regard to family, marriage and procreation. Decisional privacy protects the ability to make the choice itself. While employer drug testing may be said to implicate the individual’s interest in deciding to use drugs, this Comment does not argue that such an “interest” should be recognized. Indeed, the Court recently rejected the argument that an interest in decisional privacy could protect an activity that a state could otherwise lawfully prohibit. Drug testing, however, does implicate the individual’s interest in keeping certain information about oneself private unless one chooses to disclose such information to the government. The right of nondisclosure protects this interest.

Garfield, 61 Wash. L. Rev. at 295-96 (cited in note 22).

22 429 U.S. 589 (cited in note 3). In Whalen, a New York law required physicians and pharmacists to forward to state authorities copies of prescriptions for medicines containing certain dangerous but legitimate drugs. While the Court found that the right of privacy included “the individual interest in avoiding disclosure of personal matters,” it held that the statute did not “pose a sufficiently grievous threat to [this] interest to establish a constitutional violation” in the context of the case. 429 U.S. at 599-600.

23 433 U.S. 425 (cited in note 4). In Nixon, the Court affirmed that Whalen stood for a constitutional right of nondisclosure but held that a federal statute requiring former President Nixon to disclose his personal records did not violate the right. 433 U.S. at 457-59.


25 See Bowers, 92 L. Ed.2d 140 (cited in note 3); Roe v. Wade, 410 U.S. 113 (1973); and Griswold, 381 U.S. 479 (cited in note 3).

26 Bowers, 92 L. Ed.2d 140 (cited in note 3).
Even prior to Whalen, the interest in privacy from disclosure significantly influenced several of the Court's major privacy decisions. For instance, in Griswold v. Connecticut, the Court was just as concerned with the intrusions resulting from the enforcement of a state statute as it was with the effect on private decisions of a statute prohibiting the use of contraceptives. As John Hart Ely pointed out, "[the statute's] enforcement would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home."

Similarly, in Stanley v. Georgia, the Court characterized the privacy interest at stake as "the right to be free from state inquiry into the contents of [one's] library." The Court believed that "prosecution for mere possession of printed or filmed matter in the privacy of a person's own home" constituted a "drastic invasion" of this right, because it required the state to investigate the home in order to enforce its laws. Both cases thus identify a right that trumps laws whose only means of enforcement is the extensive disclosure of personal information to the government.

In Whalen and Nixon, the Court explicitly recognized, at least with respect to nondisclosure, the informational privacy right of individuals. Although the right has uncertain parameters, both Whalen and Nixon, as well as lower court cases, reflect the judiciary's recognition of the growing technological threat to privacy from disclosure discussed in Part I. The cases also suggest that the right more severely restricts government intrusion when the gov-

38 381 U.S. 479 (cited in note 3).
39 Id. at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship"). Some commentators argue that this was the Court's only concern in Griswold. See Comment, A Constitutional Right to Avoid Disclosure of Personal Matter, 71 Geo. L.J. 219, 232 (1982). See also Comment, Roe and Paris, 26 Stan. L. Rev. 1161, 1164-65 (1974) ("[T]he available evidence points toward the threat to the right of selective disclosure arising from attempts to enforce the law as the Court's dominant concern").
40 Ely, 82 Yale L.J. at 930 (cited in note 9).
42 Id. at 565.
43 Id. at 564. As in Griswold, the Court conflated the decisional interest and the interest in nondisclosure without expressly distinguishing them.
44 See, for example, Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978) (Florida "Sunshine Amendment" requiring certain public officials to disclose financial matters held constitutional); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) (employees deserve notice before personal medical records are supplied for research); McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978) (city's interest in screening those unfit to be firefighters was sufficient to justify intrusion into applicant's privacy).
A. Employer Testing Implicates Interests Protected By the Right of Nondisclosure

1. The Parameters of the Right of Nondisclosure. The right of nondisclosure is not an absolute right to keep private all information concerning oneself. Such protection would foreclose most of the informational exchanges that are necessary for effective governance. Accordingly, the Supreme Court has limited the right to "the individual interest in avoiding disclosure of personal matters." "Personal matter," according to the Court, includes information "which is personal in character and potentially embarrassing or harmful if disclosed."

At the other extreme, "personal matter" must extend beyond only an individual's most private, uncommunicated thoughts. The Court has thus expanded "personal matter" to that in which the individual has a "legitimate expectation of privacy." This test originated in *Katz v. United States* and applies in the nondisclosure context as a result of the Court's decision in *Nixon v. United States*. It reflects the Court's understanding that privacy, while mentioned nowhere explicitly in the Constitution, underlies several express constitutional provisions.

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46 See discussion in Part III. Given the importance of Whalen and Nixon, note that the right of nondisclosure was not affected by the Supreme Court's decision limiting the right of decisional privacy in *Bowers v. Hardwick*, 92 L. Ed.2d 140 (cited in note 3). The Court in *Bowers* had no occasion to mention the right of nondisclosure because the right's status was not before the Court. In fact, the *Bowers* Court did not even cite Whalen and Nixon.

47 *Whalen*, 429 U.S. at 602 (cited in note 3).

48 Id. at 599.

49 Id. at 605.

46 389 U.S. 347 (1967) (Court held that the Fourth Amendment protects people rather than places, so that what a person seeks to preserve as private, even in an area accessible to the public, can be constitutionally protected).

50 433 U.S. 425 (1977). The same standard is used by the lower federal courts. See, for example, *Fraternal Order of Police Lodge 5 v. Philadelphia*, 812 F.2d 105, 112-13 (3d Cir. 1987) ("In determining whether information is entitled to privacy protection, we have looked at whether it is within an individual's reasonable expectation of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) ("The legitimacy of individual expectations of confidentiality must arise from the personal quality of the information"). See also *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984); *Kimberlain v. United States*, 575 F.2d 1119 (cited in note 44).

51 The First Amendment's freedom of speech protections implicate the right to avoid disclosure of privately perceived "speech," *Stanley v. Georgia*, 394 U.S. 557 (cited in note
In *Nixon*, the Court found that former President Nixon had a "legitimate expectation of privacy in his personal communications" but that this expectation was diminished in part by his status as a public figure. Moreover, the Court found that the intrusion on materials to which Nixon could actually claim a legitimate expectation of privacy was insignificant, because the overwhelming majority of the material concerned his actions as a public official, and segregating the small quantity of private materials was a "virtual impossibility." Under *Nixon*, regardless of the availability of private information per se, the right of nondisclosure depends upon the individual's having a legitimate expectation of privacy in the information, with the "legitimacy" measured by the intrusion disclosure requires and the feasibility of alternatives.

The use of the "legitimate expectation of privacy" framework indicates that the scope of the right is not related to the technological limits of the government's ability to intrude on it. The line beyond which "personal matters," in which individuals have a legitimate expectation of privacy, become public matters is determined by an objective evaluation of the way in which the individual uses the information and the government's need for it.

2. Applying the Right of Nondisclosure: Medical Records. The right of nondisclosure is commonly implicated when the government seeks access to information contained in medical records. While other applications certainly exist, cases arising

41), while the Amendment's privilege of association can implicate both the right to avoid disclosure of political affiliation and the right to decide to undertake that affiliation freely (where disclosure would curtail it). See, for example, *NAACP v. Alabama*, 357 U.S. 449 (1958). The Fourth Amendment's limitations have repeatedly been held to protect privacy (*O'Connor v. Ortega*, 107 S. Ct. 1492 (1987); *Camara v. Municipal Court*, 387 U.S. 523 (1967)), usually from disclosure but sometimes in order to prevent intrusion on decisional privacy as well. See *U.S. v. U.S. Dist. Court*, 407 U.S. 297 (1971) (upholding a Fourth Amendment challenge to a warrantless search of demonstrators because the intrusion had a great likelihood to stifle dissent). In *Nixon*, the former president brought privacy claims under the First, Fourth and Fourteenth Amendments.


53 The Court determines the content of one's expectation of privacy from the standpoint of normative theory. An alternative method might be to rely on a notion of societal consensus, for example, which could lead to the disturbing result of defining one's protection from State and majoritarian power according to State and majoritarian norms.

54 Such information might include "personal details including age, life history, family background, medical history, present and past health or illness, mental and emotional health or illness, treatment, accident reports, laboratory reports and other scientific data from various sources." Comment, Privacy Rights in Medical Records, 13 Fordham Urb. L.J. 165, 165 n. 1 (1985).

55 See, for example, *Gonzales*, 575 F.2d 1119 (cited in note 44).
from government attempts to obtain medical records form the legal background to the employer testing cases.

A certain minimum disclosure of medical information is not protected by the right, because it is an "essential part of modern medical practice." For instance, in Whalen, the Supreme Court found that a state law which required public access to personal medical prescriptions was not burdensome because the same information was commonly disclosed to doctors, hospital personnel, insurance companies and public health agencies.57

The Court specifically noted in Whalen that disclosure of medical prescriptions to governmental health authorities "does not automatically amount to an impermissible invasion of privacy," implying that other situations might require protection. This implication was borne out in United States v. Westinghouse, in which the Third Circuit held that an employee's medical records are "well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." While the court upheld the government's request for the medical records of the employees, it emphasized that it did so because the information was private but not "sensitive," there were adequate safeguards to ensure confidentiality (including removal of identifying information) and there was a high government need for the information. It also relied on the fact that the medical information involved consisted of the "results of routine testing, such as x-rays, blood tests, pulmonary tests, hearing and visual tests," similar to that which is derived from urinalysis testing.

Information obtained from psychological testing has received even greater constitutional protection under the right of nondisclosure. In Hawaii Psychiatric Society v. Ariyoshi, the court found that "there can be little doubt that the information contained in a psychiatrist's patient's files will include personal matters." In Hawaii Psychiatric Society, a state sought administrative warrants

55 Whalen, 429 U.S. at 602 (cited in note 3).
56 Id.
57 Id.
58 638 F.2d 570 (cited in note 44).
59 Id. at 577.
60 Id. at 577-79.
61 Id.
63 Id. at 1043.
to search the patient records of Medicaid-provider psychiatrists in order to identify Medicaid fraud. The court prevented the disclosure of the psychiatric information, emphasizing that the government had offered no evidence that less intrusive alternatives, such as voluntary audits of the non-confidential portions of the files, would be inadequate.65

3. Applying the Right of Nondisclosure: Mandatory Urinalysis Testing By Employers. Employer-instituted urinalysis tests are at least as intrusive as requests for information contained in medical records.66 Once an individual hands over a urine sample, that person loses control over all information that one may extract from the sample. This surrender of control is critical, because in addition to the stated justification of detecting drug metabolites, urinalysis provides a very broad view of an individual's medical status.67

Unlike information in a medical file, information which the government may glean from a urine sample is not limited only to

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65 Id. at 1042. See McKenna, 451 F. Supp. 1355 (cited in note 44), where the court found that the psychological testing of fire fighter applicants forced "involuntary disclosure of such a unique kind" that the right of nondisclosure was implicated. Unlike Hawaii, however, the McKenna court upheld the statute, concluding that "[t]he State interest [was] compelling . . . and [was] served by the challenged" testing. Id. at 1388. The court found the state's desire to determine the psychological fitness of an applicant for the stress of fire fighting warranted the intrusion because unfit fire fighters endanger themselves, their fellow fire fighters and other citizens.


In employer testing cases, only a few courts have recognized this problem explicitly. See Capua v. City of Plainfield, 643 F. Supp. 1507, 1515 (D.N.J. 1986) ("The dangers of disclosure as a result of tell-tale urinalysis range from embarrassment to improper use of such information in job assignments, security, and promotion"); Jones v. McKenzie, 628 F. Supp. 1500, 1505 (D.D.C. 1986), rev'd in part 833 F.2d 335 (holding that drug testing of school bus drivers can be reasonable if conducted as part of a routine, reasonably required, employment-related medical exam: "It is beyond argument that discharge of plaintiff on unsupported charges of drug abuse could severely affect her interest in her 'good name, reputation, honor or integrity,'" citing Paul v. Davis, 424 U.S. 693, 708-09 (1976)).

67 Some writers appear to believe that such incursions are justifiable. For example, Richard Posner argues that the failure to disclose some discreditable personal information is tantamount to fraud, and that "the economic case for according legal protection to such information is no better than that for permitting fraud in the sale of goods." Richard Posner, The Right of Privacy, 12 Ga. L. Rev. 393, 401-02 (1978). See also Richard Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 175-76. Judge Posner's argument, if extended to employee testing, presupposes that such disclosure of drug or alcohol use is material. Since these tests do not mean necessarily that drugs and alcohol were used on the job and actually affected productivity or safety concerns, the denial of such disclosure is hardly fraudulent per se. In addition, his argument is coherent only if the information one is hiding is information in which the employer is properly interested.
what the patient reports. Urine is an “amazingly complex entity” which can provide important information about many disorders and diseases. For this reason, it has been referred to as a “mirror which reflects activities within the body” and is a basic diagnostic tool for the medical profession.

There are alarming opportunities for an employer to misuse the information contained in a urine sample. “Urine holds many hidden secrets which are revealed upon careful study. In ‘screening,’ the number of abnormal results in normal population groups is surprisingly large. Urine can be used to detect signs of urinary tract cancer, renal diseases, liver disorders, nutritional inadequacy, specific mental disorders, such as manic-depression and schizophrenia, epilepsy, heart conditions, pregnancy and even mental defects.” Perhaps the most invasive aspect of urinalysis is its genetic screening potential, which can “find individuals with a potentially fatal or debilitating genetic disease or individuals with a genetic predisposition to acute or chronic illness for which there is an ameliorative treatment.”

By emphasizing an individual’s reasonable expectation of privacy, one may readily distinguish between the necessary disclosure of personal medical information discussed by the Court in Whalen and the disclosure of information that occurs in employer drug testing cases. In Whalen, disclosure was required ultimately to benefit the individual, whether by facilitating the improvement in his health or by advancing the treatment of health problems in general. Such disclosure is often voluntary, much like vaccin-
tions. Drug tests, by contrast, are often conducted for the economic benefit of the employer. They are by no means an "essential part of modern medical practice" which the Court found so significant in *Whalen*. Thus, while an individual may not have a reasonable expectation of privacy in medical information disclosed to the government for public health purposes, one may reasonably expect such information to remain private where no legitimate purpose is served by disclosure.  

B. The Right Extends to Both Initial and Subsequent Disclosure

The right of nondisclosure protects the individual's right to control information concerning oneself and extends to interests in preventing both the initial disclosure of data to the government (through collection) and the subsequent disclosure of that data, either to third parties or the public in general. Employer testing primarily implicates the interest in preventing initial disclosure.

Federal courts considering the right of nondisclosure have gen-

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73 See Part III infra. It is important to note that the handling of information by government agencies is regulated by statute. The Privacy Act, 5 U.S.C. sec. 552a(b) (1982), forbids agency disclosure of employee medical records without consent. But this provision has many exceptions, most notably where required under the Freedom of Information Act ("FOIA"). Under subsection (b)(6) of FOIA, disclosure is not mandated where the requested information is contained in "medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. sec. 552 (b)(6). To determine this, a court must weigh an individual's right to privacy against the public's interest in the disclosure of the relevant information. Thus, both the statutory protection provided under the Privacy Act and the constitutional right of nondisclosure fundamentally involve a balancing test.

Recent federal regulations have set up restrictions on the availability of records resulting from the testing of employees for use of illegal drugs under Executive Order 12564, 51 Fed. Reg. 32889 (1986). Such records may be used in two situations. First, they may be disclosed to the Department of Justice when it has an interest in certain litigation and the use of the records is deemed relevant and necessary to the litigation, so long as it is compatible with the purpose for which the information is collected. Second, they may be disclosed to any person who is responsible for the care of the individual, when that individual is mentally incompetent or under other legal disability. Office of Personnel Management Notice, Privacy Act of 1974; Publication of Amendments of Two Existing Systems of Record, 52 Fed. Reg. 22564 (1987).

Thus, it appears that the information contained in such records may not remain confidential because the Department of Justice is allowed to use it for a variety of purposes, all of which are rather vague and open-ended. It remains to be seen what impact these exceptions will have.

erally regarded subsequent disclosure—through mishandling of information by the government—as a greater threat to the individual than initial disclosure. Emphasizing the dangers of subsequent disclosure is understandable, given the difference between the relative information needs of the government and third parties. While the government arguably needs large amounts of information in order to function effectively, the general public’s need for private information regarding any particular individual is far less justifiable. There are at least three reasons why the initial disclosure at issue in drug testing should be restricted as much as subsequent disclosure has been restricted in other contexts.

First, initial and subsequent disclosure cause the same sort of harm. Their relationship can be considered on a spectrum reflecting the severity of harm to the individual affected by disclosure. The gravity of any intrusion does not depend on the identity of the party to whom such information is disclosed. This suggests a rule of law which responds to the gravity of the intrusion on the right of privacy, not a rule which mechanically distinguishes between initial collection and subsequent dissemination of private information. In this context, there are compelling reasons to protect the release of private information contained in results of drug tests conducted by federal employers.

Second, the uncertain application of the protection against subsequent disclosure has meant that in practice it is only protection against initial disclosure that provides any genuine protection of privacy. The vagueness of the standard by which the courts have judged the possibility of subsequent disclosure partially undermines whatever protection it gives. The standard for safeguards from disclosure that courts have required varies considerably. In

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78 See Gonzales, 575 F.2d at 1133 (cited in note 44); Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1020 (D.C. Cir. 1984) ("The Court [in Whalen] recognized the difference in intrusiveness between disclosures to state employees and disclosures to the general public. The Court implied that strong governmental interests would be necessary to justify the latter, more severe intrusions on confidential matters"); McKenna, 451 F. Supp. at 1380 (cited in note 44); Louisiana Chemical Ass’n v. Bingham, 550 F. Supp. 1136 (W.D. La. 1982).

79 Some lower courts have followed such an approach, looking to the type of information disclosed, not simply to the identity of the recipient of disclosed information. In McKenna, the court believed that the gathering of psychological information was such a severe intrusion into the privacy of the individual that the possibility of subsequent disclosure was irrelevant. McKenna, 451 F. Supp. at 1380-81 (cited in note 44). Similarly, in Hawaii, the court found that "[t]he possibility that [the psychiatric] records could be disclosed to anyone, whether it be State officials or the public, is sufficient to constitute an intrusion into the right of privacy." Hawaii, 481 F. Supp. at 1041 (cited in note 63).

77 See Part II(A)(3) for a discussion of this point.
some cases, most notably *Whalen*, courts examine actual procedures and safeguards to ascertain the probability of subsequent disclosure.\(^7^8\) But in other cases, especially those involving employer testing, such safeguards amount to no more than mere assurances from the government that the information will remain confidential.\(^7^9\) Still other courts are satisfied where rules of law penalize the subsequent dissemination of information by the government.\(^8^0\) Unfortunately, such assurances and statutory penalties are insufficient where the employer may have an actual interest in disclosing such information—for example, to facilitate the dismissal of an employee the government no longer finds desirable.

Finally, the distinction between initial and subsequent disclosure collapses in the drug testing context. In cases involving subsequent disclosure of medical information obtained through routine testing, the government can assure confidentiality because the identity of the individual is not essential to later uses of the information.\(^8^1\) In cases involving initial disclosure of information contained in results of employee drug tests, however, the identity of the individual necessarily is important whenever the government uses the information for employment decisions. If an employee tests positive, the employer may attempt either to discharge the employee or require the employee to undergo rehabilitation. Initial disclosure in the testing context thus almost invariably results in subsequent disclosure to other employees, and possibly to potential

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\(^7^8\) Even in *Whalen* the Court relied less on actual safeguards than on the government’s good track record. *Whalen*, 429 U.S. at 601 (cited in note 3). It is also unclear how immediate the danger of subsequent disclosure must be before constitutional protection comes into play. Justice Brennan, in his *Whalen* concurrence, referred to the absence of any danger of “indiscriminate disclosure,” an unlikely event when collection is for official use. Id. at 607 (Brennan, concurring). Privacy protection certainly must be more meaningful than this.

\(^7^9\) Compare *Shoemaker*, where the district court was satisfied with the defendants’ representations that “they wish[ed] to do everything possible to preserve the confidentiality of the medical information collected pursuant to the regulators . . . [and would] not share any data collected with any state agency charged with the enforcement of [the state’s] criminal laws.” 608 F. Supp. 1151, rev’d 795 F.2d 1136 (cited in note 29), with *Fraternal Order of Police*, 812 F.2d at 118 (cited in note 50), where the court found such assurances insufficient: “We accept the sincerity with which these promises are made but nonetheless agree with the district court that they do not supply the necessary safeguards.”

\(^8^0\) See *Schacter v. Whalen*, 581 F.2d 35, 37 (2d Cir. 1978); *In Re Search Warrant*, 810 F.2d 67, 72-73 (3d Cir. 1987); *GMC v. Director of National Institute*, 636 F.2d 163, 166 (6th Cir. 1980). See note 73 for a discussion of the Privacy Act.

\(^8^1\) In the subsequent disclosure case, the information about individual employees can be obtained by one employer from another employer who has collected and compiled the information in an aggregate form. See, for example, *Westinghouse*, 638 F.2d 570 (cited in note 44) (employee medical information provided but names and addresses of employees deleted).
employers, of information suggesting alleged drug use by the tested employee.

III. WHEN DOES THE GOVERNMENT HAVE A LEGITIMATE INTEREST IN TESTING?

The government must justify its testing programs under the balancing methodology accepted by the Court in *Whalen* and *Nixon*.

When it acts as a regulator pursuant to public health and safety concerns, testing may be justified. But when it acts in effect as an employer—where its actual goals are to increase workplace efficiency or improve productivity by regimenting its workforce—the justifications for testing are far less persuasive. In addition, if less intrusive alternatives to urinalysis testing exist by which the government may effect its goals, the government should be obligated to use them.

A. The Balancing Methodology

Although the Supreme Court has designated the right of privacy a fundamental right under the Fourteenth Amendment, the right of nondisclosure is subject to a less rigorous balancing test. When reviewing challenged state action, a decision-maker

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82 *Whalen*, 429 U.S. 589 (cited in note 3); and *Nixon*, 433 U.S. 425 (cited in note 3). See also notes 50-53 and accompanying text.

83 See Paul Brest, The Fundamental Rights Controversy, 90 Yale L.J. 1063 (1981). See also notes 11-16 and accompanying text. In the Court's balancing of government and individual interests under the Due Process and Equal Protection Clauses, "fundamental rights" are overcome only by the government's showing of a "compelling state interest." By characterizing a right as "fundamental," the Court in effect determines the outcome of the balancing. This approach has been criticized by members of the Court itself. See, for example, *Dandridge v. Williams*, 397 U.S. 520-21 (1970) (Marshall, dissenting) (challenging "fundamental rights" notion in equal protection context and advocating a "sliding scale" approach); *Beal v. Doe*, 432 U.S. 457-62 (1977) (Marshall, dissenting) (echoing the challenge in *Dandridge* to the notion of "fundamental rights"); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-110 (1973) (Marshall, dissenting) (advocating the "sliding scale" approach); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3260-63 (1985) (Stevens, concurring) (advocating "continuum of judgmental responses to different classifications" rather than a few clearly defined standards of review).

84 See *Roe*, 410 U.S. at 152 (cited in note 3).


At least one Justice has argued that the right of nondisclosure deserves "fundamental right" status. See *Whalen*, 429 U.S. at 606-07 (cited in note 3) (Brennan, concurring) (a
must weigh the intrusion into an individual’s legitimate expectation of privacy against the asserted governmental interest in light of all the circumstances. Given the importance of the right of nondisclosure in the testing context, where test results may lead to dismissals of or sanctions against employees, the governmental interest in testing its employees must be considerable to overcome the asserted right.

B. False Results and Off-the-Job Impairment

The amount of data revealed by urinalysis is open-ended and thus exceeds the routine medical disclosures at issue in *Whalen*. To the extent that relevant information on drug use is discovered—through metabolites found in the urine sample—such information’s value is highly speculative and lessens the strength of the government’s asserted interest. The technical imprecision with which drug tests are often conducted and the high incidence of false positives, as well as the uncertain causal relationship between positive test results and workplace impairment, all reduce the predictive value of tests results. Urinalysis tests have high margins of error, making false positives or negatives a common occurrence.86 In addition, laboratories actually conducting the tests and analyzing the urine samples are often not certified and may be lax in ensuring proper identification of the samples and preventing contamination.87 Finally, these tests have proven relatively easy to evade through the substitution of “clean” urine samples. These shortcomings have led some observers to the conclusion that “almost all offenses cannot be detected.”88

While the most persuasive rationale for employer drug testing is to prevent workplace impairment, urinalysis does not determine current impairment because “urine is a waste product and metabolites found in it do not prove that impairing chemicals are still circulating in the blood stream . . . . Urine testing, then, can tell [only] whether a particular drug was used recently . . . .”89 These

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statute requiring disclosure of information “would only be consistent with the Constitution if it were necessary to promote a compelling state interest”).


87 See Denenberg and Denenberg, *Alcohol and Drugs* (cited in note 1); *Alcohol & Drugs In The Workplace* (BNA) 30-31 (1986).


89 Sonnenstuhl et al., *Employee Assistance and Drug Testing*, 11 Nova L. Rev. at 721. See also *Alcohol & Drugs in the Workplace* (BNA) at 29 (cited in note 87) (testing detects
problems severely undercut the strength of asserted government interests in overcoming an individual’s right of nondisclosure. At the very least, courts should only countenance the disclosure of information in furtherance of the government interest. In the employment context, this means in part the difference between job and non-job related information.\textsuperscript{90}

Urinalysis results are likely to be of little aid in increasing workplace efficiency in many instances. Thus, as the stated rationales for testing are demonstrated to be weaker, the collection of private information becomes increasingly unjustifiable under the employee’s nondisclosure right.\textsuperscript{91}

C. The Significance of the Government’s Status as an Employer

The applicability and effect of the right of nondisclosure depends primarily on the degree to which disclosure harms the individual. The identity of the party to whom the disclosure is made should not be relevant in assessing the harm the disclosure causes. Disclosure to the government of personal matters implicates the right of nondisclosure whether the government is acting as a law enforcer or as an employer. The government’s status as an employer affects only the degree to which it must justify employee testing.

It has been argued that the government has greater latitude to intrude on constitutionally protected privacy as an employer than it has to intrude as an enforcer of the law.\textsuperscript{92} Arguably, the strength of the government’s interest, when it intrudes for the purpose of improving employee efficiency, need not be as great as its interest that justifies an intrusion to enforce the law. The special concerns attending law enforcement, such as selective or vindictive prosecution, generally do not apply in the employment context. Even if they do apply, as in cases where an employer intrudes on privacy to develop an unjustified basis for dismissal, the Constitution does

\textsuperscript{90} See Thorne v. City of El Segundo, 802 F.2d 1131, 1138-40 (9th Cir. 1986).

\textsuperscript{91} To the extent that testing improves productivity and efficiency in the workplace assuming the problems outlined in this subsection, this improvement is due to employer hegemony based on its position of power, which is an illegitimate rationale for testing considering thejustifications that the government has proffered in testing cases.

\textsuperscript{92} O’Connor, 107 S. Ct. at 1506 (cited in note 51) (Scalia, concurring) (arguing that “government searches to retrieve work-related materials or to investigate violations of workplace rules ... do not violate the Fourth Amendment”).
not protect the employee from the intrusion.

The Court has recently decided that, at least in the Fourth Amendment context, the differences between the government's intrusion on privacy as an employer and as a law enforcer do justify a different constitutional standard by which to judge the intrusion.\(^93\) While there are obvious parallels between privacy protections under the right of nondisclosure and the Fourth Amendment's limitations on searches, they are not necessarily identical. There are at least three reasons why intrusions on employee privacy protected by the right of nondisclosure should be distinguished from, and afforded more protection than, intrusions on privacy protected by the Fourth Amendment.

First, the protections of the right of nondisclosure exceed in scope the privacy guarantees of the Fourth Amendment, because the protections of the right of nondisclosure are not wholly waived by a limited exposure of an employee's personal information to another person. Under the right of nondisclosure, an initial disclosure of "personal matter" does not necessarily waive claims against subsequent disclosure to third parties.\(^94\) Under the Fourth Amendment, in contrast, an initial voluntary disclosure of information results in a complete waiver of claims against subsequent disclosure.\(^95\)

A second principal distinction between privacy protections afforded by the right of nondisclosure and the Fourth Amendment is that the employee has no means of preventing the intrusion on the right of nondisclosure. In the Fourth Amendment context, the "employee may avoid exposing personal belongings at work by simply leaving them at home."\(^96\) There is no analogous means by which the employee can control the intrusion on the right of nondisclosure; he can not "simply leave at home" personal medical or psychological information.

Finally, the intrusion on the right of nondisclosure is necessarily severe, because it concerns "personal matter" and thus does

\(^93\) Id. at 1507 (plurality, holding that reasonableness, rather than probable cause, is the appropriate standard for evaluating the constitutionality of all workplace searches by public employers).

\(^94\) Whalen, 429 U.S. 589 (cited in note 3); Westinghouse, 628 F.2d 570 (cited in note 44).

\(^95\) See, for example, Smith v. Maryland, 442 U.S. 735 (1979) (disclosure to the phone company of phone numbers dialed, through use of a pen register, precludes caller's having a legitimate expectation of privacy in them); U.S. v. Miller, 425 U.S. 435 (1976) (rationale of Smith applied to bank records, because the transaction information has been voluntarily given over to the bank).

\(^96\) O'Connor, 107 S. Ct. at 1502 (cited in note 51).
not "'involve a relatively limited invasion' of employee privacy." While employees have legitimate expectations of privacy in both their medical and financial information, their interest in keeping medical information private is greater. Personal medical or psychological data indicate unique attributes of the individual, which need not be revealed to a third party. Financial information (such as bank account transaction records) by contrast, must be "revealed" to a third party simply to be generated.

The government has greater leeway for intrusion when it tries to ascertain the fitness of employees for work that directly affects public health and safety. Many courts have recognized just such an exception for otherwise intrusive testing. Disclosures of personal information, whether through questionnaires, psychological testing or drug testing, were considered justified provided that the testing was conducted pursuant to a legitimate safety interest such as ensuring capable fire fighters, police officers, and nuclear plant personnel. In these situations courts weigh only the government's interest in public health and safety and either disregard or minimize the economic interests of the employer.

The interests underlying employee testing, though, are often not rooted in public safety concerns. For example, requiring a postal clerk to urinate into a receptacle has at best a mysterious relation to public safety. In such instances, workplace testing is gen-

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97 Id., citing Camara v. Municipal Court, 387 U.S. 523 (1967) (drawing an analogy between the limited intrusion of a search of an employee's desk and a municipal housing code inspection).

98 McKenna v. Fargo, 451 F. Supp. 1355, 1381 (D.N.J. 1978) ("[B]ecause fire fighting, like police work, involves life-endangering situations, the State interest is of the highest order"). But see Capua, 643 F. Supp. at 1511 (cited in note 66) (although the court found that the "[g]overnment has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers, or the public, are free of drugs," it held this interest was insufficient to justify compulsory urinalysis).

99 Fraternal Order of Police, 812 F.2d 105 (cited in note 50).

100 Rushton, 653 F. Supp. at 1519 (cited in note 29) ("the paramount interest advanced by the defendants is the health and safety of the public and [its] employees. It goes without saying that a nuclear release affecting plant employees or the public at large would be disastrous"); Smith, 666 F. Supp. 1085 (cited in note 29) ("[t]he governmental interest in having a drug free work force to protect and operate the most vital areas of a nuclear power plant is patently obvious").

101 In Rushton, the nuclear plant defendant made this argument, but the court declined to rule on the relevance of economic factors, finding that the interest in public safety was sufficient. Id. at 1519-20.

102 The American Federation of Government Employees similarly asks: Now, I ask you how can the Federal Government meet this "need" standard in drug testing a GS-4 clerk typist in the census bureau? What issues of public safety, or public interest, will the government bring to bear to show that this clerk typist should be deprived of the constitutional protections enjoyed by a non-
erally aimed at solving a host of drug-related problems in the workplace, including "employee theft, absenteeism, rising health care costs, accidents, shoddy workmanship and low productivity." These are precisely the circumstances that invite the use of safety rationales to justify testing programs whose real purpose is the advancement of employers' economic interests.

D. The Availability of Less Intrusive Alternatives

The force of asserted governmental interests in testing is diminished if those interests may be met by alternative and less intrusive means. Given the extensive intrusiveness of testing on employee interests in nondisclosure, the government must use narrowly tailored means to achieve its objectives of a drug free workplace. In the last fifteen years, employers have increasingly resorted to substance abuse education and rehabilitation programs, often called Employee Assistance Programs ("EAPs"). Currently, these programs are used primarily by large, private employers, and the government should take full advantage of their successful methods of detecting and treating job-related drug abuse.

EAPs employ a two-part strategy which focuses on identifying employees actually impaired on the job and then engaging in "con-
The programs use job performance evaluations to identify alcoholic, drug-addicted or emotionally distressed employees, relying on the observations of supervisors, work output, and absenteeism levels. The ability of supervisors to discover signs of such abuse before there is an effect on job performance is actually quite high, according to a number of studies. See Harrison M. Trice and Janice M. Beyer, Work-Related Outcomes of the Constructive Confrontation Strategy in a Job-Based Alcoholism Program, 45 J. Stud. on Alcohol 393 (1984). Some courts have reached the same conclusion. See Capua, 643 F. Supp. at 1518 (cited in note 66) ("Certainly one so under the influence of drugs as to impair performance of his or her duties must manifest some outward symptoms"). Those abusers whose symptoms might go undetected by supervisors are encouraged to submit voluntarily to counseling through a variety of "outreach and intervention techniques [that] generate referrals by peers." Wrich, Beyond Testing, 66 Harv. Bus. Rev. at 124 (cited in note 106).

The statistics supporting the efficacy of EAPs are quite impressive. An evaluation of an EAP implemented at United Airlines showed the following:

Absenteism among program participants . . . went down 74% in Chicago and 80% in San Francisco, to cite two cities. Recovery rates the first time through the program were 74% for ground employees, 82% for flight attendants, and 92% for pilots and co-pilots. Recovery rates for those who relapsed and reentered the program were about 40%.

Wrich, Beyond Testing, 66 Harv. Bus. Rev. at 126. Similar results have been reported by other major corporations such as General Motors, AT&T and Phillips Petroleum. Wrich, Beyond Testing, 66 Harv. Bus. Rev. at 127.

A 1982 study by former Secretary of Health, Education and Welfare Joseph Califano found that, in general, "reported recovery rates for alcoholics referred to treatment through EAPs range as high as 90%, and in any good program they should be above 50%." Denenberg and Denenberg, Alcohol and Drugs at 35-36 (cited in note 1). Thus, "[e]mployers and EAP providers have reported impressive savings on the many human and financial costs associated with drug and alcohol abuse." Alcohol & Drugs in the Workplace (BNA) at 39 (cited in note 87).


Because employer testing is underinclusive, failing to detect many of the less well-known drugs and overlooking the deleterious effects of depression and phobia, it may lull an employer into a false sense of security regarding the potential sources of job impairment. See Sunnenstuhl et al., Employee Assistance and Drug Testing, 11 Nova L. Rev. at 721-22.
tantly, these programs focus on the primary concern of employers—job impairment—and respect private information that is not job-related.

Despite the documented potential of EAPs, they are just beginning to be used more widely by employers. The infrequent use of EAPs may be due in part to employers' failure to recognize the significance of employee drug problems and in part to employers' overlooking the success and cost-effectiveness of the programs.\textsuperscript{112} But the most important reason is the relative ease and alluring low cost of testing.\textsuperscript{113} In weighing these two alternatives against the right of nondisclosure, not only is testing less effective than claimed, but EAPs are more effective than testing. Given the substantial rights of nondisclosure employees possess, such methods of active observation by supervisors and involvement of coworkers should generally be employed in lieu of testing.

IV. Conclusion

As the right of privacy arose to meet governmental threats to the physical and decisional privacy of individuals, so must the right of nondisclosure grow to curb threats placed by the government on the informational privacy of individuals. Facilitated by new methods in obtaining, storing and manipulating information, the government's reach as both employer and regulator has broadened to create legitimate fears of surveillance and intrusion into the private affairs of individuals. Employer testing is the latest manifestation of this phenomenon. Far from merely detecting substance abuse, such testing gives the government access to a wide variety of personal information unrelated to the government's legitimate objective in preventing drug-induced job impairment.

While courts have consistently given priority to such government interests as enforcement of the laws and public safety in the disclosure of medical information, this does not preclude the unconstitutionality of employer testing when the purpose of such testing is not based on public health or safety concerns. In addition, urinalysis is of doubtful effectiveness in combating substance abuse.

\textsuperscript{112} See Alcohol & Drugs in the Workplace (BNA) at 47 (cited in note 87).

\textsuperscript{113} Although substance abuse has been a problem in the workplace for several decades, employers are only now jumping on the bandwagon to address it. As a result, these employers “have opted for hardball methods,” such as testing, and have been persuaded that “fast action can solve the problem quickly and that they have the muscle and the means to do it.” Wrich, Beyond Testing, 66 Harv. Bus. Rev. at 120 (cited in note 106). Indeed, these employers have convinced themselves “that the solution should be easy.” Id. at 127. Yet testing, while apparently simple, attacks only the manifestations of substance abuse, not the causes.
abuse over the long run. Besides its problems of accuracy and reliability, testing can only detect drug use at some point in the past, rather than abuse or actual impairment in the workplace. Finally, employment testing has been favored due to its convenience and deceptively low cost, despite the existence of equally effective and less intrusive alternatives, most notably employee assistance programs. Given these considerations, employer testing programs often unnecessarily and unconstitutionally invade employees' rights of nondisclosure. It is important that these rights are preserved now, before urinalysis provides even more intrusive information to employers and before employers, encouraged by lax judicial scrutiny, begin to rely increasingly on such invasive methods of extracting information from employees.