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Behind Open Doors: Constitutional Implications of Government Employee Drug Testing

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Abstract

By the summer of 1986 as many as 25% of America's largest companies instituted some form of employee screening for drug use.

KEYWORDS: screening, drug, employee

Behind Open Doors: Constitutional Implications of Government Employee Drug Testing

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By the summer of 1986 as many as 25% of America's largest companies instituted some form of employee screening for drug use.¹ At the same time a number of public and quasi-public organizations began testing programs, as well.² The concerns raised by such testing programs are the subject of expanding litigation.³

The President and Mrs. Reagan made a priority of combating drug use in America. A President's Commission on Organized Crime was formed to study "America's habit," and offer suggestions to remedy it.⁴ The Commission proposed that to reduce the demand for drugs, "[t]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs. . . ."⁵ State and local governments were urged to support such programs, and all government

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1. Abramowitz & Hamilton, *Drug Testing on Rise: Corporate Concern Up But Abuse is Down*, Washington Post, Sept. 21, 1986, at D1, col. 1; see also Chapman, *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985 at 57.

2. Among this group are police and fire departments throughout the country: *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985); *Caruso v. Ward*, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986); public schools: *Odenheim v. Carlstadt-East Rutherford Regional School District*, 211 N.J. Super. 54 (1985) (including urinalysis in yearly physicals for school children); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986) (requiring probationary teachers to submit to urinalysis before promotion); see also *King v. McMickens*, 120 A.D.2d 351, 501 N.Y.S.2d 679 (App. Div. 1986) (corrections officers driving prison vans); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 107 S. Ct. 577 (1986) (race horse jockeys must submit to post race urinalysis on a random basis).

3. See, e.g., cases cited *supra* note 2.

4. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 1-3 (1986).

5. *Id.* at 483.

agencies were told not to award government contracts to "companies that fail to implement drug programs, including suitable drug testing."⁶ In response to this recommendation, the President on September 15, 1986 issued an Executive Order for a "Drug-Free Federal Workplace."⁷ The order authorizes and directs federal agencies to establish and implement drug testing programs to screen federal employees who currently occupy or apply for new federal positions, for the use of illegal drugs. The order further directs agencies⁸ to remove and/or discipline employees who fail a drug test.⁹

This program of federal drug testing, and the proliferation of similar tests by the state and local governments and private industry,¹⁰ forces society to reconsider its recognition of and respect for the individual's right to be let alone.

This article will focus on public sector employee drug testing. The ultimate issue that must be resolved is whether drug testing of public employees violates constitutional guarantees of individual rights and liberties. The article begins with an historical analysis of privacy rights.

6. *Id.*

7. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). See also *New York Times*, Oct. 16, 1986, at A1, Col. 5.

8. Exec. Order No. 12,564, 51 Fed. Reg. at 32,891 (1986). Section 5(d) states: "Agencies shall initiate action to remove from the service anyone who is found to use illegal drugs and: (1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program or (2) Does not thereafter refrain from using illegal drugs."

9. The Executive Order directs agency heads to establish a drug testing program covering all employees in sensitive positions. While agency heads have discretion to determine the extent of testing that will be done, they must test employees in "sensitive" positions. *Id.* The Order's delineation of "sensitive" is broad and includes a very substantial portion of the federal work force, including professional and non-professional staff, secretarial and clerical positions. *Id.* § 7(d). Further, any current employee, regardless of position, may be ordered to submit to testing upon less than probable cause. *Id.* § 3(c). Employees who seek promotions or transfers may be required to undergo drug tests as a pre-condition for application and selection for those positions. *Id.* § 3(d). At the time of this writing, the National Treasury Employees Union (NTEU), which represents approximately 120,000 federal employees, filed at least two separate actions for declaratory and injunctive relief. See *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986); *National Treasury Employees Union v. Reagan*, 651 F. Supp. 1199 (E.D. La. 1987); *Reagan* was consolidated with *Von Raab* on Nov. 25, 1986.

10. This article will address solely issues of constitutionality when a public employer initiates a drug testing scheme. The concern for private industry is just as great; however, the mechanisms for protecting privacy are quite different and beyond the scope of the present writing.

History then forms the backdrop for a discussion of present constitutional interpretation, focussing on the fourth amendment, but also the fifth and ninth amendments. The questions addressed are whether drug testing violates the warrant clause and unreasonable search and seizure clauses of the fourth amendment, whether it abrogates due process rights to liberty and property of the fifth and fourteenth amendments, and whether it impacts upon general constitutional privacy as developed in the ninth amendment and penumbras.

I. Background

Society has long recognized the need to maintain a zone of privacy to protect the individual from the roving eye of government and fellow citizens. The enactment of the Bill of Rights in 1789 secured for the American colonists individual rights against the powers of the state. Some early statesmen believed that there was no need for a separate Bill of Rights because the Constitution represented the power of the people, executed through their representatives.¹¹ Others zealously defended the need for a separate document that would temper the power of Congress to pass laws "necessary and proper"¹² and protect the pre-eminence of what James Madison called "certain great rights."¹³

11. THE FEDERALIST No. 84, at 510-15 (A. Hamilton) (Rossiter ed. 1961). A separate Bill of Rights was first proposed by George Mason during debate on the Constitutional Convention of 1787. The question for a committee to prepare a Bill of Rights was voted down 11-0. J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 at 556-57 (1920). See generally I. BRANT, THE BILL OF RIGHTS 48 (1965); but see James Wilson's argument that "[a] bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything not enumerated is presumed to be given." A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 201 (1935).

12. "The Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." U.S. CONST. art. I, § 8, cl. 18.

13. I. BRANT, *supra* note 11, at 47-48. Brant writes that one of the things Madison hoped to eliminate was the broad power granted to Congress to carry the enumerated powers into effect. In 1789 Madison warned Congress:

The Federal Government has a right to pass all laws which shall be necessary to collect its revenue; the means of enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose? For analogous reasons general warrants were prohibited in state constitutions and there was like reason for restraining the Federal Government.

Among the "great rights" is protection from general warrants, and freedom from unreasonable search and seizure.¹⁴ The theme underlying these rights was to protect the people in certain areas where the government should not act, or at least ought to act only in a particular manner. Although the word privacy does not appear in the fourth amendment, that meaning is found to be implicit.¹⁵ General rights of privacy emanate from the other amendments as well, emphasizing the concern with this fundamental right.¹⁶

Id. at 48. Madison was even more concerned with an abuse of powers by the majority of the community:

The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely that which possesses the highest prerogative of power. But this is not found in either the Executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.

Id. Although the Bill of Rights does not apply directly to the people, Madison hoped that the enumeration of these "great rights" might "be one means to control the majority from those acts to which they might be otherwise inclined." *Id.*

14. *Id.* at 47. Madison already identified certain untouchable rights such as freedom of religion, freedom of press, and trials by jury for criminal matters.

15. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring); *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting); *Silverman v. United States*, 365 U.S. 505 (1961); *Wolf v. Colorado*, 388 U.S. 25 (1949); *Harris v. United States*, 331 U.S. 145, 195 (1947) (Jackson, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 471 (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 630 (1885).

16. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." *Griswold v. Connecticut*, 381 U.S. 479 (1965). "[T]he decision in *Griswold* is the source of a new constitutional right of privacy. . . ." J. SHATTUCK, *RIGHTS OF PRIVACY* 109 (1977). In addition to the finding in *Griswold* of a right to marital privacy, the right of privacy of unmarried couples, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and the absolute right of a woman to choose whether to have an abortion in the first trimester, *Roe v. Wade*, 410 U.S. 113 (1973), also have been found to emanate from the penumbra of rights. It is perhaps because privacy is a nebulous concept subject to disparate meanings that this right did not find its way explicitly into the Bill of Rights, but rather lies in the interstices of many of the amendments. Although a broad reading of the Constitution as a flexible, living document—see, e.g., *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting)—permits the finding of privacy in the Constitution, this same leniency of interpretation makes it susceptible of exclusion. The Supreme Court may have cut back on the penumbra of rights concept with its recent ruling, over a vigorous dissent of four justices, that a statute which bans sodomy between two consenting adults in a private home does not violate the Constitution. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). See *infra* notes 284-96 and accompanying text.

Long before the United States Constitution, British common law recognized a right in tort protecting against invasion of one's property,¹⁷ slander to one's reputation,¹⁸ and intrusion upon one's family.¹⁹ Such cases were the forerunners of a defined right of personal privacy.²⁰ In 1890, Samuel Warren and his young law partner, and later Supreme Court Justice, Louis B. Brandeis, stirred a revolution in legal thought with their conclusion that the common law provided for all persons a right to be let alone in their private places, thoughts, emo-

17. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890) "These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations." *Id.* at 194 n.2. As early as the thirteenth century, a criminal writ, the assize of trespass was available "to cover invasions of the plaintiff's land due to conduct wholly on the land of the defendant." Eventually, an action on the case for nuisance was recognized. This action allowed direct recovery of damages for nuisance, instead of the mere "incidental civil relief" afforded by the assize of nuisance. Because of its convenience, it became the sole common law action for invasion of one's property. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984) [hereinafter PROSSER].

18. By the sixteenth century, common law courts took jurisdiction over slander actions so long as "temporal" damage could be proved. If only "spiritual" damage was inflicted upon the plaintiff, relief could be had only in the ecclesiastical courts. With the decline of the ecclesiastical courts, the common law courts attained jurisdiction for all slander actions. In the seventeenth century, the Court of the Star Chamber took jurisdiction over seditious libel cases. Civil damages were awarded to victims of non-political libel as an alternative to dueling. With the abolition of the Court of the Star Chamber, the common law courts attained jurisdiction over libel actions. *Id.* § 111.

19. The action for intrusion upon one's family began as an extension of the action for "enticing away a servant and depriving the master of the quasi-proprietary interest in his services." Since the common law regarded the wife and minor children as the property of the husband-father, the deprivation of their services was actionable by the husband-father. *Id.* § 124. See also 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 427-30 (2d ed. 1937).

20. That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone. Warren & Brandeis, *supra* note 17, at 195.

tions, and sensations.²¹ As this postulate became widely accepted, legal scholars and jurists have struggled to give concrete meaning to what is still a vague notion of privacy.²² As society and technology advance, the concept of privacy has become more ephemeral and the right of privacy more evanescent. As parameters and notions are drawn, technology develops new means of intrusion that challenge previously comfortable balances.

In his prophetic dissent in *Olmstead v. United States*,²³ Justice Brandeis wrote of the dangers to individual privacy that will result as society becomes more sophisticated in its technology.²⁴

The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.²⁵

Justice Brandeis urged a broad, non-literal reading of the fourth amendment to protect what he called the constitutional "right to be let alone."²⁶ In 1968, Professor Westin wrote of the threats to privacy emanating from society's new tools for listening, watching, collecting, and disseminating data.²⁷ Other jurists and scholars also have tackled the

21. *Id.* at 206.

22. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Clark, *Ninth Amendment and Constitutional Privacy*, 5 U. TOL. L. REV. 83 (1973); Glancey, *Invention of the Right of Privacy*, 21 ARIZ. L. REV. 1 (1979); Goldstein, *Constitutional Rights of Privacy — "A Sizable Hunk of Liberty"*, 26 MD. L. REV. 249 (1966); Ringold, *History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1 (1972); Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970s*, 66 COLUM. L. REV. 1003 (1966).

23. 277 U.S. 438 (1928).

24. "But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack to obtain disclosure in court of what is whispered in the closet." *Id.* at 473.

25. *Id.* at 474.

26. *Id.* at 478.

27. A. WESTIN, *PRIVACY AND FREEDOM* 3 (1967). See also, e.g., *California v.*

problem of privacy in the technological society.²⁸ Employee drug testing presents the latest challenge.

II. Constitutional Analysis

A. History

The history of political life and times surrounding the drafting and adoption of the fourth amendment helps illuminate the intent of the framers of the Bill of Rights. The extent to which the framers went beyond the limited concepts that preceded the American Revolution illustrates their notions of freedom.²⁹

The English subjects who crossed the Atlantic in the 1600's came to their new world with well defined ideas of personal rights.³⁰ They brought with them strong beliefs in personal freedom, embodied in the Magna Carta and the common law.³¹ Among those ideals were the

Ciraolo, 106 S. Ct. 1809 (1986) (warrantless observation from airplane of fenced-in area within curtilage of home not unreasonable under the fourth amendment); *Dow Chem. Co. v. United States*, 106 S. Ct. 1819 (1986) (aerial surveillance and photography of industrial complex not a search for fourth amendment purposes).

28. See, e.g., Dowling, "Bumper Beepers" and the Fourth Amendment, 13 CRIM. L. BULL. 266 (1977); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240 (1964); Meldman, *Centralized Information Systems and the Legal Right to Privacy*, 52 MARQ. L. REV. 335 (1969); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091 (1969). See also *United States v. Karo*, 468 U.S. 705 (1984) (warrantless monitoring of a beeper inside a private house violates the fourth amendment); *United States v. New York Tel. Co.*, 434 U.S. 159 (1977) (no reasonable expectation of privacy in the numbers dialed on a telephone and discovered with a pen register).

29. "[I]f it is true that freedom is a growing thing, it cannot have a lesser meaning today or tomorrow than it had at the birth of our nation. For more reasons than one, it is vitally important to know what the framers . . . thought they were doing." I. BRANT, *supra* note 11, at 79.

30. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* at 1 (1962).

31. *Id.* at 14. Every English freeholder was guaranteed the sacred English right of protection of life, liberty, and property from arbitrary action. "Foremost among these safeguards stood the writ of habeas corpus and trial by jury." Both had roots that predated even the Magna Carta (1215). Trial by jury in criminal matters is first mentioned in the Constitution of Clarendon. "In periods of crisis Englishmen were assured that 'this great Jewel of Liberty, Trials by Juries [has] no less than fifty-eight several times since the Norman Conquest, been established and confirmed by the legislative Power . . .'" Writs of habeas corpus were used by early judges of King's Bench and Common Pleas to assert their supremacy over rival courts. In the late 1600s the writ

right to life, liberty, and property, protected by trials by jury, writs of habeas corpus, a right to counsel,³² the right against self-incrimination,³³ and prohibitions on excessive bails or fines.³⁴ The colonists set these guarantees of personal liberty down in writing as notice to the royal governors that their freeborn rights as Englishmen crossed the ocean with them and were just as applicable in America.³⁵

Indeed, it was an atmosphere of religious intolerance by the Stuart rulers of the late 1600s, Charles I and then his brother James II, that drove many English Protestants to leave their homeland in the first place.³⁶ Long before the colonies were settled, the English were placing restrictions on religious freedom. Since practically all early books were religious works, without freedom of religion there could be no freedom of press.³⁷ A proclamation during the reign of Henry VIII made the publishers and professors of certain religious works with "divers here-

was clearly established by Parliament as a means of releasing a person unlawfully imprisoned. This was in reaction to practices of sheriffs and other officials under the reign of Charles I to engage in practices of delay and evasion common to earlier regimes. *Id.* at 14-15.

32. As early as the reign of Henry I (1068-1135), an accused was granted the right to have aid of counsel, usually friends or relatives, assist in the trial. In 1236 the Statute of Merton granted the right to every freeman to be represented by an attorney except in cases of felony or treason. RUTLAND, *supra* note 30, at 15. See Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 1, 3-5 (1954).

33. Self-incrimination was a part of the English legal system for 450 years after the Magna Carta. The oath *ex officio*, initiated in 1236, "bound the person under examination to make a true answer to all questions that might be asked." The oath *ex officio* was used by the High Commission and the Court of the Star Chamber until the abolition of those two bodies in 1641. Compulsory self-incrimination died out thereafter, with Parliament finally abolishing the oath *ex officio* in 1662. I. BRANT, *supra* note 11, at 381-82.

34. In 1275 officers were warned about extortion from prisoners. In 1444 sheriffs were ordered to release prisoners on bail unless the crime was of an extremely serious nature. R. RUTLAND, *supra* note 30, at 15-16.

35. *Id.* When called upon, the English court made clear that "all laws in force in England are in force [in America]." Chief Justice Holt wrote an opinion stating that the common law of England was carried to the colonists unless there was a private Act to the contrary. *Id.* at 14. "Royal instructions to the mother colony of Virginia as early as 1606 specified that all laws should be 'as neer to the common lawes of England, and the equity thereof as may be.'" *Id.* In Massachusetts, the Code of 1636 "declared that all proceedings should be according to 'the presidents [sic] of the law of England as neer us may be.'" L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 337 (1968).

36. R. RUTLAND, *supra* note 30, at 16.

37. *Id.*

sies and erroneous opinions" subject to punishment.³⁸ Such censorship soon spread to printed materials other than religious pieces, as well.

The most notorious crime that grew out of the development of the printing industry was seditious libel. The crime, created by the Court of Star Chamber, became an insidious means of stifling criticism of the government and freedom of political opinion.³⁹ In 1606, in the earliest known description of seditious libel, Sir Edward Coke stated that it "could be prosecuted either by indictment in the Court of King's Bench (common law) or by bill in the Star Chamber."⁴⁰ In fact, only two very early cases of libel, dated 1136 and 1344, were prosecuted in King's Bench, leaving Star Chamber a virtual monopoly on seditious libel trials.⁴¹

The Licensing Act of 1662 furthered the seditious libel laws by placing the English press under a strict code of control. Parliament created licensing schemes for all printers. Then the Stationers' Company, a private guild with a state granted monopoly on printing rights, was formed and given broad power by the Court of Star Chamber to enforce the laws. Thus spread the practice of "searching in all places, where books were printing, in order to see if the printer had a license; and if upon such search he found any books which he suspected to be libelous against the church or state, he was to seize them, and carry them before the proper magistrate."⁴² Under the powerful instrument of the general warrant, proceedings for seditious libel against printers

38. *Id.* at 17. See also SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 387 (C. Stephenson & F. Marcham ed. 1937); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 at 48 (1952).

39. I. BRANT, *supra* note 11, at 92-93. R. RUTLAND, *supra* note 30, at 17. The Court of Star Chamber was formed by an act of Parliament in 1487 as a means for the king and council to bypass the processes and safeguards of the common law. It was made up of the Lord Chancellor, two common law judges, a high prelate and an indefinite number of the king's councillors. Under the rationalization of speed and certainty, the Court did away with procedures such as grand jury indictments (first initiated in 1166), resorting to "information *ex officio*." This meant the Star Chamber could hold people to trial simply by virtue of its office. Persons suspected of crime were forced to take an "oath *ex officio*" binding them to appear and answer questions asked of them. Thus, the common-law privilege against compulsory self-incrimination was abandoned. Juries of one's peers also were abolished. The Court tried the case, decided the verdict, and sentenced. See I. BRANT, *supra* note 11, at 87. See also LEVY, *supra* note 35, at 33-38.

40. I. BRANT, *supra* note 11, at 93.

41. *Id.*

42. *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 1069 (1765).

became commonplace.⁴³ Just as limits on freedom of religion restricted freedom of the press, so censorship of the press eroded rights of privacy, sanctity of the home, and freedom from unreasonable searches and seizures. These developments did not go unnoticed by those who left England for America.

While battling free expression at home, England simultaneously was waging war with France.⁴⁴ In an effort to raise funds and replenish her depleted war coffers, England began enforcing in the colonies previously neglected tariffs and customs duties.⁴⁵ Writs of assistance were issued by colonial justices to permit customs officials to search any "shop, house, cellar, warehouse, or other place, and if resisted to break open any door, trunk, chest, or other parcel in order to seize and secure contraband."⁴⁶

In 1760, King George II died, and all writs automatically expired six months after his death.⁴⁷ Before new writs could issue, sixty-three Boston merchants presented a challenge to the legality of such general

43. See, e.g., J. HALL, SEARCH AND SEIZURE § 1.11 (1982); S. SALZBURG, AMERICAN CRIMINAL PROCEDURE 47-48 (1984).

44. England and Prussia were allied against France and Austria in the Seven Years' War (1756-1763). As a result of this war, France surrendered Canada to England in 1760 and further renounced all claims to territory east of the Mississippi River, except for New Orleans. The European phase of the war ended with the Treaty of Paris, February 10, 1763. Faced with a huge post-war debt, Prime Minister George Grenville decided that the colonies should bear an increased burden. It cost more to maintain the American customs service than it brought in in revenues. Grenville ordered stricter enforcement of existing laws, and Parliament passed the Sugar Act (1764) and the Stamp Act (1765). A new court to hear cases of customs violations was established at Halifax, and the right of an accused to sue for illegal seizure was annulled. American customs officials were required to live in America, ending the practice of these officials living in England and entrusting their duties to a deputy. Customs officials went about their duties with renewed vigor and had at their disposal the writ of assistance and the general warrant. ENCYCLOPEDIA OF AMERICAN HISTORY 67-73 (R. Morris ed. 1965). See also 1 GREAT EVENTS FROM HISTORY, AMERICAN SERIES 200-02, 219-21 (F. Magill ed. 1975).

45. Under the Navigation laws crown agents were empowered with the right to use writs of assistance and general warrants in an effort to stop smuggling. Such writs essentially gave royal officers a *carte blanche* to search and seize anywhere and anything. See R. RUTLAND, *supra* note 30, at 20.

46. See J. HALL, *supra* note 43, § 1.12.

47. One of the odious features of a writ of assistance was its character as a permanent search warrant, which could be used with unlimited discretion during the life of the king. Expiration of writs within six months of the death of the sovereign apparently was simply a matter of legal practice, rather than legal requirement. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31, 33 (1966).

writs. Two lawyers, Oxenbridge Thatcher and James Otis, were hired to argue Paxton's case to the Massachusetts Superior Court.⁴⁸ Thatcher argued that the Massachusetts court was not authorized by Parliament to issue writs of assistance.⁴⁹ Otis argued more broadly that writs were repugnant to the Magna Carta, and fundamental principles of law which recognized the sanctity of the home.⁵⁰ Otis argued for independent judicial review of the statute, pronouncing the writs "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since they placed "the liberty of every man in the hands of every petty officer."⁵¹ Otis' eloquent argument against the injustice of the writs inspired John Adams to report, "[T]hen and there the child Independence was born."⁵²

But, in fact, Otis' argument was rejected by the Supreme Court of Massachusetts which, based on the British practice of commonly issuing such writs, ruled they were legal.⁵³ Thus, new writs, lacking any specificity of information or particularity of description of the place to be searched or goods to be seized, were issued. Although Chief Justice Hutchinson of the Massachusetts Supreme Court was satisfied that the writs were legal, other American judges in the other colonies were more skeptical.⁵⁴

Two years after Paxton's case, John Wilkes was tried in England for seditious libel.⁵⁵ In Wilkes' case, Secretary of State Lord Halifax authorized a warrant to search for and seize the author(s) of an article critical of King George III's cider excise tax. Under this general war-

48. Paxton's Case (1761), 1 Quincy, Massachusetts Reports 1761-1772 at 51.

49. *Id.* at 54. The full text of argument in Paxton's Case is not reproduced because the case was reargued in November of the same year (1761) and the court reporter, Josiah Quincy, made only partial notes. Historians, therefore, rely upon notes taken by John Adams, a "youthful spectator" in the courtroom. See generally J. LANDYNSKI *supra* note 47, at 33-36, & n.64.

50. *Id.* See also J. HALL, *supra* note 43, § 1.12.

51. *Boyd*, 116 U.S. at 625 (quoting W. CARRINGTON, COOLEY'S CONSTITUTIONAL LIMITATIONS 338-39 (5th ed. 1917).

52. 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (Wroth & Zobel ed. 1965).

53. J. LANDYNSKI, *supra* note 47, at 35.

54. *Id.* at 36-37. The courts of Pennsylvania, Delaware, Virginia, Connecticut, Rhode Island, Georgia and Maryland all either refused to grant, or ignored application for writs of assistance.

55. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763). See also *Wilkes v. Halifax*, XIX Howell St. Tr. 1401 (1763). For a lively and complete discussion of the prosecution and persecution of John Wilkes, see I. BRANT, *supra* note 11, at 189-93.

rant, no less than forty-nine persons were arrested over a three-day period. One of those persons arrested was a printer who identified the author of the "seditious" article as John Wilkes, a member of Parliament.⁵⁶ Wilkes refused to submit to the warrant, and was thrown into the Tower of London for a week.⁵⁷ Wilkes then sued civilly for damages for trespass. Chief Justice Pratt (later to become Lord Camden) held the warrant illegal as a subversion of the liberty and property of every Englishman.⁵⁸ The judgment was affirmed, but on the narrower ground that since it failed to name the person sought, the warrant was invalid.⁵⁹

Two years later Lord Halifax issued another warrant for the arrest and seizure of the papers of John Entick, on suspicion of seditious libel. Entick sued the messenger who executed the warrant for trespass.⁶⁰ Lord Camden held the warrant was void. Moreover, he found that in the absence of a statute,⁶¹ the authority to issue warrants is not derived from the common law. Further, he found that since the warrant failed to name the specific papers sought and no oath of probable cause had been required, the warrant was defective even if Lord Halifax had the authority to issue it.⁶² Soon after the decision in *Entick*, Blackstone wrote that "a general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty."⁶³ Lawyers and statesmen in America followed Wilkes' and Entick's cases closely and with great interest.

It was against this background that the seeds for both the Ameri-

56. J. HALL, *supra* note 43, § 1.13.

57. R. RUTLAND, *supra* note 30, at 21.

58. *Id.*

59. S. SALZBURG, *supra* note 43, at 47. As one scholar states, "A glimpse of the judicial courage and integrity involved in upholding the individual's right to freedom from unreasonable search and seizure against encroachment from a powerful executive supposedly justified by situational exigencies is contained in the words of Chief Justice Pratt in *Wilkes*: 'If higher jurisdictions should declare my opinion erroneous I submit as will become me, and kiss the rod; but . . . I shall always consider it as a rod of iron for the chastisement of the people of Great Britain.'" W. Greenhalgh, *Roots, Rights and Remedies of the Fourth Amendment 4* (1986) (unpublished manuscript).

60. *Entick v. Carrington*, 19 Howell's St. Tr. 1024 (1765).

61. Lord Halifax was issuing warrants to enforce the Printing Act. The act, however, had expired in 1644. Lord Halifax claimed that his authority to issue such warrants was a recognized part of the common law. Lord Camden disagreed. *Id.* at 1064.

62. *Id.* at 1065-70.

63. *Boyd*, 116 U.S. at 626-27; W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 291 (1790).

can Revolution and the federal Bill of Rights were sown. After the Revolution one of the first things the individual states did was to draft declarations of rights.⁶⁴ In 1776, Virginia was the first state to ratify a declaration of rights.⁶⁵ Among the list of rights in the Virginia Declaration was the prohibition against general warrants. General warrants of search and seizure were held "grievous and oppressive," hence not to be granted.⁶⁶ By 1780 all the states with the exception of New Hampshire had ratified declarations of rights.⁶⁷ Since the underlying ideas came from the English Bill of Rights,⁶⁸ and notions of common law, it

64. R. RUTLAND, *supra* note 30, at 49. Virginia's Declaration of Rights, adopted in 1776, contained provisions for "human equality," the "right of revolution," majority rule, separation of powers, and provided that "people are the source of all power." Bills of Rights in Pennsylvania, Delaware, Maryland, New Hampshire, Vermont, Massachusetts, and North Carolina contained provisions similar to or listed verbatim from the Virginia Declaration. *Id.* at 46, 52.

65. The Virginia Bill of Rights was the first American precedent of a constitutional character for the fourth amendment. It was adopted on June 12, 1776 at the Williamsburg convention. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79 (1937).

66. Virginia Declaration of Rights, Article X, *reprinted in* 2 B. SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* (1980). The full text of Article X is:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Id. at 235.

67. In 1784, when New Hampshire ratified its Declaration of Rights, it was a duplication of the Massachusetts Declaration of 1780 in which the phrase "unreasonable searches" appeared in a constitution for the first time:

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right if the cause or foundation of them be not previously supported by oath, or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by laws.

Massachusetts Declaration of Rights Article XIV, *reprinted in* B. SCHWARTZ, *supra* note 66, at 342.

68. *Id.* at 40. The English Bill of Rights was adopted the year after the "glorious revolution" of 1688. It reasserted the supremacy of Parliament over the sovereign and declared unconstitutional the suspension of the acts of Parliament. The Bill of Rights also declared unconstitutional

was not unusual that the language in most cases closely tracked that of the Virginia Declaration. All states imposed restrictions on the issuance of general warrants.⁶⁹

James Madison, the primary drafter of the federal Bill of Rights, used the individual state declarations as his models.⁷⁰ Consequently, the original language of the fourth amendment was directed only toward regulating the form of warrants.⁷¹ The original language was amended, and in addition to regulating the form of warrants, the ratified text includes a general prohibition against unreasonable searches and seizures.

The fourth amendment provides:

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

the levying of taxes without the consent of Parliament, the maintenance of a standing army in time of peace, the interference with free elections, the infliction of cruel and unusual punishment, the exaction of excessive bails, and the denial of the right of petition. Protestants were assured of their right to bear arms.

Id. at 42. The American colonists borrowed heavily from this document when they drew up their own declarations. *Id.*

69. Pennsylvania's 1776 Declaration of Rights required oath or affirmation before a warrant would issue. Vermont's 1777 Declaration of Rights forbade any search and seizure without a warrant based on oath or affirmation based on sufficient foundation. North Carolina's declaration held that general warrants "are dangerous to liberty, and ought not to be granted." See 2 B. SCHWARTZ, *supra* note 66, at 287; R. RUTLAND, *supra* note 30, at 47.

70. J. LANDYNSKI, *supra* note 47, at 41. See generally N. LASSON, *supra* note 65, at 79-105.

71. The fourth amendment, as originally drafted, stated, "The rights of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 Annals of Cong. 452 (1789); see *Warden v. Hayden*, 387 U.S. 316 (1967). Apparently, the "unreasonable searches and seizures" language was inadvertently omitted in the first draft. Representative Benson, Chairman of the Committee to arrange the amendments, preferred the "no warrants shall issue" language. Thus, when reported out of committee the phrase "unreasonable searches and seizures" was added, along with the language "and no warrants shall issue." Most problematic, however, is that the amendment went from one clause to two clauses.

seized.⁷²

As history suggests, this amendment was the framers' response to the abuses of general warrants and the violations of personal liberty they engendered. It abolishes the pre-revolutionary practices of searches pursuant to general warrants or writs of assistance, and safeguards the privacy of individuals against arbitrary invasions by agents of the state.⁷³ "The Fourth Amendment thus gives concrete expression to a right of the people which is basic to a free society."⁷⁴

Whether employers may screen employees for drug use is a timely issue of significant import, likely to appear on the dockets of many courts within the coming years.⁷⁵ When a public entity mandates such tests questions of constitutionality arise.⁷⁶ Foremost among the consti-

72. U.S. CONST. amend IV.

73. *Boyd*, 116 U.S. 617 (1886): "The essential purpose of the Fourth Amendment is to 'impose a standard of reasonableness upon the exercise of discretion by government officials' in order to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Ct.*, 387 U.S. 523 (1967); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1512 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)). See also *Patchoque-Medford Congress v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986); *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978); *Shoemaker v. Handel*, 619 F. Supp. 1089, 1098 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S. Ct. 577 (1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (1987); *Tucker v. Fraternal Order of Police*, 500 A.2d 1005, 1007 (D.C. 1985).

74. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

75. Presently, there are cases pending both at the district court and appellate levels. The Supreme Court recently denied certiorari in a case from the third circuit, *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986). As additional agencies impose drug screening, employee unions and individuals will continue turning to the courts to challenge the procedures. As the constitutionality of employee drug testing is decided in the various other circuits, the Supreme Court surely will be faced with further writs of certiorari.

76. There are significant issues of civil rights and privacy that are implicated when private employers initiate drug testing, as well. Constitutional challenges to private employer programs are more tenuous, because there is no official state action involved in the testing program; however, challenges under the Civil Rights Act, 28 U.S.C. § 1983, for example, are not precluded. Moreover, numerous private causes of action ranging from intentional infliction of emotional distress, to wrongful termination, to defamation are appropriate, and are currently being raised in various forums. See, e.g., *Luck v. Southern Pac. Transp. Co.*, No. C843-230 (Cal. Super. Ct., Dec. 20, 1985); *O'Brien v. Papa Gino's Inc.*, 780 F.2d 1067 (1st Cir. 1986). These issues are mentioned here, however, only in passing because they are beyond the scope of this writing.

tutional challenges to a drug testing program is whether rights guaranteed by the fourth amendment are compromised.⁷⁷

B. Search and Seizure and Reasonable Expectation of Privacy

Whether employee urinalysis amounts to a search is a threshold question. While it is relatively easy to define "seizure" under the fourth amendment,⁷⁸ it is correspondingly difficult to define "search." As the Supreme Court has faced novel situations, it continually has refined what constitutes a "search."⁷⁹ The first significant refinement of what is a search for constitutional purposes occurred in 1928 in *Olmstead v. United States*.⁸⁰ In *Olmstead*, the government placed a tap on Mr.

77. Other constitutional challenges include: abridgments of the rights, liberty and property without due process, U.S. CONST. amend. V; *Schmerber v. California*, 384 U.S. 757 (1966); *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985); *National Treasury Employees v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); and infringement upon penumbral privacy rights, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). For further discussion of these issues, see *infra* notes 221-83 (due process), and 284-96 (privacy), and accompanying text.

78. *United States v. Jacobsen*, 466 U.S. 109 (1984) (a seizure occurs when there is some meaningful interference with an individual's possessory interests in that property); *Hale v. Henkel*, 201 U.S. 43 (1906) ("a seizure contemplates a forcible dispossession of the owner").

79. Since the finding of a search often changes with the facts of each case, it is actually too strong to say that the Court "defines" search. According to *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), "[a] 'search' occurs when an expectation that society is prepared to consider reasonable is infringed." Likewise, in *United States v. Dionisio*, 410 U.S. 1, 15 (1973), the Court characterized a search as an action involving "the probing into an individual's private life and thoughts." Not every police effort to seek out evidence is found to be a search. See, e.g., *Hester v. United States*, 265 U.S. 57, 59 (1924) ("the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields"); *United States v. Lee*, 274 U.S. 438 (1928) (no search "on the high seas" where a coast guard agent shined a searchlight on the deck of a motorboat). In *Oliver v. United States*, 466 U.S. 170 (1983), the Court conceded that individuals do have a reasonable expectation of privacy in the area immediately adjacent to their homes ("the curtilage"), but rejected the notion that "steps taken to protect privacy (such as the erection of fences and no trespassing signs) establish that expectations of privacy in an open field are legitimate." *Id.* at 182. See also *United States v. Place*, 462 U.S. 696 (1983) ("Canine sniff" of luggage is not a search within the meaning of the fourth amendment). But see *Arizona v. Hicks*, 107 S.Ct. 1149 (1987) (moving stereo equipment to read and record serial numbers is a search).

80. 277 U.S. 438 (1928).

Olmstead's telephone wires and thereby listened to his conversations. The Court held that this was not a violation of Mr. Olmstead's constitutional rights. The electronic eavesdropping was not a search because "the intervening wires are not part of his house or office, any more than are the highways along which they are stretched."⁸¹ Accordingly, the Court began tying the concept of search to the nature of the area searched.⁸²

Thirty-nine years later in *Katz v. United States*,⁸³ the Court wrote

81. *Id.* at 465.

82. "The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office." *Id.* The trespass doctrine, under which no fourth amendment violation was found unless the government invaded a property interest of the defendant, was also followed in *Silverman v. United States*, 365 U.S. 505 (1961), where evidence was excluded because it was obtained by inserting a microphone under the defendant's baseboard until it touched a heating duct which ran throughout his house. However, in 1960, the Court began to move away from tying the right to challenge a search to property concepts alone. In *Jones v. United States*, 362 U.S. 267 (1960), the Court held that where the defendant was legitimately on the premises searched by the police, he had standing to challenge the search despite the fact that he had no possessory interest in the apartment. Furthermore, the defendant was not required to assert possession of the narcotics seized then, since this would infringe on his right not to incriminate himself, but rather was given "automatic standing" to challenge their seizure. Following the *Katz* decision, the Court tied the expectation of privacy concept to the issue of standing as well, in *Mancusi v. DeForte*, 392 U.S. 3674 (1968). In examining the legality of a search of a large labor union office shared by the defendant and other union officials, the Court focused on whether DeForte had a "reasonable expectation of freedom from governmental intrusion" in the office, rather than deciding the case on the ground that DeForte was legitimately in the office at the time of the search. The "legitimately-on-the-premises" rule was expressly overruled in *Rakas v. Illinois*, 439 U.S. 128 (1978), in favor of the legitimate expectation of privacy formulation. In *Rakas*, the Court, per Justice Rehnquist, noted that while legitimate presence was not irrelevant to the inquiry, it could not confer standing in itself. The Court also did away with the *Jones* rule of automatic standing in regard to possession of a seized item of contraband, such as narcotics, in *United States v. Salvucci*, 448 U.S. 83 (1980), stating that "we must instead engage in a 'conscientious effort to apply the Fourth Amendment' by asking not merely whether the defendant had a possessing interest in the items seized, but whether he had an expectation of privacy in the area searched." *Id.*

The same analysis was applied in a companion case, *Rawlings v. Kentucky*, 448 U.S. 98 (1980). These cases state that while possession of seized items and presence on the searched premises are not irrelevant to the issue of standing to assert fourth amendment rights, they must be viewed only as two of the factors affecting the decision; others include dominion and control of the premises, and the right to exclude others. *Rakas*, 439 U.S. at 149.

83. 389 U.S. 347 (1967).

its seminal statement on what constitutes a "constitutionally protected area." In *Katz*, the Court was once again faced with a wiretap of a telephone conversation. This time, however, the listening device was attached to the outside of a public telephone booth that *Katz* used to transmit wagering information.⁸⁴ Justice Stewart wrote:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁸⁵

While this interpretation dramatically changed the law of searches, it is the two prong test set out in Justice Harlan's concurrence that has been adopted as the benchmark of whether there has been a search. Justice Harlan wrote, "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation is one that society is prepared to recognize as 'reasonable.'"⁸⁶ Hence, a showing that state officials conducted a "search" of an area in which the defendant was present is not enough to invoke fourth amendment protections.⁸⁷ One additionally must show that the area searched was one in which the individual had an expectation of privacy that society is prepared to recognize.⁸⁸

84. *Id.*

85. *Id.* at 351-52.

86. *Id.* at 361 (Harlan, J., concurring).

87. *Rakas*, 439 U.S. at 148.

88. Given this formulation, a person's expectation of privacy conceivably could vary depending upon the individual's sensitivity or shyness. Arguably, persons less reluctant to undress in public would have a lesser expectation of privacy, and possibly would not be "searched" within the meaning of the fourth amendment.

Moreover, because in public restrooms men urinate in less than private circumstances, they might have a lesser expectation of privacy in the act of urination than women, who perform the same act behind closed doors. If based upon this distinction, employers impose drug tests on men and women differently what becomes of equal protection? In *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), Judge Edgar rejected the argument that because fire fighters live in the same quarters, undress in each other's presence, and use common restrooms exposing themselves in the act of urination in the presence of others of the same sex, they have no expectation of privacy in the act of urination.

The Court suspects that the degree of intrusion engendered by a urine test will vary greatly upon the individual being tested. Some persons may not mind it at all, while others, . . . may take great offense. This Court con-

Description of a typical drug testing scenario is useful for the discussion of expectations of privacy and reasonable searches that follows. Employee X has worked as a mail handler and driver for the Post Office for the past seven years. She has a good work record and is not unusually absent or tardy. She has two school-age children, and is the sole support for her family. She has not been involved in any accidents or mishaps in the last three years.

Last week Ms. X was asked to report to her supervisor's office, where she was told that she would have to submit to urinalysis, pursuant to new federal postal regulations. She was appalled by the request and claimed there was no basis for subjecting her to this procedure. Ms. X was informed that she could be disciplined or even suspended for refusing to take the drug test. Given this ultimatum, she agreed to the drug screening.

She was then escorted to a bathroom by a female employee hired for the specific purpose of overseeing the Post Office drug testing program. Ms. X was given a plastic cup and asked to urinate into it. She was allowed to step into a stall, but not to close the door behind her. To prevent tampering with the specimen, Ms. X was personally observed during the whole procedure. Ms. X's sample was turned over to the supervisor, labelled, and sent on to a drug testing laboratory for analysis.⁸⁹

Does forcing an individual, like Ms. X, to urinate into a container under the watchful eye of a supervisory person violate an area of individual privacy that society recognizes? Recent decisions find individuals

cludes that most people, including fire fighters, have a certain degree of subjective expectation of privacy in the act of urination.

Id.

89. This scenario is not based on any particular drug testing program, but rather on common elements of many programs. Actual cases are:

At 7:00 A.M. on May 26, 1986, the Plainfield Fire Chief and Plainfield Director of Public Affairs and Safety entered the city fire station, secured and locked all station doors and awakened the fire fighters present on the premises. Each fire department employee was required to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the city.

Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986).

The laboratory representative accompanied each of us into the restroom, one by one. He placed some dye into the urinal and then stepped behind a partition. The representative was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar.

National Treasury Employees Union, 649 F. Supp. at 382.

maintain the highest degree of privacy in bodily functions normally performed in private.⁹⁰ "Excreting body fluids and body wastes is one of the most personal and private human functions."⁹¹ One Court has declared, "drug testing bodily wastes is even more intrusive than a search of a home."⁹² American society recognizes the private nature of urination. Indeed, all but a few primitive societies respect the privacy attendant to excreting bodily wastes.⁹³ Thus, it appears likely that society is prepared to recognize not only the expectation of privacy in urination, but also the reasonableness of such expectation.

Assuming the above conclusion of a recognizable reasonable expectation of privacy in urination is correct, the next inquiry is whether

90. "Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public." *Capua*, 643 F. Supp. at 1511.

Judge Vietor, in *McDonnell v. Hunter*, agrees:

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, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

McDonnell, 612 F. Supp. at 1127. See also *Storms v. Coughlin*, 600 F. Supp. 1214, 1220 (S.D.N.Y. 1984). *Contra Shoemaker*, 619 F. Supp. at 1098; *Turner*, 500 A.2d at 1011 (Nebeker, J., concurring).

91. *McDonnell*, 612 F. Supp. at 1127. Indeed, in many jurisdictions it is a crime to urinate in public. See, e.g., CAL. PENAL CODE § 314 (West 1970) (indecent exposure; first offense is misdemeanor); DEL. CODE ANN. tit. 11, § 768 (1979) (indecent exposure; class B misdemeanor); D.C. CODE ANN., § 22-1122 (1981) (lewd, indecent, or obscene acts, penalty of not more than \$300 fine, or imprisonment of not more than 90 days, or both); N.M. STAT. ANN. § 30-9-14 (1978) (indecent exposure; petty misdemeanor).

92. *National Treasury Employees Union*, 649 F. Supp. at 386.

93. See *Capua*, 643 F. Supp. at 1507. There are some primitive societies in which body functions are performed openly. Margaret Mead noted that American notions of privacy are unknown in Samoa; bathing is done in the sea without clothes and the beaches are openly used as latrines. A.R. Holmberg described the Siriono Indians of Bolivia as a tribe in which only intercourse is performed privately. Everything else — sleeping, eating, urinating and defecating — is done openly; as many as fifty people live in the same hut. A. WESTIN, *PRIVACY AND FREEDOM* 12, 17 (1967). However, the typical American "will spend his wealth installing private bathrooms in his house, buying a private car, a private yacht, private woods and a private beach, which he will then people with his privately chosen society. The need for privacy is an imperative one in our society." D. LEE, *FREEDOM AND CULTURE* 74-75 (1959).

urinalysis is the type of intrusion that invades such privacy. In *Schmerber v. California*⁹⁴ the Supreme Court found that extracting blood for purposes of testing alcohol content is a search within the meaning of the fourth amendment.⁹⁵ In *Schmerber* the state compelled an individual suspected of drunk driving to undergo a blood test that would determine his blood alcohol level. Schmerber was under arrest at the hospital when a police officer directed a physician to take a blood sample, over Schmerber's objection.⁹⁶ The Court noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."⁹⁷ When dealing with an intrusion into the human body, rather than an interference with property relationships or private papers, the Court must make a discerning inquiry into the facts and circumstances to determine whether the intrusion is justifiable.⁹⁸

In *Winston v. Lee*,⁹⁹ Justice Brennan, writing for a unanimous Court, suggested that other factors beyond the ordinary requirements of the fourth amendment (probable cause and search warrant) must be considered when looking at a bodily intrusion. Among these are the extent to which the procedure may threaten the safety or health of the individual and the extent of the intrusion upon the individual's dignity interests in personal privacy and bodily integrity.¹⁰⁰ The community's interest in a fair and accurate determination of guilt is weighed against these individual interests.¹⁰¹ Using this analysis the Court in *Lee* affirmed the lower court's ruling that requiring the defendant to undergo surgery to remove a bullet lodged in his chest is unreasonable under the fourth amendment, and was just the kind of substantial intrusion cau-

94. 384 U.S. 757 (1966).

95. The Court then went on to determine that the search was reasonable in light of the circumstances. Schmerber was involved in an automobile accident and was taken to a hospital for treatment. At the hospital, the police officer noticed signs of drunkenness, and arrested him. The officer then directed a physician to perform a blood test, over Schmerber's objection. The Court found that although the search was conducted without a warrant, it was valid for several reasons: it was conducted incidental to a valid arrest; there was a danger that the level of alcohol in Schmerber's blood would diminish before a warrant could be obtained; the test itself was reasonable; and the test was conducted in a reasonable manner. *Id.* at 769-72.

96. *Id.* at 758.

97. *Id.* at 767.

98. *Winston v. Lee*, 470 U.S. 753 (1985).

99. *Id.*

100. *Id.*

101. *Id.*

tioned against in *Schmerber*.¹⁰² "[W]hen the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search reasonable."¹⁰³

Urinalysis is both a lesser and a greater intrusion upon individual privacy than the process at issue in *Schmerber*. To the extent that urinalysis functions by trapping fluids that persons void on a regular basis without the aid or interference of any medical instrument(s), it is a lesser, or no, intrusion upon the body.¹⁰⁴ Extracting blood, usually by inserting a hypodermic needle into a person's vein, and withdrawing the fluid into an attached syringe is certainly intrusive.¹⁰⁵ Where taking blood is an invasive procedure into the body, taking urine is not. Conversely, one submits to blood withdrawal in a routine fashion in what are usually non-private surroundings.¹⁰⁶ One does not routinely urinate in public. Moreover, one is not observed while urinating, even in a medical setting.

Since urinalysis involves an invasion of privacy normally attendant to personal body functions, it is a search covered by the fourth amendment.¹⁰⁷ Whether the procedure meets constitutional requirements,

102. *Id.*

103. *Id.*

104. *See, e.g., McDonell*, 612 F. Supp. at 1127: "Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine." *But see McDonell*, where Judge Lay stated, "A search's intrusiveness does not hinge merely upon whether or not a person's skin is punctured or body touched in some way, but must be evaluated in terms of the individual's legitimate expectations of privacy in the context in which the search is conducted." 809 F.2d at 1311 (Lay, J., concurring in part, dissenting in part).

105. *Schmerber*, 384 U.S. at 757.

106. The Red Cross, for example, routinely takes blood donations in a variety of public settings ranging from its travelling bloodmobiles, to temporary donation centers set up in gymnasiums, community centers, and churches. Generally, no efforts are made to provide privacy for blood donors within the donation facility. For procedures attendant to taking blood *see generally* J. LIPPINCOTT, *MANUAL OF NURSING PRACTICE* (1986).

107. *See* for example the holding in *Patchoque-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 37, 505 N.Y.S.2d 888, 890 (App. Div. 1986):

In *Schmerber v. California*, the Supreme Court stated that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." The court in *Schmerber* (*supra*) held that arbitrary State-sponsored intrusions into the human body are equally as offensive to the Fourth Amendment as unreasonable searches of a person's home or property. We now hold that the act of com-

however, is determined by how the search is conducted.¹⁰⁸

C. The Warrant Requirement

After concluding that urinalysis is a search, the next inquiry is whether a warrant is required for employee drug testing. Referring to the case of *Entick v. Carrington*,¹⁰⁹ Justice Bradley wrote in *Boyd v. United States*:¹¹⁰

... compelling a person to provide a urine sample is a search within the meaning of the Fourth Amendment, and we reject the argument that, since such testing involves no physical intrusion into the body, the 4th Amendment is not implicated.

The court in *National Treasury Employees Union v. Von Raab* held:

Drug testing of Customs workers' bodily wastes is even more intrusive than a search of a home. When analyzing urine specimens, the defendant is searching for evidence of illicit drug usage. The drug testing plan is no minor frisk or pat down. It is rather a full-scale search that triggers application of Fourth Amendment protections.

649 F. Supp. at 386. *Accord Shoemaker*, 795 F.2d at 1136, 1141; *Capua*, 643 F. Supp. at 1507, 1513; *McDonell*, 809 F.2d at 1307; *Allen v. City of Marietta*, 601 F. Supp. 482, 488 (N.D.Ga. 1985); *Storms*, 600 F. Supp. at 1218; *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (Fla. 5th Dist. Ct. App. 1985); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

108. For example, a search conducted pursuant to a warrant is presumed rational based upon the safeguards attending the warrant process. Among those safeguards are that a warrant be based upon probable cause. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Once the officials present their sworn affidavit alleging criminal activity, a magistrate is to determine on the basis of the affidavit, and using a "totality-of-the-circumstances analysis," whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 237, 239 (1983). The determining magistrate is required to be neutral and detached, *Shadwick v. Tampa*, 407 U.S. 345 (1972); *Johnson v. United States*, 333 U.S. 10 (1948), and the warrant must specify with particularity the place to be searched and the things to be seized, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Marron v. United States*, 275 U.S. 192 (1927). The warrant must be executed promptly, and during the day, unless a night search is specifically authorized. *See, e.g., FED. R. CRIM. P.* 41(c).

Since a search conducted without a warrant has none of safeguards mentioned, it must be presumptively unreasonable, unless it falls within one of the exceptions to the warrant requirement. *See infra* note 117 and accompanying text. *See generally* W. LA FAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 4.1 (1978) (discussing when a warrant must or may be utilized).

109. 19 Howell's St. Tr. 1029 (1765); *see supra* text accompanying notes 60-62.

110. 116 U.S. 617 (1886).

[a]s every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, [ruling that general writs were illegal] and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution. . . .¹¹¹

Although Justice Bradley concluded that the propositions from *Entick v. Carrington* and the history surrounding that case were "sufficiently explanatory of what was meant by unreasonable searches and seizures,"¹¹² more recent events do not bear him out. The relationship between the clause prohibiting unreasonable searches and seizures and the clause regulating the process for issuing warrants is unclear. "Unreasonable" is undefined, and the relationship between unreasonable searches and seizures and the warrant process is unclear.¹¹³ One scholar aptly notes that the language has "both the virtue of brevity and the vice of ambiguity."¹¹⁴

Hence, the debate continues over what role the framers intended the warrant play in protecting against unreasonable searches and seizures. One line of Supreme Court cases hold that searches conducted without a search warrant are *per se* unreasonable.¹¹⁵ This approach

111. *Id.* at 626.

112. *Boyd*, 116 U.S. at 627.

113. See W. LAFAVE, *supra* note 108, § 1.1 at 5 for further discussion.

114. J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 46 (1966).

115. C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 4.03(a) (1986).

Mr. Justice Jackson argued in favor of a *per se* rule in *Harris v. United States*:

I cannot escape the conclusion that a search, for which we can assign no practicable limits, on premises and for things which no one describes in advance, is such a search as the Constitution considered "unreasonable" and intended to prohibit.

In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment.

Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting). The following year the Court adopted the doctrine of the presumptive unreasonableness of warrantless searches, *Johnson v. United States*, 333 U.S. 10 (1948), and this has remained the general rule, although some commentators believe that the Court may be

reached its zenith in *Mincey v. Arizona*¹¹⁶ where Justice Stewart, for a unanimous Court, wrote: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.'"¹¹⁷

Under this analysis, any drug test conducted by a governmental entity¹¹⁸ absent a warrant no matter how reasonable it appeared, would

moving toward the view that the reasonableness of the search, not whether a warrant was obtained, is the key question. See, e.g., Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231, 270 (1983) ("the Court, despite its espoused preference for warrants, has largely ignored the original practical reasons for the warrant exceptions and has disregarded the previous requirement of limiting the permissible scope of warrantless activity by the practical justification for that activity"); Bloom, *Warrant Requirement — The Burger Court Approach*, 53 U. COLO. L. REV. 691, 744 (1982) ("the Court's preference is in words, not in deeds"). Although these scholars accurately perceive the recent direction of the Supreme Court, it appears they may have overstated the case. The Court continues to require that a warrant be obtained unless the search fits into an established exception. *Payton v. New York*, 445 U.S. 573 (1980); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Jeffers*, 342 U.S. 48 (1951). The day soon may come when the Court reduces the warrant requirement to a mere form of words, but that day has not yet arrived.

116. 437 U.S. 385 (1978).

117. *Id.* at 390. There are a number of such well-defined exceptions: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (5) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (6) border searches, *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985); *United States v. Ortiz*, 422 U.S. 891 (1975); (7) administrative searches of closely regulated industries, *Donovan v. Dewey*, 436 U.S. 309 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640 (1983); *Michigan v. Thomas*, 458 U.S. 259 (1982); *South Dakota v. Opperman*, 428 U.S. 364 (1976); (9) searches of school-children's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

118. Governmental entity as used in this article refers to any federal, state, municipal body, or actor within such body whose conduct is constrained by the Constitution. This article is confined to a federal constitutional analysis. Naturally, individual

be unreasonable, unless it fit in with a specific exception.¹¹⁹

Other jurists and commentators conclude that the original intention of the fourth amendment was to protect against unreasonable searches and seizures, the warrant requirement being a means to that end, but not an end of constitutional dimension in itself.¹²⁰ While the warrant clause cannot be ignored, it is given far less weight than the reasonableness requirement. Under this interpretation a search warrant is not always required, even when it would be feasible to obtain one.¹²¹ The warrant language thus is reduced to a statement of standards for issuing a warrant, should the police seek one.¹²² Presence or absence of a warrant is never dispositive; rather, whether the search is reasonable under the circumstances is controlling.¹²³ This construction has its origins in *United States v. Rabinowitz*,¹²⁴ which was overruled in *Chimel v. California*,¹²⁵ and is enjoying a renaissance particularly in the opin-

state constitutions may require additional protections.

119. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). The basis for the exceptions to the warrant requirement is that at times exigent circumstances make obtaining a warrant unfeasible, or consent makes it unnecessary. In *Schmerber*, which like the urine testing cases involved seizure of body fluids, the Court held that the evanescent nature of the evidence sought (the defendant's blood alcohol level) excused the police from obtaining a warrant. *Schmerber*, 384 U.S. at 771. However, in the case of urine testing such a rationale is unavailable, because urine retains traces of drugs for extended periods of time. Morgan, *The Problems of Mass Urine Screening for Misused Drugs*, 16 J. PSYCHOACTIVE DRUGS 305 (1984).

120. *Johnson*, 333 U.S. at 10.

121. See, e.g., *Michigan v. Clifford*, 464 U.S. 287, 305 (1984) (Rehnquist, J., dissenting); *Michigan v. Tyler*, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting). Justice White's opinion in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), held the warrant requirement inapplicable in a school search situation.

122. C. WHITEBREAD & C. SLOBOGIN, *supra* note 115, § 4.03(a) at 136.

123. See *United States v. Rabinowitz*, 339 U.S. 56 (1950) for the origination of this interpretation. "The relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case." *Id.* at 66.

124. 339 U.S. 56 (1950).

125. 395 U.S. 752 (1969). In *Chimel* the Court narrowed the search incident to arrest warrant exception to the area within the immediate control of the arrestee. The reasoning of *Rabinowitz*, however, is favored by Justice Rehnquist. *Tyler*, 436 U.S. at 516; *Clifford*, 464 U.S. at 305. Professors Whitebread and Slobogin suggest that what they call the *Rabinowitz/Rehnquist* approach "would make nearly every warrantless search acceptable, while the *Johnson/Stewart* approach would validate only those warrantless searches that fully satisfy at least one of the narrowly-defined exceptions to the warrant requirement." C. WHITEBREAD & C. SLOBOGIN, *supra* note 115, § 4.03(a) at 137.

ions of Chief Justice Rehnquist.¹²⁶

To be sure, both interpretations of the warrant clause find support in the language of the amendment. Each, however, is more a justification for a specific result (the *Mincey* per se analysis for invalidating searches; the *Rabinowitz/Rehnquist* analysis for upholding searches), than a search for the true meaning of the warrant clause. Moreover, each of these approaches are unnecessarily extreme.

Per se analyses are per se imprudent. They not only discourage further analysis, but, by definition, prevent it. Per se tests sacrifice the rigor of analysis on the altar of certainty and direction for the lower courts. With all the competing interests that must be considered to determine whether a search is constitutionally valid, a per se approach is often unworkable. In fact, *Mincey* itself, despite purporting to establish a per se test, recognizes "a few specifically established and well-delineated exceptions."¹²⁷ Further, although a per se test can be defended based on the framers' intent,¹²⁸ it cannot be defended based on the language of the amendment. The amendment contains no specific prohibition on searches without a warrant.¹²⁹ At best the language is equivocal and the prohibition implied.

Likewise, the *Rabinowitz/Rehnquist* construction is sophistic and counterproductive. Although this construction can be defended by a strict reading of the isolated words of the amendment, under this construction, warrants, and the warrant clause itself, would be superfluous.¹³⁰ The only relevant inquiry would be whether the search was rea-

126. See, e.g., *supra* note 125.

127. *Mincey*, 437 U.S. at 390.

128. See *supra* notes 64-77 and accompanying text.

129. U.S. CONST. amend. IV.

130. A strict reading of isolated words in the fourth amendment is antithetical to accepted conclusions that words and clauses in the Constitution are ordinarily to be given a broad and liberal construction, rather than a narrow or literal one. See generally C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION (1982). In 1819, Chief Justice Marshall wrote that "[f]air construction requires that words be given their full and obvious meaning." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). In 1944, Justice Black said: "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. Southeastern Underwriters Co.*, 322 U.S. 533 (1944).

Fundamental rights are especially to be accorded liberal construction. In fourth amendment cases the Court has stated that the language should be liberally construed in favor of the individual. See, e.g., *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). As Professor Antieau

sonable. In fact, under this approach there would be a substantial *disincentive* to obtaining a warrant before a search, for when a warrant was sought its issuance must be measured against the standards of probable cause; whereas a warrantless search would only be measured, after the intrusion already occurred, against the standards of reasonableness. This result cannot be reconciled either with the Supreme Court's consistent holdings that warrants should be obtained whenever possible.¹³¹

A practical middle ground between either throwing out all warrantless searches or throwing the warrant clause out of the fourth amendment, would be to consider warrantless searches *presumptively* unreasonable. A warrantless search would increase substantially the burden that the government must carry to prove that the search was reasonable. Under this presumptively unreasonable standard, although the recognized exceptions would be illustrative, they would not be exhaustive of those situations that would validate an otherwise unreasonable search. This approach would eliminate the need to squeeze the expanding girth of what are perceived to be reasonable warrantless searches into what originally were tapered vestments of the narrowly drawn, well-delineated exceptions to the warrant requirement.¹³²

concludes, "a liberal construction is to be given constitutional clauses designed to protect the individual." C. ANTIEAU, *supra* note 130, at 36.

131. See, e.g., *United States v. Ventresca*, 380 U.S. 102 (1965). "[I]n a doubtful or marginal case [of probable cause] a search under a warrant may be sustainable where without one it would fail." *Id.* at 106.

132. This development is perhaps best exemplified in the automobile exception cases. The Supreme Court first recognized a need to differentiate a search of a dwelling house, a store, or other structure from a vehicle in *Carroll v. United States*, 267 U.S. 132 (1925). The Court held that because it was impracticable to obtain a warrant where a vehicle could be quickly moved out of a jurisdiction in which the warrant must be sought, a warrantless search was permissible. In *Carroll*, however, there was no basis for an arrest of the car occupants and thus the police could not have prevented them from moving the car while a warrant was being sought. The auto exception to the warrant requirement (based upon the inherent mobility of a vehicle) was thus created. In 1970 the foundational principles of this exception shifted. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court upheld a warrantless vehicle search under conditions involving no possible vehicle mobility. Both the driver and passengers were under arrest and the car was impounded at the police station. Because the Court found there was probable cause to search the car at the arrest scene, it held there was also probable cause at the station house. Later cases further illuminate the expanding rationale for the warrantless vehicle searches. In *California v. Carney*, 471 U.S. 386 (1985), a search of a non-mobile trailer home (it was up on blocks) survived constitutional challenge because the Court held that the trailer was readily mobile, licensed to operate on

This presumptively unreasonable standard finds ample support in the language and history of the fourth amendment.¹³³ That is not, however, the motivation for it. Rather, the presumptively unreasonable standard is necessary for the warrant clause to retain any meaningful vitality. As each exception to the warrant requirement expands in scope well beyond its original purpose, the protections of the warrant clause correspondingly recede. Adopting a presumptively unreasonable standard would not engender any major change in fourth amendment law to date,¹³⁴ but it would provide a meaningful framework for analyzing future challenges to warrantless searches. Moreover, a presumptively unreasonable standard would put some teeth back into the warrant requirement. If a warrantless search comes into Court with the presumption that it is invalid, and thereby substantially increases the burden the government must carry to validate that search, then presumably law enforcement will obtain a warrant whenever practicable. The obvious danger of the presumptively unreasonable standard, however, is that it provides a ready justification for swallowing up the entire warrant requirement.

Drug tests are uniformly conducted absent a warrant,¹³⁵ thus,

the street, serviced in public places, and "subject to extensive regulation and inspection." *Id.* at 393 (citations omitted). However, recognizing the great difference in mobility between *Carney* and *Carroll*, the Court secondarily concluded that the auto exception is increasingly justified because there is a diminished expectation of privacy in an auto. "These reduced expectations of privacy derive not from the fact that the area searched is in plain view, but from the pervasive regulation of vehicles capable of travelling on the public highways." *Id.* at 392. The dissenters, Justices Stevens, Brennan and Marshall, argued that a warrantless search can be justified only when there is both inherent mobility and a lesser expectation of privacy. *Id.* at 395 (Stevens J., dissenting). But Chief Justice Burger, speaking for a six justice majority, held that "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justifie[s] application of the vehicular exception." *Id.* at 391. Thus, we see that the Court is no longer relying on the original rationale for the auto exception.

These cases illustrate the problem of trying to fit new situations into old exceptions. Under a presumptively unreasonable standard the Court could perhaps reach similar conclusions, but without straining previously defined standards.

133. See generally *supra* notes 29-77 and accompanying text.

134. All of the current exceptions to the warrant requirement (see *supra* note 117) would then just be viewed as circumstances that overcome the presumption of unreasonableness.

135. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *aff'g* 619 F. Supp. 1089 (D.N.J. 1985); *Division 241 Amalgamated Transit Union (AFL-CIO) v. Sucsy*, 538 F.2d 1264 (7th Cir. 1976); *National Treasury Employees Union v. Von*

under the above analysis they must be presumptively unreasonable. Given the humiliating nature of the invasion and the state's limited need to conduct wholesale testing,¹³⁶ their unreasonableness is all the more egregious.

In *Camara v. Municipal Court*,¹³⁷ the Court stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. . . ."¹³⁸ Using that formula the Court found that warrants to search an apartment building that was subject to municipal regulations could be based upon less than probable cause.¹³⁹

Under the very same reasoning, warrants to search a person's urine should be based upon a "greater than ordinary" showing of probable cause. If the Court chooses to tie probable cause to the nature of the area searched, as it did in *Camara*, or more recently in *New Jersey v. T.L.O.*,¹⁴⁰ then it must require an even higher than average standard

Raab, 649 F. Supp. 380 (E.D. La. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Penny v. Kennedy, 643 F. Supp. 615 (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); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985); Odenheim v. Carlstadt-East Rutherford Regional School Dist., 211 N.J. Super. 54, 510 A.2d 709 (1985); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 799 (1986); Patchoque-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986); King v. McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986).

136. The fact that the government had failed to demonstrate any widespread drug problem among its employees was one factor relied on by the courts to enjoin screening of the entire work force in *National Treasury Employees Union*, 649 F. Supp. at 380; *Penny*, 643 F. Supp. at 615; and *Lovvorn*, 647 F. Supp. at 875. See also NATIONAL INSTITUTE ON DRUG ABUSE, HOUSEHOLD SURVEYS (1986) (reporting a decline or stabilization in the use of all illegal drugs except cocaine in the three years since 1983).

137. 387 U.S. 523 (1967).

138. *Id.* at 536-37.

139. *Id.* at 538. The Court noted that probable cause for an area search "will not necessarily depend upon specific knowledge of the condition of the particular dwelling."
Id.

140. 469 U.S. 325 (1985). In *T.L.O.*, a student's purse was searched by the assistant vice principal after a teacher caught the girl smoking in the lavatory. He found cigarettes, marijuana, rolling papers, and letters implicating her in drug dealing. The Court reversed the New Jersey Supreme Court's suppression of the evidence, and held that neither a warrant nor probable cause were required for this type of search; the only requirement is that the search be reasonable, that is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference."

where the area is traditionally and undeniably private.¹⁴¹

The Court, however, appears willing to forego the warrant requirement and use a "reasonableness" test in situations presenting circumstances other than "ordinary [street] crime."¹⁴² Not surprisingly, therefore, every lower federal court faced with a challenge to governmental drug testing devotes little, if any, discussion to the warrant issue, even though a majority of those decisions have struck down testing procedures as unconstitutional.¹⁴³ Failing to address the warrant issue skips a critical step in analyzing the constitutionality of drug screening.

Id. at 341.

141. Justice Marshall dissenting in *Gooding v. United States*, 416 U.S. 430 (1974), argued that a flexible notion of probable cause cannot be a "one-way street, to be used only to water down the requirement of probable cause when necessary to authorize governmental intrusions." *Id.* at 465. "In some situations . . . this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause." *Id.*

142. C. WHITEBRED & C. SLOBOGIN, *supra* note 115, § 3.11 at 292. Professor LaFave states:

[T]he Supreme Court's assertion "that the police must, whenever practicable, obtain advance judicial approval of searches and seizure" [citing *Terry v. Ohio*, 392 U.S. 1 (1968)] must be taken with a grain of salt. The Court in fact has not been that demanding, but yet has failed to articulate clearly any basis for squaring the principle that warrants when practicable is the best policy.

W. LAFAVE, *supra* note 108, § 4.1 at 5.

143. Cases which fail to address the warrant requirement issue include *McDonnell*, 809 F.2d at 1302; *Odenheim v. Carlstadt-East Rutherford Regional School Dist.*, 211 N.J. Super. 54, 510 A.2d 709 (1985); *Caruso v. Ward*, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986); *Patchoque-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986); *King v. McMickens*, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986). A number of cases do refer to the warrant requirement, although they all conclude that no warrant is required. *See, e.g., Shoemaker*, 795 F.2d at 1136, 1142 (using administrative search exception for testing jockeys); *Lovvorn*, 647 F. Supp. at 875 (discussing the warrantless administrative searches and the reasonable suspicion standard in testing fire-fighters); *Capua*, 643 F. Supp. at 1507, 1513 (citing *New Jersey v. T.L.O.* for proposition that warrants are not always necessary, and requiring reasonable suspicion for testing firefighters and city employees); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-491 (N.D. Ga. 1985) (discussing a "government employee" exception to the warrant requirement); *Turner*, 500 A.2d at 1005, 1009 (holding that a warrant is required for private citizens, but not for police officers). *But see National Treasury Employees Union*, 649 F. Supp. at 380 (warrant supported by probable cause must be obtained in order to test urine of Customs workers).

D. Exceptions to the Warrant Requirement

While urinalysis may fail the warrant requirement of the fourth amendment, its constitutionality may survive under one of the exceptions that have been carved out of the amendment.¹⁴⁴ The two most appropriate are the administrative search and the consensual search.¹⁴⁵ Each will be discussed in turn.

1. Administrative Searches

"All of us are protected by the Fourth Amendment all of the time, not just when police suspect us of criminal conduct."¹⁴⁶ However, when we are engaged in an activity that is subject to public regulation or inspection, the strictures of the fourth amendment may be somewhat relaxed. Under the broad doctrine of "administrative or regulatory search" courts will sometimes allow wide scale searches without a warrant and without particularized suspicion. This is most apparent in highway license checks,¹⁴⁷ safety inspections of residential¹⁴⁸ and commercial buildings,¹⁴⁹ metal detector checks at airports,¹⁵⁰ at United

144. See *supra* note 117.

145. There are other exceptions, such as search incident to arrest (*Weeks v. United States*, 232 U.S. 383 (1914)), the so-called emergency exception (*Warden v. Hayden*, 387 U.S. 294 (1967)), and the automobile exception (*Carroll v. United States*, 267 U.S. 132 (1925)), that will not be discussed. To the extent that border searches (*Almeida-Sanchez v. United States*, 413 U.S. 266 (1971)) are similar to administrative searches, they will be included in this section.

146. *McDonell*, 612 F. Supp. at 1122, 1127. As Professor LaFave remarked: "It is a perversion of the exclusionary rule to conclude that the Fourth Amendment should protect most against the conviction of criminals. The basic function of the Amendment is to protect personal privacy [T]he individual's interest in privacy 'would not appear to fluctuate with the 'intent' of the invading officers.'" W. LAFAVE, *supra* note 108, § 10.1 at 188-89 (quoting from the dissent in *Abel v. United States*, 362 U.S. 217 (1960)).

147. *Delaware v. Prouse*, 440 U.S. 648 (1979).

148. *Camara*, 387 U.S. at 523.

149. *Marshall v. Barlows*, 436 U.S. 307 (1978); See *v. City of Seattle*, 387 U.S. 541 (1967).

150. *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974). Magnetometer searches at airports are conducted without even reasonable suspicion because they "involve none of the indignities" of more intrusive searches and do not humiliate those who pass through them. *Id.* at 806. See also *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (upholding pre-boarding screening of all airplane passengers and carry-on luggage for weapons and explosives as reasonable, so long as each prospective boarder retains the right to leave rather than submit to search).

States border areas,¹⁵¹ and in school discipline matters.¹⁵² At least one United States Court of Appeals has employed this rationale in upholding a random drug testing scheme for racehorse jockeys.¹⁵³

The Supreme Court first recognized the need for a relaxed standard of probable cause in 1967 in a case involving purported violations of a San Francisco housing code. In *Camara v. Municipal Court*,¹⁵⁴ the defendant was convicted of housing code violations after he refused to permit housing inspectors to inspect quarters that he leased and used for residential purposes, allegedly in violation of the apartment building's occupancy permit.¹⁵⁵ The Court overturned the conviction because the inspectors did not seek a warrant after the defendant's refusal.¹⁵⁶

Although the Court found that a nonconsensual search of private property was unconstitutional, it significantly relaxed the standard of probable cause needed to obtain a warrant for an administrative inspection. Particularized suspicion was abandoned in favor of a more flexible general standard of need to inspect. After *Camara* an "administrative" warrant may be based upon such factors as the passage of time (from last inspection), nature of the building, or the condition of the entire area.¹⁵⁷

A few years later the Court dispensed completely with the warrant requirement in a case involving the inspection of gun dealers.¹⁵⁸ Due to the highly regulated nature of the firearms industry, pervasive government regulation and licensing were found to have reduced the dealer's legitimate expectation of privacy.¹⁵⁹ Furthermore, the Court found that unannounced periodic inspections were essential if the law were to have any effect.¹⁶⁰ Thus, further exception to the prohibition of warrantless

151. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985). "[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Id.* at 549; *United States v. Ramsey*, 431 U.S. 606 (1977) (border searches are reasonable by the single fact that the person or item — in this case letters mailed from Thailand suspected of containing drugs — had entered the country from the outside).

152. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

153. *Shoemaker*, 795 F.2d at 1136.

154. *Camara*, 387 U.S. at 523.

155. *Id.* at 526.

156. *Id.* at 534.

157. *Id.* at 538.

158. *United States v. Biswell*, 406 U.S. 311 (1972).

159. *Id.* at 316.

160. *Id.* See also *Donovan v. Dewey*, 452 U.S. 594 (1981), in which the Court held that warrantless inspections of the coal mining industry, as required by the Fed-

searches is carved out for highly regulated industries. Absent consent or some exigency, however, in "ordinary" business or quasi-public settings, the state still must obtain an "administrative warrant" prior to searching.¹⁶¹

Assuming that a business is subject to some form of license or regulation, the only question remaining after *Camara*¹⁶² and *Donovan v. Dewey*¹⁶³ is how heavily the government interest outweighs the private interest; that, in turn, directs how deeply the inroads into the fourth amendment will travel. Apparently, the greater the need to search freely, the more freely the search will be allowed.

Indiscriminate employee drug testing, therefore, may withstand constitutional challenge if it can fit itself into this regulatory framework. First, however, the justification for finding an exception to the warrant and probable cause requirements of the fourth amendment must come within the rationale set out in *Camara*. Writing for the Court in *Camara*, Justice White set out three factors supporting the reasonableness of relaxed probable cause in a regulatory setting: the long history of judicial and public acceptance of code-enforcement programs; the public interest in abating dangerous conditions; and the lim-

eral Mine Safety and Health Act, serve a legitimate Congressional purpose and do not violate the fourth amendment. "[A] system of warrantless inspections was necessary if the law is to be properly enforced and inspection made effective." *Id.* at 602-03; *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970) (pervasive regulation in the liquor industry).

161. See, e.g., *Michigan v. Clifford*, 464 U.S. 287 (1984). A fire investigator entered a home without a warrant or consent six hours after a blaze was extinguished, and searched the basement where he discovered the cause of the fire, but then went upstairs, where he gathered evidence of arson. A four-justice plurality found that the investigator should have obtained a warrant because there were no longer exigent circumstances justifying an entry. Moreover, the Court found that an administrative warrant would have sufficed to search the basement to "determine the cause and origin of the fire," but a criminal search warrant was required before going upstairs into the private residence with the purpose of gathering evidence of criminal activity. The Court thus upheld the administrative warrant requirement of *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire inspectors may enter a burning building to fight a blaze and remain a reasonable time to investigate the cause of the fire, but later entries without consent require an administrative warrant). However, Justice Rehnquist, joined by Chief Justice Burger, Justice Blackmun and Justice O'Connor, would have found the search of the basement reasonable under the exigent circumstances doctrine enunciated in *Michigan v. Tyler*.

162. *Camara*, 387 U.S. at 523.

163. *Donovan*, 452 U.S. at 594. See *supra* note 160 for a discussion of the facts in *Donovan*.

ited invasion of the urban citizen's privacy stemming from the non-personal and non-criminal nature of the searches.¹⁶⁴ These three factors provide the structure for analyzing whether public employee drug testing programs fall within the administrative exception to the warrant requirements.

First, since employee drug testing is such a new practice, there is no long standing history of judicial and public policy favoring it. In fact, most recent judicial opinions disfavor random employee drug screening, finding it offensive to guarantees of individual freedom.¹⁶⁵ Second, certainly the public is interested in ridding government of the scourge of illegal drug use, but there are natural limits to such enforcement.¹⁶⁶ Public interest might also be in the abatement of all crime and criminals. Yet we do not relax probable cause standards and sanction area searches of homes to find criminals.¹⁶⁷ Finally, unlike regulatory searches, drug screenings are personal,¹⁶⁸ and while they may not start out as a criminal search, they may end up as one.¹⁶⁹ Thus, the rationale supporting the administrative search decisions may face greater challenge in the area of employee drug testing.

Furthermore, some quantum of individualized suspicion is generally a prerequisite to a constitutional search or seizure, even in areas where the government has a great need to search.¹⁷⁰ Within the vast array of government jobs, there lie varying degrees of supervision and regulations. A rationale for testing one government employee may be irrelevant and insufficient for another.¹⁷¹

164. 387 U.S. at 537.

165. See, e.g., *National Treasury Employees Union*, 808 F.2d at 1057; *Lovvorn*, 647 F. Supp. at 875; *Penny*, 648 F. Supp. at 615; *Capua*, 643 F. Supp. at 1507; *Jones*, 628 F. Supp. at 1500; *Odenheim*, 211 N.J. Super at 54, 510 A.2d at 709; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35, 505 N.Y.S.2d at 888.

166. See *infra* notes 180-85.

167. See, e.g., *W. LAFAVE*, *supra* note 108, at § 10.1(b).

168. See notes 146-78 and accompanying text.

169. "[G]overnment investigations of employee misconduct always carry the potential to become criminal investigations." *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

Moreover, "Governmental agents, once they possess incriminatory information, may not have the authority to withhold such information from prosecuting agents, even if that is their desire." *Capua*, 643 F. Supp. at 1507, 1520.

170. *Shoemaker*, 795 F. Supp. at 1100.

171. See *Capua*, 643 F. Supp. at 1518, distinguishing *Shoemaker*: "[I]n balancing the state's interest against that of individual jockeys, the considerations before the *Shoemaker* court differed dramatically from those of the instant case. First, horse rac-

In *Delaware v. Prouse*,¹⁷² the Court held that random stops of automobiles on a highway, without any reasonable suspicion that a motorist is unlicensed or the vehicle is unregistered, or that any other violation has occurred, is the kind of "standardless and unconstrained discretion" that must be circumscribed.¹⁷³ To be constitutional, a discretionary search must be tempered by safeguards including the legitimate purpose of the search and the reasonableness of the procedures followed.¹⁷⁴ In *United States v. Martinez Fuerte*,¹⁷⁵ the Court upheld a warrantless automobile search for illegal aliens not because it was based upon probable cause, but because it occurred at a fixed reasonably located checkpoint. The Court found the procedures were reasonable, met a legitimate purpose, and because they were at a checkpoint, not a roving border patrol, they were a minimal intrusion upon the individuals searched.¹⁷⁶ Unless the government can meet the challenge of showing that employee drug testing is reasonable, minimally intrusive, and legitimately related to its interest in fighting drug abuse, its warrantless testing programs must be found unconstitutional.¹⁷⁷

ing, unlike fire fighting, is an intensely regulated industry within the administrative search exception to the Fourth Amendment."

172. 440 U.S. at 661.

173. *Id.*

174. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976).

175. *Id.*

176. *Id.* Three years earlier, in *Almeida Sanchez v. United States*, 413 U.S. 266 (1973), the Court struck down random searching by border patrol agents. The only significant difference in the cases appears to be the Court's finding that the latter procedure (fixed checkpoints) was less of an intrusion upon individual privacy interests and more reasonable. Possibly due to the fact that the illegal alien problem in this country was on the rise, the Court found a heightened legitimacy to the government's purpose, as well.

177. *See supra* 136 note and accompanying text. In *Capua* the Court found that there was no need to randomly test police and firefighters even though preserving the integrity of such forces is in the public interest. While the state may derive less benefit if jockeys are perceived negatively by the public (lost wagering-related revenues), "fire fighters can still continue to serve the public effectively, even in the face of unpopular perception." *Capua*, 643 F.Supp. at 1519. If safety or job performance is the basis for testing, then such concerns can adequately and more efficiently be addressed through an individualized suspicion standard. *See also Penny*, 648 F. Supp. at 815. "The defendants do not have to rely on across-the-board drug tests to insure the integrity of the Police Department. Information concerning drug problems can be acquired by physical observation of police officers, citizens complaints, tips from other law enforcement agencies and other means." *Id.* at 817.

There are public employees who may fall within the "intrusively regulated" stan-

The reasoning that because in certain areas one has a lesser expectation of privacy (due to regulations, notice of inspections, etc.), and the state has a greater interest in regulating the area for the public good,¹⁷⁸ warrantless random searches are permissible, highlights the need for the most stringent protections for ordinary government workers. The mere fact that a practice or industry is heavily regulated does not in itself justify a search of the participants in that industry or practice. However, the individuals who participate in regulated industries and practices do so voluntarily and subject themselves to state regulation, at least with respect to their professions or businesses. The legitimacy of the state's search of these individuals upon a lesser showing of

dard, such as air traffic controllers (FAA regulations), nuclear power plant operators (NRC regulations). Such individuals may be subject to testing under a lesser standard than individualized suspicion given the nature of their professions, the tremendous detriment to the public good should they be impaired on the job, and the fact that they knowingly accept employment in these highly regulated industries.

It is not always true, however, that the degree of state regulation is an accurate guide to the state's interest in conducting a search. Presumably the state's interest in conducting a search is either to root out criminal activity or to protect public safety. The state, however, regulates industries and practices for additional reasons as well. Thus, the mere fact that an industry or practice is pervasively regulated does not necessarily mean that the state has regulated that industry for purposes of public safety.

For instance, wagering is a practice that most states regulate extensively. Although it is true that the state has a significant interest in ensuring that wagering activity is conducted only under the most open and honest circumstances, the state's interest in regulating that activity is not so much one of public safety, as resulting from the enormous trust that those who engage in wagering place in the system, and relative ease and susceptibility of that system to abuse. *See infra* note 178. *See also Shoemaker*, 795 F.2d at 1136. Similarly, most states pervasively regulate the sale of liquor. To be sure, many of those regulations are to protect the public safety by controlling the persons to whom liquor may be sold and the circumstances of sale. However, most of the regulation of liquor sales are fiscally related, to raise revenue through taxes.

178. *See, e.g., Shoemaker*, 795 F.2d at 1136:

[T]he horse racing industry has been among the state's most highly regulated industries. . . . Because of the state's interest in the revenue generated by wagering and the vulnerability of the industry to untoward influences, the statute has always provided that no person could be employed in any capacity at a race track "who has been convicted of a crime involving moral turpitude. . . ." As previously noted, the intense regulation of the racing industry is justified because of public wagering on the outcome of races. Substance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport.

Id. at 1141, 1144 (citations omitted).

suspicion derives not from the mere fact that the state regulates the industry or practice, but rather from their consent to the state's regulation. Thus, while the rationale for the administrative search may fail, the consensual search exception to the warrant requirement may justify the warrantless drug testing of public sector employees.

a. *Consensual Search*

An alternative argument supporting random drug screening is that the searches are reasonable because they are based upon employee consent.¹⁷⁹ A finding of consent can validate a warrantless and otherwise unreasonable search. Interestingly, consent searches are frequently relied upon by police because they involve less paperwork and offer an opportunity to search when probable cause is lacking.¹⁸⁰ To the extent they are free from official duress or coercion, express or implied, they are a perfectly useful and legitimate investigative tool.¹⁸¹ However, when the government relies upon consent because it has no probable cause to search without it, it must bear a heavy burden of proving such consent, because "the Constitution explicitly prefers the private person's interest to society's."¹⁸²

Whether a search based upon consent is reasonable under the fourth and fourteenth amendments depends upon whether the defendant voluntarily agreed to a search.¹⁸³ If, for example, an individual

179. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

180. See also Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 57-8 (1974):

When the police do rely on consent, either (1) they could not have obtained a warrant because a constitutional requirement like probable cause was not met; or (2) they could have obtained a warrant but did not; or (3) the constitutional requirements were met, but the police could not obtain a warrant for other reasons, such as unavailability of a magistrate.

In the drug testing setting only the first of these reasons applies. In fact, in all of the drug testing cases the government admits that it has no probable cause to test all employees, but argues the need to search based upon general safety considerations.

181. *Schneckloth*, 412 U.S. at 220.

182. *Weinreb*, *supra* note 180, at 57.

183. Actually, for many years a debate centered on whether the test for consent was voluntariness or actual waiver of constitutional rights. To be voluntary, the government had only show that the person made a free choice in allowing the search. On the other hand, to show waiver the government had to meet the test of *Johnson v. Zerbst*, 304 U.S. 458 (1938) — that is, an intentional relinquishment or abandonment of a known right or privilege. In *Schneckloth*, the Court did away with the strict voluntariness and waiver approaches, favoring instead a bipartite analysis.

agrees to a search of a home, but only after she is led to believe that the police had a warrant, there is no consent.¹⁸⁴ Or, if a person agrees to a search when his or her ability to understand or reason effectively is impaired, there is no valid consent.¹⁸⁵ Under the holding of *Schneckloth v. Bustamonte*¹⁸⁶ and later cases, voluntariness is determined only after considering all the facts and circumstances surrounding the search, including whether the individual knew of, and was able to exercise, a right to refuse.

Consent to surrender fourth amendment rights cannot be implied from the fact that one works for the government, even in high risk security positions.¹⁸⁷ This is most apparent in some of the recent prison

[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth, 412 U.S. at 249-50. Justice Marshall harshly criticized the majority opinion. He argued that the Court unnecessarily clouded the issue by importing the fifth amendment standard for coerced confessions as opposed to simply seeing if a consent search violated the fourth amendment. He argued that consent searches should be permitted,

not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. . . . I am at a loss to understand why consent "cannot be taken literally to mean a 'knowing' choice." In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.

Id. at 284-85.

184. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). When a law enforcement officer announces that he has a warrant, there is coercion. "Where there is coercion there can be no consent." *Id.* See also *United States v. Jones*, 641 F.2d 425 (6th Cir. 1981) (a valid consent must be free and voluntary — more than a mere expression of approval); *People v. Mullaney*, 104 Mich. App. 787, 306 N.W.2d 347 (1981) (no consent where police falsely state that a warrant is on the way).

185. See *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971). The key to valid consent is actual mental capacity of the suspect, regardless of whether police believed that at the time the individual had adequate mental capacity to consent.

186. 412 U.S. 218 (1973).

187. Conceivably, a government employee could have a lesser expectation of privacy in certain "sensitive" positions. If, for example, the branch of government is highly regulated and subject to frequent security checks, and the individual was aware

litigation.¹⁸⁸ *McDonell v. Hunter*¹⁸⁹ presents a good example. McDonell, and other guards at Anamosa Prison, Iowa Department of Corrections, challenged the Department's policy allowing for broad searches of employee's cars and persons, including urine, blood, or breath specimens. Before coming to work at Anamosa, guards are informed that all employees may be searched (including strip searched), or asked to provide blood, urine or breath samples at any time at the discretion of the warden. They then sign standardized forms acknowledging their consent to such procedures.¹⁹⁰

of such procedures at the time of accepting employment, it would be reasonable to find a reduced privacy interest. Members of the military find themselves in just this situation. See, e.g., *Goldman v. Weinberg*, 106 S. Ct. 1310 (1986) (air force regulation that prevented an Orthodox Jewish serviceman from wearing a yarmulke does not violate the first amendment because of great deference given to professional decisions of military authorities). But even military personnel do not give up all constitutional rights. See, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974); *Committee for G.I. Rights v. Calloway*, 518 F.2d 466, 476 (D.C. Cir. 1975).

The reduced fourth amendment protection afforded military personnel is justified under a general balancing test of state versus private interests, with the government usually tipping the scales due to the unique requirements and responsibilities of the military. Drug screenings and other warrantless military inspections are not reasonable because they are consensual. Indeed, this is the antithesis to the notion of voluntary act, absent express or implied coercion, established in *Schneckloth*, 412 U.S. at 218. They are constitutional, however, because they are reasonable.

188. See, e.g., *SEC & Law Enforcement Employees Dist. v. Carey*, 737 F.2d 187 (2d Cir. 1984) (visual body cavity and strip searches of prison employees for contraband unconstitutional in the absence of individualized suspicion); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985); *King v. McMickens*, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986).

189. 612 F. Supp. at 1122. The Eighth Circuit modified the district court's opinion, which disallowed urinalysis on less than reasonable suspicion, to allow "systematic random selection of . . . employees who have regular contact with prisoners on a day to day basis in medium or maximum security prisons." 809 F.2d at 1308. It affirmed the remainder of the lower court's opinion including its finding that employees may not give advance consent to unreasonable searches. *Id.* at 1310.

190. In addition to language indicating that employees have read and understood the appropriate portions of the employees' manual, the forms include the following "waiver":

My signature on this page constitutes my permission to be searched at any time while on State property by a staff member of the same sex that I am, when the staff member is directed to do so by the Warden. . . . I, also, agree to submit to a urinalysis or blood test when requested by the administration of the institution. I further agree to cooperate and assist in any and all investigations of a security or possible criminal nature when requested to do so. I hereby affix my signature knowingly and voluntarily,

Although the Corrections Department argued that McDonell validly consented to urinalysis and other searches, the Court found otherwise. Judge Viator found that there was no evidence from which he could determine voluntariness.¹⁹¹ The consent form cannot provide a blanket waiver of all fourth amendment rights.¹⁹² Moreover, the court concluded that it was unlawful for the Iowa Department of Corrections to condition employment on consent to future unreasonable searches.¹⁹³ "Fourth Amendment rights are more limited inside the correctional institution, but the consent cannot be construed to be a valid consent to any search other than one that is, under the circumstances, reasonable and, therefore, permissible under the Fourth Amendment."¹⁹⁴

absent of any duress or coercion.

Plaintiff McDonell signed such a form when he accepted employment, several years before the events challenged in the case.

191. "There is no evidence concerning the circumstances of that signing from which the court can determine voluntariness. . . . Under this record the court cannot rest its decision on an assumption that plaintiff McDonell [and others] who signed consents voluntarily consented in advance to any search made under the Department's policy." 612 F. Supp. at 1131.

192. *Id.* See also 809 F.2d at 1310.

193. 612 F. Supp. at 1122. Cases which have held that consent to future unconstitutional searches is invalid include: *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1198 (1986); *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984); *National Treasury Employees Union*, 649 F. Supp. at 380; *McDonell*, 612 F. Supp. at 1131; *Armstrong v. New York State Comm'r of Corrections*, 545 F. Supp. 728, 731 (N.D.N.Y. 1982); *Caruso*, 133 Misc. 2d at 549, 506 N.Y.S.2d at 794.

194. 612 F. Supp. at 1131. Urinalysis and strip searches of prison personnel based upon less than reasonable suspicion are unreasonable. *McDonell* 612 F. Supp. at 1129-30. See also *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985). Visitors to the Louisiana State Penitentiary (LSP), a maximum security facility, were required to sign a form agreeing to a personal search by security personnel while on prison grounds. There was also a large sign posted outside the front gate warning that "If you enter the gates of Angola, you consent to a search of your person and property . . ." *Id.* Mr. Thorne, father to two inmates, brought a civil rights action after being strip searched before a visit with his sons. LSP argued that Mr. Thorne consented to the search, or, alternatively, that he waived his fourth amendment rights when he entered the facility. The court rejected the consent argument as too broad, finding that it would validate otherwise unreasonable random strip searches of prison visitors. Simply being a visitor in a prison does not deprive one of fourth amendment protections. *Accord Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); *Security & Law Enforcement Employees*, 737 F.2d at 205; *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). *But see United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977) (upholding search of prison employee's lunch bag based upon explicit and inferred consent).

Judge Collins reached a similar conclusion in *National Treasury Employees Union v. Von Raab*,¹⁹⁵ finding that a scheme to screen customs workers as a precondition to advancement was unconstitutional and based upon invalid consent. The court found that workers who agreed to the plan did not do so voluntarily, but rather gave their consent "as a result of coercion, express or implied."¹⁹⁶ Additionally, the court held that "it is unconstitutional for the government to condition public employment on 'consent' to an unreasonable search [and] refuses to find voluntary 'consent' to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit."¹⁹⁷

The consent exception to the warrant requirement cannot validate an otherwise unconstitutional urine screening. Notions of consent in the employment context are strained, at best. One does not have freedom of choice where one's profession and livelihood are conditioned upon submitting to a drug test.¹⁹⁸ Looking at all the facts and circumstances, it is unreasonable to conclude that consent is voluntary in the employment context.¹⁹⁹

E. *Balancing Test of Reasonableness*

The fourth amendment does not protect against all searches and seizures, only those that are unreasonable. As we see from the above discussion, reasonableness is determined by a careful review of all the facts and circumstances attendant to the search.²⁰⁰

For example, it is reasonable to stop a "suspicious" person for questioning,²⁰¹ and even to conduct a limited search at the scene if

195. 649 F. Supp. at 380.

196. *Id.*

197. *Id.*

198. See discussion of property rights, *infra* notes 251-65 and accompanying text.

199. This is especially true where drug testing policies are implemented after an employee accepts employment with the government, as is the case with the Reagan plan that seeks to screen current as well as new employees. Our hypothetical, Ms. X, a seven year veteran of the post office, certainly did not accept employment with an understanding that she would be subject to urinalysis. When asked to submit to a test she can refuse and jeopardize her seniority, security and pension. Or, she can "consent."

200. "Although the underlying command of the fourth amendment is always that searches and seizures 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).

201. *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court stated that a frisk for

there is any concern that the individual may be armed;²⁰² however, it is not reasonable to follow that same person home and then stop and search the individual there.²⁰³ Both scenarios involve a significant invasion of personal privacy,²⁰⁴ yet the first setting is constitutionally acceptable while the latter is not. The explanation for this difference lies not within the language of the fourth amendment, but again in the balancing test of state's interests versus the individual's expectation of privacy.²⁰⁵

Government has a vital interest in ensuring that its workforce, particularly those in "sensitive" areas, is drug free.²⁰⁶ This interest is even

weapons was justified following an investigatory stop after "a police officer observes unusual conduct which leads him reasonably to conclude in the light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id.* at 30. In *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Court held that an automobile stop must be justified by "at least particular and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law" Likewise, in *Brown v. Texas*, 443 U.S. 47 (1979), the Court reversed the conviction of the defendant for refusing to identify himself to a police officer, because the initial detention and questioning of the defendant was not justified by a reasonable suspicion that he was involved in criminal activity. *Terry* and its progeny are still good law. *See, e.g., United States v. Sharpe*, 397 U.S. 1026 (1985) (referring to *Terry* for the proposition that an investigative stop must be justified at its inception and reasonably related in scope to the circumstances which justified it in order to be reasonable).

202. *Terry*, 392 U.S. at 27.

203. *Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale*, after police observed what they believed to be a narcotics transaction between Vale in front of his house, they arrested him at his front steps. They then searched his house without a warrant. The Supreme Court held that this search was not justifiable as a search incident to arrest and violated the fourth amendment.

204. *See T.L.O.*, 469 U.S. at 325, 341. The Court stated that in determining the reasonableness of a search, "one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place'" (quoting *Terry v. Ohio*, 392 U.S. at 1, 20).

205. *T.L.O.*, 469 U.S. at 325, 337. It is reasonable, for example, for police to search a suspect after they have placed the individual under arrest. Considering the need for officers to protect themselves from a potentially dangerous situation, it would be unreasonable for them to wait until a warrant was secured. It is also reasonable for police to seize an object clearly within their view, assuming they are legitimately in the place where they are viewing it. Again, to require police to do anything else might jeopardize the evidence, and would be unreasonable. In fact, all the "exceptions to the warrant requirement" are rooted in basic notions of reasonableness.

206. *Shoemaker*, 795 F.2d at 1136, 1142 (state has strong interest in assuring integrity of horse racing industry); *Division 241 v. Suscy*, 538 F.2d at 1267 (transit

more pressing in the face of reported widespread drug use in our society.²⁰⁷ This has been recognized by every court to address the issue.²⁰⁸ Two additional questions, however, must be answered: (1) whether drug testing is reasonably related to the government's goal, and (2) whether it violates individual rights.

If testing were conducted pursuant to a warrant based upon probable cause, the likelihood of exposing a drug user is strong, and the need to take appropriate action in that case is great. But, in fact, that is not the case in the President's drug testing plan, which calls for mandatory testing of *all* government employees on a random basis, nor in any of the governmental plans adopted to date. To the extent the government

authority has "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs"); *National Treasury Employees Union*, 649 F. Supp. at 387 (government has legitimate interest in a "drug-free work place and work force"); *Lovvorn*, 808 F.2d at 1057 (city has "compelling interest in having its fire fighters free from drugs"); *Capua*, 643 F. Supp. at 1511 ("Government has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers or the public, are free from drugs"); *McDonell*, 612 F. Supp. at 1128 (state's interest in preservation of security and order in prisons); *Allen*, 601 F. Supp. at 491 (government employer has same right to investigate job-related misconduct as private employer); *Turner*, 500 A.2d at 1008 (paramount interest in public safety justifies limited testing of police); *Bauman*, 475 So. 2d at 1326 (same); *Caruso*, 133 Misc. 2d at 551, 506 N.Y.S.2d at 796 (maintaining integrity, order and discipline in law enforcement agencies); *King v. McMickens*, 120 A.D.2d at 351, 501 N.Y.S.2d at 679 (corrections officer cannot perform duties if impaired by drugs). *But see* *Jones v. McKenzie*, 628 F. Supp. at 1509 (public safety considerations do not require urine testing of school bus attendant without particularized probable cause); *Odenheim*, 211 N.J. Super. at 60-61, 510 A.2d at 712 (distinguishing students from corrections officers and jockeys in regard to government interest in testing); *Patchoque-Medford Congress of Teachers*, 119 A.D.2d at 35, 505 N.Y.S.2d at 891 (government's interest in testing urine of teachers not as strong as that in testing urine of police, firefighters, bus drivers, or train engineers).

207. Results of the most recent National Institute for Drug Abuse (NIDA) study do not fully support a finding of widespread drug abuse. NIDA's surveys indicate that marijuana use of persons 12 or older has decreased by 10% from 20.0 million in 1982 to 18.2 million in 1985. For the same group cocaine use increased 1% from 4.2 million in 1982 (2% of the household population) to 5.8 million in 1985 (3% of the population). Overall, persons eighteen to twenty-five years of age stabilized or decreased their use of most drugs in 1985. While persons twenty-six and older were "most likely to have increased their drug use." Of this group current drug use, based on figures from 1972-1985, is estimated at 6.2% for marijuana and hashish, 2.1% cocaine, less than half of 1% for hallucinogens and heroin; 60.7% for alcohol and 32.8% for cigarettes. (NIDA classifies both alcohol and cigarettes as drugs.) *National Household Survey on Drug Abuse* (Nov. 1986).

208. See *supra* note 206.

cannot establish an individualized basis for its need to search, and then carefully tailor its search to that need, its drug screening programs most likely will fail the balancing test.²⁰⁹

Additionally, the government's plan must be reasonably related to its interest. Indiscriminate testing of employees is not a reasonable means to address the problem.²¹⁰ Such procedure is likely to reveal few positive results.²¹¹ Thus, the effect that random drug testing will have on the national drug problem is speculative, at best.²¹² Whereas, the effect it will have on civil liberties is great.²¹³

209. Division 241 Amalgamated Transit Union v. Sucsy, 538 F.2d 1264 (8th Cir. 1976). City bus drivers were tested for drug use after involvement in serious bus accidents, but only after two supervisory personnel concurred on the necessity to test the individual. In *National Treasury Employees Union*, 649 F. Supp. at 387, a federal court held that, regarding urine testing of customs workers in "covered positions": "[t]his dragnet approach, a large scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution." Other cases which have required reasonable suspicion for testing employees for drugs are *Lovvorn*, 647 F.Supp. at 875 (fire fighters); *Penny v. Kennedy* 648 F. Supp. at 815 (police officers); *Capua*, 643 F. Supp. at 1507, 1517-1520 (fire fighters and police department employees); *McDonell*, 612 F. Supp. at 1122, 1130 (correctional officers); *Turner*, 500 A.2d at 1005, 1009 (police officers); *Bauman*, 475 So. 2d at 1325-26 (police officers and fire fighters); *Caruso*, 133 Misc. 2d at 553, 506 N.Y.S.2d at 798-99 (police officers in the City of New York's Organized Crime Bureau); *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35, 505 N.Y.2d at 888 (teachers).

210. Judge Irving Kaufman, Chairman of the President's Commission on Organized Crime, makes the contrary argument. Judge Kaufman suggests that random drug testing programs that affect all employees equally may be more reasonable than programs that single people out or apply only to employees "who stir the boss's whimsy." Kaufman, *The Battle Over Drug Testing*, N. Y. Times, Oct. 19, 1986, (Magazine), at 52, 66. The fallacy in this position is that it totally ignores the fourth amendment probable cause requirement and undermines its protection of the individual. Certainly, charges of retaliatory testing may arise occasionally under a drug testing plan based upon probable cause or reasonable suspicion, but that is not a justifiable basis for abandoning standards altogether.

In fact, random testing protects only the person (or entity) least needy of protection — the employer. The reasonableness to employees argument is thus only a disguised insulation for employers. Under a constitutionally permissible drug testing plan there would be no need to protect employers because there already would be adequate procedures for investigating and resolving charges of discrimination.

211. The term positive results is used advisedly, for even a so-called positive may be false. See further discussion of this in the section on reliability, *infra* notes 244-50.

212. The effect upon the individual is just the opposite, since it may result in suspension, dismissal, damaged reputations, and permanent impact upon livelihood.

213. Judge Sarokin expresses this thought far more eloquently:

The threat posed by the widespread use of drugs is real and the need to

Under Justice Harlan's twofold test in *Katz*,²¹⁴ a person must have a subjective expectation of privacy in the area or thing searched, and such expectation must be one that society recognizes. Under this test the level of intrusion of mass urine testing is significantly high.²¹⁵ As mentioned earlier, individuals maintain a high degree of privacy in bodily functions. This extends not only to where or how the functions are performed, but also to what happens to the product.²¹⁶

Furthermore, urinalysis forces individuals to divulge private personal facts unrelated to the government's professed interest in discovering illegal drug use.²¹⁷ Medical sampling of urine can reveal information such as whether a person is diabetic, epileptic, and whether a woman is pregnant.²¹⁸ Judge Sarokin writes:

Plaintiffs have a significant interest in safeguarding the confidenti-

combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections. A combination of interdiction, education, treatment and supply eradication will serve to reduce the scourge of drugs, but even a reduction in the use of drugs is not worth a reduction in our most cherished constitutional rights.

Capua, 643 F. Supp. at 1522.

214. 389 U.S. 347, 361 (1967). See *supra* notes 83-88 and accompanying text. In *Hudson v. Palmer*, 468 U.S. 517 (1984), a case involving fourth amendment rights of prisoners, the Court focused primarily upon the legitimate expectation of privacy, abandoning subjective expectation. However, even if we are to assume that the Court has abandoned the subjective part of Justice Harlan's two-part test, urinalysis certainly meets the legitimate expectation of privacy test. See, e.g., *National Treasury Employees Union*, 649 F. Supp. at 387 ("Customs workers do maintain a legitimate expectation of privacy in their urine.").

215. *Capua*, 643 F. Supp. at 1514; *Patchoque-Medford Congress of Teachers*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986); *Caruso*, 133 Misc. 2d at 554, 506 N.Y.S.2d at 789.

216.

The Court notes that excreting body fluids and body wastes is one of the most personal and private human functions. While body fluids and body wastes are normally disposed of by flushing them down a toilet, Customs workers do maintain a legitimate expectation of privacy in their urine until the decision is made to flush the urine down the toilet and the urine is actually flushed down the toilet.

National Treasury Employees, 649 F. Supp. at 387.

217. *Capua*, 643 F. Supp. at 1515.

218. *Id. McDonell*, 612 F. Supp. at 1127. See also Bookspan, *A Balanced Privacy*, 11 DEL. LAW 40 (1986). In addition, the individual tested may be required to disclose prescription and non-prescription medications recently ingested. See, e.g., *Shoemaker*, 619 F. Supp. at 1089, 1095.

ality of such [medical] information whereas the government has no countervailing legitimate need for access to this personal medical data. The dangers of disclosure as a result of telltale urinalysis range from embarrassment to improper use of such information in job assignments, security and promotion."²¹⁹

When it comes to balancing states' interests against individual rights, Judge Viotor wrote:

Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. 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.²²⁰

As Judge Viotor aptly notes in his reference to the activities of King George III's soldiers, the creation of the fourth amendment is shrouded in the fabric of early colonial history. It is a document designed to protect the citizen from over-zealous law enforcers. While the drafters of the fourth amendment could not possibly foresee with particularity the ever-expanding opportunities for the government to invade the individual's private sphere, they did draft a document broad enough to encompass and regulate searches unknown to them at the time. Warrantless, random drug testing is unreasonable in scope and application and

219. *Capua*, 643 F. Supp. at 1515. The United States Supreme Court and other federal courts have recognized that individuals do have a constitutional right to privacy which limits the government's access to their medical records. *Whalen v. Roe*, 429 U.S. 589, 602 (1977); *Robinson v. McGovern*, 83 F.R.D. 79, 90 (W.D. Pa. 1979); *United States v. Colletta*, 602 F. Supp. 1322, 1327 (E.D. Pa. 1985). In *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980), the court set forth several factors to be considered in determining whether a government intrusion into someone's medical records is reasonable:

the type of record requested, the information it does or might contain, potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

220. *McDonell*, 612 F. Supp. at 1130.

unconstitutional under the fourth amendment.

III. Fifth Amendment and Due Process

The fifth amendment commands that the federal government must provide a person with due process before depriving him of "life, liberty or property."²²¹ The fourteenth amendment similarly binds the states: "[N]or shall any State deprive any person of life, liberty, or property without due process of law."²²² Like the fourth amendment, these provisions have their historical origins in the concern that there must be checks upon arbitrary governmental action.²²³ Unlike prohibitions on searches and seizures and the requirements of a warrant, the historic and generative principles of due process preclude defining, and thereby confining standards of conduct.²²⁴ In the broadest manner, due process serves as a constitutional restraint on all three levels of government.²²⁵ It protects "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"²²⁶ and guarantees a protection of intimate decency in a civilized society.²²⁷

In *Rochin v. California*²²⁸ the Court took its first look at bodily invasions and due process. Upon information that Rochin was selling

221. The fifth amendment states, among other things: "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

222. U.S. CONST. amend. XIV, § 1.

223. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7 (1978) See generally Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & C. 397, 400-01 (1979); Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 340 (1957); L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968).

224. See L. TRIBE, *supra* note 223, at § 10-7. The broad and general maxims of the Magna Carta were "[a]ppplied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation. . . [T]hey must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property." *Hurtado v. California*, 110 U.S. 516 (1884).

225. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (14 How.) 272 (1856), "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any due process of law, by its mere will." *Id.* at 276.

226. *Hurtado v. California*, 110 U.S. at 535.

227. *Adamson v. California*, 332 U.S. 46, 60 (1947) (Frankfurter, J., concurring).

228. 342 U.S. 165 (1952).

narcotics, police broke into his home, forcefully tried to open his mouth and remove capsules he had just swallowed. Unsuccessful at this attempt to secure the capsules, they then took Rochin to a hospital where upon instruction by the officers a doctor forced an emetic solution through a tube into Rochin's stomach.²²⁹ The emetic solution caused Rochin to vomit, thereby producing two morphine capsules he swallowed earlier. His conviction for possession of morphine chiefly was based upon those capsules.²³⁰ Rather than finding that the police action violated specific guarantees of individual freedom in the Bill of Rights, the Court per Justice Frankfurter, reversed the conviction on the grounds that the police action violated fourteenth amendment notions of due process.²³¹ Justice Frankfurter wrote that the police action was "conduct that shocks the conscience. . . . They are methods too close to the rack and the screw to permit of constitutional differentiation."²³² In later cases the Court limited its holding in *Rochin* to cases involving coercion, violence, or brutality to a person.²³³ Following this developing line of analysis, the *Schmerber*²³⁴ Court found no due process violation in forcefully extracting blood because the procedure at issue was conducted in an ordinary, "medically acceptable manner in a hospital environment."²³⁵ The Court found the procedure involved none of the indignity suffered by Rochin and thus, did not offend the "sense of justice" alluded to in *Rochin*.²³⁶

229. *Id.* at 172.

230. *Id.*

231. *Id.*

232. *Id.* Justice Black concurred in opinion but wrote that he would have decided the case on strict fifth amendment grounds. He felt that "faithful adherence to the Bill of Rights insures more permanent protection of individual liberty than nebulous [fourteenth amendment] standards." *Id.* at 175. Justice Douglas also would have decided that case on fifth amendment grounds. However, he would have included within the privilege against self incrimination "words taken from [an accused's] lips, capsules taken from his stomach, blood taken from his veins . . ." *Id.* at 179.

233. *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (blood); *Irvine v. California*, 347 U.S. 128, 133 (1954) (wiretap).

234. *Schmerber v. California*, 384 U.S. 757 (1966).

235. *Id.* at 759.

236. *Id.* at 760. *Schmerber* thus reaffirmed *Breithaupt*, 352 U.S. at 432, where blood was extracted from an unconscious person who was involved in a fatal automobile accident. That individual was later convicted of manslaughter based upon the alcohol level of his blood at the time of the accident. But see the dissent by Justices Douglas and Black, "if the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him" *Id.* at 778.

Challenges to employee drug tests conducted by government agencies may force the Court to once again examine the parameters of fifth and fourteenth amendment procedural and substantive due process. Three distinct but related questions are involved — whether drug tests by their very nature offend principles of decency in civilized society;²³⁷ whether they involve a protected property interest;²³⁸ and whether they involve protected liberty interests in reputation, good name, and integrity.²³⁹

Given the reluctance of the Court to expand the analysis in *Rochin*²⁴⁰ to other body invasions, it is unlikely that a urine test will be found to so offend the conscience as to violate due process. However, unlike extracting blood, urinalysis involves a much greater indignity, requiring an individual to urinate in a humiliating and degrading setting.²⁴¹ Moreover, unlike blood alcohol tests performed in hospitals, urine tests performed through the most widely used procedure²⁴² are

237. *Breithaupt*, 352 U.S. at 444. Cf. *Rochin v. California*, 342 U.S. 165 (1952).

238. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (state junior college professor who had been teaching for four years was denied procedural due process by failure of junior college to grant him a hearing before deciding not to renew his teaching contract); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (a nontenured state university professor hired on one year contract had no right to a hearing before the university declined to renew his contract). “[T]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it; property interests “are created and . . . defined by existing rules or understandings that stem from an independent source such as state law” or independent custom. *Id.* at 577. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964).

239. *Bishop v. Wood*, 426 U.S. 341 (1976); *Vaughn v. Shannon*, 758 F.2d 1535 (11th Cir. 1985); *Sipes v. United States*, 744 F.2d 1418 (10th Cir. 1984).

240. 342 U.S. at 165.

241. See *infra* note 289 and accompanying text.

242. The most widely used urinalysis screen is the EMIT test. EMIT stands for Enzyme Multiplied Immunoassay Technique. EMIT is based on immunological chemistry. The drug to be tested for is bound to an enzyme, which is then mixed with an antigen of the drug and added to the urine specimen. If the specimen contains the drug, the antigen will bind itself to the drug, leaving the enzyme active. A bacterial suspension in the solution will then be acted upon by the enzyme. If the specimen does not contain the drug being tested for, the antigen will attach itself to the drug bound to the enzyme. The enzyme will be inactive, and will not act on the bacterial suspension. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. OF PSYCHOACTIVE DRUGS 305, 306-08 (1984). Scientific experts have concluded that EMIT tests are not as reliable as a “one-shot test.” See *Wykoff v. Resig*, 613 F. Supp. 1504, 1508-09 (N.D. Ind. 1985). Instead, EMIT tests should be used only as a quick and efficient method of eliminating negative urine samples; any positive result should be confirmed

not reliable. The question is not only one of the invasion itself, but also the unreliability of results obtained thereby. Given the potential negative impact that a positive result can have upon a person's job, reputation, and ability to earn a living in the future,²⁴³ the question of reliability is a critical one.

A. Reliability

Depending upon variables such as the type of test used,²⁴⁴ the substance tested for, the laboratory employed, the handling of the sample,²⁴⁵ and the taking of the sample, results vary tremendously.²⁴⁶ The

by an alternative method. *Id.* Several courts have held that a single, unconfirmed EMIT test is unreliable. *See, e.g., Higgs v. Wilson*, 616 F. Supp. 226 (W.D. Ky. 1985) (district court issued a preliminary injunction barring punishment of inmates based on unconfirmed EMIT test); *Wykoff*, 613 F. Supp. at 1504 (due process requires confirmation of EMIT test by second EMIT test or its equivalent); *Peranzano v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1985) (due process requires second EMIT test to confirm a positive EMIT test); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (Plaintiff entitled to summary judgment that her termination on basis of unconfirmed EMIT test was arbitrary and capricious); *contra Jensen v. Lick*, 589 F. Supp. 35 (D.N.D. 1984) (unconfirmed EMIT test sufficient for imposition of sanctions upon prisoners).

243. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Justice White for the Court wrote of the significant private interest in retaining employment. "We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.* at 543 (citations omitted).

244. There are a number of tests currently on the market. The most popular of these are the EMIT and ABUSCREEN, both are based on immunoassay techniques which screen for certain metabolites in bodily fluids. *See supra* note 242. Gas chromatography (G/C) and mass spectrometry (M/S) are two more accurate tests, and are recommended if an initial screening assay shows a sample as positive. G/C and M/S are more expensive tests that require sophisticated instruments and highly trained technicians to operate them. M. WALSH, *QUESTIONS AND ANSWERS* (1986). Because of the expense they are not often used.

245. Reliability is also significantly affected by handling of a specimen. Appropriate procedures must be implemented to preserve and prove chain of custody. Documentation of how and by whom a sample is handled from the time it is taken to the time when final assay results are tabulated is critical to reliability. *See generally* FED. R. EVID. 901; IMWINKELREID, *EVIDENTIARY FOUNDATIONS* 82 (1980).

After I urinated, I noticed that the laboratory representative was affixing a sticker to my sample bottle. The sticker he was affixing had the wrong social security number on it. He had already filled out the labels before collecting our samples, and apparently he placed Fred Robinson's sticker on my bottle. When I alerted him to his mistake, he went back and

greatest problem of reliability is that test results cannot indicate whether an employee is impaired on the job.²⁴⁷ Moreover, present tests poorly differentiate certain compounds. Poppy seeds may be confused for opiates, cold medications for amphetamines, antibiotics for cocaine, and aspirin for marijuana.²⁴⁸ The National Centers for Disease Control in Atlanta did a secret study of selected laboratories and found that the worst laboratories came up with false positives as often as 66% of the time.²⁴⁹

Given the opportunities for substantial error, and the grave consequences that may result from a positive drug test, at least one court has found that the procedure is a violation of due process.

The Court concludes that the drug testing program is so fraught with dangers of false positive readings as to deny Customs workers due process of law when they apply for promotion into covered positions. Furthermore, in balancing the legitimate law enforcement, societal and governmental interests of the defendant against the severity of the intrusiveness, the unreliability of the testing further convinces the Court that the drug testing plan is unreasonable and not related to achievement of the governmental interest.²⁵⁰

checked his papers to determine my social security number and then corrected his error.

National Treasury Union, 649 F. Supp. at 390 (affidavit of Benito D. Juarez, Plaintiffs' Exhibit No. 6, at 3).

246. Problems of unreliability are highlighted by the experience of the military drug testing program. In 1981, the military initiated a drug testing program using primarily urinalysis. The number of false positives, mixed up samples or both, was overwhelming. See, e.g., Battiata, *Drug Testing: The Pros and Cons*, Washington Post, May 5, 1986, at B8, col. 5. In 1982 and 1983 a total of 9,100 Army employees were given dishonorable discharges. The Pentagon later tried to track them down to apologize for convicting them on faulty evidence. Problems ranged from inadequate specimen collection and handling to poor quality control at testing laboratories. *Id.*

247. "Impairment, intoxication, or time of last use cannot be predicted from a single urine test. A true positive . . . test indicates only that the person used marijuana in the recent past, which could be hours, days, or weeks depending on the specific use pattern." M. WALSH, *supra* note 244 at 10; see also *The Yellow Peril*, THE NEW REPUBLIC Mar. 31, 1986, at 28.

248. Battiata, *supra* note 246.

249. Hansen, Caudill, & Boone, *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. A.M.A. 2382 (1985). The CDC blind study found false positive error rates as follows: barbiturates, 0-6%; amphetamines, 0-37%; methadone, 0-66%; cocaine, 0-6%; codeine, 0-7%; and morphine, 0-10%.

250. *National Treasury Employees Union*, 649 F. Supp. at 390.

The unreliability of testing methods is only one factor in this analysis. While the statistics in this area are compelling, alone they are unlikely to rise to the level of a due process violation. Thus, questions of property and liberty rights are considered next.

B. Property

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."²⁵¹

While the Court respects the need for flexible concepts of property and liberty, it also recognizes the need to create certain boundaries. Over the years property interests in employment recognized by the constitution have been defined either by statute or by some mutually explicit understanding of continued employment between the parties.²⁵² While the Court has to some extent narrowed the liberty and property interests protected by procedural due process,²⁵³ most government employees still have a valid basis for reliance upon their continued employment.²⁵⁴

251. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). See also *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

252. See *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985); *Board of Regents v. Roth*, 408 U.S. at 577. Property interests "are created and their dimensions are defined by existing rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits." *Id.* There must be a legitimate claim of entitlement, not a mere need or desire in order for a protected interest to be found. *Id.* See also *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). The source of a claim of entitlement must be a federal, state, or local law which "governs the dispensation of the benefit." R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* § 17.5 (1986). As to employment contracts, the general rule is that if an employee may be terminated only "for cause," he has an interest in his job which is protected by the fifth and fourteenth amendments. An employee who may be terminated "at will" has no such protected interest. *Jungels v. Pierce*, 638 F. Supp. 317, 319-20 (N.D. Ill. 1986). *But cf.* *Bishop v. Wood*, 426 U.S. 341 (1976) (state that creates a benefit is able to define that benefit in such a way that no property interest is created).

253. See generally L. TRIBE, *supra* note 223, § 10-10.

254. Government employees are considered part of the Civil Service. Job appli-

Where a legislative body confers a property interest either through statute, ordinance, or contract, it may not constitutionally authorize "the deprivation of such an interest . . . without appropriate procedural safeguards."²⁵⁵ In *Capua v. City of Plainfield*,²⁵⁶ for example, Judge Sarokin found that firefighters as civil servants were endowed with constitutionally protected interests in their tenure, pursuant to a New Jersey statute governing municipal fire fighters.²⁵⁷ Once a statutorily bestowed property right to continued employment is found, it cannot be abrogated without due process.²⁵⁸ The question, put simply, is: What process is due?²⁵⁹ That is determined in one of two ways — by looking at the mandates in the statute itself, or, if this is unavailable, by looking to precedent in other cases.²⁶⁰

In *Capua*, the statute was sufficiently detailed to provide procedures for notice, hearing and adjudication. There also were provisions permitting pre-hearing suspension in cases requiring further investigation, but disallowing the procedure as a punitive measure prior to a finding of guilt.²⁶¹ Since the fire fighters were terminated without pay following positive test results, with no hearing, and no opportunity to

cants must follow individual agency procedures, which in turn must meet federal civil service guidelines. Retention, promotion, and dismissal are all subject to federal statutes and agency guidelines. *See, e.g.*, 5 U.S.C. § 3301 (Civil Service Exam Selection), 5 U.S.C. § 3501 (retention), 39 U.S.C. § 1005 (Postal service employee guidelines).

255. *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974). *See also* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 252, § 17.5.

256. 643 F. Supp. 1507 (D.N.J. 1986).

257. *Id.* at 1520. *See* N.J. STAT. ANN. § 40A:14-7 conferring upon fire department employees a reasonable expectation of continued employment unless and until "just cause" is established for their termination. Additionally, the statute provides for written complaints, setting forth the charge or charges, and notice of a hearing within a specified time period. *Id.*

258. *Capua*, 643 F. Supp. at 1520.

259. *See, e.g.*, *Morrisey v. Brewer*, 408 U.S. 471 (1972).

260. An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The "root requirement" of the due process clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). At a minimum, the employee must have access to the material upon which the dismissal charge is based and be able to respond to the charge. *Arnett*, 416 U.S. at 167; *Barry v. Barchi*, 443 U.S. 55, 65 (1979).

261. *Capua*, 643 F. Supp. at 1521.

ment could not be terminated without due process.

C. Liberty

Governmental drug testing procedures may also impact upon employees' constitutionally protected liberty interests in their good name, reputation, honor and integrity.²⁶⁶ Among the considerations are whether the governmental act damages a person's standing in a community,²⁶⁷ or imposes a stigma that forecloses an individual's freedom to work.²⁶⁸ Additionally courts will look to whether the person was stigmatized in or as a result of an employment termination,²⁶⁹ whether the charges were publicly disclosed,²⁷⁰ and whether the individual was given a meaningful opportunity to clear her name.²⁷¹

In *Board of Regents v. Roth*,²⁷² the Court first discussed its liberty analysis in the context of public employment. Roth was hired for a one year appointment as Assistant Professor at Wisconsin State University-Oskosh. Before his term was up he was informed by the University President that he would not be rehired. Roth was given no reasons for the decision, and no opportunity to challenge it. He then brought an action in federal district court alleging infringement of his fourteenth amendment rights. The majority stressed that in discharge of a public employee only two liberty concerns are implicated: the employee's interest in good standing in the community, and the interest in being able to pursue a career elsewhere.²⁷³ Roth's liberty claim was denied, be-

266. See *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. at 573. See also *Paul v. Davis*, 424 U.S. 693 (1976) (reputation alone, when not coupled with some more tangible interest such as employment, may not be sufficient "liberty" or "property" to invoke procedural protections).

267. *In re Selcraig*, 705 F.2d 789, 795-96 (5th Cir. 1983); but see *Codd v. Velger*, 429 U.S. 624, 628 (1977) (in a footnote the Court required a finding that the charges not only seriously damaged the employee's standing and association in the community or foreclosed future employment, but that the charges were false). *Id.* at 629 n.1.

268. *Board of Regents v. Roth*, 408 U.S. at 575; *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960); *Sipes v. United States*, 744 F.2d 1418 (10th Cir. 1984).

269. *Blanton v. Griel Memorial Psychiatric Hosp.*, 758 F.2d 1540 (11th Cir. 1985); *Vaughn v. Shannon*, 758 F.2d 1535 (11th Cir. 1985).

270. *Vaughn*, 758 F.2d at 1535.

271. *Id.*

272. 408 U.S. 564 (1972).

273. *Id.* at 573-74; accord *Hadley v. County of DuPage*, 715 F.2d 1238, 1244-45 (7th Cir. 1983).

cause the Court found that the university's decision not to rehire Roth would not *seriously* damage his reputation and standing in the community. While Roth would have to explain his non-renewal of contract, he was not precluded from working in a university setting again.²⁷⁴

Later cases narrowed the liberty claim of Roth much further. The additional restrictions include a finding that a detriment to reputation alone, without identifiable impact on employment, is insufficient to involve procedural protections;²⁷⁵ the employee must prove that the allegations upon which she was dismissed are false;²⁷⁶ and that the governmental agency publicly disclosed the reasons for dismissal.²⁷⁷

Dismissal or suspension for failing a drug test presents a situation that falls within even the Court's narrowed construction of liberty interest. The return of a positive result of a urinalysis is certain to have a detrimental effect upon the good name and reputation of a government employee. It also will affect that individual's ability to obtain other employment with the government.²⁷⁸ The question of whether the result is

274. 408 U.S. at 574. Cf. Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. at 159-62, 390 A.2d at 97-99. Plaintiff, Mr. Nicoletta was dismissed from his job as a police officer on the Wanaque Reservoir Police Force. The officer had received a letter summoning him to a meeting of the commission to discuss an altercation with a fellow officer. At this meeting, prior actions of Officer Nicoletta were examined, including subjects which the officer had not known would be inquired about. The hearing resulted in the officer's dismissal. The hearing was held to violate the notice that officer Nicoletta's liberty interests were implicated because his dismissal exposed him to disqualification from public employment. Thus, the court ruled, Officer Nicoletta was entitled to a hearing. However, because the officer was terminable at will, only a post-termination hearing was required to satisfy the due process clause. *Id.* at 147-50, 390 A.2d at 92-95.

275. Paul v. Davis, 424 U.S. 693 (1976). Plaintiff's name and photograph were distributed to local merchants as part of a flyer listing known shoplifters. Mr. Davis' name was included on the basis of an arrest for shoplifting. The charge was dropped with leave to reinstate. Plaintiff sued local police officials under 42 USC § 1983 claiming deprivation of his fourteenth amendment rights to due process. The Supreme Court, per Justice Rehnquist, held that injury to reputation alone, without some tangible interest such as employment, does not implicate the liberty interest of the due process clause. *Id.* at 694-96, 701. This holding has come to be known as the "reputation plus" requirement. See generally *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1789-90 (1984).

276. Codd v. Velger, 429 U.S. 624 (1977) (per curiam).

277. Bishop v. Wood, 426 U.S. 341, 348 (1976). Justice Brennan in dissent observed the fallacy of the majority's reasoning was that even if discharge reasons are not initially publicized, they will be conveyed to prospective employers upon request.

278. Since the President's Order requires a drug free work-place, Exec. Order No. 12,564, 51 Fed. Reg. 32,899 (1986), an employee dismissed for drug abuse has

false is complicated, and can only be answered after determining exactly what test or tests were performed upon the sample, where and under what conditions the tests were performed, and whether the employee had an opportunity to have the sample tested by an independent laboratory.²⁷⁹ The government has engaged in a significant media campaign publicizing its use of drug tests in the war against drugs.²⁸⁰ If an otherwise satisfactory employee is dismissed shortly after an agency institutes a drug screening program, it is hard to conclude that the reasons for dismissal are not publicly disclosed.²⁸¹ Thus, public employees must be given some form of due process prior to any punitive action for a positive urinalysis.²⁸²

In discussing the liberty interest of a public school bus attendant, Judge Oberdorfer concluded:

[I]t is beyond argument that discharge of plaintiff on unsupported charges of drug abuse could severely affect her interest in her "good name, reputation, honor or integrity," and it is well established that such a deprivation in her reputation triggers constitutional procedural due process requirements. While there is no evidence that defendants published their drug abuse findings, it is a reasonable inference that, unless expunged, the rationale for her termination will remain in her file for automatic publication to any prospective employer of plaintiff.²⁸³

To meet the safeguards of due process, any governmentally imposed drug screening must be narrowly confined and strictly monitored.

little chance of regaining federal employment. Chances may be equally as dismal within the private sector, which recently has become most sensitive to drug use.

279. See generally *supra* notes 244-50 and accompanying text.

280. See, e.g., N. Y. Times, Sept. 12, 1986, at A19, col. 4.; N. Y. Times, Sept. 3, 1986, at A12, col. 1; N. Y. Times, Sept. 2, 1986, at A1, col. 1; N. Y. Times, Aug. 21, 1986, at A1, col. 4; N. Y. Times, Aug. 5, 1986, at A24, col. 1.

281. See, e.g., *Bratt v. IBM*, 392 Mass. 508, 467 N.E.2d 126 (1984).

282. At a minimum public employees must be given notice of any testing procedure sufficient to allow the employee to curtail employment within the government prior to any drug test. If an employee submits to a test and the results are positive, the employee must have the opportunity to formally challenge the test result. Areas ripe for challenge would be the type of test used, what, if any, confirmation assays were performed, and the quality control at the testing laboratory. See generally *Developments in the Law—Public Employment*, *supra* note 275, at 1791.

283. *Jones v. McKenzie*, 628 F. Supp. 1500, 1505 (D.D.C. 1986) (citations omitted). See also Justice Brennan's dissent in *Bishop v. Wood*, discussed *supra* note 277.

IV. Ninth Amendment, Privacy and the Penumbra

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.²⁸⁴

Beyond the technical violations of the law of search and seizure and the procedural encroachments on fifth and fourteenth amendment due process, employee drug screening raises questions of violations of general notions of a constitutional right to privacy.²⁸⁵ Although the term never appears in the Constitution, the concept of a "zone of privacy" within which the government shall not intrude, is recognized by the Court, and relied upon by the people.²⁸⁶ As Justice Goldberg con-

284. U.S. CONST. amend. IX.

The tenth amendment can be read along with the ninth amendment as together preserving and protecting certain natural rights to the citizens and states of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

285. General notions of a constitutional right to privacy deserve, and have been the subject of, substantial scholarly attention on their own. See, e.g., Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILL. L. REV. 833 (1974); Redlich, *Are There Certain Rights . . . Retained by the People*, 37 N.Y.U. L. REV. 787 (1972); R. DIXON, T. EMERSON, P. KAUPER, R. MCKAY, & A. SUTHERLAND, *THE RIGHT OF PRIVACY* (1971); M. GOODMAN, *THE NINTH AMENDMENT* (1981); B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955); J. SHATTUCK, *RIGHTS OF PRIVACY* (1977); see also authorities collected *supra* note 22. It is beyond the scope of this article to explore the origins, or try to delineate the parameters, of constitutional privacy rights. Nonetheless, this article on constitutional implications of employee drug testing would be remiss if it neglected the ninth amendment and the penumbras of the amendments comprising the Bill of Rights; for in these shadows lie some of the most compelling bases for finding a constitutional right of privacy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965)." The specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . ." The "Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . ." *Id.* (Goldberg, J., concurring).

The analysis in this section, therefore, begins with the premise that jurists and scholars alike recognize a general constitutional right of privacy in areas involving governmental intrusions on an individual's body. See *Griswold*, 381 U.S. at 493; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 296 & n.119 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-9, 15-10 (1977).

286. See, e.g., *Griswold*, 381 U.S. at 484, "Various guarantees [in the Bill of

cluded in *Griswold v. Connecticut*,²⁸⁷ this right which emanates from the ninth amendment and the penumbras of first, third, fourth, fifth and fourteenth amendments, is the constitutional embodiment of natural law privacy rights.²⁸⁸ There simply are certain areas of personal lives into which the state has no right to intrude.

Employee drug testing potentially violates the individual zone of privacy in three ways: (1) it involves the state in the traditionally private and personal act of urination; (2) it allows the government to intrude upon non-work related activities performed in the sanctity of the home; and, (3) it reveals confidential medical information found in urine.

The nature of the testing process demands that individuals provide their specimen in non-private surroundings.²⁸⁹ Consequently, employees must bare their genitals and urinate in the presence of another individual. To permit specimen collection in any less intrusive manner could jeopardize the integrity of a drug testing program and subject it to strong reliability challenges.²⁹⁰

Present drug tests are not sophisticated enough to identify when a drug was used. The metabolites of certain compounds will remain in a person's body and show up in urine long after actual use.²⁹¹ Since drug tests screen for presence of metabolites, they cannot reveal whether an employee used an illegal substance on-or-off the job.²⁹² Individuals who

Rights] create zones of privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1972). The Constitution does not explicitly mention any right or privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.

287. 381 U.S. at 486 (Goldberg, J., concurring).

288. *Id.*

289. A recent news article highlights the need to observe employees while they are producing a urine sample. "A black market for clean urine samples is developing as more employers consider drug testing on the job. Clean urine samples are going for \$50 in Nashville to employees subject to drug testing. . . ." *Wilmington News Journal*, October 12, 1986, at 6, col. 1.

290. To the extent that the science involved is imprecise, drug tests are already unreliable. Any further questionable factors will most certainly impact upon employee due process rights. For a more complete discussion see *supra* notes 244-50 and accompanying text.

291. M. WALSH, *supra* note 244, at 9.

292. *Id.* This argument should not be misread as condoning the use of drugs in society, since that is not at all what is intended. Rather the underlying idea is that individuals must be free to choose how they wish to run their lives. Not all persons will make the same choices. Some may, in effect, choose lifestyles that run counter to per-

have not used a drug but may have been in a room where other persons were, can test positive as a result of passive inhalation.²⁹³ Not only may drug tests affect individual leisure activities, they may also influence decisions about whom to associate with.²⁹⁴ Furthermore, employee drug testing may go way beyond its stated purpose, and could be used as a tool for government to dictate the morality of its workers.²⁹⁵

Finally, drug tests can divulge significant medical facts about the individual tested. The information that can be gleaned from urinalysis includes whether an individual is diabetic, epileptic, pregnant or has AIDS.²⁹⁶ The improper use of this confidential information could have

ceived notions of a general good. That is, of course, a corollary of freedom of choice. But it is such freedom and variety that gives color and excitement to our democratic American culture. *Accord* *Bowers v. Hardwick*, 106 S. Ct. 2841, 2848-57 (Blackmun, J., dissenting).

Drugs certainly are a scourge on society. But there are other means of eradicating them than by snooping on what individuals do on Saturday nights in their homes. Certainly some people may change their leisure activities if they are concerned about drug tests at work. But those who do so are probably those who are also the least threat to society. Spending more money on enforcement of drug laws here and in foreign countries, imposing harsher penalties for persons convicted of trafficking in drugs, and educating schoolchildren are just some alternatives, less intrusive, and probably more effective means to the same end.

293. M. WALSH, *supra* note 244, at 9. False positive results from passive inhalation can be corrected. They occur due to poor quality assurance procedures in a laboratory and drug concentrations cut off too low to eliminate detectable levels from passive inhalation. Individual laboratories can be instructed not to report a result as positive unless it falls above a certain pre-determined figure, and only after an appropriate confirmation assay is performed.

294. Thus, the intrusion upon constitutional privacy resulting from governmental drug testing invokes the first amendment right to freedom of association. We have, therefore, a noticeable example of the interplay of "ninth amendment privacy" emanating from the penumbra of another amendment.

295. Such a conclusion may not be as implausible as it sounds. Over 50 years ago Aldous Huxley envisioned a society with government sponsored morality and harsh punishment for non-adherents to its models.

[T]his man who stands before you here, this Alpha-Plus to whom so much has been given, and from whom, in consequence so much must be expected, this colleague of your — or should I anticipate and say this ex-colleague? — has grossly betrayed the trust imposed in him. By . . . his refusal to obey the teachings of Our Ford and behave out of office hours, even as a little infant, he has proved himself an enemy of Society. . . . For this reason I propose to dismiss him, to dismiss him with ignominy from the post he has held in this Centre

A. HUXLEY, *BRAVE NEW WORLD* (1932).

296. *See supra* note 218. In addition to what tests results reveal, individuals may

severe consequences upon an individual's job.

Before concluding that any governmental drug testing program is constitutional, courts must carefully consider whether this isn't exactly the type of governmental act that "denies or disparages rights retained by the people."

V. Conclusion

Employee drug testing is an issue of substantial public moment. Urinalysis programs already are prevalent and are expanding in all areas of American industry. Government employee drug testing is prominent on President Reagan's agenda, and is appearing with increased frequency on court dockets throughout the country.²⁹⁷ While testing programs offer the allure of a drug-free work force and workplace, they also threaten to fulfill some of Orwell's and Huxley's more ominous predictions²⁹⁸ by extending government tendrils into the most private of bodily functions. The challenge is to balance these countervailing and equally valid concerns into a constitutional, prudential, and practical testing program.

The President's proposed testing program does not meet this challenge. The government employee drug testing program advocated by President Reagan's Executive Order does not pass constitutional muster. The fourth amendment prohibits wholesale testing of government employees, without a warrant and absent probable cause. Because it is warrantless, the procedure is presumptively unreasonable. While this presumption may be overcome under particular circumstances, random or dragnet testing does not qualify. The procedure does not fall within any of the well-defined exceptions to the warrant requirement, nor does it meet a general balancing test of reasonableness.

The President's proposed testing program also runs afoul of fifth amendment due process rights. The reliability of the tests themselves are suspect. Errors arise from numerous sources, including: the type of test used, the number (if any) of confirming assays, contamination of

be asked beforehand to disclose all medications they may be using. *See, e.g., Shoemaker*, 795 F.2d at 1136.

297. At the time this article went to press (Feb. 1987), for example, Secretary Dole of the Department of Transportation announced a program to begin drug screening railroad employees. At about the same time, the union representing transportation workers announced that it would fight any drug screening program. Similar scenarios are being enacted outside of Washington, D.C. in many of our states and cities.

298. *See supra* note 295.

samples, and poor quality assurance procedures for sample collection and handling. The devastating effects of false positive test results on persons, careers and jobs make these errors particularly serious, and unconstitutionally encroach on government employees' property interests in their jobs and liberty interests in their goods names and reputations.

Government employee drug testing also violates privacy rights emanating from the ninth amendment and the shadows of the Bill of Rights. Personal hygienic bodily functions fall within the zones of privacy that historically have been protected by the Constitution and general notions of decency and dignity. Further, the broad panoply of private facts that may be learned about individuals by analyzing their wastes also intrudes upon constitutionally protected spheres of privacy. Thus, the President's drug testing program is not the answer.

While no set of static rules can properly balance the need to remove drugs from our work force and workplace against the need to respect individual privacy in doing so, any government employee drug testing program should include the following considerations:

1. Some quantum of individualized suspicion must be a prerequisite to any search or seizure, even within areas where the government has a great need to search. To avoid potential abuse by supervisors, the individualized suspicion should be based upon well-articulated and demonstrable performance criteria.
2. The quantum of individualized suspicion may vary with the job, but it should only be significantly relaxed in the most intrusively regulated industries. Society's need for a drug-free work force and workplace varies with the job being performed. For example, presumably society has a greater interest in ensuring that its nuclear engineers are drug-free than ensuring that its clerical workers are. Thus, a correspondingly lesser degree of suspicion necessary to justify testing the nuclear engineer than for testing the clerical worker may be acceptable.
3. Rigorous safeguards must be implemented to ensure that drug testing is as accurate and reliable as possible. Testing laboratories should be licensed, and they should be inspected on a regular basis. Trained specimen handlers should be employed, and detailed chain of custody procedures must be mandatory.
4. Test results should remain confidential. All employees should be given the opportunity to enroll in a government sponsored treatment program before being disciplined or dismissed. Participation in any treatment program must also be kept strictly confidential.

While these rules may not resolve all the constitutional issues

raised by government mandated drug testing, they suggest the minimal individual protections necessary to sustain any broad-based drug testing program.