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THE CONSTITUTIONALITY OF DRUG TESTING AT THE BAIL STAGE*

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I. INTRODUCTION: THE FOCUS ON DRUG ABUSE AS A PREDICTOR OF DEFENDANT CRIME

During the 1980's public controversy and policy debate surrounding the problems of importation of illicit drugs and of their widespread use within the United States have given the "drugs issue" a high priority on both domestic and foreign policy agendas. Among the diverse social problems being linked to abuse of controlled substances is the idea that a great deal of crime—at least in the major urban centers—is closely tied to drug abuse. This issue has received renewed attention, particularly by the Reagan administration and more recently, the Bush administration, but also by Congress. Recent government research reports, for example, have pointed to a role for drug abuse in the development of "criminal careers"[1] and in arguments supporting policies of selective incapacitation at the sentencing stage in the criminal justice process.[2] Against a background of general findings from criminological litera-

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While this article was going to press, the Supreme Court decided *Jenkins v. Jones*, 109 S. Ct. 1633 (1989) and *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

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1 *See* 1 & 2 CRIMINAL CAREERS AND CAREER CRIMINALS (A. Blumstein, J. Cohen, J. Roth, & C. Visher eds. 1986)[hereinafter "CRIMINAL CAREERS"].

2 *See* P. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (1982).

ture showing associations between drug use and delinquency,[3] recent, preliminary research has hypothesized that because large proportions of arrestees test positively for drugs as they enter the criminal process, evidence of drug use ought to be considered a significant predictor of crime.[4]

As the heightened concerns about crime in the United States during the 1970s were transformed into concerns about drugs and crime in the 1980s, drug testing technology which had been establishing a track record in military applications became available for private industry and was suggested as a potentially useful tool in the criminal justice setting. The availability of rapidly evolving drug testing technology in the last several years from major manufacturers—such as Roche, Syva, and Abbott—has offered the possibility of what proponents perceive as a dramatic new direction in the campaign against drug abuse.

The adoption of drug testing programs in private industry as well as in other areas, such as in public schools to identify students who are using drugs, in the military to identify and deter drug use among its personnel, and in prisons and jails to detect and deter drug use among prisoners and employees, has, of course, been the source of considerable debate and controversy.[5] Critical commentary concerning the use of drug testing programs has been developed primarily in response to applications by private industry and government regulated businesses. The arguments for the use of drug testing by private employers have focused on concerns for employee productivity and, in a number of occupations, concerns that

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[3] *See* R. GANDOSSY, J. WILLIAMS, J. COHEN, & H. HARWOOD, DRUGS AND CRIME: A SURVEY AND ANALYSIS OF THE LITERATURE (1980)[hereinafter R. GANDOSSY].

[4] *See* M. Toborg, A. Yezer & J. Bellassai, *Analysis of Drug Use Among Arrestees*, Monograph 4 (Assessment of Pretrial Urine Testing in the District of Columbia), Washington, D.C.: Toborg Associates, 1987 (unpublished report); A. Yezer, R. Trost, M. Toborg, J. Bellassai & C. Quintos, *Periodic Urine Testing as a Signalling Device for Pretrial Release*, Monograph 5 (Assessment of Pretrial Urine Testing in the District of Columbia), Washington, D.C.: Toborg Associates, 1987 (unpublished report); A. Yezer, R. Trost & M. Toborg, *The Efficiency of Using Urine Test Results in Risk Classification of Arrestees*, Monograph 6 (Assessment of Pretrial Urine Testing in the District of Columbia), Washington, D.C.: Toborg Associates, 1987 (unpublished report); E. WISH, DRUG USE FORECASTING: NEW YORK, 1984 TO 1986 (U.S. Department of Justice, National Institute of Justice, February, 1987).

[5] See *generally infra* notes 132-138 and accompanying text for a discussion of government interests in employee testing. An extensive literature has developed over the past few years debating the pros and cons of workplace drug testing. While proponents of employee urinalysis generally cite the benefits described in the text, opponents argue, *inter alia*, that because alcohol abuse is much more widespread than drug abuse, universal drug testing is disproportionate to the scope of the problem and has little functional value in screening out impaired workers or applicants. *See, e.g.*, Council on Scientific Affairs, *Council Report: Issues in Employee Drug Testing*, 258 J.A.M.A. 2089 (1987).

drug impaired behavior may present hazards to other employees and to the public. Thus, for example, employers have used pre-employment urinalysis to avoid hiring employees with drug abuse related problems. Employers have used both random and mandatory testing programs after the hiring stage to identify drug abusers and refer them to counseling or terminate them, and to deter employees from using illicit drugs.

Although difficult issues are shared by the application of drug testing programs in each of these areas—such as questions relating to individual health, public safety, accuracy of results, due process and fairness—this Article focuses specifically on the introduction of drug testing as a routine element of the processing of defendants at the earliest stages of the criminal process.

Routine urinalysis of arrestees prior to the bail or pretrial release decision is an innovation with a relatively short history. Although preceded by occasional uses of drug testing to enforce conditions of probation and in pretrial diversion, systematic testing of arrestees prior to bail was pioneered in the District of Columbia in 1984 with funding from the National Institute of Justice.[6] Prompted by preliminary findings from research in New York City and in the District of Columbia pointing to a relationship between positive drug test results and new arrests,[7] the District of Columbia Pretrial Services Agency implemented a model program of testing designed to inform judges concerning defendants' drug abuse and to monitor the behavior of defendants granted conditional nonfinancial release before trial. Under the D.C. program, arrestees testing positively are required, as a condition of release, to report for further urinalysis and perhaps for referral to drug counseling. Failure to comply with the monitoring and reporting conditions of release assigned by the judge in that jurisdiction can result in the setting of more restrictive conditions (including increased monitoring), revocation of release, and prosecution for contempt of court.[8]

The director of the Pretrial Services Agency has described the underlying rationale for the pilot urinalysis program in the District of Columbia, reflecting a pragmatic interpretation of research findings relating to the drug-crime link, in the following manner:

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[6] J. CARVER, DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING 2-3 (1986).

[7] *See, e.g.*, Toborg & Kirby, *Drug Use and Pretrial Crime in the District of Columbia, Research Brief, Nat'l Inst. Just.* (1984); Wish & Johnson, *The Impact of Substance Abuse on Criminal Careers*, in 2 CRIMINAL CAREERS, *supra* note 1, at 52.

[8] *See* J. CARVER, *supra* note 6; *D.C. Code Ann.* § 23-139 (1981); Brief for the United States as Amicus Curiae at 6, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987).

> The theoretical basis for the program is derived from earlier studies that show, among other things, that drug use is very much a characteristic of serious and violent offenders. On the other hand, even among high-risk individuals with established patterns of both drug abuse and criminality, increasing or reducing the level of drug abuse is associated with a corresponding increase or reduction in criminality.[9]

Since implementation of the D.C. program, findings showing a relationship between positive urinalysis results at the bail stage and subsequent criminality or flight by defendants during pretrial release have been reported.[10] In addition, one study has reported findings interpreted as showing that the D.C. program has been successful in increasing the likelihood of appearance for court dates and in decreasing the rate of further crime among those released.[11]

The experience with the District of Columbia's testing program and these findings have stirred interest in the wider scale establishment of arrestee drug testing programs. The Bureau of Justice Assistance, for example, has recently provided funding to test the applicability of the D.C. testing program to other jurisdictions, including Tucson, Phoenix, Milwaukee, Portland, Wilmington, and Prince George's County, Maryland.[12] In addition, the National Institute of Justice has funded the Drug Use Forecasting (DUF) pro-

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9 J. CARVER, *supra* note 6, at 2-3.

10 *See supra*, note 4 (series of unpublished monographs describing research evaluating the drug testing program in Washington, D.C., by Toborg and Associates (1987), which report that, above and beyond the power of other kinds of information to predict the likelihood of flight and crime during pretrial release, knowledge of positive drug test results serves as an important measure of defendant risk, and that drug testing itself can be employed effectively as a condition of pretrial release to reduce crime and flight). *But see* BELENKO & MARA-DRITA, DRUG USE AND PRETRIAL MISCONDUCT: THE UTILITY OF PRE-ARRAIGNMENT DRUG TESTS AS A PREDICTOR OF FAILURE-TO-APPEAR (New York Criminal Justice Agency, February, 1988) (preliminary report) (describing similar research in New York and reporting that knowledge of drug test results contributes little to a judge's ability to predict defendant flight). *See also* Goldkamp, Gottfredson, & Weiland, *The Utility of Drug Testing in the Assessment of Defendant Risk at the Pretrial Release Decision*, Temple University (1988) (unpublished report) (where such a relationship was not found).

11 *See* BELENKO & MARA-DRITA, *supra* note 10 (a study of New York City defendants that did not find that knowledge of drug test results adds to the ability of judges to predict a failure to appear beyond the information generally available at the bail stage).

12 *See Pretrial Drug Testing in Six Jurisdictions*, 12 PRETRIAL RPTR., i-iv (1988)[hereinafter *Pretrial Drug Testing*]. The United States Department of Justice's endorsement of drug testing at the arrest stage certainly appears grounded on this belief. *See, e.g.*, J. STEWART, NATIONAL INSTITUTE OF JUSTICE RESEARCH, PROGRAM PLAN, FISCAL YEAR 1988 (Nov. 17, 1987):

> Now, we no longer need to watch helplessly as drug spawned crime vitiates entire neighborhoods. We can do something . . . . Mandatory, court supervised drug testing represents an objective test for identifying these high risk offenders. With this scientifically accurate, impartial data, judges are in a position to decide appropriate conditions for pretrial release, including periodic testing which research shows lowers the demand for drugs.

gram to test arrestees anonymously on a quarterly basis in principal American cities to chart the kinds of drugs being used among arrestee populations based on its hypothesis that information about drug abuse obtained through urinalysis is an important and—because it is scientific—superior instrument for identifying "the high risk offender" and minimizing the risk posed by defendants during pretrial release.[13] The Arizona legislature enacted a law in 1987 authorizing mandatory drug testing of felony arrestees beginning in 1988 for the purpose of informing the pretrial release decision.[14]

To date, urinalysis of arrestees has been used solely to inform the decision regarding conditions of pretrial release - particularly whether to require further periodic drug testing during the pretrial period. The potential importance of drug testing at the pre-bail stage for the purpose of "identifying the high rate offender," that is, for purposes of community safety, takes on added significance since enactment of the Federal Bail Reform Act of 1984[15]—the federal preventive detention law aimed at the identification and incapacitation of a "small but identifiable group of particularly dangerous defendants."[16] That law, like the District of Columbia law enacted in 1970 and other state laws,[17] emphasized the drug-crime relationship in its designation of factors to be considered by judges in establishing conditions of release,[18] in its inclusion of drug-related offenses among the criteria qualifying defendants for detention hearings on the basis of potential dangerousness,[19] and in its provision for examination of temporarily held defendants to determine whether they are "addicts."[20]

The recent decision of the United States Supreme Court in

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13 *See E. Wish, supra* note 4.

14 *See* PADD Enabling Legislation, ARIZ. REV. STAT. ANN. § 3967-68 (1987).

15 18 U.S.C. § 3142(e) (1982).

16 S. REP. No. 225, 98th Cong., 1st Sess. 6-7 (1983).

17 *See* Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 59-64 (1985).

18 The relevant section, 18 U.S.C. § 3142 (1982), entitled "Factors to Be Considered," urges judicial consideration of drug related concerns in two provisions: first, in considering the "nature and circumstances of the offense . . . including whether the offense . . . involves a narcotic drug"; 18 U.S.C. § 3142(g)(1), and second, in considering the "history and characteristics" of the defendant, including "his . . . history relating to drug or alcohol abuse." 18 U.S.C. § 3142(g)(3)(A).

19 *Id.* at § 3142(1)(c). This provision outlines as one of the eligibility criteria for pretrial detention proceedings charged offenses "for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, 21 U.S.C. § 801, the Controlled Substances Import and Export Act, 21 U.S.C. § 951, or section 1 of the Act of September 15, 1980, 21 U.S.C. § 955."

20 18 U.S.C. § 3142(f)(2).

United States v. Salerno,[21] upholding the Federal Bail Reform Act of 1984, also makes questions about the introduction of drug testing into the bail process more critical in two ways. First, the Supreme Court's decision in *Salerno*, appears to have finally silenced the long-standing controversy about the appropriateness of public safety goals in the bail/pretrial release process. *Salerno* held that the preventive detention provisions of the Federal Bail Reform Act of 1984 do not violate the eighth or fourteenth amendments.[22] The Act authorizes pretrial detention of persons charged with federal crimes when the court determines that the defendant poses a threat to community safety that cannot be neutralized by imposing any set of conditions on pretrial release. The Court found the Act to be constitutional in its substance and procedure. Referring to its earlier decision in *Schall v. Martin*,[23] regarding juvenile pretrial detention based on anticipation of likely danger to the community, the Court stated that the "general concern with crime prevention is no less compelling when suspects are adults."[24] Thus, drug testing at the pre-bail stage has been proposed chiefly as a means for reducing the threat to public safety believed to be posed by drug abusing defendants.

The *Salerno* decision is important as well because of its position on standards for prediction at the pretrial release stage. A traditional argument of opponents to preventive detention has been that judges are not able to predict the future acts of defendants with sufficient accuracy to warrant adoption of explicit preventive detention procedures.[25] To the arguments that judges cannot predict sufficiently well the likelihood that defendants will engage in crime in the future and that pretrial detention on that basis is tantamount to punishment without due process, the Court responded, as it had in *Schall*, that "there is nothing inherently unattainable about a prediction of future criminal conduct"[26] and that once courts perceive that a defendant poses a "threat" of some danger to the public, they may "disable the arrestee from executing that threat."[27]

As the movement to revise bail and pretrial detention law has

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21 481 U.S. 739 (1987).

22 *Id.*

23 467 U.S. 253 (1984).

24 *Salerno*, 481 U.S. at 749.

25 *See, e.g.*, Foote, *The Coming Constitutional Crisis in Bail (pts I and II)*, 113 U. PA. L. REV. 959, 1125 (1965); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC., 24 (1970); Ervin, *Forward: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 290 (1971).

26 United States v. Salerno, 481 U.S. 739 (1987).

27 *Id.*

simmered over the last two decades to make community safety an explicit and legitimate concern,[28] so too have questions about how judges might best identify "dangerous" defendants. The criteria in the Federal Bail Reform Act of 1984, derived from the District of Columbia prototype in 1970, defining defendants eligibility for detention represent the assumption of Congress that the defendant's criminal charge and prior record of convictions, among other factors, can identify future criminals.[29] Analysis of current pre-trial release laws has shown that legislatures have suggested many criteria for judges to consider in making their bail/pretrial release determinations, including aspects of the criminal charges, the defendant's community ties, prior criminal record, and in a few instances, the defendant's history of drug abuse.[30] Although research has not produced empirical support that these statutory criteria—or others—can powerfully predict defendant crime during periods of pretrial release,[31] recent research has begun to develop empirical risk classifications that, if used, would at least offer improvements over the accuracy of judges' subjective assessments.[32]

Reliance on results of urinalysis to inform important decisions, such as the determination of conditions of pretrial release or, even pretrial detention, raises a number of questions similar to those raised about use of other kinds of information, such as prior criminal history, for the same purpose.[33] In the first place, for its use to

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28 *See, e.g.*, STANDARDS RELATING TO PRETRIAL RELEASE, Appendix C (A.B.A. Tent. Draft 1968); A.B.A. TASK FORCE ON CRIME, TASK FORCE REPORT (Criminal Justice Section 1981).

29 Of course, the federal law was only the last, not the first, example of laws implementing "danger" classifications; a wide variety of state laws had been enacted in the previous 15 years employing hosts of danger criteria. *See generally* Goldkamp, *supra* note 17.

30 *See id.*; J. GOLDKAMP, TWO CLASSES OF ACCUSED 62-69 (1979).

31 *See, e.g.*, Angel, Green, Kaufman, & Van Loon, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 301 (1971).

32 *See* Goldkamp, *Prediction in Criminal Justice Policy Development*, in PREDICTION AND CLASSIFICATION (D. Gottfredson & M. Tonry eds. 1987); J. GOLDKAMP & M. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM (1985). Bail/pretrial release guidelines have been developed and implemented using risk classifications in Philadelphia, Pennsylvania, Dade County, Florida, and Maricopa County, Arizona. *See* Goldkamp & Gottfredson, *Guidelines for Bail and Pretrial Release*, in THREE URBAN COURTS: VOLUME I - THE DEVELOPMENT OF BAIL/PRETRIAL RELEASE GUIDELINES IN MARICOPA COUNTY SUPERIOR COURT, DADE COUNTY CIRCUIT COURT AND BOSTON MUNICIPAL COURT (1988)(unpublished report).

33 Although in United States v. Salerno, 481 U.S. 739 (1987), the Supreme Court approved pretrial detention based on risk classifications defined by the legislature, in the absence of empirical support for the accuracy of the predictive tool, further research remains essential. There is a qualitative difference between prediction based upon information such as prior convictions or nature of the current charges that is obtained without implicating any constitutionally protected rights and prediction based upon in-

be rational, there must be an arguable, if not demonstrable, connection between the predictive information—in this case, drug use—and crime. Although much literature has reported on this relationship,[34] there are questions about its interpretation, such as whether it is causal or spurious.

In the pretrial context, theoretically, the concern is for crime that might be committed within the limited period of pretrial release, perhaps averaging no more than ninety days before a case is adjudicated, although possibly extending considerably longer depending on the court system. However interpreted, the empirical support of the general relationship between drug use and pretrial crime is not uniformly strong. In the area of pretrial release, several studies have suggested a relationship at the bivariate level between misconduct during pretrial release and active defendant drug abuse.[35] Whether the relationship survives the exercise of appropriate statistical controls is not at all assured at this stage of the research and is the source of continued study.[36]

While acknowledging the centrality of prediction in the bail or pretrial release decision task, the Supreme Court in *Salerno* refused to be bound by statistical notions of error, such as discussion of false positives and false negatives. Thus, in evaluating the use of drug testing of defendants at the pretrial release stage, one might suppose that the Court would not reject its utility merely on statistical grounds—such as whether or not knowledge of defendants' drug test results really adds to a judge's statistical ability to predict defendants' criminal proclivities. Rather, the Court might view such data as relevant and reasonably objective information appropriately playing a role in the classification of defendants for the purposes of the release decision.[37]

The second way in which the *Salerno* decision might have a bearing on the acceptance of drug testing is in testing's proposed role as a constraint on the criminal activities of released defendants. Proponents of drug testing at the bail stage argue that a program of drug testing during the release period will reduce the use of drugs among defendants—and hence their criminal activities. At the very least, they argue, ongoing testing provides a mechanism for distin-

formation that can only be obtained by intruding upon constitutionally protected rights of privacy.

34 *See generally* R. GANDOSSY, *supra* note 3.

35 *See* Toborg & Kirby, *supra* note .

36 Recent studies questioning the strength of this relationship include *supra* note 10, and Goldkamp, Gottfredson, & Weiland, *supra* note 10.

37 *See generally* Morris & Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985).

guishing individuals who are willing and able to comply with court-ordered conditions of release from those who are not, before those individuals fail to appear for trial.[38] Provided that the Court would accept the reasoning that evidence of drug abuse (via drug test results) is an indicator of criminality, it may well view conditional release type drug monitoring programs as appropriately "disabling the defendant from executing the threat" of criminality detected by testing in the first place.[39]

Drug testing after an intitial appearance is also offered by proponents as a means of securing the release before trial of defendants who would otherwise remain detained. That is, testing would be a condition of pretrial release intended as an "alternative to incarceration."[40] This rationale—that monitoring the urine of released defendants would serve as a "less restrictive" bail option than detention—is proposed independently of its empirical grounding.

The advent of drug testing at the bail stage of the criminal process raises important legal and ethical considerations that extend beyond those considered by the Court in *Salerno*.[41] These kinds of questions—as well as the practical questions concerning predictive power—will ultimately affect how society will view use of urinalysis test results as an informational tool in bail decisionmaking and how the criminal justice system will be able to employ this technology. This Article begins to address these ethical/legal questions by exploring pressing threshold issues regarding the constitutionality of the actual process of conducting urinalysis on all arrestees prior to their first appearance.[42] Regardless of the predictive power of urinalysis, if mandatory bail stage testing unduly intrudes upon the

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38 *See, e.g.*, J. CARVER, *supra* note 6; J. STEWART, *supra* note 12; Brief of the United States as Amicus Curiae at 15, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987).

39 United States v. Salerno, 481 U.S. 739 (1987).

40 *See Pretrial Drug Testing*, *supra* note 12.

41 As is demonstrated *infra*, the legal questions cannot be completely divorced from the empirical ones. In Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia remanded with directions to the district court to make findings of fact regarding empirical support for the assertion that positive urinalysis is positively correlated to successful performance on pretrial release.

42 Bail stage urinalysis raises other legal issues that we have yet to explore as fully as the fifth, fourth, and fourteenth amendment issues related to the legitimacy of such testing. There are a number of very practical legal concerns that are best addressed in the context of the law of particular jurisdictions. Arrestee urinalysis is futile if the information cannot be used at the bail stage. Bail laws in the jurisdiction must be investigated to determine whether drug use is a permissible consideration in the pretrial release decision and whether drug testing conditions may be imposed on pretrial release. *See, e.g.*, 18 U.S.C. § 3142 (1982); D.C. CODE ANN. § 23-1321 (1981 & Supp. 1988). If not, devel-

constitutional rights of criminal defendants, it is unlikely to survive

opment of a drug testing program must be preceded by appropriate legislative action. *See, e.g.*, PADD Enabling Legislation, ARIZ. REV. STAT. ANN. §§ 3967-68 (1987).

Even if there is appropriate legislation, imposition of testing conditions on pretrial release may be challenged as implicating the liberty interest protected by the due process clause. Bell v. Wolfish, 441 U.S. 520, 530 (1979)(due process protects liberty interests of persons accused of crime). It is unlikely, however, that this argument will prevail because the primary purpose for urine testing is regulatory rather than punitive. Consequently, due process requires only that urinalysis conditions be reasonably related to the legitimate government interest in preventing non-appearance and protecting community safety. *Id.* at 539. The rationality of the relationship cannot be disputed under this deferential standard. However, closer scrutiny of the government's goals and the means-end relationship is required under the fourth amendment. *See id.* at 559-60; *infra* notes 185-190 and accompanying text.

Other issues relate to the use of urinalysis results in judicial decisionmaking. At the trial stage (and in other judicial proceedings), in order for the test result to be introduced into evidence, the urinalysis technique must be recognized as a legitimate scientific test in the jurisdiction. *See, e.g.*, Jones v. United States, No. 86-31, slip op. at 24 (D.C. Ct. of App. Sept. 9, 1988)(double EMIT test presumptively reliable and, therefore, generally admissible in D.C. courts). In addition, chain of custody requirements must be met in order to assure that the test results reveal the urine contents of the proper individual. Because reports of test results are hearsay, special procedures may be necessary in order to introduce the evidence if the hearsay rule applies to bail and bail revocation hearings in the jurisdiction. *See Id.* at 7 n.3 (holding D.C. Pretrial Services urine test results admissible under the business records exception to the hearsay rule). Rules, if they exist, regarding the burden of proof at bail and bail revocation hearings are also very important. *See generally* Goldkamp, *supra* note 17, at 33-38 and Table 9. Questions concerning accuracy of certain testing techniques in identifying drug users and the reliability of the results become more significant as the burden of proof increases. Finally, the extent of the accused's right to rebut evidence at bail and bail revocation hearings is particularly important in light of the potential for false positives.

Many of these evidentiary questions loom larger at the stage in which the government seeks to rescind pretrial release or convict the defendant of criminal contempt because of failure to comply with regular testing conditions than they do at the bail hearing itself where the evidentiary standards may not be as rigorous. *See* United States v. Roy, 14 Daily Washington L. Rptr. 2481, 2491 (D.C. Super. Ct. 1986)(positive EMIT test alone is insufficient to show drugs used in violation of condition of pretrial release beyond a reasonable doubt). Failure of jurisdictions to meet the requisite evidentiary standards at either stage in the operation of their testing programs may amount to a denial of due process. *Cf.* Washington Post, Sept. 9, 1988, § C at 1 (reporting on appeal to D.C. Court of Appeals from lower court decision holding defendant in contempt of court for failure to comply with the condition of pretrial release requiring periodic clean urine samples; the issue raised is whether contempt conviction on basis of EMIT test violates due process).

Similarly, the prospect of increased adoption of pretrial detention and the possibility that urinalysis test results could be used to help inform that decision place a still different light on these issues. In *Salerno*, 481 U.S. 739 (1987), the Court held that preventive detention was permissible when the procedures under review were followed. The Bail Reform Act requires that it must be established by clear and convincing evidence that the defendant falls within the statutory risk classifications before release can be refused. 18 U.S.C. § 3142(f). To the extent that evidence of drug abuse established through pre-bail testing is relevant to the outcome of detention hearings, the adequacy of screening immunoassay technologies to meet this evidentiary standard without other corroborative evidence is uncertain at best. *Cf. Roy*, 114 Daily Washington L. Rptr. at

very long as a criminal justice innovation.[43] This Article reviews fourth, fifth, and fourteenth amendment questions that arise when drug testing is applied to defendants entering the criminal process and assesses their likely resolution and impact on the increasing number of bail stage testing programs.

II. Bail Stage Urinalysis in Operation

Drug testing at the bail stage of the criminal process differs from drug testing in other settings principally because of the short period of time between the collection of a urine specimen from the arrestee and the first judicial stage at which test results are made available to the court for its deliberation concerning pretrial release. The short "turnaround" time means, for one thing, that more time-consuming but more accurate urinalysis procedures cannot be conducted, at least not on a routine basis. As a result, one of the less costly and quicker screening technologies—such as the EMIT system used in the District of Columbia—is used.[44] Screening—as opposed to confirming—tests are more general in detection capacities

2491 (single positive EMIT test insufficient to prove drug use beyond a reasonable doubt). Although there is no constitutional right to bail, *see Salerno*, 481 U.S. 739 (1987), in the detention decision context, as opposed to the decision to set restrictive conditions of pretrial release, scrutiny of the testing results might be more demanding given the weightier defendant interests at stake. This may alter the outcome of fourth amendment analysis, *see generally supra* notes 95-98 and accompanying text, and increase procedural due process requirements.

[43] *See* AFGE v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986). In *Weinberger*, the court admonished the government that the end (useful information) does not necessarily justify the means (intrusion on fourth amendment rights):

> As a final note on the topic of "reasonableness," the Court addresses the government's adamant argument that drug use is "simply incompatible" with federal employment . . . the Court does not take issue with it. The question here, however, is not *whether* drug use, off-duty or on-duty is incompatible with federal employment. Rather, the question is *by what means* is it permissible to come by evidence of such drug use. The growing of marijuana in an employee's basement would certainly not be appropriate, but surely the government cannot be heard to say that a warrantless search of all civilian employees' basements is permissible in order to find out who is growing marijuana. Similarly, the random search of civilian employees' urine, a bodily fluid generally retained for disposal when and where an individual chooses, is impermissible under any but the most urgent of circumstances. The much-quoted language of the district court in *McDonell v. Hunter* puts it best: "There is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists). That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one."

Id. at 735-36 (emphasis in original).

[44] Goldkamp, Gottfredson, & Weiland, *supra* note 10, at 21-32. Several screening technologies are available, including radioimmunoassay (RIA), and enzyme immunoassay (EMIT). *See* U.S. Dep't of Health and Human Services, *Urine Testing for Drugs of Abuse*, in Nat'l Institute on Drug Abuse, Research Monograph 73 (R. Hawks and C. Chiang ed. 1986).

and provide a less specific, semi-quantitative measure of the amount of drug metabolites present in urine. Although there is debate about the exact level of accuracy associated with screening tests, it is arguably very high.[45]

Although professionals in the field generally recommend that screening test results be repeated (confirmed) on the more accurate gas chromatography/mass spectometry technology when positive test results can have serious implications for the person tested (such as when employment or military service can be terminated),[46] this is seldom practical in the bail stage testing. Rather, screening tests may be repeated and the urine may be saved for later confirmation, in the event that the results are contested.

Drug testing for pretrial release determinations differs as well from other kinds of testing programs in the standard of proof governing the use of the information. Currently, proponents believe that results of drug tests can be used just like any other information pertaining to a defendant's background, including evidence of drug or alcohol abuse obtained by other methods,[47] that would assist the judge or judicial officer in making the most informed bail/pretrial release decision. Thus, rather than regarding drug test results in a fashion similar to evidence to be submitted at the trial stage, at the bail stage they are viewed in the context of other background information. Given the often unreliable nature of background information on defendants at this stage of the criminal process, drug test results are viewed as a much more objective source than the usual information obtained through interviews with defendants about their histories of substance abuse.[48]

Procedures for conducting testing in the few sites implementing testing programs are based primarily on the procedures developed by the District of Columbia Pretrial Services Agency's pilot model.[49] Once a defendant has been arrested and confined to the lockup in that city, a pretrial services worker will ask the defendant for a speci-

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45 *See generally* Council on Scientific Affairs, *Council Report: Scientific Issues in Drug Testing*, 257 J. A.M.A. 3110-14 (1987) for a discussion of the relationship between accuracy and sensitivity.

46 *See, e.g., id.* at 3113; Blanke, *Quality Assurance in Drug Testing*, 33 CLINICAL CHEMISTRY 41B (1987); Dep't of Health and Human Services, Alcohol, Drug Abuse and Mental Health Administration, *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, NIDA, *Fed. Reg.* 11,970-989 (April 11, 1988).

47 *See, e.g.*, National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion*, 15-18 (1978).

48 *See* J. CARVER, *supra* note 6; J. STEWART, *supra* note 12; *Pretrial Drug Testing*, *supra* note 12.

49 For a description of the District of Columbia program, see J. CARVER, *supra* note 6.

men and explain the purpose of the testing program. The defendant is then asked to sign a waiver form indicating voluntary compliance. The defendant is required to produce the specimen under observation by a pretrial services worker in order to assure authenticity of the specimen and to preserve the chain of custody. After the full pretrial services interview has been completed and background information summarized, the test results are noted and the combined information goes into a pretrial services recommendation for pretrial release.[50]

The judge is shown/informed whether or not the defendant tested positively for a drug of abuse (marijuana is excluded), or whether the test was refused or not completed for other reasons. With the test results as well as the more general background information, the judge proceeds to determine pretrial release. In the event that a defendant has not provided a specimen, the judge may require one as a condition of release.[51] Given positive results for a drug of abuse, the judge may grant pretrial release on the condition that the defendant participate in a program of urine monitoring.[52]

In the District of Columbia, by statute,[53] results are to remain confidential and be used only for determining pretrial release or for

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50 *See generally* J. CARVER, *supra* note 6; *Pretrial Drug Testing*, *supra* note 12.

51 Brief of the United States as Amicus Curiae at 3-4, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987). Some jurisdictions are following this "post-arraignment" procedure in all cases rather than using mass pre-arraignment testing. This effort to avoid constitutional difficulties may well be futile. First, *Berry* establishes that post-arraignment testing implicates fourth amendment rights. *Berry*, 833 F.2d at 1034. Second, to the extent that this approach relies on the argument that because urine testing is regulatory rather than punitive because it is a permissible condition of pretrial release, it fails to distinguish between the requirements of substantive due process and the fourth amendment. It is permissible to impose conditions on pretrial release that implicate interests protected by the due process clause so long as they are reasonably related to a non-punitive government interest. *See* Bell v. Wolfish, 441 U.S. at 523, 534, 539 (1979); United States v. Salerno, 481 U.S. 739 (1987). Where fourth amendment rights are implictated the analysis is different, however, and the government burden is more difficult requiring, *inter alia*, consideration of the government interest and clear scrutiny of the means-end fit. *See Bell*, 441 U.S. at 558-60 (discussing standard for reviewing pretrial detainees' claim that body cavity searches violated their fourth amendment rights); *Berry*, 833 F.2d at 1034-36 (explaining standard to be applied to determine whether post-arraignment testing violates fourth amendment). Thus, even if testing is reasonably related to a legitimate regulatory purpose, fourth amendment principles may prohibit the government from conditioning pretrial release on a urine test, regardless of the specific timing and context, without *some* factual basis other than arrest on probable cause. *See* notes 173-175 and accompanying text. *Cf.* United States v. Salerno, 481 U.S. 739 (1987) (upholding pretrial detention as non-violative of due process where, *inter alia*, dangerousness must be proved by clear and convincing evidence).

52 *See generally* J. Carver, *supra* note 6; *Practical Drug Testing*, *supra* note 12.

53 D.C. Code Ann. § 23-1324 (1981 & Supp. 1988).

supervising released defendants.[54] Thus, results should not be shared with the prosecutor or the probation department for other uses.[55] In addition, very careful arrangements had to be devised to assure continued chain of custody of the urine specimen and its results (so that appropriate results were attributed to the correct individuals).

As the District of Columbia program was being set up—and as new sites consider implementing drug testing programs—many difficult issues, legal, practical and ethical had to be addressed. Questions about error rates due to the technologies employed or due to human error are often raised, for example.[56] Questions about the sufficiency of chain of custody procedures and about re-testing and appeals have also been discussed.[57] Currently, research is addressing many of these questions and courts are beginning to consider others.[58]

This Article begins addressing those issues by considering only the constitutional issues associated with the process of mandatory drug testing, because, should such testing programs fail to meet constitutional standards, other questions regarding the propriety and procedure for using the information in bail and bail revocation decisions will be moot. Requiring persons arrested for crime to produce urine samples prior to the first judicial appearance potentially implicates three constitutional rights: the fifth amendment privilege against self-incrimination; the right to due process, protected by the fifth and fourteenth amendments; and the prohibition against unreasonable searches and seizures contained in the fourth amendment. The self-incrimination and due process questions are easily answered but the strictures of the fourth amendment raise much more difficult and interesting questions about the propriety of bail stage urinalysis.[59]

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54 *Id.*

55 *But see* Jones v. United States, 833 F.2d 335 (D.C. Cir. 1988) (positive pre-arraignment drug test admissible at trial for possession of a controlled substance to rebut defendant's testimony that he did not know the substance he picked up from street was cocaine). *Jones* is consistent with D.C. CODE ANN. § 23-303(d) which provides that information obtained by the Pretrial Services Agency "shall not be admissible on the issue of guilt in any judicial proceeding, but such information may be used . . . for the purposes of impeachment in any subsequent proceeding."

56 *See, e.g.*, Goldkamp, Gottfredson, & Weiland, *supra* note 10, at 21-32.

57 *See generally Pretrial Drug Testing*, *supra* note 12.

58 *See generally* Goldkamp, Gottfredson, & Weiland, *supra* note 10. *See also* Jones v. United States, 833 F.2d at 24 (D.C. Cir. 1988); United States v. Roy, 14 Daily Washington L. Rptr. 2481, 2491 (D.C. Super. Ct. 1986).

59 The discussion in the remainder of this Article is narrowly focused on the permissibility of the mandatory urine tests performed on all arrestees held for bailable offenses

III. The Privilege Against Self Incrimination

On first consideration, jurisdictions considering the implementation of a drug testing program might question whether urine testing of arrestees violates the privilege against self-incrimination because individuals are required to provide the government with evidence (urine) that they committed a crime (illegal use and possession of controlled substances).[60] However, the privilege against self-incrimination protects individuals from being compelled by the government to give only testimonial or communicative evidence.[61] Because urine testing involves the observation and analysis of a physical attribute of a person's body, it is non-testimonial and the fifth amendment privilege against self-incrimination is not applicable.[62]

Nonetheless, in response to fifth amendment concerns, the District of Columbia and the other jurisdictions implementing drug testing programs have moved to prevent use of test results by other agencies, such as the prosecutor's office, for purposes other than the pretrial release decision. While these assurances are unnecessary to protect test subjects' privilege against self-incrimination, they are relevant to the question of the reasonableness of urine testing as a fourth amendment search and seizure and therefore should not be discarded.[63]

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prior to their first judicial appearance. Similar issues are raised when an order granting pre-trial release is conditioned upon provision of an initial urine sample despite lack of individualized suspicion of drug use as in Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987). *See supra* notes 59-61 and accompanying text. Once pretrial release has been conditioned upon periodic urinalysis because initial test results were positive, however, the constitutional implications change considerably. Questions under the fourth, fifth, eighth and fourteenth amendments as well as statutory and common law regarding the propriety of including urine testing as a condition of release and of revoking release or convicting releasees of criminal contempt because of failure to comply with the condition are not addressed in this Article.

60 W. LaFave & J. Israel, Criminal Procedure § 8.10, at 386-87 (1985). In the absence of legally binding guarantees of immunity, the potential for direct or indirect use of the information to convict an individual of a crime makes it incriminating. *Id.* § 8.11, at 393-98.

61 Schmerber v. California, 384 U.S. 757, 761, 764 (1966).

62 National Treasury Employee's Union v. Von Raab, 816 F.2d 170, 181 (5th Cir. 1987) *cert. denied*, 109 S. Ct. 1637 (1989); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985); Hampson v. Satran, 319 N.W.2d 796, 800 (N.D. 1982).

63 See *infra* notes 125-126 and accompanying text for a discussion of the relevance of the confidentiality of test results to reasonableness of the search procedure under the fourth amendment. If urine testing did implicate the privilege against self-incrimination, mere oral or written promises to limit the use of the information to the bail decision would not be sufficient to overcome constitutional objections to mandatory testing. Only a legally binding guarantee of immunity and careful procedures to insure that the

IV. Due Process Prohibition Against Outrageous Government Conduct

Among the many substantive and procedural rules imposed on government by the due process clauses of the fifth and fourteenth amendments is a prohibition against gathering evidence in a manner that "shocks the conscience."[64] At first blush it might appear that because urine samples usually are provided while the subject is being observed, urinalysis shocks the conscience. This claim as well as arguments that techniques of facilitating urination, such as requiring test subjects who have difficulty providing a sample to drink liquids, violate due process have been rejected.[65] Nonetheless, program planners and administrators should be aware of the possibility that extraordinarily unseemly deviations from normal procedure might give rise to due process claims.

V. Prohibition Against Unreasonable Searches and Seizures

The fourth amendment requires that all searches and seizures conducted by government agents be reasonable regardless of whether the fruits of the search will be used to prosecute an individual for a crime or for any other "non-criminal" government purpose.[66] Whether urine samples are obtained by the police, civilian police department employees, or court agency employees (for example, pretrial services or probation department workers), state action is involved. The constitutional right to be free from unreasonable searches and seizures is not diminished by the fact that the exclusionary remedy may be inapplicable at bail and bail revocation hearings.[67] Therefore, if urinalysis is a search and seizure, bail stage urinalysis must be constitutionally reasonable in order to be permissible under the fourth amendment.

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evidence was not used directly or indirectly by the prosecutor would be sufficient. *See generally* W. LaFave & J. Israel, *supra* note 60, § 8.11, at 393-98.

64 Rochin v. California, 342 U.S. 165, 172 (1952).

65 *See, e.g.*, Yanez v. Romero, 619 F.2d 851, 854 (10th Cir. 1980). In *Yanez*, the defendant challenged the use of results of a urine test to convict the defendant of possession of morphine. The court held, over one judge's dissent, that obtaining the urine sample by threatening to use a catheter did not shock the conscience because the threat itself was sufficient to induce the defendant to urinate. The court implied that actual use of a catheter may violate due process. *Id.*

66 U.S. Const. amend. IV.

67 *Cf.* United States v. Leon, 468 U.S. 897, 906 (1984)(the exclusionary rule is a judicially created remedy for fourth amendment violations and thus separable from the right to be free from unreasonable searches and seizures by government agents).

A. URINALYSIS IS A SEARCH AND SEIZURE

The fourth amendment protects individuals from unreasonable government intrusions into their reasonable expectations of privacy.[68] Virtually every court that has addressed the issue has concluded that urinalysis implicates the right of privacy protected by the fourth amendment.[69] Underlying these decisions is recognition that, in contemporary American society, urination is generally considered to be a private matter. Thus, courts have no difficulty reaching the conclusion that one's objectively reasonable expectation of privacy is violated when one is forced to urinate while being observed by other persons.[70]

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68 *See* Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring); W. LAFAVE & J. ISRAEL, *supra* note 60, at § 53.2(a). This determination requires a two step inquiry: (1) whether there was a subjective expectation of privacy; and (2) whether there was an objectively reasonable expectation of privacy. The *Katz* standard has undergone a subtle transformation in recent years. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987), in which the plurality defined the standard for determining whether fourth amendment rights were implicated by government activity as "whether the conduct infringed 'an expectation of privacy that society is prepared to consider reasonable,' United States v. Jacobsen, 466 U.S. 109, 113 (1984)," and suggested that whether the government agent conducting the search was a law enforcement official is relevant to the analysis. *O'Connor*, 480 U.S. at 1498.

69 *See, e.g.*, Lovvorn v. City of Chatanooga, 846 F.2d 539, 1542 (6th Cir. 1988); Penny v. Kennedy, 846 F.2d 1563, 1565 (6th Cir. 1988); RLEA v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988), *rev'd*, 109 S. Ct. 1902 (1989); NFFE v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1635 (1989); Everett v. Napper, 833 F.2d 1507, 1511 (llth Cir. 1987); Berry v. District of Columbia, 833 F.2d 1031, 1034 (D.C. Cir. 1987); Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986); Schaill v. Tippecanoe School Corp., 679 F. Supp. 833, 850, 855 (N.D. Ind. 1988); Wrightsell v. City of Chicago, 678 F. Supp. 727, 730 (N.D. Ill. 1988); Transport Workers v. SEPTA, 678 F. Supp. 543, 549 (D.C. Pa.), *aff'd*, Brotherhood of Locomotive Engineers v. SEPTA, 863 F.2d 1110 (1988); Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987); PBA v. Washington Township, 672 F. Supp. 779, 784 (D.N.J. 1987), *rev'd*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); AFGE v. Dole, 670 F. Supp. 445, 447 (D.D.C. 1987); Taylor v. O'Grady, 669 F. Supp. 1422, 1435 (N.D. Ill. 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), *modified*, 809 F.2d 1302 (8th Cir. 1987); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 64, 510 N.E.2d 325, 330, 517 N.Y.S.2d 456, 461 (1987); Caruso v. Ward, 133 Misc. 2d 544, 547, 506 N.Y.S.2d 789, 792 (Sup. Ct. 1986), *aff'd*, 131 A.D.2d 214, 520 N.Y.S.2d 551 (1987). *Cf.* Allen v. City of Marietta, 601 F. Supp. 482, 488 (D. Ga. 1985)(expresses "some doubt" whether urinalysis is a search but "feels constrained by current law" to hold that it is).

70 *See, e.g.*, *Lovvorn*, 846 F.2d at 543; *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 64, 510 N.E.2d at 330, 517 N.Y.S. at 461; *Feliciano*, 661 F. Supp. at 586; *Taylor*, 669 F. Supp. at 1435. See *infra* notes 126-128 and accompanying text for a discussion of the degree of intrusiveness of the search when urinalysis is observed. In fact, public urination is widely prohibited and certainly frowned upon. Yet, most urinalysis programs require that urination be observed in order to assure that the samples are genuine. This

Unobserved urine testing—which would present chain of custody and accuracy problems for drug testing programs—is also subject to fourth amendment protections.[71] A number of courts have concluded that because individuals have a reasonable expectation of privacy in the personal information that their bodily fluids contain—urinalysis can reveal, for example, information regarding a test subject's medical condition and the subject's use of prescription and over the counter drugs in addition to use of illegal drugs—analysis of urine also constitutes a search.[72] Other courts have reasoned that requiring an individual to produce urine for inspection in a particular time, place, and manner is unreasonable because it violates one's sense of personal dignity.[73] In short, the processes of obtaining and

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procedure was adopted in the District of Columbia program. Samples are collected from arrestees while they are in the court house lock-up. Arrestees must urinate in a position from which the pretrial services employee can observe from outside the lock-up. Other persons in the lock-up are able to observe the procedure as well.

[71] *See, e.g., Lovvorn*, 846 F.2d at 543; Jones v. McKenzie, 833 F.2d at 338, *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); *Weinberger*, 818 F.2d at 942; *Schaill*, 679 F. Supp. at 855; *Taylor*, 669 F. Supp. at 1435; AFGE v. Weinberger, 651 F. Supp. 726, 734 (S.D. Ga. 1986); NFFE v. Carlucci, 680 F. Supp. at 435 (D.D.C. 1988) (lack of visual observation limits, but does not eliminate, intrusiveness of search). Whether the process is observed, however, may affect the degree of intrusiveness courts assign to urinalysis. *See infra* notes 126-131 and accompanying text. *But see Weinberger*, 651 F. Supp. at 734 (concluding that lack of direct observation does not go "very far toward minimizing the overall intrusion"); Jones v. McKenzie, 833 F.2d at 338, *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989) (observation increases seriousness of already intrusive search); PBA v. Washington Township, 672 F. Supp. at 787, *cert. denied*, 109 S. Ct. 1637 (1989) (observation increases seriousness of already intrusive search).

[72] *See, e.g., Burnley*, 839 F.2d at 580 *rev'd*, 109 S. Ct. 1902 (1989); *Washington Township*, 672 F. Supp. at 784 *cert. denied* 109 S. Ct. 1637; *Feliciano*, 661 F. Supp. at 586. This argument hinges on the fact that given current testing techniques, urinalysis may either directly or indirectly reveal information about medical conditions other than the use of illegal drugs. *See* Whalen v. Roe, 429 U.S. 589, 602 (1977); "Applicants for D.C. Police Secretly Tested for Pregnancy," Washington Post, Nov. 5, 1987, at A1, col. 1, *cited in Carlucci*, 680 F. Supp. at 434 n.17 (revealing that pregnancy tests were conducted on urine samples of women applying for jobs as police officers). If test methods were refined to reveal only whether a person had or had not used drugs, an argument could be made that because one is not legally entitled to take drugs, there is no reasonable expectation of privacy in information revealing drug use. *See* United States v. Jacobsen, 466 U.S. 109 (1984)(testing of a small amount of a white powdery substance seized without probable cause or a warrant to determine whether it was cocaine was not a search because there is no legitimate expectation of privacy in contraband); United States v. Place, 462 U.S. 696 (1983)(sniffing of luggage by drug detecting dog was not a search because there is no legitimate expectation of privacy in contraband). *But see Feliciano*, 671 F. Supp. at 586 ("But even if urinalysis were restricted to seeking information about illicit drug use, it would still invade personal privacy. The fourth amendment requires that such invasions of privacy be carefully controlled, even though the government's end in an investigation is justified."). *Accord Washington Township*, 672 F. Supp. at 790, *cert. denied*, 109 S. Ct. 1637 (1989).

[73] *See, e.g., Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 64, 510 N.E.2d at 330, N.Y.S.2d at 461.

of testing the sample each separately constitute fourth amendment searches and seizures.

B. IS URINALYSIS REASONABLE?

Because collecting and testing the urine of arrestees for drug metabolites amounts to a search and seizure, it must be reasonable to perform urinalysis in order for it to be permissible under the fourth amendment.[74] The fourth amendment also requires that the procedures for conducting urinalysis be constitutionally reasonable.[75]

To date, no court has adjudicated the difficult issue of whether, or under what circumstances, mandatory pre-arraignment urine testing as permitted, for example, by the recent Arizona legislation,[76] is a reasonable search and seizure. The constitutionality of other aspects of the District of Columbia drug testing program however, is presently before the courts. *Berry v. District of Columbia*[77] involves a claim that plaintiff's fourth amendment rights were violated when he was ordered by a bail commissioner to provide a urine sample as a prerequisite for obtaining pretrial release and, because the initial test was positive, to submit to regular periodic urinalysis while awaiting trial. The United States Court of Appeals for the District of Columbia remanded for development of a factual record on which the permissibility of post-arraignment urinalysis under the fourth amendment can be evaluated.[78]

Although the constitutionality of mass pre-arraignment testing is not at issue in *Berry*, the ultimate outcome of that litigation may be determinative of the questions raised in this Article. For example, the court could decide that there is no correlation between positive urine tests and dangerous crime and that urinalysis for the purpose of informing the pretrial release decision is always unreasonable. Given the general reluctance of the judiciary to engage in critical examination of social science research,[79] however, that outcome is

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74 *See* Berry v. District of Columbia, 833 F.2d 1031, 1034 (D.C. Cir. 1987).

75 *Id.* at 1036.

76 *See supra* note 14.

77 833 F.2d at 1031.

78 *Id.* at 1034. Among the evidence that the appellate court suggested be developed is proof of a positive correlation between drug use and arrestee performance on pretrial release. *Id.* at 1035. The court further implied that even if there is a correlation between positive test results and pretrial crime, it will be necessary to show that those crimes posed threats to community safety. *Id.* at 1035 n.17.

"Arraignment" refers to the first judicial appearance after arrest at which time the pre-bail release decision is made in Washington, D.C.

79 *See, e.g., Salerno*, 481 U.S. at 748 (1987); McCleskey v. Kemp, 481 U.S. 278 (1987).

unlikely. As a consequence, questions relating to the constitutional legitimacy of pre-bail arrestee urinalysis will ultimately have to be resolved by asking whether urinalysis of arrestees fits into any of the many categories of searches and seizures that have been deemed reasonable under the fourth amendment by the courts.

The epitome of a constitutionally reasonable search is one conducted pursuant to a valid warrant issued upon probable cause. Neither of these criteria can be met in the case of bail stage urine testing. Urine testing of arrestees is normally, although not necessarily, performed without probable cause—or even the less rigorous standard of reasonable suspicion—to believe that evidence of drug use will be found in the subject's urine.[80] The fact that some studies have shown that a large percentage of arrestees in some jurisdictions are drug users is not sufficient to establish probable cause or reasonable suspicion as to any particular arrested individual.[81] Without probable cause, it is impossible to obtain a valid search warrant permitting urinalysis.

There are a number of well established exceptions to the search warrant and the probable cause requirements. Any one of three broad categories of exceptions could conceivably be offered to justify warrantless arrestee urinalysis performed without probable cause: a search permitted by virtue of the subject's lawful arrest; a non-criminal "administrative" search;[82] or a consent search.

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80 Except for the small minority of test subjects who have been arrested pursuant to an arrest warrant, urine samples are obtained before a judicial officer has had an opportunity to determine whether there is probable cause to hold the arrestee for any crime at all. The Public Defender Service of the District of Columbia has noted that "[a] significant number of cases—juvenile and adult—are 'no papered,' that is, dismissed without formal charges having been filed." Brief of the Public Defender Service for the District of Columbia as Amicus Curiae at 13, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987).

81 In support of the District of Columbia testing program at issue in *Berry*, the United States as amicus curiae argued that "an exceptionally large percentage of persons arrested in the District are current drug users." *Berry*, 833 F.2d at 1036. The D.C. Circuit correctly observed that this fact would not be a basis for a finding of suspicion, if individualized suspicion was required.

82 The term "administrative" appears in quotation marks because of the varying interpretations accorded it in legal literature. At times, the term is used to refer to any non-criminal search or seizure performed by a government agent. At other times the term is used to refer only to the much narrower category of searches conducted by, or under the auspices of, certain administrative agencies in the performance of their regulatory functions. The term as used in this Article has the former meaning. Searches performed in the context of highly regulated industries are specifically designated as such and are considered to be only one of a number of varieties of the broad category of non-criminal administrative searches.

1. Searches and Seizures of Property from Persons Who Have Been Arrested for Suspected Criminal Activity

Individuals do not, by virtue of being arrested, lose their fourth amendment right to privacy. Nonetheless, government officials possess relatively extensive rights to search arrestees and seize property in their possession[83] under two exceptions to the search warrant and probable cause requirements: searches incident to arrests and booking (or inventory) searches. To be constitutionally reasonable, the scope of a search in either category must be reasonably related to the justifications that the Supreme Court has articulated for permitting the searches to be conducted without a warrant or probable cause.

a. Search incident to arrest

A search incident to an arrest permits police to search an arrestee's person and the area within his or her immediate control contemporaneous with the arrest.[84] The search, for which neither probable cause nor a lesser degree of individualized suspicion is needed, is justified by: (1) the need to seize weapons or other items the arrestee might use to assault the arresting officer or to escape; and (2) the need to prevent destruction of evidence of the crime for

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[83] Arrest for a crime does not alter one's fourth amendment rights with respect to other property. For example, in the absence of exigent circumstances, police cannot search the entire house of a person who has been arrested for a crime without probable cause and a search warrant. *Cf.* Arizona v. Hicks, 480 U.S. 321 (1987)(refusing to hold that any search of an arrestee or his property is reasonable).

[84] Chimel v. California, 395 U.S. 752 (1969). There is some question as to how temporally proximate to the arrest the search incident to an arrest must be. There is authority indicating that a search incident to an arrest can occur at booking and as long as ten hours after an arrest. *See* United States v. Edwards, 415 U.S. 800 (1974)(holding that seizure of defendants' clothing ten hours after his arrest and the subsequent search of the clothing for paint chips did not violate the fourth amendment despite the lack of a warrant where police had probable cause to believe that the paint chips would be found in the clothing). The justification for upholding the warrantless search in *Edwards*, however, is uncertain. The majority opinion at varying points refers to searches incident to arrest and to inventory searches and seizures of property in an arrestee's possession as justifying the search. *See, e.g., id.* at 803 (referring to search incident to arrest); *id.* at 804-05 (referring to usual procedure incident to arrest and incarceration). To add to the confusion, the Court was careful to limit its decision to situations in which there is probable cause for the search despite the absence of a warrant. *Id.* at 808 n.9. Probable cause is not a requirement for either a search incident to an arrest or an inventory search, and urinalysis is not a probable cause search. Further, the Supreme Court refused to extend *Edwards* to hold that any search of an arrestee or his or her property is reasonable. *See id.* at 808-09. *Cf. Hicks*, 480 U.S. at 325 (warrantless search of arrestee's apartment under exigent circumstances did not permit police to extend search beyond scope justified by the exigency in absence of probable cause).

which the arrest was made.[85] The search incident to an arrest is reasonable because of the important state interest in removing weapons and evidence from the area where the arrestee can personally gain access to them. The exception does not extend to evidence that cannot be destroyed or concealed by the arrestee because it is beyond his or her reach.[86]

Urinalysis is not reasonably related to either of the justifications for searches incident to arrest. Urine testing has no conceivable relevance to discovery of a weapon or other items that the arrestee may use to harm the arresting officer or to effectuate an escape. Nor can urinalysis be construed as somehow related to preventing destruction of evidence by the arrestee. The presence of drug metabolites in urine has no relevance as evidence of most crimes for which test subjects have been arrested.[87] Even if the individual was arrested for a drug related crime, urinalysis programs at the pre-bail stage have been explicitly designed *not* to obtain evidence of the crime[88] and it is not evidence that is in danger of destruction if it is not immediately removed from the arrestee.[89] Therefore, urine testing

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85 *Chimel*, 395 U.S. at 752.

86 *See id.*

87 Nor is it relevant as evidence of any other crime in jurisdictions that do not criminalize actual ingestion of controlled substances. Police can only seize an item discovered during a search incident to an arrest if they have probable cause to believe it is evidence, an instrumentality or fruit of a crime. W. LAFAVE & J. ISRAEL, *supra* note 60, at 60.

88 See *supra* notes 41-42 and accompanying text for a discussion of the D.C. program. The information obtained through urinalysis ostensibly is used solely for informing the pretrial release decision. *But see* D.C. CODE ANN. § 23-1303(d) (1981 & Supp. 1988); Jones v. United States, 833 F.2d 335 (D.C. Cir. 1988) (urinalysis results may be used at trial for impeachment purposes).

89 In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that a blood sample or a comparable intrusion into the body of an arrestee could be made without a warrant only when the search was performed in a reasonable manner, there was "a clear indication that in fact [the evidence] will be found" (a stricter standard than probable cause), and there were exigent circumstances because the evidence was evanescent—that is, it would be lost if the police were required to take the time necessary to obtain a warrant. Although urinalysis does not require an intrusion into the body, most courts that have considered the question have concluded that urinalysis is either equal to or more invasive than a blood test because it requires test subjects to perform a private bodily function under observation. *See infra* note 149. Therefore, the *Schmerber* standard would apply.

Warrantless urinalysis, however, does not meet the *Schmerber* standard. First, drug metabolites are not evanescent evidence. *But see infra* note 135 (discussing cases in which court assumed drugs were evanescent). Most drug metabolites remain in the urine for at least 48 hours. Further, unlike blood alcohol or breathalyzer tests, urinalysis does not reveal whether a subject is presently under the influence of illegal drugs. Therefore, timeliness is much less critical. Second, urinalysis is not designed to obtain evidence of the crime for which the subject was arrested and is not based on any individualized suspicion of drug use. Therefore, the *Schmerber* "clear indication standard" can-

cannot logically be justified as a search incident to an arrest.

b. Booking searches

A person under lawful arrest may be required to undergo a booking or inventory search before being placed in a holding cell. Inventory searches are justified by the following objectives:

> (1) protecting the arrestee's property while he is in jail; (2) protecting the police from groundless claims that they have not adequately safeguarded the defendant's property; (3) safeguarding the detention facility by preventing the introduction therein of weapons or contraband; and (4) ascertaining or verifying the identity of the person arrested.[90]

The extent of the intrusion on the arrestee's right of privacy will be balanced against these four objectives when determining whether a booking search is reasonable.[91]

One difficulty in justifying urine testing as part of a standard booking search is that its primary purpose is to determine whether a person is a drug user for purposes of reaching a bail decision, rather than for any of the goals that justify booking searches. It is equally problematic to assert that a secondary purpose for urinalysis is reasonably related to any of the existing justifications for booking searches. Pre-bail drug testing has no apparent relevance to protection of the arrestee's property, to identifying the person arrested, or to maintenance of detention facility security.[92] Urinalysis indicates

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not possibly be met. *But see*, Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974)(holding that warrantless urinalysis of person arrested for narcotics crime was permissible under *Schmerber* and that the results were admissible in a probation revocation proceeding).

90 W. LaFave & J. Israel, *supra* note 60, at 147 (1985). *See also* Illinois v. Lafayette, 462 U.S. 640 (1983).

91 Many courts have concluded that urinalysis is as intrusive as a strip search. *See, e.g., infra* notes 93 and 149. A number of courts have disapproved strip searches at booking without individualized suspicion under this standard despite the fact that, unlike urinalysis, strip searches are rationally related to the justifications for inventory searches. *See, e.g.*, Ward v. County of San Diego, 791 F.2d 1329, 1332-33 (9th Cir. 1986); Mary Beth G. v. City of Chicago, 740 F.2d 963 (7th Cir. 1985); Stewart v. Lubbock County, 767 F.2d 153 (5th Cir. 1985); Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom.* Clements v. Logan, 455 U.S. 942 (1982); Kathriner v. City of Overland, 602 F. Supp. 124 (E.D. Mo. 1984). *See also* Comment, 54 U. CIN. L. REV. 175 (1985).

92 Any detention facility relevant to this discussion will be a short term holding facility for arrestees prior to the first appearance and bail hearing. Once it has been determined that a person will not be released on bail—either because bail is denied or due to failure to post the required bond—the person becomes a pretrial detainee and may be subjected to urinalysis on the same basis as a convicted prisoner. See *infra* notes 103-07 and accompanying text for a discussion of prisoner urinalysis.

only that a person who tests positive may have used illegal drugs sometime prior to providing a urine specimen; a positive test does not and cannot indicate whether a person is presently under the influence of illegal drugs and, thus, does not serve as a means of detecting a threat to security. Similarly, although a positive urine test may raise questions about a defendant's possible addiction to drugs, it does not provide evidence of addiction, nor does it indicate whether a defendant is likely to introduce contraband or weapons into the detention facility.[93] Thus, fourth amendment objections to urine testing are unlikely to be overcome merely by adding urinalysis to the standardized booking procedure.[94] Examination of both types of searches occurring at arrest, therefore, leads to the conclusion that systematic pre-bail urine testing would not be permissible under the fourth amendment solely because the test subjects are persons who have been arrested for crimes.

2. *Non-Criminal Searches and Seizures*

There is a marked tendency in the literature to categorize searches as either criminal or non-criminal depending on the government's primary purpose. Analysis usually follows from that classification. Criminal searches must either be based on a warrant or fall within a recognized exception to the warrant requirement. Non-criminal searches, on the other hand, rarely require warrants or probable cause; there need only be a constitutionally reasonable accommodation between legitimate government objectives and individual rights of privacy. Pre-initial appearance urine testing to inform the pretrial release decision is a hybrid; it occurs in a criminal context but, like booking searches, its primary purpose ostensibly is not related to further prosecution of an individual. Although,

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[93] There is an additional consideration in the area of booking searches. There is precedent indicating that the permissibility of some booking procedures may be dependent upon the seriousness of the suspected crime. For example, strip searches are normally permitted during booking on the theory that they protect lock up security by preventing contraband or weapons from being introduced into the facility. Nonetheless, courts have held that strip searches of persons held for certain minor crimes are unreasonable under the fourth amendment. *See Giles*, 746 F.2d at 614 (requiring individualized reasonable suspicion to strip search persons arrested for minor crimes); *Logan*, 660 F.2d at 1013 (holding strip searches of detainees are constitutionally constrained by due process requirements). The same reasoning extends to urinalysis of persons held for minor crimes.

[94] Whether urine testing is permissible in order to serve a new government objective, in addition to that have been identified to date in connection with booking searches is discussed in connection with whether mandatory pre-bail urinalysis is permissible as a non-criminal search. If systematice mass pre-bail testing does not violate the fourth amendment, in effect, identification of drug users through urine analysis would become a part of standardized procedures. *See infra* notes 173-26 and accompanying text.

as demonstrated in the prior section, when conceptualized as a criminal search, bail stage urinalysis is not permissible, it may, under certain circumstances, meet constitutional requirements for non-criminal searches.

Non-criminal searches are performed to assist government agencies in achieving legitimate objectives other than crime detection and prosecution, although inadvertent discovery of evidence of a crime is a possible consequence and detection of criminal misconduct in order to impose non-criminal sanctions may be a primary purpose. Although criminal prosecution may not result from a non-criminal search, important rights, privileges, or interests such as continued employment, the right to attend school, or imposition of civil fines and penalties may be at stake.

Generally, to determine whether a non-criminal search is reasonable under the fourth amendment, a court must balance the degree of intrusion on the subject's right of privacy against the importance of the government's legitimate interest in conducting the search.[95] The outcome of that balance will dictate the circumstances, if any, under which the search is permissible. The decision can theoretically range from a very strict holding that a search warrant and probable cause are required,[96] to a conclusion that the extent of intrusion on the individual privacy interest is so weak in relation to the importance of the government goal that mandatory or random searches are permitted without any degree of individualized suspicion.[97] Between these extremes are decisions holding that

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[95] Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). On occasion, the Supreme Court has used this same standard to determine whether criminal searches and seizures meet fourth amendment standards. *See, e.g.*, United States v. Place, 462 U.S. 696, 703 (1983); Terry v. Ohio, 392 U.S. 1 (1968). Relying on a combination of the criminal and administrative search traditions, the first stage of the standard that the D.C. Circuit directed the district court to apply on remand in Berry v. District of Columbia, 833 F.2d 1031, 1034.

This standard appears to be undergoing revisions, at least in the employment and school contexts. See *infra* notes 138-47 and accompanying text for a discussion of *O'Connor v. Ortega* and *infra* notes 122-23 and accompanying text for a discussion of the TLO standard. There is, however, considerable confusion among lower federal courts and state courts as to whether, and at what stage, balancing remains necessary. *See infra* note 142 and accompanying text.

[96] *See, e.g.*, Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989). Variations on the normal criminal search warrant have also been created. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967)(approving area-wide inspections for health and safety code violations, where warrant is obtained upon demonstration that inspection is pursuant to reasonable legislative and administrative criteria).

[97] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976)(INS may set up fixed automobile checkpoints to briefly question occupants regarding immigration status); McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978)(approving routine metal detector

some degree of individualized suspicion is necessary before the search will be reasonable.[98]

Although no reported cases have yet addressed the question of whether urinalysis of arrestees to determine conditions of pretrial release is constitutional,[99] the reasonableness of mandatory and random urine testing[100] has been widely litigated in other non-criminal contexts such as prisons,[101] the military, public schools, and public employment.[102] Balancing the extent of the test subject's privacy rights against the government's interest in conducting the urine tests, the courts have decided on the facts of each case whether urine testing is permissible at all and, if so, under what conditions it is reasonable. To date, the outcomes of these decisions

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and pat-down searches of persons entering courthouse); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972)(allowing search of briefcase of person entering federal building). These cases consistently require that the intrusion on privacy rights be minimal, that there be no room for officials to exercise discretion, and that the searches be reasonably effective means of achieving the government's objective. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 661-63 (1979); *Martinez-Fuerte*, 428 U.S. at 563-64; Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978); Wheaton v. Hagan, 435 F. Supp. 1134, 1146 (M.D.N.C. 1977).

98 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985)(school officials may search student when there are reasonable grounds to suspect search will turn up evidence of violation of law or school rule); Delaware v. Prouse, 440 U.S. 648 (1979)(discretionary stops of automobiles to check for driver's license must be based on reasonable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873 (1975)(roving border patrols may only stop cars based upon reasonable suspicion that they contain illegal aliens).

99 *See supra* notes 69-72 and accompanying text.

100 Urine testing prior to the first appearance is generally performed uniformly on all members of the subject group without regard for individualized suspicion of any kind. Both mandatory testing (such as testing of all members of a subject group either at one time or over a period of time, for example, when urinalysis is included as part of an annual physical exam, or group members are tested on pre-defined occasions, such as their return to employment after a leave of absence) and random testing share this salient characteristic and are therefore analogous for purposes of fourth amendment analysis.

101 Periodic or on demand urine testing has also become increasingly common as a condition of probation and parole. There do not appear, in the reported cases, to be any general fourth amendment challenges to the propriety of this practice without either individualized suspicion or prior consent. Instead, probationers and parolees have challenged the validity of specific condition, of release mandating urinalysis. Courts uphold the condition on the theory that urinalysis is reasonably related to the rehabilitation and public safety objectives of probation. *See, e.g.*, United States v. Williams, 787 F.2d 1182 (7th Cir. 1986); Macias v. State, 649 S.W.2d 150 (Tex. Crim. App. 1983).

102 Mandatory and random testing of the urine of amateur and professional athletes has also received a great deal of publicity in the last few years. To date, there are no reported decisions adjudicating the question of the propriety of such testing under the fourth amendment. The issue, however, has been discussed in the academic literature. *See, e.g.*, Comment, *Drugs, Athletes, and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J. MARSHALL L. REV. 205 (1984); Comment, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815 (1987).

are widely divergent both within and among particular contexts. Nonetheless, some general trends can be discerned. Analysis of the cases is helpful in predicting whether pre-bail arrestee urinalysis would be viewed as reasonable by the courts, and if so, under what conditions.

a. Prisoners

Searches of prisoners constitute a special category of administrative searches in which the privacy rights of the search subjects are virtually non-existent and the government interest in conducting the search is very strong.[103] Although by virtue of their status, prisoners lose many of the rights enjoyed by other citizens, they retain their fourth amendment right to bodily privacy which is infringed by urine testing.[104] Nonetheless, a prisoner's privacy rights are substantially diminished in comparison to those of other citizens because they are subject to restriction and limitation in order to achieve legitimate goals of the penal institution. When these minimal individual interests are balanced against those of the government, virtually any search conducted in a reasonable manner and reasonably related to maintenance of order, security, and discipline

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103 Prisoners include both convicted prisoners and pretrial detainees, because, for all practical purposes, the fourth amendment rights of both groups are equivalent. Bell v. Wolfish, 441 U.S. 520, 545 (1979). *Bell* held that pretrial detainees' fourth amendment rights are diminished (though not completely eradicated) by virtue of their incarceration and the legitimate safety and administrative concerns of the correctional institution. Notably, none of the prisoner urinalysis cases reported to date involve pretrial detainees. It is unlikely, however, that urinalysis of pretrial detainees would be treated differently than urinalysis of convicted prisoners.

The arrestees who are the subjects of pre-bail urinalysis do not share the status of the pretrial detainees who were the plaintiffs in *Bell*. Pretrial detainees are persons for whom there has been a judicial determination that there is probable cause to hold them for a crime as required by Gerstein v. Pugh, 420 U.S. 103 (1976), and who have been incarcerated because they either have been denied pretrial release, are unable to meet the bail amount set, or have had their pretrial release revoked for violation of conditions. Arrestees are those persons who have yet to appear before a judicial officer for the purpose of determining probable cause and making a pretrial release determination.

Persons subject to post-arraingment testing, under circumstances similar to those involved in *Berry*, are also distinguishable from pretrial detainees. Although they have had their *Gerstein* hearing, they have been released pending trial. Thus, their fourth amendment rights are not subject to the compelling safety and administrative concerns of correctional institutions identified in *Bell* as amendment rights. *Bell*, 441 U.S. at 545.

104 In Hudson v. Palmer, 468 U.S. 517, 526 (1984), the Supreme Court held that a prisoner does not have any right of privacy in his prison cell and that searches of cells are not subject to the fourth amendment. Most lower courts have concluded that *Hudson* is limited to a prisoner's right of privacy in places and possessions and does not apply to the right to privacy in one's person. *See, e.g.*, Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

in the penal institution will be upheld.[105]

Applying the above principles, the majority of courts have upheld random drug testing of prisoners against fourth amendment challenges.[106] The courts have not agreed on the degree of intrusiveness of observed urinalysis, though none has concluded there was no privacy interest at all.[107] The test subjects' status as prisoners, however, substantially reduced the courts' assessment of the importance of the individual interest when compared to the asserted penal goals. Weighing the reduced privacy interest of the prisoners against the legitimate threat to prison security, discipline, and order from widespread drug use, these courts concluded that it was reasonable to require randomly selected prisoners to provide urine samples under direct observation by a guard or testing officer where positive samples were to be used as the basis of disciplinary proceedings (usually involving loss of good time for the first of-

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105 Thus, strip searches and body cavity searches of a prisoner are reasonable under the fourth amendment if they are related to maintenance of institutional order, security and discipline and are not an obviously excessive means of achieving the prison administration's goal. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979). Prison officials' judgment that certain policies or procedures are needed to achieve these goals are entitled to great deference. A court should substitute its judgment only if substantial evidence in the record indicates that the official response is exaggerated. *Id.* at 545-48. *See generally* Turner v. Safley, 482 U.S. 278 (1987).

This deferential treatment of correctional administrators appears, at least in some cases, to weigh heavily against the privacy rights of prison employees as well as inmates. *Compare* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987)(permitting random urinalysis of prison employees) *with* Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987)(prohibiting random urinalysis of prison employees).

106 *See, e.g.*, Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Hampson v. Satran, 319 N.W.2d 796 (N.D. 1982). *Cf.* Petition of Johnston, 109 Wash. 2d 493, 502, 745 P.2d 864, 868 (1987)(holding random urine tests of prisoners valid, although it is not clear whether a fourth amendment challenge was raised). The random testing programs in *Hampson* and *Spence* were upheld as implemented. The *Storms* court granted an injunction against continuation of the urine testing program because the method of selection was not truly random. The court clearly stated, however, that adoption of a better method of random selection would result in a constitutional program of urinalysis.

Use of urinalysis results to prove misconduct in prison disciplinary proceedings also has been challenged frequently on procedural due process grounds. *See generally*, Comment, *Urinalysis Testing in Correctional Facilities*, 67 B.U.L. REV. 475, 485-95 (1987)(reviewing cases).

107 As in the public employment context, *see infra* notes 132-40 and accompanying text, the degree of intrusiveness the courts assign to prisoner urinalysis is not necessarily predictive of the outcome. *Compare Coughlin*, 600 F. Supp. at 1214 (equating urinalysis with a body cavity search) *and* Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wisc. 1985)(equating urinalysis with a body cavity search) *with Hampson*, 319 N.W.2d at 796 (stating urinalysis is less intrusive than a body cavity search). *See generally*, Cohen & King, *Drug Testing and Corrections*, 23 CRIM. L. BULL. 151, 157-59 (1987)(arguing that observed urinalysis is most analogous to a "strip search and bodily inspection"; the intrusiveness of such a search falls between a "strip and body cavity search" and a "strip search").

fense).[108] Since prison administrators are entitled to substantial judicial deference,[109] they have not been required to substantiate their claims empirically that drug abuse is extensive or that random testing is an effective deterrent.[110] Serious scrutiny of prison programs has, for the most part, been limited to the reasonableness of the actual procedures, such as whether the selection process is truly random or whether samples are collected under the least intrusive conditions possible.[111]

b. Military personnel

The United States military has employed urinalysis extensively. In some instances random testing has been used;[112] for other purposes mandatory testing of all persons similarly situated has been adopted.[113] In military settings, the consequences of a positive test may range from referral to counselling to initiation of court martial proceedings.[114]

Both random and mandatory urine testing in the military have been upheld under fourth amendment challenges.[115] These cases,

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108 *See supra* note 106.

109 *See supra* note 105 (regarding deference to prison administrators).

110 The court in *Hampson* took into consideration information obtained from the defendant's counsel at oral argument showing that, since drug testing had begun, the percentage of positive samples had dropped from fifty percent to ten percent. It concluded that "the program has significantly decreased drug usage within the penitentiary." *Hampson*, 319 N.W.2d at 800 n.3. In public school and employee cases, where courts grant less deference to the government agencies, empirical evidence or other objective facts are required to substantiate claims that a drug problem exists and that urine testing can solve the problem. *See infra*, note 128 and accompanying text and note 164 and accompanyng text.

111 *See, e.g.*, Storms v. Coughlin, 600 F. Supp. 1214, 1219 (S.D. N.Y. 1984). It is particularly intriguing that the one case in which a prison's random urine testing program was held unconstitutional, in part, hinged on the failure of the government to allege that deterrence of drug use was an objective. Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985). To determine the extent of drug use by inmates in Wisconsin prisons, correctional authorities decided to conduct urinalysis on a random sample of fifteen percent of all prisoners. Testing was conducted without advance notice but was anonymous, and unlike the cases discussed above, positive samples would not lead to any disciplinary actions. Refusal to provide a sample, however, led to disciplinary action for failing to follow orders. The court held that on the record the facts were insufficient to establish that the program served a legitimate institutional need for security, order, and discipline as required by Bell v. Wolfish, 441 U.S. 520 (1979).

112 *See* Abney, *Drug Abuse, Courts-Martial, and Random Urinalysis - An Unworkable Combination*, 27 ARIZ. L. REV. 1, 4-6 (1985)(describing the random testing program).

113 *See, e.g.*, Murray v. Haldeman, 16 M.J. 74 (CMA 1983)(return from leave urine testing).

114 Abney, *supra* note 112, at 3.

115 *See* Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Murray v. Haldeman, 16 M.J. 74 (CMA 1983). *Callaway* involved "intrusive" drug inspections of servicemen's persons and property. It is not apparent from the opinion that urinalysis

however, are not very helpful in attempting to determine whether mandatory urinalysis of arrestees is permissible in the criminal justice setting because constitutional standards apply differently to military personnel than to civilians. The need for obedience and discipline essential to military effectiveness has justified limitations on the rights of military personnel that would not be condoned for others.[116] Although military personnel retain their fourth amendment rights, their expectation of privacy is less than that of civilians.[117] When this diminished expectation of privacy is balanced against the military's very strong interest in identifying and deterring drug users,[118] the scales inescapably tip in the government's favor. Drug abuse in the military threatens the effectiveness and readiness of the armed forces to accomplish its mission of defending the United States.[119] In a context in which inspections intruding on ordinary privacy rights in one's person and property are an accepted part of life, the necessity of maintaining an alert and ready military justifies mandatory testing under certain circumstances, unannounced testing, and random testing of all personnel.[120]

c. Public school students

Both prisoners and military personnel certainly appear to enjoy

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was part of these inspections. However, the Court of Military Appeals later, in *Murray*, 16 M.J. at 78, referred to *Callaway* as a case involving urinalysis. Even if the *Callaway* did not involve urinalysis it is very strong precedent because it invloved highly intrusive strip searches. Urinalysis is equally or less intrusive, but certainly not more intrusive. *See supra* note 107 and *infra* notes 149-154 and accompanying text for a discussion of the intrusiveness of urinalysis.

116 "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it." Parker v. Levy, 417 U.S. 733, 758 (1974), *quoted in Callaway*, 518 F.2d at 477; *Murray*, 16 M.J. at 81.

117 *Callaway*, 518 F.2d at 477; *Murray*, 16 M.J. at 81.

118 In *Callaway*, the court accepted the argument that unannounced inspections were necessary for deterrence: "Given the nature of drugs and the paraphernalia associated therewith, unannounced drug inspections appear to be the most effective means of identifying drug users so that they might receive treatment and eliminating illegal debilitating drugs from a unit." *Calloway*, 518 F.2d at 476. The court based its conclusion that requiring a warrant would likely frustrate the government purpose behind the search, in part, on the fact that it would increase the possibility of advance notice of searches and thus minimize the effectiveness of inspections. *Id.*

119 *Callaway*, 518 F.2d at 476-77; *Murray*, 16 M.J. at 81. In *Callaway*, the court noted statistical evidence regarding the extent of drug abuse in the military and its impact on military effectiveness. 518 F.2d at 476 nn.24-25.

120 Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983). *Accord* Committee for G.I. Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975). This same rationale is at least partially responsible for decisions upholding urinalysis of police officers, correctional officers and nuclear power plant employees without individualized suspicion. *See infra* note 167 and accompanying text.

fewer fourth amendment rights than accused persons entering the criminal process at the arrest stage. Diminished expectations of privacy, however, do not alone tip the balance in favor of either random or mandatory searches. Consideration of cases involving public school students demonstrates that the importance of the government interest and the degree of deference due the government agency also play important roles. As a practical matter, courts appear much more willing to review school administrators' decisions critically than those of correctional administrators or of the military.[121]

The fourth amendment rights of public school students are subject to the school administrator's interest in maintaining discipline in the classroom and on school grounds.[122] School officials may search a student's person or property on less than probable cause so long as the search is reasonable under the circumstances. A school search is reasonable if it is justified at its inception and is reasonably related in scope to the government objectives that made it permissible in the first instance. A search is justified at its inception when there are reasonable grounds for suspecting that the search will reveal evidence that the student has violated either a law or a school rule.[123]

In the two reported decisions applying this standard to evaluate the constitutionality of urine testing of students by school officials, school testing policies have been held invalid.[124] In *Odenheim v. Carlstadt-East Rutherford Regional School District*,[125] the court held that a school's policy requiring all students to provide urine samples for

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121 *But see* Schaill v. Tippicanoe School Corp., 679 F. Supp. 833, 855 (N.D. Ind. 1988) (according considerable deference to school administrators).

122 New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985). In T.L.O., the court did not specify whether a student's rights were equal to those of an adult or those of a minor outside of school. It did, however, reject the notion that students have no fourth amendment rights at all when in school. It is likely that, if pressed, the Court would hold that students enjoy fewer fourth amendment rights when in school than when out of school. *See Id.* (Powell, J., concurring)(students' expectation of privacy diminished because school stands in *loco parentis*).

123 *Id. T.L.O.* involved the search of a student's pocketbook. It is not clear whether the "reasonable grounds" standard requires individualized suspicion for all types of school searches.

124 In a third case, *Schaill*, 679 F. Supp. at 833, the court refused to enjoin implementation of a program in which high school students were required to consent to random urinalysis as a condition of participating in interscholastic athletics. Although the precise grounds for the court's resolution of the fourth amendment issues are unclear, it appears to have decided that the consent was valid under the fourth amendment because participation in interscholastic athletics was not a constitutionally protected interest. *See generally infra* notes 227-244 and accompanying text.

125 211 N.J. Super. 54, 510 A.2d 709 (1985).

drug testing as part of an annual physical examination violated the students' fourth amendment rights.[126] The court concluded that even if the testing policy's purpose was, as the school asserted, to inquire into a medical condition in order to identify students with drug problems for rehabilitation, mandatory urinalysis violated the students' reasonable expectations of privacy.[127] In contrast to the prison cases, the court was unwilling to hold that the means of achieving this legitimate government objective were reasonable in the absence of evidence that drug abuse was a widespread problem or that dragnet testing was an effective method for identifying drug abusers. The court implied that the school's objectives could be achieved if testing was limited to cases where there was individualized suspicion of drug abuse. Given relatively small absolute numbers and percentages of students who had been referred to drug counselling in prior years, the testing policy was "not reasonably related in scope to the circumstances which justified the interference in the first place."[128]

Urine testing of students may not always be permissible even when there is individualized suspicion. In *Anable v. Ford*,[129] the United States District Court for the Western District of Arkansas held that even when there was probable cause to believe that a student had been violating school rules prohibiting use of illegal drugs on school property and that a urine test would reveal the presence of drug metabolites in the student's urine, urine testing was unreasonable. Because an immunoassay test cannot reveal whether the students were under the influence of drugs at school, its use was not reasonably related to maintenance of order and security nor to preservation of the educational environment.[130] The court in *Anable* further suggested that testing may not be permissible even where there is probable cause when there are less intrusive methods of obtaining the desired evidence.[131]

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126 Detailed discussion of the Carlstadt-East Rutherford policy can be found in Comment, *School Drug Tests: A Fourth Amendment Perspective*, 1987 U. ILL. L. REV. 275 (1987).

127 *Odenheim*, 211 N.J. Super. at 61, 510 A.2d at 713.

128 *Id.*

129 653 F. Supp. 22, 44 (W.D. Ark. 1985).

130 The court also found that the manner in which urine tests were conducted in *Anable* was unreasonable. High school students were required to disrobe from the waist down and urinate into a tube while an adult school official of the same sex watched. Under the circumstances, this was an excessive intrusion into the students' legitimate expectations of privacy. *Id.* at 41.

131 *See id.*

d. Public employees

The courts have considered the permissibility under the fourth amendment of urine testing for drug metabolites most often in cases involving urinalysis of public employees.[132] Most courts that have confronted the constitutionality of urine testing of current[133] employees have held that neither mandatory nor random testing is permissible, but that testing may be conducted in the presence of some variety of individualized suspicion.[134] Probable cause is not re-

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132 Urine testing is currently popular in private industry and numerous court challenges have been filed by employees and unions. These cases, however, are not relevant because the fourth amendment constrains only government action and thus is not a relevant factor under private employment contracts.

The past few years have seen the proliferation of a vast literature on the subject of private and public employee drug testing. *See generally*, Anastaplo, *Governmental Drug-Testing and the Sense of Community*, 11 NOVA L.J. 295 (1987); Barnes & White, *Employee Privacy Rights "Everything You Always Wanted to Know—But Shouldn't"*, 64 MICH. B. J. 1104 (1985); Bishop, *Employees' Assertion of Privacy Rights is Giving Employers Legal Hangovers*, 6 CALIF. L. REV. 29 (1986); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L.J. 307 (1987); Connors & Engle, *Alcohol and Drug Testing: Legal Considerations*, 42 J. MO. B. 523 (1986); Halbert, *Coming Up Dirty: Drug Testing at the Workplace*, 32 VILL. L. REV. 691 (1987); Heins, *The Right to Be Let Alone—Drug Testing and the Fourth Amendment*, 21 SUFFOLK U.L. REV. 119 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. J. 605 (1987); 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 (1986); Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J. Nov. 1986 at 50; Zeese, *Urine Testing and the Fourth Amendment*, 14 SEARCH & SEIZURE L. REP. 97 (1987); Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597 (1987); Comment, *Drug Testing in the Work Place; A Legislative Proposal to Protect Privacy*, 13 J. LEGIS. 269 (1986); Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451 (1986); Comment, *Employee Drug Testing: Guilty Until Proven Innocent*, 52 MO. L. REV. 625 (1987); Comment, *Employee Privacy Rights v. Business Needs: Drug Testing in the Work place*, 22 NEW ENG. L. REV. 413 (1987); Comment, *Drug Testing of Government Employees and the Fourth Amendment: The Need For a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063 (1987); Comment, *"Jar Wars" in the Workplace: The Constitutionality of Urinalysis Programs Designed to Eliminate Substance Abuse Among Federal Employees*, 38 SYRACUSE L. REV. 937 (1987); Comment, *The Drug-Free Federal Workplace: A Constitutional Procedure*, 54 U. CHI. L. REV. 1335 (1987); Note, *Specimen Surveillance - The Fifth Circuit Approves Urine Testing*, 33 LOY. L. REV. 1148 (1988); Note, *A Proposal for Mandatory Drug Testing of Federal Civiliam Employees*, 62 N.Y.U. L. REV. 322 (1987); Note, *Constitutional Law: Urinalysis and the Public Employer - Another Well-Delineated Exception to the Warrant Requirement?*, 39 OKLA. L. REV. 257 (1986); Note, *Workers, Drinks and Drugs: Can Employers Test?*, 55 U. CINN. L. REV. 127 (1986); Note, *Drug Testing: America's New Work Ethic?*, 15 STETSON L. REV. 883 (1986).

133 Cases addressing only the question of whether job applicants may be tested are not useful for purposes of this analysis. Unlike current employees, applicants have no right to government employment. Because they can avoid being tested merely by not applying for the job, submission to the test constitutes implied consent to the search and seizure. See *infra* notes 227-244 for a discussion of consent.

134 *See* RLEA v. Burnley, 839 F.2d 575, 587 (9th Cir. 1988), *rev'd*, 109 S. Ct. 1402 (1989); NFFE v. Carlucci, 680 F. Supp. 416 (D.D.C. 1988); Wrightsell v. City of Chicago,

quired.[135] Rather, the courts usually define the requisite factual ba-

678 F. Supp. 727, 732 (N.D. Ill. 1988); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1569 (C.D. Cal. 1987); Feliciano v. City of Cleveland, 661 F. Supp. 578, 592 (N.D. Ohio 1987); PBA v. Washington Township, 672 F. Supp. 779, 790 (D.N.J. 1987), *rev'd*, 850 F.2d 133 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); Taylor v. O'Grady. 669 F. Supp. 1422, 1439 (N.D. Ill. 1987); AFGE v. Weinberger, 651 F. Supp. 726, 733 (S.D. Ga. 1986); Bostic v. McClendon, 650 F. Supp. 245, 250 (N.D. Ga. 1985); National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 U.S. 1072 (1988); Penny v. Kennedy, 648 F. Supp. 815, 817 (E.D. Tenn. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1516-1520 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508-1509 (D.D.C. 1986), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987), *cert. granted* and *judgment vacated sub. nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); Smith v. City of East Point, 183 Ga. App. 659, 359 S.E.2d 692 (1987), *rev'd*, 258 Ga. 111, 365 S.E.2d 432 (1988); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985); Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 474, 524 A.2d 430, 437 (1987); Caruso v. Ward, 133 Misc. 2d 544, 557, 506 N.Y.S. 2d 789, 799 (Sup. Ct. 1986) *aff'd*, 131 A.D. 2d 214, 520 N.Y.S. 2d 551 (1987); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 69, 510 N.E.2d 325, 330, 517 N.Y.S.2d 456, 462 (1987). Other cases have held that specific urine tests which were in fact based upon reasonable individualized suspicion did not violate the fourth amendment. *See* Everett v. Napper, 833 F.2d 1507, 1513 (llth Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008-09 (D.C. 1985); King v. McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986). *Cf.* Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976)(upholding warrantless urinalysis of any bus operator involved in a serious accident or suspected of being under the influence of drugs while at work if two supervisors agree that test should be conducted).

[135] Most cases do not even address the possibility that a search warrant may be required to conduct employee urinalysis. When the issue is discussed, search warrants generally are held unnecessary on the theory that requiring government employers to obtain a search warrant before conducting urinalysis would unduly interfere with achievement of a legitimate, non-criminal government objective. *See, e.g.*, Taylor v. O'Grady, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987). This conclusion is based either on the view that evidence of drug metabolites in urine is evanescent, *see, e.g.*, RLEA v. Burnley, 839 F.2d 575, 582-83 (9th Cir. 1988) *rev'd, sub nom.* Skinner v. RLEA, 109 S. Ct. 1402 (1989); PBA v. Washington Township, 672 F. Supp. 779, 785 (D.N.J. 1987) *rev'd*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); Amalgamated Transit Union v. Sunline Transportation Agency, 663 F. Supp. 1560, 1567-68 (C.D. Cal. 1987), or on the conclusion that the delay necessary to establish probable cause or to obtain a warrant may seriously impede the government's purpose for conducting the search. *See id.* The conclusion that the evidence obtained from urinalysis is evanescent is erroneous. See *supra* note 89. Notably, each of the cases in which the courts have reached that conclusion involved alcohol tests as well as drug tests. Evidence of alcohol intoxication dissipates within a few hours. Therefore, the Supreme Court has held that even in a criminal context, a search warrant is not required to perform a blood test for alcohol so long as there is probable cause. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

One early district court decision held that probable cause was necessary to perform urinalysis on a school bus attendant. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) *rev'd*, 833 F.2d 335 (D.C. Cir. 1985), *cert. granted and judgment vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989). On the government's appeal, however, the D.C. Circuit held that it was reasonable to perform urine tests for drugs as part of a mandatory employment related annual physical examination so long as the scope of the

sis upon which testing may be permitted as reasonable individualized suspicion.[136] Decisions upholding random or mandatory employee urinalysis without individualized suspicion constitute a substantial minority of the numerous cases that have been litigated in this area in the past few years.[137]

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search was reasonably related to a legitimate government objective. However, there was no reasonable relation because current technology cannot reveal whether the test subject used or was under the influence of drugs while at work—the employer's sole interest. Therefore, Jones was tested in violation of the fourth amendment. Jones v. McKenzie, 833 F.2d at 340-41 *cert. granted and judgement vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989).

136 The standard is usually defined as reasonable suspicion based upon specific objective and articulable facts and the reasonable inferences therefrom. *See, e.g.*, Wrightsell v. City of Chicago, 678 F. Supp. 727, 732 (N.D. Ill. 1988); PBA v. Washington Township, 672 F. Supp. 779, 791 (D.N.J. 1987) *rev'd*, 850 F.2d 133 (3d Cir. 1988), *cert. denied* 109 S. Ct. 1637 (1989); *Amalgamated Transit Union*, 663 F. Supp. at 1567-68; *Feliciano*, 661 F. Supp. at 589; Capua v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986); Bostic v. McClendon, 650 F. Supp. 245, 250 (N.D. Ga. 1985); *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d. at 69, 517 N.Y.S.2d. at 462, 510 N.E.2d at 330. There are, however, variations. In *Carlucci*, 680 F. Supp. at 436, the court specified that drug tests were only permissible if "based upon a reasonable, articulable, and individualized suspicion that a specific employee is under the influence of drugs or alcohol while on duty." The standard may be quite specific, specifying the kinds of facts that will constitute reasonable suspicion. *See, e.g., RLEA*, 839 F.2d at 578 n.7, *rev'd sub nom.* Skinner v. RLEA, 109 S. Ct. 1402 (1988). Corroboration by a second observer may be required. *See id.* One judge, writing the lead opinions in two connected cases for a divided panel of the United States Court of Appeals for the Sixth Circuit, recently concluded that urinalysis is impermissible unless there is either individualized suspicion or evidence of a significant drug problem among the employee population being tested. *Lovvorn*, 846 F.2d at 1547; *Penny*, 846 F.2d at 1568.

In other cases, courts erroneously include a person's involvement in an accident as a basis for individualized suspicion. *See, e.g., Weinberger*, 651 F. Supp. 726, 733 (S.D. Ga. 1986)("actual evidence of a trustworthy nature pointing toward drug use or occurrence of an accident involving government property"); *Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976)(warrantless urinalysis of any bus operator involved in a serious accident or suspected of being under the influence of drugs while at work is permissible where tests are conducted only if two supervisors agree), *cert. denied*, 429 U.S. 1029 (1989). *Cf.* Mack v. United States, 814 F.2d 120, 125 (2d Cir. 1987)(employee's voluntary consent to urinalysis obviates need to determine whether there was reasonable suspicion).

137 *Wrightsell*, 678 F. Supp. at 733, and Jones v. McKenzie, 833 F.2d at 340 (D.C. Cir. 1987), *cert. granted* and *judgement vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989), upheld urine testing for drug metabolites that was included in mandatory, non-pretextual physical examinations. In *PBA*, 850 F.2d 133 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); *SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988); AFGE v. Dole, 670 F. Supp. 445 (D.D.C. 1987); and Rushton v. Nebraska Public Power District, 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988), random and mandatory urinalysis of employees working in highly regulated industries was permitted on the theory that licensing requirements and comprehensive regulatory schemes substantially reduced the employees' privacy expectations. *But cf.* Brotherhood of Locomotive Engineers v. SEPTA, 863 F.2d 1110 (1988) (3d Cir. 1988), *aff'g*, Transportation Workers v. SEPTA, 678 F. Supp. 543 (E.D. Pa. 1988)(rejecting the district court's analysis on

As with other non-criminal searches, a search and seizure of a public employee by a government employer must be reasonable to pass constitutional muster.[138] In March 1987, the Supreme Court decided *O'Connor v. Ortega*,[139] in which a plurality articulated a standard for determining the fourth amendment reasonableness of government work place searches. The plurality held that the fourth amendment requires searches conducted in the course of public employer investigations of work-related misconduct to be reasonable under all the circumstances. Under this standard of reasonableness, the search must be justified at its inception and the scope must be reasonably related to the government objective. A search will be justified at its inception when there are reasonable grounds for suspecting that the search will reveal the evidence sought. The Court declined to determine whether individualized suspicion was required for there to be reasonable grounds because there was individualized suspicion in the case at bar.[140]

The plurality specifically stated that its standard applied only to a search of property within the workplace and did not consider the appropriate fourth amendment standard for assessing the reasonableness of drug and alcohol testing of employees.[141] Nonetheless, subsequent lower court cases have purported to follow the plurality's standard although there is considerable disagreement regarding the precise nature of the test and the extent to which it is applicable to searches and seizures that implicate an individual's right to bodily privacy as opposed to privacy interests in property.[142] As a practical matter, most courts continue to balance the extent of the intrusion on the employee's reasonable expectation of

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the highly regulated industry theory and holding that the government's real safety concerns and the documentation of a drug problem among the work force outweighed the workers' "more than minimal" privacy interests). One other case, National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988), upheld testing of employees who sought promotion to certain sensitive positions. *Von Raab* is more analogous to urinalysis of job applicants than to employee testing. *See supra* note 133.

138 O'Connor v. Ortega, 480 U.S. 709 (1987).

139 480 U.S. 709 (1987).

140 480 U.S. at 726.

141 480 U.S. at 729.

142 *See, e.g.*, *Burnley*, 839 F.2d 575, 586 (9th Cir. 1988), *rev'd sub nom.* Dkinner v. RLEA, 109 S. Ct. 1402 (1989); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987) *cert. granted and judgment vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); Everett v. Napper, 833 F.2d 1507, 1511 (11th Cir. 1987); NFFE v.Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); Wrightsell v. City of Chicago, 678 F. Supp. 727, 731 (N.D. Ill. 1988); PBA v. Township of Washington, 672 F. Supp. 779, 786 (D.N.J. 1987); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1567 (C.D. Cal. 1987); Feliciano v. City of Cleveland, 661 F. Supp. 578, 583 (N.D. Ohio 1987).

privacy against the employer's legitimate interest in accomplishing the objectives to which the search is reasonably related in order to determine what quantum of evidence, if any, is required before urinalysis can be performed. If the search is justified at its inception, the court will then examine the reasonableness of its scope in relation to the government's legitimate objectives.

Assessment of the nature of the individual interests at stake in employee urinalysis begins with the general proposition that the government, as an employer, has a legitimate interest in strictly supervising the job-related behavior and performance of its employees to promote efficient and proper operation of the workplace.[143] While public employees do not completely forfeit their constitutional rights by virtue of their jobs,[144] their legitimate expectations of privacy vis a vis their employers in the context of the employment relationship may be reduced.[145] On the continuum of diminished expectations of privacy, however, public employees rights are greater than those of either prisoners or the military[146] and less than those of other citizens.[147]

Courts are unanimous in their conclusions that employee urinalysis intrudes upon reasonable expectations of privacy.[148]

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143 See O'Connor v. Ortega, 480 U.S. 709 (1987); Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985). Whether off-duty drug use—as opposed to on-duty intoxication—is within the government's realm of interest is a matter of dispute. *Compare, e.g., Jones*, 833 F.2d at 341; *Burnley*, 839 F.2d at 588; NFFE v. Carlucci, 680 F. Supp. 416, 423-26; *with* Brotherhood of Locomotive Engineers v. SEPTA, 863 F.2d 1110 (3d Cir. 1988); *Washington Township*, 850 F.2d at 136; *Bostic*, 650 F. Supp. at 250, *McDonell*, 809 F.2d at 1309.

144 O'Connor v. Ortega, 480 U.S. 709 (1988).

145 *See* O'Connor v. Ortega, 480 U.S. at 715; *Weinberger*, 651 F. Supp. 726, 733 (S.D. Ga. 1986); Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 472, 524 A.2d 430, 436 (1987); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 69, 510 N.E.2d at 323, 330, 517 N.Y.S. 456, 462 (1987) (teachers have diminished expectation of privacy with respect to state inquiry into physical fitness). The plurality in *O'Connor* held that, due to the operational realities of the workplace, the precise extent of the employees' legitimate expectations of privacy must be assessed on an *ad hoc* basis in the context of the actual employment relationship. 480 U.S. at 717.

146 *See* Caruso v. Ward, 133 Misc. 2d 544, 555-56, 506 N.Y.S.2d 789, 798 (Sup. Ct. 1986).

147 *See* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985).

148 See *supra* note 51 for cases holding that urinalysis is a search. *But see* Amalgamated Transit Union v. Suscy, 538 F.2d at 1267 (7th Cir. 1976)(stating that employees "have no reasonable expectation of privacy with regard to submitting to blood and urine tests"). This statement was made, however, in the context of balancing the individual interest against what the court termed a "paramount" employer interest in insuring that bus and train operators were fit to perform their job. Thus, rather than concluding that the employees had no reasonable expectations of privacy, the court held that the individual interests at stake were outweighed by the public interests.

There is considerable disagreement, however, regarding the weight or extent of the individual interest implicated by urine testing. A number of courts have found urinalysis comparable to highly intrusive strip searches or body cavity searches.[149] Courts often point to the fact that urination is generally considered to be so private an act that public urination is frequently prohibited by law.[150] Being required to urinate on demand under observation by another person is degrading and humiliating.[151] The conclusion that urinalysis constitutes a substantial intrusion on privacy rights is not limited to cases involving observed urination; some courts have also deemed unobserved urination to be "highly intrusive."[152] These courts reason that urinalysis implicates values at the heart of the fourth amendment because the information it uncovers intrudes upon one's private life.[153] In contrast, other decisions view unobserved urinalysis as less intrusive than a blood test, barely infringing on the test subjects' fourth amendment rights at all.[154] Curiously, the as-

149 *See, e.g.*, Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986); *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 67-68, 517 N.Y.S.2d at 461, 510 N.E.2d at 329. *Burnley*, 839 F.2d at 589 (observed urination categorized as highly intrusive search and seizure of bodily fluids); AFGE v. Weinberger, 651 F. Supp. at 726, 733 (S. D. Ga. 1986) ("the taking of a urine sample most closely resembles the taking of a blood sample, which has been held to be a highly invasive search and seizure").

150 *See, e.g.*, *Amalgamated Transit Union*, 663 F. Supp. 1568; *Felciano*, 661 F. Supp. 589; *Capua*, 643 F. Supp. at 1514; Fraternal Order of Police v. City of Newark, 524 A.2d at 437; *Patchogue-Medford Congress of Teachers*, 505 N.Y.S.2d 888, 890 (App. Div. 1986).

151 *See, e.g.*, *Feliciano*, 661 F. Supp. at 588; *Capua*, 643 F. Supp. at 1514; Caruso v. Ward, 133 Misc. 2d 544, 548, 506 N.Y.S.2d, 789, 793 (Sup. Ct. 1986), *aff'd*, 131 A.D.2d 214, 520 N.Y.S.2d 551 (1987). *See also* Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 474, 524 A.2d 430, 437 (urinalysis is profoundly demeaning).

152 *See, e.g.*, PBA v. Washington Township, 672 F. Supp. 779, 789-90 (D.N.J. 1987); *Feliciano*, 661 F. Supp. at 588-89; AFGE v. Weinberger, 651 F. Supp. at 734. *Cf.* Taylor v. O'Grady, 669 F. Supp. 1422, 1435 (N.D. Ill. 1987)(correctional employees have "fairly strong expectation of privacy in the place, act, and decision of urination"). *But see* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987)(pre-scheduled, unobserved testing "not as intrusive as an invasion of bodily integrity or of the home, nor do employees suffer the indignity of either strip or body cavity searches").

153 *See, e.g.*, Jones v. McKenzie, 833 F.2d 339; NFFE v. Carlucci, 680 F. Supp. 416, 434; PBA v. Washington Township, 672 F. Supp. at 787-90; *Feliciano*, 661 F. Supp. at 588; *Weinberger*, 651 F. Supp. at 734.

154 Wrightsell v. City of Chicago, 678 F. Supp. 727, 734 (N.D. Ill. 1988) (minimal intrusion where urine sample taken as part of non-pretextual physical exam); Transport Workers v. SEPTA, 678 F. Supp. 543, 550 (E.D. Pa. 1988)(unobserved urination and other procedures "markedly reduce intrusiveness"); AFGE v. Dole, 670 F. Supp. 444, 447-49 (D.D.C. 1987)(minimal intrusion where testing "discrete and private," advance notice of random testing program given, and employees already subjected to pre-scheduled testing); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. at 1569 (private urination and confidentiality measures); Mack v. U.S., 653 F. Supp. 70, 74-75 (S.D.N.Y. 1986)(less intrusive than a fingerprint). *Cf. Jones*, 833 F.2d at 340 (minimi-

sessment of the degree of intrusiveness of urinalysis is not necessarily predictive of the outcome of the decision.

On the other side of the balancing equation is the government's interest in utilizing urine testing to identify users of illegal drugs among its employees. It is generally recognized that public employers, like their private counterparts, have a right to a drug free workplace. However, neither that interest in and of itself, nor the related claim that drug use is incompatible with government employment, is sufficient to justify random or mandatory urinalysis.[155] The government generally asserts that the drug testing program under judicial review will achieve more specific goals. The specific objectives offered to justify urinalysis programs naturally vary depending upon the nature of the employees subject to testing and the particular problems confronted by individual employers. Nonetheless, the interests can be categorized generally as: (1) public safety;[156] (2) em-

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zation of intrusion on privacy interests due to fact urinalysis is conducted as part of annual medical examination relevant to reasonableness of scope of search).

155 *See Carlucci*, 680 F. Supp. at 433; Bostic v. McClendon, 650 F. Supp. 245, 250 (N.D. Ga. 1986).

156 *See, e.g.*, PBA v. Washington Township, 850 F.2d at 136 (law enforcement officers) *cert. denied*, 109 S. Ct. 1637 (1989); RLEA v. Burnley, 839 F.2d 575, 586 (9th Cir. 1986) (railroad employees), *rev'd sub nom.* Skinner v. RLEA, 109 S. Ct. 1402 (1989); *Jones*, 833, F.2d at 340 (school bus drivers and attendants); NFFE v. Weinberger, 818 F.2d 935, 937 (D.C. Cir. 1987) (civilian law enforcement employees of Department of Defense); *Carlucci*, 680 F. Supp. at 423-26, 433 (civilian employees, civilian law enforcement employees, and civilian employees occupying critical positions relating to nuclear and chemical warfare material of Department of Defense); Transport Workers v. SEPTA, 678 F. Supp. 543, 549 (operating employees of public transit authority); AFGE v. Dole, 670 F. Supp. at 448 ("critical" employees of Department of Transportation); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1569 (bus drivers and maintenance workers); AFGE v. Weinberger 651 F. Supp. at 735 (S.D. Ga. 1986) (civilian police on military base); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1326 (Fla. Dist. Ct. App. 1985)(police and fire fighters); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (Sup. Ct. 1986)(police officers assigned to Organized Crime Control Bureau). *Cf.* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. App. 1985)("use of controlled substances by police officers creates a situation fraught with serious consequences to the public"). For the most part, these courts accept the argument that drug use by the affected employees poses a direct risk to public safety on its face, presumably because the employees are operating hazardous equipment or are armed. *But see* PBA v. Washington Township, 672 F. Supp. at 791 (pointing to failure to show identifiable risk to public in rejecting random testing of police). Rarely is any evidence offered that a risk to public safety is, in fact, present. A notable exception is Brotherhood of Locomotive Engineers v. SEPTA, in which the court upheld a random testing program in part because of the recent history of drug-related transit accidents. 863 F.2d 1110 (3rd Cir. 1988). *Compare Burnley*, 839 F.2d at 579 (despite empirical evidence and employees' concession that alcohol and drug abuse presented serious safety problem, post accident testing unconstitutional).

Another variation on the public safety theme arises in the context of public school teachers. In Patchogue-Medford Congress of Teachers v. Board of Education, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), the government argued that urine testing of all

ployee fitness and effectiveness;[157] (3) workplace safety;[158] (4) promotion of public confidence in employees' integrity;[159] and, (5) prevention of corruption and maintenance of security.[160] In addi-

teachers before they were granted tenure was related to confirming the ability of teachers to safeguard and supervise students. The court concluded that mandatory testing was not justified by this objective, which it specifically stated was not as important a government interest as it is in cases such as those involving police officers, fire fighters or bus drivers where drug use could cause imminent danger to the public. *Id.* at 39, 505 N.Y.S.2d at 891.

157 *See, e.g., Burnley*, 839 F.2d at 586 (railroad operating employees); Everett v. Naper, 833 F.2d 1507, 1511 (11th Cir. 1986) (fire fighter); Jones v. McKenzie, 833 F.2d 335 (attendant on school bus for handicapped children); *Weinberger*, 818 F.2d at 937 (DOD civilian law enforcement emplovees); *Von Raab*, 816 F.2d at 178 (customs service employees); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987)(correctional officers); *Wrightsell*, 678 F. Supp. at 733 (police officers); PBA v. Washington Township, 672 F. Supp. at 790 (law enforcement officers); Feliciano v. City of Cleveland, 661 F. Supp. at 588 (N.D. Ohio 1987) (police academy cadets); *Bostic*, 650 F. Supp. at 250 (police); *Bauman*, 475 So. 2d at 1326 (police and fire fighters); *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 69, 517 N.Y.S.2d at 462, 510 N.E.2d at 330 (teachers). Concern for the general welfare of employees is included in this category. *See, e.g.*, Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. at 1569 (bus drivers and maintenance workers).

158 *See, e.g.*, NFFE v. Weinberger, 818 F.2d at 937 (DOD civilian law enforcement employees); *Von Raab*, 816 F.2d at 178 (customs service employees); McDonell v. Hunter, 809 F.2d at 1307 (correctional officers); *Carlucci*, 680 F. Supp. at 423-26, 433 (civilian aviation employees, civilian law enforcement employees, and civilian emplyees occupying critical positions with regard to nuclear and chemical warfare material of Department of Defense); *Weinberger*, 651 F. Supp. at 735 (civilian military police); *Bauman*, 475 So. 2d at 1326 (Fla. App. 1985)(police and fire fighters). This category includes protection of both persons and property from harm.

159 *See, e.g.*, PBA v. Washington Township, 850 F.2d at 141 (police officers), *cert. denied.* 109 S. Ct. 1637 (1989); Shoemaker v. Handel, 795 F.2d at 1138 (jockeys); National Treasury Union V. Von Raab, 816 F.2d 170, 178 (customs service employees); *Carlucci*, 680 F. Supp. at 423-26, 433 (civilian law enforcement employees and employees involved in drug and alcohol abuse counselling and testing); Transport Workers v. SEPTA, 678 F. Supp. 416, 549 (operating employees of public transit authority); AFGE v. Dole, 670 F. Supp. 445, 448 (D.C. Cir. 1987) (DOT critical employees); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. at 1569 (bus drivers and maintenance workers); *Feliciano*, 661 F. Supp. at 588 (police academy cadets); AFGE v. Weinberger, 651 F. Supp. at 735 (civilian police on military base); Bostic v. McClendon, 650 F. Supp. at 250 (police); *Bauman*, 475 So. 2d 1322, 1326 (Fla. Ct. App. 1985)(police and fire fighters); Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 475, 524 A.2d 430, 437, 552 (1987)(police officers assigned to Narcotics Bureau); Caruso v. Ward, 133 Misc.2d 544, 552, 506 N.Y.S.2d 789, 795 (Sup. Ct. 1986)(police officers assigned to Organized Crime Control Bureau). *See* Taylor v. O'Grady, 669 F. Supp. 1422, 1439 (N.D. Ill. 1987) (correctional officers; stating that no court has ever considered this interest sufficient in and of itself to justify mandatory urinalysis).

160 *See, e.g., Weinberger*, 818 F.2d at 937 (posing potential for drug related blackmail leading to disclosure of classified information); *Von Raab*, 816 F.2d at 178 (customs service employees); *Shoemaker*, 795 F.2d at 1138 (jockeys); *Carlucci*, 680 F. Supp. at 423-26, 433 (civilian law enforcement employees and civilian emplyees occupying critical positions with regard to nuclear and chemical warfare material of Department of Defense); AFGE v. Weinberger, 651 F. Supp. at 735 (S.D. Ga. 1986) (civilian military police); *Caruso*, 133 Misc.2d at 552, 506 N.Y.S.2d at 795 (narcotics officers).

tion to these particularized reasons why drug abuse is deleterious in the workplace, public employers often claim that either mandatory or random testing programs are necessary to deter employee drug abuse or to build public confidence that the work force is drug free.[161]

While recognizing that concerns like safety, employee fitness, and prevention of corruption are legitimate and often compelling objectives,[162] the majority of courts have held that it is not constitutionally reasonable to accomplish them through either mandatory or random testing.[163] Often this decision is based upon the lack of empirical or other objective evidence that abuse of illegal drugs is a significant problem in the affected work force, that public confidence is in fact low, or that threats to public safety and employee efficiency are, in fact, substantial.[164] As a result, testing on the basis

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161 *See, e.g., Carlucci*, 680 F. Supp. at 433; Transport Workers v. SEPTA, 678 F. Supp. at 549; PBA v. Washington Township, 672 F. Supp. at 790; Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 475, 524 A.2d at 437; *Caruso*, 133 Misc. 2d at 551, 506 N.Y.S.2d at 795. In *Caruso*, the government claimed that its testing program was justified by a need to ascertain the extent of drug abuse within the workplace. This desire to obtain admittedly useful information was deemed far from sufficient to justify mandatory or random urinalysis. *Id.* at 551-52, 506 N.Y.S.2d at 795.

162 *See, e.g.*, Jones v. McKenzie, 833 F.2d 335, 340 (D.C. Cir. 1987) ("significant and compelling"); Penny v. Kennedy, 846 F.2d 1563, 1566 (6th Cit. 1988) ("compelling"); Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1544 (6th Cir. 1988) ("compelling"); *Carlucci*, 680 F. Supp. at 433("compelling"); PBA v. Washington Township, 672 F. Supp. 790 ("legitimate"); Capua v. City of Plainfield, 643 F. Supp. 1507, 1516 (D.N.J. 1986) ('legitimate'); City of Palm Bay v. Bauman, 475 So. 2d 1326 ("legitimate"); Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 475-76, 524 A.2d at 437-38("important and legitimate"—applying Art. I. para. 7 of the New Jersey Constitution); *Caruso*, 133 Misc.2d at 552, 506 N.Y.S.2d at 795, 799. *Cf.* Transport Workers v. SEPTA. 678 F. Supp. at 549 ("paramount").

163 *See supra* note 135.

164 *See, e.g., Lovvorn*, 846 F.2d at 1547 (no evidence of fire department-wide drug problem); *Penny*, 846 F.2d at 1567 (no evidence of significant police department-wide drug problem); *Carlucci*, 680 F. Supp. at 433 (holding interest in public safety and security insufficient to justify testing for off-duty drug use and integrity interest insufficient to justify testing for on- or off-duty use because of lack of concrete evidence of relationship between drug use and claimed harm); PBA v. Washington Township, 672 F. Supp. at 791 (data regarding extent of drug use in society as a whole, insufficient to justify random testing where there was no evidence of drug use among employees); Taylor v. O'Grady, 669 F. Supp. at 1437-39 (random testing not justified where only one-tenth of 3% of work force are chronic abusers of illegal drugs and there is no evidence of a public perception problem); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1568 (C.D. Cal 1987) (no evidence of drug abuse problem among employees); Feliciano v. City of Cleveland, 661 F. Supp. 578, 588-589 (N.D. Ohio 1987) (citing lack of evidence that drugs are a problem among employees or that they cause the specific harms the government was trying to avoid); Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 474, 524 A.2d at 437 (noting lack of evidence that drug use among employees is extensive or that the public is presently endangered); *Caruso*, 133 Misc. 2d at 557, 506 N.Y.S.2d at 795 (evidence showed drug abuse to be an occa-

of individualized reasonable suspicion is deemed sufficient to accomplish the desired ends.[165] Urine testing without individualized suspicion is overly intrusive on the already diminished rights of public employees and constitutes an unreasonable search and seizure under the fourth amendment.

There are a few exceptions to this trend. Cases upholding

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sional problem at best); Patchogue-Medford Congress of Teachers v. Board of Education, 119 A.D.2d at 40, 505 N.Y.S.2d at 891, 550 N.E.2d at 331 (1986)(no evidence of drug abuse problem among employees). *Cf.* Jones v. McKenzie, 833 F.2d at 340 (mandatory drug tests included in routine employment-related medical examinations reasonable at the inception in view of strong evidence of drug use among employees); Transport Workers v. SEPTA, 678 F. Supp. at 548-550 (random testing permissible as possible deterrent where prior "suspicion testing" program did not prevent drug related accidents and there was evidence of loss of public confidence). *But see* AFGE v. Dole, 670 F. Supp. 445, 448 (D.C. Cir. 1987) (mere notice of testing program may have had deterrent effect resulting in lack of evidence of drug problem among employees). There is some question whether random or mandatory testing conducted solely to bolster public confidence would be sufficient to permit "highly intrusive" urinalysis even if lack of confidence were documented. *Cf.* Taylor v. O'Grady, 669 F. Supp. at 1439 (no court has ever considered loss of public confidence sufficient in and of itself to justify mandatory urinalysis) *with* Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (where public confidence is essential to success of pervasively regulated horse racing industry, state's "strong" interest outweighs minimal privacy interest of jockeys) *cert. denied*, 478 U.S. 986 (1986).

Empirical or other objective evidence that the urinalysis program will accomplish the desired ends may also be essential. *See* Taylor v. O'Grady, 669 F. Supp. at 1439; AFGE v. Weinberger, 651 F. Supp. at 735-36.

165 Most of these courts reached this conclusion by determining that the individual and government interests could best be accommodated by imposing an individualized suspicion standard. *See, e.g.*, RLEA v. Burnley, 839 F.2d at 588; PBA v. Washington Township, 672 F. Supp. at 790; *Carlucci*, 690 F. Supp. at 433-34; Taylor v. O'Grady, 669 F. Supp. 1422, 1439 (N.D. Ill. 1987); Feliciano v. City of Cleveland, 661 F. Supp. at 589; Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986); Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 475, 524 A.2d at 437; Patchogue-Medford Congress of Teachers v. Board of Education, 119 A.D.2d at 40, 505 N.Y.S.2d at 891, 550 N.E.2d at 330. Thus, mandatory or random searches were unreasonable in their inception. Several more recent decisions take a somewhat different approach. They conclude that while it may be reasonable to conduct mandatory or random searches *ab initio*, such searches are not reasonable in scope because there are less intrusive means of accomplishing the government's objectives, usually amounting to training supervisors to look for sufficient evidence of drug abuse to constitute reasonable suspicion. *See, e.g.*, NFFE v. Carlucci, 690 F. Supp. 416, 434 (D.C. Cir. 1988); Taylor v. O'Grady, 669 F. Supp. at 1438; Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1568, 1569 (C.D. Cal. 1987). *Cf. Caruso*, 133 Misc.2d at 557, 506 N.Y.S.2d at 799. Other courts conclude that the scope of urine testing is not reasonably related to the employer's goals. *See, e.g.*, RLEA v. Burnley, 839 F.2d at 588-89 (9th Cir. 1988) (urinalysis cannot detect degree of current impairment), *rev'd sub nom.* Skinner v. RLEA, 109 S. Ct. 1402 (1989); Jones v. McKenzie, 833 F.2d 340-341 (for drug testing of employees to be reasonable, there must be a neus between the test and the employers legitimate safety concern), *cert. granted* and *judgement vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); *Carlucci*, 690 F. Supp. at 434 (urinalysis not reasonably related to detecting on-the-job impariment); Taylor v. O'Grady, 669 F. Supp. at 1438 (urinalysis not reasonably related to detecting on the job impariment).

mandatory or random public employee urinalysis fall into four sometimes overlapping groups. The first category of cases hold that urine testing of workers in highly regulated industries is permissible in order to promote strong government interests in protecting the public from danger, preventing corruption, or promoting public confidence.[166] Warrantless random or mandatory searches are permitted in pervasively regulated industries based in part on the theory that persons who choose to participate in such ventures, by virtue of their knowledge of the statutes and regulations authorizing administrative inspections of persons and places, enjoy substantially reduced expectations of privacy with regard to such searches.[167] In

166 *See Washington Township*, 850 F.2d at 144; Nebraska Public Power District v. Rushton, 844 F.2d 562, 566 (8th Cir. 1988); *Shoemaker*, 795 F.2d at 1143; Transport Workers v. SEPTA, 678 F. Supp. at 550. *Cf.* National Treasury Employees Union v. Von Raab, 816 F.2d at 180 (drawing analogy to highly regulated industry), *cert. granted*, 108 S. Ct. 1072, 1988; Mack v. United States, 653 F. Supp. 70, 75 (S.D.N.Y. 1986)(FBI agent had diminished expectation of privacy given knowledge of FBI's strong interest in personal lives of agents).

167 *See Shoemaker*, 795 F.2d at 1142. *Cf. Washington Township*, 850 F.2d at 136 (police officers' expectations of privacy to the point where a strong governmental interest outweighed them). While the wisdom of applying the highly regulated industry doctrine to urine testing of jockeys was questionable in the first instance, *Taylor*, 669 F. Supp. at 1442 (implying that *Shoemaker* extended doctrine from prior applications only to searches of premises to searches of persons), the Third Circuit's application of the doctrine in *Washington Township* is even more disturbing. Concluding that the government interests in safety and police integrity were substantial and that police officers' expectations of privacy were lowered because they worked in a highly regulated industry, the court held that *Shoemaker* was controlling and that mandatory and random testing without individualized suspicion was permissible because the procedural and confidentiality protections in the Washington Township plan were comparable to the plan upheld in *Shoemaker*. *Id.* at 136, 141. This analysis satisfies only the first part of the requisite fourth amendment inquiry—whether the search was justified at its inception. *See supra* note 89 and accompanying text. The court failed to properly evaluate whether the means of conducting the search were reasonable because it erroneously concluded that only the methods of selecting employees for random searches and of insuring confidentiality were relevant to that inquiry. The court failed to evaluate the nexus between the search and the government's objectives and whether the search was more intrusive than necessary. *See supra* notes 139-142 and accompanying text and *infra* notes 159-60 and accompanying text. Although it may legitimately affect the outcome of the initial balancing inquiry, the highly regulated industry detemination should not grant the government *carte blanche* to perform any search regardless of the unreasonableness of its scope. *Cf. Brotherhood of Locomotive Engineers*, 863 F.2d at 1117 (3d Cir. 1988) ("[T]he standard for sustaining administrative searches does not represent an independent use of Fourth Amendment analysis . . . . [A]dministrative searches are merely one illustration of the reasonableness standard arising out of the 'careful balancing of governmental and private interests.' "(citations omitted)). *See generally* LAFAVE & ISRAEL, *supra* note 60 at § 3.9(c), 190-92 (on the highly regulated industry standard doctrine).

Essentially the pervasively regulated industry theory is based on implied consent to the search by virtue of voluntarily choosing to engage in a regulated indutry with knowledge of the regulations. This may help to explain the analogy drawn by the Eighth Circuit in *Von Raab* in which Customs Service employees seeking transfers to certain

the second category are cases in which the courts hold that the employees' reasonable expectations of privacy are less than those of other employees based on the fact that they were already subject to equally or more intrusive employment related searches.[168] The third category includes cases in which the courts determined that urine testing was only minimally intrusive because of the manner in which it was performed. In some cases, the fact that urination was unobserved and that other procedures were carefully delineated was sufficient to earn this characterization.[169] Urine testing for evidence of illegal drug abuse is also considered minimally intrusive when it is

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positions were tested. Applicants were told that they would be tested at a certain time and could withdraw their application without any adverse consequences. National Treasury Employees Union v. Von Raab, 816 F.2d at 178, 180 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988). *Accord* Transportation Workers v. SEPTA, 678 F. Supp. at 550; (analogizing employment setting to highly regulated industries); *Rushton*, 653 F. Supp. at 1524-25 (same). *Cf.* NFFE v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987) (indicating that advance notice that mandatory urinalysis is required as a condition of employment is relevant when assessing the extent of the employees' privacy interests). Thus, the highly regulated industry standard exception should not apply when the regulated scheme is not directed toward employees. *See Brotherhood of Locomotive Engineers*, 863 F.2d at — (3d Cir. 1988); *Burnley*, 839 F.2d at 585. *See also Lovvorn*, 846 F.2d at 1545 (criticizing application of highly regulated industry doctrine in urinalysis cases).

168 *See, e.g., Rushton*, 844 F.2d at 566; McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987). In both cases, employees were also subjected to strip searches under certain circumstances. *Cf.* AFGE v. Dole, 670 F. Supp. at 448 (indicating random urinalysis not very intrusive where employees already subject to regularly scheduled urinalysis). Urinalysis programs in the military have been upheld, in part, on the same theory. *See generally supra* notes 112-120 and accompanying text. *Cf. Washington Township*, 850 F.2d at 141 (referring to police as a quasi-military organization), *cert. denied*, 109 S. Ct. 1637 (1989).

A *sub silentio* factor in these cases may be an assessment that the government—and public—interest in safety was more substantial than in other employment situations. For example, the scope of threatened harm from prison riots, nuclear power plant accidents, or air disasters far exceeds the harm feared by the government in other cases. *Cf.* Mack v. United States, 653 F. Supp. at 75 (emphasizing vital national security interest in drug free FBI); AFGE v. Weinberger, 651 F. Supp. at 735 (indicating that the balance may be altered in favor of mandatory drug testing if the government were to substantiate its claim that the employees' responsibilities regularly involved national security rather than duties comparable to a local police officer). Further, the connection between substance abuse and public safety may be more intuitive and direct in these cases than in others where stronger evidence that the feared harms are real is required. *See* Transport Workers v. SEPTA, 678 F. Supp. at 550 (analogizing *McDonell* and calling operating employees positions "safety critical"). *See also Lovvorn*, 846 F.2d at 1546-47 (suggesting that fourth amendment balancing should include consideration of potential harm to society posed by drug-impaired employees and the extent to which drug tests will decrease the risk of harm).

169 *See, e.g.*, National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1988), *cert. granted*, 108 S. Ct. 1072 (1988); AFGE v. Dole, 670 F. Supp. 445, 448 (D. D.C. 1987); Shoemaker v. Handel, 619 F. Supp. at 1100-02 (D. N.J. 1985). Notably, in each of these cases, the courts also relied upon one of the other two categories discussed above.

included in mandatory, employment related, non-pretextual physical examinations.[170] Because urine samples are generally taken during physical exams, the courts reason that there is little additional interest in protecting the specimen from analysis for drug metabolites.[171]

Unlike the first three groups of cases, the fourth category recognizes that urinalysis constitutes a substantial interference with employee privacy rights. The one decision in this category cites unusually strong evidence of the actual presence of a drug problem in the employee population, a past record of actual drug-related harm to the public, and failure of a prior individualized suspicion testing program to alleviate the drug problem, to support its conclusion that the government interest was predominant. Because the testing program was reasonably related to affectuation of the particularly strong public safety interest, it did not violate the fourth amendment.[172]

e. Arrestees

Pre-bail urinalysis of arrestees is not directly analogous to any of the contexts in which the courts have adjudicated the reasonableness of urine testing as a non-criminal search. There are important distinctions among the various contexts with regard to the extent of fourth amendment interests possessed by the persons subject to urine testing,[173] the government interest,[174] and the degree of def-

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[170] Jones v. McKenzie, 833 F.2d 335, 340 (D.C. Cir. 1986) (routine annual examinations), *cert. granted and judgment vacated sub. nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); Wrightsell v. City of Chicago, 678 F. Supp. 727, 733-34 (N.D. Ill. 1988) (return to work examinations). *But see* Transport Workers v. SEPTA, 678 F. Supp. at 551 (holding that where random testing is permitted, return to work testing is unreasonable absent some reasonable suspicion or programmatic basis).

[171] *See, e.g.*, Wrightsell v. City of Chicago, 678 F. Supp. at 734.

[172] *Brotherhood of Locomotive Engineers*, 863 F.2d at 1121 (3d Cir. 1988). *Cf.* Smith v. City of East Point, 258 Ga. 111, 365 S.E.2d 432, 434 (1988)(citing evidence of actual drug use by police and failure of efforts to solve problem by other means in addition to relatively weak assessment of employee privacy interest to uphold mandatory testing).

[173] As demonstrated above, arrestees cannot be required to undergo urinalysis solely because of their status as arrestees. *See supra* notes 83-94 and accompanying text. Further, arrestees enjoy more substantial fourth amendment rights than prisoners and members of the military. *See supra* notes 85-87 and accompanying text and *supra* notes 116-117 and accompanying text. Because arrest, in and of itself, does not provide a basis for diminishing an individual's fourth amendment protections, arrestees arguably enjoy more extensive privacy rights than public employees. *See infra* notes 180-183 and accompanying text for a discussion of arrestees' privacy interests vis-a-vis pre-bail testing.

The ultimate use of the information obtained from urinalysis is another factor that varies among contexts and that may subtly influence the outcome of judicial decisions. Pre-bail urinalysis is distinguishable from most of the employment cases because it oc-

erence to which the relevant government agency is entitled.[175] These cases do, however, provide guidance for an independent analysis of the reasonableness of mandatory arrestee testing.

No court has ruled that a urinalysis program violates the fourth amendment under any and all circumstances. On the other hand, courts have approved mandatory and random urinalysis programs only when the government interest in conducting the program is very strong and when the court's assessment of the test subjects' privacy interest is relatively weak.[176] Thus, in cases involving prisoners, the military, and employees such as prison guards, jockeys, and nuclear power plant workers, urine testing programs have survived fourth amendment challenges even in the absence of evidence that testing in fact accomplished the desired objectives.

Where the government interest, while still substantial, is not as important, and when the court's assessment of the individual's privacy interest is high, the government's burden of proving that mandatory or random testing does not violate the fourth amendment is much more difficult. Thus, in cases involving public school students and government employees such as police officers, fire fighters, public transit employees, and school teachers, courts have held that random or dragnet testing is impermissible in the absence of a strong record revealing that drug use is a significant problem[177] and that the testing program is a reasonable means of ameliorating the problem.[178] Under these circumstances, urinalysis is only per-

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curs in the criminal justice context where the fruits of the urinalysis may be used in criminal or other enforcement proceedings; specifically to revoke pretrial release, Berry v. District of Columbia, 833 F.2d 1031, 1035 n.16 (D.C. Cir. 1987), and possibly as evidence at trial. Jones v. United States, 833 F.2d 335, (D.D.C. 1988)(urinalysis results may be used at trial for impeachment purposes). The school cases may be the most analogous because they involve enforcement and/or criminal searches of a group that retain some fourth amendment rights. The analogy is difficult, though, because the subjects are minors and the consequences of many infractions of school rules—for example, assignment to detention hall—are much less serious than the loss of liberty resulting from revocation of pretrial release.

174 See *infra* notes 194-200 and accompanying text for a discussion of the government's interest in pre-bail testing.

175 This is especially important when evaluating the extent to which courts will require objective and, possibly, empirical proof that urinalysis serves the government's purpose and the rigor with which they will critically examine the proffered evidence. *See infra* notes 204-205 and accompanying text.

176 This is consistent with decisions approving other types of "dragnet" searches. *See supra* note 97.

177 Mandatory testing designed to ascertain the extent of drug use in a population has been disapproved. *See, e.g.*, Tucker v. Dickey, 613 F. Supp. 1124, 1131-32 (W.D. Wisc. 1985); Caruso v. Ward, 133 Misc. 2d 544, 551, 506 N.Y.S.2d 789, 795 (Sup. Ct. 1986).

178 *See supra* notes 162-65 and accompanying text. In contrast, where there is strong evidence that drug abuse is a critical concern among the population to be tested, that it

missible if there is reasonable individualized suspicion.[179]

Given the current judicial climate, and the apparently inconsistent, evolving standards for adjudicating the constitutional reasonableness of non-criminal searches, it is difficult to ascertain exactly what standard should be used to assess the reasonableness of pre-bail stage urinalysis. The choice appears to be between traditional balancing, illustrated by the cases involving prisoners,[180] and the more recent method of weighing individual and government interests through the two step inquiry the Supreme Court has adopted for school searches[181] and workplace searches.[182] While the latter apparently is the wave of the future, there is considerable confusion about the proper analysis that occurs within each of the two steps and the role balancing plays in the decision making process.[183]

The approach articulated by the United States Court of Appeals for the District of Columbia in *Berry v. District of Columbia* provides

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does cause the harm sought to be avoided, and that urinalysis only on the basis of individual suspicion will not solve the problem, mandatory and random programs have been upheld. *See, e.g.*, Transport Workers v. SEPTA, 678 F. Supp. 543, 548-550 (D. Pa. 1988).

179 *See supra* note 136 and notes 162-165 and accompanying text. PBA v. Washington Township, 850 F.2d 133, 141 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989), is the only reported decision inconsistent with this trend. In that case, the Third Circuit held that police officers in Washington Township, New Jersey, worked in a highly regulated industry. Therefore, as in the cases discussed in the text accompanying *supra* note 152, the government interest in testing was very strong and the police officer's privacy interest was very low. Taking a narrow view of the issues in the case, the court decided that under its prior decision in *Shoemaker*, random testing and mandatory testing during an annual physical exam did not violate the fourth amendment. The court did not consider whether drug use was in fact a problem among police officers in Washington Township or whether there were alternate methods of accomplishing the government's goals of assuring police integrity and safety.

As the Third Circuit noted in *PBA v. Washington Township*, courts are split on the question of whether *Shoemaker* was correctly decided. *Washington Township*, 850 F.2d at 141 n.3. Moreover, *Shoemaker* has been distinguished or disregarded as an anomaly in other cases involving random or mandatory urinalysis of police officers. *See, e.g.*, Feliciano v. City of Cleveland, 661 F. Supp. 578, 591 (N.D. Ohio 1987); Fraternal Order of Police v. City of Newark, 500 A.2d at 434-35; *Weinberger*, 651 F. Supp. at 734-35; Caruso v. Ward, 133 Misc.2d at 506, N.Y.S.2d at 798; Capua v. City of Plainfield, 643 F. Supp. 1507, 1518-19 (D.N.J. 1986). Whether the highly regulated industry doctrine was ever meant to ease restrictions on searches of government employees in addition to the premises and records of licensed commercial enterprises is subject to dispute. *See* Taylor v. O'Grady, 669 F. Supp. 1442, 1442 (N.D. Ill. 1987); *Fraternal Order of Police*, 524 A.2d at 435. Nevertheless, the doctrine should not be construed to grant government officials *carte blanche* to disregard employee privacy rights without demonstrating that there is a real and significant drug problem and that the search and seizure is a reasonable means of ameliorating the problem.

180 *See supra* notes 103-111 and accompanying text.

181 *See supra* notes 122-123 and accompanying text.

182 *See supra* notes 139-142 and accompanying text.

183 *See supra* note 142 and accompanying text.

the best guidance.[184] The issue of the constitutionality of post-arraignment urinalysis, although not identical, is very similar to that of pre-arraignment urine testing, and the circuit court's interpretation of the two step approach is logical and does not suffer, at least initially, from being too heavily weighted on behalf of either the government or the individual. *Berry* indicated that to meet constitutional standards, post-arraignment urinalysis must, first, be reasonable at its inception. This determination requires balancing of the government interest in conducting urine tests against the arrestees' privacy interest in not being required to submit their urine for scrutiny. The inquiry includes consideration of what level of suspicion, if any, may be necessary to make the intrusion on the individual's right of privacy reasonable. The second step, which is not necessary unless the search is reasonable at its inception, involves consideration of whether the search is reasonable in scope. This inquiry involves exploration of whether the search is reasonably related to the government's objective and whether the manner of conducting the search is reasonable.[185] The former inquiry explores the fit between means and ends; the latter investigates the procedural aspects of the urinalysis program.

Analysis of the constitutionality of pre-arraignment urinalysis begins with balancing. The first consideration is the degree of privacy arrestees enjoy in the act of urination. Most courts have concluded that urine testing is highly intrusive, comparable to a strip search or a body cavity search.[186] Requiring an individual to urinate on demand and to produce urine for scientific examination is degrading and humiliating. Urinalysis can expose confidential medical information to which the government has no right, in addition to evidence of drug ingestion.[187] If observation is required, as is generally necessary to meet chain of custody concerns, the already grave privacy implications become even more serious.[188] Privacy rights are infringed still more if the act of urination is observed by

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184 The court adopted this standard directly from employee urinalysis cases it had decided since *O'Connor*, 480 U.S. 709 (1987). Berry v. District of Columbia, 833 F.2d 1031, 1035 (D.C. Cir. 1987) (citing NFFE v. Weinberger, 818 F.2d 935, 942-43) (D.C. Cir. 1987). *Accord* Jones v. McKenzie, 833 F.2d 335, 338-39 (D.C. Cir. 1987).

185 *Berry*, 833 F.2d at 1034-36 (describing approach to be taken by district court on remand). *Accord Weinberger*, 818 F.2d at 942-43; *Jones*, 833 F.2d at 338-40.

186 *See supra* notes 93 and 149-154 and accompanying text.

187 *See supra* note 72 and accompanying text.

188 *See Jones*, 833 F.2d at 340 n.11 (D.C. Cir. 1987) (observation raises different privacy concerns), *cert. granted and judgment vacated* sub nom. Jenkins v. Jones, 109 S. Ct. 1633 (1989); PBA v. Washington Township, 672 F. Supp. 779, 787 (D.N.J. 1987) (the taking of urine samples under direct supervision would be an additionally intrusive procedure).

unnecessary persons.[189]

Even though, in the abstract, urinalysis is highly intrusive and the privacy interests apparently substantial, the privacy interests will be diminished if, by virtue of their status, the test subjects cannot reasonably expect the same degree of privacy as ordinary citizens. Unlike prisoners, members of the military, public school students, and even public employees, there is no basis for concluding that the overall privacy rights enjoyed by arrestees are diminished solely by virtue of their status.[190] Even if it is assumed that arrestees' rights are not equivalent to those of ordinary citizens, their rights are more analogous to public school students and public employees, who retain some rights, than to prisoners and the military, who lose almost all their fourth amendment rights. Unlike convicted prisoners, arrestees have not yet been convicted of a crime. The overwhelming interests in institutional and national security that play a strong role in the assessment of the strength of the constitutional rights of pris-

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189 *See* Storms v. Coughlin, 600 F. Supp. 1214, 1222 (S.D.N.Y. 1984)(unreasonable to collect urine samples in a place where unnecessary persons can observe). In the District of Columbia, pre-bail urine samples must be produced from a position in the lock up from which the pretrial services officer, and other detainees, can observe the urination. Brief of the Public Defender Service for the District of Columbia as Amicus Curiae, at 12, Berry v. District of Columbia, 833 F.2d 1034 (D.C. Cir. 1987).

Commonly, toilet facilities in lock-up cells are subject to observation. The fact that all urination is subject to view, however, does not eradicate the privacy rights implicated by urinalysis. "That an individual may voluntarily engage in an activity cannot be the basis of granting to the government the power to *compel* an individual to engage in that activity." Lovvorn v. City of Chattanooga, 846 F.2d 539, 544 (6th Cir. 1986). An analogous argument, that use of public restrooms takes away one's privacy interest in this regard, has been rejected. As one Court of Appeals that ultimately approved employee testing stated, "expectations of privacy in a particular activity do not exist on an all or nothing basis . . . 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." National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987) (footnotes omitted). *Accord Lovvorn*, 846 F.2d at 1544.

190 Although arrestees, unlike ordinary citizens, may be subjected to quite intrusive booking searches and to warrantless searches incident to arrest, those searches are permitted because of the overwhelming importance of the government's interest in conducting them when balanced against the ordinary interest in bodily privacy rights. The fact that an individual's rights may be invaded for one purpose does not automatically permit an additional invasion of privacy rights for a separate purpose. Thus, in *Arizona v. Hicks*, 480 U.S. 321, 325 (1987), the Court held that an intrusion into an arrestee's home justified by exigent circumstances cannot be extended to allow officers to search portions of the home or objects unrelated to the objectives of the original search. Urinalysis involves an additional invasion of privacy of arrestees because it is not justified by either exigent circumstances or the compelling interests that make searches incident to arrest and booking searches constitutionally reasnable. *See supra* notes 83-94 and accompanying text. Therefore, as in *Hicks*, pre-bail urinalysis must be authorized independently.

oners and the military are not present in the context of bail stage urinalysis.[191]

Finally, none of the considerations beyond mere status that have led some courts to hold urinalysis only minimally intrusive apply to pre-bail testing.[192] Bail stage urinalysis is observed; it is not collateral to a non-pretextual medical examination; and there is no basis for concluding that test subjects implicitly consent to intensified scrutiny of their private lives by virtue of their arrest.[193] There is no escaping the conclusion that pre-bail urinalysis implicates privacy rights that are far from minimal; in fact, it is highly intrusive.

On the other side of the balance must be weighed the government interest in performing pre-bail urine tests and using the results to inform the pretrial release decision. Although until recently the sole acknowledged objective of the bail or pretrial release decision was to insure that criminal defendants will appear for trial,[194] in *United States v. Salerno*, the Court legitimized the hitherto *sub rosa* goal of protecting the community from dangerous defendants.[195] Conditioning pretrial release to address public safety concerns does not violate the Constitution,[196] and authority to impose appropriate conditions on release has been incorporated into the laws of many states, the District of Columbia and the federal jurisdiction.[197]

The government claims that the information revealed by urine testing is useful to pretrial release decisionmakers because it serves both purposes of bail: to ensure the efficient operation of the criminal justice system and to preserve public safety. It is believed by proponents of drug testing programs at the bail stage—and preliminary research has reported findings—that drug users are more likely to abscond and/or be rearrested for new crimes if released pretrial than non-drug users.[198] Thus, it is reasoned that requiring further

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191 *See supra* note 103. The analysis here is directed to a preliminary assessment of the strength of the subject population's personal privacy rights in general, which is necessary before a more direct comparison between the actual privacy interest involved (urination and analysis of urine specimens) and the government interest in the specific search and seizure can be made. The relative strength of the government's interest in bail stage urinalysis is assessed below. *See infra* notes 194-199 and accomanying notes.

192 *See supra* note 154 and accompanying text.

193 The analogy here is to the reasoning in cases involving highly regulated industries and analogous cases where employees were forewarned that they would be subject to other types of highly intrusive searches if they accepted the employment. *See supra* notes 169-191 and accompanying text.

194 *See* Goldkamp, *Danger and Detention*, *supra* note 17, at 1-14.

195 United States v. Salerno, 481 U.S. 739 (1987).

196 *Id.*

197 For a general discussion of these laws see Goldkamp, *Danger and Detention*, *supra* note 17.

198 *See supra* notes 7 and 10 and accompanying text.

testing and/or treatment as a condition of release helps individuals to become drug free, decreases the likelihood of non-appearance, protects the community from the risk that released defendants will commit further crimes, and provides the court with a reliable indication of which releases are unwilling or unable to comply with the conditions imposed on their pretrial liberty.[199] Indeed, the government argues that because drug abuse is apparently a feature of criminality, requiring users to stay free of drugs as a condition of pretrial release will decrease the overall incidence of crime.[200]

The government's purposes for performing pre-arraignment urine testing appear, at least superficially, reasonably related to its legitimate and important interests in public safety and efficient operation of the criminal justice system. These interests, however, do not rise to the level of the national security concerns or risk of catastrophic accidents involving mass transit, nuclear reactors, and nuclear or chemical weapons invoked in a number of cases in which the courts have upheld mandatory or random urinalysis under the fourth amendment.[201] Rather, the government interest in pre-bail urinalysis is analogous to the still significant, but less catastrophic concerns of public safety and efficient operation of the work place articulated in most of the public employee cases[202] and in the public school cases.[203] Principles established in those cases reveal that the relative strength of the government's claims, when measured against the more than minimal individual rights implicated by mandatory or random drug testing, is substantially affected by the ability of the government to prove empirically that positive urinalysis results are reasonably related to its articulated goals.[204] In contrast to the prison cases in which the courts usually defer to agency expertise, the courts are unlikely to accept the claim that pre-bail stage testing is a reasonable means of assuring public safety or court appearances without relatively close judicial scrutiny because pre-

199 *Id.*

200 *Id.*

201 *See, e.g., supra* notes 142-143 and accompanying text. Cases approving mandatory or random testing where the government interest was not as high, for the most part, have relied on some variety of implied consent or a notice theory to diminish the privacy interest. There is no basis for a comparable finding of implied consent or notice in the case of arrestees merely because they have been arrested. *See supra* note 190 and accompanying text. *But see infra* notes 228-244 and accompanying text suggesting how potential fourth amendment difficulties with mandatory pre-bail urinalysis may be avoided by obtaining express consent.

202 *See supra* notes 162-165 and accompanying text.

203 *See supra* notes 121-131 and accompanying text.

204 Berry v. District of Columbia, 833 F. 2d 1031, 1035 (D.C. Cir. 1987). *See supra* notes 162-165 and accompanying text.

trial release decisionmaking is an area well within the expertise of the judiciary.[205] Therefore, empirical support for the proposition that positive urinalysis results are reasonably related to incidence of crime in the pretrial period and non-appearance for court dates is likely to be required to prove that the government objectives.[206]

Preliminary research provides empirical evidence tending to show a connection between positive results in bail stage urine testing and performance on pretrial release.[207] Thus, preliminary analysis, at least, leads to the conclusion that the government interest in public safety and efficient operation of the criminal justice system outweighs the individual privacy interests implicated by urinalysis. But there is an additional consideration that must be addressed in order to determine whether bail stage urinalysis is justified at its inception—whether there is sufficient evidence to show that the government interest is compelling enough to justify mandatory testing of all arrestees.[208] In *Berry*, the circuit court strongly implied that unless post-arraignment testing is limited to those arrestees for whom there is some individualized basis for suspecting drug use, it does not meet the strictures of the fourth amendment.[209] The court was evidently concerned that the government interest, while weighty, was not sufficiently related to mandatory testing to over-

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205 This is in contrast to the lack of scrutiny in cases involving prisoners due to the substantial deference courts accord prison administrators' decisions. *See supra* notes 109-110 and accompanying text.

206 *Berry*, 833 F.2d at 1035; NFFE v. Carlucci, 680 F. Supp. 416, 433 n.15 (D.C. Cir. 1988).

207 *See supra* notes 10-13 and accompanying text.

The *Berry* court indicated one potential difficulty with the current research showing a positive correlation between drug abuse and crime, noting that not all crime directly poses a threat to community safety. In such cases, imposing conditions upon pretrial release and revoking release for failure to comply with those conditions may be problematic for two reasons. First, in some jurisdictions specific statutory authorization may be required. Often, as in the case of the District of Columbia, the authorization is limited to concern for the "safety of . . . the community." D.C. Code Ann. § 23-1321(a)(1981). More significantly, in United States v. Salerno, 481 U.S. 739 (1987), the Court upheld pretrial detention against a claim that it unjustifiably intruded upon an arrestee's liberty interests on the theory that concern for community safety outweighed the individual interests. It could be argued that imposing conditions on pretrial release unrelated to community safety violates constitutionally protected liberty interests. *See Berry*, 833 F.2d at 1035 n.208

208 *See supra* note 184 and accompanying text. *But see* AFGE v. Dole, 670 F. Supp. 445, 447-48 (D.D.C. 1987) (erroneously placing burden of proof on persons challenging urinalysis program).

209 The court of appeals explicitly directed the district court to "determine whether there is a reasonable basis for the apparent assumption that arrestees ordered into the testing program are potential drug users." Berry v. District of Columbia, 533 F.2d 1031, 1035 (D.C. Cir. 1987).

come the substantial privacy interests at stake.[210] The same conclusion is likely here.

There are exceptions to the general trend requiring individualized suspicion when mandatory testing is pursued to protect public safety, including cases in which there is evidence of a considerable drug culture among the populations subject to urinalysis.[211] These courts are willing to accept the argument that mandatory or random testing will deter, and therefore diminish, the drug problem in the population.[212] Researchers examining drug use among recently arrested persons report that large proportions of arrestees test positively for drugs of abuse, thus indicating a large drug subculture among the population subject to bail stage testing.[213] This evidence, however, is not likely to be sufficient to alleviate the qualms expressed by the *Berry* court. First, evidence of widespread drug abuse was not the only factor affecting the balancing equation in those cases; the courts also found, for various reasons not present in bail stage testing, that the intrusion on individual privacy interests was minimal.[214]

Second, although pre-arraignment testing may ultimately lead to deterence of drug abuse, the means by which this may occur are not analogous to the deterrence argument in other contexts. One of the purposes of bail stage testing is to determine which defendants granted pre-trial release should be ordered into a program of periodic urine testing to deter drug use during the pretrial period. This goal, however, differs from promotion of pre-arrest abstinence

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210 *Id.* at 1035-36. The court did not question the importance of the government's claimed goals. However, the court did not "that exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal." *Id.* at 1036. In an earlier footnote, the court indicated that post-arrainment urine testing involved a "significant intrusion" on an individual's right of privacy. *Id.* at 1035 n.17.

211 *See, e.g.*, Jones v. McKenzie, 833 F.2d 335, 340 (D.C. Cir. 1987), *cert. granted and judgement vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); Transport Workers v. SEPTA, 678 F. Supp. 543, 548-550 (D. Pa. 1988).

212 *See supra* notes 110, 118, and 161 and accompanying text (referring to prison cases, military cases, and employment cases where deterrence is cited as one reason why testing is permissible). *See also* Hampson v. Satran, 319 N.W.2d 796, 800 n.3 (W.D. 1982).

213 *See* sources cited *supra* note 4.

214 *See, e.g.*, PBA v. Washington Township, 850 F.2d 133, 141 (3d Cir. 1988) (police officer has "diminished lowered expectations of privacy" where police industry is "most highly regulated" in New Jersey), *cert. denied*, 109 S.C. 1637 (1989); Jones v. McKenzie, 833 F.2d at 340 (D.C. Cir. 1988) (privacy interest minimal where urine tests included in non-pretextual annual physical examination), *cert. granted and judgement vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); Transport Workers v. SEPTA, 678 F. Supp. 543, 548-550 (E.D. Pa. 1988) (privacy interest minimized where public transit analogized to highly regulated industry).

due to knowledge that testing might occur after arrest and does not logically support mass testing of *all* arrestees.

Finally, it may be argued that the high prevalence rate of drug use among arrestees provides a sufficient factual basis to suspect that all arrestees' tests might be positive. The mere fact that an individual belongs to a suspect group, however, is not sufficient, in and of itself, to permit any intrusion upon that individual's fourth amendment rights.[215] Thus, despite the documented finding that a large number of arrestees will test positively for drug use, it is unlikely that courts would find mandatory or random testing at the pre-bail stage warranted and more likely that they would conclude that government and individual interests could best be accommodated by limiting testing to those arrestees for whom there is some reasonable individualized basis for suspecting drug abuse.[216]

Even if a court did hold mandatory pre-bail urinalysis reasonable at its inception, its scope must also be reasonable to meet fourth amendment requirements. Similarly, the Constitution requires that the scope of testing based upon individualized suspicion also be reasonable. Determination of the reasonableness of the scope of a search involves consideration of the nexus between the search and the government's objectives and of whether the procedure is more intrusive than necessary to accomplish these goals effectively.[217] Using this yardstick, proponents of mandatory testing will encounter a number of potential criticisms. For example, pre-

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215 *See, e.g.*, Ybarra v. Illinois, 444 U.S. 55 (1979). *But cf.* Morris & Miller, *supra* note 37 (arguing that attributes placing defendants in a high-risk classification justify treating them like high-risk defendants for purposes of pretrial release).

216 *See* Berry v. District of Columbia, 833 F.2d 1031, 1036 (D.C. Cir. 1987). While the definitions of the specific standard of individualized suspicion differ, *see supra* note 110, a likely standard to apply to bail stage testing would be a reasonable basis to believe, supported by objective articulable facts, that urinalysis would show evidence of drug use. As a practical matter, this standard would require a showing of some basis for suspecting that the test subject was a drug user. A mere "hunch" or "feeling" does not meet this standard; nor does a claim that drug use was simply suspected because the individual was involved in criminal activity (unless, perhaps, the arrest was for a drug-related crime).

As a practical matter, limiting pre-bail urinalysis to arrestees for whom there is individualized suspicion may result in many drug users escaping detection, thus defeating the purposes of the urine testing program. *See* Brief of United States as Amicus Curiae at 16, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987). This, however, does not alter the analysis. The fact that the only way to obtain useful information is through a constitutionally unreasonable search has never been sufficient to make the search constitutional. *Accord* AFGE v. Weinberger, 651 F. Supp. 726, 735 (S.D. Ga. 1988); NFFE v. Carlucci, 680 F. Supp. 416, 433 n.16 (D.C. Cir. 1988); Feliciano v. City of Cleveland, 671 F. Supp. 578, 586 (N.D. Ohio 1987).

217 See *supra* note 160 and accompanying text for a discussion of the fourth amendment standard described in *Berry*.

bail testing of all arrestees may be excessive. There is no purpose in testing those arrestees who ultimately are discharged at their first appearance because the judge finds no probable cause or those defendants who are not charged with bailable offenses. Still other arrestees will admit they are drug users to pretrial services officers during the informational interview; others may have been discovered to be in possession of drugs at the time of their arrest or display observable evidence of intravenous drug use or exhibit behavior characteristic of either intoxication or withdrawal; some may have prior records that reveal them to be users of controlled substances. Once again, mandatory drug testing to establish recent drug use seems extraneous when applied to these categories of individuals.[218]

Another difficulty may lie in the limitations of the testing procedure itself.[219] Although the various testing technologies are remarkably accurate, especially when compared with earlier technologies,[220] a certain number of false positive results (results designating a person as a user of drugs who is not a user of drugs) are nevertheless generated. In other settings when positive results from screening tests are submitted to confirmatory testing—such as gas chromatography/mass spectometry—false positives are mostly corrected before the information may be used to influence important decisions. Because time and cost constraints prohibit routine use of confirmatory techniques in the pre-bail application of drug testing, the problem presented by the potential for false positives (as well as false negatives) will be more significant. One recent study reports between eleven and thirteen percent false positives generated from a sample of tested defendants.[221] Of course, even true positive results are open to problems of interpretation; for example, they may reveal only an isolated incident of drug use rather than habitual abuse and thus make a defendant inappropriately eli-

218 Given the government's minimal standard of proof at bail hearings, any of these circumstances may be sufficient to condition release upon abstinence from substance abuse. *See supra* notes 120-131 and accompanying text (suggesting that urinalysis is more intrusive than necessary when there is already sufficient evidence to establish probable cause that the test subject was using drugs).

219 *See generally* supra notes 87-89 and accompanying text.

220 *See* Council on Scientific Affairs, *supra* note 45 (discussing accuracy and sensitivity of testing technologies); Blanke, *supra* note 46.

221 *See* Goldkamp, Gottfredson, & Weiland, *supra* note 10, at 30. Despite these concerns, the District of Columbia Court of Appeals recently held that a single, unconfirmed EMIT test constitutes reliable, competent evidence of intoxication in that jurisdiction. *See* Jones v. United States, 833 F.2d 335 (D.C. Cir. 1988). The concerns articulated in the text are equally relevant to the weight and creditibility to be ascribed to the evidence as to its admissiblity in the first instance.

gible for more restrictive conditions of pretrial release. Moreover, despite the rationale underlying testing that suggests a relationship between drug use and crime, drug testing may show correctly that a defendant abuses illegal drugs, but it does not show whether use of the drug in question is somehow connected with the defendant's alleged criminal activity or is merely coincidental.[222] To the extent that pre-bail testing plays a role in helping pretrial service employees to determine, prior to actual non-appearance or re-arrest, which releases are unlikely to comply with court-imposed conditions of release, a simple reporting condition that would not implicate any specifically protected constitutional rights is only one of the many possible alternative methods of accomplishing the same goal. These limitations surrounding the inferences that can be drawn from drug test results argue in favor of using other means of identifying drug abusers that do not infringe upon constitutionally protected rights.[223]

Finally, the actual procedures used for collecting the samples must be examined to determine whether they are no more intrusive than is reasonable given the circumstances that justify testing in the first instance. It is generally accepted that urine samples must be given under observation in order to assure the chain of custody and to thwart falsification of results.[224] However, observation by one person of the same sex in as discrete a manner as possible is all that is required.

Another consideration is whether and when test subjects are given an opportunity to explain positive results. Subjects should, at the least, be given an opportunity to challenge the evidence at the release hearing; questions about use of legal prescription and non-prescription drugs and other facts that may cause a false positive result should come before the test is performed. Scrupulous procedures must be developed and followed to maintain the confidentiality of the information obtained in response to pre-test questioning and in test results. In the criminal justice context there are two as-

222 The usefulness of drug testing as a classification instrument at the pre-bail stage is not dependent upon its ability to show that the subject was under the influence of drugs at the time the criminal conduct occurred. Nonetheless, to the extent that the reason for classifying arrestees as drug users is based upon the belief that there is a relationship between drug use and crime, the inability of the current technology to demonstrate more than a coincidental connection between ingestion of a controlled substance and alleged criminal activity is troublesome.

223 See *supra* text accompanying note 125 for some possible alternatives. The suggestions there are not intended to be exhaustive.

224 It is important to scrupulously maintain chain of custody procedures throughout the testing and reporting process in order to assure the admissibility of the evidence at the pretrial release hearing.

pects to this requirement. On one level, the information must be limited to the purpose for which it was obtained—informing the pretrial release decision. Positive test results cannot be used as evidence at trial, in sentencing, or in probation or parole violation proceedings.[225] Confidentiality requirements, however, go further. Drug use information should only be disseminated on a "need to know" basis. In the typical case the only people who "need to know" are the pretrial services officer, the judicial officer, the prosecutor, and the defense attorney involved in the pretrial release hearing. The fourth amendment requires that when, as here, substantial privacy interests are involved, procedures must be designed to uphold individual dignity as much as possible, whether mandatory urinalysis is reasonable or testing is limited to arrestees for whom individualized suspicion of use of controlled substances can be established.[226]

It is difficult to predict the ultimate outcome of either the *Berry* case or other litigation involving pre-bail stage testing that is sure to follow. Both the legal and social science research questions involved are complex and research and analysis in both disciplines is relatively recent and incomplete. *Berry* and other non-criminal urinalysis cases demonstrate that testing programs that are carefully tailored to respect the privacy rights of arrestees to the greatest extent possible and to recognize the limitations of urinalysis as a predictive tool are most likely to survive fourth amendment challenge. Mandatory drug testing of all entering criminal defendants does not appear to meet these criteria. Moreover, even testing limited to those defendants for whom there is individualized suspicion of drug abuse may be problematic if it is not carefully limited in scope to persons for whom the information obtained is useful for the pretrial release decision or if testing procedures are more intrusive than is reasonably necessary.

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225 This restriction is not being followed in the District of Columbia. In *Jones*, *supra* note 221, the court held that evidence of a positive pre-bail urine test was admissible at trial to rebut defendant's claim that he did not know a substance he found on the street was cocaine. *Accord* D.C. CODE ANN. § 23-1303(d) (1981 & Supp. 1988). Use of pre-bail urine test results at trial significantly alters the analysis of whether the tests are reasonable under the fourth amendment. The possibility that the evidence will be used at trial to convict a defendant of a crime rather than be limited to imposing additional conditions on pretrial release significantly increases the arrestees' interests in being free from dragnet testing and makes procedural due process concerns more significant. Notably, these concerns were not raised in *Jones*; the only constitutional issue presented to the court involved the sixth amendment's confrontation clause. *Jones*, 833 F.2d 335.

226 See *supra* notes 74-75 and accompanying text.

3. Consent Searches

If this Article has correctly analyzed the impediments to systematic urine testing of arrestees as a non-criminal search, drug testing at the pre-bail stage may be limited to individuals for whom there is reasonable individualized suspicion of recent drug use, based on objective, articulable facts. Thus, for all practical purposes, adoption of mass urine testing programs seem nearly impossible. Many of these objections, of course, could be overcome if arrestees consented to provide urine samples, because an otherwise reasonable search may be conducted without individualized suspicion or a warrant pursuant to the fourth amendment so long as valid consent is obtained. In all likelihood, constitutionally valid consent to bail stage urinalysis can be obtained in the vast majority of cases. Review of the legal requirements for consent, however, helps to illustrate some of the pitfalls that may nevertheless be encountered.

First, to be valid, consent must be given voluntarily by the person upon whose right of privacy the search intrudes.[227] The government must prove voluntariness, which is determined based on the totality of the circumstances.[228] The court will assess both the characteristics of the alleged consenter and the circumstances under which the government agents obtained the alleged consent. Among the circumstances that must be considered in determining if consent is voluntary are traits of the individual such as maturity, level of education, emotional state, physical health, and whether the individual was under the influence of drugs or alcohol at the time the consent was obtained.[229] It is not necessary to prove that the consenter was aware of his or her right to withhold consent, although such evidence substantially eases the government's burden.[230] The highly individualized nature of the consent inquiry, dependent as it is on the specific characteristics of the individual whose consent is sought, is particularly problematic in the context of a mandatory testing program in which every arrestee is asked to provide a urine sample, regardless of the arrestee's intellect, physical and emotional health, or possible state of intoxication. Significant numbers of arrestees suffer from one or more infirmities that would call the validity of their consent into question.[231] The difficulty of insuring that con-

227 Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

228 *Id.*

229 LaFave & Israel, *supra* note 60, at 204.

230 *See, e.g.*, Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987); Feliciano v. City of Cleveland, 661 F. Supp. 578, 593-94 (N.D. Ohio 1987); Wheaton v. Hagan, 435 F. Supp. 1134, 1147 (M.D.N.C. 1977).

231 As a practical matter, it may be difficult for test subjects to obtain any remedy for

sent of large numbers of arrestees is voluntary poses a significant obstacle to successful implementation of mass pre-bail urinalysis programs.

Examination of the characteristics of the individual who is the subject of the search and seizure is not the end of the consent inquiry. Other circumstances relevant to the voluntariness determination are more susceptible to control by program administrators. The environment and the means by which consent was obtained are both crucial to the inquiry. Consent given pursuant to express or implied threats, coercion, or claim of right to search, of course, will not be viewed as voluntary.[232] Consent obtained as a condition of exercising a separate benefit, privilege, or right is constitutionally inadequate to validate a search.[233] Although there is no absolute constitutional right to bail or pretrial release,[234] there are in the laws of many jurisdictions in the United States presumptions for both release on personal recognizance and release under the least restrictive conditions[235]—in short, tantamount to defining at least an important privilege, pretrial liberty of the accused, that should not be conditioned upon agreement to submit to a constitutionally unreasonable search.[236]

The jail or other custody environment in which the request for consent is made obviously plays a role in determining the validity of that consent. Certainly, a person can give valid consent for a fourth amendment search while in custody awaiting a first appearance. However, because of the coercive nature of the environment, other aspects of consent, such as the individual characteristics and the specific means used to obtain the consent, are likely to be scrutinized more carefully.[237] The identity and numbers of the officials

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an invalid consent because in most jurisdictions the exclusionary rule does not apply to bail or bail revocation hearings. *See generally* Goldkamp, *Danger and Detention*, *supra* note 17 at 74 (table summarizing due process features of American bail laws including whether application of the same rules of evidence as at trial). Nonetheless, civil actions for either damages or injunctions are possible. Further, the absence of a remedy does not justify deprivation of fourth amendment rights. *See supra* note 49.

232 LAFAVE & ISRAEL, *supra* note 60, at § 3.10(1), 204-06. *See also* United States v. Mendenhall, 446 U.S. 544, 557-59 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 224-26 (1973); Feliciano v. City of Cleveland, 661 F. Supp. 578, 593-94 (N.D. Ohio 1987).

233 *See, e.g.*, *Feliciano*, 661 F. Supp. at 593; Bostic v. McClendon, 650 F. Supp. 245, 249 (N.D.Ga. 1986); *Wheaton*, 435 F. Supp. at 1147; Gaioni v. Folmar, 460 F. Supp. 10, 14-15 (N.D. Ala. 1978). *See generally* LAFAVE & ISRAEL, *supra* note 60 at § 3.10, 206; Caruso v. Ward, 133 Misc. 2d at 548-50, 506 N.Y.S.2d at 793-94 (Sup. Ct. 1986) *aff'd*, 131 A.D. 2d 214, 520 N.Y.S.2d 551 (1987) (collecting cases).

234 *See* United States v. Salerno, 481 U.S. 739 (1987).

235 *See* Goldkamp,*Danger and Detention*, *supra* note 14, at 10-14.

236 *See supra* note 203.

237 *Cf.* LAFAVE & ISRAEL, *supra* note 60, at § 3.10, 206.

requesting the consent, for example, may be significant.[238] Arguably, a request by pretrial services employees is not as inherently coercive as one by police officers or by guards in the lock-up.[239]

While lack of knowledge of the right to refuse consent is not conclusive, such knowledge can counteract other coercive circumstances.[240] Given the inherently coercive environment in which bail stage urinalysis is necessarily performed, probably the most efficient method of avoiding challenges to the validity of any particular individual's consent at later stages is adoption of an "informed consent" procedure. A pre-printed form would detail what the urine sample would and would not be used for and what the test can and cannot reveal, would explain the possible consequences of a positive test result, and would specify that consent need not be given in order to obtain pretrial release.[241] The arrestee would be asked to sign a statement on the form indicating that he or she had read the form, understood it, and gave consent.

No matter how well drafted, the use of an informed consent procedure is not foolproof because examination of the circumstances may disclose that it was not signed voluntarily. For example, signing a consent form under an express or implied threat of punitive measures or loss of opportunity to obtain pretrial release may invalidate the consent.[242] Likewise, a form signed by an individual who is incapable of giving voluntary consent due to personal

238 *See Mendenhall*, 446 U.S. at 558-59 (threats perceived by accused because of social discrepancies are relevant); *Feliciano*, 661 F. Supp. at 595 (noting that police academy instructors, who were usually unarmed, wore arms on day urine was tested); Wheaton v. Hagan, 435 F. Supp. 1134, 1147 (M.D.N.C. 1977) (patrons were searched by armed police officers).

239 Procedures for requesting consent must be carefully delineated because express or implied threats, coercion, or claims of right must be avoided. Program developers should avoid use of procedures that falsely imply that urinalysis is permissible regardless of whether consent is obtained or that pretrial release is contingent upon submitting to urinalysis. *See* Anable v. Ford, 653 F. Supp. 22, 39 (W.D. Ark. 1985); AFGE v. Weinberger, 651 F. Supp. 726, 736 (S.D. Ga. 1986); Bostic v. McClendon, 650 F. Supp. 245, 249 (N.D. Ga. 1986); Gaioni v. Folmar, 460 F. Supp. 10, 14-15 (N.D. Ala. 1978); *Wheaton*, 435 F. Supp. at 1146-48. Critics have argued that jurisdictions that will not release the defendant before trial until the judge has seen urinalysis results, even though pre-bail testing is "voluntary," may be undermining the validity of the testing program because the consent may be given due to knowledge that pre-trial release is contingent upon promise of a urine sample.

240 United States v. Mendenhall, 446 U.S. 544, 558-59; *Schneckloth*, 412 U.S. at 248-49; *Feliciano*, 661 F. Supp. at 594.

241 The form should be written in the simplest language possible and should be read aloud to test subjects in addition to giving individuals time to study it themselves. Spanish language forms may also be desirable in many jurisdictions. The District of Columbia program employs a version of such a consent form. *See* J. CARVER, *supra* note 6.

242 *Cf.* City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324-25 (Fla. Dist. Ct. App. 1985)(consent invalid where signatures procured under threat of disciplinary action).

characteristics is not valid.[243] Nonetheless, use of a well drafted consent form that includes strictly adhered to guarantees that failure to cooperate will in no way penalize an individual is probably the best method for legitimatizing pre-bail urinalysis, both constitutionally and ethically.[244]

VI. CONCLUSION

As concerns for public safety at the pretrial release stage of the criminal process have emerged from the realm of public controversy, judicial discretion and *sub rosa* preventive detention to a level of explicit, constitutional recognition, the advent of drug testing at the entry stages has been embraced by its proponents as a valuable informational tool as well as an effective means for controlling crime among released defendants. The pretrial release decision has long suffered from vague and controversial goals, few release alternatives and poor or irrelevant information upon which to base decisions. Given this history, proponents argue that drug testing technology brought to bear on bail decisionmaking offers more accurate and objective information and thus, ideally, more effective decisionmaking by the courts at the bail/pretrial release stage.

This promise, however, is based on two critical assumptions: first, that the information provided by the new technology is pertinent to the demands of the predictive bail decision task; and, second, that mass drug testing of all arrestees is constitutionally permissible. The relevance of the information to the performance of the pretrial release decision task—the utility of drug test results in discerning the risk of defendant flight and crime during pretrial release—can best be determined by empirical research, research that is in comparatively early stages. If drug testing does not serve as a good predictor of defendant behavior during pretrial release, or if drug use and criminality are not related in the direct way assumed, then programs of detecting current defendant drug use and programs monitoring defendant drug abuse during provisional pretrial liberty will not ultimately improve the effectiveness of the courts' pretrial release function.

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243 *See supra* notes 127-231 and accompanying text.

244 *See* Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987), holding plaintiff's consent valid where he signed a form that included the following statement:

> I have been advised that I am under no obligation to provide a urine sample in connection with this administrative inquiry and I have further been advised that any information I supply would not be used against me in any criminal proceeding. Therefore I voluntarily submit to providing a urine specimen.

Id.

This Article has examined the constitutional implications of drug testing at the pre-bail stage. That drug testing constitutes a search within the meaning of the fourth amendment is clear. The constitutionality of such a search hinges principally on the notions of reasonableness and voluntariness. Quite obviously, if systematic testing of all arrestees violates fourth amendment prohibitions against unreasonable searches and seizures—even assuming powerful empirical findings to buttress the operating assumptions—current plans for expanded drug testing at this stage in the criminal process will have to be reconsidered and existing programs will require modification to conform to fourth amendment requirements. Program revisions may range from relatively simple alterations in testing procedure to ensure the search and seizure is conducted in a reasonable manner to more radical changes in the definition of the population tested. For example, it may be necessary to limit testing to persons arrested for bailable offenses. Similarly, it is quite likely that nonconsensual testing prior to the bail decision must be limited to persons for whom individualized suspicion can be established.

Existing programs operate under the notion that potential fourth and fifth amendment difficulties can be cured by obtaining voluntary compliance. Theoretically, defendants can consent to drug testing. However, the voluntariness of that consent depends on problems that may not be totally corrected by the use of a consent form. The personal attributes of the defendants, the coercive nature of the custody environment, and the informal lore about how judges in a particular jurisdiction will react to defendants at the bail stage who have declined to consent to urine testing, all may be viewed as invalidating the consent and falsifying the notion that the testing programs are based on voluntary defendant participation.

The government would like to employ the technology to screen as broad a spectrum of criminal defendants entering the system as possible to use the collected information effectively for the pretrial release decision. Obviously, if assumptions about the drug-crime relationship are borne out empirically, restriction of pre-bail drug testing to only those who give valid fourth amendment consent or to those for whom there is individualized suspicion will seriously weaken the utility of the technology. By allowing a potentially large number of defendants with drug abuse habits to refuse testing, a great many of the "target" defendants will be able to avoid classification based on drug use information. Similarly, pre-bail testing will be duplicative and unnecessary once sufficient evidence of drug usé to show individualized suspicion has been mustered; the same information standing alone provides an adequate basis for ordering

conditional pretrial release.[245] In this event, the empirical benefits—if they ever existed—may be so diminished by the constitutional limitations, that jurisdictions might be forced to ask how the effectiveness of pretrial release practices could be improved in other ways not involving the expense and complexity of drug testing programs.

[245] *See supra* note 218 and accompanying text.