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Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard

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NOTE

Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard

As concern over the abuse of illicit drugs spreads throughout the country,[1] many businesses have responded to the problem by implementing employee drug testing programs.[2] Similarly, governmental bodies have started programs designed to determine whether government employees use drugs in the workplace. Proponents of such testing claim that by identifying drug users, government officials can prevent the evils of drug use from spreading into the government workplace, and thus enable the government to carry out its duties more effectively.[3] With this reasoning in mind, the Reagan Administration proposed the "Drug-Free America Act of 1986" which included the "Drug-Free Federal Workplace Act of 1986" as one of its titles.[4] The "Drug-Free Federal Workplace Act" would require most federal workers to undergo drug testing.[5]

Some courts, however, view drug testing as a violation of the delicate privacy interests of tested individuals because the testing subjects those individuals to highly intrusive scrutiny of personal medical information.[6] Some argue that urine tests are particularly embarrassing and degrading to the person tested.[7]

In a government employee drug testing situation, the provision of the fourth amendment prohibiting unreasonable searches and seizures protects a tested employee. This note explores this constitutional protection and examines the individual and governmental interests at stake in employee drug testing.[8] Part I examines the motivations behind gov-

1 *See America's Crusade: What is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60 ("Opinion polls show that drug abuse has surpassed economic woes and the threat of real war as the nation's No. 1 concern.").

2 *See* O'Boyle, *More Firms Require Employee Drug Tests*, Wall St. J., August 8, 1985, at 6, col. 1.

3 *See, e.g.*, Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986) (drug testing procedures implemented in federal executive branch to reflect the government's concern with "the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity").

4 *See* President's Message to Congress Transmitting "Drug-Free America Act of 1986," 22 WEEKLY COMP. PRES. DOC. 1192 (Sept. 15, 1986). *See also* Exec. Order No. 12,564, *supra* note 3 (mandatory drug testing for employees in sensitive positions in executive agencies).

5 *See* "Drug-Free Federal Workplace Act of 1986," *reprinted in* President's Message to Congress Transmitting "Drug-Free America Act of 1986," *supra* note 4.

6 *See infra* note 56 and accompanying text.

7 *See infra* notes 22-23 and accompanying text.

8 The body of this note will not deal with the issue of employee consent to drug testing by a government employer. Consent freely and voluntarily given precludes fourth amendment inquiry into an intrusion. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

An employer may make consent to future drug testing a condition to continued employment, subject to collective bargaining agreements. *See* Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMP. REL. L.J. 422, 428 (1985). However, as the district court in McDonell v.

ernment-sponsored drug testing. Part II determines whether government drug testing must comply with the fourth amendment.[9] Part III examines several of the standards that courts have used when determining whether drug testing violates government employees' fourth amendment rights. Part IV compares drug testing of government employees to other searches that require reasonable suspicion. Part V concludes that employee drug testing is constitutional only if a reasonable suspicion of drug use exists before such testing occurs.

I. Reasons for Employee Drug Testing

A government employer has several undeniably strong interests in implementing drug testing programs for its employees. In any employment context, drug use can cause severe problems, including actual impairment caused by on-the-job intoxication or pathological behavior that can adversely affect an employee's ability to do his job.[10] Drug use may decrease productivity, increase absenteeism, and cause accidents for which the employer may be liable.[11] Economic consequences of drug use for an employer may include increased health insurance and workers' compensation costs, training new workers to replace drug-dependent employees, employee theft, and decreased quality control.[12]

Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 808 F.2d 1302 (8th Cir. 1987) pointed out: "Public employees cannot be bound by unreasonable conditions of employment. Advance consent to future unreasonable searches is not a reasonable condition of employment." *Id.* at 1131 (citation omitted). A commentator has noted:

> The mere fact that [a public] employee signs a form in which he purports to acquiesce to a urine test . . . will not automatically legitimatize any ensuing test . . . . At best, the existence of such consent will likely be but one of many factors considered by a court in determining the overall 'reasonableness' of a urine testing policy.

Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L.J. 309, 340 (1986).

9 The fourth amendment states:

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

U.S. CONST. amend. IV.

Additionally, the Supreme Court has held the fourth amendment applicable to the actions of state government through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

10 *See Battling the Enemy Within: Companies Fight to Drive Illegal Drugs Out of the Workplace*, TIME, March 17, 1986, at 52.

Pathological behavior patterns stem from substance abuse disorders, and can cause an employee to lose the capacity to function in his occupation. Erratic behavior may result, and physiological dependence on the drug may set in. *See* G. UELMAN & V. HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK 1-8 (1986).

11 *See* Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMP. REL. L.J. 181, 190-91 (1985); Husband, *Drug and Alcohol Abuse in the Workplace*, 15 COLO. LAW. 31 (1986).

12 *See* Geidt, *supra* note 11; Husband, *supra* note 11, at 31. *See also* Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42 (1985).

> For the individual business, at least four types of worker behavior can be identified as creating drug problems for the employer. These include: drug intoxication on the job (arriving at work under the influence of drugs or ingesting drugs during the workday); possession, buying, and selling drugs in the workplace; poor job performance resulting from a drug use or dependency problem; and employee thefts undertaken to support a drug habit.

Id. at 43.

When an employee's duties help a government employer fulfill a public obligation, employee misconduct due to drug use may cause the government to breach its obligation to the community.[13] Drug use by government employees may endanger public safety.[14] Government employees such as firefighters and policemen perform functions that are so essential to a community that the consequences of drug abuse by such employees might prove disastrous.[15] For these reasons, drug testing for the purposes of identifying, disciplining, or firing a government employee whose drug use could have a deleterious effect on job performance serves a valid public interest.

Apparently, the government has instituted employee testing in part because of its stance on drug use in general. For various political[16] and sociological[17] reasons, federal, state and local governments have long attacked drug use in society. For these reasons, currently enacted drug testing legislation rightly may be seen as part of a government's overall drug policy. The frequent media exposure of government drug testing programs, often initiated by the very government agents who implement the programs, demonstrates the volatile political character of employee drug testing.[18]

Governments have frequently included employee testing plans as part of an overall plan to combat the abuse of illegal drugs in society. Proponents describe government workplace testing as a means of creating an exemplary drug-free employment setting that the nation's private

13 *See infra* note 103 and accompanying text.

14 *See* Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (firefighters); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (police officers); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (firefighters and police officers).

15 *See Capua*, 643 F. Supp. at 1515 (The city employer is responsible "for ensuring that its firefighting force is fully capable of protecting the welfare and public safety of Plainfield's citizenry."); *Bauman*, 475 So. 2d at 1326 ("The nature of a police officer's or fire fighter's duties involves so much potential danger to both the employee and to the general public as to give the City legitimate concern that these employees not use controlled substances.").

See also Division 241 Amal. Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.) (bus driver), *cert. denied*, 429 U.S. 1029 (1976); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (firefighters); Jones v. McKenzie, 628 F. Supp. 1500, 1507 (D.D.C. 1986) ("obvious and special danger" posed by school bus drivers who use drugs); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (prison guards), *modified*, 808 F.2d 1302 (8th Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (city electrical workers).

Cf. infra note 88. In *Turner*, 500 A.2d 1005, the court ruled that the type of job held by a government employee may reduce the legitimate expectation of privacy of that employee. For example, a policeman would have a lesser expectation of privacy than a desk clerk.

16 Drug use has long been grist for the political mill. As a recent example, President Reagan, Secretary of Transportation Elizabeth Dole, and Attorney General Edwin Meese have advocated drug testing for the nation's airline pilots, train engineers, and federal employees. *See, e.g.*, Pagano, *U.S. Will Require Random Drug Tests for Flight Crews*, Los Angeles Times, January 22, 1987, at 1, col. 5; Stuart, *Amtrak Crash Spurs Call for Random Drug Tests*, N.Y. Times, January 22, 1987, at A22, col. 1; Pear, *Testing Plan Indicates Reagan's "Outrage" Over Drug Abuse*, N.Y. Times, December 7, 1986, § 4, at 4, col. 1.

17 *See* Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54 (1968). Professor Gusfield argues that designating drug addicts as criminals operates as a "symbolic" function of the law—a public expression of disapproval—instead of fulfilling the "instrumental" function of effectively controlling drug use and abuse. Establishing drug use as deviant behavior is a means of "designating the content of public morality." *Id.* at 57. The legislative process of condemning drug use is thus seen as an effort to have the law reflect a "public affirmation of social ideals and norms." *Id.*

18 *See Capua*, 643 F. Supp. at 1515.

workplaces can emulate.[19] In addition to this governmental interest, the President's Commission on Organized Crime recently advocated that both government and private employers test their employees for drugs in order to help battle illegal drug traffic.[20]

The government has substantial interests in both preventing employee drug use from impeding the fulfillment of its public duties and in maintaining optimally safe conditions in the workplace and for the public at large. However, the effect of instituting drug testing of government employees as part of a plan to create an exemplary drug-free workplace or to fight drug traffic is extremely attenuated. A plan to use drug tests to combat drug traffic or to set an example for the nation's workplaces, therefore, fulfills a lesser government interest than a plan to directly benefit either public safety or the employer's ability to discharge its statutory responsibility.[21]

Even though the government has several strong interests in testing its employees for drugs, several problems exist in doing so. Drug testing severely compromises employee privacy. Courts have found drug testing to be embarrassing[22] and even degrading.[23] Moreover, tests for most illegal drugs not only detect recent drug use, but will also register a positive result for drug use even though the individual is no longer impaired.[24] Because public and workplace safety has been identified as the primary goal of the government employer,[25] the gravest threat to safety would seem to come from on-the-job impairment. Whether a government employer can discipline or fire employees who test positive on drug tests but whose drug use may not have occurred while on the job and may not have affected performance[26] is another issue facing the courts.[27] Because these problems exist, critics argue that the drug testing of gov-

19 When implementing a drug screening program in the United States Customs Service, the Customs Commissioner wrote in a memo to the Service's employees that the program would "set an important example in our country's struggle with this most serious threat to our national health and security." Marcus, *U.S. Drug Tests Challenged in Appeals Court*, N.Y. Times, February 4, 1987, at D4, col. 4. As part of his Administration's 1986 omnibus drug abuse legislation proposal, President Reagan said the "Drug-Free Federal Workplace Act of 1986" would enable "the Federal government, as the Nation's largest employer, to set an example in ensuring a drug-free workplace." President's Message to Congress Transmitting "Drug-Free America Act of 1986," *supra* note 4. *See also* Exec. Order No. 12,564, *supra* note 3 (requiring each executive agency to test employees in sensitive positions for drugs).

20 *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING AND ORGANIZED CRIME (1986).

21 *See* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 223 n.97 (1986).

22 *Capua*, 643 F. Supp. at 1514.

23 National Treasury Employees Union v. Von Raab, Civ. No. 86-3522 (E.D. La. 1986) (LEXIS, Genfed library, Newer file).

24 *See infra* note 36 and accompanying text. *See also* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 732 (S.D. Ga. 1986) ("[O]ne may be subject to the adverse consequences of a positive test even where no 'intoxication' is involved.").

25 *See* Miller, *supra* note 21, at 217.

26 *Cf.* The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (1982)). The Act prohibits employment discrimination against handicapped individuals who are able to perform their jobs in a program receiving federal financial assistance or under any program conducted by an executive agency or by the U.S. Postal Service. 29 U.S.C. § 794. *See generally* Rothstein, *supra* note 8, at 431-32. Alcoholics and drug abusers who do not, by reason of their alcohol or drug abuse, "constitute a direct threat to the property or safety of others,"

ernment employees should be implemented only in extreme circumstances.[28]

II. Applicability of the Fourth Amendment to Employee Drug Testing

A. *Is Drug Testing Subject to Fourth Amendment Scrutiny?*

The fourth amendment protects people from unreasonable searches and seizures undertaken by either federal or state governments.[29] The United States Supreme Court has declared that the purpose of the fourth amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."[30] The fundamental inquiry to be asked when investigating potential violations of the fourth amendment, according to the Court, is whether the search is reasonable.[31]

Before a court determines whether a particular invasion is reasonable, however, it must decide whether the invasion is within the scope of fourth amendment regulation. Although the fourth amendment lists several areas to which it applies,[32] the Supreme Court, in *Katz v. United States*,[33] rejected a locus-oriented definition of the fourth amendment, declaring that "the fourth amendment protects people, not places."[34] Justice Harlan's concurring opinion in *Katz* elaborated that the fourth amendment governs intrusions into situations where a person has a reasonable expectation of privacy.[35]

Usually drug testing takes one of two primary forms—urine testing or blood testing. Body fluids are seized and subjected to a series of tests that seek to detect the presence of either an illegal drug or the body-

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29 U.S.C. § 706(7)(B), are defined as "handicapped" individuals by the Act. *See* Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

> Professor Rothstein sums up the concerns raised by the Act:
>
> It is not clear whether an employer could refuse to hire or could discharge an employee who was found to have drugs in his or her system but who had not indicated any difficulty in performing job duties. The key question would appear to be related to the nature of the job and whether the employer could demonstrate that the mere employment of the individual "would constitute a direct threat to property or the safety of others."

Rothstein, *supra* note 8, at 431-32.

27 *See Palm Bay*, 475 So. 2d at 1326 (A municipality can adopt a policy that prohibits police officers and firefighters from using controlled substances "*at any time* while they are so employed, whether such use is on or off the job.") (emphasis in original); Rothstein, *supra* note 8, at 424-25; Note, *Drug Testing: America's New Work Ethic?*, 15 STETSON L. REV. 883, 898-901 (1986) (discussion of *Palm Bay* holding). *See also* Comment, *Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy*, 13 J. LEGIS. 269, 279 (1986) ("If the employer can fire a person for smoking marijuana on Saturday night, what prevents him from regulating such things as off-duty alcohol consumption or even sleeping habits to ensure that the employee works to his full capacity?").

28 *See American Fed'n of Gov't Employees*, 651 F. Supp. at 735-36.

29 *See supra* note 9.

30 Camara v. Municipal Ct., 387 U.S. 523, 528 (1967).

31 *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979) (essential purpose of fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials); Terry v. Ohio, 392 U.S. 1, 9 (1968).

32 *See supra* note 9 ("The right of the people to be secure in their persons, houses, papers and effects . . . .").

33 389 U.S. 347 (1967).

34 *Id.* at 351.

35 *Id.* at 361 (Harlan, J., concurring). *See also* California v. Ciraolo, 106 S. Ct. 1809 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984); United States v. Chadwick, 433 U.S. 1, 7 (1976).

produced metabolites of that drug.[36] Most courts have held that blood and urine testing must satisfy the fourth amendment's requirement of reasonableness to be constitutionally permissible.[37] In *Schmerber v. California*,[38] the Supreme Court held that the governmental taking of a blood sample from an arrested suspect was within "the constraints of the fourth amendment."[39] Although urine collection does not involve penetration of body walls, as does blood testing, at least one court has found urine testing to be indistinguishable from blood tests because it involves "the involuntary extraction of bodily fluids."[40]

Some courts have held that in order for the fourth amendment to protect an individual undergoing drug testing, that person must possess a reasonable expectation of privacy in the fluids tested.[41] Under this line of reasoning, certain seizures of blood or urine might not have to comply with the fourth amendment. For example, some courts have found that military personnel and prisoners have limited expectations of privacy in their urine, thus making a "search" of such urine reasonable under the fourth amendment.[42]

Courts, however, have never found that a person has *no* legitimate expectation of privacy in either his blood or urine.[43] This position is consistent with the Supreme Court's rulings on other governmental invasions into other personal characteristics. The Court has maintained that the fourth amendment will not apply to inspections of certain physical characteristics, such as fingerprints, that are "constantly exposed to the

36 Drug metabolites are by-products of the body breaking down the intoxicating element of a drug. Although the drug's intoxicant may only be present in the system for a short time, the metabolites to that intoxicant may linger for a greater period of time. Thus, a test may register a positive result based upon the presence of drug metabolites in the body, when the intoxicating agent of the drug is gone. *See* Marks, *Immunoassays in Pharmacology and Toxicology*, in IMMUNOASSAYS FOR THE 80S 272 (1981).

37 For government employment cases so holding, see McDonell v. Hunter, 808 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986); Division 241 Amal. Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); National Treasury Employees Union v. Von Raab, civ. no. 86-3522 (E.D. La. 1986) (LEXIS, Genfed library, Newer file); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Mack v. United States, No. 86 Civ. 5764 (S.D.N.Y. 1986) (LEXIS, Genfed library, Newer file); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); Patchogue-Medford Cong. of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986).

38 384 U.S. 757, 766-72 (1966).

39 *Id.* at 767.

40 Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984) (drug test of prisoner).

41 *See Von Raab*, Civ. No. 86-3522 (E.D. La. 1986) (LEXIS, Genfed library, Newer file) (treasury employees); *Capua*, 643 F. Supp. at 1513 (firefighters); *Jones*, 628 F. Supp. at 1508-09 (school bus attendant); *McDonell*, 612 F. Supp. at 1127 (prison guard); *Patchogue-Medford Cong. of Teachers*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (teachers).

42 *See, e.g., Storms*, 600 F. Supp. 1214 (drug testing of prisoners); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (army warrantless drug tests and inspections reasonable). *But see* Tucker v. Dickey, 613 F. Supp. 1124 (D. Wis. 1985) (drug tests in prison given for nonsecurity purposes not accorded same level of deference as security-related drug tests).

For a perspective on drug testing in the military, see Abney, *Drug Abuse, Courts-Martial, and Random Urinalysis—An Unworkable Combination*, 27 ARIZ. L. REV 1 (1985).

43 *But see Turner*, 500 A.2d at 1009 (Nebeker, J., concurring) (argues that police officers have no reasonable expectation of privacy in their urine for purposes of employee testing).

public."[44] Unlike these characteristics, a person's blood and urine are not subject to constant public scrutiny. Because urine is a physical characteristic not ordinarily open to the public eye, a person retains a legitimate expectation of privacy in his urine.[45] Urine tests thus fall within the purview of the fourth amendment.[46]

Because the testing of blood and urine involves *Schmerber*-type situations and because people retain a reasonable expectation of privacy in their blood and urine, employee drug testing constitutes a search governed by the fourth amendment.[47] While some government employees may have a *lesser* expectation of privacy in their bodily fluids, this lesser expectation affects the *degree* of fourth amendment protection, not the *existence* of protection itself.

B. *Fourth Amendment Standards for Drug Testing*

If an intrusion falls within the fourth amendment's scope of protection, it must be reasonable to be constitutional. Although the Supreme Court has normally required a warrant[48] or a determination of probable

44 *See* Cupp v. Murphy, 412 U.S. 291, 295 (1973) (finger printing, removal of dried blood sample from under fingernails); United States v. Mara, 410 U.S. 19 (1973) (handwriting sample); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplar); United States v. Simmons, 569 F. Supp. 1155 (M.D. Tenn. 1983) (picture of defendant).

See generally American Fed'n of Gov't Employees, 651 F. Supp. at 733 (inherent intrusiveness of urine testing is qualitatively different from the intrusion involved in the taking of fingerprints or of fingernails or hair clippings).

45 *But see* United States v. Place, 462 U.S. 696 (1983). The Supreme Court in *Place* held that a test so limited in scope that it revealed only the "presence or absence of . . . contraband" was "less intrusive than a typical search." *Id.* at 707. *See also* United States v. Jacobsen, 466 U.S. 109, 123 (1984) (A field test to determine solely whether a substance was contraband, and which discovered "no other arguably 'private' fact, compromises no legitimate privacy interest."). A person has no legitimate expectation of privacy in contraband.

Because the government takes possession of a surrendered blood or urine sample, the tests on those samples are not as limited in scope as the warrantless intrusions upheld in *Place* (a canine sniff) and in *Jacobsen* (a cocaine field test). Even if the government subjects the sample to a drug-specific test that can only reveal whether contraband exists or not, no guarantee exists that the government will not perform other tests on the surrendered sample. Further testing may tread upon the legitimate expectation of privacy of the subject by probing the other information contained in his body fluids.

46 In *Capua*, 643 F. Supp. 1507, for example, the court identified a highly personal and reasonable expectation of privacy in the urine of firefighters subjected to random testing. The court recognized that testing can reveal "numerous physiological facts about the person from whom it came, including but not limited to recent ingestion of drugs." *Id.* at 1513. The *Capua* court realized that urinalysis could reveal information such as whether the person tested had epilepsy. *Id.* at 1515. *See also McDonell*, 612 F. Supp. at 1127 ("One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds.").

47 *See, e.g., Capua*, 643 F. Supp. at 1513 ("Though urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection, it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.").

Most courts have held that employee drug testing constitutes a fourth amendment search. *See* cases cited *supra* note 37.

48 When determining the reasonableness of an intrusive governmental procedure, the Supreme Court has ruled that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a proper search warrant." *Camara*, 387 U.S. at 528-29. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); *Katz*, 389 U.S. at 356-57 ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment . . . .").

A search warrant reflects a prior judicial determination of probable cause made by a neutral and

cause to be executed prior to a search for that search to be declared reasonable, a class of cases has arisen in which searches do not require either of these standards.[49] The courts judge the reasonableness of a warrantless search in these cases by "balancing the need to search against the invasion the search entails."[50]

Some courts have upheld warrantless urinalysis on grounds that it stands outside the warrant requirement and can be justified on a standard of suspicion less than probable cause.[51] Other courts uphold such testing programs because the searches fit within exceptions to the warrant requirement; these exceptions are derived from the diminished expectation of privacy of either government employees or employees in heavily regulated industries.[52] Yet, regardless of any exception to the warrant requirement, these searches must also satisfy the reasonableness balancing test.

1. The Intrusiveness of Drug Testing

Courts have disagreed on the level of personal intrusiveness inherent in a urinalysis. Some analogize the procedure to highly intrusive strip searches or body cavity searches.[53] Other courts equate the intrusiveness of urinalysis to that of a blood test.[54] Still other courts find that urinalysis is less intrusive than the taking of a blood sample.[55]

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detached magistrate. *See* W. LAFAVE & J. ISRAELS, CRIMINAL PROCEDURE §§ 3.3 to 3.4, at 109-10 (1986).

The Court has viewed a warrant as nearly indispensable, for it has viewed the process of obtaining a warrant as an effective safeguard, in and of itself, against arbitrary intrusions by the government. *See, e.g.*, McDonald v. United States, 335 U.S. 451, 455-56 (1948). The Court has recognized a number of situations where a search may be reasonable without a warrant or even a determination of probable cause. *See* Terry v. Ohio, 392 U.S. 1 (1968); *Camara*, 387 U.S. 523. Examples include the stop-and-frisk and the various types of administrative and regulatory searches that the Court has historically recognized. As the Court recently explained, "Although the underlying command of the fourth amendment is always that searches be reasonable, what is reasonable depends on the context within which a search takes place." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

49 *See infra* notes 70-75 and accompanying text.

50 *Camara*, 387 U.S. at 536-37.

51 *See infra* cases cited at note 77 & notes 96-108 and accompanying text.

52 *See Turner*, 500 A.2d 1005 (D.C. 1985); notes 109-28 *infra* and accompanying text.

Courts have long held that, consequent to accepting a government job, government employees possess lesser constitutional rights in some respects than do other people. *See infra* note 88 and accompanying text. *See generally* D. ROSENBLOOM, PUBLIC ADMINISTRATION AND LAW (1976). One court has ruled that the nature of government employment subsumes some of the fourth amendment protections of employees, at least in investigations that probe job-related misconduct. *See infra* notes 96-108 and accompanying text. A government employer must comply with certain minimum constitutional mandates in dealing with employees. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (employee due process rights examined in termination proceeding). The rights of employees in these dealings, however, may be limited. The limited constitutional rights of government employees make it easier to justify drug testing in the employment context than it would be to justify drug testing of people who are not government employees.

53 *See, e.g., Tucker*, 613 F. Supp. 1124 (drug test of prisoner); *Storms*, 600 F. Supp. 1214 (drug test of prisoner).

54 *See, e.g., Shoemaker*, 795 F.2d 1136; *Capua*, 643 F. Supp. 1507.

55 *See, e.g.*, McDonell v. Hunter, 808 F.2d 1302, 1308 (8th Cir. 1987); *Allen*, 601 F. Supp. 482. *Schmerber* suggests that a medical procedure's risk, trauma, and pain are the relevant criteria for judging its intrusiveness, and indicates further that societal acceptance of a particular test (*e.g.*, a blood test) may mitigate its invasiveness in terms of the fourth amendment. 384 U.S. at 771.

Whatever the level of intrusiveness of urinalysis, clearly the individual's surrender of a urine sample implicates privacy interests different in kind from those brought to bear in the search of a

Drug testing is intrusive for several reasons. By surrendering a urine sample to government officials, a tested employee may unwittingly reveal "private, personal medical information unrelated to the government's professed interest in discovering illegal drug abuse."[56] Drug testing also compels employees to engage in the highly personal act of urination and may bring considerable stigma to the employee as news of the drug testing is revealed to society.[57] In addition, those drug tests taken at random imply a presumption of guilt that the tested employee must overcome with a negative result.[58] The unreliability of many drug test results increases the invasiveness of drug testing[59]—an inaccurate test reading or a test result that registers positive for "passive" or second-hand inhalation of contraband smoke may result in the unjust discipline or firing of an employee.[60] Aside from the intrusiveness inherent in all drug testing, specific testing procedures themselves may further violate the dignity of an employee.[61]

2. The Government's Need to Search

The interests of the government must be sufficiently important to counterbalance the invasiveness of drug testing. While governmental interests in a search may be important and compelling,[62] these interests do not always justify all of the testing programs that the government wishes to implement. In fact, random drug testing, the type of testing that would prove most effective in uncovering drug use in the government workforce,[63] has been allowed only in isolated circumstances.[64] Efficacy at fulfilling government objectives, without more, cannot justify any

home, business, or automobile. Consequently, drug testing should not be justified on rationales borrowed from nonpersonal searches.

56 *Capua*, 643 F. Supp. at 1515. *See* Comment, *supra* note 27, at 279 ("In addition to detecting drugs ingested, [a urine sample] reveals the individual's medical history of such afflictions as venereal disease, epilepsy, and schizophrenia as well as his susceptibility to diseases such as heart attacks and sickle cell anemia.") (footnote omitted).

57 *See* Marrotte, *Drug Testing*, 72 A.B.A. J. 20 (1986) (reviews holding in City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985), and examines assertion that "tests could unjustifiably stigmatize an employee").

58 *See infra* note 94 and accompanying text.

59 *See* Miller, *supra* note 21, at 205-07.

60 Test results, especially of primary "screening" examinations (as distinct from more exact "confirmatory" testing), may vary greatly in terms of reliability. A drug test may also register a positive result for "passive" inhalation of marijuana when the subject does not actually smoke contraband, but is exposed to the smoke created by another who uses the drug. *See* Comment, *supra* note 27, at 273-75; Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391, 392-98 (1984).

61 Some testing programs may be more intrusive than others. For example, several cases have involved programs that include provisions for "direct observation" of the tested person as he or she produces a urine sample. *See, e.g.*, *Lovvorn*, 647 F. Supp. at 877; *Capua*, 643 F. Supp. at 1514. Some programs may include a "pat-down" of the employee to guard against a "switched or adulterated sample." *Lovvorn*, 647 F. Supp. at 877. In an egregious example, a prisoner was forced to urinate into a cup held by a guard. *Storms*, 600 F. Supp. at 1217.

In *Lovvorn*, the court recognized that the inquiry into intrusiveness was "subjective" and that the degree of invasiveness might "vary greatly depending on the individual tested." 647 F. Supp. at 880. However, the court concluded that "most people . . . have a certain subjective expectation of privacy in the act of urination." *Id.*

62 *See supra* notes 10-28 and accompanying text.

63 Random testing very likely would uncover more drug use among employees than testing based upon individualized suspicion. An employee using drugs might not manifest any of the visible

search, much less a highly intrusive search such as urinalysis.[65]

One court has recognized the danger of an "unfortunate precedent" that might arise from decisions permitting random drug testing.[66] The court observed that allowing random testing for drugs might lead to other random medical examinations designed to reveal conditions that might impair public safety. For example, employers might implement random psychiatric examinations for reasons closely akin to those forwarded in support of drug testing.

III. Specific Judicial Interpretations of the Fourth Amendment and Employee Drug Tests

Courts have upheld the constitutionality of the government's warrantless drug testing of its employees or of private employees in heavily regulated industries on three grounds. First, some courts have held that a drug test will satisfy the requirements of the fourth amendment if it is based on a standard of reasonable suspicion.[67] Second, other courts have relied on an employee context exception to the warrant requirement.[68] Third, two federal circuits have found that random drug testing of either employees in heavily regulated industries or of government employees in sensitive positions falls within an existing administrative search exception.[69] Examining these rationales in light of the reasonableness balancing test reveals that drug testing should not proceed without some initial suspicion of drug use, even if the applicable standard for suspicion falls below that of probable cause.

A. *"Reasonable Suspicion": A Lesser Standard*

Although the Constitution generally requires the government to have probable cause before executing a search or seizure, some searches occur upon a showing of less than probable cause and still are reasonable. Courts analyze these "inspections" and "administrative searches" by somewhat different criteria than those searches and seizures that fulfill purposes of traditional criminal investigation. "Administrative searches" comprise an amorphous category for searches undertaken in response to unique problems that the government cannot remedy using search tactics that comply with traditional fourth amendment strictures.[70] In these

effects of drug use in his demeanor or work habits. The employee's appearance thus would not give an employer reasonable suspicion to search.

64 *See American Fed'n of Gov't Employees*, 651 F. Supp. at 736 (declares random search of employees' urine impermissible under any but the most urgent of circumstances).

65 *See McDonell*, 612 F. Supp. at 1130.

66 *American Fed'n of Gov't Employees*, 651 F. Supp. at 736 (precedent allowing random testing would have a far-reaching impact upon the rights of all citizens in areas outside the drug context).

67 *See infra* notes 70-95 and accompanying text.

68 *See infra* notes 96-108 and accompanying text.

69 *See infra* notes 109-28 and accompanying text.

70 Professors LaFave and Israels described the overall category of administrative searches in this manner: "[I]t is generally assumed that the problems to which [administrative searches] are addressed could not be adequately dealt with under the usual fourth amendment restraints and that consequently the practices must be judged by somewhat different standards." W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9 at 187.

See Camara v. Municipal Ct., 387 U.S. 523 (1967). To qualify as a search due different standards

cases, a balancing of the government's justification for the search against the extent of the invasion determines the search's reasonableness.[71] For example, in *Camara v. Municipal Court*,[72] the Supreme Court held that valid housing inspection warrants could issue upon a showing that "reasonable legislative or administrative standards are satisfied for conducting an area inspection with respect to a particular dwelling."[73] Similarly, in *Terry v. Ohio*,[74] the Court permitted brief, limited personal seizures based upon less evidence than probable cause.

Administrative searches may be declared reasonable, therefore, if they adhere to reasonable legislative or administrative standards (a *Camara* situation), or if they are based on suspicion that, although not amounting to the level of probable cause, is reasonable (a *Terry* situation).[75]

Courts have consistently held that the urine testing of government employees to protect public safety and welfare falls within the general administrative search category.[76] Most of these courts have held that searches falling within this general exception to normal fourth amendment standards must be based upon a standard of "reasonable suspicion."[77] While a less demanding standard than probable cause, the reasonable suspicion standard still requires individualized suspicion[78]

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than other fourth amendment intrusions, the *Camara* court cited three criteria: (1) whether the practice has a long history of judicial and public acceptance; (2) whether the practice is necessary to achieve acceptable results; and (3) whether the practice involves a relatively limited invasion of privacy. *Id.* at 537.

Professors LaFave and Israels criticize this reasoning. They suggest that the *Camara* test would be more effective to judge administrative search techniques if the holding were couched in terms of two factors that supported the holding: (1) inability to accomplish an acceptable level of administrative enforcement within the traditional probable cause test; and, (2) the fact that the invasion was based upon a relatively minor invasion of personal dignity and privacy. W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9 at 190.

71 *Camara*, 387 U.S. at 536-37; W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9, at 187-202. *See also* New Jersey v. T.L.O., 469 U.S. 325, 326 (1985).

72 387 U.S. 523 (1967).

73 *Id.* at 538.

74 392 U.S. 1 (1968).

75 *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986). *See generally* W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9 at 188.

76 *See* Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); cases cited *infra* note 77.

77 *See* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua*, 643 F. Supp. 1507; Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 808 F.2d 1302 (8th Cir. 1987); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); Patchogue-Medford Cong. of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986). *But see* National Treasury Employees Union v. Von Raab, Civ. No. 86-3522 (E.D. La. 1986) (LEXIS, Genfed library, Newer file) (probable cause required for employee urinalysis).

In *Terry v. Ohio*, the Supreme Court defined reasonable suspicion in this way: The searcher "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21 (footnote omitted).

78 *See Terry*, 392 U.S. at 21 n.18.

In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court stated that "to accommodate public and private interests some quantum of individualized suspicion is usually required" to execute a valid search. *Id.* at 560 (citation omitted). But, as the Court in *Martinez-Fuerte* was careful to point out, "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 561. For example, the Court's decision in *Camara* permitted "area" warrants without individualized

that an employee uses drugs before he may be tested. Random testing of employees clearly does not satisfy this standard.

The rationale applied to various types of administrative and regulatory procedures suffers from an imprecise definition of those searches to which the standard applies.[79] However, when one applies the balancing test provided by the Supreme Court in *Camara*[80] and *Terry*[81] to the interests of the government and individual at stake in drug testing, it becomes clear that drug testing indeed falls within those "rather special search practices"[82] that comprise the administrative search category.

The Court has held that in certain settings "some easing of the restrictions" that normally regulate the ability of public authorities to search may be necessary.[83] When recourse to the warrant requirement would "unduly interfere"[84] with government interests, a warrantless search may be permissible. The Court declared in *New Jersey v. T.L.O.*[85] that where "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[86]

A balancing of interests demonstrates that requiring a governmental employer to obtain a warrant or to have probable cause would unduly frustrate the governmental need for the search. A government's need to search is compelling in many circumstances.[87] The government has a strong interest in preventing any public harm that employee drug use

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suspicion. 387 U.S. at 536. *See also* United States v. Biswell, 406 U.S. 311 (1972) (warrantless search of premises of gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless search of premises of liquor seller).

However, drug testing of employees is distinguishable from those searches in which individualized suspicion is not required. The searches declared reasonable in *Camara*, *Biswell*, and *Colonnade* did not involve searches of the person. *Biswell* and *Colonnade* involved situations where the searching officers knew that the premises searched were used for the sale of liquor or guns, so it was logical that evidence pertaining to those heavily regulated activities would be found there. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 269-72 (1973). Drug testing of government employees involves, on the other hand, highly intrusive personal searches in situations where the testing officer will often have no inclination whatever that evidence of drug use will be found.

79 *See* W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9 at 187.

> Some of the practices, such as the examination of the effects of persons entering the country from abroad, have been followed for many years and have rather strong historical credentials, while others, such as the airport hijacker detention screening process, are rather recent innovations undertaken in an effort to respond to new problems. However, they all have this in common: it is generally assumed that the problems to which they are addressed could not be adequately dealt with under the usual fourth amendment restraints and that consequently the practices must be judged by somewhat different standards.

Id.

80 387 U.S. 523 (1967). *See supra* notes 72-73 and accompanying text

81 392 U.S. 1 (1968). *See supra* note 74 and accompanying text.

82 W. LAFAVE & J. ISRAELS, *supra* note 48, § 3.9 at 187.

83 New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). *T.L.O.* involved a search of a student in a public high school.

84 *Id. See also Camara*, 387 U.S. at 532-33 (A warrant is not required when "the burden of obtaining a warrant is likely to frustrate the government purpose behind the search.").

85 469 U.S. 325 (1985). *See supra* note 83.

86 *Id.* at 341.

87 The compelling interest of the government in having nonintoxicated policemen, firemen, school bus drivers, and prison guards is manifest. For an employee in one of these sensitive positions to be impaired on the job could be calamitous to any community. *See supra* notes 10-20 and accompanying text.

might cause. On the other side of the balance are employee privacy interests that have been somewhat diminished by accepting government employment.[88] To require a search warrant or probable cause determination prior to any employee testing could harm the efficiency of the government workplace without according reasonable additional protection to an employee's fourth amendment rights. Given the nature of government employment, a warrant or probable cause determination should not be required for drug testing of government employees.[89]

Although the balancing test indicates that neither a warrant nor probable cause should be required, employee testing should not proceed based upon a standard less than reasonable suspicion that a particular employee uses drugs. The privacy rights of government employees demand that a quantum of individualized suspicion exist before testing may commence.[90] The Supreme Court allowed the *Camara* intrusions into in-

88 *See* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 736 (S.D. Ga. 1986) ("[I]t has generally been accepted that an employee does have a reasonable expectation of privacy that is diminished in comparison with that reasonably held by members of the public at large."). *See generally* Kelly v. Johnson, 425 U.S. 238, 244-49 (1976) (state has greater latitude in regulating policemen's conduct than conduct of "citizenry at large").

In a recent Supreme Court decision, O'Connor v. Ortega, 107 S. Ct. 1492 (1987), a four justice plurality appended an opinion to the judgment of the Court. *O'Connor* dealt with hospital officials investigating the alleged improprieties of a doctor in charge of the hospital's residency program. The plurality reasoned: "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of for a private employer. The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *Id.* at 1498. Although four justices dissented from the Court's judgment, the dissent agreed with the plurality on this point. *Id.* at 1508 (Blackmun, J., dissenting).

It appears that the type of position a government employee holds may further limit his reasonable expectation of privacy. *See* Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (drug testing case; policemen analogized to military personnel who have a severely reduced reasonable expectation of privacy).

89 In *O'Connor* the plurality ruled that requiring a warrant or probable cause for either a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected employee misfeasance would impose "intolerable burdens" on public employers. 107 S. Ct. at 1502. The plurality cited language in *T.L.O.*, 469 U.S. 325, which suggested that "special needs" of the government might make either a probable cause requirement or a warrant requirement impracticable. *Id.* at 351 (Blackmun, J., concurring). The plurality found that the government employer possessed "special needs, beyond the normal need for law enforcement" for both "legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." 107 S. Ct. at 1502 (quoting *T.L.O.*, 469 U.S. at 351).

Three justices joined Justice Blackmun's dissent from the plurality opinion in *O'Connor*. Justice Blackmun followed his concurring opinion in *T.L.O.* in reasoning that courts should apply the *Camara* balancing test only to those cases in which a "special" need was manifest. 107 S. Ct. at 1510-11 (Blackmun, J., concurring) (quoting *T.L.O.*, 469 U.S at 351). Justice Blackmun faulted the plurality for applying the *Camara* analysis without ascertaining this special need. 107 S. Ct. at 1511. The dissent concluded that no special need existed in *O'Connor* that would justify the abandonment of the probable cause or warrant requirements, and that the search, because it failed to comply with these standards, was unreasonable. *Id.*

The plurality opinion stressed that it had no occasion to address the "proper Fourth Amendment standard for drug and alcohol testing of employees." *Id.* at 1504 n.**. Even so, the persuasive value of this opinion to drug testing cases is probably very high, although the value of the separate opinions is, in and of themselves, questionable due to the lack of a majority opinion. Although the plurality and dissent disagree on several points, both opinions attempt to establish a standard to regulate work-related searches of government employees. This standard would be, if clearly formulated, the applicable standard for medical screening of government employees.

90 Requiring a standard that demands a quantum of individualized suspicion places a limit on the government's power to test, and can thus prevent entirely arbitrary testing. *See T.L.O.*, 469 U.S.

dividual homes pursuant to administrative standards devoid of individualized suspicion in part because the intrusions were *nonpersonal* and because the invasions of privacy involved were "relatively limited."[91] In contrast, warrantless testing of body fluids for the presence of drugs is highly personal in nature and involves more than a relatively limited invasion of privacy.

The District Court of New Jersey applied the proper reasonable suspicion standard in *Capua v. City of Plainfield*[92] after balancing the interests of both employer and employee in drug testing. The court found that a municipality needed to have a reasonable suspicion of drug use before it could test its firefighters. Although the state's interest in testing was "weighty,"[93] the court condemned random testing, finding that such a procedure violated the constitutional guarantee against arbitrary governmental invasions by "essentially presum[ing] the guilt of each person tested."[94] The court held that even the firefighters' diminished privacy interests as public employees were entitled to protection from such a grave intrusion. Furthermore, the court decided that the reasonable suspicion standard would not significantly impair the state's interest in testing its employees for drug use.[95] In so doing, the court in *Capua* recognized that a warrant or probable cause requirement would unduly burden the state, and correctly settled on a reasonable suspicion standard.

B. *The "Employment Context" Exception for Drug Testing*

In *Allen v. City of Marietta*,[96] the District Court for the Northern District of Georgia upheld the warrantless urinalyses of several government employees on the ground that the searches fell within an exception to the warrant requirement.[97] While the court found that government employees had "as much of a right to be free from warrantless government searches as any other citizens,"[98] it pointed out that "the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties."[99] The court concluded that when the purpose of govern-

325; *Capua*, 643 F. Supp. at 1517. *See also Prouse*, 440 U.S. at 654 (fourth amendment protects right of personal security against arbitrary invasion by official power).

91 *Camara*, 387 U.S. at 537.

92 643 F. Supp. 1507 (D.N.J. 1986).

93 *Id.* at 1517.

94 *Id.*

95 *Id.* at 1519.

96 601 F. Supp. 482 (N.D. Ga. 1985). *See also* Note, *Constitutional Law—Urinalysis and the Public Employer—Another Well-Delineated Exception to the Warrant Requirement?*, 39 OKLA. L. REV. 257 (1986).

97 601 F. Supp. at 491.

98 *Id.*

99 *Id.* Although *Allen* refers to a general right of private employers to search employees while investigating misconduct, this right is not clearly defined. *See* Deneberg, *Remarks Before Conference on Alcohol and Drug Abuse*, Daily Lab. Rep. (BNA) No. 220, at D-1 (Nov. 14, 1983). Deneberg states:

> Arbitrators . . . differ in their willingness to uphold an employee right to freedom from unreasonable searches while at work. One arbitrator has declared in a substance abuse case that 'there is no absolute right of an employer to search personal effects.' Another has asserted that the constitutional protections against unreasonable searches and seizures 'do not shelter [an employee] from appropriate employer discipline.' Still others find a middle

mental testing is not to investigate crime, but rather to ferret out employee misconduct that might impede job performance, "the employee cannot really claim a legitimate expectation of privacy from searches of that nature."[100] Thus, because drug use might have impaired the government employees' performance of their duties in *Allen*, the warrantless intrusion was deemed reasonable.

While under the facts in *Allen* reasonable suspicion probably existed for the urinalysis, the court did not state explicitly that this quantum of evidence was *required* for the search to be declared reasonable. The *Allen* court placed only one limitation on the government employer's ability to search employees—the search's purpose must be to investigate employee misconduct "in a purely employment context."[101] The court held that the city had the right "to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work . . . ."[102]

The *Allen* court based its holding on a "class of cases" that apparently confers a power on the government to search its employees without a warrant in order to protect its ability to "discharge its statutory responsibility."[103] The *Allen* opinion, however, does not cite any cases supporting a warrantless, suspicionless search of personal body fluids for

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ground by drawing an analogy between the employer and a law enforcement officer; they hold that an employer has the authority to search for contraband substances—but only where the superior has probable cause to believe an 'industrial felony' has been committed.

Id.

See also Comco Metal Prods., Ltd., 58 Lab. Arb. (BNA) 279 (1972) (Brown, arb.) (no absolute right exists for employer to search personal effects).

On a related point, it is difficult to see how a government employer can infringe on constitutional rights, even in the employment context, simply by equating the government to a private employer. *See American Fed'n of Gov't Employees*, 651 F. Supp. at 737 ("[I]t will be a dark day indeed when the United States government finds it appropriate to abandon the strictures of the Constitution in favor of a less burdensome 'private sector' set of rules that can allow for infringement of constitutional rights.").

100 601 F. Supp. at 491.

101 *Id.*

102 *Id.*

103 *Id.* The court in *Allen* cited the following cases in support of its decision: United States v. Sanders, 568 F.2d 1175 (5th Cir. 1978) (warrantless search of postal employee's locker); United States v. Bunkers, 521 F.2d 1217 (9th Cir.) (same), *cert. denied*, 423 U.S. 989 (1975); United States v. Donato, 379 F.2d 288 (3d Cir. 1967) (warrantless search of United States Mint employee's locker); United States v. Collins, 349 F.2d 863, 867 (2d Cir. 1965) (warrantless search of United States Customs Service employee's jacket as "it hung on a rack in his supervisor's office"), *cert. denied*, 383 U.S. 960 (1966); United States v. Grisby, 335 F.2d 652 (4th Cir. 1964) (warrantless search of marine's living quarters on military reservation).

The *Allen* court found a distinction between the aforementioned permissible searches and other warrantless impermissible searches of employees by their government employer. United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 479 F.2d 290 (2d Cir. 1973), *rev'd*, 415 U.S. 239 (1974); United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). The distinction between permissible and impermissible warrantless searches of government employees depended on the government motivation for the search. Government searches "to gather evidence of crime" from an employee could not proceed under the employee context exception that *Allen* promulgated. A warrant was required or the search would have to be justified under another exception to the warrant requirement. A legitimate employee context search was limited to those searches "undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibility." *Allen*, 601 F. Supp. at 491.

The distinction between criminal investigations and other investigations on which *Allen* based its exception is muddled. As the court itself recognized, "governmental investigations of employee

medical information. Such a search differs not only in the degree of intrusiveness from the types of intrusions cited in support, but also in kind. For example, the cited cases involved the searches of personal effects left in the workplace,[104] of the home of a marine on a military reservation,[105] and of employee lockers in the government workplace.[106] Searches of body fluids touch on different notions of privacy than do these searches, and turn up information that is markedly different from that revealed by these invasions.

By not requiring some suspicion of drug use by individual employees prior to testing, the *Allen* court's exception to the warrant requirement is flawed. Under *Allen*, an employer has absolute discretion to search any employee for drug use that would impair his ability to perform his work safely. The doctrine permits the unjustifiable result of completely arbitrary searches within the employment context. The Supreme Court has clearly preferred in other exceptions to the warrant requirement that the discretion of government officials be narrowly channelled,[107] an objective that *Allen*'s lack of standards does not accomplish.[108]

C. *Random Drug Tests of Government Employees and Employees in Heavily Regulated Industries*

Two Circuit Courts have permitted a governmental body to implement random testing plans in the workplace.

In *Shoemaker v. Handel*,[109] the United States Court of Appeals for the Third Circuit upheld a warrantless, random urinalysis program conducted by the New Jersey Racing Commission.[110] The program did not require Commission officials to possess individualized suspicion of drug use by any of the jockeys, trainers, and grooms who were to be tested. The court held that the program fell within an exception to the warrant requirement recognized for heavily regulated industries. The court ruled that a drug testing program would fall within the exception based upon two criteria: (1) if there was a strong state interest in an unannounced search, and (2) if the pervasive regulation of the industry had reduced the legitimate expectation of privacy of the person searched.[111] The court found that these requirements were satisfied in the extensively regulated field of horse racing. Thus, the court concluded that the program of random testing conducted without initial suspicion of individual

misconduct always carry the potential to become criminal investigations." *Id.* *See* Note, *supra* note 96 (criticism of *Allen*'s distinction and holding).

104 *Collins*, 349 F.2d 863.

105 *Grisby*, 335 F.2d 652.

106 *Sanders*, 568 F.2d 1175; *Bunkers*, 521 F.2d 1217; *Donato*, 379 F.2d 288.

107 *See Prouse*, 440 U.S. 648; *Marshall*, 436 U.S. 307.

108 Several courts, faced with fact situations similar to *Allen*, have not relied on *Allen*'s blanket exception. *See Lovvorn*, 647 F. Supp. 875; *Capua*, 643 F. Supp. 1507; McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 808 F.2d 1302 (8th Cir. 1987).

109 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

110 *Id.* at 1143.

111 *Id.* at 1142.

drug use was reasonable.[112]

The *Shoemaker* court required no individual suspicion but instead justified the random urinalysis program in terms of an administrative scheme that sufficiently limited the discretion of the testing officer.[113] Although administrative standards channelled the discretion of the testing officials, the *Shoemaker* doctrine is flawed. The court's contention that pervasive regulation of the industry reduced the plaintiffs' expectation of privacy defies logic. The court in *Shoemaker* derived its exception from a warrant exception that permitted administrative searches of business premises,[114] not of people. Even though a state's pervasive regulation of horse racing may justify warrantless searches of various racing premises pursuant to an administrative scheme, the search of an individual in that industry is a different matter.[115] Searches of persons are qualitatively different from searches of business premises. Arguably, people have a far greater expectation of privacy in their bodily fluids than they do in their business premises. Thus, if the pervasive regulation of the industry lowers a person's expectation of privacy in his bodily fluids at all, it does so to a *lesser extent* than it reduces his expectation of privacy in his business premises. The *Shoemaker* court mistakenly applied the administrative search exception for business premises to the drug testing of individuals in a highly regulated industry.

In *McDonell v. Hunter*,[116] the United States Court of Appeals for the Eighth Circuit upheld a warrantless random urinalysis conducted by the Iowa Department of Corrections on certain correctional employees.[117] The Circuit Court modified an order issued by the district court[118] that had required the Department of Corrections to have reasonable suspicion of drug use before ordering its prison guards to undergo drug test-

112 *Id.* at 1142-43. An additional concern of the court was that the discretion of the Racing Commission officials administering the test be sufficiently circumscribed. *Id. See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

113 The names of all jockeys participating in a race were placed in an envelope. A state official would draw three to five names of individuals who were then tested at the end of the racing day. The state invited a member of the Jockey's Guild to supervise the selection process. If a name was drawn more than three times in a seven-day period, the fourth selection would be disregarded. The Racing Commission could change the names of those to be tested at the end of each day. *Shoemaker*, 795 F.2d at 1139-40.

See generally Prouse, 440 U.S. 648 (fourth amendment requires that intrusions left to discretion of officials in the field have limiting guidelines).

114 In support of its exception to the warrant requirement, the *Shoemaker* court cited Donovan v. Dewey, 452 U.S. 594 (1981) (inspection of coal mines); United States v. Biswell, 406 U.S. 311 (1972) (premises of gun seller); and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (premises of liquor seller).

For an overview of the administrative search exception applicable to business premises, see W. LaFave & J. Israels, *supra* note 48, § 3.9, at 190-92.

115 *But see Shoemaker*, 795 F.2d at 1142.

> [W]hile there are distinctions between searches of persons and searches of premises, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable.

Id.

116 808 F.2d 1302 (8th Cir. 1987), *modifying*, 612 F. Supp. 1122 (S.D. Iowa 1985).

117 *Id.* at 1304.

118 612 F. Supp. 1122.

ing.[119] The Eighth Circuit balanced the intrusiveness of drug testing against the state's interest in prison security.[120] In so doing, the court found that urinalysis was not as intrusive as a strip search or blood test,[121] that the state's interest in prison security was a central one,[122] and that what it felt to be a limited intrusion into the guards' legitimate expectation of privacy was one "which society will accept as reasonable."[123] After balancing the intrusiveness of the tests against the government's need to search, the court held that the state could implement a program of uniform or random urinalysis on guards who had "regular contact with prisoners on a day-to-day basis in medium or maximum security prisons."[124]

The *McDonell* holding lacks persuasive precedential value for two reasons, however. First, the court heavily relied on its finding that urinalysis was not as intrusive as strip searches,[125] a procedure for which the court required reasonable suspicion earlier in the *McDonell* opinion.[126] Because urinalysis is highly intrusive in its own right, however, it does not follow that it is due a lesser standard of suspicion than strip searches merely because it may be less intrusive than those extreme invasions.

Second, the court relied on the Third Circuit's opinion in *Shoemaker*, which erroneously applied the administrative search exception for inspecting the business premises of heavily regulated industries to searches of individuals in those industries. The court compared the Department of Corrections testing program to the Racing Commission program upheld in *Shoemaker*, and stated that "the state's interest in safeguarding the security of its correctional institutions is at least as strong as its interest in safeguarding the integrity of, and the public confidence in, the horse racing industry."[127] Because the *McDonell* court relied on a distinction between urinalysis and strip searches that largely ignored the inherent intrusiveness of urinalysis, and because it relied on *Shoemaker* as a strong precedent, its opinion lacks persuasive force.[128]

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119 *Id.* at 1130.

120 808 F.2d at 1308.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* The court limited its holding by stating that "Urinalysis testing within the institution's confines, other than uniformly or by systematic random selection of the employees so designated, may be made only on the basis of reasonable suspicion . . . ." *Id.* The court also pointed out that the method of selection could not be arbitrary or discriminatory. *Id.*

125 *Id.*

126 *Id.* at 1306-07. *See also* Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 203-04 (2d Cir. 1984).

127 808 F.2d 1308. *See Shoemaker*, 795 F.2d 1136; *supra* notes 109-115 and accompanying text.

128 Moreover, in his separate opinion, Chief Judge Lay found that, by modifying the district court's order, which had issued with the district judge as fact finder, the majority had engaged in "de novo fact finding contrary both to Fed. R. Civ. P. 52(a) and to the Supreme Court's guidelines for appellate review" which the Court had set forth in Anderson v. City of Bessemer City, 470 U.S. 564 (1985). 808 F.2d at 1311 (Lay, C.J., concurring in part and dissenting in part). Chief Judge Lay pointed to several instances where the majority had disagreed with the district court's findings, and argued that in relying on its own version of the facts of the case, the majority did not adhere to the "clearly erroneous" standard mandated in *Anderson*. *Id.* at 1311-12.

IV. The Need for a Reasonable Suspicion Standard

By comparing the interests at stake in drug testing to those interests at stake in other types of searches that may be permitted based upon reasonable suspicion, it can be seen that drug testing cannot proceed under a lesser standard than reasonable suspicion. In *Terry*,[129] the Supreme Court balanced the interest of a police officer in protecting himself and others from harm against the nature of the "brief, though far from inconsiderable, intrusion on the sanctity of the person"[130] posed by a frisk. Because the officer had a reasonable suspicion that the person he stopped was armed, the *Terry* Court concluded that a limited patdown was constitutional.[131] In *Delaware v. Prouse*,[132] the Court held that motorists could not be subjected to spot checks for license and registration absent reasonable suspicion that either the motorist was unlicensed, that the vehicle was unregistered, or that the vehicle or an occupant had violated the law.[133] This holding resulted from the Court's balancing of the government's interest in highway safety against the invasiveness of the search. In *United States v. Brignoni-Ponce*,[134] the Court required United States Border Patrol roving patrols to have reasonable suspicion that a car was carrying illegal aliens to justify a stop of that car for brief questioning of the occupants as to immigration status and citizenship.[135] The Court balanced the invasiveness of the search against the government's interest in stemming the flow of illegal aliens.

The interests of the government in conducting drug testing of its employees are not greater than any of the governmental interests examined in *Terry*, *Prouse*, or *Brignoni-Ponce*. The degree of invasiveness of drug testing on the tested individual, however, is much greater than the level of invasiveness in any of the above situations. Consequently, government officials must possess reasonable suspicion of drug use before they test their employees. Applying the *Camara* standard[136] compels the conclusion that employee drug testing cannot be based upon administrative standards devoid of individualized suspicion.

V. Conclusion

Mandatory drug testing of government employees can aid the government employer in implementing the noteworthy goals of maintaining workplace and public safety and can enable the government to better fulfill its statutory responsibility. Such tests, however, severely compromise employee privacy. Drug testing is inherently intrusive because a surrendered urine sample may reveal personal information unrelated to drug use. The tests also most commonly involve the private activity of urination, and may impose a damaging social stigma on an employee. In a

129 392 U.S. 1. *See supra* notes 74 & 81 and accompanying text.
130 392 at 26.
131 *Id.* at 30-31.
132 440 U.S. 648 (1979).
133 *Id.* at 663.
134 422 U.S. 873 (1975).
135 *Id.* at 884.
136 *See supra* note 91 and accompanying text.

random testing situation, the tests effectively impart a presumption of guilt upon the person tested. In addition, the specific test procedures themselves may be especially intrusive or embarrassing.

Drug testing of government employees touches on privacy interests far removed from those involved in administrative searches of business premises and from those implicated in warrantless nonpersonal searches of government employees. The costs of obtaining a warrant or making a determination of probable cause may inconvenience a governmental employer in its attempt to eradicate the effects of drugs from the a workplace. However, absent some form of consent by contractual provision or otherwise, some quantum of individualized suspicion should be required before the government can test its employees. Random testing cannot be justified under constitutional principles.

John F. Lawlor

Addendum

In National Treasury Employees Union v. Von Raab, *816 F.2d 170 (5th Cir.),* emergency stay denied, *107 S. Ct. 3182 (1987), the United States Court of Appeals for the Fifth Circuit vacated an order of the District Court for the Eastern District of Louisiana which enjoined a warrantless urinalysis program set up by the United States Customs Service. The Fifth Circuit agreed with the district court that urinalysis was "a search for purposes of the fourth amendment," 816 F.2d at 176, but held that the warrantless drug tests proposed by the Customs Service were reasonable even without a quantum of individualized suspicion.* Id. *at 180.*

The court balanced "all of the factors suggesting constitutional violation against all of those indicating validity," id. *at 177, and looked to criteria for judging the reasonableness of medical invasions set out by the Supreme Court in* Bell v. Wolfish, *441 U.S. 520 (1979): The scope, manner, justification, and place of the intrusion.* Id. *at 559. The court also examined the possible voluntariness of the search, the significance of the employment relationship on the government's ability to test its private citizen employees, the administrative nature of the search, the availability of less restrictive measures of accomplishing drug use screening of employees, and the effectiveness of the tests. Additionally, the court analogized the expectation of privacy of Customs Service employees to the diminished expectation of privacy of individuals in highly regulated industries. 816 F.2d at 178-80. After examining all these points of inquiry, the court concluded that the Customs Service's program was reasonable even without reasonable suspicion. "It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens."* Id. *at 179.*

Following Von Raab, *there are now three federal circuit court opinions that permit drug tests of either government employees or employees in highly regulated industry without any individualized suspicion that a particular employee uses drugs.*