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"Drug Testing of Government Employees Should Not be a Matter of Fourth Amendment concern" Cries a Lone Voice in a Wilderness of Opposition

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COMMENTS

"Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" Cries a Lone Voice in a Wilderness of Opposition

Drug abuse is an enormous problem in today's society. According to the Acting Director of the National Institute on Drug Abuse, illicit drug use " 'may well be . . . the most common health hazard in the American workplace today.' "[1] Statistics show that "at least 20 million Americans use marijuana/hashish. Approximately four million Americans are cocaine users, and two million are using other stimulants."[2] Such widespread illicit drug use in the employment arena costs the United States approximately thirty-three billion dollars per year.[3]

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1. Aron, *Drug Testing: The Employer's Dilemma*, 1987 LAB. L.J. 157, 157 (quoting statement on Drug/Alcohol Abuse in the Workplace Before House Labor Subcommittee on Health and Safety, 234 D.L.R. D-1 (1985)). The National Household Survey, conducted for the National Institute on Drug Abuse indicates that "[i]n the 18 to 25 year old adult population, representing those entering the work force, 65 percent have used illicit drugs, 44 percent in the last year." NATIONAL INSTITUTE ON DRUG ABUSE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERDISCIPLINARY APPROACHES TO THE PROBLEM OF DRUG ABUSE IN THE WORKPLACE 1 (1986). Approximately twenty-five percent of America's largest companies have some form of drug testing program. *See* 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, 202 (1986).

2. Aron, *supra* note 1, at 157 (citing Alcohol and Drugs in the Workplace, BNA (quoting National Institute on Drug Abuse (NIDA) 1982 household survey)); *see* Imwinkelried, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 NOVA L. REV. 563, 564 (1987) (approximately 6 million Americans are currently cocaine users) (citing Marcottee, *Drugs at Work: Employee Testing Challenged*, A.B.A. J., Mar. 1, 1986, at 34 (citing Dr. Michael Walsh of the National Institute of Drug Abuse)); Shaw and Fleming, *Drug Testing as an Element of the Everlasting Drug War*, 11 NOVA L. REV. 693, 694 (1987) (The Select Committee on Narcotics Abuse and Control estimate that in 1986 at least 150 tons of cocaine entered the United States.).

3. Miller, *supra* note 1, at 203 (The thirty-three billion dollar cost is a product of "lost productivity and accident-related costs, and in other, lesser respects . . . increased

President Reagan responded to this problem by declaring war on drugs. He issued Executive Order No. 12,564[4] directing the head of each Executive agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions."[5] The purposes of such testing are to identify illicit drug users and to offer them assistance.[6] President Reagan's Order directs that the agencies "shall . . . refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate."[7] If an employee responds favorably to the counseling, no further action will be taken against him.[8] However, if counseling is refused by the employee and he does not discontinue use of the illicit drugs, administrative action may be taken to remove him from employment.[9] President Reagan emphasized that drug testing should not be conducted "for the purpose of gathering evidence for use in criminal proceedings."[10]

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health care costs, shoddy workmanship and employee theft.") (footnote omitted), *cited in* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 172-73 (5th Cir.), *stay denied*, 107 S. Ct. 2479 (1987).

4. Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

5. *Id.* at 32,890. Some of the reasons given by the President for implementation of this testing program are that illegal drug use results in

> serious adverse effects upon a significant proportion of the national work force[;] . . . and results in billions of dollars of lost productivity each year[.]
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> . . . .
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> Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;
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> The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;
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> . . . [and the use of illegal drugs] by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law.

Id. at 32,889.

6. *Id.* at 32,890-92.

7. *Id.* at 32,891.

8. *Id.*

9. *Id.*

10. *Id.* at 32,892 ("Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations

Some government employers responded to President Reagan's Order by subjecting their employees to random drug testing. Immediately, courts and scholars harmoniously reacted by declaring such testing unconstitutional, claiming that it violates an employee's reasonable expectation of privacy.[11] Most courts and scholars argue that such an intrusion may be justified only if an employer has reasonable suspicion to believe that an employee is using illicit drugs.[12]

Drug testing justifiably alarms many people for a variety of reasons. Some are concerned about the unreliability of the tests.[13] Others fear that the testing clinics are inadequately regulated. Hence, there is no assurance that testing will be done accurately and uniformly.[14] Still others are concerned that random drug testing raises fifth amendment due process[15] and ninth amendment privacy and penumbra problems.[16] However, the most predominant concern expressed by courts and commentators is that random drug testing by government employers violates an employee's reasonable expectation of privacy protected by the fourth amendment.[17] This comment addresses only the fourth amendment concerns.[18]

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of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order."). To ensure that random drug testing does not violate the fourth amendment, employers should be forbidden from reporting the findings of its drug testing to the government for criminal prosecution.

11. *See, e.g.*, Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307 (1987); Miller, *supra* note 1.

12. *See, e.g.*, Feliciano v. City of Cleveland, 661 F. Supp. 578, 587-92 (N.D. Ohio 1987); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 641 (1987).

13. For a discussion concerning testing reliability, see Dubowski, *Drug-use Testing and Scientific Perspectives*, 11 NOVA L. REV. 415, 436-84 (1987), and Imwinkelried, *supra* note 2, at 568-70.

14. For a discussion on regulation of testing clinics and the quality controls at those clinics, see Dubowski, *supra* note 13, at 484-96, 531-58.

15. For a discussion about potential fifth amendment due process problems, see Bookspan, *supra* note 11, at 354-64.

16. For a discussion of any ninth amendment privacy and penumbra problems, see *id.* at 365-68.

17. *See* cases and articles cited *supra* note 11.

18. The fourth amendment reads:

> The right of the 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

This comment first examines the two major arguments made by opponents of random drug testing. They argue that such testing implicates the fourth amendment because: (1) a urinalysis may reveal physiological secrets beyond whether an employee is an illicit drug user; and (2) a testing administrator must actually watch an employee produce the urine sample.

After examining these arguments, section one of this comment surmises that the fourth amendment does not afford protection against all governmental invasions of one's privacy. However, what privacy invasions are worthy of fourth amendment protection is uncertain under the current state of the law.

Section two of this comment attempts to resolve some of the uncertainty by resurrecting an analysis that historically demarcated those privacy invasions worthy of fourth amendment protection. This comment demonstrates that traditionally the fourth amendment was not implicated by a governmental intrusion unless information obtained from that intrusion could be used in a criminal proceeding. Although the death bell tolled on this analysis in the early seventies, the comment points out that currently there is a slight movement among some of the members of the Supreme Court to partially revitalize the traditional view.

Section two concludes with a plea for total resurrection of the traditional analysis, arguing that it is better than the approach currently used by the Supreme Court for two reasons. First, it interjects some certainty into fourth amendment jurisprudence by providing a semi-bright demarcating line for determining which actions by governmental agencies implicate the fourth amendment. Second, it is more consistent with the theory that the fourth amendment does not guarantee a general right of privacy and that some privacy protections are better left to the democratic process rather than the courts.

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things to be seized.
U.S. CONST. amend. IV.

I. An Analysis of the Fourth Amendment Arguments Advanced by Opponents of Random Drug Testing

A. Analyzing Urine Has the Potential of Revealing Physiological Secrets About an Employee Beyond Whether He or She is an Illicit Drug User

One of the principal arguments made by courts justifying their determination that the fourth amendment is implicated by random drug testing is that such testing may reveal physiological secrets beyond whether an employee is an illicit drug user. For example, the Fifth Circuit, in *National Treasury Employees Union v. Von Raab*,[19] said:

> Urine testing may disclose not only the presence of drug traces but much additional personal information about an employee—whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms.[20]

In *McDonell v. Hunter*,[21] the district court stated that "[o]ne clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids,"[22] and according to the Fifth Circuit "even the individual who willingly urinates in the presence of another does not 'reasonably expect to discharge urine under circumstances making . . . [discovery of] the personal physiological secrets it holds' possible."[23]

Many courts cite *Schmerber v. California*[24] as support for the conclusion that revelation of physiological secrets implicates the fourth amendment.[25] Without analysis, courts have reasoned that "[s]ince a blood test is subject to fourth amendment con-

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19. 816 F.2d 170 (5th Cir.), *stay denied*, 107 S. Ct. 2479 (1987).

20. *Id.* at 175-76; *see also* Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

21. 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

22. *Id.* at 1127; *see also Feliciano*, 661 F. Supp. at 586 (inquiry into physiological secrets contained in urine is a search, despite the fact that urine is routinely discharged).

23. *Von Raab*, 816 F.2d at 175 (quoting Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986) (quoting McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987))).

24. 384 U.S. 757 (1966).

25. *See, e.g.*, Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985).

straints, it seems clear that a urine test likewise amounts to a search and seizure from a person within the fourth amendment."[26]

However, such a conclusion is not justified by *Schmerber*. In *Schmerber*, petitioner was taken to a hospital after being involved in an automobile accident. At the hospital, a police officer, over petitioner's objection, ordered petitioner to surrender a blood sample.[27] An analysis of the sample revealed that petitioner was intoxicated at the time of the accident. This evidence was used to convict petitioner of driving while intoxicated.[28] Petitioner claimed that the evidence was improperly admitted because the mandatory blood test violated, *inter alia*, his fourth amendment rights.[29]

The Supreme Court disagreed with the petitioner and upheld the constitutionality of the blood test.[30] The Court's fourth amendment analysis addressed two issues: (1) whether the officer's failure to obtain a search warrant before proceeding with the blood extraction was unreasonable; and (2) whether the method chosen to determine if the petitioner was intoxicated was unreasonable. The Court did not find it necessary to dwell on the issue of whether the fourth amendment was implicated because the government never contested its application.[31] However, the Court left no doubt that had it been asked to address this issue, it would have found the blood test implicative of the fourth amendment. The Court said that even if "a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."[32]

After concluding that the blood test came within the parameters of the fourth amendment, the Court proceeded to determine if the warrantless search was justified. The Court could not justify the search under the traditional search-incident-to-arrest doctrine because the blood test, unlike other searches previously

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26. *Lovvorn*, 647 F. Supp. at 879 (citing Schmerber v. California, 384 U.S. 757, 767 (1966)); *see* McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985).

27. *Schmerber*, 384 U.S. at 758-59.

28. *Id.* at 759.

29. *Id.*

30. *Id.* at 772.

31. *Id.* at 767.

32. *Id.*

addressed by the Court, involved an intrusion beyond the body surface.[33] However, despite the novel nature of this warrantless search, the Court found it justified under the circumstances because the officer could have reasonably believed he was confronted with an emergency—any delay may have resulted in destruction of the evidence.[34]

After determining that no warrant was required, the Court next addressed the question of whether the method chosen to test for intoxication was reasonable. Although other less-intrusive alternatives for determining intoxication were available, the Court concluded that the use of the blood test was not unreasonable because of the widespread use and acceptance of such tests.[35]

A similarity between the blood test in *Schmerber* and a urine test is that both can be analyzed to reveal physiological secrets beyond that which is necessary for the particular test (e.g., whether a person is taking medication for depression or epilepsy, or in the case of a female, whether she is pregnant). For example, in *McDonell v. Hunter*,[36] the court said:

> It is significant that *both blood and urine* can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. . . . Therefore, governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment.[37]

Those courts relying almost exclusively upon *Schmerber* to support this proposition completely ignore the fact that *Schmerber* did not accord this factor any weight.[38] The Court implied that although other less-intrusive tests were available, it was not un-

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

34. *Id.* at 770.

35. *Id.* at 771. The Court said that for most people blood tests involve "virtually no risk, trauma or pain." *Id.*

> "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors."

Id. at 771 n.13 (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1957)).

36. 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

37. *Id.* at 1127 (emphasis added) (citations omitted).

38. *See* Schmerber v. California, 384 U.S. 757, 771 (1966).

reasonable for the officer to have chosen the blood test.[39] The Court never mentioned that the blood analysis could reveal secrets about Mr. Schmerber beyond whether he was intoxicated. Consequently, those courts relying heavily upon *Schmerber* to support the proposition that revelation of physiological secrets implicates the fourth amendment are making whole cloth from threads.[40]

Probably the reason many courts cite *Schmerber* in their drug testing analysis is because the Supreme Court has not yet given a definitive answer on what type of personal secrets the fourth amendment protects. Hence, *Schmerber* may be the best sword they have. However, several Supreme Court decisions do suggest that the Court may not be willing to protect all personal secrets. In *United States v. Dionisio*,[41] twenty persons were subpoenaed to produce voice exemplars. The Court held this not violative of the fourth amendment because

> [t]he physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public.
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> . . . .

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39. *Id.* Although petitioner refused both the blood and the breathalyzer tests, the officer chose the blood test.

40. Another problem with courts and scholars relying on *Schmerber* to support their fourth amendment argument is that *Schmerber* arose in a criminal context. Conversely, drug testing arises in an employment context. The Supreme Court has struggled with the question of whether the fourth amendment applies to situations outside the criminal context since the framing of the Constitution. *See infra* notes 70-134 and accompanying text. Yet, despite this struggle, courts and commentators addressing the drug testing situation have completely ignored this distinction.

For example, Professor Bookspan, an assistant professor of law at Delaware Law School, in her analysis of *Schmerber* never mentioned this distinction. After assuming that a person has a reasonable expectation of privacy in urination, Bookspan used *Schmerber* and Winston v. Lee, 470 U.S. 753, 767 (1985) (the Court held that allowing a surgeon to remove a bullet from a man's body to be used as evidence violates the fourth amendment), to springboard to her conclusion: "Since urinalysis involves an invasion of privacy normally attendant to personal body functions, it is a search covered by the fourth amendment." Bookspan, *supra* note 11, at 328. The *only relevant* factor to Bookspan was the extent of the intrusion. She said that "[u]rinalysis is both a lesser and a greater intrusion upon individual privacy than the process at issue in *Schmerber*." *Id.* To the extent that there is no physical intrusion into the skin, as in *Schmerber*, she reasoned that drug testing is a lesser intrusion. But to the extent that the taking of urine is a function not routinely performed under public gaze, as is the withdrawal of blood, the taking of urine is more intrusive upon individual privacy. *See id.* at 328 & nn.104, 106-07. The purpose for which the information was sought (employment vs. criminal) was irrelevant to Bookspan in her analysis of whether drug testing implicates the fourth amendment.

41. 410 U.S. 1 (1973).

> The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*.[42]

Admittedly, a urinalysis may reveal more about a person's private life than the study of a voice exemplar. However, the Supreme Court did not stop with voice exemplars. In *United States v. Mara*,[43] the Court applied the *Dionisio* analysis to a case involving the compelled production of a handwriting exemplar. The Court said that "[h]andwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."[44]

At a superficial level of analysis, if the reasoning of *Dionisio/Mara* was applied to urine testing, such testing would appear to implicate the fourth amendment because urine, unlike one's voice or handwriting, is not routinely exposed to public gaze and it may be analyzed to reveal hidden secrets. However, at a more probing level of analysis, *Mara* arguably seems to indicate that the Court may tolerate some intrusion into one's private life. Irregardless of what the Court said, one's handwriting is not necessarily constantly exposed to the public and thus like one's voice. A person may be embarrassed by his handwriting and choose not to make it public simply by typing all correspondence. Furthermore, like urine, handwriting may be analyzed to reveal personal secrets about an individual. In *Mara* the Court was not manifestly concerned about this possibility.

Another example of where the Supreme Court has refused to protect privacy invasions is illustrated in *California Bankers Association v. Schultz*.[45] In *Schultz*, the Court upheld the Bank Secrecy Act of 1970 ("Bank Act") against challenges that it violated an individual's reasonable expectation of privacy because of the nature of the information the Bank Act required banks to disclose. The Bank Act was designed to assist the government in obtaining financial information having a " 'high degree of usefulness in criminal, tax, or regulatory investigations or proceed-

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42. *Id.* at 14.
43. 410 U.S. 19 (1973).
44. *Id.* at 21 (citations omitted).
45. 416 U.S. 21 (1974).

ings.' "[46] The Bank Act required banks to maintain records and make reports on certain transactions by the bank's customers.[47]

The dissent argued that granting government access to this type of information provides it with "telltale clues to those who are bent on bending us to one point of view" because

> [i]n a sense a person is defined by the checks he writes. By examining [these checks] . . . the agents get to know [one's] doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines [one] reads, and so on *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.[48]

The dissent continued: "One's bank accounts are within the 'expectations of privacy' category. For they mirror not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments."[49]

This Bank Act certainly has the potential for revealing significantly more about an individual's private life than urine testing; yet, the Supreme Court did not conclude that it implicated the fourth amendment. Arguably then, merely because drug testing reveals extraneous secrets should not necessarily mean that it implicates the fourth amendment as many courts and scholars have concluded. However, even if it is assumed that revelation of such secrets does trigger the fourth amendment, the goals of drug testing may be achieved without the government discovering this other information. The employer simply needs to inform the testing laboratory to disclose only whether an employee is using illicit drugs, not whether she is pregnant.[50]

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46. *Id.* at 26 (quoting 12 U.S.C. §§ 1829b(a)(2), 1951 (1982); 31 U.S.C. § 1051 (1982)).

47. *Id.* at 26-30.

48. *Id.* at 85 (Douglas, J., dissenting) (emphasis in original).

49. *Id.* at 89 (Douglas, J., dissenting).

50. Part of a testing laboratory's regulatory scheme should include a provision making a laboratory expressly liable to an employee if the laboratory reveals information besides whether an employee is an illicit drug user.

B. Urination is a Uniquely Private Function; Therefore, Supervised Collection of Urine Implicates the Fourth Amendment

According to courts and scholars, drug testing implicates the fourth amendment not only because a urine sample may reveal physiological secrets, but also because a supervised collection of the sample infringes upon one's privacy and dignity interests.[51] In *Capua v. City of Plainfield*,[52] the district court said that "[u]rine testing involves one of the most private of functions."[53] In fact, urinating "in public is generally prohibited by law as well as social custom."[54] One's privacy and dignity interests are infringed because the test administrator, to ensure receipt of a pure sample, must actually watch the individual produce the sample.[55] This has been necessitated because of employees substituting drug-free urine for their own; employees have been known to bring clean urine samples to work in balloons concealed in their trousers.[56]

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51. *See, e.g.*, cases and articles cited *infra* note 54.

52. 643 F. Supp. 1507 (D.N.J. 1986).

53. *Id.* at 1511.

54. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir.) ("Few activities in our society are more personal or private than passing of urine."), *stay denied*, 107 S. Ct. 2479 (1987); *see also* Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); Bookspan, *supra*, note 11, at 326 ("American society recognizes the private nature of urination." It is "one of the most personal and private functions.").

55. Rather discomforting pictures have been painted of the observer:

> I am a Baltimore County resident and thought I wanted to serve my country until June 4, 1986. On that day I was given a drug test. A drug test you say. Big deal. Well, it was a big deal! I was not informed of the test until I was walking down a hall towards the bathroom with the attendant. I thought no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was led into a very small room with a toilet, sink and a desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did. I pulled down my pants, put the container in place—*as she bent down to watch*—gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar—and that is exactly what it is. . . . I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt.

Siegel, *Toward a New Federal Right to Privacy*, 11 NOVA L. REV. 703, 703-04 (1987) (emphasis in original); *see also* Bookspan, *supra* note 11, at 325.

56. *See, e.g.*, Stone, *Mass Round-Up Urinalysis and Original Intent*, 11 NOVA L. REV. 733, 742 (1987) ("If samples are taken in private without supervision, the test is a

Arguably, most Americans have a subjective expectation of privacy in the act of urinating. Many would find urinating under the watchful eye of an observer an unpleasant, embarrassing experience. However, the crucial question is not whether one has a subjective expectation of privacy, but whether that expectation is one that society is prepared to recognize as reasonable.[57] As a fact of life, many men daily urinate in the presence of others. In most instances when a male uses a public bathroom, he urinates under circumstances making observation of that act by unknown others possible. In fact, it would be difficult for men to conceal this act from others in many public bathrooms.[58]

Nevertheless, most federal courts addressing this issue simply have concluded that urinating is an act that society is prepared to recognize as reasonable because it is an act normally performed in private.[59] However, the Supreme Court said in *Katz* that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against *certain kinds* of governmental intrusion . . . ."[60] The dissent in *Katz* believed that even this language and the outcome in *Katz* was slanted too heavily towards the protection of a person's privacy:

> With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth

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farce. In *Penny,* some employees carried clean urine samples to the test in balloons in their trousers. It is widely reported that some employees buy and sell drug-free urine and even insert it into their bladders using catheters.") (footnote omitted).

57. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also infra* notes 62-67 and accompanying text. In *Katz,* Justice Harlan said that an individual receives fourth amendment protection from governmental intrusions or invasions if the individual has "exhibited an actual (subjective) expectation of privacy and, [if that] . . . expectation [is] one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's reasonable expectation of privacy approach has become the accepted test for determining when the fourth amendment is implicated. *See, e.g.,* O'Connor v. Ortega, 107 S. Ct. 1492, 1497-99 (1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified,* 809 F.2d 1302 (8th Cir. 1987); Joseph, *supra* note 12, at 617.

58. Many public bathrooms have no dividers between the urinals and in many there is no more than a large trough in which to urinate. However, in Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986), the court said that even if we undress or urinate in front of others, "most people . . . have a certain degree of subjective expectation of privacy in the act of urination."

59. *See, e.g.,* cases cited *supra* note 54.

60. Katz v. United States, 389 U.S. 347, 350 (1967) (emphasis added) (footnotes omitted).

> Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy. . . . Thus, *by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy.*[61]

That the fourth amendment does not protect against all privacy invasions by governmental officials has been reaffirmed in subsequent Supreme Court decisions. As previously discussed, the Court said in *Dionisio* and *Mara* that one cannot have a reasonable expectation of privacy in one's voice or handwriting.[62] Recently, the Court also has held that a landowner cannot have a reasonable expectation of privacy in his or her open fields[63] even if "[s]ome landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, [and] still others to engage in sustained creative endeavor."[64] In *Wyman v. James*,[65] the Court held that a homeowner did not have a reasonable expectation of privacy sufficient to justify closing his or her door against visits by government caseworkers.[66] This was true even though allegations were made that the home visits could not only be very embarrassing but also intrusive into one's personal life.[67]

Thus, evidently the Supreme Court is not willing to protect against all intrusions upon an individual's privacy expectations. Drug testing by government employers should not be held violative of the fourth amendment because it, arguably, is no more intrusive than some of the previously discussed invasions. However, the Court does not currently have a line demarcating under

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61. *Id.* at 373 (Black, J., dissenting) (emphasis on *unreasonable* in original, other emphasis added).

62. *See supra* notes 41-44 and accompanying text.

63. Oliver v. United States, 466 U.S. 170, 179 (1984).

64. *Id.* at 192 (Marshall, J., dissenting). Although most reasonable Americans would have a subjective expectation of privacy in the area immediately beyond the curtilage of their homes, the Court held that such an expectation was not reasonable. *Id.* at 179.

65. 400 U.S. 309 (1971).

66. *Id.* at 316-18. See *infra* notes 83-93 and accompanying text for a discussion of *Wyman*.

67. *Wyman*, 400 U.S. at 320. Affidavits were in the record stating that a "caseworker 'most often' comes without notice[.] . . . [T]he visit[s can be] 'very embarrassing . . . if the caseworker comes when [there is] . . . company'; and that the caseworker 'sometimes asks very personal questions' in front of children." *Id.* at 320 n.8.

what situations the fourth amendment will protect privacy. This comment will now discuss where a demarcating line should be drawn.

II. The Fourth Amendment Should Not Be Implicated by a Governmental Intrusion Unless Information Obtained From That Intrusion Will Be Used in a Criminal Proceeding

This comment is not advocating random drug testing without some quantum of suspicion. However, it is advocating that since drug testing is strictly an employment matter, the decision of whether to conduct a drug test should not be made a matter of fourth amendment concern. The drug tests are not conducted for the purpose of obtaining evidence of guilt to be used in a criminal proceeding.[68] If a governmental investigation is not for the purpose of gathering evidence to be used in a criminal proceeding, the fourth amendment should not be implicated. This was the traditional understanding of how the fourth amendment operated as illustrated by *Boyd v. United States*.[69]

A. Traditional Operation of the Fourth Amendment

Boyd was a leading case on the subject of search and seizure.[70] *Boyd* involved the seizure and forfeiture of thirty-five cases of plate glass seized by a customs collector pursuant to an "An act to amend the customs-revenue laws and to repeal moieties."[71] At trial it became necessary to show the quantity and value of twenty-nine of the cases previously seized.[72] Consequently, the attorney of the United States, acting under the pre-

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68. Throughout the remainder of this comment, when the words "criminal proceeding" are used they include any type of subterfuge designed to avoid the classification of a "criminal proceeding."

69. 116 U.S. 616 (1886).

70. N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 107 (1937); *see* California Bankers Ass'n v. Shultz, 416 U.S. 21, 61 (1974) ("*Boyd* . . . is a case which has been the subject of repeated citation, discussion, and explanation since the time of its decision 88 years ago."); Joseph, *supra* note 12, at 607 ("The conceptual framework for fourth amendment analysis begins with *Boyd v. United States*."). However, parts of *Boyd* have been rejected. *See, e.g., id.* at 608-09.

71. Act of June 22, 1874, ch. 391, 18 Stat. 186 (repealed in part 1909), *cited in Boyd*, 116 U.S. at 617.

72. *Boyd*, 116 U.S. at 618.

viously mentioned Act,[73] obtained an order directing the claimants of the seized glass to produce the invoices for twenty-nine of the cases of glass.[74] The claimants produced the invoices pursuant to the notice but made constitutional objections to the validity of the compelled production.[75] The Court held that the compelled production violated the claimant's rights under the fourth and fifth amendments.[76]

The Court had some difficulty reaching this conclusion because prior to *Boyd* it was understood that the fourth amendment applied only to criminal proceedings.[77] In *Boyd,* the Act expressly excluded "criminal proceedings from its operation"; consequently, before the Court could afford the claimants fourth amendment protection it had to conclude that the "information" was "quasi-criminal" in nature.[78] It was only after such a finding by the Court that the claimants received fourth amendment protection. The Court concluded that the proceeding was criminal because the penalties affixed were in substance criminal penalties. The twelfth section of the Act "on which the information [was] based, consist[ed] of certain acts of fraud committed against the public revenue in relation to imported merchandise . . . [and was] made criminal by the statute."[79] The Act also

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73. The fifth section of the Act provided:

> That in all suits and proceedings *other than criminal* arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court . . . and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed . . . .

18 Stat. at 187 (emphasis added), *quoted in Boyd,* 116 U.S. at 619-20.

74. 116 U.S. at 618.

75. *Id.*

76. *Id.* at 638.

77. N. LASSON, *supra* note 70, at 107.

78. 116 U.S. at 633-34. The *Boyd* Court said:

> we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth.

Id. at 633.

79. *Id.* at 634.

provided for a fine, imprisonment and for forfeiture of the merchandise.[80]

Therefore, under traditional fourth amendment jurisprudence random drug testing by government employers should not implicate the fourth amendment[81] because the tests are not con-

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80. 18 Stat. at 188, *cited in Boyd,* 116 U.S. at 634. The Act provided for fines ranging from $50 to $5,000 or for imprisonment not exceeding two years, or both; and in addition to the fine, the merchandise was to be forfeited. *Id.*

81. Professor Joseph disagrees. He said:

> *Boyd* can be read to support the proposition that conduct which would be a search or seizure if performed by government agents is the equivalent of a search and seizure when performed under government threat of sanction to the holder of the evidence in question. Thus, it is included within the range of protection under the fourth amendment's "search" and "seizure" terms.

Joseph, *supra* note 12, at 612 (footnote omitted). This proposition is correct. However, Joseph continues:

> Furthermore, the *Boyd* Court appears to have recognized that this question is analytically distinct from the question of whether a particular search and seizure is reasonable. Thus, under this analysis a governmental requirement to either surrender a urine sample or be fired amounts to a search and seizure as those terms were understood by the Court in *Boyd.*

Id. at 612-13 (footnotes omitted). Joseph derives this conclusion from the following language in *Boyd*:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.
>
> The principle question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?

Boyd, 116 U.S. at 622 (emphasis in original). According to Joseph, this language demonstrates that the Court assumed that since the government compelled the claimants to produce the documents, the fourth amendment was triggered. *See* Joseph *supra* note 12, at 609-11. Consequently, the only question left for the Court to resolve was whether the production was unreasonable. The quoted language from *Boyd* seems to support this. But when this language is read with the rest of the opinion it is evident that the Court was struggling even to say the fourth amendment was implicated. The Court had to struggle to conclude that the fourth amendment was implicated because in the past the fourth amendment was not implicated unless there was a criminal proceeding.

Furthermore, *Boyd* said that the compelled production amounts to a search and seizure—and thus the fourth amendment is implicated—if it is used to "establish a *criminal charge* against him." *Boyd,* 116 U.S. at 622 (emphasis added). Consequently, the Court spends several pages demonstrating that the nature of the "information," though technically a civil proceeding, was "in substance and effect a criminal one." *Id.* at 634. It was only after the Court concluded that the proceeding was criminal in substance, that it concluded the fourth amendment was implicated. *Id.* Consequently, Joseph's conclusion seems tenable.

Boyd was struggling with this criminal/civil distinction because prior to *Boyd* the

ducted for the purpose of gathering information to be used in a criminal proceeding. The only penalty for lack of rehabilitation is termination of employment, not criminal prosecution.[82]

Some may argue that a proceeding for termination of employment or revocation of governmental benefits, for all practical purposes, is equivalent to a criminal proceeding. However, the Supreme Court implicitly rejected this notion in *Wyman v. James*.[83] *Wyman* is a 1971 decision that addressed not only the termination of benefits issue but also implicitly reaffirmed the traditional proposition that it is necessary to examine the use to which information obtained will be put in determining whether fourth amendment protections are triggered.

In *Wyman*, a Mrs. James applied for and was granted financial assistance through "Aid to Families With Dependant Children" (AFDC) shortly before she gave birth to her child.[84] As a precondition to receiving this aid, Mrs. James was required to allow a caseworker visit her in her home. She made no objection to the initial visit.[85] Two years later, a caseworker informed Mrs. James that another home visit was necessary to ensure continuation of her financial assistance.[86] Mrs. James refused the home visit but said that she would supply any "information 'reasonable and relevant' to her need for public assistance."[87] Because of Mrs. James' refusal, her financial assistance was subsequently terminated.[88] She thereafter brought an action alleging, *inter alia*, violation of her fourth amendment rights,[89] and alleging that "she and her son have no income, resources, or support other than the benefits received under the AFDC program."[90]

The Court held that the home visits did not implicate the

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fourth amendment was understood to apply *only* to criminal proceedings. *See* N. LASSON, *supra* note 70, at 107 (In 1885, in Murray v. Hoboken Land Company, 59 U.S. (18 How.) 372, the Court held "that the Fourth Amendment applied to criminal proceedings only and had no relation to civil proceedings for the recovery of debts."). This history further weakens Joseph's interpretation of *Boyd*.

82. If information obtained from employee drug testing is sought to be used in a criminal proceeding, the information could be excluded by application of the exclusionary rule.

83. 400 U.S. 309 (1971).

84. *Id.* at 313.

85. *Id.*

86. *Id.* at 313, 315-16.

87. *Id.* at 313.

88. *Id.* at 314.

89. *Id.*

90. *Id.* at 315.

fourth amendment. Ironically, after acknowledging that "one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior," the Court said:

> This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that *we are not concerned here with any search* by the New York social service agency *in the Fourth Amendment meaning of that term.* . . . It is . . . true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that *the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.*[91]

Drug testing has several similarities to the *Wyman* home visit.[92] First, the home visit was not conducted for the purpose of obtaining information to be used in a criminal proceeding; rather, it was conducted for the purpose of advancing the agency's goal of providing assistance to the needy. Similarly, drug testing is not conducted for the purpose of obtaining infor-

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91. *Id.* at 317-18 (emphasis added). After holding that the home visit did not implicate the fourth amendment, the Court continued:

> If however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits, somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard.

Id. at 318 (citations omitted). In applying this balancing test for determining whether the visit was reasonable, the Court emphasized that the visit was not for search of evidence to be used in any criminal proceeding. *Id.* at 321-23, 325.

92. The defendants in McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987), relied on *Wyman* as part of their argument that drug testing does not violate the fourth amendment. *Id.* at 1131. However, *McDonell* said that "numerous factors relied on in *Wyman* clearly distinguish it from the instant case." *Id.* at 1131. The mistake made by *McDonell* was that it failed to examine the real holding of *Wyman*, which is that the fourth amendment was not triggered by the home visit. *Cf. id.* ("The Court, assuming without holding that such a home visit was a search, concluded that it was reasonable and therefore not violative of the Fourth Amendment."). *McDonell* did not even examine the Court's holding. *Id.*

mation to be used in a criminal proceeding; rather, it is conducted to ensure a safe and efficient working environment and to help rehabilitate employees.

Second, refusal of the home visit in *Wyman* was not a criminal act and if the recipient refused the only consequence was loss of her financial assistance. Likewise, refusal to submit to a drug test is not a criminal act and the only possible penalty that may be imposed is termination of employment.[93] In *Wyman,* the Court did not conclude that the proceeding to terminate Mrs. James' only source of income was equivalent to a criminal proceeding requiring invocation of fourth amendment protections.

Total reliance on *Wyman,* however, may be problematic for proponents of drug testing because *Wyman* was the last Supreme Court case receiving a majority vote on the proposition that if the information is not sought to be used in a criminal proceeding, the fourth amendment is not implicated. Although the Court ceased making this threshold inquiry during the early seventies, presently there is some indication that the Court may be making a slight movement back toward the traditional approach. This comment will now examine the death and partial resurrection of the traditional approach and explain why a full rebirth of the traditional approach would be better than the approach currently used by the Court.

B. Death of the Traditional Approach

The death of the traditional approach was foreshadowed, if not begun, by *Frank v. Maryland.*[94] In *Frank,* an inspector of the Baltimore City Health Department, acting on a complaint from a resident, began an inspection of the neighborhood. During this inspection, he discovered that one house was in an extreme state of decay.[95] Because the owner refused to let the inspector look inside the home, the inspector returned with an

93. Certainly this appears to be a severe consequence to suffer for refusing to submit to the testing. But, in all likelihood, loss of employment to a government employee is not as severe as the termination of assistance was to Mrs. James. She alleged that these benefits were her only source of income and support for her and her child. *Wyman,* 400 U.S. at 315. Although an employee's job is probably his or her only source of income, which of the two is more likely to find replacement income, the employee or Mrs. James? The employee can move to another job. What can Mrs. James do?

94. 359 U.S. 360 (1959), *overruled in part,* Camara v. Municipal Court, 387 U.S. 523 (1967).

95. *Id.* at 361 (In the rear of the house was a pile of "rodent feces mixed with straw and trash and debris to approximately half a ton.").

arrest warrant and arrested the homeowner.[96] The owner was subsequently fined for refusing to allow the inspection.[97] The Supreme Court upheld the warrantless inspection against a fourth amendment challenge for two reasons.[98] First, the inspection was not conducted for the purpose of obtaining evidence of guilt to be used in a criminal proceeding[99] and second, this type of an inspection had deep historical antecedents.[100]

Frank foreshadowed the death of the traditional approach because the Court failed to explain whether it was examining the purpose of the inspection to determine whether the fourth amendment was implicated, or to determine whether a warrant was required. Consequently, *Frank* can be read to support two different propositions. First, one may argue that *Frank* stands for the proposition that the use to which the information will be put is examined *only* for the purpose of determining the degree of protection afforded by the fourth amendment, not for the purpose of determining whether the fourth amendment is implicated. Arguably, *Frank* supports this proposition because the Court spent over half the opinion discussing why a warrant was not required; [101] there is no need to reach the warrant issue unless it is first determined that the fourth amendment is implicated. If this is the proper interpretation of *Frank,* the Court never explained why the fourth amendment was triggered. It must have assumed that such regulatory inspections automatically implicate the fourth amendment.

Subsequent Supreme Court decisions have accepted this interpretation of *Frank.* In *Camara v. Municipal Court,*[102] an inspector of the San Francisco Department of Public Health was making a routine building inspection for possible violations of the city's housing code.[103] While making that inspection, he was informed by the building's manager that the lessee of the ground floor was using the rear of his leasehold as a personal residence.[104] The lessee was issued a citation for refusing to allow

96. *Id.* at 361-62.
97. *Id.* at 362.
98. *Id.* at 373.
99. *Id.* at 365-66.
100. *Id.* at 367-72.
101. *Id.* at 367-73.
102. 387 U.S. 523 (1967).
103. *Id.* at 525-26.
104. *Id.* at 526.

inspection of the premises[105] and was subsequently charged with violation of the housing code.[106]

Camara's analysis begins by overruling *Frank* "to the extent that it sanctioned such warrantless inspections."[107] To the majority, it was irrelevant whether the inspections were conducted by a police officer or any other governmental official because "[t]he basic purpose of [the fourth] amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[108] The Court said: "It is surely 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."[109] Although the Court concluded that the fourth amendment was implicated by this investigation, it examined the purpose of the investigation in determining what level of protection was to be afforded by the warrant clause.[110] "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property."[111] This difference in purpose of the investigation was one of the factors leading the Court to conclude that the traditional probable cause requirement did not apply.[112] The Supreme Court has consistently considered the purpose of the investigation in determining the degree of protection to be afforded by the warrant clause.[113]

On the other hand, arguably *Frank* is consistent with the traditional approach, and it was not until *Camara* that a major-

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105. *Id.*

106. *Id.* Any person found violating the Code would be guilty of a misdemeanor and would be subject to a fine or imprisonment. *Id.* at 527 n.2.

107. *Id.* at 528.

108. *Id.*

109. *Id.* at 530.

110. *Id.* at 535.

111. *Id.*

112. This relaxation of the probable cause requirement itself is anomalous because it does not comport with the literal language of the Constitution declaring that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend IV. Justice Clark stated in his dissent to *Camara* that the majority "prostitutes the command of the Fourth Amendment . . . and sets up in the health and safety codes area inspection a newfangled 'warrant' system that is entirely foreign to Fourth Amendment standards." *Id.* at 547 (Clark, J., dissenting).

113. *See, e.g.*, Burger v. United States, 107 S. Ct. 2636, 2649, 2651 (1987); New Jersey v. T.L.O., 469 U.S. 325, 335, 355-56 (1985); Donovan v. Dewey, 452 U.S. 594, 598, 606 (1981); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978); See v. City of Seattle, 387 U.S. 541, 542 (1967).

ity of the Court believed that the investigative purpose is irrelevant in determining whether the fourth amendment is implicated. Whether *Frank* is consistent with the traditional approach is important because there has been some talk among the Court that maybe *Frank* was the proper vehicle for dealing with these types of intrusions. For example, in *Donovan v. Dewey*,[114] a case involving a refusal to allow a warrantless inspection of a mine, Justice Stewart said that when *Camara* was decided he believed *Frank* had been correctly decided rather than *Camara*.[115] Justice Stewart said that he "must, nonetheless, accept the law as it is, and the law *is now established* that administrative inspections are searches within the meaning of the Fourth Amendment."[116] According to Justice Stewart, if the law "*is now established*" that administrative inspections are searches, then at some earlier point in time they must not have been. This earlier point in time was probably when *Frank* was decided because of Justice Stewart's inference that *Camara* is what changed the law.

Assuming that *Frank* is consistent with the traditional approach, is it possible that the Supreme Court will return to such an approach? In *Donovan*, Justice Stevens said that the option of overruling *Camara* and returning to *Frank* "is more viable today than when some of the reasoning that would support it could only be found in dissenting opinions."[117] Moreover, a 1987 Supreme Court decision, *O'Connor v. Ortega*,[118] suggests that the Court may be making a very slight shift toward the traditional approach.

C. Partial Resurrection of the Traditional Approach

In *Ortega*, an investigation was conducted by a government employer (hospital officials) of an employee's (Dr. Ortega) office, desk, files and other personal items[119] because Dr. Ortega was

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114. 452 U.S. 594 (1981).

115. *Id.* at 609 (Stewart, J., dissenting).

116. *Id.* (emphasis added).

117. *Id.* at 607-08 (Stevens, J., concurring).

118. 107 S. Ct. 1492 (1987). What significance this case will have in the drug testing context is uncertain for two reasons: (1) There was no opinion of the Court—Justice O'Connor wrote for the plurality with Justice Scalia joining in the judgment; and (2) The plurality stated expressly that it was not "address[ing] the proper analysis for drug and alcohol testing of employees." *Id.* at 1504 n.**.

119. *Id.* at 1496.

suspected of misconduct.[120] Information obtained from this investigation was used to impeach the credibility of a witness testifying on behalf of Dr. Ortega at a proceeding before a hearing officer of the California State Personnel Board.[121] Subsequent to this preceding, Dr. Ortega commenced an action alleging that the inspection violated his fourth amendment rights.[122]

The plurality's analysis began by determining whether the fourth amendment was triggered by an employer investigation.[123] The plurality first concluded that the fourth amendment *may* apply to government employers because the Court had previously found that the fourth amendment applies to "the conduct of school officials, building inspectors, and Occupational Safety and Health Act inspectors."[124] The plurality reiterated what it had observed in *New Jersey v. T.L.O.*:

> "[b]ecause 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,' . . . 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.' "[125]

Having determined that the fourth amendment *may apply* to government employers, the plurality next turned to the question *of when* the fourth amendment is to apply. The plurality said the test for determining whether the fourth amendment applies in this context is whether "the Hospital officials at issue in this case infringed 'an expectation of privacy that society is prepared to consider reasonable.' "[126]

In determining whether an employee has a reasonable expectation of privacy in the work place, the plurality rejected pe-

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120. *Id.* at 1495-96 (Dr. Ortega was suspected of wrongful acquisition of a computer, sexual harassment of several female employees, and taking inappropriate disciplinary actions against a resident.).

121. *Id.* at 1496.

122. *Id.*

123. *Id.* at 1497-99.

124. *Id.* at 1497 (citations omitted).

125. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978); Camara v. Municipal Court, 387 U.S. 523, 530 (1967))).

126. *Id.* (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). The test the plurality uses is the second prong of Justice Harlan's test announced in *Katz*. *See supra* note 57.

titioner's and the Solicitor General's petition that "public employees can never have a reasonable expectation of privacy in their place of work."[127] The plurality said:

> Individuals do not lose fourth amendment rights merely because they work for the government instead of a private employer. The *operational realities* of the work place, however, may make some employee's expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. . . . The employee's expectation of privacy must be assessed in the context of the employment relation.[128]

The plurality in effect said that the fourth amendment does not guarantee a general right of privacy forbidding all intrusions by governmental officials. Rather, the context or purpose of the intrusion must be examined to determine whether the employee's expectation of privacy is reasonable.[129]

The plurality concluded that the fourth amendment was implicated by this investigation because of the private nature of

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127. *Ortega*, 107 S. Ct. at 1498.

128. *Id.* at 1498 (emphasis added). Contrary to what the plurality says, individuals do not lose their fourth amendment rights when they work for the government; rather, they are gaining them. If Dr. Ortega had worked for a private, rather than a public employer, he could not have claimed any fourth amendment protection. That a government employee gets more constitutional protection because he works for the government is demonstrated by the drug testing situation. For example, in a situation where two employers (one public and one private) institute a drug testing program, only the employee working for the government may argue that his fourth amendment rights have been violated. Even though the employees are similarly situated in all aspects, except for the name of their employer, the government employee is given constitutional protection.

129. Justice Scalia sharply disagreed with this part of the plurality's decision. He did not believe that the question of whether the fourth amendment applied should be decided on a case-by-case basis. He said:

> Constitutional protection against unreasonable searches by government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.
>
> *I cannot agree, moreover, with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes "when an intrusion was by a supervisor rather than a law enforcement official."* The identity of the searcher (police vs. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search of a protected area is reasonable.

Id. at 1505 (Scalia, J., concurring in the judgment) (emphasis added) (quoting plurality opinion).

A case addressing the drug use testing issue since *Ortega* and using *Ortega* as its framework for analysis found that drug use testing implicated the fourth amendment. *See* Feliciano v. City of Cleveland, 661 F. Supp. 578, 583-84 (N.D. Ohio 1987). *Feliciano* believed "that the Supreme Court would join Scalia's inclination to find drug testing inevitably triggers fourth amendment protection." *Id.* at 584.

the items found and examined by the hospital officials.[130] After concluding that the fourth amendment was triggered, the plurality proceeded to determine whether the search was reasonable without a warrant. The plurality concluded that a warrant was not required because the investigation was not conducted for the purpose of gathering evidence of guilt to be used in a criminal proceeding.[131] The plurality said:

> In contrast to other circumstances in which we have required warrants, supervisors in offices . . . are hardly in the business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency. Under these circumstances, the imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter."[132]

The plurality also concluded that the probable cause requirement had no application because "[i]n contrast to law enforcement officials . . . public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."[133]

Ortega takes a slight step back toward the traditional approach, and hence is one step in the right direction, because the plurality examined the purpose or context of the investigation before determining whether the fourth amendment was implicated. However, even under *Ortega*'s analysis random drug testing probably implicates the fourth amendment because one's

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130. *Ortega*, 107 S. Ct. at 1499. The court found that Dr. Ortega's expectation of privacy was reasonable because he had not shared his desk or files with anyone; he had occupied his office for seventeen years; and his files included personal correspondence, medical files, correspondence from private patients unconnected to the hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. *Id.*

131. *Id.* at 1500 ("The only cases to imply that a warrant should be required involve searches that are not work-related, or searches for evidence of criminal misconduct.") (citation omitted).

132. *Id.* at 1501 (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)). The dissent disagreed with the plurality on this point, believing that the plurality erred for dispensing with the warrant and probable cause requirements. *Id.* at 1511 (Blackmun, J., dissenting). According to the dissent, the only time the traditional warrant and probable cause requirement can be ignored is when a "special need" beyond the need for law enforcement is present. *Id.* (The term "special need" was first used in Justice Blackmun's concurrence to New Jersey v. T.L.O., 469 U.S. 325, 351 (1984) (Blackmun, J., concurring)). The dissent found that no "special need" existed in this case; consequently, the search was unconstitutional. *Id.*

133. *Id.* at 1502.

urine, like Dr. Ortega's files, personal correspondence and other gifts and personal mementos, is not usually exposed to an employer in the traditional workplace context. Drug testing is not part of the "operational realities" of the workplace because arguably employer's do not need access to this type of information to conduct their business.[134]

D. A Full Rebirth Would be Better

Although *Ortega* examined the purpose or context of the investigation in determining whether the fourth amendment was implicated, it did not go far enough.[135] *Ortega* should have returned to the traditional analysis evidenced in *Boyd*. Under the traditional analysis, the threshold inquiry for determining whether the fourth amendment is implicated is whether there is a possibility that the information obtained may be used in a criminal proceeding.[136] If no such possibility exists, the fourth amendment is not implicated and the complainant is left to his non-constitutional remedies. Such an analysis is better than that currently employed by the Supreme Court for at least two reasons.

First, it interjects some certainty into fourth amendment jurisprudence by providing a semi-bright demarcating line for determining which actions by governmental agencies implicate the fourth amendment. This line will save courts from the burden of

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134. One case analyzing random drug testing under the *Ortega* rationale concluded that it was not necessary to analyze the "operational realities" of the employment relationship before determining whether the fourth amendment was implicated because the conclusion that drug testing infringes upon one's "expectation of privacy is inevitable." Feliciano v. City of Cleveland, 661 F. Supp. 579, 584 (N.D. Ohio 1987). The employee's reasonable expectation of privacy is infringed because of the privacy expectation that one holds in the act of urination and because of the physiological secrets that analysis of such urine can reveal. *Id.* at 586.

135. If the traditional approach and the pre-*Ortega* approach were plotted on a scale ranging from one to ten, with the traditional approach being at one and the pre-*Ortega* approach being at ten, *Ortega* probably only moved down the scale to a nine.

136. In determining whether the information obtained may be used in a criminal proceeding, the courts should examine the legislative scheme that the administrators are operating under, or if there is no scheme, they should examine whether there is any official rule by the governmental party involved against using the information obtained in a criminal proceeding. If this test is applied to drug testing by government employers, the fourth amendment should not be triggered because the purpose of gathering the information is not to use it in a criminal proceeding; rather, it is for employee rehabilitation. However, if an attempt is made to use this information for criminal purposes, the fourth amendment would be triggered and the exclusionary rule would exclude use of the information.

balancing and weighing every governmental action to determine whether it violates a reasonable expectation of privacy. Yet, even with this savings, the traditional approach obtains the same end result the Supreme Court has obtained through its nebulous balancing approach. For example, *Frank, Camara, See, Michigan, T.L.O.,* and *Burger* each involved a true search for violations and in each case a criminal proceeding was pending.[137] Consequently, the fourth amendment should have been implicated, and in each case it was. In *Ortega,* allegations were made that the investigation was nothing more than a subterfuge for obtaining evidence to be used against Dr. Ortega in a subsequent criminal proceeding.[138] The hospital had no policy forbidding use of such information in criminal proceedings. Therefore, under the traditional approach the fourth amendment should have been implicated, and in *Ortega* it was. In *Marshall,* the Court did not mention what the penalty was for failure to comply with the inspection request, but since the Idaho District Court had issued an order compelling defendant to obey, it is reasonable to assume that some type of criminal proceeding could have been invoked to enforce that order.[139] *Donovan* is the only case where the two approaches facially appear inconsistent. In *Donovan,* failure to refuse inspection of the mine could only

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137. *Frank* and *See* involved a criminal prosecution for the owner's refusal to permit entry. "*Camara* had to do with a writ of prohibition sought to prevent an already pending criminal prosecution. The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed." *Wyman v. James,* 400 U.S. 309, 325 (1971). In *Michigan,* evidence that was obtained from a fire was being introduced against the owner of the premises to convict him of conspiracy to burn real property. *Michigan v. Tyler,* 436 U.S. 499, 501 (1978). In *T.L.O.,* the school girl was trying to suppress the evidence found in her purse during a state delinquency proceeding. New Jersey v. T.L.O., 469 U.S. 325, 329 (1985). In Burger, defendant was arrested and charged with five counts of possession of stolen property. Burger v. United States, 107 S. Ct. 2636, 2640 (1987).

138. *See* Reply to Petition for Writ of Certiorari at 4, O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (No. 85-530) ("Napa" officials "expropriated his [Dr. Ortega's] property, packed and sealed them with tapes marked 'Evidence, Napa County Sheriff's Department.'" *Id.* "[R]umor was leaked out into the medical community . . . that Dr. Ortega would be arrested for Medi-Cal fraud." *Id.* at 52.); *see also* Brief for Respondent at 9, O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (No. 85-530) ("Only after searching pawn's [Ortega's] papers for forged documents did amateur investigation become an administrative inventory . . . ." *Id.* "Pawn [Ortega] was also told [he would] be charged with Medi-Cal fraud and may be arrested before he can be tried for whatever else the 'administrative investigation' may turn up." *Id.* at 20 n.2.20. "If amateur investigators can be believed under oath, so was their 'administrative inventory' a search for forgery!" *Id.* at A-39.) (citations to record omitted).

139. Marshall v. Barlow's, Inc., 436 U.S. 307, 310 (1978).

result in a civil action for injunctive or other appropriate relief.[140] Although the Supreme Court said that the fourth amendment was triggered, it found the inspection scheme reasonable without a warrant.[141] Thus, regardless of which approach is applied the end result in *Donovan* would be the same: an inspection not authorized by a detached, disinterested magistrate. The only real difference would be the absence of legal gymnastics performed by the *Donovan* Court.[142]

The second reason the traditional approach is better than that currently used by the Supreme Court is that it is more consistent with the theory that the fourth amendment does not guarantee a general right of privacy. Some privacy protections are better left to the law of the individual states or to the democratic process in general rather than to the courts. The question of whether the fourth amendment protects against all governmental invasions of privacy was answered in *Katz v. United States*.[143]

In *Katz*, the dissent accused the majority of rewriting the fourth amendment to protect privacy so that it could hold "all laws violative of the Constitution which offended the Court's broadest concept of privacy."[144] However, the majority implied that such was not the case, by stating

> the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion. . . . But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the

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140. Donovan v. Dewey, 452 U.S. 594, 597 (1981).

141. *Id.* at 606.

142. Under the traditional approach, an aggrieved party could not come before the court arguing fourth amendment reasonableness because an investigation for non-criminal purposes would not trigger fourth amendment protections. The aggrieved party would be left to his non-constitutional remedies.

Some may argue that the proposed test will permit inventive lawyers to avoid imposition of the fourth amendment by drafting penalties for non-compliance to ensure that there will be no future criminal proceedings. However, such a drafter must be reminded that if the civil or other penalties imposed are too onerous, the Court will be free, under the *Boyd* rationale, to determine that the penalty is quasi-criminal in substance and thus invoke the protections of the fourth amendment. In these few instances, the traditional approach may be almost as burdensome to apply as the approach currently used by the Supreme Court.

143. 389 U.S. 347 (1967).

144. *Id.* at 373 (Black, J., dissenting).

> protection of his property and his very life, left largely to the law of the individual States.[145]

Since protection from certain privacy intrusions are to be left to the law of the individual states, the courts should not act as super-legislatures "holding all laws violative of the Constitution which offend [their] . . . broadest concept of privacy."[146] Since "the principal concern of [the Fourth] Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy *in the course of criminal investigations*,"[147] then privacy invasions that cannot result in a criminal prosecution should not offend the fourth amendment. Consequently, control over such intrusions should be left to the individual states or to the democratic process in general. "The history of governments proves that it is dangerous to freedom to repose such powers in courts."[148]

The traditional approach vests in the courts authority to deal with matters that are clearly of constitutional significance, while leaving to the people, either in their respective states or on a national level, the right to address issues that are not clearly within the parameter of constitutional protection. As this comment has illustrated, random drug testing is not a matter that is clearly within the parameters of fourth amendment protection; therefore, the people, not the courts, should be given the opportunity to address this concern as they deem appropriate.[149]

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145. *Id.* at 350-51 (emphasis in original) (footnotes omitted).

146. *Id.* at 373 (Black, J., dissenting).

147. Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (emphasis added).

148. *Katz*, 389 U.S. at 374 (Black, J., dissenting).

149. If drug use testing is repulsive to the citizens of a state, that state may enact a privacy statute such as was enacted in the city of San Francisco:

> ARTICLE 33A PROHIBITION OF EMPLOYER INTERFERENCE WITH EMPLOYEE RELATIONSHIPS AND ACTIVITIES AND REGULATION OF EMPLOYER DRUG TESTING OF EMPLOYEES
>
> . . . .
>
> Sec. 3300A.5 EMPLOYER PROHIBITED FROM TESTING OF EMPLOYEES. No employer may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to blood or urine testing if:
>
> (a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and
>
> (b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

The American people are not opposed to drug testing of employees. A survey conducted by Yankelovich, Clancy, and Shulman indicates that sixty-nine percent of responding employees favored periodic drug testing of employees. Eighty-one percent said that they would be "willing to submit to a test even '[i]f given a choice' to refuse."[150] Since " 'most Americans favor testing all workers for drug use,' "[151] and since this is a government of the people, by the people, and for the people, the American people's wishes should be afforded significant weight in the fourth amendment calculus. A return to the traditional approach would allow the giving of deference to the voice of the American people because they could address, through the democratic process, those concerns that are not clearly prohibited by the Constitution.

III. CONCLUSION

To combat the enormous drug abuse problem in today's society many governmental employers, heeding President Reagan's declaration of war on drugs, instituted some form of random drug testing. Immediately, courts and scholars harmoniously re-

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

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

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

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

Palefsky, *Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance,* 11 NOVA L. REV. 669, 681-84 (the appendix of Palefsky's article is a copy of the San Francisco's Worker Privacy Ordinance).

150. Imwinkelried, *supra* note 2, at 603 (quoting Lamar, *Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs,* TIME, Sept. 22, 1986, at 26; *Most Favor Mandatory Testing, Poll Concludes,* DAVIS ENTERPRISE, Sept. 15, 1986, at 2.).

151. *Id.* (quoting *Down on Drugs: A Newsweek Poll,* NEWSWEEK, Aug. 11, 1986, at 16.).

acted by declaring such testing unconstitutional, claiming that it violates an employee's reasonable expectation of privacy.

The opponents of random drug testing argue that such testing violates an employee's reasonable expectation of privacy because of its intrusive nature and its potential for revealing extraneous physiological secrets. However, the Supreme Court has not been willing to afford fourth amendment protection for all privacy invasions and under the current state of the law what privacy invasions will receive its protection is uncertain. Much of this uncertainty could be resolved by adding a threshold inquiry to the "reasonable expectation of privacy" test. Before addressing the question of whether a reasonable expectation of privacy has been violated, the court should ask whether there is a possibility that the information obtained from the intrusion may be used in a criminal proceeding. If there is no such possibility, the fourth amendment should not be implicated and the complainant should be left to his non-constitutional remedies.

Such an approach is better than that currently used by the Supreme Court because it interjects some certainty into fourth amendment jurisprudence by providing a semi-bright demarcating line for determining which governmental actions implicate the fourth amendment. It is also more consistent with the historical theory that the fourth amendment does not guarantee a general right of privacy and that some privacy protections are better left to the democratic process rather than to the courts.

Ronald W. Truman