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Injunctions Against Drug Testing Programs Pending Arbitration: The Role of Courts and the Right to Privacy

Susan L. Paulsrud

In the midst of the growing national concern over substance abuse, more employers are implementing programs to monitor and check the use of drugs and alcohol. Employees and their unions have resisted these programs as restrictions upon employee rights. The conflict is particularly intense when employers unilaterally implement testing programs. Unions may then seek to enjoin programs over which they have not bargained and on which arbitrators have not yet ruled. This Comment explores whether courts may, and under what circumstances they should, enjoin employers from implementing drug testing programs pending arbitration of the testing issue.

Employers’ drug testing programs are used in a variety of contexts and are administered in different ways. Still, all drug testing

† B.S. 1986, Butler University; J.D. Candidate 1989, The University of Chicago.
2 This Comment examines only testing programs initiated by private employers. Myriad constitutional issues, beyond the scope of this comment, arise in the public employment context. This Comment also will not discuss claims that the employer has engaged in an unfair labor practice under Section 8(d) of the Labor Management Relations Act. 29 U.S.C. sec. 158(d) (1982). As a result, only suits by the union to enjoin the employer are considered here, not decisions by the National Labor Relations Board to request that a court issue an injunction. This Comment is also limited to suits initiated by unions rather than individual employees. Non-union cases are not within the ambit of the federal labor laws examined here, which apply to “labor organizations.”

In addition, the this Comment will focus on claims brought in federal court. Generally, actions by unions to enjoin private employers arise in federal court because state courts are not subject to Norris-LaGuardia restrictions. Although some states have “little Norris-LaGuardia” acts that permit the bringing of such claims in state court, the arguments advanced in this Comment assume that the suit has been removed to federal court. See generally Henry H. Perritt, Jr., Labor Injunctions, sec. 2.17-2.18 at 82-85 (1986). Finally, the term “injunction” is used here to include temporary restraining orders.
cases involve a conflict between the interests of the employer and those of the union. On the one hand, management seeks increased productivity and protection from liability to employees or third parties for worker misconduct caused by drug impairment. Many employers believe the best way to achieve these goals is by testing employees for drug use. In addition, employers may regard limitations on their ability to test employees as an infringement upon their freedom to manage the workplace.

Unions, on the other hand, although generally not opposed to programs that increase workplace productivity and safety, are concerned about intrusions on employees' rights that may result from testing programs. When employers unilaterally begin drug testing programs, unions often sue for injunctions pending arbitration. More often than not, these suits include claims that the challenged testing programs invade employees' privacy.

Ideally, injunctions in cases involving disputes over arbitrable issues in general, and over drug testing programs in particular, should operate to promote and protect the use of the arbitration mechanism as a means of settling labor disputes. In addition, the

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* Although the circumstances of each testing program vary, there is a typical chain of events that leads to the union filing suit for an injunction pending arbitration. In general, the collective bargaining agreement between the union and the employer limits the employer's ability to institute a testing program. The agreement requires that the parties bargain over terms of employment. To that end, the agreement also provides for arbitration of workplace disputes. Drug testing of employees is a condition of employment and thus a mandatory subject of bargaining. See, for example, Oil, Chemical & Atomic Workers v. Amoco Oil Co., 653 F. Supp. 300, 302 (D.N.D. 1986) (Amoco II) (no dispute as to the arbitrability of the issue of employee drug testing); Intern. Broth. of Elec. Workers v. Potomac Elec., 634 F. Supp. 642, 646 (D.D.C. 1986) (both sides agreed that the testing program was subject to arbitration); Oil, Chemical and Atomic Workers v. Amoco Oil Co., 651 F. Supp. 1, 2 (D. Wyo. 1986) (Amoco I) (parties agreed that dispute as to implementation of testing program was subject to arbitration). Accordingly, a union expects to bargain over the terms of a proposed employee testing program. A suit for an injunction against the employer's program arises whenever the employer unilaterally begins testing prior to the start or conclusion of arbitration over the program.

The employer may unilaterally implement portions of a testing program that are not covered by the agreement only if it has bargained in good faith to an impasse over the portions that are mandatory subjects of bargaining. See Intern. Union, United Auto., Aerospace & Ag. v. N.L.R.B., 765 F.2d 175, 179 (D.C. Cir. 1985).

* Boys Markets, Inc. v. Retail Clerk's Union, 90 S. Ct. 1583, 1591 (1970); Potomac Elec., 634 F.Supp. at 643; Taft-Hartley Act, 29 U.S.C. sec. 185 (1982). Federal courts have jurisdiction over labor injunction cases under Section 301 of Taft-Hartley, 29 U.S.C. sec. 185. A union request for injunctive relief in a testing case would not be preempted even if the union has filed an unfair labor practice charge with the National Labor Relations
outcomes of these cases should promote the congressional mandate of a uniform national labor policy. In reality, however, courts considering claims by unions against employers that institute drug testing programs have failed to elucidate and follow consistent standards for granting or denying injunctions, particularly where invasions of employees' privacy by the challenged programs are alleged. Rather, courts have enjoined some drug testing programs and permitted strikingly similar plans to continue with no ascertainable reason for distinguishing between cases.

This Comment argues that in order to protect the arbitration mechanism and promote a uniform national labor policy courts should assess the harms caused by challenged drug testing programs according to majority principles of privacy derived from state common law. Part I of this Comment traces the development of the Boys Markets doctrine, which controls the disposition of cases involving injunctions against employer breaches of collective bargaining agreements. Part II examines the role of the courts in labor disputes. Part III discusses the application of the Boys Markets doctrine to drug testing cases and the inconsistent results yielded by such application. Part IV proposes that courts, in order to promote the national labor policy, should use state common law rights as a guide for determining whether injunctions must issue against testing programs.

I. THE BOYS MARKETS DOCTRINE

The United States Supreme Court, in Textile Workers v. Lincoln Mills, held that federal courts possess the authority to develop federal common law in labor cases. Although Lincoln Mills appears to create a large role for courts in labor cases, the tension between the Norris-La Guardia Act and Section 301 of the Taft-Hartley Act may create a jurisdictional restraint on this role. While Norris-LaGuardia prohibits federal courts from issuing injunctions in cases involving labor disputes except in extremely lim-

Boys Markets, 90 S. Ct. at 1590.

* 353 U.S. 448 (1957).


Section 301 of the Labor Management Relations Act (Taft-Hartley Act) grants federal courts jurisdiction over suits between employers and unions for breaches of collective bargaining agreements. 13

In *Sinclair Refining Co. v. Atkinson,* 14 the first in a series of cases that attempted to resolve this tension, the United States Supreme Court determined that Taft-Hartley ("Section 301") did not conflict with the anti-injunction provisions of Norris-LaGuardia. 14 Accordingly, the Court ruled in *Sinclair* that it could not enjoin the union from striking in violation of the anti-strike provision in the collective bargaining agreement. This ruling created many problems for labor litigation and undermined the arbitration process. 15

The Court in *Boys Markets, Inc. v. Retail Clerk's Union* 16 reconsidered the injunction issue and overruled the decision in *Sinclair,* adopting the view of the *Sinclair* dissent. 17 Suggesting that the holding of *Sinclair* undermined courts' ability to effectively enforce agreements to arbitrate, 18 the Court in *Boys Markets* carved out a narrow exception to the anti-injunction provisions of Norris-LaGuardia. The Court held that, under certain circumstances, injunctive relief could be granted by courts in cases involving strikes

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11 Section 4 of the Norris-LaGuardia Act provides that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of a labor dispute . . . .” 29 U.S.C. sec. 104 (1982).

12 Section 301 of the Labor Management Relations Act (Taft-Hartley Act) provides in pertinent part: "Suits for violations of contracts between an employer and a labor organization representing employees in an industry . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .” 29 U.S.C. sec. 185(a) (1982).


14 Id. at 213.

15 *Sinclair* effectively stripped not only federal but also state courts of jurisdiction over suits to enjoin alleged violations of collective bargaining agreements. Because state courts were not subject to the anti-injunction provisions of Norris-LaGuardia, any party that wanted to avoid an injunction against it could invoke Section 301 and remove the dispute to a federal court that was subject to the anti-injunction restrictions. For a more complete discussion of the effect of Norris-LaGuardia and Section 301 on the state courts' role see, James B. Atleson, The Circle of *Boys Markets:* A Comment on Judicial Inventiveness, 7 Indus. Rel. L. J. 88 (1985).

More importantly, *Sinclair* jeopardized the government's ability to carry out its pro-arbitration policy. A union's no-strike obligation is the quid pro quo for an employer's agreement to submit grievances to the arbitration mechanism. If a union could not be forced to adhere to its contractual promise not to strike, then there was no incentive for an employer to agree to arbitrate labor issues. *Boys Markets,* 90 S. Ct. at 1591 (cited in note 6).

16 Id.

17 Id. at 1592.

18 Id. at 1591 (concluding that *Sinclair* did "not make a viable contribution to [the] federal labor policy" of promoting and protecting the arbitration process).
over arbitrable grievances. According to the Boys Markets exception to the anti-injunction provisions of Norris-LaGuardia, a court considering a request for injunctive relief must base its determination on: (1) The probability of success on the merits; (2) the arbitrability of the dispute; (3) whether the violation at issue is ongoing; (4) the presence of irreparable harm; (5) the balance of hardships to the parties. Although the irreparable harm criterion generally determines the outcome of the suit, each factor must be considered in turn.

*Probability of success on the merits.* In cases involving requests by unions for injunctive relief, courts most often have reduced “probability of success on the merits” to a showing that arbitration is not a futile endeavor or that the suit is not based on a frivolous claim. In other words, this prong of the Boys Markets standard amounts in practice to an extremely low threshold requirement and limits the courts’ examination to a cursory glance at the face of the collective bargaining agreement.

*Arbitrability.* The second prong of the Boys Markets exception to the proscriptions of Norris-LaGuardia requires that the disputed issue be subject to arbitration. In *AT & T Tech., Inc. v.*
Communications Workers, the Supreme Court elucidated three principles to guide courts in identifying arbitrable disputes. First, courts must respect the intent of the parties to the collective bargaining agreement; thus, "a party cannot be required to submit to arbitration a dispute . . . which it has not agreed to so submit." Second, courts are required to determine arbitrability without ruling on the merits of the underlying claim. Finally, given agreements which contain general arbitration clauses, courts should presume that the grievance is arbitrable. In light of this strong presumption in favor of arbitrating disputes and the national policy of promoting the arbitration process, this prong of the Boys Markets standard rarely affects a union's effort to obtain an injunction against its employer.

Ongoing violation. The third element of the Boys Markets exception to the Norris-LaGuardia prohibition against injunctions is that the alleged breaches of the bargaining agreement are "occurring and will continue, or have been threatened and will be committed." In effect, this is a mootness requirement, as a satisfactory showing by the union merely establishes that there is indeed a violation for the arbitrator to remedy. This factor requires so little inquiry by the courts that many do not even state the require-

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26 The Court in AT & T emphasized that, unless the parties to the collective bargaining agreement clearly expressed a contrary intent, the question of arbitrability was unmistakably one for the court and not for the arbitrator. Id. at 1418.

27 Id. at 1418, citing Steelworkers v. Warrior & Gulf Co., 363 U.S. 573, 582 (1960).

28 Id. at 1419. This directive is consistent with the role of the courts under the "probability of success on the merits" requirement of the Boys Markets standard.

29 Standard collective bargaining agreements contain clauses which provide for arbitration or for grievance procedures that culminate in arbitration of all terms of employment. See Bernard D. Meltzer, Labor Law 921 (3d ed. 1985).

30 AT & T, 106 S. Ct. at 1415 (cited in note 25). The Court explained that in these circumstances only an "express exclusion" of the issue from arbitration or "other forceful evidence" of a purpose to exclude bars arbitration of a grievance. Id. This presumption of arbitrability recognizes the "greater institutional competence of arbitrators in interpreting collective bargaining agreements" and "furthers the national labor policy of peaceful resolution of labor disputes" through the arbitration process. Id.

31 See cases cited in notes 44-46.

32 Boys Markets, 90 S. Ct. at 1594 (cited in note 6).

33 In other words, if the employer had agreed not to commence testing until after the conclusion of arbitration, then the court would dismiss the suit. Conceivably an employer that had started testing could stop if it appeared that the union would prevail in the suit for an injunction or in subsequent arbitration. The union’s recourse under these circumstances would be to initiate a grievance procedure with respect to any damages to employees that occurred while the employer was testing.
Ongoing violation, like probability of success, is an element that requires only a cursory glance by the court.

Irreparable harm. The success of every claim for an injunction against an employer's violation of a collective bargaining agreement hinges on the union's showing that its members will suffer irreparable harm if the employer's actions are allowed to continue. Under the irreparable harm criterion, courts examine whether, absent the issuance of an injunction, the injury to employees is so great that it renders the arbitrator's potential award a "nullity" or "hollow formality." An arbitrator's award is considered a nullity if it cannot possibly compensate employees for the injury that occurs between the start of the employer's activity and the arbitrator's decision. In such instances, the court, by issuing an injunction, shields unions from harms that are beyond repair by the arbitrator.

Balance of hardship. Once the union establishes that its members will sustain irreparable harm, the court balances the hardships to the employer and the public imposed by the court's putting a stop to employer's activity against the injury to the union that stems from the continuation of the disputed activity. The

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34 See, for example, Local Lodge No. 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981); Lester Eng'ing, 575 F.Supp. 797 (cited in note 22); Weyerhaeuser, 650 F. Supp. 431 (cited in note 6); Potomac Elec., 634 F. Supp. 642 (cited in note 5).

35 Aluminum Workers Intern. v. Consol. Aluminum Corp., 696 F.2d 437, 443 (6th Cir. 1982) ("[T]he irreparability of the injury suffered by the union has in many cases become virtually the sole inquiry in those cases where injunctive relief is sought against an employer") (cites omitted).

36 Consol. Aluminum Corp., 696 F.2d at 443. See also Columbia Local, Am. Postal Workers Un. v. Bolger, 621 F.2d 615, 618 (4th Cir. 1980) (injury is so great as to render the arbitral process a "hollow formality"); Amoco Oil II, 653 F. Supp. at 303 (cited in note 5) (the harm "renders the arbitration process nullity").

37 Possible post-arbitration harms are considered by the arbitrator. For a general discussion of the arbitration process, see Meltzer, Labor Law at 921-25 (cited in note 29). Furthermore, during the determination of irreparable harm, only harms to the moving party, the union in this case, are examined. Harms to the employer or the public caused by delay in the implementation of the employer's disputed program are balanced against injury to the union once irreparable harm is proved. See, for example, Amoco I, 651 F. Supp. at 4 (cited in note 5); Weyerhaeuser, 650 F. Supp. at 433 (cited in note 6); Amoco II, 653 F. Supp. at 303 (cited in note 5).

38 Issuance of an injunction by the court in such circumstances is proper. See Owen M. Fiss, Injunctions 59 (2d ed. 1984) ("The injunction is an equitable remedy . . . [and] is available only after the applicant shows that the legal remedies are inadequate").

39 See Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 388 (7th Cir. 1984) ("Sometimes an order granting or denying a preliminary injunction will have consequences beyond the immediate parties. If so, these interests—the 'public interest' if you will—must be reckoned into the weighing process . . . . ") Because the balance of hardships is only considered once the union establishes irreparable harm, only courts granting injunctions are required to reach the issue.
union must show that the balance favors the issuance of an injunction.\textsuperscript{40}

Once the union makes a showing of irreparable harm, it is quite difficult for the employer to demonstrate that the harm it suffers due to delay in implementing the disputed program or the cessation of the challenged activity exceeds the harm to the union.\textsuperscript{41} Even showings that third parties or the public interest would be harmed by the injunction often fail to outweigh the union's alleged injury.\textsuperscript{42} Only in cases where there is an extreme concern for public safety, as with labor disputes at a nuclear facility, does the balance of harms tend to favor the employer.\textsuperscript{43}

II. THE ROLE OF THE COURTS IN LABOR DISPUTES

The integrity of the arbitration process depends in part on the courts assuming a restricted role in the resolution of labor disputes. There are at least three ways in which confining the courts' role promotes and protects the arbitration process. First, courts' limited involvement in labor disputes furthers the national labor policy favoring peaceful settlement of labor disputes through the arbitration process, not the courts.\textsuperscript{44} Accordingly, courts, in deference to the role of the arbitrator, should not and do not rule on the

\textsuperscript{40} Boys Markets, 90 S. Ct. at 1594 (cited in note 6).

\textsuperscript{41} In Panoramic, for example, the court highlighted the difficulty of overcoming a showing by the union of irreparable harm: "[R]elative hardships may favor issuance of an injunction even when the employer is compelled to maintain what may be a less efficient or more costly operation." 668 F.2d at 289 (cited in note 34). See also Weyerhaeuser, 650 F. Supp. at 433 (cited in note 6) (employer's safety rationale for implementing drug policy could not defeat union's showing of irreparable harm).

\textsuperscript{42} In Truck Drivers, Oil Drivers, Etc. v. Almarc Mfg., 553 F. Supp. 1170, 1174 (N.D. Ill. 1982), the court made clear that "it is a rare case in which granting of a preliminary injunction will disserve the public interest."

\textsuperscript{43} For example, in Rushton v. Nebraska Public Power Dist., 653 F. Supp. 1510 (D. Neb. 1987), the court, persuaded by the public safety argument, allowed drug testing at a nuclear facility to continue. Rushton is distinguishable, however, because the employer was considered to be a state actor. In the private employer context, such safety concerns may influence the balancing of harms to a lesser extent. In Metropolitan Edison, No. 86-4426, slip. op. (cited in note 21), the court issued an injunction against drug testing of employees at a nuclear facility, finding that public interest in the safe operation of the facility did not outweigh employees' rights to privacy. It is worth noting, however, that, prior to the dispute, the employer had extensive safety precautions in place which guarded against drug or alcohol related accidents and which were unaffected by the injunction.

\textsuperscript{44} Boys Markets, 90 S. Ct. at 1594 (cited in note 6) ("[C]ongressional policy favor[s] the voluntary establishment of a mechanism for the peaceful resolution of labor disputes"); Warrior & Gulf Co., 363 U.S. at 578 (cited in note 27) ("[t]he present federal policy is to promote industrial stabilization through the collective bargaining agreement . . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement").
merits of the case. Second, parties to a collective bargaining agreement place the arbitrator, not the courts, at the center of the dispute resolution process. If courts were to inextricably involve themselves in adjudicating the merits of claims for violations of collective bargaining agreements, the intent of the contracting parties would be frustrated. Third, by limiting their involvement in the resolution of disputes, courts properly reserve the interpretation of collective bargaining agreements to the expertise of the arbitrator.

The Boys Market doctrine restricts judicial involvement in cases involving injunctions against employers to enforcing promises to arbitrate, thereby protecting the arbitration process. The court in Boys Market clearly limited the use of injunctions to those instances in which the arbitration mechanism agreed to by the parties was imperiled by the employer's activity. The five criteria set forth in Boys Markets operate to prevent the automatic issuance of injunctions and simultaneously protect employees from em-

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47 Once parties have agreed that arbitration is the desired mechanism for settling grievance disputes arising over the interpretation or application of a collective bargaining agreement, the federal labor policy can be "effectuated only if the means chosen by the parties . . . is given full play." Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

48 "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator." Id. at 567-68.

49 The Court in Enterprise Corp. described the special ability of the arbitrator to understand the circumstances of the dispute and the effect of its resolution: "[A]rbitrators under . . . collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in the particular agreements." 363 U.S. at 596 (cited in note 45).


51 "The driving force behind Boys Markets was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties."

52 The Court explicitly stated that its holding was "a narrow one," and that it did not want to "undermine the vitality of the Norris-LaGuardia Act" by overextending the injunctive powers of the federal courts. Boys Markets, 90 S. Ct. at 1591 (cited in note 6).

53 As discussed earlier, these are: Probability of success on the merits, arbitrability of the dispute, ongoing dispute, irreparable harm and balance of hardships. Id. at 1594.

54 A practice of issuing injunctions following any unilateral action that is arguably arbitrable would create a powerful incentive for both parties not to include an arbitration clause in the collective bargaining agreement. Such a result clearly is contrary to the mandate of the Steelworkers trilogy: American Mfg., 363 U.S. at 566 (cited in note 46); Warrior & Gulf, 363 U.S. at 578 (cited in note 27); Enterprise Corp., 363 U.S. at 596 (cited in note 46).
ployer abuses of collective bargaining agreements.

*Boys Markets* illustrates precisely how the limited use of injunctions promotes the integrity of the arbitration process. In that case, an injunction was granted against a union which was striking in violation of its no-strike obligation in the collective bargaining agreement. The injunction, by forbidding the union to maintain its strike, encouraged the parties to the collective bargaining agreement to adhere to the arbitration provision. In addition, it reinforced the parties' confidence in the efficacy of the arbitration mechanism as a means of settling disputes over conditions in their workplace. Absent reassurance that the union could be compelled to abide by its contractual obligations, the employer would have been wary of assuming any obligation to arbitrate disputes.

The directive in *Boys Markets* that courts considering injunctions in arbitrable disputes may not reach the merits of the claims also preserves the integrity of the arbitral process. Parties to an agreement contract for the arbitrator's review of the grievance; an adjudication on the merits of the claim by a court would clearly frustrate the intent of the parties. Moreover, the impartiality and authority of the arbitrator would be undermined by a court's ruling on the contract claim.

III. THE APPLICATION OF *BOYS MARKETS* TO TESTING CASES

*Boys Markets* involved a suit by an employer to enjoin a union from striking, but the *Boys Markets* five-step approach to injunctions pending arbitration of disputes also applies to cases concerning suits by unions to enjoin employers. Most courts have adopted the view that, provided the five *Boys Markets* criteria are met, injunctions can issue against employer breaches of collective bargaining agreements.  

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84 *Boys Markets*, 90 S. Ct. at 1594 (cited in note 6). Although *Boys Markets* involved an injunction against a union, rather than an injunction against an employer as is at issue here, the *Boys Markets* doctrine applies equally to both situations. See *Metropolitan Edison*, No. 86-4426, slip op. (cited in note 21) (stating that "it is now well-established that federal courts have jurisdiction to enjoin employer actions as well as employee actions"), citing *Sky Vue Terrace*, 759 F.2d 1094 (cited in note 21).

85 Allowing the strike to continue, by contrast, would "interfere with and frustrate the arbitral process by which the parties had chosen to settle a dispute." Id.

86 *Boys Markets*, 90 S. Ct. at 1593 (cited in note 6).

87 Id.

88 *Buffalo Forge*, 428 U.S. at 411 (cited in note 49) ("[The parties] have not contracted for a judicial preview of the facts and the law"); *Enterprise*, 383 U.S. at 599 (cited in note 45) ("It is the arbitrator's construction which was bargained for").

89 See, for example, *Panoramic*, 668 F.2d at 282-83 (cited in note 34); *Bolger*, 621 F.2d
A minority of courts has adopted alternative approaches to cases involving injunctions against employers. According to one view, the proscriptions of the Norris-LaGuardia Act apply only to injunctions against unions; in other words, the Act does not restrict the way in which courts issue injunctions against employers. This view is premised on the Act's original purpose of protecting employees from the "abuses that . . . resulted from the interjection of the federal judiciary into union-management disputes on behalf of management." This view, however, fails to take into consideration that the Taft-Hartley Act was intended to de-emphasize the protection of labor and eliminate pro-union bias which dominated the settlement of disputes following the enactment of Norris-LaGuardia. Finally, a few courts have taken the position that the Boys Markets exception to Norris-LaGuardia does not apply to employers absent a provision in the agreement that the employer will maintain the status quo.

The Supreme Court has implicitly approved of the majority view that the Boys Markets rule is essentially a "two-sided coin" and thus applies to injunctions against employers and unions alike. The language of Norris-LaGuardia suggests that its anti-

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60 See, for example, United Auto Workers v. White Farm Equipment, 119 L.R.R.M. 2878, 2881 (D. Minn. 1984).

61 Boys Markets, 90 S. Ct. at 1592 (cited in note 6).


64 "The Supreme Court, by requiring Buffalo Forge analysis in suits against employers, seems also to accept at least partial application of the Norris-LaGuardia Act to such suits." Perritt, Labor Injunctions at 174 n. 35 (cited in note 2), citing Greyhound Lines, Inc. v. Transit Union Div. 1384, 429 U.S. 807 (1976) (reversing and remanding injunction against employer for reconsideration in light of Buffalo Forge), on remand, 550 F.2d 1237. Buffalo Forge has been interpreted as "stating] a jurisdictional rule: In the absence of a dispute over an arbitrable issue, a district court lacks jurisdiction to give injunctive relief against a purported breach of a no-strike agreement." Teamsters, Chauffeurs, Etc. v. Branch Motor, 463 F. Supp. at 288 (cited in note 59), quoting Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1342 (3d Cir. 1976). On remand, the Ninth Circuit in Greyhound emphasized that, in light of Buffalo Forge, the Boys Markets exception to the Norris-LaGuardia Act, applies only if the dispute is covered by the collective bargaining agreement. Greyhound, 550 F.2d at 1238. In other words, provided that a court considering a claim for a preliminary injunction against a party to a collective bargaining agreement finds that the dispute is arbitrable, a Boys Markets injunction can issue against either a union or an employer.
injunction provisions, which were subsequently modified by the Taft-Hartley Act, reach unions as well as employers. Furthermore, injunctions against employers are not inconsistent with the policies expressed in the legislative histories of the Norris-LaGuardia and Taft-Hartley Acts. While the Norris-LaGuardia Act was designed to protect labor unions from the pro-employer bias created by the use of labor injunctions, the Taft-Hartley Act signalled a "shift in Congressional emphasis away from the protection of labor to the . . . protection of contractual rights of both parties to a collective bargaining agreement." Thus, although the Taft-
Hartley Act did not overrule Norris-LaGuardia, the former requires a reading of Norris-LaGuardia which extends its protections to cover both employers and unions.

Whether a Boys Markets injunction will issue against either a union or an employer which has violated a collective bargaining agreement generally depends on a finding of irreparable harm. In cases involving union challenges to drug testing programs, three types of harms to the employees usually are claimed: (1) Loss of employment as a result of a positive drug test result; (2) stigma or injury to reputation caused by circulation of test results, and; (3) invasion of employees’ privacy by the act of testing.

There is general agreement among the courts that loss of employment can be remedied by the arbitrator through awards of backpay and reinstatement. Accordingly, in most circumstances, union claims that drug testing programs irreparably
harm employees by leading to suspensions or job loss inevitably fail before a court considering an injunction against the employer.

The second type of harm often alleged in drug testing cases is the stigma that attaches to employees who test positively for drugs and are subsequently subjected to disciplinary action. More often than not, courts have found these consequences of employee drug testing insufficient to sustain a claim for an injunction. At least one court has concluded that stigma caused by unfavorable test results was not irreparable at all, as it could be remedied with compensation for lost income and, in cases where an employee was fired, with reinstatement.

Although stigma and loss of employment are harms that are almost uniformly deemed insufficient to sustain an injunction against a testing program, it is unclear under what circumstances injury to employees' right to privacy will justify enjoining employee testing. Because courts have exercised discretion in defining the scope of an employee's right to privacy and the extent of the intrusion caused by testing programs, the drug testing cases have yielded conflicting and seemingly arbitrary results.

*Intern. Broth. of Elec. Workers v. Potomac Elec.* illustrates the arbitrary treatment of the privacy right in testing cases. In *Potomac Elec.* the district court originally issued a temporary restraining order prohibiting the employer from replacing its old drug testing policy with one that imposed swifter penalties for post-
itive test results. The court harshly criticized the remedial provisions of the program and ruled that its implementation would clearly invade employees' privacy. Following an evidentiary hearing on the motion for a preliminary injunction, a different judge on the same court denied the preliminary injunction, finding that the testing program did not violate employee rights to privacy. Both judges considered the same testing program; yet, each had different notions of the scope of the employees' privacy rights.

Other drug testing cases reveal similar inconsistencies. In Weyerhaeuser, the court, without discussing the nature of the challenged drug testing program, concluded that the testing program constituted an invasion of privacy that caused irreparable injury to employees. The court in Metropolitan Edison reached the same conclusion regarding a program that featured testing for cause and during annual check-ups. But in Olin, a drug testing program administered, in part, on a random basis was found not to impinge on rights to privacy. In Oil, Chemical & Atomic Workers v. Amoco Oil Co. (Amoco I), the court ruled that employees' rights of privacy were not violated by testing conducted for cause and during mandatory annual physicals. The court also determined that even if the testing invaded employee privacy, the grievance procedures in the collective bargaining agreement provided adequate remedies.

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78 The court in PEPCO characterized the challenged testing program as a "drastic measure" causing "invasions of privacy . . . almost unheard of in free society." Id. at 3072.
80 Although the defendant employer did modify several features of its drug testing program between the issuance of the temporary restraining order and the hearing for the preliminary injunction, the provisions to which the union most strenuously objected remained in the latter version. The union opposed two provisions in the former program which allowed for random testing and testing without cause. Id. at 643. The company agreed in the preliminary injunction hearing to abide by certain conditions in implementing the new program prior to completion of arbitration. The employer did not, however, modify the provisions for random testing. Id. at 644. Thus, the disparate holdings cannot be distinguished based on the circumstances of the testing.
81 In denying the preliminary injunction, the judge failed to reconcile his decision with that of his colleagues. There is possibly a distinction between a temporary restraining order, which is only in effect for a few days, and an injunction pending arbitration, but the injunction court did not rely on this difference.
82 Weyerhaeuser, 650 F. Supp. at 433 (cited in note 6). The court did not explain the basis for its determination that employee privacy rights were being invaded by the drug testing program.
83 Metropolitan Edison, slip op. (cited in note 21).
84 Olin, slip op. (cited in note 21).
85 Amoco I, 651 F. Supp. at 5 (cited in note 5).
86 Id. The Weyerhaeuser court, in contrast, did not consider the protection afforded employees by the grievance procedure.
The above cases suggest that, to date, determinations regarding the extent to which drug testing programs infringe upon employees' rights to privacy depend less on the nature of the testing program, and more on courts' vague notions of the privacy rights. The inconsistent judicial treatment of injunctions against employers that initiate testing programs undermines the congressional policy favoring a uniform system of labor law.\textsuperscript{87} In addition, the inconsistency in the case law regarding employee drug testing creates an "unacceptably risky gamble for employers who should test and an unproven and unreliable shield for employees who deserve better protection from unwarranted testing."\textsuperscript{88}

IV. A PROPOSED APPROACH TO DRUG TESTING CASES

In \textit{Lincoln Mills}, the Supreme Court held that "the substantive law to apply in suits under Section 301(a)\textsuperscript{89} is federal law, which the courts must fashion from our policy of national labor laws."\textsuperscript{90} Federal constitutional provisions generally are not relevant in the private employer context,\textsuperscript{91} and no federal legislation expressly proscribes or regulates the testing of employees for sub-

\textsuperscript{87} \textit{Boys Markets}, 90 S. Ct. at 1590 (cited in note 6). The Court in this case discussed a "federal policy of labor law uniformity" with reference to the variance in remedies caused by disparate state laws. Id. However, a disparity in remedies awarded by courts that apply federal law similarly undermines the policy of labor law uniformity. By simultaneously granting and denying injunctions in cases involving indistinguishable testing programs, courts may "greatly frustrate any relative uniformity in the enforcement of arbitration agreements." Id.

\textsuperscript{88} Note, Employee Drug Testing: Redrawing the Battlelines in the War on Drugs, 39 Stan. L. Rev. 1453, 1466 (1987).


\textsuperscript{90} Boys Markets, 90 S. Ct. at 1588 (cited in note 6), quoting \textit{Lincoln Mills}, 353 U.S. at 456 (cited in note 8).

\textsuperscript{91} It is well established that constitutional safeguards apply only to state actions. See, \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948); \textit{United States v. Price}, 383 U.S. 787 (1966); \textit{Blum v. Yaretsky}, 102 S. Ct. 2777 (1982). Although the United States Constitution does not expressly establish a right to privacy, a penumbral right, emanating from the First, Third, Fourth, Fifth and Ninth Amendments, has been held to exist. See Hurd, Employment Testing at D:13 (cited in note 1), citing \textit{Griswold v. Connecticut}, 381 U.S. 479, 485 (1965). Although constitutional analogies are sometimes used by litigants, the link to the private employment context is weak. See, for example, \textit{Venegas v. United Farm Workers Union}, 552 P.2d 210 (Wash. App. 1976). At least ten states have constitutional provisions that mention a right to privacy. Hurd, Employment Testing at D:13. See also, Note, 39 Stan. L. Rev. at 1466 (cited in note 88). Most state provisions, however, are broadly worded and subject to judicial interpretation. Id. Only in California does the state constitutional provision apply to private employers. \textit{Porten v. University of San Francisco}, 64 Cal. App.3d 825 (1976).
stance abuse. Yet Lincoln Mills does permit courts to look to state law for guidance in suits for injunctions against employers, provided that the state law is compatible with Section 301(a) and effectuates the federal labor policy. In Boys Markets the Court found no inconsistency between the Lincoln Mills directive that federal law be used and the application of common law principles to Section 301(a) cases: "The congressional purpose embodied in Section 301(a) was to supplement and not to encroach upon the pre-existing jurisdiction of the state courts . . . . Congress clearly intended to provide additional remedies for breach of collective bargaining agreements."

State common law traditionally serves as the core of claims against private actors for invasions of privacy. Thus, courts considering suits by unions for injunctions against employers that institute drug testing plans have at their disposal an expansive body of law concerning the privacy right. Rather than fashioning the federal law on individual and disparate concepts of privacy, courts should anchor the law of injunctions against drug testing programs on majority principles derived from the aggregate of state common law.

There are, of course, arguments against using state common law as a guide in determining whether union members have suffered irreparable harm in the course of drug testing. First, this approach is rather formalistic and, if strictly applied, unduly con-

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92 Hurd, Employment Testing at D:13 (cited in note 1). Federal labor laws impose on employers the duty to bargain over conditions of employment; accordingly, failure to bargain constitutes an unfair labor practice. The determination of unfair labor practices is within the purview of the National Labor Relations Board, which also may seek an injunction against the employer. For an explanation of the duty to bargain over terms of employment, see Meltzer, Labor Law at 838-44 (cited in note 29). Other federal statutes to some extent affect employer's ability to test employees. It has been argued that the Federal Rehabilitation Act of 1973, 29 U.S.C. sec. 701-796, 1901-06 and 42 U.S.C. sec. 6001-81 (1982 and Supp. 1985), which applies to private employers, may cover drug addicts as "handicapped" individuals. The act does not bar testing itself, but only testing that is used to discriminate against a protected group. Note, 39 Stan. L. Rev. at 1469 (cited in note 88). Title VII of the Civil Rights Act of 1964 also bars only testing which operates to discriminate against minorities. Id.

93 Lincoln Mills, 353 U.S. at 457 (cited in note 8).

94 Boys Markets, 90 S. Ct. at 1589 (cited in note 6) (emphasis added).


96 Restatement sec. 652A et. seq., offers a concise statement of the majority approach to privacy.
strains courts of equity. This Comment does not argue, however, that all courts of equity are constrained by substantive law. Instead, this Comment suggests that the labor context is unique in that courts must provide remedies not otherwise available at law and simultaneously adhere to the overriding national labor policy of promoting the use and uniform enforcement of the arbitration process. Moreover, this Comment proposes that courts merely use state common law of privacy as a guide for dispute resolution and not as a restraint on equitable remedies.

A second argument against the proposed methodology is that state common law is not useful as it invariably is preempted by federal labor law. In the event that state law is preempted, denying the injunction forecloses the union from recovery for some harms because the arbitrator can only grant compensation provided for by the collective bargaining agreement. Yet state law is not necessarily preempted. A state claim is preempted only if the state court, in considering whether the testing program violated the employees' right of privacy, would have to interpret the contract.

A. Mechanics of the Proposed Approach

Under the commonly accepted approach to tort claims for invasion of privacy, an invasion of privacy is caused by: (1) An unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life, or; (4) publicity that unreasonably places another in a false light before the public. Clearly, the second form of intrusion does not apply in the context of employee drug tests. Also, provided that the employer does not intentionally or inadvertently publicize the results of the tests, the third and
fourth type of invasion are not relevant. In drug testing cases, therefore, the most appropriate question is whether the employer's program constitutes an unreasonable intrusion upon seclusion of the tested employee.

Generally, the tort of intrusion upon seclusion is committed by "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another." Liability for intrusions extends to employers as well as individuals. Liability attaches to the actor whenever the intrusion violates the individual's actual or circumstantial declaration of a "zone of seclusion" and the intrusion is highly offensive to the reasonable person.

In Satterfield v. Lockheed Missiles & Space Co., Inc., a case involving an employee's suit for an injunction against a private employer for invasion of privacy caused by an employee drug testing program, the court explicitly held urinalysis testing not to be an

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103 In Spencer the court concluded that liability for intrusion upon seclusion applies to employers. Spencer, 551 F. Supp. at 899. The court also explicitly rejected the application of constitutional protections absent a showing that the employer is a state actor. Id. at 898. Finally, the fact that Spencer involved a temporary injunction and did not involve labor statutes does not render the case irrelevant to claims for permanent injunctions against drug testing. The harm at issue in Spencer is identical to that alleged in testing cases; accordingly, the common law standards applied in Spencer are equivalent to those which should control the testing cases.

104 Id. The Restatement defines the "zone of seclusion" to include places in which the plaintiff has secluded himself (e.g., a room, home), plaintiff's private affairs (e.g., private phone conversations) and private concerns (e.g., mail, wallet, bank account).

105 Spencer, 551 F. Supp. at 899. The court in Spencer elucidated the required offensiveness by quoting Comment d, Section 652B, of the Restatement: There is "no liability unless the interference with the plaintiff's seclusion is a substantial one . . . [and is] the result of conduct to which the reasonable man would strongly object. Thus there is no liability for knocking at the plaintiff's door, or calling him on the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded."

Id. at 899.


107 Although Satterfield did not consider suits brought by unions, nothing in the case prevents the application of its principles to claims for injunctions against employers' drug testing programs. The harms allegedly caused by drug testing programs are the same regardless of whether the plaintiff is a union or a single employee. In case involving union
intrusion upon employee seclusion. The court concluded that absent a showing by the plaintiff that the testing program represented a "blatant and shocking disregard of his rights" and caused "serious mental or physical injury or humiliation," the plaintiff’s invasion of privacy claim must fail.

The Satterfield approach, which represents the common view of the tort of intrusion upon seclusion, should be adopted in cases involving union suits for injunctions against employers. Under this methodology, the threshold question in these cases is whether the disputed drug testing invades the employees’ zone of seclusion and highly offends a reasonable person. Thus, the method by which the test is administered, rather than a court’s vague notions of the right to privacy, becomes the focal point of the analysis.

The Satterfield analysis in the context of drug testing would go as follows: The court first examines the reach of the employees’ zone of seclusion and whether the employer’s method of conducting drug tests oversteps the bounds of the zone. A program which neither secretly nor forcibly obtains a urine sample most likely would not violate the employees’ zones of seclusion. The employee’s consent to a request for a urine sample operates to remove the act of surrendering the sample from the zone of seclusion. Admittedly, the employee’s consent might be coerced through threats of loss of employment for noncompliance. Still, the em-
ployee can avoid the intrusion by refusing the test, accepting the ensuing discharge and suing for reinstatement and backpay.\textsuperscript{112}

An example of a testing program which arguably would violate the employee's zone of seclusion is one which forces the employee to urinate in the presence of a test administrator or monitor. In such an instance, the employee's reasonable expectation of "private seclusion . . . about his personal affairs" is violated.\textsuperscript{113}

In the second step of the Satterfield analysis, the court examines whether the testing program subjects employees to intrusions which are substantial enough to highly offend the reasonable person. It appears that, at least in the context of drug testing, this second step will be subsumed in the first; in other words, the more flagrant and egregious the violation of the zone of seclusion, the greater the offense taken by the reasonable person. Thus, in cases involving tests conducted surreptitiously or tests requiring urination in the presence of a supervisor, it is not unlikely that the reasonable person would be offended.\textsuperscript{114}

Absence blatant disregard for the employee's declared or implicit zone of seclusion, a disputed drug testing program will survive scrutiny under the Satterfield test.\textsuperscript{115}

graph tests by balancing the employer's property interests against the employee's privacy interests. Id. at 700-01. The drug testing cases would be analogous to Community Distributors only if they involved statutes that prohibited testing of employees. Although polygraphs are often compared to drug tests, there is a notable difference. Polygraph tests enter into the "personal thoughts, attitudes, and beliefs of the individual subjects." Charles B. Craver, The Use of Lie Detectors and Surreptitious Surveillance in Private Employment, San Fernando Valley College of Law Symposium on Labor Law and Industrial Relations 55, 63 (1978). Drug tests are incapable of yielding similar information. Given this difference, Community Distributors is not in any way binding on a court considering an injunction to stop drug testing.\textsuperscript{116}

An aggrieved employee can sue the employer for wrongful discharge; the employee's union is obligated to represent the employee in the proceedings. For an explanation of the extent of this duty of representation, see Meltzer, Labor Law at 1127-89 (cited in note 29). The likelihood of false positives is a factor that should be weighed by the arbitrator in considering the reasonableness of an employee's discharge. See Elaine W. Shoben, Test Defamation in the Workplace: False Positive Results in Attempting to Detect Lies, AIDS, or Drug Use, 1988 U. Chi. Legal F. 181, 210-11.

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\textsuperscript{113} This result is consistent with the court's conclusion in Olin that "[t]he right of privacy of an employee of a private company to be free of testing is not absolute." Olin, slip op. (cited in note 21). It should be noted, however, that in Olin the union failed to allege that the testing of employees violated their right of privacy; the union merely objected to the possible dissemination of test results and the stigma associated with such publicity. Id. The court, ruling against the injunction, properly focused its attention on the testing itself, because the testing, not the dissemination of data, was being challenged. Indeed, invasion of
B. Promoting the National Labor Policy

By defining irreparable harm according to the right of privacy developed in state common law, courts dealing with claims for injunctions against drug testing by employers would effectuate the national labor policy of promoting and consistently enforcing the arbitration process. First, the practice of issuing injunctions only in cases where employee rights to privacy—as defined by the common law of the majority of states—are infringed by a testing program, provides employers with incentives to agree to arbitration. Given assurances that injunctions will not issue based on any type of harm to employees, employers will be more likely to submit labor issues to arbitration. Second, by measuring irreparable harm according to state common law rights of privacy, courts ultimately will develop a more cohesive body of federal law regarding employee drug testing, thus fulfilling the Boys Markets mandate of a uniform federal labor policy. Third, this approach to privacy claims arising from drug testing policies in the private workplace maintains the separation between the role of the court—enforcing arbitration—and the role of the arbitrator—interpreting the collective bargaining agreement. The determination of whether a testing plan intrudes upon an employee’s seclusion and thereby violates his or her right to privacy is made by the court without resort to the collective bargaining agreement.

privacy suits are more common when the information obtained from testing is publicized. See, for example, Gravatt v. Columbia University, No. 86 C 1308, slip op. (N.D. Ill. Oct. 10, 1986) (refusing damages for publication of information); Intern. Union v. Garner, 601 F. Supp. 187 (M.D. Tenn. 1985) (injunction to prohibit release of information by defendant to plaintiff’s employer denied). More often than not, test results become known through no fault of the employer, but because people observe that the employee was released shortly after testing began. The harm caused by inadvertent publication should be treated as consequential damages of unemployment, and not as irreparable harm. Otherwise, as noted by the court in Sun Ship, Inc., an injunction would issue every time a dispute was shown to be arbitrable. Sun Ship, Inc., 511 F. Supp. at 350 (cited in note 71).

Employers might otherwise fear that unions will abuse injunctive relief. This does not imply that unions are more prone than employers to act opportunistically, nor does this question the validity of the unions’ interest in obtaining an injunction. But denying injunctions pending arbitration is not as likely to deter the union from seeking an arbitration clause in the bargaining agreement. Unions traditionally have been viewed as the beneficiaries of an agreement by the employer to submit to arbitration. For employers, the agreement to arbitrate a grievance is merely the quid pro quo for unions’ promises not to strike. Lincoln Mills, 353 U.S. at 455 (cited in note 71).

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Boys Markets, 90 S. Ct. at 1593 (cited in note 6).

Boys Markets, 90 S. Ct. at 1590 (cited in note 6).

Finally, this proposed approach to claims for injunctions against testing programs does not unduly constrain courts sitting in equity. This approach merely limits, but does not eliminate, the circumstances under which employers can be enjoined from testing employees for drugs to those cases where the usual legal remedy available to employees is inadequate.\footnote{Injunctions operate to “enforce underlying legal rights when the usual legal remedy of judgment for damages is inadequate.” Perritt, Labor Injunctions at 18-19 (cited in note 2).}

V. Conclusion

Although courts sitting in equity should not be constrained by rigid formulas for determining irreparable harm, it is possible to maintain a more consistent approach to injunctions in drug testing cases than exists today. The present inconsistent and seemingly arbitrary decisions undermine the federal policy favoring uniform labor law and the arbitration process. By issuing injunctions against employee drug testing programs only when employees’ privacy rights, as defined by the common law of a majority of states, have been violated, courts would effectuate the objectives of the national labor policy. This approach respects employers’ freedom to manage the workplace without compromising employees’ rights to be free from unduly intrusive testing programs.