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The Difference between Mine and Thine: The Constitutionality of Public Employee Drug Testing

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THE DIFFERENCE BETWEEN MINE AND THINE: THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE DRUG TESTING

There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.¹

PROLOGUE

It was a Friday evening and I sat down to watch the movie *Rush*.² The movie involved two police officers, who become addicted to heroin while working undercover to expose the horrors of the drug underworld. It portrayed a tragic view about drug addiction and law enforcement. During the movie, my feelings vacillated between anger and despair. Anger, because these officers had taken an oath to serve and protect the citizens who relied on their agility and attentiveness. Despair, because these were officers who had succumbed to the same evils that have claimed so many others in this country. My feelings of despair became even more pronounced after the recollection of former Washington, D.C. mayor Marion Barry's use of crack cocaine.³

But there was another aspect to my despair that led me to reflect on the role of the government in the fight against drug addiction not only in the schools and in the homes but also in the workplace. In a country infested with drugs, one often wonders what the role of the government is in the war against drugs.

Is the government's role limited only to educating in our schools and interdicting at our borders?⁴ Is it possible to believe realistically that the war on drugs could be won without more of an active role from the government?

If the answer to the previous questions is that a more active role is needed, then suppose a state enacts a statute that requires computer operators to be drug tested randomly because of their unlimited access to personal information. Is this statute constitutional? What if the statute required all grade and middle school teachers to be tested randomly because they work with children who are at vulnerable ages? In an emergency situation, teachers must be able to stay calm, get the students out of the buildings, respond to the emergency and account for all the children accurately. Is this statute constitutional? What about judges whose decisions affect the lives of hundreds of citizens? If on drugs, they may be susceptible to blackmail and persuasion. Would a statute requiring them to be drug tested be constitutional?

1. GEORGE ORWELL, 1984 6 (New American Library ed., 1949). *See also* Capua v. City of Plainfield, 643 F. Supp 1507, 1511 (D.N.J. 1986) (stating that George Orwell's "Big Brother" Society has come to life).

2. *Rush* (Metro-Goldwyn-Mayer 1991).

3. *See, e.g.*, Michael York & Steve Twomey, *Experts Say Barry's Blood Pressure Dangerously High at Arrest*, WASH. POST, June 29, 1990, at A23. *See also* Editorial, *Mayor Barry Should Resign*, WASH. POST, Jan. 20, 1990, at A18.

4. This Comment considers the drug testing of both federal and state employees. Under the Fourteenth Amendment, states must comply with the provisions of the Fourth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

I. INTRODUCTION

While many people believe that drug testing should be reserved for those whose positions involve public safety, the legal criteria determining who may be drug tested has expanded greatly over the years.⁵ This Comment is about how the government has initiated drug testing and how the war on drugs is used to justify intrusion on employees' privacy interests. The debate about drug testing in the workplace continues to flourish as more employees are drug tested at different points in their careers and as states deal with the consequences of legalized medical marijuana.⁶

This Comment analyzes various judicial tests used in determining when drug testing in the public arena might be constitutional.⁷ Part II provides a summary of the Supreme Court decisions relating to search and seizure and, more specifically, drug testing. Part III discusses the Fourth Amendment prohibition against unreasonable searches and seizures as a challenge to drug testing of public employees. Part IV explains the balancing test used by the Supreme Court to determine whether the drug testing programs it examines are constitutional. Part V discusses the different circumstances under which a public employee may be subjected to drug testing and the criteria used for determining whether the test is constitutional. Part VI discusses the implications of the test and attempts to determine what we can expect next from the Supreme Court. It further attempts to determine whether an accurate prediction can be made based on the Supreme Court's analysis of drug testing cases thus far. Finally, this Comment concludes that the balancing test used by the Supreme Court does not provide adequate guidelines for an equitable balancing of individual privacy rights, employee rights and the public interest.

5. See generally *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (finding that city's mandatory urinalysis testing of its firefighters, without reasonable suspicion, violated their rights under the Fourth Amendment), *vacated*, 861 F.2d 1388 (6th Cir. 1988); see also *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 587 (9th Cir. 1988) (stating that the inception of a drug test is justified only if the employer has reasonable grounds for suspecting that the employee used controlled substances on the job) *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *American Fed'n of Gov't Employees v. Weinburger*, 651 F. Supp. 726 (S.D. Ga. 1986) (federal police officers cannot be tested without reasonable suspicion).

6. See *Drug Watch International* (visited June 23, 1998) <<http://www.drugwatch.org/mm.html>> (reporting various articles and findings regarding medical marijuana use); see also <http://www.marijuananeews.com/california_medical_association_t.htm> (discussing a medical marijuana summit called by state Senator John Vasconcellos, after an order from federal appellate court Judge Charles Breyer prohibited San Francisco Cannabis Cultivator's Club owner Dennis Peron from selling medical marijuana at his Market Street outlet). According to San Francisco District Attorney Terence Hallinan, 80% of voters in San Francisco approved Proposition 215. In Arizona, voters passed Proposition 200 which legalizes all drugs such as heroin and LSD to be prescribed for seriously and terminally ill patients; James Brooke, *5 States Vote Medical Use of Marijuana*, N.Y. TIMES, Nov. 5, 1998, at A1 (stating that voters approved initiatives to legalize the medical use of marijuana in Alaska, Arizona, Nevada, Oregon and Washington State. In Colorado and the District of Columbia, where conservatives managed to nullify medical marijuana initiatives, surveys of voters indicated strong support for the measures).

7. Drug testing in the private arena is not considered in this Comment because there must be state action or private employers acting at the direction of the government to invoke the Constitution. See, e.g., *United States v. Jacobsen*, 466 U.S. 109 (1984) (stating that the Fourth Amendment proscribes only government action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government without participation or knowledge of government officials). This Comment does not consider the constitutional challenges raised by drug testing other than the Fourth Amendment, such as the Fifth Amendment and the right to be free from self-incrimination, due process of law concerning the accuracy of the testing, and the privacy rights.

II. A BRIEF HISTORY OF DRUG TESTING PROGRAMS

In 1986, President Ronald Reagan issued Executive Order 12,564,⁸ which prohibits illegal drug use by federal employees, both on and off duty.⁹ The Order directs all executive agencies to develop a plan for achieving the objective of a drug free workplace with due consideration of the rights of the government, the employee and the public.¹⁰ The Order also provides that each agency must establish a program to test the illegal use of drugs by employees in sensitive positions.¹¹ The extent and criteria for such testing is to be determined by the head of each agency, based on the agency's mission, the employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his position.¹² Drug testing is authorized: (1) if there is a reasonable suspicion that any employee uses illegal drugs; (2) for employees involved in accidents or unsafe practices; or (3) for new job applicants.¹³

The United States Supreme Court has addressed the issue of drug testing only four times in a non-criminal context. In *Skinner v. Railway Labor Executives' Ass'n*,¹⁴ the Court held that the Department of Transportation regulations mandating drug screening of railroad employees after an accident were reasonable under the Fourth Amendment because the safe operation of a railroad is an important government interest.¹⁵ In its companion case, *National Treasury Employees Union v. Von Raab*,¹⁶ the Supreme Court held that Customs employees seeking promotions or transfers to positions involving drug interdiction or the use of a firearm could be compelled to submit to random drug testing.¹⁷

Since *Skinner* and *Von Raab*, the Supreme Court has expanded the boundaries of when a drug-testing program is constitutional. In *Vernonia School District 47J v. Acton*,¹⁸ the Court held that the public school district's student athlete drug policy program did not violate the student's federal or state constitutional right to be free from unreasonable searches. Most recently, in *Chandler v. Miller*,¹⁹ the Court determined a Georgia statute, that required candidates for elected office be drug tested within thirty days prior to qualifying for nomination or election and test negative, to be unconstitutional.²⁰

8. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), reprinted in 5 U.S.C. § 7301 (1994).

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 226 (stating that the agency head may test any employee who is undergoing, or has undergone, drug rehabilitation).

14. 489 U.S. 602 (1989).

15. *See id.* at 608.

16. 489 U.S. 656 (1989).

17. *See id.* at 668.

18. 515 U.S. 646 (1995).

19. 520 U.S. 305.

20. *See* 520 U.S. at 313 (stating that Georgia's drug testing requirement effects a search is an uncontested point).

III. THE FOURTH AMENDMENT

The Fourth Amendment's prohibition against unreasonable searches and seizures makes it the most invoked ground for challenging drug testing of public employees.²¹

This Amendment is divided into two clauses. The first establishes the right to be free from unreasonable searches and seizures.²² The second provides that no warrant shall be issued except for upon probable cause describing the things to be seized.²³ It is in the first clause that the two prerequisites needed to invoke Fourth Amendment protection are explained. First, the intrusion must be a "search" or a "seizure."²⁴ Second, the intrusion must be unreasonable.²⁵

Two other tests must be satisfied for Fourth Amendment protection. The Fourth Amendment only protects against government action²⁶ and the Fourth Amendment only offers protection to "people."²⁷ Governmental action includes, but is not limited to, the action of police officers,²⁸ health and safety inspectors,²⁹ tax law inspectors,³⁰ public school officials,³¹ public employers conducting urinalysis of their employees,³² and private employers acting at the direction of government regulations.³³ Thus, government actors may be broadly interpreted.

21. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

Other possible grounds for challenging drug testing are the due process clauses of the Fifth and Fourteenth Amendments. See U.S. CONST. amend. V & XIV.

22. See U.S. CONST. Amend. IV.

23. See *id.*

24. See *id.* Although the Fourth Amendment protects against searches and seizures, there is a distinction between the two types of intrusions. See Jeffrey S. Pavlovich, Comment, *Just Say Yes to Drug-testing Legislation: The Skinner and Von Raab Decisions*, 39 DEPAUL L. REV. 161, 165 (1989).

25. See *id.*

26. Any governmental intrusion resulting in a seizure may also raise a Fifth Amendment cause of action. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993) (stating that in order for a purpose to go beyond the traditional meaning of search and seizure, such action "must comply with the Due Process Clause of the Fifth and Fourteenth Amendments" as well as with the Fourth Amendment).

27. "People" in this context includes both suspected offenders and law abiding individuals. Corporations and businesses also have some Fourth Amendment protections. See *General Motors Leasing Corp. v. United States*, 429 U.S. 338 (1977).

28. See *Schmerber v. California*, 384 U.S. 757 (1966); *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Rochin v. California*, 342 U.S. 165 (1952).

29. See, e.g., *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (involving city housing inspectors).

30. See, e.g., *G.M. Leasing Corp.*, 429 U.S. 338.

31. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (involving the search of a student by school officials).

32. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (stating that U.S. Customs Service employers subjecting their employees to drug testing invokes the Fourth Amendment).

33. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (finding that because the railroad industry was acting at the direction of federal regulations, the Fourth Amendment was properly raised).

A. Search and Seizure Cases

The Constitution does not explain what constitutes a search under the Fourth Amendment. However, the Supreme Court has defined a search as an infringement of a reasonable expectation of privacy,³⁴ and it has stated that a "seizure" of property occurs when there is a "meaningful interference with an individual's possessory interests in that property."³⁵ These definitions of a Fourth Amendment "search" and "seizure" are applicable to the activities of civil as well as criminal authorities.³⁶

1. Administrative Searches

The Supreme Court delineated the analysis to be applied when determining whether the government action at issue constitutes a search in *Katz v. United States*.³⁷ In *Katz*, the Court determined that when a government invasion occurs in a situation where the individual has a reasonable expectation of privacy, then that invasion constitutes a Fourth Amendment search.³⁸

In his concurrence, Justice Harlan articulated a two-prong inquiry for determining whether a person had a legitimate expectation of privacy and thereby had the right to enjoy Fourth Amendment protections.³⁹ The first prong of the test is that a person has exhibited an actual (subjective) expectation of privacy.⁴⁰ The second prong is that the expectation of privacy "be one that society is prepared to recognize as 'reasonable'."⁴¹ The Court has adopted this two-prong test in subsequent cases.⁴² This inquiry has resulted in the standard that there must be a subjective expectation of privacy before it can be established whether the privacy interest actually exists.⁴³

34. See generally Kenneth Stern, *Government Drug Testing and Individual Privacy Rights: Crying Wolf in the Workplace*, 5 YALE L. & POL'Y REV. 235, 249 (1986). See *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

35. *Jacobsen*, 466 U.S. at 113. See also *United States v. Place*, 462 U.S. 696, 708-09 (1983) (holding that police seizure of luggage from a suspect's immediate custody on less than probable cause must be within "the limitations applicable to investigative detentions of the person").

36. See *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (recognizing Fourth Amendment protections as applicable to city housing inspections). The Court noted that the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978), it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530.

37. 389 U.S. 347 (1967).

38. *Id.* at 353. In *Katz*, the government electronically listened to and recorded the defendant's conversation on a public telephone. Until the *Katz* decision, every Fourth Amendment claim was based on invasion of private property. *Id.* at 351. The Court in *Katz* held that the "Fourth Amendment protects people, not places." *Id.*

39. See *id.* at 361 (Harlan, J., concurring).

40. See *id.* (Harlan, J., concurring). There is no comparable statement made in the majority opinion. However, the majority opinion did note that the government's action directed at *Katz* "violated the privacy upon which he justifiably relied." See *id.* at 353. This can be read as a subjective expectation of privacy.

41. See *id.* at 361 (Harlan, J., concurring).

42. See *Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (deciding first whether the expectation of privacy was the kind that "society was prepared to recognize as reasonable") (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

43. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (stating that determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place).

But the "reasonableness" prong of the test has come to mean two very different things. First, whether or not the person desiring privacy has taken steps to attempt to secure it.⁴⁴ In fact, failure to take steps to secure privacy has proved fatal to the Fourth Amendment claim.⁴⁵ The second meaning is whether the privacy expectation in the information sought to be concealed or in the area sought to be kept free from observation is worthy of Fourth Amendment protection. The question is: what information and what areas does society view as private?⁴⁶

The *Katz* decision made a mark on Fourth Amendment jurisprudence⁴⁷ and "altered all future applications of fourth amendment rights regarding searches and seizures."⁴⁸ *Katz's* rule has been identified as the "reasonable expectation of privacy" test.⁴⁹ However, this rule has been "difficult to apply."⁵⁰ Thus, it offers little solution to the problem of what is considered an expectation of privacy and whether it must be one that is subjective or one that society recognizes as reasonable.⁵¹

The focus of the standard has shifted from an individual's subjective privacy expectation to whether such subjective expectation is a reasonable or legitimate expectation of privacy. *See, e.g., Hudson*, 468 U.S. at 525 (stating that the question is whether a prisoner's expectation of privacy is the kind that "society is prepared to recognize as reasonable") (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); *T.L.O.*, 489 U.S. at 337 (stating that the reasonableness as to a specific class of searches requires "balancing the need to search against the invasion the search entails. On one side of balance are the individual's legitimate expectations of privacy and personal security on the other the government's need for effective methods to deal with breaches of public order."); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (federal regulations of private railroads requiring railroad employees to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade expectations of privacy "that society has long recognized as reasonable").

44. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 211 (1986) (stating that one prong of the two-part inquiry is satisfied when the individual meets the test of "manifesting his own subjective intent and desire to maintain privacy" in the object of the challenged search).

45. *See id.* at 211-12 (questioning whether a ten-foot fence around a backyard was a sufficient manifestation of an expectation of privacy from all views of backyard or merely a manifestation of a hope that no one would observe his backyard).

46. The Court has held that some places, such as open fields and prison cells, do not warrant protection regardless of the steps taken to prevent invasions of privacy. *See Oliver v. United States*, 466 U.S. 170, 171 (1984) (stating that while an intrusion upon a fenced open field is trespass as common law, such governmental intrusion does not constitute a search under the Fourth Amendment, because it does not infringe "upon the personal and societal value" that society deems private); *Hudson*, 468 U.S. at 524 (holding that there is no reasonable expectation of privacy in a jail cell due to prison needs and objectives).

47. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974).

48. Richard L. Aynes, Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 66 (1974). *See also* Richard S. Walinski & Thomas J. Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1, 2-4 (1981).

49. *See Terry v. Ohio*, 392 U.S. 1, 9 (1968). Some have claimed that this designation is somewhat inaccurate. *See Amsterdam, supra* note 47, at 383-86.

50. Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 135. *See also* Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 328-29 (1981) (asserting that the *Katz* rule is "essentially standardless" and that this could be overcome by a "secrecy and solitude" analysis being applied to Fourth Amendment "privacy" interests to identify those interests constitutionally protected); Walinski & Tucker, *supra* note 48, at 2 ("no principled way for judges to determine whether a given expectation of privacy" is reasonable).

51. The "reasonable expectation of privacy" test is essentially a combination of Harlan's two-prong test: an actual expectation of privacy which is an expectation that society is prepared to recognize as reasonable. A close examination of Harlan's two-prong test suggests that the expectation does not have to be reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967). It only has to be one that society is prepared to recognize as reasonable. *Id.*

Another Supreme Court case that heavily influenced the analysis of searches and seizures was *New Jersey v. T.L.O.*,⁵² in which a public school official searched a student's purse after learning that she had been smoking in the school's lavatory. In considering the student's Fourth Amendment challenge to the search by a public school official, the United States Supreme Court inquired into the reasonableness of the search by balancing the student's interest in privacy against the school's interest in maintaining an orderly classroom environment.⁵³ The Court upheld the search, reasoning that a teacher's report of the student's smoking made the issue of whether the student was carrying cigarettes relevant.⁵⁴ This relevancy, the Court opined, served as a nexus between the search item and the violation under investigation.⁵⁵ Finally, the Court held that the search was reasonable in light of the suspicion provided by the rolling papers found in the student's purse.⁵⁶

The "special needs" exception was first introduced in Justice Blackmun's *T.L.O.* concurrence⁵⁷ and took flight from that point. The concurrence by Blackmun stated that only when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable,"⁵⁸ is a court entitled to change the balancing of interests.⁵⁹

In *Griffin v. Wisconsin*,⁶⁰ the Court again found that a search was reasonable, in spite of the fact that there was no warrant. The reasonable ground in *Griffin* was a detective's suggestion that the probationer's home contained firearms.⁶¹ The Court upheld the search as reasonable on the grounds that there was a special need and

For example: a homeless person who lives in a box in a public park could be considered not to have a reasonable expectation of privacy. However, if he has an actual (subjective) expectation of privacy in his box as a residence and society is prepared to recognize his box as a residence and consequently, recognize his expectation of privacy as reasonable, this passes Harlan's two-prong test.

52. 469 U.S. 325 (1985). As he reached into the purse for the cigarettes, the official also noticed rolling paper, prompting a more thorough search. *See id.* at 328. This resulted in the discovery of a small quantity of marijuana, and paraphernalia which indicated that the student was selling marijuana. *See id.* The school brought charges against the student. At the hearing, the student moved to suppress the evidence, contending that the search violated her Fourth Amendment rights. *See id.*

53. *See id.* at 339. Justice White also noted the growing disorder in the school rooms, and specifically the growth of drug use and violent crime in schools. *See id.*

54. *See id.* at 345-46. Justice White's majority opinion discounted the need for a search warrant or probable cause and instead held that the legality of the search was dependent on the reasonableness of the search considering all the circumstances. *See id.* at 345-46. Justice White reasoned that a search warrant was unsuited to the school environment, because requiring a teacher to obtain a warrant would interfere with the disciplinary procedures needed in schools. *See id.* He also noted that probable cause was not always a necessary requirement for a reasonable search. *See id.*

55. *See id.* at 345.

56. *See id.* The Court held that the warrant requirement would unduly interfere with "the maintenance of the swift and informal disciplinary procedures needed," and that "strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* Thus establishing the "special needs" exception.

57. *See id.* at 351 (Blackmun, J., concurring in judgment).

58. *Id.* at 341.

59. *See id.* (Blackmun, J., concurring in judgment). These "special needs" were inherent in the school setting because maintaining order was often difficult and the need for immediate response to the drug use problem among the students was required to protect the very safety of the students. *See id.* at 352-53 (Blackmun, J., concurring in judgment).

60. 483 U.S. 868 (1987).

61. *See id.* In *Griffin*, a probation officer acting without a warrant searched a probationer's home and discovered a handgun. The search was conducted pursuant to a state statute that permitted warrantless searches of a probationer's home if there were "reasonable grounds to believe the presence of contraband." *Id.* at 871.

that a warrant requirement would decrease the deterrent effect of expeditious searches in the state's operation of the probation system.⁶²

2. Bodily Searches

While the traditional search and seizure cases dealing with property are numerous, it was not until 1957 that the Court was confronted with a Fourth Amendment case involving physical exams or bodily searches.⁶³ In *Breithaupt v. Abram*,⁶⁴ the Court examined whether evidence of blood taken from an unconscious person by a physician in order to determine intoxication was admissible.⁶⁵ The Court held that the conduct was not so brutal or offensive that it did not comport with traditional ideas of fair play and decency.⁶⁶

Nine years later, the Court in *Schmerber v. California*⁶⁷ greatly influenced the characterization of drug tests as "searches" and "seizures."⁶⁸ The Supreme Court held that a compulsory blood test clearly constitutes a search and seizure under the Fourth Amendment.⁶⁹ However, the Court found, that the search was reasonable and thus constitutional, even though it was performed without a warrant.⁷⁰ The Court based its conclusion on three factors: (1) the delay necessary to obtain a warrant threatened to destroy the evidence; (2) the test chosen to measure Schmerber's blood alcohol content was reasonable; and (3) the test was performed in a reasonable manner.⁷¹

Finally, in *United States v. Montoya de Hernandez*,⁷² the Court held that the detention of an individual at the border was justified because there was reasonable suspicion that she was an alimentary canal smuggler.⁷³ In *Montoya de Hernandez*, the Court found that although the rectal examination did constitute a search under the Fourth Amendment, it was not unlawful under a balancing of the interests at

62. *See id.* The Court found that a more stringent probable cause standard would decrease a program's deterrent effect. *See id.* at 878.

63. *But see* *Rochin v. California*, 342 U.S. 165 (1952) (although the Court held that forcing the accused to vomit capsules containing morphine was unconstitutional, it addressed the violation under the Due Process Clause of the Fourteenth Amendment).

64. 352 U.S. 432 (1957).

65. *See id.* at 433-34. *Breithaupt* concerned the criminal prosecution of a man who had been unconscious while an attending physician withdrew a sample of blood which was shown to contain about 0.17% alcohol. *See id.* at 433. The man was charged with manslaughter and the blood was used to convict him.

66. *See id.* at 435. The Court held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment. *See id.* at 434.

67. 384 U.S. 757 (1966). For a discussion of the analysis of a search and seizure under the Fourteenth Amendment, see Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261 (1993).

68. *See Schmerber*, 384 U.S. at 766. Schmerber was involved in a car accident and was subsequently hospitalized for injuries sustained. *See id.* at 758. At the hospital, he was arrested for drunk driving. *See id.* A blood sample was drawn without his consent, for the purpose of determining the alcohol content in his blood. *See id.* at 759.

69. *See id.* at 767-68.

70. *See id.* at 772.

71. *See id.* at 770-71.

72. 473 U.S. 531 (1985).

73. *See id.* at 541-42.

stake.⁷⁴ Further, there was a reasonable, "articulable suspicion of smuggling".⁷⁵ Under the circumstances, the detention did not violate the Fourth Amendment rights of the traveler.

This was the beginning of the Court's review of cases involving bodily searches under the Fourth Amendment.⁷⁶

B. Drug Testing Cases

In the context of drug testing, the chronological occurrence of the "search" and the "seizure" has been reversed.⁷⁷ The intrusion might be aptly considered the seizure phase because the actual search of the contents does not occur until the specimen is returned from the laboratory.⁷⁸ As such, the "seizure" occurs before the "search." A "seizure"⁷⁹ is deemed to have occurred when there is some meaningful interference with an individual's "possessory" interest in the individual's property or person.⁸⁰ A "search" occurs when an expectation of privacy that society considers to be reasonable is infringed.⁸¹

1. The *Skinner* Decision

The Supreme Court examined the issue of drug testing in 1989 in companion cases.⁸² *Skinner v. Railway Labor Executives' Ass'n* concerned Federal Railroad Administration (FRA) regulations that required blood and urine tests of all railway employees involved in train accidents.⁸³ The regulations also authorized railroad companies to administer breath and urine tests to employees who violated certain safety rules.⁸⁴

The Ninth Circuit Court of Appeals held that the post-accident testing as applied to the railroad employees violated the Fourth Amendment because the tests had no

74. See *id.* at 539-40.

75. *Id.* at 544.

76. However, these cases all involved evidentiary issues in criminal prosecutions. The Supreme Court cases teach that even without the warrant requirement, the probable cause standard "is peculiarly related to criminal investigations." See *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976)).

77. In cases involving property, the search occurs before the actual taking of the property. In drug testing cases, the seizure of the urine or blood occurs first and the search of the composition occurs afterwards. See Jeffrey S. Pavlovich, Comment, *supra* note 24 at 165.

78. *Id.*

79. In *Skinner v. Railway Labor Executives' Ass'n*, the Court noted that "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy[,] . . . these intrusions must be deemed searches under the Fourth Amendment." 489 U.S. 602, 617 (1989) (footnote omitted).

80. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

81. See *id.* See also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (discussing "expectation of privacy"); *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (stating that in order "[t]o receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is 'prepared to recognize as legitimate'" (quoting *Hudson v. Palmer*, 468 U.S. 517, 525 (1984)); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (declaring that "[a] search occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed'" (quoting *Jacobsen*, 466 U.S. at 113)).

82. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

83. See *Skinner*, 489 U.S. at 606.

84. See *id.*

requirement for individualized suspicion.⁸⁵ The Ninth Circuit found that the regulations failed a two-prong reasonableness test: 1) the search must be "justified at its inception"; and 2) the search as conducted must be "reasonably related in scope to the circumstances which justified the interference in the first place".⁸⁶ The circuit court based its holding on the fact that the regulations failed the second prong of the test.⁸⁷ The court found that "blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment."⁸⁸ Thus, the court held that the regulations were unconstitutional.⁸⁹

The Supreme Court reversed the Ninth Circuit decision and upheld the regulations.⁹⁰ In recognizing that the urinalysis test raised privacy concerns,⁹¹ the Court noted two considerations. First, the regulations reduced the intrusiveness of the collection process.⁹² Second, and more importantly, railway employees, "by reason of their participation in an industry that is regulated pervasively to ensure safety," had a diminished expectation of privacy.⁹³

The Court held that the safety interests warranted the FRA testing program.⁹⁴ The Court concluded that the drug tests could deter illegal drug use by railroad employees who are positioned to "cause great human loss before any signs of impairment become noticeable to supervisors."⁹⁵ The drug-testing program also informed the railroad industry about the causes of major train accidents.⁹⁶ Employees could not forecast the timing of an accident or a safety violation or other events that could trigger testing.⁹⁷ The Court explained that the employee's inability to avoid detection simply by the employees staying drug-free at a prescribed test time significantly enhanced the deterrent effect of the program.⁹⁸

85. See *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 375 (9th Cir. 1988) *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

86. *Id.* at 587 (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)).

87. *See id.*

88. *Id.* at 588 (citations omitted).

89. *See id.* at 589.

90. *See Skinner*, 489 U.S. 602 (1989) *rev'g Skinner v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

91. The Supreme Court also concluded that drug testing by taking blood and breath samples constitutes a search. *See id.* at 616-17. The *Skinner* Court added that

[t]aking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the employee's possessory interest in his bodily fluids. It is not necessary to our analysis in this case, however, to characterize the taking of blood or urine samples as a seizure of those bodily fluids, for the privacy expectations protected by this characterization are adequately taken into account by our conclusion that such intrusions are searches.

Id. at 617-18 n.4 (citation omitted).

92. *See id.* at 626.

93. *Id.* at 627.

94. *See id.* at 628-30.

95. *Id.* at 628.

96. *See id.* at 650.

97. *See id.*

98. *See id.*

2. The *Von Raab* Decision

In *National Treasury Employees Union v. Von Raab*,⁹⁹ the issue involved a program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm, or involving access to classified information.¹⁰⁰ The Fifth Circuit Court of Appeals Court found that the justification for initiating the testing was reasonable.¹⁰¹ Further, the Fifth Circuit recognized that since the purpose of the search was administrative rather than criminal, the need for protection against government intrusion was minimal.¹⁰²

The Supreme Court upheld the U.S. Customs service program stating that the service's program was not prompted by a demonstrated drug abuse problem.¹⁰³ However, the Court found that the agency had an "almost unique mission,"¹⁰⁴ as the first obstacle against the smuggling of illicit drugs into the United States.¹⁰⁵ The Court held that the government had a compelling interest in assuring that employees in positions, which involve large amounts of illegal narcotics and interaction with criminals, would not themselves be drug users.¹⁰⁶ Individualized suspicion would not work in such a setting because it was not feasible to subject these employees and their work product to the kind of day-to-day scrutiny that is the norm in traditional office environments.¹⁰⁷

3. The *Vernonia* Decision

In *Vernonia School District 47J v. Acton*,¹⁰⁸ the Court vacated and remanded the decision by the Ninth Circuit Court of Appeals that held a random drug-testing program for high school students engaged in interscholastic athletic competitions unconstitutional.¹⁰⁹ The Supreme Court concluded that the program's context was very significant because local governments bear large "responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."¹¹⁰ It was an "immediate crisis" caused by "a sharp increase in drug use" in the school district¹¹¹ that sparked the program. The District Court found that the student athletes were not only "among the drug users"¹¹² but that they were also the "leaders

99. 816 F.2d 170, 179 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656 (1989).

100. *See Von Raab*, 816 F.2d at 173.

101. *See id.* at 179.

102. *See id.*

103. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989), *aff'g in part and vacating in part* 816 F.2d 170 (5th Cir. 1987).

104. *Id.* at 674.

105. *See id.* at 668.

106. *See id.* at 670.

107. *See id.* at 674.

108. 515 U.S. 646 (1995). For a more thorough analysis of *Vernonia School District 47J v. Acton*, see Darrel Jackson, Note and Comment, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?* 28 ARIZ. ST. L.J. 673 (1996); Blake W. Martell, Note, *Hitting the Mark: Vernonia School District v. Acton*, 31 U.S.F. L. REV. 223 (1996); Eric N. Miller, Comment, *Suspicionless Drug-testing of High School and College Athletes after Acton: Similarities and Differences*, 45 U. KAN. L. REV. 361 (1996).

109. *See Vernonia*, 515 U.S. at 648, 666.

110. *Id.* at 665.

111. *Id.* at 648.

112. *Id.* at 649.

of the drug culture."¹¹³ The Court noted in its decision that "students within the school environment have a lesser expectation of privacy than members of the population generally."¹¹⁴ The Court emphasized the importance of deterring drug use among children and the risk of injury a student athlete poses on himself and those engaged with him on the playing field.¹¹⁵

A significant portion of the *Vernonia* decision rested on the fact that the students had a limited expectation of privacy both as students and as athletes. As students, they were subject to a "degree of supervision and control that could not be exercised over free adults"¹¹⁶ and as athletes, they had "voluntarily subject[ed] themselves to a degree of regulation even higher than that imposed on students generally."¹¹⁷ Thus, the Court was very cautious against applying the presumption that all suspicionless testing would pass constitutional muster in other contexts.¹¹⁸

4. The *Chandler* Decision

More recently, however, in *Chandler v. Miller*,¹¹⁹ the Court addressed the constitutionality of a Georgia statute which required that all candidates for designated state offices certify that they have taken a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the test result was negative.¹²⁰ The Eleventh Circuit relied on the Supreme Court's precedents sustaining drug-testing programs for student athletes, customs employees, and railroad employees in *Vernonia*,¹²¹ *Von Raab*¹²² and *Skinner*,¹²³ and judged Georgia's law constitutional.¹²⁴ The Supreme Court reversed the judgment holding that Georgia's requirement that candidates for state office pass a drug test "does not fit within the closely guarded category of constitutionally permissible suspicionless searches."¹²⁵

The Court found that Georgia failed to show a special need that was substantial enough to override the individual's acknowledged privacy interest.¹²⁶ It continued by remarking that a demonstrated problem of drug abuse is not always necessary to validate a testing program.¹²⁷ However, the Court stated that if there were a showing of unlawful drug use, it would support the assertion of a "special need" for a suspicionless general search program.¹²⁸ The Court used *Skinner* and *Vernonia* to

113. *Id.*

114. *Id.* at 656-57 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

115. *See id.* at 661-62.

116. *Id.* at 655.

117. *Id.* at 657.

118. *See id.*

119. 520 U.S. 305 (1997).

120. *See* 520 U.S. at 309.

121. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995).

122. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 658-59 (1989).

123. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 608-13 (1989).

124. *See Chandler v. Miller*, 73 F.3d 1543, 1549 (11th Cir. 1996), *rev'd*, 520 U.S. 305 (1997).

125. *Chandler v. Miller*, 520 U.S. 305, 309.

126. *See* 520 U.S. at 318. "Proof of unlawful drug use may help to clarify—and substantiate—the precise hazards posed by such use." *Id.* at 319.

127. *See id.* at 319 (citing *Von Raab*, 489 U.S. at 673-75).

128. *See id.*

help bolster the reasoning that public safety was not genuinely in jeopardy and that the Georgia statute diminished personal privacy for mere symbolic sake.¹²⁹

IV. REASONABLENESS AND THE BALANCING TEST

Generally, the primary drug testing procedure used by the government involves urinalysis.¹³⁰ Once it is determined that urinalysis falls under the search and seizure analysis of the Fourth Amendment, the inquiry into the constitutionality of the testing begins.¹³¹ The reason for this is that the Fourth Amendment does not forbid all searches and seizures by the state.¹³² The Constitution only prohibits those searches and seizures that are unreasonable.¹³³ Thus, constitutional requirements of reasonableness must be applied to the issue of public employee drug-testing.

As the Fourth Amendment indicates, the ultimate and defining measure of the constitutionality of a search is "reasonableness."¹³⁴ What is reasonable depends on "all of the circumstances surrounding the search and seizure and the nature of the search or seizure itself."¹³⁵ Thus, the permissibility of an employee drug test must be "judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests."¹³⁶

Finding that a search occurred begins the inquiry into whether there has been a Fourth Amendment violation. The general rule is that warrantless searches, such as the urinalysis testing discussed in this Comment, are unreasonable and therefore violate the Fourth Amendment.¹³⁷ However, the general rule is not absolute and clearly delineated exceptions have been forged.¹³⁸

The exceptions allow the state to prove the reasonableness of the search or seizure without showing probable cause or obtaining a warrant.¹³⁹ Instead, in order to determine the reasonableness of the search, courts have articulated a balancing test where the invasion of privacy rights are weighed against the governmental interests in the search.¹⁴⁰ The balancing test also involves weighing the necessity of

129. *See id.* at 321-22.

130. However, drug use can also be detected through blood and hair analysis. *See Michael Isikoff, Splitting Hairs to Find the Roots of Drug Use*, WASH. POST, Mar. 14, 1990, at A15 (use of mass spectrometer to detect drugs in hair samples expands from law enforcement to private industry).

131. *See* U.S. CONST. amend. IV.

132. *See id.* *See also* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

133. *See* U.S. CONST. amend. IV.

134. *See Vernonia*, 515 U.S. at 646.

135. *Skinner*, 489 U.S. at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (internal quotations omitted)).

136. *Vernonia*, 515 U.S. at 652-53 (quoting *Skinner*, 489 U.S. at 619).

137. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

138. For examples of exceptions to the warrant requirement, see *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (finding that a warrantless search of a probationer's home was valid because special needs made warrant requirement impracticable); *New York v. Burger*, 482 U.S. 691 (1987) (discussing administrative searches of closely regulated industries); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (addressing border searches); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (finding that the requirement of a warrant in the search of a student was reasonable); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (addressing inventory searches); *Carroll v. United States*, 267 U.S. 132 (1925) (addressing the "automobile exception").

139. *See T.L.O.*, 469 U.S. at 340; *Burger*, 482 U.S. at 701-03.

140. *See O'Connor v. Ortega*, 480 U.S. 709, 719 (1987) (addressing government searches to retrieve work-related materials or to investigate violations of workplace rules).

a particular search against the invasion of personal rights that the search entails.¹⁴¹ In applying this balancing test, courts generally consider four main factors: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted.¹⁴² These can also be characterized as: (1) the nature of the intrusion; (2) the character of the intrusion; and (3) governmental interest involved.¹⁴³ It is because of the melange of the factors that the reasonableness question and the balancing test have become a case-by-case analysis.¹⁴⁴

A. *The Nature of the Intrusion*

There are a number of factors to consider when examining the nature of the intrusion of drug testing. These factors tend to permit drug testing when the testing is conducted under less intrusive circumstances.¹⁴⁵ Among them is prior notice.¹⁴⁶ This is how long in advance does the employee know of the planned drug test. This was brought up by the Court in *Von Raab* because if an employee knows in advance then s/he may avoid using drugs in order to receive the right result.¹⁴⁷ Another factor is the limited discretion in choosing the tested employee.¹⁴⁸ The reasoning behind this is that if the employee is chosen in a way which is not random but is actually triggered by either some activity of the employee or some perceived activity, then the employee has some hand in being chosen for the drug test. Finally, another factor is the particular employment context.¹⁴⁹ If the position is one which involves the safety of the public then it is often presumed that the safety of the public outweighs the interest of the employee.

B. *The Character of the Intrusion*

The character of the intrusion caused by urinalysis must be analyzed in terms of both the "physical" nature of the intrusion as well as its "personal" nature.¹⁵⁰ The Fourth Amendment of the United States Constitution protects individuals from unreasonable government searches.¹⁵¹ Obtaining and examining physical evidence,

141. *See id.* at 719-20

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

143. *See generally* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (in analyzing the drug testing program, the court considered the nature of the privacy interest, the character of the intrusion that is complained of and the nature and immediacy of the governmental concern).

144. *See id.* *See also* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177-80 (5th Cir. 1987), *aff'd in part, vacated in part*, 489 U.S. 656 (1989). The court suggested a list of determinative factors to determine the intrusiveness of the test which included: 1) the scope and manner of the test; 2) the justification for the test; 3) the location of the test; 4) voluntary nature considerations; 5) the existing employment relationship; 6) the possible administrative nature of a search; 7) the availability of less intrusive measures; and 8) the effectiveness of the administered test.

145. *See Von Raab*, 489 U.S. at 671.

146. *See id.* at 672-73 n.2.

147. *See id.*

148. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989).

149. *See id.* at 627-28; *see also Von Raab*, 489 U.S. at 677.

150. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995).

151. U.S. CONST. amend. IV.

as in a urinalysis, from a person constitutes a search if doing so infringes the person's expectation of privacy.¹⁵²

With respect to drug testing, courts have recognized two varieties of 'intrusion'.¹⁵³ The first variety is common to all kinds of searches: the humiliation of exposing oneself.¹⁵⁴ This intrusion might aptly be called the 'seizure phase', since the actual search does not occur until the specimen is returned to the laboratory. Requiring some level of suspicion before forcing someone to urinate at the command of a tester reasonably limits the number of the seizure-phase intrusions.

The second intrusion is that of revealing the secrets locked in the chemical makeup of one's urine – the actual "search phase."¹⁵⁵ A urine sample may reveal medical disorders including epilepsy and diabetes.¹⁵⁶ Most employers have no legitimate interest in such information, nor do they have a permissible interest in any indications of drug use not affecting the employees' job performance.

The Supreme Court has held that a compelled intrusion into the body, for blood to be analyzed for alcohol content, is a Fourth Amendment search.¹⁵⁷ This stems from society's concern for the security of one's person.¹⁵⁸ Any physical intrusion that penetrates beneath the skin infringes on one's reasonable expectation of privacy.¹⁵⁹ The chemical analysis of the sample obtained in order to discover physiological data, is a further intrusion on the tested individual's privacy interest.¹⁶⁰

Therefore, it is necessary to examine urinalysis with respect to the individual's expectation of privacy. A court must ask whether the individual has "exhibited an actual expectation of privacy" before an intrusion by urinalysis is made.¹⁶¹

Courts have held that an individual can reasonably expect to be protected by the Fourth Amendment from bodily intrusions such as the taking of blood,¹⁶² nails,¹⁶³ and hair.¹⁶⁴ The individual, subject to urinalysis, should also be protected under the Fourth Amendment under the same analysis as that applied to the taking of one's

152. See *Cupp v Murphy*, 412 U.S. 291 (1973).

153. See generally *Skinner*, 489 U.S. 602, 617 (stating that it is not disputed "that chemical analysis of urine . . . can reveal a host of private medical facts . . . [n]or can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.").

154. See John A. Scanlan, Jr., *Playing the Drug Testing Game: College Athletes, Regulatory Institution and the Structures of Constitutional Argument*, 62 IND. L. J. 863, 666 (1987) (urinalysis has the potential for inflicting humiliation and virtually limitless information about the person being tested); see also Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 701 (1961) (discussing the humiliation and mental suffering caused by searches in the criminal context).

155. See *Skinner*, 489 U.S. 602, 614-17.

156. See *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987). See also Jeannette C. James, Comment, *The Constitutionality of Federal Employee Drug Testing: National Treasury Employees Union v. Von Raab*, 38 AM. U. L. REV. 109, 116 n.2 (1988).

157. See *Skinner*, 489 U.S. at 616 (citing *Schmerber v. California*, 384 U.S. 757 (1966) and *Winston v. Lee*, 470 U.S. 753 (1985) (internal citations omitted)).

158. See *Terry v. Ohio*, 392 U.S. 1 (1968).

159. See *Skinner*, 489 U.S. at 615.

160. *Id.*

161. *Skinner*, 489 U.S. 602 (1989).

162. See *Schmerber*, 384 U.S. 757.

163. See *Cupp v. Murphy*, 412 U.S. 291 (1973).

164. See *Bouse v. Bussey*, 573 F.2d 548 (9th Cir. 1977).

blood, nails and hair.¹⁶⁵ Although passing urine is not and cannot be considered an invasive procedure, it does involve the act of urination, which is recognized as a *private* body function.¹⁶⁶ There is a great expectation of privacy in an individual's urine because modern technology has made it possible for laboratory tests to reveal personal information about an individual's medical history including venereal diseases and pregnancy.¹⁶⁷ Thus, because of the search involved, urinalysis falls within the protection of the Fourth Amendment.¹⁶⁸

However, although urinalysis intrudes upon an "excretory function traditionally shielded by great privacy,"¹⁶⁹ the degree of physical "intrusion depends on the manner in which the urine produced was monitored."¹⁷⁰ Thus, a drug-testing policy that requires a person to be observed by a monitor or that discloses more information than simply the presence or absence of illicit drugs may affect the intrusiveness of the policy and consequently, its reasonableness. However, this factor is generally not considered significant enough to prevent a drug testing policy that meets the other factors.¹⁷¹

C. *The Governmental Interest*

The final factor in determining the constitutionality of a search and search through urinalysis is the nature and the immediacy of the government's interest¹⁷² and the effectiveness of the policy behind the intrusion.¹⁷³ In order for the state to lawfully intrude upon a constitutional right, the governmental interest usually must be compelling.¹⁷⁴ However, six years after the Court found that a compelling interest was required by the state to effectuate a constitutional search, the Court

165. See *Skinner*, 489 U.S. 604, 616-17 (the court noted that excretory functions are traditionally shielded by great privacy).

166. See *id.* at 617. "There are few activities in our society more personal or private than the passing of urine. . . . It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 656 (1989).

167. See *Skinner*, 489 U.S. 604, 617. See also Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 621 & n.59 (1987).

168. See *Skinner*, 489 U.S. at 617.

169. *Id.*

170. *Id.*

171. See generally *Von Raab*, 489 U.S. 656.

172. When courts have weighed the balancing interests, the governmental interests generally fall into three categories. The first is integrity. See *Von Raab*, 489 U.S. at 670 (stating that government has a compelling interest in ensuring that the frontline interdiction personnel has unimpeachable integrity); *Chandler v. Miller*, 520 U.S. 305, 318 (asserting that statute is justified because the use of illegal drugs draws into an official's integrity). *But see Von Raab*, 489 U.S. at 681 (Scalia J., dissenting) (characterizing integrity claim as nothing more than a "symbolic opposition to drug use"); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (stating that a generalized interest in the integrity of the workplace is not enough to overcome the privacy interests at issue).

The second governmental interest is the protection of sensitive information. See generally *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991).

The third and perhaps the most significant governmental interest is public safety. See *Von Raab*, 489 U.S. at 664; *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989). See also Michael Mass, *Public Sector Drug Testing: A Balancing Approach And The Search For A New Equilibrium*, 42 BAYLOR L. REV. 231, 249 (1990).

173. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995).

174. See *Skinner*, 489 U.S. at 628 (holding that compelling state interest precipitating the search was to prevent railway accidents); *Von Raab*, 489 U.S. at 670 (finding that the compelling state interest was to ensure the fitness of customs officials in the interdiction of drugs and in the handling of firearms).

noted that it was a mistake to characterize the term "compelling state interest," as applied in the Fourth Amendment context, as a "fixed minimum quantum of governmental concern."¹⁷⁵ But the primary issue is whether there is a state interest here and whether it needs to be compelling.¹⁷⁶

Thus, the governmental interest does not have to be a compelling or substantial one. Rather, the government interest need only be one that appears to be important enough to justify the particular search at hand and which, in light of other factors, shows the search to be relatively unintrusive on a genuine expectation of privacy.¹⁷⁷

D. *The Warrant Requirement and the "Special Needs" Exception*

Even though the first part of the Fourth Amendment test is met, the court still has to contend with the warrant requirement.¹⁷⁸ The warrant requirement mandates that the government obtain a warrant before conducting a search. However, as a result of the case-by-case analysis, a significant exception to the warrant requirement has developed. This exception is the "special needs" exception,¹⁷⁹ which recognizes that special needs often exist, which make a warrant requirement or a probable cause requirement impracticable.¹⁸⁰ In recognizing this impracticability, courts have waived the Fourth Amendment warrant or probable cause requirements in public employee drug-testing cases, and instead apply a balancing test to determine a search's reasonableness.¹⁸¹

"Special needs" are those needs, which are "beyond normal law enforcement that may justify [a] departure[] from the usual warrant and probable-cause requirements."¹⁸² "Normal" needs presumably refer to those searches conducted by the police for the purpose of gathering evidence in a criminal prosecution.¹⁸³ To escape the standard applied in cases of "normal" needs, a "special need" must have some distinct or unique quality. A "special need" refers to a need that is purportedly even greater than the normal needs of law enforcement.¹⁸⁴ This "special need" exception was demonstrated in the concurring opinion of *New Jersey v. T.L.O.*¹⁸⁵

175. *Vernonia*, 515 U.S. at 660.

176. The "phrase [compelling state interest] describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*

177. *See id.* *See also* *Jones v. McKenzie*, 833 F.2d 335, 337 (D.C. Cir. 1987) *vacated and remanded sub nom. Jenkins v. Jones*, 490 U.S. 1001 (1989), 878 F.2d 1476 (D.C. Cir. 1989) (focusing only on drug testing in the context of a regular medical examination for employment purposes).

178. *See* U.S. CONST. amend. IV.

179. For a more thorough analysis of the "special needs" exception, see Jennifer Y. Buffaloe, "Special Needs" And The Fourth Amendment: An Exception Poised To Swallow The Warrant Preference Rule, 32 HARV.C.R.-C.L. L. REV. 529 (1997).

180. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1986) (Blackmun, J., concurring).

181. *See id.* at n.27.

182. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). *See also* *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (plurality opinion) (discussing special need for work related searches of employees' desks and offices); *T.L.O.*, 469 U.S. at 337-42 (addressing the special need for search of students proper by school officials).

183. *See* Buffaloe, *supra* note 179, at 529.

184. *Skinner*, 489 U.S. at 619.

185. 469 U.S. 325.

In considering the student's Fourth Amendment challenge, the Court in *T.L.O.* balanced the student's interest in privacy and the school's interest in maintaining an orderly classroom environment.¹⁸⁶ In applying this balancing test, Justice White eliminated the need for a search warrant¹⁸⁷ or probable cause.¹⁸⁸ Instead, he held that the legality of the search was a question of whether it was reasonable considering all the circumstances.¹⁸⁹

The "special needs" exception was further demonstrated regarding probationers in *Griffin v. Wisconsin* as previously discussed.¹⁹⁰ The special needs exception was extended to employment cases soon after the *Griffin* case because of the risks involved with drug abuse in the workplace. In *Skinner v. Railway Labor Executives' Ass'n*, the special need was to ensure safety on the railroads.¹⁹¹ *National Treasury Employees Union v. Von Raab* involved the "substantial interests"¹⁹² to deter drug use among those employees charged with protecting the borders from the flow of drugs.¹⁹³ Prior to the *Skinner* and *Von Raab* decisions, all "special needs" involved either an element of individualized suspicion or realized harm which was mitigated by the search.¹⁹⁴ The Supreme Court decisions in *Skinner* and *Von Raab* established that the designation of a "special need" or a safety sensitive position was necessary for establishing whether the interest of the government is substantial enough to override an individual's privacy interest.¹⁹⁵

As indicated above, the reasonableness requirement of the Fourth Amendment is often the determinative factor in assessing whether a drug testing program is constitutional. This prevents the issues in a drug testing program from being arranged easily within pre-set rules. Instead, courts apply various balancing tests and view the totality of the circumstances. Because the balancing tests analyze different positions and different interests, the results of the tests are often not consistent.

V. CIRCUMSTANCES UNDER WHICH EMPLOYEES ARE TESTED

There are six common circumstances under which an employee might be subject to drug testing.¹⁹⁶ These are listed from the least intrusive means of drug testing to the most intrusive. Intrusiveness is based on several factors from the manner in

186. See *T.L.O.*, 469 U.S. at 340. Justice White also noted the growing disorder in the school rooms, and specifically the growth of drug use and violent crime in schools. See *id.* at 339.

187. See *id.* at 340. The Court reasoned that a search warrant was unsuited to the school environment, because requiring a teacher to obtain a search warrant would unduly interfere with swift and informal disciplinary procedures needed in schools. See *id.*

188. See *id.* Justice White noted that probable cause was not always a necessary requirement for a reasonable search. See *id.*

189. See *id.* at 341.

190. 483 U.S. 868 (1987). See *supra* Part III.A.1, nn.60-62 and accompanying text.

191. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989).

192. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989).

193. *Id.*

194. See *T.L.O.*, 469 U.S. at 330 (where the student had been searched because she had been caught smoking); see also *Griffin*, 483 U.S. at 873 (where a detective had declared his suspicion that the probationer's home contained contraband).

195. See *Skinner*, 489 U.S. at 618; *Von Raab*, 489 U.S. at 665-66.

196. See 3 C.F.R. 224 (1987), reprinted in 5 U.S.C. § 7301 (1994).

which the employee is chosen to the amount of notice given to the employee.¹⁹⁷ There are also distinctions drawn between the timing of the tests (e.g. pre-employment, periodic, return-to-duty) and the basis of the tests (e.g. random, reasonable suspicion, post-accident).

A. *Pre-employment Drug Testing*

This type of testing is perhaps the most common and the least objectionable form of drug testing.¹⁹⁸ The employer's interest in testing an applicant is different from testing an incumbent employee because an applicant cannot be evaluated on work performance. Thus, the employer must review the applicant's entire background to determine if the applicant will be a good employee.¹⁹⁹ Because evidence of drug abuse raises legitimate concerns about safety and productivity, it must be part of the hiring criteria. Thus, the employer may make the job offer conditional on the result of a drug test.

Pre-employment testing often does not involve the same type of analysis as the other types of testing because the applicant has not yet been hired and as such does not have the same level of privacy interests or expectations that an employee has.²⁰⁰ The privacy expectation of people seeking certain positions is significantly reduced relative to other members of society.²⁰¹ Those who voluntarily choose to accept a job that requires testing do not encounter the same level of intrusion on privacy.²⁰² The test is triggered by the job applicant's voluntary conduct and generally occurs only one time during the applicant's career.²⁰³ The applicant is also presumably on notice and might choose not to go forward with the application and drug test.²⁰⁴

197. See *Von Raab*, 489 U.S. at 671 (citing several factors used in determining the intrusiveness of a drug test).

198. See *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir 1991); *Doe v. City of Honolulu*, 816 P.2d 306 (Haw. 1991); *City of Annapolis v. United Food & Commercial Workers*, 565 A.2d 672 (Md. 1989); *Middlebrooks v. Wayne County*, 521 N.W.2d 774 (Mich. 1994); *Fraternal Order of Police v. City of Newark*, 524 A.2d 430 (N.J. 1987). See also *McDonnell v. Hunter*, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985) (stating that "[t]he Fourth Amendment, however, does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees").

199. See *Willner*, 928 F.2d at 1192 (stating that the hiring process, particularly the interviews and the background investigation, is designed to gather information so that a judgment may be made regarding the applicant's suitability for employment).

200. See *id.* "If the reasonable privacy expectations of applicants are less than those of the employees and if the testing procedure for applicants is itself unintrusive, the government is not required to demonstrate as high a degree of justification as it must to conduct random testing of those already employed." *Id.* at 1188.

201. See generally *International Brotherhood of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (holding that applicants have a reduced expectation of privacy); *Willner*, 928 F.2d 1185 (applicant's knowledge of what will be required, and when, affects the strength of his or her interest).

202. See *Willner*, 928 F.2d at 1190 (finding that no one is compelled to seek a job and if individuals view drug testing as offensive, they need only refrain from applying).

203. This is unless the position is a safety-sensitive one.

204. "[T]here is a human difference between losing what one has and not getting what one wants." Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975).

To determine whether a pre-employment test is constitutional,²⁰⁵ the Supreme Court's reasoning in *Skinner*,²⁰⁶ *Von Raab*²⁰⁷ and *Chandler v. Miller*²⁰⁸ is the best place to begin. Appellate courts have generally required the presence of a public safety concern to find a pre-employment drug-testing program reasonable under the Fourth Amendment.²⁰⁹ Therefore, merely submitting an application is not sufficient to satisfy the reasonableness test.²¹⁰ However, the applicant's status as a non-employee certainly lessens their privacy rights²¹¹ and under *Von Raab* and *Skinner*, the government's burden in defending an applicant's challenge to a drug test is minimal.²¹²

Regarding this type of testing, courts generally base their decisions on the applicant's reduced expectation of privacy.²¹³ *Willner v. Thornburgh*²¹⁴ presents an excellent example of a reduced right to privacy of a job applicant. In *Willner*, a federal circuit court was confronted with the issue of whether the government could subject an applicant to a pre-employment urinalysis drug test in connection with his application for a position as an attorney with the Department of Justice.²¹⁵ In determining whether the testing was permissible under the Fourth Amendment, the court focused on the applicant's reduced expectation of privacy.²¹⁶ The court also found that the applicant's privacy expectation was significantly diminished when the applicant submitted to a complete and thorough background investigation.²¹⁷ Additionally, the court noted that the applicant had been provided with adequate notice of the testing.²¹⁸

In *Von Raab*, the employees who were subjected to the drug test were those seeking a promotion or transfer.²¹⁹ Under the Customs program, all employees who sought these positions knew that they had to take a drug test and were likely aware of the procedures the Service must follow in administering the test.²²⁰ Further, the process becomes automatic when the employee elects to apply for, and thereafter

205. For a general analysis of preemployment drug testing, see Stefan Jan Marculewicz, *Some Tough Questions for Challenges to Preemployment Drug-testing*, 10 J. CONTEMP. HEALTH L. & POL'Y 243 (1993).

206. 489 U.S. 602.

207. 489 U.S. 656.

208. 520 U.S. 305.

209. See *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990) (striking as unconstitutional a Georgia law that required all applicants for state employment to submit to and pass a drug test). See also *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1307 (9th Cir. 1991) (holding that the Department of Transportation has a sufficient interest in protecting public safety on the highways to require pre-employment testing of truck drivers).

210. Several courts have held that a mere interest in the integrity of the workplace is not good enough to require an individual to submit to a drug test. See *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989); *Georgia Ass'n of Educators*, 749 F. Supp. at 1115.

211. *Transportation Indus. v. United States Coast Guard*, 727 F. Supp. 648, 655 (D.D.C. 1989).

212. See Lois Yurow, Note, *Alternative Challenges to Drug-testing of Government Employees: Options After Von Raab and Skinner*, 58 GEO. WASH. L. REV. 148, 149 (1989).

213. See *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991).

214. *Id.*

215. *Id.* at 1186-87.

216. *Id.* at 1189-90.

217. *Id.* at 1189.

218. *But cf.* *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990) (blanket testing of applicants for all state jobs unconstitutional).

219. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

220. See *id.* at 670-71.

pursue, the position.²²¹ The employees were essentially self-selected,²²² the tests were not conducted by surprise,²²³ and the taking and analysis of the urine sample was limited in many respects.²²⁴ The employees were not tested again.²²⁵ This is essentially a pre-employment process²²⁶ yet, the Court analyzed the testing policy as one involving a "safety sensitive" or "special needs" exception.²²⁷ Nevertheless, the court implicitly modified its holding of *Von Raab* in *Chandler v. Miller*.²²⁸

In *Chandler v. Miller*, the Supreme Court held that a Georgia statute which required all candidates to submit to and pass a drug test was unconstitutional.²²⁹ The Court held that in order for a drug testing program to be upheld in a situation where there is no safety sensitive position, a "special need" had to be shown.²³⁰ The "special need" had to be substantial enough to override an individual's acknowledged privacy interest.²³¹

Although *Chandler* was not a pre-employment case,²³² it involves essentially the same issues.²³³ The statute in *Chandler* required that the test be taken before nomination or election.²³⁴ The test revealed only the presence or absence of illegal drugs.²³⁵ The results are not made available to law enforcement officers in the event that a candidate chooses not to file them.²³⁶

However, the consequence of *Chandler* is that now the government has to show that there is some special need before it subjects the applicant to a drug test.²³⁷ In *Skinner* and *Von Raab*, the standards for applicants were easy for the government to meet. *Chandler* has made it more difficult for a government to succeed against a claim of unreasonable search and seizure under the Fourth Amendment in the context of drug testing. Thus, *Chandler* modified *Willner*, to the extent that *Willner* required applicants to be subjected to drug testing irrespective of the fact that the position was not safety sensitive.

221. See *id.* at 667.

222. See *id.* at 670.

223. See *id.*

224. See *id.* at 670-71.

225. See *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987).

226. See *National Fed'n of Fed. Employees v. Weinberger*, 819 F.2d 935 (D.C. Cir. 1987) (stating that advance notice of the employer's condition may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy).

227. *Von Raab*, 489 U.S. at 670-71.

228. See Nathan A. Brown, *Reining in the National Drug Testing Epidemic*, *Chandler v. Miller*, 33 HARV. C.R.-C.L. L. REV. 253, 261 (1998).

229. See *Chandler*, 520 U.S. 305, 308-09.

230. See 520 U.S. at 321-22.

231. See 520 U.S. at 318.

232. The drug-testing requirement in *Chandler* does not fall into any of the circumstances set out in this Comment. The facts and the requirements of the program in *Chandler* indicate that it would fit best in the category of pre-employment testing.

233. See *Chandler*, 520 U.S. at 320 (respondents stating that court should rely on the decision in *Von Raab* where the court sustained a drug-testing program for officers seeking a promotion or transfer).

234. See *id.* at 309.

235. See *id.* at 312.

236. See *id.*

237. In the alternative, the government may show that there is a "safety sensitive" position involved.

B. Post-accident Drug Testing

Post-accident testing occurs when the employee is tested after an accident or some other safety violation.²³⁸ It is likely that *Skinner* insulated most post-accident testing from Fourth Amendment attack because it gives much latitude to employers.²³⁹ In *Skinner*, the Supreme Court held that drug testing after an accident was reasonable because the invasion of privacy was minimal.²⁴⁰ Often, post-accident testing involves employees whose positions concern issues of a sensitive nature, such as bus drivers²⁴¹ or railroad employees.²⁴² Thus, the sensitive nature of the employees' duties may justify the testing without individualized suspicion.²⁴³

The most important basis for post-accident testing, which allows for a lower expectation of privacy, is the protection of public safety.²⁴⁴ The *Skinner* Court stressed that post accident procedures are intended to provide valuable information that can help to pinpoint the cause of an accident, and to deter drug use "[b]y ensuring that employees . . . know that they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty."²⁴⁵

Writing for the Court, Justice Kennedy argued that requiring supervisors to establish the existence of individualized suspicion in the aftermath of an accident would defeat the government's compelling interests in public safety, investigating the causes of accidents, and deterring drug use among covered employees.²⁴⁶ The scene at a serious accident is typically confused and chaotic, and investigators often find it very difficult to determine which employees may have contributed to the accident.²⁴⁷ The delay caused by the need to identify suspected employees and gather sufficient evidence to support the existence of individualized suspicion would likely result in the "loss or deterioration of the evidence provided by the tests."²⁴⁸ Consequently, the important governmental interests served by the post-accident testing regulations would be seriously hindered if supervisors were forced to gather specific facts amounting to an individualized suspicion of impairment

238. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 607-11 (1989).

239. See generally *Skinner*, 489 U.S. at 602, 608-09 (stating that the regulations do not restrict a railroad's authority to absolutely prohibit the presence of alcohol and drugs in the body fluids of an employee and that the post-accident toxicological testing is mandatory).

240. See *id.* at 628.

241. See *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475 (6th Cir 1991).

242. *Skinner*, 489 U.S. at 608-10 (commenting that to the extent transportation and like restrictions are necessary to procure the requisite samples for testing, this interference alone is minimal given the employment context in which it takes place); see also *Cronin v. FAA*, 73 F.3d 1126 (D.C. Cir. 1996); *Delta Air Lines, Inc. v. Airline Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1988) (vacating on public policy grounds an arbitration award reinstating pilot who was discharged after narcotics detection dogs found marijuana butts in his car and he tested positive for marijuana use). See generally Carroll E. Dubec & Jacqueline Fitzgerald Brown, *Drug Testing In Aviation: The Double Standard Continues*, 21 *TRANSP. L.J.* 43 (1992) (exploring drug testing in aviation as promulgated by the Omnibus Transportation Employee Training Act, the Department of Transportation and the Federal Aviation Administration); Lisa A. Wilcox, Note, *Random Drug Testing in the Aviation Industry*, 26 *U.S.F. L. REV.* 559 (1992) (suggesting that the stricter and more traditional approach of the Fourth Amendment analysis should be used in aviation cases).

243. See *Skinner*, 489 U.S. at 606-07, 610.

244. See *id.* at 639-40.

245. *Id.* at 630.

246. See *id.* at 632.

247. See *id.* at 631.

248. *Id.*

before testing a particular employee. This led inexorably to the majority's conclusion.²⁴⁹

The balancing test in this type of testing would involve weighing the employer's interest in determining whether drugs contributed to the cause of the accident and initiating a resolution of a problem against the employee's privacy interest.

C. Routine Drug Testing

Routine drug testing generally involves tests taken as part of a medical examination with minimal intrusion on the employee's privacy interest. Routine testing²⁵⁰ is usually upheld against a constitutional challenge.²⁵¹ One reason that drug testing during routine scheduled physicals is less objectionable than other tests is that employees have a lower expectation of privacy as to such testing. Thus, this is only minimally intrusive.²⁵² Moreover, because urine specimens are normally requested in medical examinations for reasons other than to detect illicit drug use, one can argue that an analysis for the presence of drugs can be conducted with no additional physical intrusion.²⁵³ Moreover, urinalysis testing in these situations is further supported by the fact that regularly scheduled medical examinations do not foster the same type of anxiety as do random, unscheduled exams.²⁵⁴

One of the major factors that reduce the privacy expectation and the intrusiveness of the drug test²⁵⁵ is that in a routine drug test, employees have notice far in advance.²⁵⁶ Notice in a routine drug test can be met in different ways. In *Skinner*, accidents and rule violations triggered notice of the testing.²⁵⁷ In *Von Raab*, testing

249. See *id.* at 633-34.

250. This is also known as "periodic" testing.

251. See generally *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) *vacated and remanded for further consideration sub nom. Jenkins v. Jones*, 490 U.S. 1001 (1989) (upholding routine examination of school bus attendant).

252. See *Jones v. McKenzie*, 833 F.2d at 340; see also *Amalgamated Transit Union v. Cambria City Transit Authority*, 691 F. Supp. 898, 902 (W.D. Pa. 1988) (no Fourth Amendment violation in a transit authority's policy of drug-testing bus drivers and mechanics during annual physical exams); *McKendall v. New Orleans*, 1993 WL 85954 (E.D. La. 1993) (unreported opinion).

253. However, in that particular instance the process involved is one of a search not the seizure of the specimen. In this circumstance, the urine sample is already "seized" thus it is the search aspect which is at issue here.

Giving a urine sample is part of an ordinary physical examination and, whatever interest in "physiological secrets" in already-discharged urine there may be testing for the presence of certain drugs is a minimal intrusion. See *Wrightshell v. City of Chicago*, 678 F. Supp. 727, 734 (N.D. Ill. 1988).

254. See *Wrightshell*, 678 F. Supp. at 733 (stating that there is a reasonable ground for desiring to test the fitness of a public safety employee and since the medical examinations are only conducted under specified circumstances, the likelihood of abuse or harassment is reduced and intrusion is minimized by limiting the mandatory examinations to specific circumstances).

255. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672-73 n.2 (1989). See also *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1302 (9th Cir. 1991) (stating that notice that one will be subject to testing on the job reduces the element of surprise and diminishes the expectation of privacy).

256. See *City of Annapolis v. United Food and Commercial Workers, Local 4000*, 565 A.2d 672, 678 (Md. 1989) (citing *Von Raab*, 816 F.2d 179 (5th Cir. 1987)). See also *International Fed'n of Prof'l & Technical Eng'rs, Local 1944 v. Burlington County Bridge Comm.*, 572 A.2d 204, 208 (N.J. 1990) (explaining that drug-testing during a routine physical is less intrusive than other drug-testing).

Another reason for lower privacy expectation and reduces intrusiveness is the fact that taking a urine sample for a purely medical examination is generally not monitored.

257. See *Von Raab*, 489 U.S. 672-73.

was required only for employees who sought transfer or promotions to certain sensitive positions and the employees were notified in advance of the scheduled sample collection.²⁵⁸ In both these cases, the employees knew in advance when the testing could take place even if it did not occur in a physical examination. This knowledge means that "the amount of anxiety should not be substantial" and thus, the level of privacy intrusion is less severe.²⁵⁹ The Supreme Court also acknowledged the importance of notice in the Fourth Amendment calculus in *Von Raab*, where it identified advance notice as a factor that minimized the testing programs intrusion on privacy.²⁶⁰

Courts are more likely to approve of routine testing over other drug testing because routine testing does not infringe on employee privacy interests as much as unexpected testing. However, in *Chandler*, the court asserted that "Georgia's singular drug test for candidates is not part of a medical examination designed to provide certification of a candidate's general health, and we express no opinion on such examinations."²⁶¹

However, as Chief Justice Rehnquist sarcastically expressed

[I]t is all but inconceivable that a case involving [questions of medical examinations] could be decided differently than the present case. . . . The only possible basis for distinction is to say that the State has a far greater interest in the candidate's "general health" than it does with respect to his propensity to use illegal drugs.²⁶²

Under Chief Justice Rehnquist's reasoning, any routine drug test would be permissible if it is in connection with a routine physical examination. Further, *Chandler* appears to be narrower than the holding in *Von Raab* regarding the analysis of the duties of the tested class, the presence or absence of a past history of drug use, and the deterrent role of the drug testing scheme. If the *Chandler* Court had accepted the rationale in *Von Raab* of the deterrent rationale, it would still be considered a legitimate justification for a suspicionless search. But the *Chandler* Court rejected the deterrence rationale as a justification, rendering the analysis of routine drug testing unclear. What is indisputable is that *Chandler* does not shield routine drug testing programs from attacks.

Nevertheless, under a routine test, because the intrusion is so minimal and the government interest is only required to be important (rather than compelling), the test of constitutionality is usually met.²⁶³ Thus, the search may still be reasonable

258. *See id.*

259. *International Bhd. of Teamsters*, 932 F.2d at 1303.

260. *See Von Raab*, 489 at 672 n.2.

261. *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

262. *Id.* at 327-28 (Rehnquist, J., dissenting).

263. *See, e.g., Chandler*, 520 U.S. at 318 (stating that the proffered special need for drug testing must be substantial—important enough to override the individual's privacy interest); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (finding that in limited circumstances where privacy interests are minimal and where important governmental interests furthered by the intrusion would be placed in jeopardy by requiring suspicion, a search could be reasonable); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (stating that it is not unreasonable to drug test as part of a routine medical examination when there is a clear nexus between the tests and the employers' legitimate safety concerns) *vacated and remanded for further consideration sub nom. Jenkins v. Jones*, 490 U.S. 1001 (1989), 878 F.2d 1476 (D.C. Cir. 1989) (stating that the program had a close and substantial relation

in spite of the absence of any suspicion of drug use.

D. *Return-to-Duty Drug Testing*

This circumstance occurs when the employee has either tested positive in the past, has admitted to drug use, or sometimes has simply refused to test and is dismissed.²⁶⁴ Thereafter, the person is tested either randomly or periodically.²⁶⁵

Return-to-duty testing is usually authorized if the employee has completed a drug rehabilitation program and the medical review officer approves his return to work.²⁶⁶ Many government agencies provide those employees experiencing drug problems with Employee Assistance Programs (EAP).²⁶⁷ These programs offer therapy, rehabilitation and counseling.²⁶⁸ The employee may become a part of the program on a mandatory or voluntary basis.²⁶⁹ The voluntary participation generally allows the employee to maintain a good employment relationship with the company.

Return-to-duty testing is rarely challenged²⁷⁰ and as a result, there are few cases that address it.²⁷¹ This may be because employees subjected to return-to-duty testing have a diminished expectation of privacy because they often have already tested positive for drug use.²⁷² The employer actually does the employee a favor by continuing to keep the employee with the company.²⁷³

E. *Reasonable Suspicion Drug Testing*

Of all the standards of drug testing, perhaps the most straightforward is the reasonable suspicion testing.²⁷⁴ An employer can subject employees to drug testing

to the government's interest).

264. See 3 C.F.R. 224, reprinted in 5 U.S.C. § 7301 (1994).

265. See *id.*

266. See *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1989) (citing to 53 Fed. Reg. 47,024, 47,058 (1988)).

267. See 3 C.F.R. 224, reprinted in 5 U.S.C. § 7301 (1994) (authorizing drug testing as part of an employee's counseling or rehabilitation for drug use through an employee assistance program). See *Patterson v. New Jersey Transit Bus Operators*, 957 F. Supp. 1391 (1997) (noting that the policy of the defendant provided all employee who experience alcohol and drug problems with in house assistance programs); see also *Romaguera v. Gegenheimer*, 1996 U.S. Dist. LEXIS 6272 (1996).

268. See *Patterson*, 957 F. Supp. at 1394 (citing *Drug and Alcohol Free Workplace Policy* at 27).

269. The Executive Order prescribes the action agencies must take when an employee tests positive for drugs. Generally, refusal to participate in the EAP will result in dismissal. See 3 C.F.R. 224, reprinted in 5 U.S.C. § 7301 (1994).

270. See *Patterson*, 957 F. Supp. at 1394. Although the regulations required the return to duty testing of an employee who has tested positive, plaintiffs challenged only the random drug-testing portion of the regulations. See *id.*

271. See *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1262-63 (10th Cir. 1996) (involving the return-to-duty testing of an employee required to drive a 20,000 pound truck). See also *Buckley v. Consolidated Edison of New York, Inc.*, 127 F.3d 270 (2d Cir. 1997) (involving the drug testing of an employee who was part of an employee assistance program and was being drug tested randomly every month where other employees were being tested every five years. The court found that the policy to drug test this employee once every month and other every five years violated the ADA to the extent that the employee's bladder problem would subject him to termination for failure to give a urine sample).

272. Mandatory participation may be made available to employees who test positive for drugs in connection with a pre-employment, routine, post-accident, reasonable suspicion, random or following a return-to-duty voluntary participation. 3 C.F.R. 224, reprinted in 5 U.S.C. § 7301 (1994).

273. One claim that may arise out of return-to-duty testing (if the employee cannot stop using drugs) is a discrimination claim based on disability.

274. This is also called for-cause testing.

where those individuals were suspected of drug use.²⁷⁵ Reasonable suspicion exists if the facts and circumstances known warrant rational inferences that the person is using drugs.²⁷⁶ Courts have recognized that the issue is whether the government "had sufficient evidence at the time of the compelled urinalysis to support an objectively reasonable suspicion that the employee used drugs."²⁷⁷

Courts have allowed warrantless drug testing if the government employer had "reasonable, articulable grounds"²⁷⁸ to suspect an employee of illegal drug use.²⁷⁹ In other words, to require an employee to undergo drug testing, the employer must have "individualized suspicion, specifically directed to the person who is targeted for the urinalysis test."²⁸⁰

A reasonable search would have to be performed "under circumstances exhibiting individualized suspicion of on-the-job impairment and with evidence of substantial reliability."²⁸¹ The district court in *Bangert v. Hodel*²⁸² set forth several factors that might provide a basis for reasonable suspicion testing, including: (1) observable phenomena, such as direct observation of an employee engaged in drug-related activity or exhibiting the physical symptoms of being under the influence of a drug; (2) a pattern of abnormal conduct or erratic behavior; (3) an arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use or trafficking; (4) information provided either by reliable or credible sources or independently corroborated; (5) sudden change in work performance including unexplained or excessive absenteeism, tardiness or workplace negligence; or (6) evidence that the employee has tampered with a drug test.²⁸³

Most cases of reasonable suspicion only involve those employees in positions "where the impairment of his or her facilities presents a clear and present danger to the physical safety of the employee, another employee, or a member of the public."²⁸⁴ Thus, reasonable suspicion testing has been applied to and upheld as to police officers because "the lives of the public rest upon [their] alertness."²⁸⁵ It has been applied as to firemen because their insufficient performance is "threatening

275. See D. Garrison "Gary" Hill, Feature, *The Needle and the Damage Done: The Fourth Amendment, Substance Abuse and Drug Testing in the Public Sector*, 8-JUN S.C. LAW. 19, 20 (1997).

276. See *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. 1991).

277. *Id.* at 1296.

278. *Id.*

279. See *id.*

280. *Id.* at 1289-90. See *Jackson v. Gates*, 975 F.2d 648, 653 (9th Cir. 1992), *cert. denied*, 509 U.S. 905 (1993) (a reasonable search under the Fourth Amendment requires an articulable, individualized basis for suspecting the use of narcotics); See also *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 77-78 (3d Cir. 1989); *Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 974 (D.C. Cir. 1990); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987).

281. *Bangert v. Hodel*, 705 F. Supp. 642, 650 (D.D.C. 1989).

282. 705 F. Supp. 642.

283. See *id.* See also *American Fed'n of Gov't Employees v. Sullivan*, 744 F. Supp. 294 (D.D.C. 1990); *American Fed'n of Gov't Employees v. Martin*, 969 F.2d 788 (9th Cir. 1992) (stating that the criteria for reasonable suspicion from the Department of Labor, Drug-Free Workplace Plan § 10A provides similar factors).

284. David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 217 (1986).

285. *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985).

[to] the safety of the community."²⁸⁶ The test has been applied to bus drivers because of the "paramount interest in protecting the public."²⁸⁷ The test has also been applied to municipal utility employees "engaged in extremely hazardous work."²⁸⁸ Thus, it may be reasonable to assert that the only employees that may be tested based on reasonable suspicion are those whose positions are "imbued with safety considerations."²⁸⁹ This means that integrity and the objective of enhanced productivity lacks sufficient importance to permit reasonable suspicion testing.

F. Random Drug Testing

This standard of testing is the most controversial and often depends on the type of position involved. Under this standard, the employee is chosen by some "scientifically acceptable manner,"²⁹⁰ usually a number chosen by computer and tested. Since the Supreme Court's decisions in *Skinner* and *Von Raab*, lower federal and state courts have disagreed on whether a government agency can impose a random drug-testing program on its employees absent individualized or reasonable suspicion.²⁹¹

"Random" drug testing has many variables, including: (1) any combination of the actual collection procedures; (2) notice or forewarning to those to be tested; (3) randomness in the selection of the tested person; and (4) randomness in the timing of the testing, such as "unannounced testing." Many courts that have been confronted with random drug testing have held that individualized suspicion is not required, especially where the employee's duties and responsibilities can cause great human loss before any signs of impairment become noticeable to supervisors.²⁹² Generally, in order for the random testing to be considered reasonable, the job must be a highly-regulated industry.²⁹³ This showing indicates that the employee has a diminished expectation of privacy.²⁹⁴ In limited circum

286. *Everett*, 632 F. Supp. 1481 (N.D. Ga. 1986), *aff'd*, 833 F.2d 1507 (11th Cir. 1987). *See also* Saavedra v. Albuquerque, 73 F.3d 1525 (10th Cir. 1996).

287. *Division 241, Amalgamated Transit Union v. Sucusy*, 538 F.2d 1264 (7th Cir. 1978).

288. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

289. *Miller*, *supra* note 284, at 217-18.

290. *See International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1295 (9th Cir. 1991) (citing 53 Fed. Reg. 47,134, 47,137).

291. *See, e.g., Taylor v. O'Grady*, 888 F.2d 1189, 1194 (7th Cir. 1989) (stating that government does not need to demonstrate that any suspicion at all, in individualized or otherwise, exists to justify a drug-testing program compelling government employees to urinalysis); *Doyon v. Home Depot USA, Inc.*, 850 F. Supp. 125, 128 (D. Conn. 1994) (stating that with limited exceptions, government may not require employee to submit to urinalysis absent a showing of individualized suspicion).

292. *See generally Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (stating that the government interest in testing without individualized suspicion is compelling); *Transport Workers Union of Philadelphia Local 234 v. SEPTA*, 884 F.2d 709, 712 (3d Cir. 1989) (finding that the random drug testing program was constitutionally justified notwithstanding its lack of basis in individualized suspicion). *See also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (court upheld a random drug-testing program for high school athletes because of the risk that an athlete on drugs can place on other players before the supervisors become aware of the danger).

293. *See Policemen's Benevolent Ass'n Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) (police industry is a quasi-military industry and the most heavily regulated in the state); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (horseracing is a heavily regulated industry and participants have a diminished expectation of privacy).

294. The relevance of a heavily regulated industry is that it demonstrates that the employees have a

stances, where primary interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.²⁹⁵

Within the area of random drug testing, an emerging classification has arisen called "safety sensitive."²⁹⁶ Courts have struggled with whether public employees are properly classified as "safety sensitive".²⁹⁷

The term "safety sensitive" was unintentionally coined in *Skinner* in discussing the non-random testing of railroad employees.²⁹⁸ The Court found these employees to be engaged in duties "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences"²⁹⁹ and whom "can cause great human loss before any signs of impairment become noticeable to supervisors or others."³⁰⁰ This was the only suggestion made for determining whether a position fell into the classification of "safety sensitive".³⁰¹

In determining whether a job is safety sensitive, one must determine whether there is an immediate threat posed to the public by an employee whose judgment and perception is impaired by drug and alcohol abuse.³⁰² The rationale in *Skinner* and *Von Raab* focused on the immediacy of the threat and where a single misperformed duty could have irremediable and disastrous consequences, such as where an employee could not rectify his mistake or other government employees would have no opportunity to intervene before harm occurs.³⁰³ Applying this or similar rationales, courts have decided that police officers,³⁰⁴ firefighters,³⁰⁵

diminished privacy expectation. See *Policemen's Benevolent Ass'n*, 850 F.2d 133, 140; *Shoemaker*, 795 F.2d 1136, 1139; *Everett v. Napper*, 838 F.2d 1507 (11th Cir. 1987) (firefighters considered part of highly regulated industry).

295. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

296. The term "safety sensitive" was conceived in the *Skinner* decision while analyzing the "special needs" exception. See *Skinner*, 489 U.S. at 620.

297. See *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (considering a compelling governmental interest in determining whether to classify positions in the aviation industry as safety sensitive). See generally *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (analyzing classification of Department of Justice employees).

298. *Skinner*, 489 U.S. at 620.

299. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989) (quoting *Skinner*, 489 U.S. at 628).

300. *Skinner*, 489 U.S. at 628.

301. See *id.* at 620. The Court stated that it is undisputed that persons handling orders dealing with train movements, operating crews, and signal maintenance crews and repair of signal systems are engaged in safety-sensitive tasks. See *id.* (citing 50 Fed. Reg. 31,508, 31,511 (1985)).

302. See *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1366 (S.D. Miss. 1991) (citing *Skinner*, 489 U.S. at 628); see also Regulations from Department of Defense which define employee in a "sensitive position" as one where the employee has been granted access to classified information, or employees in other positions where the Contractor determines involve national security, health or safety, or other functions requiring a high degree of trust and confidence. Drug-Free Work Force, 48 C.F.R. 252.223.7004 (1996); Exec. Order No. 12,564, 3 C.F.R. 224, 229 (1987), reprinted in 5 U.S.C. § 7301 (1994) (defining a "sensitive position" as any position which is designated sensitive, critical-sensitive, or non-critical sensitive; any employee who has access to classified information; any individual who was appointed by the President; any law enforcement officer; and any position which the head of the agency determines involves law enforcement, national security, public safety or health, or positions which require a high degree of trust and confidence).

303. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989) (quoting *Skinner*, 489 U.S. at 628).

304. See *Ford v. Dowd*, 931 F.2d 1286 (1991).

305. See *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996).

emergency medical technicians,³⁰⁶ truck drivers,³⁰⁷ railroad workers,³⁰⁸ scrub technicians at county hospitals,³⁰⁹ and subway signaling maintenance workers³¹⁰ are safety sensitive employees who may be randomly tested for drugs.³¹¹

"Safety sensitive" positions are those whose duties bear "a direct and immediate impact on public health, safety, or national security."³¹² There is ample evidence of the extraordinary safety sensitivity of the bulk of the covered positions. For example, mechanics are charged with the duties of repairing large vehicles and are responsible for driving the repaired vehicles on the streets. This has been found to directly affect the safety of the vehicle operators and the public.³¹³ A "single drug related lapse by any covered employee could have irreversible and calamitous consequences."³¹⁴

Blanket testing of government employees is permissible where the position at issue is one that is "fraught with serious risks of injury to others."³¹⁵ The question is what will trigger the random blanket testing of a class of employees. Perhaps there are a few forms of public employment in which the hazards of even a momentary lapse of attention of judgment are so substantial in terms of physical danger to the general public that only this type of testing will suffice.³¹⁶

306. *See id.*

307. *See International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991).

308. *Railway Labor Executives' Ass'n v. Skinner*, 934 F.2d 1096 (9th Cir. 1991).

309. *See Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1367 (S.D. Miss 1991) (finding that "[t]he most salient factor in determining the safety sensitivity of a job is the 'immediacy' of the threat posed to the public by an employee whose judgment and perception is impaired by drug and/or alcohol use") (quoting *American Fed'n of Gov't Employees v. Sullivan*, 744 F. Supp. 294, 300 (D.D.C. 1990)).

310. *See Brown v. New York City Transit Auth.*, No. 95-9248, 1996 WL 601426 (2d Cir. 1996) (unpublished opinion).

311. *See generally* Procedures for Transportation Workplace Drug Testing Programs, 53 Fed. Reg. 47,002 (1988) (Department of Transportation regulations required random testing of airline pilots, truck and bus drivers, merchant seamen, mass transit employees, and natural gas and hazardous liquids pipeline operators). *See also* Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 53 Fed. Reg. 47,024 (1988) (Federal Aviation Administration); Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 47,064 (1988) (Coast Guard); Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations, 53 Fed. Reg. 47,084 (1988) (Research and Special Programs Administration); Controlled Substances Testing, 53 Fed. Reg. 47,134 (1988) (Fed. Highway Administration); Control of Drug Use in Mass Transportation Operations, 53 Fed. Reg. 47,156 (1988) (Urban Mass Transportation Administration).

312. *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (urinalysis justified where employees have control or access to dangerous instrumentalities). Examples of these job categories are: air traffic controller, pilot, aircraft engine mechanic, aircraft overhaul specialist, propeller and motor mechanic, aircraft mechanic, aircraft servicer, guard, police, criminal investigator, correctional officer, chemical and nuclear surety positions, direct service staff, and all employees at Army forensic drug testing laboratories. *Id.* at 606 n.4.

313. *See 19 Solid Waste Mechanics v. City of Albuquerque*, 1998 WL 244694 *2 (N.M. App.) (citing to the regulations of the Department of Transportation which require interstate carriers to subject their drivers of vehicles weighing more than 26,000 pounds to drug testing, 49 C.F.R. § 382.301 (1997)).

314. *See Cheney*, 884 F.2d at 610.

315. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989).

316. This was the assumption in *Policemen's Benevolent Ass'n of New Jersey v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) (upholding the random testing of police officers); *see also Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (finding that the testing of firemen and police officers without reasonable suspicion is lawful); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990) (upholding the random testing of Department of Transportation employees, including air traffic controllers, aircraft mechanics, and motor vehicle operators); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (random testing of employees working with highly lethal chemical warfare agents is lawful); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 493 U.S. 963 (1989) (upholding random

VI. CONFUSION REMAINING AFTER SUPREME COURT DECISIONS: WEAKNESSES IN THE DRUG-TESTING ANALYSIS

[Y]ou must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.³¹⁷

With respect to drug testing, the difficulty in determining when it is constitutional is caused by the lack of any clear standards. All of the circumstances under which employees may be drug tested do have some uncertainty. However, the task is in predicting how a challenge would result.

A. *Pre-employment*

The primary questions for any court faced with a question of the constitutionality of job applicant testing should be: who can be tested and does it matter what type of position is involved? The cases that address pre-employment testing do not confront this issue. However, if we include in our search for the more concrete standards in pre-employment testing a consideration of the various positions involved, we are guided by more definite criteria. In addition to the positions involved, we should consider how substantial an interest the parties have in the testing. For example, there appears to be no justification for the drug testing of a janitor with no access to any security sensitive information should not be tested before being hired. The only employees that should be tested at the pre-employment stage are those who could be subjected to suspicionless testing upon accepting the position.

However, the law does not direct us to any particular revelation. It merely suggests that a government employer has much discretion in deciding whether an applicant or an employee whose position is contingent on the results of the drug test is hired. This is very disconcerting because there is no reason that a government should have that much discretion.

The relationship between the unknown history and the diminished expectation of privacy of the applicant remains the sole defense for allowing such discretion with pre-employment testing. Thus, the wiser course for the public employer to take is to perform the testing only after a conditional offer of employment has been made. However, regardless of the status of the applicant, the government appears to have the authority to subject that employee to a drug test before he is hired.

testing of police who carry firearms or who participate in drug interdiction); *Delaraba v. Nassau County Police Dep't*, 632 N.E.2d 1251 (N.Y. 1994) (upholding the random testing of an elite group of police officers engaged in narcotics enforcement because the daily exposure to drug users and traffickers present enormous and self-evident risks). *But see* *Guiney v. Police Comm'r of Boston*, 582 N.E.2d 523, 525 (Mass. 1991) (under the state constitution, random drug testing of police unreasonable where "the record offers nothing to show that there is a drug problem in the Boston police department").

317. WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975* 8 (1980). This is a statement made by former Chief Justice Charles Hughes to former Justice Douglas.

B. Post-accident

The decision to test an individual involved in an accident for drug use is based on sound reasoning that cannot be easily collapsed or damaged. There will doubtlessly be challenges when those involved in accidents are tested. However, *Skinner* protected this circumstance from any significant opposition. The likelihood that any individual will prevail in a claim seeking to prevent post-accident testing is slim.

One issue that can arise is whether the testing includes accidents that result in non-physical damage. What if the damage is to a computer network or a set of files? What if it results in a loss of a million dollars? Will post-accident testing still apply?

It appears that *Skinner* only makes provisions for those accidents which involve or could potentially involve a life. Yet, this issue is one that may arise and which no court has yet considered. If a policy provides for post-accident testing, it should at a minimum require drug testing of any employee involved in an accident involving personal injury or property damage above a specific amount.

C. Routine

Routine drug testing becomes controversial if it involves a drug test taken without the knowledge of the employee, particularly when the employee is interested in keeping private certain aspects of their personal lives such as genetic diseases or pregnancy. However, routine drug testing doesn't appear to have the same deterrent effect as the other drug testing programs. This is apparent in the *Chandler* decision. The *Chandler* court rejected the idea that addicts might be unable to abstain from using drugs even if they had the notice and the time to eliminate detection of drug use from their urine.³¹⁸ Thus, rather than affirming a testing scheme that could be effective, as did the *Von Raab* Court, *Chandler* invalidated a testing scheme because it was not certain to be effective.³¹⁹

It seems as if routine testing may still be upheld if it is part of physical examination. It is clear that *Chandler* narrowed Fourth Amendment analysis for drug testing cases to the extent that it limited the decision of *Von Raab* and thus, affecting the direction of drug testing cases for district courts.

D. Return-to-duty

There is generally no grounds for an employee to challenge return-to-duty drug testing after the employee has failed a drug test. Most regulations issued by government employers require drug testing after the employer has tested positive.³²⁰

In return to duty testing, there is an attempt to balance the employer's interest with that of the affected employee. The employer's interest is in maintaining a drug-free workplace. However, both the employee's interest and public policy lie in

318. *Chandler v. Miller*, 520 U.S. 305, 320 (1997).

319. *See id.* at 319-20; *see also* Brown, *supra* note 228, at 268.

320. *See* Drug Tests Required, 49 C.F.R. § 199.11 (1994) (regulations issued by the Research and Special Programs Administration of the United States Department of Transportation); Control of Drug Use in Mass Transportation Operations, 53 Fed. Reg. 47,155-77 (1988) (regulations issued by the Urban Mass Transportation Administration of the Department of Transportation). On the same day, the Coast Guard issued very similar regulations. *See* Required Drug Testing, Application, 46 C.F.R. 16.201 (1988).

preventing discrimination against a person addicted to drugs and who may be covered under the Americans with Disabilities Act (ADA).³²¹ However, mandated drug testing is an area of federal law which has not received much attention regarding its association with the ADA.³²²

E. Reasonable Suspicion

Reasonable suspicion seems to be the emerging ground for which most testing programs administered by the government are justified. At first glance, the reasonable suspicion standard is an appealing concept.³²³ Under this standard, an employee cannot reasonably expect to avoid being observed on the job. However, she can expect to avoid the additional scrutiny of body fluid testing unless she gives her employer reasonable grounds to doubt her abstinence from drug use. Unlike other tests, the reasonable suspicion test is not an all-purpose test which may be easily or rationally applied to any employment situation. Even in the context of government administrative searches, courts have relaxed the suspicion standards, especially when the government's need for the testing was compelling.³²⁴

To say that the reasonable suspicion test offers some degree of protection from those two intrusions does not mean that it offers the best protection. On one hand, the reasonable suspicion test will permit testing when less intrusive measures would adequately protect the employer's interest.³²⁵ An employee may be validly suspected of drug use only when her employer or co-worker observes her intoxicated, performing poorly, or selling or buying drugs at work.³²⁶ This may even involve irrational behavior.³²⁷ It is unclear why the employer, at this point, should find it necessary to administer a drug test. It is more natural for the employer to ask the employee to explain why he *appears* to be intoxicated or why he has not been meeting some performance expectation. An employee unwilling to plausibly explain

321. Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 29, 42 & 47 U.S.C.).

322. See David LaPorte, Comment, *The Conflict and Interaction of the Americans with Disabilities Act with the Omnibus Transportation Employee Testing Act: Two Modest Proposals to Achieve Greater Synchrony*, 45 DEPAUL L. REV. 537, 537 (1996).

323. Since reasonable suspicion testing depends solely on what the employer observes, it gives employers much latitude on who to drug test, when and how often employees can be drug tested.

324. See *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (public employee's privacy interest in contents of work desk is outweighed by governmental interest in efficient operation of workplace).

325. For example, an employer can simply ask an employee whether he is feeling alright or whether s/he has taken any drugs.

326. *But see Benavidez v. City of Albuquerque*, 101 F.3d 620 (10th Cir. 1996). The Tenth Circuit rejected the contention that "such testing must be based only on direct observation and/or physical evidence that the employee's ability to perform his job is under the influence of a drug." *Id.* at 624. It then found that there was a need for sufficient "information which would lead a reasonable person to suspect non-safety-sensitive employees . . . of on-the-job drug use, possession or impairment." *Id.* What is curious about classifying a position as safety sensitive but not upholding the just cause drug testing is that the "special needs" exception to the warrant and probable cause requirements generally permits drug testing of employees in safety sensitive positions, pursuant to a random selection process, and does not require reasonable suspicion that an employee might be impaired.

327. See *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) (involving a physician who slapped a patient and was dismissed after refusing to undergo a drug test).

or improve her performance could be dismissed for 'just cause.'³²⁸ But this is dangerous if the employer has no personal knowledge or concrete evidence of the employee's diminished work performance or on-the-job intoxication.³²⁹

On the other hand, the reasonable suspicion standard might overprotect the employee's privacy interest. An employee may be impaired without showing signs of impairment.³³⁰ Because a reasonable suspicion standard would not permit testing below the threshold of human observation, it may keep employers from discovering a human reliability problem in very dangerous settings until after it is too late.

Finally, reasonable suspicion is unlikely to prove a practical and easily administered standard. What constitutes reasonable suspicion is often a very fact-specific inquiry.³³¹ Therefore, employers may lack bright-line standards to test with confidence, knowing that they are within the law. Furthermore, as safety concerns become more important, a random, but not arbitrary or indiscriminate, testing scheme may make more sense. As safety concerns decline in importance, the employer seeking to guard against other problems, such as absenteeism, poor performance, or theft, by testing, can also do so by using less intrusive means.³³² A reasonable suspicion standard has value because it prevents employers from arbitrarily testing any employee and permits employees to rebut false, but nevertheless reasonable suspicions of drug use. However, the standard is too inflexible for use across the range of employment situations and, consequently, often overprotects or underprotects the employee's privacy.

F. *Random*

Random drug testing and reasonable suspicion testing are the two most controversial circumstances under which an employee has been subjected to drug testing. The application of safety sensitive and the "special needs" doctrine in drug testing cases has not led to uniformity in analysis. Courts have applied the safety sensitive and the "special needs" doctrine believing that consistent application of these factors would lead to consistent results. However, the opposite has occurred. After four Supreme Court decisions regarding the constitutional analysis of drug-testing programs, it appears that the federal courts are more confused about who may be classified as "safety sensitive" and thus, subject to random drug testing.³³³

328. *See id.* at 870. This is assuming the employer has conscientiously documented the employee's poor performance at work. Serious care should be taken not to rely on "hearsay" type information. *See Hill, supra* note 275, at 20.

329. *See Roberts v. City of Newport News*, 36 F.3d 1093 (unpublished disposition), No. 93-2327, 1997 WL 520948 (4th Cir., Sept. 23, 1994) (finding that the city had violated the Fourth Amendment by conducting for-cause testing on a fire department emergency medical technician based solely on two telephone calls from another employee's spouse who never actually observed the supposed illegal drug use).

330. For example, regular users of drugs may be able to mask their use very easily.

331. Often, reasonable suspicion depends on the employer. A more experienced employer might be able to catch a drug abuser more quickly and more efficiently than an inexperienced employer.

332. An employer may simply decide to fire an employee after several warnings so long as the position does not involve public safety.

333. *See generally* *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (analyzing classification of Department of Justice employees); *Romaguera v. Gegenheimer*, 1996 U.S. Dist. LEXIS 6272 (E.D. La. May 3, 1996) (discussing the classification of employees of clerk of court's offices).

Although courts have confused what constitutes "safety sensitive" or what falls under the "special needs"

The only issue on which all courts agree is that any type of drug testing constitutes a search and seizure under the Fourth Amendment.³³⁴

What creates such confusion and discord among the courts is that there is no clear test except where it is indisputable that the position involved has an effect on public safety. The "safety sensitive" criteria as well as the "special needs" exception has caused chaos among the courts.³³⁵ For example, in *Rutherford v. City of Albuquerque*,³³⁶ the Tenth Circuit concluded that although driving a 26,000 pound truck is properly designated as a "safety sensitive" position, the testing of an employee returning to work is an unreasonable search. However, rather than concentrating on the privacy interest at stake and the expectation of privacy, the courts have emphasized the policy rationale behind the drug testing programs.³³⁷

Random drug testing appears to be the most effective deterrent to drug use.³³⁸ When conducted without notice or probable cause, random testing can ensure compliance with regulations against drug use.³³⁹ This is particularly important where drug abusers cannot be easily identified.

VII. CONCLUSION

Although some individuals may be skeptical of public employee drug testing for philosophical reasons, the practice appears to rest on firm legal basis. The Supreme Court decisions seem to cover much ground in the analysis of the issue of drug testing, however, there are still some areas that are left unclear. Among the areas needed to be clarified are: (1) what determines a position which has a diminished expectation of privacy; (2) whether deterrence is sufficient as an objective for drug testing; and (3) what constitutes a safety sensitive position.

Initially, when this author first began examining this issue, she objected to the notion that the Supreme Court could determine that some employees' privacy rights were more "legitimate" or "reasonable" than others. Furthermore, the Supreme Court seemed to waver on its criteria, particularly with respect to the *Chandler* decision. However, after researching the issue of public employee drug testing, this author's perspective has changed from one of outright objection to one of reluctant acceptance.

In the long term, this author is almost certain that subjecting public employees to testing will provide or promote a safer environment for the public, particularly because it appears that some form of drug testing is one of the most effective ways

exception, there are certain positions for which there is undoubtedly a legitimate reason to test randomly. These positions most often involve police officers, firefighters, pilots, train conductors and bus drivers.

334. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (stating that the Fed. Courts of Appeals have concluded unanimously that these intrusions must be deemed searches under the Fourth Amendment). See generally *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1996); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

335. See *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1262-63 (10th Cir. 1996); see also *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996).

336. 77 F.3d 1258 (10th Cir. 1996)

337. See *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997). See also *Jackson*, *supra* note 108, at 694-95.

338. See R. Scott McClain, Comment, *The Expanding Spectrum of Permissible Public Employee Drug Testing*, 1990 DET. C. L. REV 727, 765 (1990).

339. *Id.*

to prevent drug abuse among employees. The balancing test provided by the Supreme Court appears³⁴⁰ to promote such an interest. However, achieving success of such a goal actually depends less on the ability to win courtroom legal battles and more on educating the public, including public employees, on the potential dangers of drug use. The proper forum for such an issue should not be in the courtroom, but in schools and employment training classes.

The Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of the "right to be let alone" which is the most comprehensive of rights and the right most valued by the citizens of the United States.³⁴¹ As noted by Justice Brandeis, in *Olmstead*:

Experience should teach us to be most on our guard to protect our liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in invidious encroachment by men of zeal, well-meaning but without understanding.³⁴²

For positions where drug use does not pose a risk to the public, the right of those public employees to be let alone and free from the intrusion of drug testing should be protected. Certainly, the greatest threats to our constitutional freedoms come in times of crisis and surely, there is a drug crisis in America. However, we must always remain firm in the idea that the government will not respond hysterically when there is a crisis. Certainly when the crises are real, the government may justify an intrusion. However, it should never broadly sweep the rights of groups of people together.

There is one enduring lesson in the long struggle to protect individual rights and society's need to defend itself against lawlessness. The lesson is that

it is easy to make light of insistence or scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, needlessly at first, then stealthily, and brazenly in the end.³⁴³

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340. In a 1995 Gallup survey, when asked to describe the prevalence of drug problems in the workplace, most of the respondents said that they felt the problems had either increased or stayed the same. Thirty-seven percent of all respondents said they felt that problems with drugs had increased over the past five years. Thirty-eight percent felt that it had remained the same. See Institute for a Drug-Free Workplace, Gallup Survey, <<http://www.drugfreeworkplace.org>> (visited June 23, 1998).

Some surveys show that there has been a decrease in drug test "positive" rate in 1996. See SmithKline Beecham Drug Testing Index (stating that of more than four million tests which were conducted in 1995, nearly 232,000 were "positive"). Further, the same source reveals that positive rates for safety-sensitive transportation workers increased for "pre-employment" (4.1% to 4.3%), "for cause/reasonable suspicion" (10.8% to 11%) and return to duty (3.7% to 3.8%). See *id.*

341. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

342. *Id.* at 479 (Brandeis, J., dissenting).

343. *Davis v. United States*, 328 U.S. 582, 597 (1946).