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GOVERNMENTAL DRUG TESTING:
CRITIQUE AND ANALYSIS OF FOURTH
AMENDMENT JURISPRUDENCE

Phoebe Weaver Williams*

I. INTRODUCTION

Combatting illicit drug use is an important national issue. Employment drug testing is one weapon currently used by governmental agencies to deter illicit drug consumption. Both public and private sector employers test for drugs. The focus of this Article will be on one aspect of employment drug testing: the use of urinalysis to detect and identify employees who have used illicit substances. Illicit substances may refer to "street" drugs which are illegal to possess, or to certain drugs which are illegal to possess without a prescription and

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include substances such as amphetamines, cocaine, marijuana, opiates and phencyclidine. This Article considers fourth amendment jurisprudence addressing the constitutionality of employer drug testing programs.  

Most of the litigation involving employee drug testing has been initiated by governmental employees. This Article examines and critiques judicial precedent addressing fourth amendment challenges to the constitutionality of governmental employment urine testing programs.

Often private sector employees lack the constitutional protections afforded governmental employees because the Constitution is interpreted as preventing unwarranted governmental intrusions in contrast to intrusions by private employers. 4 Private employee claims

2. See infra notes 212-539 and accompanying text.
3. Id.

Private sector employees may be 'forced to consent' to random urine testing without individualized suspicion as a condition of employment. The fourth amendment operates to restrain the freedom of only state actors, and thus the private-sector is protected only by statutory enactments or by the common law of torts. Great concern has been expressed with respect to the voluntariness of the consent to such invasions of privacy given by private sector employees, but the majority of legislatures and courts have not addressed the problem.

Id. A few state constitutions recognize an express right of privacy or have been interpreted to include such a right. See McGovern, Employee Drug-Testing Legislation: Redrawing the Battlegrounds of the War on Drugs, 39 Stan. L. Rev. 1453, 1466 (explaining that the Alabama, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana and Washington state constitutions recognize an express right of privacy or have been interpreted to include such a right). However, the defense of lack of state action still remains available for some employers. See also Grzby v. Evans, 700 S.W.2d 399 (Ky. 1985) (stating that the first amendment of the United States Constitution and Section 1 of the Kentucky Constitution only proscribe governmental transgressions); State v. Long, 216 Mont. 65, 71, 700 P.2d 153, 157 (1985) (holding "that the privacy section of the Montana Constitution contemplates privacy invasion by state action only."); White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 106-107 (1975) (concluding that privacy amendment to California's constitution was intended to reach "overbroad collection and retention of unnecessary personal information by government and business interests."); Roulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (holding that an employer violated an employee's reasonable expectation of privacy when the employer fired the employee because of the employee's romantic involvement with a rival firm's manager); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (discussing the university's violation of the plaintiff's state constitutional right to privacy by disclosing the student's grades to a scholarship commission and concluding that the California Constitution prohibits private employers from interfering with one's privacy). California recognizes constitutional protections from invasions of privacy by both state
of constitutional violations by private employers are subject to dismissal for lack of the requisite state action. However, private employers may be considered governmental actors or agents. In such cases, the constitutionality of the use of urinalysis to detect drug using employees becomes an issue of concern for both public and private sector employees and employers.

Employment drug testing programs have evoked diverse reactions. Views are polarized among employers and employees, with some supporting employment drug testing and others bitterly opposing it. Part II of this Article sets forth arguments advanced by both proponents and opponents. Discussions concerning the efficacy of urine testing could be improved if positions consider historical, technological and pragmatic perspectives associated with drug testing. Parts III, IV, and V discuss these perspectives. A brief history of the use of employment urine testing programs is set forth in Part III. Technological concepts are discussed in Part IV. Various approaches to the use of urine testing in employment are discussed in Part V.

Urine testing for drug use requires the forced production, collection and relinquishment of a body fluid for toxicological examination. Employment urine testing programs intrude upon private matters which are traditionally afforded protections against such intrusions.

The fourth amendment protects individuals from unreasonable governmental intrusions into matters of private concern. Because

and private employers.

A broad interpretation of the public policy exception to the employment at-will doctrine may extend constitutional protections to private employees. Cf. Novesel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (recognizing that employees stated claims for a cause of action for wrongful discharge based on the claim of infringement of their first amendment rights); Busko v. Miller Brewing Co., 134 Wis. 2d 136, 396 N.W. 2d 167 (1986) (holding that a public policy exception may not be used to extend constitutional free speech protections to private employment). See also notes 215-27 and accompanying text.

5. See Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), rev'd on other grounds sub nom. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. —, 109 S.Ct. 1402 (1989). "We cannot view the testing provisions, even those which authorize testing by private railroads, as anything less than part of an overall, nationwide anti-drug campaign." Burnley, 839 F.2d at 582. See infra text accompanying notes 215-27 (discussing the Supreme Court's determination in Skinner that private railroad employers were state actors or agents of the federal government).

6. See infra notes 21-64 and accompanying text.

7. See infra notes 65-139 and accompanying text.

8. See infra notes 140-83 and accompanying text.

9. See infra notes 184-214 and accompanying text.

10. See U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects
urine testing intrudes upon individual privacy, governmental employees have argued drug testing programs violate fourth amendment prohibitions against unreasonable governmental searches.\textsuperscript{11}

Courts have grappled with a number of analytical approaches when resolving fourth amendment questions concerning the constitutionality of drug testing programs. The result has been the development of a body of precedent that is inconsistent and confusing, providing little guidance to litigants on either side of the issue.\textsuperscript{12} Resolution of fourth amendment issues raised by drug testing would benefit from consideration of historical, technological and various pragmatic aspects of employment drug testing programs. Development and use of an analytical framework for addressing the constitutionality of drug testing programs would also assist both potential litigants and the judiciary.

The Supreme Court had the opportunity to set forth an analytical framework in \textit{Skinner v. Railway Labor Executives Association},\textsuperscript{13} and \textit{National Treasury Employees Union v. Von Raab}.\textsuperscript{14} Those decisions involved fourth amendment challenges to governmental drug testing programs which used urinalysis.\textsuperscript{15} Analysis and critique of the Court's decisions, when considered with other authorities, suggest that a cogent approach for analyzing fourth amendment drug testing issues still needs to be developed. Part VI sets forth an analytical framework.\textsuperscript{16} It suggests examination of the applicability of the fourth amendment to the employer's testing program, the state action question, whether the program involves a fourth amendment "search," the extent the search intrudes upon the privacy of the individual, whether the government must obtain a warrant before conducting the testing, and whether probable cause, or some quantum of individualized suspicion, (i.e., reasonable suspicion), or suspicionless testing comports with the fourth amendment.\textsuperscript{17}

against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

\textit{Id.}

11. \textit{See infra} notes 21-64 and accompanying text.
12. \textit{See infra} notes 20-539 and accompanying text.
15. \textit{See infra} text accompanying notes 223-539.
17. \textit{Cf. Skinner}, 489 U.S. \textit{at}, 109 S. Ct. at 1426 (Marshall, J., dissenting). However, the analytical framework proposed here suggests evaluation of the extent the search intrudes upon individual privacy at an earlier point in the analysis. \textit{Id.} Should the urine testing
Part VI discusses and critiques the analytical approach used by the Supreme Court in *Skinner* and *Von Raab* and considers also the analyses of lower courts. The objective of the critique is to extract an analysis which permits orderly consideration of the various doctrinal elements associated with fourth amendment protections.

Part VII concludes that fourth amendment drug testing jurisprudence is plagued with conceptual and analytical flaws at each stage of adjudication of the constitutional issues. The jurisprudence suffers in part because it is difficult to apply constitutional values to evolving technology. However, the decision making process surrounding fourth amendment drug testing issues also suffers from lack of a clear analytical framework for evaluating the issues. Various criticisms are offered to stimulate a more orderly analysis of the issues.

II. DRUG TESTING: PERSPECTIVES ON THE POSITIONS OF PROPONENTS AND OPPONENTS

Views on employee drug testing are diverse. Those who support urine testing view it as a means to protect business and employer interests. Proponents are primarily employers, their associations and representatives. Those who oppose employee drug testing view urine testing as an unnecessary intrusion upon individual privacy rights. Opponents are primarily employees, particularly those program require a highly intrusive search, then the analysis may be appropriately terminated and the search deemed unconstitutional if it was conducted without any suspicion of drug use. *Id.* Should the testing involve only minimal intrusions, this evaluation should be available at each stage of the analysis which may call for balancing the intrusion upon privacy interests against governmental objectives. *Id.* There seems to be no reason to delay consideration of the extent to which urine testing invades privacy interests until a later stage in the analysis. See infra text accompanying notes 282-305 & 463-94. 18. See infra text accompanying notes 215-539.

19. See infra text accompanying notes 144-45.

20. See infra text accompanying notes 21-64.

21. See *Alcohol and Drug Abuse in the Workplace*, 26 Gov't Empl. Rel. Rep. (BNA) 263 (Feb. 22, 1988) (statement of Robert J. Cynkar, Dep't of Justice, before the United States Senate Committee on the Judiciary Concerning Constitutional Issues Surrounding Federal Employee Drug Testing (April 9, 1987)) (stating that “[b]ecause of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to deter employee's use of illegal drugs.”); *Stille, Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, THE NAT'L L.J., April 7, 1986, at I. "Corporations see new, inexpensive drug tests as the antidote to many ailments: employee theft, absenteeism, rising health care costs, accidents, shoddy workmanship and low productivity. But critics say drug programs are a seductive quick fix answer that is, in fact, incapable of solving the drug problem and sure to create a series of negative side effects." *Id.*


23. See infra text accompanying notes 47-64.
who may be subject to such testing, their representatives and certain civil libertarian groups.\(^4\)

\section*{A. The Case for Testing: Security Risks and Safety Factors are the Articulated Concerns but Performance May be the Real Objective}

Proponents claim that drug use creates a security problem, and that drug testing is necessary to identify those employees who are potential security risks. The Presidential Executive Order calling for drug testing of federal employees in certain “sensitive” positions reflects beliefs on the part of the Executive Branch that drug using employees create security risks.\(^5\)

Drug use is thought to exert financial demands and temptations on employees. Industries dealing with large sums of money test their employees to screen out those individuals who may engage in criminal acts because of financial pressures associated with drug addiction.\(^6\)

There is concern that drug using employees may commit criminal acts. They may sell drugs to other employees, breach employer


The use of illegal drugs by federal employees in certain positions evidences less than the complete reliability, stability and good judgment that is consistent with access to sensitive information. This situation creates the possibility for coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law.

\textit{Id.} at 16. See also 24 Gov’t Empl. Rel. Rep. (BNA) 1270 (Sept. 22, 1986) (reporting that “Rep. Dan Burton (R.-Ind.), the subcommittee’s ranking Republican, said government employees with drug problems pose an easy target for Soviet KGB agents.”). The Executive Order Fact Sheet stated that “[t]he head of an agency must establish a testing program for employees in sensitive positions based on the agency’s mission, the employee’s duties, and the potential consequences of employee drug use to public health and safety to national security.” \textit{Id.} at 1299 (emphasis in original).


27. \textit{Id.}

28. See A. WASHON & M. GOLD, COCAINE, A CLINICIAN’S HANDBOOK (1987) (discussing the results of hot line telephone surveys of cocaine users). Noting that prior to their surveys “no previous attempts had been made to . . . study drug use occurring in the workplace by actually interviewing drug-using employees;” they discuss the results of national surveys conducted during 1983 and 1985. \textit{Id.} at 19. Forty-five percent of those surveyed stated that they had stolen money from their employers and from family or friends to support their cocaine habit. \textit{Id.} Seventeen percent had lost a job because of cocaine. \textit{Id.} at 14. The percentage of callers who reported they used cocaine at work increased from forty-two percent in 1983 to seventy-four percent in 1985. \textit{Id.} at 17. The authors report, from a random sample 227 em-}
policies, or even steal from employers or co-workers to support their addictions.

Some advocates feel that employee associations with drug traffickers are inimical to business objectives or governmental missions. Such beliefs are common among employers charged with enforcing laws. Other employers conclude that it is appropriate to enforce societal standards of morality in the workplace.

Proponents of drug testing also claim that drug use creates safety hazards in the workplace. Drug users create safety problems not only for themselves, but also for co-workers and the public. Drug users are thought to have higher incidences of workplace injuries and accidents causing serious injury to others.

ployed cocaine abusers who were interviewed about drug use on the job, the following:

Survey Results. The demographic profile of these drug-using employees was as follows: 70% were male; 61% were white; 53% were 20-29 years old, 40% were 30-39 years old, and 7% were 40 years old or over; 67% earned under $25,000 per year; 32% earned $26,000-50,000, and 1% earned over $50,000. Their occupations included the following: automobile mechanic, attorney, stockbroker, legal secretary, salesperson, real estate agent, airline flight attendant, dentist, nurse, optician, pharmacist, physician, office clerk, postal employee, public utility worker, security guard, computer programmer, retail store owner, pipe filler, bus driver, and railway switchman.

Id. Seventy-four percent said they used drugs at work. This includes respondents who said that they had self-administered drugs during working hours (or breaks), as well as those who had come to work while already under the influence of drugs. Id. The types of drugs used were cocaine (83%), alcohol (39%), marijuana (33%), sedative-hypnotic (13%) and opiates (10%). Id. The total of these percentages exceed 100% because most subjects reported multiple drug use. Id. at 19. Sixty-four percent said that drugs were readily obtainable at their place of work, and 44% said that they had dealt drugs to fellow employees. Twenty-six percent reported being fired from at least one previous job because of drug related problems; thirty-nine percent feared that a raise in salary would lead to further escalation of their drug use. Id. Eighteen percent said that they had stolen money from co-workers in order to buy drugs, and twenty percent reported having been involved in at least one drug-related accident on the job. Id.

29. See id.
30. See id. at 194 (including an article by Robert L. Dupont, which asserts that drug dependence leads to lying and corruption among all users).
31. See infra notes 528-32 and accompanying text (discussing Von Raab).
32. Id.
33. See infra notes 128-39 and accompanying text.
34. See infra notes 133-35 and accompanying text.
35. See 26 Gov't Empl. Rel. Rep. (BNA) 879 (June 13, 1988) (stating that according to Solicitor General Charles Fried, Federal Railroad Administration Regulations requiring railroad employees to be tested in the aftermath of a rail accident were intended to prevent railroad employees, impaired by drugs or alcohol, from causing accidents and casualties). See also Celis, Drugs, Inadequate Skills Cited As Construction Deaths Rise, Wall St. J., June 17, 1987, at 29; but see 5 Empl. Rel. Wkly. (BNA) 200 (Feb. 16, 1987) (stating that building unions cite OSHA standards violations rather than substance impairment as the cause of serious job-site accidents).
36. See National Ass'n of State Personnel Executives and the Council of State Gov'ts,
Drug using employees are also considered a source of higher medical costs for employers. Employers attribute substantial costs in medical insurance and other employee benefits to drug using employees. Thus, drug testing may be viewed as a means of curbing cost increases in this area.

Where public safety is implicated by the employer’s business objectives, preventing employee drug use becomes a public safety imperative. Certain industries consider drug testing an effective means for detecting threats to public safety posed by drug impaired employees.

However, the more probable reason for urine testing may stem from employers’ desires to increase productivity. Speaking at a workplace substance abuse conference at Duke University, on February 8, 1988, former President Ronald Reagan cited studies which demonstrated that drug users were only two-thirds as productive as non-users. Reports of employer surveys conducted over the past seventeen years conclude “impact on job performance” has been the number one factor stimulating drug policy development. Absenteeism

37. Freudenheim, Mental Health Costs Soaring, N.Y. Times, Oct. 7, 1986, at 2-D (stating that “[l]arge companies are spending 7 to 15 percent of health-care dollars in psychiatric care, with drug and alcohol cases absorbing more than a third of this.”).

38. See id.

39. Wholesale Grocer Group Asks OSHA for Mandatory Drug Testing, 5 Empl. Rel. Wkly. (BNA) 199 (Feb. 16, 1987) (citing concerns about safety and health of all workers in the warehouse, the grocer’s association filed the first request ever made by an industry group directing OSHA for a mandatory drug testing program for workers employed in warehouses which stored harmful chemicals). See Duensing, infra note 85, at 5 (noting that levels of substance abuse reflective of over-all societal problems cannot be tolerated by the railroad industry where “the concern for public safety is so great.”).

40. See, e.g., Borsari v. FAA, 699 F.2d 106 (2d Cir.), cert. denied, 464 U.S. 833 (1983) (upholding the firing of an air traffic controller convicted of selling drugs even though it occurred during off-work hours because the employee’s conduct conflicted with the FAA’s mission); see also 5 Empl. Rel. Wkly. 1157 (Sept. 21, 1987) (describing a survey of drug testing policies of 209 companies and government agencies by a Chicago-based consulting firm). Thirty-seven percent stated that health and safety were their primary concern; twenty-seven percent stated that there was a workplace substance abuse problem; eleven percent cited the use of drugs as a national problem; and nine percent cited the high-risk nature of the job. Id. at 1157. See Watts v. Union Pac. R.R. Co., 796 F.2d 1240 (10th Cir. 1986) (upholding termination of an engineer of a locomotive who pleaded guilty to a cocaine possession charge, noting that the employer could reasonably find the employee’s conduct threatened public safety).


was the second most cited factor stimulating drug policy development.43 Other reasons cited for developing substance abuse policies were the dramatic rise in drug use cases among employees, company image, public security, the illegality of certain drugs, crime and loss due to theft.44 Drug testing may be supported because it addresses the most serious problem hampering employer drug abuse programs, detection of drug users.45 Since employers perceive substance abuse programs as tools to address problems such as performance, absenteeism, accidents and injuries, problems which impact productivity, and the desire to enhance productivity, may be the foremost reason for drug testing programs.46

B. The Case Against Drug Testing: “[S]upporting Compulsory Tests to the Public Heads You Down the Proverbial Slippery Slope on Greased Skis”47

Opponents of urine testing argue that such testing unreasonably intrudes upon the privacy of the employee.48 Urinalysis monitors drug use, not intoxication. It can reveal off-duty behavior by an employee. Opponents argue such behavior should be none of the employer’s business.49

Urinalysis may reveal much more than illicit drug use. It can disclose the presence of prescription drugs or over-the-counter medications, the use of which may be legal and unrelated to job performance.50 Urine may be analyzed to disclose non-work-related personal matters, such as treatment for a heart condition, depression, epilepsy, diabetes or asthma.51

A chief complaint of opponents is that urine testing programs are adopted without any proof of drug abuse problems among governmental workers.52 The testing is not only a privacy intrusion, but

43. Id.
44. Id. at 104.
45. Id.
46. See infra text accompanying notes 89-139.
47. Cohen, 20 B.D. HEALTH 6 (1988); see also Stille, infra note 195, at 24 (stating that “[t]he problem with the test is that it says nothing about job impairment, according to the ACLU.”). “The employer has a legitimate interest in performance on the job, but not to delve into what people do off the job. If a person smoked a joint on Saturday, whose business is it?” Id. at 24. See Rust, The Legal Dilemma, 72 A.B.A.J. 50 (1986).
48. See infra text accompanying notes 252-62.
49. See Stille, infra note 195; Cohen, supra note 47, at 24.
50. See National Ass’n of Personnel Executives and Council of State Gov’ts, supra note 36 (referring specifically to article by the Executive Director of the ACLU).
51. See McGovern, supra note 4, at 1458 n. 27.
52. See, e.g., 24 Gov’t Empl. Rel. Rep. (BNA) 1270 (Sept. 22, 1986) (citing the sub-
Opponents also cite problems with the accuracy of the tests and the laboratories which administer them. Misidentification of legal substances as illegal, and sample mishandling by laboratory personnel, are cited as reasons for eschewing urine testing.

Anecdotal accounts of abusive or arbitrarily administered policies support opponents' arguments that urine testing policies are prone to abuse, and subject to discriminatory and arbitrary implementation.

C. Critique of the Advocates' Arguments

Proponents' advocacy of drug testing programs ignores the historical context surrounding the development and use of urine drug testing programs. Part III of this Article concludes that urinalysis to detect illicit drug use is a recent phenomenon with testing trends among employers significantly emerging only during the most recent decade. Proponents of drug testing programs do not have a long history of employee acceptance of such intrusions to justify societal acceptability of testing programs. Urine testing is so new that its impact upon work performance problems has not been the subject of

committee on House Post Office and Civil Services). "Drug testing has captivated the imagination of the Administration much like the loyalty oaths of the 1950's... The simple truth is that there is no evidence of drug abuse among federal workers." Id. See also id. at 1271 (citing Mark Roth, general counsel of the American Fed'n of Gov't Employees). "What bothers us most is that there is no evidence of a drug problem in the federal workplace." Id. at 1270-71.

55. See infra text accompanying notes 163-76.

56. See Stille, infra note 195, at 23 (describing the accuracy problem occurring in military drug testing programs). "Studies of the early military drug testing sound like a Keystone Kops movie... Samples got mixed up, jars were mislabeled, and tests were bungled by technicians who often failed to clean bottles adequately, so that the drug traces from one sample contaminated the urine of a person whose sample followed. Error rates in the labs used by the Navy, which has done the most testing, went as high as 97 percent." Id. See also Nevling, Urinalysis Reexamined, ARMY LAW. 45-46 (Feb. 1985) (discussing the Einsel Commission's finding, which affirmed the basic soundness of the Army's urine testing program but discovered gross deficiencies in the actual procedures); Havemann, Catching Innocents in the Federal Drug Net, Washington Post Nat'l Wkly. Edl. (Feb. 29 - Mar. 6, 1988) (describing laboratory error resulting in an air traffic controller being falsely accused of drug use).

57. See infra text accompanying notes 84-101.
extensive empirical research.

Part III of this Article discusses technological perspectives on urine testing, and from that discussion one may conclude that proponents' arguments regarding the usefulness of urine testing programs are largely speculative and unsubstantiated by empirical data. Ignoring the limited uses of urinalysis results, proponents posit that testing the urine of employees will assist employers in identifying drug impaired individuals or persons who may be security risks.

Proponents could advance better arguments to support testing if studies were performed and results obtained which empirically supported claims that testing programs deterred drug use or correlated with improved safety. Urine testing policies could then be justified because they respond to specific and legitimate work-related objectives. To the extent proponents develop urine testing policies which provide adequate safeguards that prevent arbitrary administration, unnecessary privacy intrusions, inaccurate results and unnecessary dissemination of test results, proponents will eliminate many of opponents' objections to urine testing.

Opponents of urine testing programs generally ignore emerging employer concerns about workplace productivity, safety, and integrity. Opponents' arguments tend to overlook employer objectives to hire and maintain a workforce that is inculcated with values that promote these concerns. Opponents' arguments do not effectively address drug testing advocates' positions that employers have work-related interests in deterring all illicit drug use because drug use may adversely impact job performance.

Opponents' arguments generally do not focus on specific employer policies. If properly adopted and administered, substance abuse policies can address opponents' concerns about discriminatory and abusive administration, unwarranted privacy intrusions, problems with accuracy and dissemination of urine test results. If the policy addresses these concerns, opponents' complaints are confined to issues regarding the circumstances under which the government may require employees to produce urine specimens for testing to determine drug use.

Opponents' positions would be improved if criticisms were directed toward flaws in specific testing programs. Each step involved with testing policies should be examined, from adoption of the pro-

58. See infra text accompanying notes 65-139.
59. See infra text accompanying notes 162-539.
60. Id.
gram to administration to the uses made of urine test results.

Opponents of urine testing programs may appropriately focus on historical data, presented in Part III, demonstrating the recency of urine testing programs and the lack of empirical data which supports their usefulness.61 Discussions in Part IV62 suggest opponents should continue to attack the usefulness of urinalysis results until the scientific community either reaches a consensus or produces a sufficient body of research which establishes a correlation between urinalysis results and identification of impaired employees or other work-related objectives.

 Discussions in Part V categorize and distinguish drug testing programs.63 Arguments may be better framed and precedent better understood if advocates define and identify the type of drug testing policy at issue.

Part VI contains an analytical framework for addressing fourth amendment search issues implicated by urine testing programs.64 Litigation in this area would benefit from an orderly examination of the issues.

III. HISTORICAL PERSPECTIVES ON DRUG TESTING

A. Historically Employers were not Concerned About Employee Drug Use

Historically the use of intoxicants by employees at the workplace was not discouraged.65 During the nineteenth century, alcohol could be found in practically all places of work, with the modern coffee break having its roots in the “grog break.”66 “It was not uncommon that sometime in the late afternoon skilled craftsmen would take a work break to partake in an alcoholic beverage provided at the employer’s expense.”67

The first strikes by American artisans were in small part related to employer attempts to eliminate the grog break.68 During the early nineteenth century, drinking alcohol on the job was established, with road and canal builders receiving whiskey as part of their wages.69

61. See infra text accompanying notes 65-139.
62. See infra text accompanying notes 140-83.
63. See infra text accompanying notes 194-201.
64. See infra text accompanying notes 215-539.
66. Id.
67. Id.
68. Id.
69. Id.
There were few occupations which did not permit or even encourage drinking on the job.\textsuperscript{70}

The abuse of drugs other than alcohol in the workplace during the nineteenth century is difficult to document.\textsuperscript{71} Little is known about the abuse of morphine, cocaine and hashish by American workers during that era.\textsuperscript{72} However, these substances were used by the American public and it is assumed that their use also occurred in the workplace.\textsuperscript{73}

During the nineteenth century, "all drugs in the United States were licit drugs and could be legally sold over the counter without a prescription."\textsuperscript{74} Opium, morphine, heroin, cocaine, and marijuana were among the licit drugs, with opiates as freely accessible as aspirin is today.\textsuperscript{75} The one exception, a city ordinance in San Francisco, banned "smoking houses" or "opium dens" in 1875.\textsuperscript{76} During the following decades twenty-seven other jurisdictions enacted similar bans.\textsuperscript{77} The San Francisco ordinance was considered as directed more towards banning interracial fraternization between the Chinese railroad workers who brought opium smoking with them and Caucasian Americans than trying to ban opium smoking.\textsuperscript{78} Passage of the Harrison Act in 1914 made non-medical use of narcotics illegal.\textsuperscript{79} The Harrison Act regulated the marketing of opium, though it was

\textsuperscript{70.} Id.
\textsuperscript{71.} Id. at 286.
\textsuperscript{72.} See id.

Between 1880 and 1910, the sale of patent medicines containing addictive drugs increased seven-fold (Morgan 1974). Some of these sales were obviously made to industrial workers. In 1919, it was reported that morphine addiction had been a notable problem in the bituminous coal industry where working conditions were notoriously bad (Blair 1919). This same report suggested the abuse of drugs by those operating coke ovens in Pennsylvania. On the whole, however, there were few reports of opiate abuse in the iron and steel industry, or the automobile industry in the first two decades of this century (Blair 1919).

\textsuperscript{73.} Id.
\textsuperscript{74.} E. BRECHER, Drug Laws and Drug Law Enforcement: A Review and Evaluation Based on 111 Years of Experience, Perspectives On Drug Use In the United States, at 1 (1986).

\textsuperscript{75.} 55 N.Y. STATE J. MED. 341 (1955). See WASHTON & GOLD, supra note 28, at 3.

"A large number of patent medicines containing cocaine, especially those touted for asthma and hay fever, were almost pure cocaine. The tonics, elixirs, and fluid extracts containing cocaine or coca kept the use of the substance alive until 1906 when the Pure Food and Drug Act required the proper labeling of cocaine and other narcotics on proprietary medicines." Id.

\textsuperscript{76.} C. KANE, OPIUM SMOKING IN AMERICA AND CHINA, at 73 (1882).

\textsuperscript{77.} See Brecher, supra note 74, at 3.
\textsuperscript{78.} Id.
\textsuperscript{79.} Id. at 5.
enforced to prohibit the non-medical use of opium.80

While alcohol abuse occurred prior to the Vietnam War, drug abuse problems were relatively rare among American workers.81 The Vietnam War, along with the availability of synthetic drugs, opened the workplace to increased drug abuse.82 By 1968, the use of marijuana and LSD had become an increasingly prevalent problem on college campuses.83 The number of drug users grew with returning Vietnam veterans.84

Documentation is scarce about the use of drugs in the workplace by federal, state or municipal workers or the responses of governmental agencies to employee drug use problems.85 Courts have noted the absence of such documentation in drug testing decisions.86

Lack of documentation does not necessarily establish that drug use is not occurring among public employees. It is likely that public employers, not unlike their private counterparts, are experiencing employee drug abuse problems.87 Robert M. Kruger, Associate Counsel to Ronald Reagan, former President of the United States,

80. Id.
81. See McClellan, supra note 65.
82. Id.
83. Id.
84. Id. (stating that "[t]here was a prevailing contempt for traditional authority because of involvement in Vietnam [which] fostered an environment in which students could experiment with drugs.").
85. See National Ass’n of State Personnel Executives and the Council of State Gov’ts, supra note 36, at 4. "The data on use of drugs by operating [railroad] employees was either unavailable or very sketchy. The only data came from pre-employment drug screens." Id. The military has data concerning drug use among enlisted personnel. After being plagued with drug-related problems throughout the 1970’s, the U.S. military forces began drug testing in 1981. Id. All branches of the military have reported a high rate of success in reducing drug use through testing programs. Official reports list the following drug use reductions by junior grade enlisted personnel between 1982 and early 1984, as sixty-two percent in the Navy; twenty-six percent in the Air Force; and twenty-two percent in the Army. See Axel, Corporate Strategies for Controlling Substance Abuse, A RESEARCH REPORT FROM THE CONFERENCE BOARD (1986).
has stated, "[T]here is no reason to believe that the federal workforce is insulated from a drug abuse problem which pervades society at large."\(^{88}\)

B. **The Concern About Employee Drug Use is A Recent Trend\(^{89}\)**

Drug use by employees, whether during work time or off duty, is now an issue of national concern.\(^{80}\) The current employer focus on drug use by employees represents a major "policy shift."\(^{81}\) This shift is perhaps part of the developing trend among employers of monitoring the off-duty conduct of employees.\(^{82}\) Critics describe these monitoring efforts as attempts to detect employees engaged in "deviant" behaviors.\(^{83}\)

Current efforts by public employers to monitor drug use are also recent developments. Executive Order 12,564, calling for the creation of policies prohibiting drug use by governmental employers, suggests they were previously not in existence.\(^{84}\) In fact, a prior survey


\(^{89}\) "Drug abuse issues have recently assumed considerable prominence on the state of world events, even though the non-medical use of drugs to alter human consciousness is a phenomenon with roots extending beyond the dawn of written history." Skirrow & Sawka, Alcohol and Drug Abuse Prevention Strategies - An Overview, 14 CONTEMP. DRUG PROBLEMS 147, 148 (1987).

Political and business leaders increasingly advocate taking what is termed a "hard line on drugs", and the North American public generally appears to be supportive. On the basis of objective criteria, it is difficult to understand this developing consensus. However, the perception of a major crisis is understandable in terms of growing public awareness that, despite everyone's best efforts, drug use has become deeply embedded in the social fabric, is permanently altering that fabric in a manner not seen by most as any sense positive, and is closely associated with a host of other vexing social problems.

*Id.* at 149.

\(^{90}\) Illegal drugs have become so pervasive in the U.S. workplace that they are used in almost every industry, the daily companions of blue- and white-collar workers alike. Their presence on the job is sapping the energy, honesty and reliability of the American labor force even as competition from foreign companies is growing even tougher.

Castro, Battling The Enemy Within, TIME, Mar. 17, 1986, at 52.

\(^{91}\) Cohen, Drugs in the Workplace, 45 J. CLINICAL PSYCHOLOGY 4 (1984).

\(^{92}\) In addition to drug testing, employers may use other procedures to assess individual characteristics in contrast to evaluating work performance. Personality testing, honesty testing, forms requiring disclosure of lifestyle preferences, finances, etc. are a few of the means by which employers gather information about employee off-duty conduct. See Westin, Past and Future in Employment Testing: A Socio-Political Overview, 1988 U. CHI. LEGAL F. 93.

\(^{93}\) "[U]rine screening is a probe to identify deviance, not dysfunction - a technique to investigate humans, not accidents." Morgan, Problems of Mass Urine Screening for Misused Drugs, 16 J. PSYCHOACTIVE DRUGS 305, 306 (1984).

of federal agencies had disclosed that over three-quarters (80%) of the federal agencies had not required urinalysis screening for drug use.95 Public employers have utilized codes of conduct to regulate other off-duty activities of public employees.96 However, attempts by public employers to specifically regulate off-duty use of illicit substances are a recent phenomena.97

Drastic increases in the use of drug testing by private sector employers are also a recent phenomena. A 1986 survey of Fortune 500 companies reported a growing corporate trend towards using urinalysis with 30% of the employers surveyed utilizing urine testing.98 An earlier survey in 1982 had reported only 3% of the employers polled using drug testing.99 Another poll of 1,118 companies with 5000 or more employees concluded that 28% of those companies screened job applicants for drug use.100 Half of those companies had begun testing within the past year.101 While the opinion of employers on the efficacy of urinalysis testing is not unanimous,102 urine testing is becoming a popular method for detecting illicit substance


96. Suddarth v. Slane, 539 F. Supp. 612, 615 (W.D. Va. 1982) (concerning an action brought by a state trooper who was terminated for violating a state regulation prohibiting "criminal infamous, dishonest, immoral or notoriously disgraceful conduct or other conduct prejudicial to the Department.").

97. An explanation for the lack of federal regulations prohibiting off-duty drug use may be that civil service regulations require federal employers to establish a nexus between off-duty behavior and job performance before discipline can be administered. For example, the Civil Service Reform Act of 1978, § 2302(b)(10) prohibited personnel practices against employees on the basis of conduct which did not adversely affect the performance of the employee or applicant or the performance of others. 5 U.S.C. § 2302(b)(10) (1988). See 24 Gov't Empl. Rel. Rep. (BNA) 1104 (Aug. 18, 1986) (stating that the Office of Personnel Management proposed legislative reforms to exclude illegal use of a controlled substance from this section).


101. Id.

102. There are divergent views among employers about drug testing. Lewis Maltby, Vice Pres. of Drexelbrook Controls states that drug testing generates resentment and anger that is antithetical to the corporate esprit de corp. 4 Empl. Rel. Wkly. (BNA) 1423 (Nov. 17, 1986). Carrie Peterson, Administrator of Health and Promotion Programs for Blue Cross and Blue Shield of Maine, rejects random testing, concluding that Employee Assistance Programs should address the "cocaine epidemic in the workplace." Id. at 1569. Robert J. Geiger, Allied Corp's Vice Pres. of Labor Relations, indicates that pre-employment is the time for drug testing. Id. at 1515.
use among employees.\textsuperscript{103}

Increased use of drug testing will also occur in the public sector. One of President Reagan's proposals in the stepped-up drive against drugs was to encourage state and local governments to follow the federal government's example of urine drug testing to identify drug using employees.\textsuperscript{104} The Justice Department has supported municipalities when challenged by employees for implementing drug testing policies.\textsuperscript{105}

\section{The Reasons for the Change in Employer Attitudes}

There are several reasons for the changes in attitudes. During the past twenty years, the use of intoxicants and illegal substances is believed to have increased and involved significant numbers of employees.\textsuperscript{106} Reports suggest that one worker in four is involved with substance abuse.\textsuperscript{107} Other reports indicate that one worker in eighteen sells drugs.\textsuperscript{108}

Initially attitudes changed after employers found the use of alcohol in the workplace incompatible with mechanization of the work-
Railroad and factory managers imposed prohibitions on the use of intoxicating beverages in the workplace to avoid accidents. During the 1970’s, testing procedures developed which provided objective screening methods for detecting drug use through the analysis of urine. With improved urine screening technology, it was possible for the vast majority of legal and illegal drugs to be identified and verified with a high degree of sensitivity and specificity. Improvements in drug screening technology and delivery of inexpensive, quick screen processes account in some part for the change in employer attitudes about employee drug use.

Perhaps the most influential factor which reshaped attitudes towards drug use was the perception by employers that drug use adversely affected profits. Business could not ignore exhortations from management consultants that drug use among employees affected their bottom lines. Peter Bensinger, advisor to management, estimated that employers were paying $500 to $1000 per employee because of drug abuse problems in the workplace. Studies attributed significant amounts of absenteeism, productivity losses, worker injuries, fatalities, and public safety hazards to either illicit drug or alcohol abuse by employees. Estimates of the direct

109. Id. at 285.
110. Id. at 286.
111. Alcohol and Drugs in the Workplace: Costs, Controls and Controversies, Special Report (BNA) at 27 (1986) [hereinafter BNA Special Report].
113. Screening for Alcohol and Drugs, 121 Lab. Rel. Rep. (BNA) 199 (Mar. 17, 1986) (stating that “[t]he cost to industry from employee substance abuse has been estimated at upwards of $100 billion per year.”).
114. See BNA Special Report, supra note 111, at 7.
115. Id. (stating that substance abusers are absent from work twice as many times as other workers, according to Peter Bensinger, president of the Chicago-based drug policy advisory group, Bensinger, DuPont and Associates).
116. The Employee Assistance Society of North America estimates that lost productivity due to drug abuse costs the U.S. approximately $8.3 billion a year. Id. According to some estimates, drug abuse costs the economy as much as $60 billion annually in lost productivity. See Kruger, supra note 25, at 15-16. A study conducted by North Carolina’s Research Triangle Institute estimated that drug abuse by employees cost employers approximately $33 billion in productivity losses in 1983. See BNA Special Report, supra note 111, at 8.
117. The railroad industry is a prime example of numerous injuries occurring due to employee drug abuse. According to the Federal Railroad Administration, 48 accidents took place between 1975 and 1984, with alcohol or drugs as “directly affecting causes.” BNA Special Report, supra note 111, at 9.
118. The 48 drug-related railway accidents between 1975 and 1984 resulted in 37 fatalities. Id.
119. “Drug abusers are three times as likely as nonusers to injure themselves or someone else.” Castro, supra note 90, at 59.
costs to industry from drug use ranged from $85-$100 billion per year.\textsuperscript{120} It was even posited that American industry's ability to compete with foreign manufacturers in domestic and international markets for manufactured goods was adversely affected by employee drug abuse.\textsuperscript{121}

Already ignited by profitability concerns, the national campaign to decrease the consumption of illicit substances by Americans added more fuel to the drug testing movement.\textsuperscript{122} On July 28, 1983, former President Reagan issued Executive Order 12,435, establishing a Commission on Organized Crime, directing it to examine the nature and scope of organized crime in the United States, and to make recommendations concerning the "appropriate administrative and legislative improvements in the administration of justice."\textsuperscript{123}

Three years later, in March 1986 the Commission presented its report to the President.\textsuperscript{124} The Commission concluded that "drug trafficking is the single most serious organized crime problem confronting this country."\textsuperscript{125} The Commission did not concede that traditional law enforcement efforts had failed to stop the flow of drugs into the United States; the Commission did, however, focus on the need for a concerted campaign to reduce the demand for narcotics in the United States to complement current law enforcement ef-

\textsuperscript{120} See supra note 116 (discussing the costs of drug abuse to the economy). These statistics should be viewed with caution since some question the ability of those who promulgate them to measure the costs to employers from drug abuse and the motives of those who develop the statistics. Krueger, supra note 25, at 15-16.

\textsuperscript{121} See also Masi, Drug Free Workplace: A Guide for Supervisors 3 (1987).

\textsuperscript{122} BNA White House Fact Sheets on President's Commitment to National Crusade Against Drugs, and Executive Order on Drug-Free Federal Workplace, 24 Gov't Empl. Rel. Rep. (BNA) 1298 (Sept. 22, 1986) (stating that President Reagan often referred to the national effort and his personal commitment to reducing both supply and demand for illegal drugs). The President's new program involved six goals: eliminating illegal drugs from workplaces; eliminating drug abuse in schools; providing effective treatment for those suffering from past abuse; improving international cooperation to stop the inflow of illegal drugs; further state law enforcement; and increasing public awareness and drug abuse prevention. Id.


\textsuperscript{124} REPORT OF COMMISSION ON ORGANIZED CRIME, PRESIDENT'S COMMISSION ON ORGANIZED CRIME (1986).

\textsuperscript{125} Id. at 452.
The Commission also recommended suitable drug testing for federal and governmental contractors' employees. This recommendation was viewed as essential to reducing the demand for drugs. In 1986 the sudden death of Len Bias, a prominent college basketball athlete, focused national attention on the problem of drug use. After Bias' death, a University of Maryland task force recommended a widespread program of drug testing for students, staff, and faculty. With public attention focused on the drug problem, initiatives to stem drug use became a political agenda. "The War on Drugs" received bipartisan support and became an issue with public appeal.

On September 14, 1986, President Reagan and his wife, Nancy delivered a nationally-televised address in which they exhorted the American people to "rise up together in defiance against this cancer of drugs." The following day the President signed Executive Order 12,564, requiring agency heads to develop programs prohibiting drug use. With this impetus, illicit drug use became a major issue for the public. Urinalysis testing for illicit drug use gained acceptability as a means of curbing drug consumption.

On January 4, 1987, a Conrail freight locomotive collided with an Amtrak passenger train, resulting in the deaths of sixteen people. The public's attention was refocused on the issue of drug use by public transportation workers after urine and blood tests of crewmen of the Conrail train disclosed "traces of marijuana." Propos-

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126. Id.
127. See generally Brecher, supra note 74 (discussing the development of drug laws in the United States, and concluding that these laws have failed to control drug use and that controlling demand is a solution).
129. Id.
130. See Wall St. J., July 1, 1988, at 38 (discussing the proposals submitted to President Reagan by the National Drug Policy Board). The Board recommended [w]ithdrawing Federal student aid for a year from students convicted of drug use or possession offenses, testing prison inmates for drugs to discourage use, providing more money, arms and air planes to help other countries eradicate drug crops, establishing 'constitutional procedures' to impose the death penalty for drug-related murders, establishing exceptions to the 'exclusionary rule,' which prohibits introduction of improperly seized evidence in court, revoking passports of those caught bringing illegal drugs into the U.S.
132. Id.
134. Id.; see Jacoby, supra note 98, at 66.

On January 4, 1987, Conrail engineer Ricky Gates reported to work as usual in a
Employers were also encouraged to use drug testing by reports that drug testing had decreased drug use. The military had used testing since 1981. Penal institutions and professional sports were also testing. Drug testing gained support as reports suggested that testing decreased drug use, enhanced productivity and addressed a plethora of work-related problems.

Employment drug testing became one of the government’s strategies for fighting the war on drugs. In addition to law enforcement agencies, traditional non-law enforcement entities, such as employers, educational institutions, federal governmental contractors, were used to ferret out and identify those persons who use illegal substances.

IV. WORKPLACE DRUG TESTING FROM A TECHNOLOGICAL PERSPECTIVE

A. The Urinalysis Process

Urine testing for drugs involves analysis of the urine specimen by accepted toxicological methods in order to determine drug use or exposure to drugs. Urine, as compared with blood, is the “speci-
men of choice” for drug testing.\footnote{142} Collection of urine is easy and does not generally require invasive techniques to procure the specimen.\footnote{143} Drugs are readily detected in urine specimens, since urination is the primary means by which drugs and their metabolites are excreted from the body.\footnote{144}

Although a number of body tissues and fluids can be used for drug testing, the most common specimen is urine for the following reasons: (1) the collection of urine is not invasive; (2) large volumes can be collected easily; (3) drugs and their metabolites are generally present in higher concentrations in urine than in other tissues or kidneys; (4) urine is easier to analyze than blood and other tissues because of the usual absence of protein and cellular constituents; and (5) drugs and their metabolites are usually very stable in frozen urine, allowing long-term storage of positive samples. Drug Testing, 257 J.A.M.A. 3110 (1987). In addition to urinalysis testing, there are a number of other laboratory procedures available which may be utilized to detect alcohol or drug use.

Hair may be tested to determine drug use over a period of time. Human hair has been found to contain methamphetamine, imipramine, nicotine and the metabolites of these substances. Cox, Analysis of Hair Traces Drug Use, NAT’L L. J., 3 (1987); Ishiyama, Nagai, & Toshida, Detection of Basic Drugs (Methamphetamine, Antidepressants, and Nicotine) from Human Hair, 28 J. FORENSIC SCI. 380 (1983).

Breath samples may be analyzed to detect alcohol use and will provide corollary information on blood alcohol levels. Breath samples, in contrast to testing of hair and urine, may more accurately reveal if the individual has used drugs within a period of time which would render him impaired to perform his duties. Cohen, Drugs in the Workplace, 45 J. CLINICAL PSYCHIATRY 4, 7 (1984).

Blood, in contrast to urine, may be tested for the actual presence of the drugs. However, the quantity of a particular drug, with the exception of alcohol, necessary to constitute impairment, is still subject to medical debate. Thus, while blood alcohol levels indicating intoxication have been agreed upon by the medical and legal communities, such levels for other drugs have not been established. Consensus Development Panel, Drug Concentrations and Driving Impairment, 254 J.A.M.A. 2618, 2620 (1985).

Except for ethanol, determinations of drug concentrations in body fluids are at present of limited value for establishing driving impairment. Adequate information on correlations of body fluid concentration of drugs with measurements of behavioral impairment are rare. Data currently available indicated wide ranges of drug concentrations may be present at equal levels of impairment; also, evidence of impairment is often lacking in some subjects at drug concentrations that are associated with impairment in others.

Id. Brain waves may be measured by machines which collect brainwave data. Compare that data with references for standard wave forms and print out the results. N.Y. Times, Mar. 22, 1986, at 36, col. 1. Described as “non-invasive,” this method is capable of detecting drugs such as cocaine, heroin, or alcohol. Id.

Tests have also been done on saliva, which may be analyzed for the presence of THC, the active ingredient causing psychoactive impairment in marijuana. THC may be detected in saliva from two to several hours after consumption. McBry, J. FORENSIC SCI. 874, 876 (1988).

“The finding of THC in saliva or breath indicates marijuana smoking sometime before obtaining the specimen, but its presence cannot be correlated with the time of smoking with blood concentrations, or with impairment.” Id.

141. See Drug Testing, supra note 140, at 3111.

142. Id.

143. See Kaufman, supra note 140, at 4.
The use of urinalysis in employment drug testing should be viewed as a laboratory process involving two steps: screening tests and confirming tests.144 Where the results are to be used to make employment decisions, urinalysis drug testing should incorporate both testing procedures.

1. Differences Between Screening and Confirming Tests.—Screening tests determine the presence or absence of drugs and, if present, their probable identity.145 Screening tests are designed for maximum sensitivity; they are capable of detecting the presence of the substance for which the test is being conducted.146 Screening procedures are designed to elicit very few or no false-negative results. A negative result terminates the testing process.147

Several testing methodologies are used for analytical drug screening of urine. Among those currently used are enzyme multiplied immunoassay, radioimmunoassay (RIA) and thin-layer chromatography (TLC).148 Immunologic assays (enzyme multiplied immunoassay and the radioimmunoassay) are the methods of choice for screening urine for drug use.149 The enzyme-multiplied immunoassay technique has advantages. It is rapid, inexpensive, and can detect a

144. Id.; see Caplan, supra note 136. Yale H. Caplan, Ph.D., Chief Toxicologist of the Office of the Chief Medical Examiner of Baltimore, Maryland, has observed “[t]o properly realize the results derived from drug testing urine, the entire process must be considered in its totality, from specimen collection and transport through screening and confirmation analysis to final report and interpretation of the results.” Caplan, supra note 136.

145. “The screening test should be sensitive and drug class selective generally employing an immunoassay technique. These procedures will identify and eliminate negative specimens and select presumptive positive specimens.” Caplan, supra note 136.

146. Kaufman, supra note 140, at 4.

147. Drug Testing, supra note 140, at 3110. A false-negative is the failure to find a drug that is there, while a false-positive is finding a drug that is not there. Lundberg, supra note 112, at 3004.

148. Drug Testing, supra note 140, at 3112.

149. Kaufman, supra note 140, at 4 (noting that immunoassays are one of the most commonly used assays). A kit using the enzyme-multiplied immunoassay technique is manufactured by the Syva Company under the trade name ‘EMIT.’ Id. at 5.

The EMIT assay is performed by following a complex sequence of steps. First a drop of urine is mixed with antibodies against the drug being sought, known quantities of the drug labeled with an enzyme, and a substrata on which the enzyme can act. The unlabeled drug in the specimen and the added enzyme-labeled drug compete for binding with the antibodies. As a result, the more unlabeled drug there is in the specimen, the more enzyme-labeled drug is left free to react with the substrata. The enzyme-substrata reaction causes a color change that is measured with a spectrophotometer. The degree of color change represented by this measurement is proportional to the amount of drug and/or drug metabolites present in the original specimen.

Id.
number of drugs.\textsuperscript{150} The radioimmunoassay technique,\textsuperscript{151} on the other hand, has been used extensively by the military.\textsuperscript{152} It requires the use of radioactive substances, a laboratory with an expensive gamma counter to analyze the radioactivity, and specially trained professionals.\textsuperscript{153} Thin-layer chromatograph (TLC) can be used to screen for a spectrum of drugs, as many as fifty, a broader range than the immuno-logic assays.\textsuperscript{154}

Confirming tests, in contrast to screening tests, are more specific. They separate true-positive from false-positive results.\textsuperscript{155} When determining the appropriate confirming test, the use of the test should be a consideration.\textsuperscript{156} If the results are to be used for diagnostic purposes or to monitor progress in a rehabilitation program, clinical confirmatory procedures may be used.\textsuperscript{157} These procedures are reliable but do not meet forensic standards.\textsuperscript{158} If the results “impact on the life, liberty, property, reputation, or employment of a person being tested, [they] must be able to withstand the scrutiny of litigation and therefore must meet forensic standards.”\textsuperscript{159}

\textsuperscript{150} Drug Testing, supra note 140, at 3113.

\textsuperscript{151} The radioimmunoassay technique works according to the principle that a drug labeled with a radioactive substance competes for the antibody binding site with the same drug not labeled with a radioactive substance. \textit{Id.} at 3112. “The more unlabeled drug there is in the sample, the less radioactive drug binds to the antibody. After all reagents are mixed, the drug-radioactivity is measured in the supernatant.” \textit{Id.}

\textsuperscript{152} Morgan, supra note 93, at 306.

\textsuperscript{153} Kaufman, supra note 140, at 5. “The RIA, because of its use of radioactive isotopes, must generally be used in a licensed laboratory facility although a large or moderately-sized company could easily obtain a license for an on-site laboratory.” \textit{Id.}

\textsuperscript{154} Drug Testing, supra note 140, at 3112.

\textsuperscript{155} \textit{Id.} at 3110.

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} at 3111. “Forensic confirmations must (1) unequivocally establish the identify of the compound(s) detected, (2) quantify the compound(s) detected, and (3) document a chain of custody.” \textit{Id.} A well-documented chain of custody would require:

The urine should be collected under direct visualization to verify the source of the sample. The urine should then be labeled carefully to prevent intentional or inadvertent confusion of the samples. Each time a sample changes hands, an authorized person should sign for the sample and verify that it is in a sealed container. Chain-of-custody forms are designed to establish an audit trail for the court . . . . The testing laboratory should save a portion of the sample in its original container for future testing should any question arise regarding the results.

\textit{Id.} In \textit{Wykoff v. Restig}, the court indicated that the following procedures would establish the chain of custody of a specimen: seal the sample in the presence of the donor; keep a written record of the location and transportation of the samples at all times while the samples are in the possession of the facility; store the specimens in a locked refrigerator with very limited access; and give a duplicate copy of the test results to the individual. 613 F. Supp. 1504, 1514
Early decisions challenging the accuracy of urinalysis dealt with testing programs which used only screening procedures. A constitutionally acceptable employment drug testing policy would need to utilize both screening and confirmation laboratory procedures. Use of screening results alone would violate procedural due process requirements.

2. Accuracy Problems with Urinalysis Testing.—As discussed previously in Part II, there are concerns that urine tests are prone to error, capable of misidentifying licit substances as illicit ones. There are legitimate concerns that urinalysis may erroneously brand an employee as a drug user.

When one considers the sources of accuracy problems with urinalysis testing, one may conclude that these problems can be addressed. Inaccurate results may stem from several sources including the test, personnel who administer it, and the individual tested.

a. Accuracy Problems Stemming from Screening Procedures are Addressed by Confirmation Testing.—Immunoassay screening procedures lack the ability to accurately identify the substances detected. False-positive results may occur because screening procedures have misidentified over-the-counter or prescription drugs as illicit psychoactive substances. Such problems may be addressed by a preferred confirmatory testing method, GC/MS (Gas}

(N.D. Ind. 1985). The failure to have appropriate chain of custody procedures raises due process issues. Id.

160. See supra note 144 (listing relevant cases).
161. See, e.g., Hester v. City of Milledgeville, 598 F. Supp. 1456, 1475-77 (M.D. Ga. 1984) (holding that the fact finding procedure must be reasonably calculated to arrive at the truth required and that procedural due process requires a procedure designed to ascertain the truth with reasonable accuracy); Jones v. McKenzie, 628 F. Supp. 1500, 1506 (D.D.C. 1986), rev'd, 833 F.2d 335 (D.C. Cir. 1987) (holding that an unconfirmed EMIT test is not sufficiently reliable to afford due process since the manufacturer warns that “positive results should be confirmed by an alternate method”); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (stating that “part of the due process guarantee is that an individual not suffer punitive action as a result of an inaccurate scientific procedure.”). But see Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (denying injunctive relief to plaintiff prisoners where EMIT test was confirmed by a second EMIT using numerical benchmarks assigned to various standards of proof) (ruling that prison officials could impose sanctions on prisoners based upon unconfirmed EMIT test when court accepted 97% accuracy rate for the test as sufficient); Peranzo v. Coughlin, 608 F. Supp. 1504 (D.C.N.Y. 1985). The “various standards of proof may be fairly estimated as 50+% for preponderance of the evidence, 70% for clear and convincing evidence, above 80% for clear, unequivocal and convincing evidence, and 95+% for evidence beyond a reasonable doubt.” Peranzo, 608 F. Supp. at 1512 (citing United States v. Fatico, 458 F. Supp. 338, 403-406 (E.D.N.Y. 1978)).

162. See supra text accompanying notes 20-64.
163. Morgan, supra note 93, at 309.
164. Lundberg, supra note 112, at 3004.
Chromatography coupled with Mass Spectrometry).165

b. Accuracy Problems Due to Laboratory Personnel are Addressed Through Careful Selection and Supervision of the Laboratory.—Accuracy problems with urine drug testing can stem from those who administer the testing. Data concerning accuracy problems with licensed laboratories demonstrate "woefully poor" performance by many laboratories.166 If laboratories with licensed personnel are prone to errors, then on-site testing by unlicensed personnel must be even more suspect.167

In its report, "Scientific Issues in Drug Testing; Council on Scientific Affairs," the American Medical Association recommends that accredited laboratories perform urinalysis drug testing and suggests the Center for Disease Control or the College of American Pathologists as accrediting agencies.168 The Council also recommends regular proficiency testing.166

c. Accuracy Problems Caused by the Individual Tested are Addressed by Specimen Collection Procedures Which Prevent Subterfuge.—Experiences with prisoners and drug abusers suggest there

165. See Walsh & Hawks, Drug Screening: Is It Always Reliable?, 1987 U.S. PHARMACIST 107, 110 (stating that "[b]ased on its accuracy, gas chromatography/mass spectrometry is the procedure that is most often used in forensic work."); Drug Testing, supra note 140, at 3113; see also Morgan, supra note 93, at 312. "Many commentators now feel that a positive immunoassay screen must be confirmed by gas chromatography plus mass spectrometry (GC/MS). This may be particularly applicable when an accepted individual brings suit after losing job or status privileges." Caplan, supra note 136.

In spite of the capabilities of GC/MS, it should not be assumed that the results of GC/MS are conclusive. The instrument can be operated in a variety of modes, the choice of which depends on what drugs are to be detected, the minimum concentration of drugs that will constitute a positive identification, and whether or not the concentration of the drug is to be quantitatively determined. The reliability of the [assay] is also dependent upon the skill and experience of the operator and the method used for extraction and preparation of the drug(s) from the urine. If appropriate methods are used by well-trained analysts then a GC/MS analysis can insure conclusive identification for a suspected drug. Id.

166. Lundberg, supra note 112, at 3004.
167. See Morgan, supra note 93; Bigger, supra note 140.
168. The Council advises in its report "that the laboratory director should be a pathologist, other physician, toxicologist or doctoral-level laboratory scientist who has extensive experience and background in analytic chemistry, clinical pharmacology, and/or forensic toxicology. The director should be qualified to interpret the results of the test procedures." Drug Testing, supra note 140, at 3111. A survey conducted by the General Accounting Office concluded that there was no uniform nationwide regulation of laboratories which perform employee or job applicant drug testing, 6 Empl. Rel. Wkly. (BNA) 1288 (Oct. 17, 1988).

169. Drug Testing, supra note 140, at 1311. See also Laboratory Accreditation Standards Are Described At House Hearing, 6 Empl. Rel. Wkly. (BNA) at 849 (June 14, 1987) (describing standards proposed by the National Institute on Drug Abuse for laboratories which perform federal employee drug screening programs); 53 Fed. Reg. 11,970 (1989).
are numerous opportunities for contamination, sabotage or manipulation of the specimen.\textsuperscript{170} A test subject engaging in such conduct will be attempting to avoid detection of his drug use.

A few methods by which individuals have used to avoid detection of drug use include switching clean urine with their own contaminated specimen, adding compounds and water to the specimen, and flushing or drinking large quantities of fluids or taking diuretic preparation prior to the test to rapidly remove fluid from the body so that the drug concentration is reduced below the sensitivity level of the test.\textsuperscript{171}

Subterfuge may be detected through laboratory procedures. The testing laboratories can identify urine samples which appear to be diluted or contaminated.\textsuperscript{172} Specific gravity tests may detect dilution.\textsuperscript{173} Collection of the urine specimen under direct visual observation has been used to avoid switching of samples and contamination.\textsuperscript{174} This procedure is avoided because it is unpleasant for both the observer and the person being watched. Social taboos associated with directly watching a person urinate often result in the observer not directly watching the collection of the urine.\textsuperscript{175} The Council on Scientific Affairs of the American Medical Association has concluded that if testing is to meet forensic standards, the specimen collection should be directly observed.\textsuperscript{176}

C. Technological Perspectives on Urinalysis Results

Urinalysis results are frequently reported as positive or negative.\textsuperscript{177} Urinalysis results may also be expressed quantitatively.\textsuperscript{178}

\textsuperscript{170} Bigger, supra note 140, at 32-33.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Drug Testing, supra note 140, at 3111. Dr. George P. Lundberg's criticism of employment urinalysis drug testing describes the process of observed micturition as follows:

The problem of positive specimen identification remains unchanged. Proper urine drug screening requires that that specimen collection be done under conditions of direct informed observation of urine flow from the urethra to the container. Without large numbers of diligent and devoted micturition observers, the entire mandatory urine drug screening system becomes a travesty certain to fail. Lundberg, supra note 112, at 3004. See Where There's A Market, 5 Empl. Rel. Wkly. (BNA) 198 (Feb. 16, 1987) (referring to newspaper advertisement offering lab tested urine specimens totally free of illegal drugs in contoured, body-heat absorbing containers for $49.95).
\textsuperscript{175} Drug Testing, supra note 140, at 3111.
\textsuperscript{176} Id. at 3112.
\textsuperscript{177} Walsh & Hawks, supra note 165, at 114. If the sample is reported as positive, the laboratory has detected the drug in an amount exceeding the cutoff level that it has set for the drug. Id. “Different laboratories using different procedures and methods may have different
These reports express the results in terms of the concentration of the detected substance in a certain amount per volume of urine. Depending on the drug, urine concentrations may be expressed as either nanograms per milliliter (ng/ml) or as micrograms per milliliter (ug/ml).

Urinalysis results reveal prior exposure or drug use. They do not establish the time of consumption, method of ingestion, impairment, intoxication, or use patterns.

Urinalysis test results are not necessarily probative evidence of impairment or intoxication from the substance detected.

There is almost no proven correlation between any positive urinary test for drugs and observed or assessed human behavior. The tests that assess the drugs of most current interests (marijuana and cocaine) measure metabolites of the drug that persist for hours or days after use. Therefore, any positive tests cannot be used in an assessment of work-related dysfunction because it might well reflect recreational or even work-related use within the past period.

V. PRAGMATIC PERSPECTIVES ON DRUG TESTING: DRUG TESTING POLICIES

A. Policies Vary Among Employers

The quality of managerial decision-making associated with the cutoff levels, therefore one laboratory could determine a sample to be positive while another may determine the same level to be negative. Id. See also Caplan, supra note 136 (stating that “[a] urine drug analysis report should include the following information: (1) the drugs and metabolites included in the test; (2) the cutoff limits for each assay including screening and confirmation; (3) the methodology employed in each assay . . . and (4) the drugs and/or metabolites confirmed as positive.”).

178. Walsh & Hawks, supra note 165, at 114.
179. Id.
180. Id.
181. National Ass'n of State Personnel Executives and Council of State Gov'ts, supra note 36, at 32 (referring to article by David L. Black, Asst. Professor, Vanderbilt U. Medical Center, Pathology Dep't.).
182. Id.

A confirmed positive result offers nearly 100% assurance that the specimen tested does in fact contain a drug or drugs. However, assays for drugs of abuse do not necessarily indicate how the drugs were used, nor can they distinguish between drugs that were obtained legally and drugs obtained or used illegally. [The tests] . . . can provide only a very general and unreliable estimation of the time of drug use, and a positive test result gives no indication of whether or not the user's behavior was affected at the time of specimen collection.

Kaufman, supra note 140, at 10.
183. Morgan, supra note 77 (illustrating this point with an example). "An employee who smokes [a marijuana cigarette] on Friday night and is tested on Monday could have a positive test despite the fact that he is sober." Id. at 306.
adoption of a drug testing policy will vary. Some employer policies reflect well-formulated managerial decisions. They are characterized by concerns for accomplishment of legitimate work-related objectives along with respect for the dignity of the individual employee. The general consensus is that well-formulated policies are specific and written; reflect appropriate consideration of work-related objectives which necessitate urine testing; are communicated to employees in advance of such testing; contain adequate procedures to ensure accurate results (i.e., careful laboratory selection, chain of custody procedures, and use of confirmatory tests); maintain the

184. See Axel, supra note 85, at 24 (recommending that companies "[d]evelop a specific and written substance-abuse policy."). Id. The policy should be developed in consultation with all elements of the company that might be affected, such as the union representatives, occupational safety and health divisions, the employee assistance program, security personnel, and the firm's legal department." Id.; See Stille, Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers, 1986 Nat'l. L.J. 1, 24 (stating that the National Institute on Drug Abuse sponsored a major conference on drug testing in the workplace that brought together corporations, civil liberties groups and scientists). The groups reached a consensus, "[a]ll people tested must be informed that they are being tested. An employee cannot be tested without a clear job performance problem—either an accident at work or an objective decline in effectiveness at work. All positive tests must be confirmed through the use of alternate tests. Test results must remain confidential. Use of urinalysis must be accompanied by drug rehabilitation." Id.

185. See Masi, supra note 121, at 69-70.
Before a drug testing method is implemented, a company should ask some key questions: why does the company want to test? Is it because an impaired employee might threaten the safety of others? Are the employees in positions of public trust? Jobs should be classified according to five categories: Public safety, National security, Safety of a Co-Worker, Public trust, and Fitness of work. Each area must be defined in terms of what effect drug use would have on the employee's job performance. These categories could then be correlated with an appropriate method or methods of urinalysis testing, based on the amount of risk in having an impaired employee in each category.

Id. See also 5 Empl. Rel. Wkly. (BNA) 1076 (Sept. 21, 1987) (suggesting that as methods to assess the prevalence of substance abuse problems that employers review EAP and health insurance utilization, conduct a confidential employee survey, analyze accident reports coupled with disciplinary actions and/or arbitrations, and determine if there is evidence that drugs are sold on company premises).

186. "Inform all job applicants and employees of the policy. Document the relationship between substance abuse and job performance. Employees should be given advance notice of any possible disciplinary actions that might be instituted as a result of confirmed substance abuse on the job." Axel, supra note 85, at 54. The due process clause of the fourteenth amendment requires that notice be given of the testing. Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

187. National Ass'n of State Personnel Executives and the Council of State Gov'ts, supra note 36, at 31 (stating that "[d]eveloping and operating a dependable drug testing program goes beyond addressing the analytical technologies employed."). Important issues include specimen collection and identification; transport of specimen to reference laboratory with proper chain of custody; screening test technology; confirmation test technology; limited access to drug testing area, data or reports; training of technologists and instrument maintenance."
confidentiality of testing results, restricting their dissemination to limited personnel;\textsuperscript{188} avoid unnecessary affronts to the privacy and dignity of the employee through the use of trained medical and professional personnel and procedures;\textsuperscript{189} and, include as their goal educational and rehabilitation objectives so that detection and discipline are not the sole aims of drug policy.\textsuperscript{190}

Other management policies suggest "knee jerk"\textsuperscript{191} reactions to perceived problems of drug use. These policies needlessly offend human dignity without accomplishing legitimate employment goals. Such policies spawned some of the early litigation.\textsuperscript{192}

Regardless of their merit, employer alcohol and drug testing policies typically contain three components: toxicological examination of bodily fluids; rehabilitation and educational objectives; and disciplinary procedures for violation of employer drug policies.\textsuperscript{193}

\textit{Id.}

\textsuperscript{188} "Urine test results are sent by the laboratory to the Executive Director and are available to that official, a designee, and the commissioners. Pursuant to the express provisions of the regulations, the results are kept confidential even from the enforcement agencies." \textit{Shoemaker}, 795 F.2d at 1140.

\textsuperscript{189} See, e.g., \textit{Capua}, 643 F. Supp. at 1515 (citing \textit{Shoemaker}, 795 F.2d at 1144).

\textsuperscript{190} "To be most effective, urinalysis should be used as part of a comprehensive health and safety program aimed at detecting and preventing substance abuse." \textit{Axel}, supra note 85, at 27.

\textsuperscript{191} In \textit{Capua}, fire fighters were ordered to take a surprise urine test. \textit{Capua}, 643 F. Supp. at 1511. The Fire Chief and the Plainfield Director of Public Affairs entered the station, locked all the doors and awakened the employees. \textit{Id.} Each employee was required to submit a urine specimen while under the watch and supervision of bonded testing agents. \textit{Id.}

\textsuperscript{192} In \textit{Capua}, the City of Plainfield proceeded with urine testing without any specific knowledge or information that any individual fire department employee was under the influence of drugs. \textit{Capua}, 643 F. Supp. at 1511-12, 1516.

\textsuperscript{193} Hooker, \textit{The Pitfalls of Pre-Employment Drug Testing}, 6 \textit{GRAND RAPIDS BUS. J.} 36 (1988) (stating that "[s]ince the prudent employer's ultimate objectives are increased productivity, better employee health and workplace safety, substance abuse screening should be but one aspect of a company-wide policy on substance abuse, which might also include employee and supervisor education; employee assistance plans and health insurance coverage of such problem.").

Any discussion of drugs in the workplace usually leads to the topic of drug testing. Sophisticated testing procedures can now reveal traces of various drugs in the body, often over a month after these substances were last taken. Most commonly used is the urinalysis, which can provide information ingested down to several nanograms per milliliter of urine. A company wishing to become involved in drug testing must also be clear on its policies. This clarity will aid the company in instituting a fair, workable testing and rehabilitation program, and a lucid, written policy that protects everyone involved legally.

\textit{Masi}, supra note 121, at 3.
B. Policies May Provide for Applicant Testing or Testing of Both Applicants and Employees

Employers who test for drug use routinely require job applicants to submit to urinalysis.194 Job applicants may be screened without regard to the nature of the job or safety issues.195 Health and safety concerns are often cited as the reasons for implementing testing programs, but mass testing of job applicants suggests that safety is not the chief employer concern; rather, the desire is to avoid hiring a drug abusing individual.196

Testing of incumbent employees is proceeding at a slower pace than testing of job applicants.197 Among the reasons for employer reluctance to test incumbent employees is the concern that such testing would generate anger and resentment among employees.198 Companies whose employees are represented by a collective bargaining agent have additional concerns. Drug testing may violate collective bargaining agreements or national labor laws, subjecting the employer to arbitral, administrative or judicial sanctions.199 Publicity

194. See Hooker, supra note 193. "As of late 1987 at least 30% of the Fortune 500 companies had adopted substance abuse policies that included drug and alcohol screening of applicants for employment. Typically, these companies refuse to hire applicants who fail, or 'test positive.'" Id. See BNA Special Report, supra note 111. "A third method to limit testing is to conduct only pre-employment screens." Id. "The belief is that such screens will keep drug users from joining the company work force, or force them to reform before they join." Id.

195. See Stille, supra note 184, at 1.

Those most often tested are job applicants . . . . Companies are much less careful in testing applicants . . . . A urine sample will be taken from the job applicant as part of a general physical examination . . . . [A]nother problem, scientists say, is that many companies do not bother to perform confirmation tests when a job applicant's urine test is positive for drug use.

Id.

196. Boring to Test all New Applicants for Drugs, 4 Empl. Rel. Wkly. (BNA) 1458 (Nov. 24, 1986) (discussing that the employer noted how many other Fortune 500 firms test and expressed concern that if they did not test they may get the drug abusers or those who refuse to submit to testing).

197. See BNA Special Report, supra note 111, at 33 (stating that Alfred Klein, a management attorney from Los Angeles, expressed certain concerns over drug testing). "Employers can jeopardize valuable employees through drug screens. Widespread screening efforts have been the source of employee protests." Id.

198. "The fear is that employees will perceive a testing program as a detection and discipline device, and thereby destroy employees' trust that the employer is trying to help them - a critical element to EAP success." Id. at 44. See Capital Cities/ABC To Test Job Seekers For Drug Use, Wall St. J., July 10, 1987, at 16 (discussing that management decides to study the prospect of testing employees "after widespread public protest from employees.").

199. See, e.g., Johnson-Bateman Co., 295 N.L.R.B. 26 (1989) (holding that drug testing for incumbent employees is a mandatory subject of collective bargaining); In re Phillips Industries, 90 Lab. Arb. (BNA) 222 (1988) (stating that the arbitrator held unilateral implementation of testing policy violated the agreement); NLRB Issues Complaint Over Drug Testing Plan, 5 Empl. Rel. Wkly. (BNA) 711 (June 8, 1986) (stating that the NLRB issued a com-
and notoriety associated with the litigation brought by public sector employees may also deter testing of incumbents.\textsuperscript{500}

C. Testing Strategies

When analyzing legal issues raised by urine drug testing, it is helpful to identify the testing strategy used by the employer. There are several broad categories including mass or random testing (suspicionless testing); testing based on an employer's suspicion that the individual employee is either intoxicated, has used drugs, is under the influence of drugs while at work, or is impaired due to drug abuse or addiction (reasonable suspicion or probable cause testing); and drug testing as part of a physical examination (suspicionless drug testing associated with a search which otherwise is not being challenged).

Initially courts considered mass or random testing (suspicionless testing) unconstitutional.\textsuperscript{201} Testing based on a reasonable suspicion was usually considered constitutional.\textsuperscript{202} Routine physical examinations requiring urinalysis for drug use have been considered constitutional even in the absence of an individualized suspicion of drug use.\textsuperscript{203} Suspicionless and suspicion testing strategies are described below.

Under mass testing policies all employees or job applicants will be required to submit to urine drug testing.\textsuperscript{204} Employees will be


\textsuperscript{202} See infra text accompanying note 341 (describing suspicionless post accident testing policies considered by the Supreme Court in Skinner).
tested even though there are no previous suspicions of drug use and even if job performance is adequate or exceptional.

Similar to mass testing under random testing programs employees are tested even though there is no belief or suspicion of drug use or impairment to work. Random testing differs from mass testing because random testing programs do not require all employees to submit to urinalysis. Rather, employees are randomly selected for testing through the use of objective selection criteria. Random testing has been used in prison settings with courts upholding its constitutionality as long as the random selection procedure is objective and non-discriminatory.

Reasonable suspicion testing is based on the employer's belief that, because of some conduct of the employee, and some event, (i.e., an accident occurring under suspicious circumstances or an encounter with law enforcement authority for violation of drug laws) the employee has used drugs, violated company rules or is impaired to perform his job duties. This testing has been less controversial than suspicionless testing.

The various testing strategies raise different legal issues. Suspicion based testing raises questions such as what suffices as an adequate, reasonable suspicion. What quantum of suspicion is necessary, reasonable suspicion, probable cause, or mere suspicion? In Smith v. White, employees argued that the employer lacked a reasonable suspicion to require urine testing for drug use since no one had actually observed any work behavior allegedly influenced by drugs, though a nuclear power plant had required testing based on information obtained from another employee, who was a known drug abuser. That employee identified the employees tested as drug users or distributors. Investigations with local law enforcement agencies confirmed some of this information. The Eastern District Court of Tennessee, noting that reasonable suspicion was less than probable cause, concluded that the statements from other employees and informants' tips, confirmed as much as possible by subsequent investigation, were sufficient to create a reasonable suspicion that the

205. Spense v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986).
206. Id.
209. Id. at 1086.
210. Id. at 1087-88.
211. Id. at 1086-87.
employees were using drugs.\textsuperscript{212} Mass or random testing (suspicionless testing) raises issues regarding the circumstances under which the government may engage in suspicionless testing.\textsuperscript{213}

Employer drug testing policies may combine testing strategies. Job applicants may be subject to suspicionless testing while current employees are subject only to suspicion based testing. It is useful when engaging in constitutional adjudication to distinguish suspicionless strategies from suspicion based strategies.\textsuperscript{214}

VI. AN ANALYTICAL FRAMEWORK FOR ADDRESSING THE CONSTITUTIONALITY OF URINE TESTING

A. Determine the Relevancy of the Fourth Amendment to the Urine Testing Program

Two threshold issues determine the relevancy of the fourth amendment to a particular employment testing program: whether there exists the requisite state action; and whether the urine testing involves a fourth amendment “search” or “seizure.”

1. The State Action Requirement.—The Constitution prohibits governmental, but not private, deprivations of constitutional rights.\textsuperscript{215} Urine testing implicates the fourth amendment only when the government is considered as undertaking the testing. The fourth amendment applies to governmental conduct in both civil and criminal contexts.\textsuperscript{216}

If the employees tested work for federal, state or local governments, the state action requirement is clearly met.\textsuperscript{217} There are some circumstances where private employers may be considered state ac-

\textsuperscript{212} Id. at 1089-90. Cf. Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1143-44 (3d Cir. 1988). The employee, a police officer, challenged the city employer's determination that it had sufficient reason to suspect the employee used illicit drugs where the reasonable suspicion was based on another officer's first hand observations that the employee had used illicit drugs in her presence. Id. The allegation was later recanted. Id. The Third Circuit Court of Appeals cited the following as relevant factors for evaluating the reasonableness of a suspicion, "the nature of the tip... the reliability of the informant... the degree of corroboration... and other facts contributing to suspicion or lack thereof." Id.

\textsuperscript{213} See infra text accompanying notes 456-539 (discussing this issue in greater detail). This discussion is also relevant for evaluating the constitutionality of suspicionless testing within the context of searches. Id.

\textsuperscript{214} See McKenzie, 833 F.2d at 339 (suggesting that the constitutionality of random testing would include consideration of what level of suspicion might be required for random individualized testing).

\textsuperscript{215} Chermerinsky, Rethinking State Action, 80 Nw. U.L. Rev. 503, 508 (1986).

\textsuperscript{216} New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

\textsuperscript{217} See Chermerinsky, supra note 215, at 507 n.15 (stating that the state action refers to action at any level, federal, state or local).
tors. In *Skinner v. Railway Labor Executives Association*,218 the Supreme Court concluded private railroad employers were state actors because they served as agents for the federal agency regulating safe railway transportation.

State action is determined by "sifting facts and weighing circumstances."219 In *Burton v. Wilmington Parking Authority*,220 the Supreme Court declined to fashion a "precise formula for recognition of state responsibility," describing the endeavor as an "impossible task."221 Lower courts have developed various tests to determine whether sufficient state involvement exists to find state action.222

In *Skinner*, the Supreme Court noted that whether a private party should be deemed an agent of the government would turn on the degree of governmental participation in the private party's activities.223 There was sufficient evidence of active governmental participation where federal regulations governing private railroad employers not only indicated a "strong preference for testing,"224 but also removed legal barriers to the testing by preempting state laws and superseding provisions in collective bargaining agreements or arbitration awards.225 Further, the federal government had the right to receive test results or share in the "fruits of such intrusions."226 Accordingly, the private railroads were agents or instrumentalities of the government,227 where the government encouraged, endorsed and participated in the testing. Under the *Skinner* decision, private employers who conduct testing because of governmental regulations have had legal impediments to the testing removed because of federal regulations, and who share test results with governmental officials and governmental agents and thus are subject to constitutional

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220. Id.
221. Id.
222. See generally Chermerinsky, supra note 215 (discussing that the lower courts have developed various tests); Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1222-23 (5th Cir. 1982) (discussing three lines of state action doctrine which have emerged for determining the presence of state action: (1) symbiotic relationship which governs cases in which the government has so far insinuated itself into a position of interdependence; (2) public function concept which has two branches, one involving those functions exclusively reserved to the state, and the other involving the assumption by private parties of governmental powers; and (3) how heavily regulated the private enterprise is by the state so that a sufficiently close nexus between the state and the challenged action results in the action being treated as that of a state).
224. Id. at , 109 S. Ct. at 1412.
225. Id. at , 109 S. Ct. at 1411.
226. Id. at , 109 S. Ct. at 1412.
227. Id.
constraints. 228

2. The search requirement.—Once state action is established, the conduct must be the type protected by the fourth amendment searches or seizures. A fourth amendment search occurs when the government infringes upon “an expectation of privacy that society is prepared to consider reasonable.” 229 A fourth amendment seizure of the person occurs when the government meaningfully interferes with his liberty. 230 Seizure of property occurs when the government interferes with a possessory interest in the property. 231

Courts have usually concluded that urine drug testing programs are fourth amendment searches. 232 The method by which they reach this conclusion deserves examination and critique.

Because urine testing involves toxicological examination of a body fluid, consideration of the search issue may appropriately begin with the Supreme Court’s holding in Schmerber v. California. 233 In Schmerber, the Supreme Court considered chemical analysis of an individual’s blood alcohol level by means of a compulsory administered blood test, under the direction of police officials, a fourth amendment search. 234 Emphasizing the fourth amendment right of the people to be secure in their “persons,” the Court concluded without further analysis that “[s]uch testing procedures plainly . . . were searches of persons and focused upon the intrusion into the human body . . . associated with blood testing.” 235

In cases involving compulsory urine testing of employees district courts generally analogized urinalysis to blood alcohol testing and concluded the Schmerber holding was dispositive of the search issue. 236 Wholesale adoption of Schmerber’s reasoning is inapropri-

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228. Id.
230. Id. at 113.
231. Id.
234. Id.
235. Schmerber, 384 U.S. at 767.
236. See Feliciano v. City of Cleveland, 661 F. Supp. 578, 584 (N.D. Ohio 1987) (listing the cases); see also Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984). “Although it involves no forced penetration of body tissues, as does a blood test, it does involve the involuntary extraction of bodily fluids. In that sense, if not literally, it is an ‘invasion beyond the body’s surface.’” Id. (quoting Schmerber, 384 U.S. at 769).
Urinalysis does not require intrusion into the human body for specimen production. Adoption of Schmerber's analysis for urinalysis ignores distinctions between the privacy intrusions associated with urinalysis and those caused by blood alcohol testing. In Skinner, the Supreme Court appropriately recognized these distinctions. Unlike lower courts, the Court did not analogize urine testing to blood testing. Rather, the Court considered the privacy interests implicated during the collection of the urine sample and during the chemical analysis of its contents.

The question arises as to what relevant factors should be considered when determining whether urine testing infringes upon "an expectation of privacy that society is prepared to accept as reasonable." Courts generally have assumed societal attitudes towards urinalysis. Illustrative of this rationale is the following observation by the Federal District Court of Iowa in McDonnell v. Hunter: "[o]ne 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."

The Supreme Court in Skinner also assumed societal attitudes toward urinalysis when addressing the search issue: "[B]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."

Judicial perceptions of societal understandings, however, should not be the sole determinant when deciding whether to extend fourth amendment protections. Acknowledging that no "talisman exists which . . . determines in all cases those privacy expectations that society is prepared to accept as reasonable," the plurality in Ortega v. O'Connor observed that the Supreme Court had previously given weight to factors such as "the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the

237. *Skinner*, 489 U.S. at ___, 109 S. Ct. at 1413 (stating that "the procedure prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body.").
238. See id.
239. Id.
most scrupulous protection from government invasion." Ortega involved workplace searches of an employee's property, and the plurality noted that its opinion did not address the appropriate fourth amendment analysis for drug testing. Analysis of the factors set forth in Ortega permits a broader inquiry than judicial assessment of societal perceptions of privacy; it permits consideration of values underlying the fourth amendment by examining the intentions of the Framers of the fourth amendment.

a. The Intent of the Framers.—The fourth amendment was the Framers' response to broad and abusive searches conducted by the British government. The British had engaged in unrestrained searches in England and the American colonies, encountering resistance from both the English citizens and the American colonists.

The concept of search and seizure, however, was well-founded in English history long before the discovery of America. During the fourteenth century, the Tudors introduced broad search and seizure powers into England. By the sixteenth century the English government expanded the search power to enforce the state licensing system for printed matter. Searches to detect seditious libel and parallel offenses were conducted under broad warrants. Conditions did not improve during the next century. Authorities began to use the writ or warrant of assistance, a general warrant.

244. Id. (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)).
245. Ortega, 480 U.S. at 720.
246. See Kay, Adherence To The Original Intentions In Constitutional Adjudication: Three Objections And Responses, 82 NW. U.L. REV. 226, 228 n.11 (1988) (stating that the use of the original intentions of the Framers of the Constitution for constitutional adjudication has been the subject of frequent scholarly debate).
248. See Cohen & Kaplan, supra note 247, at 513-19. Edward III passed legislation in 1335 requiring innkeepers in the ports to search guests for imported counterfeit money. Id. The innkeepers, as a reward for their trouble, were given one quarter of the seizure. Id.
249. Id. at 513-14 (stating that "[t]he Stationer's Company, a private guild organization, was incorporated under Queen Mary in 1559 and, in return for monopoly privileges over printing granted to its members, was instructed 'to make search wherever it shall please them in any place . . . within our Kingdom of England . . . and to seize, take hold, burn . . . those books and things which are or shall be printed contrary to the form of any statute, act or proclamation.'").
250. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 26 (1976) (discussing that "[p]ersons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant.")
251. See Cohen & Kaplan, supra note 247, at 514 (stating that during the seventeenth century, King James authorized searches and seizures for "heretical, schismatical and seditious books, libels and writings.").
252. See Lasson, supra note 250, at 28; see also Hutchinson, supra note 247, at 293.
During the seventeenth century developments began which resulted in limitations on broad searches and seizures. Under the English common law, general warrants were declared void. "On April 25, 1766, Parliament adopted a resolution declaring all general warrants for the seizure of persons or papers illegal."

During the period when the English were struggling to free themselves from indiscriminate searches, the American colonists were being subjected to broad and abusive searches. To preserve the mercantile system, Parliament passed a number of Navigation and Trade Acts, which were designed to prevent the colonists from trading with areas outside the British Empire. This was accomplished by using prohibitive import duties.

Prior to 1760, enforcement of English trade acts was lax, and smuggling was rampant. After 1760 the British government began to make efforts in earnest to end the smuggling. The British used the "writ of assistance" as a principal weapon. Colonists opposed these writs. Several states adopted constitutional provisions prohibiting their issuance. Recollections of abusive searches conducted under general warrants were fresh in the memories of the Constitutional Framers. The fourth amendment was framed to prohibit the use of such writs and the abusive practices accompanying their execution.

(stating that "[a] general warrant is one which either does not give the name of the person to be apprehended, or does not specify any particular place to be searched.").

253. See COHEN & KAPLAN, supra note 247, at 514. A tax was abolished because enforcement required searches of homes. Id. Another tax failed to come into existence because enforcement required a similar search. Id. Another tax failed to come into existence because enforcement would have subjected warehouses to searches under general warrant. Id.

254. Id. at 515. See also HUTCHINSON, supra note 247, at 205 (discussing a series of English cases in which the courts declared general warrants to be illegal).

255. See HUTCHINSON, supra note 247, at 298.

256. See COHEN & KAPLAN, supra note 247, at 316.

257. Id.

258. Id.

259. See LASSON, supra note 250, at 53. Lasson discusses that "[t]he writ empowered the officer and his deputies . . . to search, at their will, wherever they suspected non-customary goods to be, and to break open any receptacle or package falling under their suspecting eye." Id. at 54.

260. See HUTCHINSON, supra note 248, at 295. "[T]he use of general warrants in the shape of writs of assistance in the colonies caused considerable stir, and roused intense opposition to the practice. In 1772, Samuel Adams included general warrants in the list of infringements and violations of the rights of the colonists, and declared: 'These officers are by their commission invested with power altogether unconstitutional, and entirely destructive to that security which we have a right to enjoy.' " Id.

261. Id. at 204.

262. Id. at 295.
b. Mass or Random Urinalysis to Detect Drug Use is Similar to Searches Performed under General Warrants.—The Framers did not anticipate governmental searches made possible by technological advances used in urinalysis drug testing. However, they likely anticipated that nongovernmental personnel would assist with governmental searches. The technology used for urinalysis does not place it beyond the reach of the fourth amendment.

Mass or random employment drug testing, like the general warrant used against the colonists, seeks evidence of violations of important governmental employer policies, (i.e. safety, security, etc.). These suspicionless testing policies are unspecific as to the identity of the persons to be searched, and unlimited with respect to time of execution. Such similarities could support the conclusion that these policies are within the sphere of governmental conduct intended to be covered by the Framers of the Constitution, if not prohibited by the fourth amendment. Based on the similarity to general warrants alone, one could conclude that drug testing is a search. Deciding that urine tests for drugs are searches does not dispose of the issue of whether the testing should be prohibited by the fourth amendment. Testing policies may sufficiently restrict the discretion of governmental officials performing the search, by limiting the circumstances justifying urine testing and restricting the scope of the urinalysis. Such policies avoid subjecting employees to the grievous type of intrusions colonists experienced under general warrants. Other policies may allow for unbridled, arbitrary or discriminatory execution of drug testing programs so that one could conclude they clearly are akin to the general warrants that the Framers sought to prohibit. Adjudication of the constitutionality of governmental drug testing programs should include consideration of the specific policies and procedures regulating the program to determine if they subject employees to the types of objectionable practices experienced by the colonists under general warrants.

c. Societal Attitudes Toward Using Urinalysis to Detect Drug Use.—As indicated earlier, societal attitudes, understandings

263. See Lasson, supra note 250, at 53-54 (explaining that writs of assistance were called such because they commanded “all officers and subjects of the Crown to assist in their execution.”). Id. He notes that the assistance of bystanders may now be asked in the execution of search warrants, citing 18 U.S.C. § 614 (1982). Id. at 54.

264. See infra text accompanying notes 341-52 (describing mass post-accident testing).

265. Id.

266. See Lasson, supra note 250, at 53-54 (stating that customhouse officers under general warrants were given permission to enter houses when they pleased, could break open anything in their way and could undertake searches out of malice and revenge).
and customs are also assessed when deciding if individual expectations of privacy deserve fourth amendment protections. 267 In Skinner,268 the Court concluded that both the collection and testing of urine implicated fourth amendment privacy interests.269 The collection of urine for drug testing implicated privacy interests because the procedures required monitoring, in some form, a very personal and private activity.270 The chemical analysis of the urine specimen implicated privacy interests because examination of urine, like blood, could reveal "a host of private medical facts about an employee."271 For purposes of analysis, the collection of urine should be distinguished from the testing and analysis of urine for drug use. Procedures requiring the presence of an observer should be distinguished from those allowing production of a urine specimen in private. Relinquishment of the urine specimen for testing by laboratory professionals should be distinguished from relinquishment to trained, but unprofessional personnel. Each aspect of drug testing implicates different privacy interests and societal attitudes toward privacy intrusions associated with specimen production and examination, and each aspect should be considered.

There are strong societal taboos against urinating in the presence of an observer.272 Courts have acknowledged these taboos.273

267. See California v. Greenwood, 486 U.S. 35, 51 n.3 (1988) (Brennan, J., dissenting) (stating that "[i]n evaluating the reasonableness of [a private expectation] . . . the Court has held that [it] must look to 'understandings that are recognized and permitted by society.'") (citing Rakas v. Illinois, 439 U.S. 144-44 n.12 (1978)); Dow Chemical Co. v. United States, 476 U.S. 227, 248 (1986) (opinion of Powell, J.); New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (stating that “[i]t is necessary to receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is . . . 'prepared to recognize as legitimate.' ”) (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)); Robbins v. California, 453 U.S. 420, 428 (1981) (stating that "[e]xpectations of privacy are established by general social norms."); Bush & Bly, Expectation of Privacy Analysis and Warrantless Trash Renaissance After Katz v. United States, 23 ARIZ. L. REV. 283, 293 (1981) (stating that "social custom . . . serves as the most basic foundation of a great many legitimate privacy expectations." (citation omitted)); see also supra note 244 and accompanying text (discussing an additional factor the Supreme Court has considered when determining if the government intrusion is a fourth amendment search, the use to which the individual has put the location; that factor contemplates searching a place making it inapplicable to urinalysis examinations).

269. Id.
270. Id.
271. Id.

272. See Drug Testing, supra note 140, at 3111-12. "Direct visual observation is not pleasant for the person supplying the urine or the person watching. Many people find it difficult to urinate while being observed. Because of the social taboo of directly watching a person urinate, the observer will not directly watch the collection of the urine, thereby permitting tampering with the sample." Id.

273. See Skinner, 489 U.S. at ___, 109 S. Ct. at 1413. "There are few activities in our
Urine testing methods which require the production of a specimen in the presence of an observer undoubtedly offend strong societal traditions respecting privacy during this act which deserves the most “scrupulous protection”. 274

Societal attitudes associated with urination should not necessarily extend to the testing of urine for drugs. Urinalysis subjects a bodily fluid to toxicological examination. While courts have held that this “inquiry into the physiological secrets contained in urine is a search within the meaning of the fourth amendment,”275 privacy concerns which accompany the act of urination will differ from those raised by toxicological examination of urine. Determining whether toxicological examination of urine is a search requires consideration of societal attitudes toward privacy intrusions caused by the toxicological examination of the specimen produced.276

The problem arises as to how courts should determine societal attitudes. Opinion polls may be one indication of prevailing social norms. Such polls have assessed public approval of drug testing for individuals employed in certain occupations or professions.277 Long standing and historic voluntary compliance with certain policies may be another.278 Increased use of drug testing by businesses, the military, and sports associations (both professional and amateur) suggest

society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.” Id. (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987)); Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987) (deciding that “[i]n addition, this court agrees that the act of urination is uniquely private, so that the supervised collection of a sample also implicates the fourth amendment.”); Capua v. City of Plainsfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (stating that “[u]rine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public.”).

277. Note, Employee Drug Testing - Balancing the Interests in the Workplace: A Reasonable Suspicion Standard, 74 Va. L. Rev. 969, 971-72 n.21 (1988) (authored by Michael R. O'Donnell). See also Gordon, supra note 56. “A NEWSWEEK poll showed 64% of respondents favoring mandatory tests for teachers; 72% favoring tests for government workers; and 50% favoring work place testing for everybody regardless of occupation. In a New York Times/CBS poll, 72% of full-time working people said they would be willing to submit to testing by their employers. Another poll of 1,000 working people found 60% approving mandatory tests at work, although two-thirds of all union members were opposed.” Id.
278. Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (stating that housing inspection programs have a long history of judicial and public acceptance).
various institutions accept the use of toxicological examinations of bodily fluids to detect rule violations. The validity of these indicators is questionable.

Challenges to drug testing by unions, civil libertarian groups, and commentators demonstrate that societal attitudes of approval are not universal. Data demonstrating diverse opinions toward urine drug testing, polarized viewpoints among those interested in this issue, and the recency of testing trends demonstrate that acceptance of urinalysis to detect violations of employment policies is neither universal nor longstanding.

It is difficult to assess societal attitudes. Public opinion polls may reflect at best inaccurate measures of the viewpoints of a transient majority. Assessment of societal understandings of privacy in this fashion assumes the ability to establish some cutoff where too few persons would consider reasonable an individual's expectation of privacy. Therefore, constitutional protection should be denied. If one applies this assumption, the question arises of how a court determines the percentage of persons who must agree before an individual's expectations of privacy should be deemed reasonable. But the Constitution protects those persons whose expectations are outside the mainstream of contemporary opinion so that societal dissidents do not become subject to the tyranny of the majority. Considering societal understandings of privacy when determining constitutional protection is a troublesome process, based primarily on judicial perceptions of shifting societal values and traditions.

B. The Nature of the Intrusion Caused by Employment Urinalysis Testing for Drug Use

When adjudicating the constitutionality of drug testing policies, courts should consider assessing the extent to which urinalysis for drug use intrudes upon individual privacy interests, as one of the threshold issues. This assessment impacts on the analysis of urinalysis testing under the fourth amendment at several junctures; when deciding if the employer must obtain a warrant and when courts balance the employer's interests advanced by the testing against the intrusion upon the employee's privacy.

Currently, there exists substantial disagreement within the judiciary concerning the extent to which urinalysis intrudes upon indi-
individual privacy. Courts which have acknowledged this issue have reached diverse conclusions. They range from findings that urinalysis is a highly intrusive invasion upon privacy to conclusions that it involves minimal intrusions. 282 A conclusion which characterizes the 

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282. See Railway Labor Executives’ Ass’n v. Burnley, 839 F.2d 575, 586, rev’d, 489 U.S. ——, 109 S. Ct. 1402 (1989) (stating that “[s]tops for questioning, pat-down searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids . . . [and] we do not consider breath, blood or urine testing to be similarly minimal intrusions.”); Policeman’s Benevolent Ass’n of New Jersey v. Township of Washington, 672 F. Supp. 279 (D.N.J. 1987), rev’d, 850 F.2d 133 (3d Cir. 1988) (discussing the “severe intrusion” upon cherished personal security associated with limited personal searches). The court concluded that urine testing was “a considerable intrusion” upon an individual’s reasonable expectation of privacy. Id. See also Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (determining that “the question that arises in this case is whether the administrative search exception extends to warrantless testing of persons.”); American Fed’n of Gov’t Employees Council 33 v. Meese, 688 F. Supp. 547 (N.D. Cal. 1988)(deciding that both the specimen collection process and the subsequent laboratory analysis are definitely intrusive); Taylor v. O’Grady, 669 F. Supp. 1422, 1435 (N.D. Ill. 1987) (stating that “[i]n contrast to O’Connor [v. Ortega], this case [involving observed production of the specimen] involves the search and seizure of a person, not an office”).

‘Persons’ is one of the categories explicitly guaranteed protection in the fourth amendment. This case also involves the search and seizure of urine. Virtually every one disposes of urine in a fashion to preclude the public from witnessing the urine itself, thus making the urine a personal item at least during the urination act. The very purpose of the urine testing program of this case is to make sure an employee’s urine is seized at work. Thus, unlike O’Connor, one cannot avoid the seizure and search by ‘leaving at home’ one’s urine. In view of all this, I must conclude the correctional employees of this case have a strong expectation of privacy in the place, act, and decision of urination.

Id. See also Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987) (stating that [W]ith regard to one’s expectation of privacy in bodily integrity and the interference with that interest, the court considers mandatory urinalysis, while physically painless and less intrusive, roughly equivalent to the blood testing expressly held to be a search and seizure in Schmerber v. California.”); American Fed’n of Gov’t Employees v. Weinberger, 651 F.Supp. 726, 732-33 (S.D. Ga. 1986).

[While it would appear that the matter is firmly settled, the Court takes the opportunity to note the highly intrusive nature of such a search, notwithstanding the steps taken to minimize the intrusiveness of the actual taking of urine from an individual . . . [and] intrusion into the private affairs of an individual inherent in the taking of a urine sample is qualitatively very different from the intrusion involved in the taking of fingerprints or fingernail and hair clippings; the latter are merely evidence of certain immutable characteristics of an individual’s body . . .[while] the taking of a urine sample most closely resembles the taking of a blood sample, which has been held to be a highly invasive search and seizure.

See Lovorn v. City of Chattanooga, 647 F. Supp. 875, 879 (E.D. Tenn. 1986) (determining that it seems clear that a urine test likewise amounts to a search and seizure from a person within the fourth amendment.”). But see Mack v. F.B.I., 653 F. Supp. 70, 75 (N.Y. 1986) (stating that “[f]irst collecting a urine sample is minimally intrusive”). (citations omitted)

The collection of a urine sample has little in common with stomach pumping or body cavities’ searches (or even with the taking of a blood sample, which requires the infliction of an injury, albeit a small one). It is even less intrusive than a fingerprint which requires that one’s fingers be smeared with black grease and pressed
nature of the intrusion as being of the same type and degree for all drug testing programs is conceptually flawed. Where the specimen is produced in private, urinalysis, unlike the visual body cavity searches in *Bell v. Wolfish*, \(^{283}\) does not require an invasion of bodily integrity and is not equally degrading. Unlike the blood testing which occurred in *Schmerber v. California*, \(^{284}\) and pat-downs which occurred in *Terry v. Ohio*, \(^{285}\) urinalysis policies do not necessarily require invasive procedures or touching.

Urinalysis does not neatly fit within any of the traditional fourth amendment categories of person, home, or effects. While the Supreme Court in *Skinner* suggested aspects of drug testing involved a personal search or search of personal effects, \(^{286}\) urinalysis does not necessarily involve a direct or indirect assault upon bodily integrity. It strains common perceptions of personal effects to equate a bodily waste product with other personal property.

Examining the procedures accompanying urinalysis is preferable to asserting broad generalizations about the extent drug testing invades individual privacy. The procedures should be examined to determine the extent they protect employees from unbridled, unnecessarily intrusive searches and the extent they intrude upon privacy interests.

Procedures which require production of a specimen in the presence of non-medical personnel with exposure of the genital areas require significant invasions upon personal privacy and are thus highly intrusive. Such procedures offend human dignity and are more akin to the visual body cavity searches conducted by prison officials of prison inmates in *Bell v. Wolfish*. \(^{287}\) The Supreme Court upheld those searches but only upon a showing that highly unusual circumstances at the prison justified their use. \(^{288}\) Ordinarily such circum-

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\(^{284}\) Schmerber v. California, 384 U.S. 757, 758 (1966).

\(^{285}\) Terry v. Ohio, 392 U.S. 1, 7 (1967).

\(^{286}\) Skinner, 489 U.S. at 109 S. Ct. at 1412.

\(^{287}\) Bell, 441 U.S. at 558.

\(^{288}\) Id. at 558-59.
stances do not exist in governmental workplaces, and governmental regulations should protect employees from such intrusions.

Testing which entails specimen production in the presence of medical professionals, on the other hand, would reduce the intrusion. Societal traditions accept the need to disrobe for medical examinations. Nevertheless, forcing a person to urinate in front of another, even when the observer is a medical professional, requires performing an excretory function ordinarily performed in private in the presence of another. This requirement invades significant privacy interests. Ordinarily medical examinations do not impose such requirements and scientific commentary suggests that even medical professionals blush at the thought of having to watch another person urinate.280

Testing performed by medical professionals with the production of the specimen in private would reduce the intrusion further. Testing as part of an annual medical examination would involve the least intrusion.280 Procedures requiring the removal of garments, pat-downs for specimen contaminants, aural monitoring for the sounds of urination, disclosures of prescribed medications, and disclosures of illness or medical conditions would also increase the intrusion.291

The individual who examines the specimen and procedures limiting the scope of the examination would also impact the extent urinalysis intrudes upon privacy interests. Procedures requiring examination of the urine specimen for only specified proscribed illicit substances by professionally accredited laboratories, with sufficient precautions for confidentiality and even anonymity, would provide substantial protections against unnecessary and arbitrary intrusions upon employees’ privacy interests and reduce the intrusion. Employees could be assured that the toxicological examination would not provide opportunities for discovery for physiological secrets contained in their bodily fluids which have no relation to job performance or impairment because of illicit drug use. Requirements for maintaining confidentiality of the test results and strict regulations prohibiting and restricting disclosure would limit the privacy intrusion to work-related matters.292 Specimen examination by trained

289. See supra text accompanying note 175.
291. See National Treasury Employees Union v. Van Raab, 816 F.2d 170, 173-74 (5th Cir. 1987) (discussing the procedure of the United States Customs Service’s drug test).
292. See supra text accompanying note 188. See also National Fed’n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) (suggesting that non-consensual disclosure of urine
but nonprofessional personnel onsite at the workplace should be considered as substantially intrusive. Testing policies of this nature do not adequately protect employees, because, among other reasons, false-positive screening results may be disseminated to supervisory or other personnel. Also, relinquishment of one's urine specimen to a nonprofessional offends societal traditions which respect private disposal, whereas, relinquishment of one's urine specimen to a medical professional for testing does not offend societal traditions.

Courts should consider the extent to which urinalysis testing procedures invade individual privacy, because the extent of the intrusion weighs heavily in fourth amendment analysis. However, testing procedures vary. Generalizations about the extent of the intrusion are inappropriate. Likewise, wholesale characterizations about the extent of the intrusion are also inappropriate. The extent of the intrusion should be analyzed by examining the procedures and circumstances surrounding the production and testing of the urine specimen to determine whether the specimen is produced in private or observed; the professional status of the observer and the extenuating circumstances warranting observation if the process is observed; whether the procedures require employees to disrobe, submit to pat-downs, disclose medication, or require aural monitoring of urination; who performs the testing, medical or laboratory professionals; and the precautions in place to prevent dissemination of test results. The Court in *Skinner* adopted aspects of this approach.\(^{293}\)

In *Skinner*, the Supreme Court measured the intrusion upon privacy interests caused by urinalysis to determine if probable cause or some quantum of individualized suspicion should be required to conduct blood and urine tests of railroad employees for drug use after an accident.\(^{294}\) Before concluding that the testing could occur without a showing of individualized suspicion, the Court reasoned that prior precedents required a determination that the privacy interests implicated by the drug testing were "minimal."\(^{295}\) Rather than making a generalized assertion about the extent urine testing in-

\(^{293}\) "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such a suspicion." *Id.*

\(^{294}\) *Id.* at ____, 109 S. Ct. at 1417.

\(^{295}\) *Id.* at ____, 109 S. Ct. at 1418.
trusted upon the privacy interests of the employees, the Court appropriately focused on specific regulations and procedures surrounding the urine testing in question.\textsuperscript{296} Thus, the Court in \textit{Skinner} did not indulge in a generalized characterization of the extent to which urine testing for drug use intruded upon individual privacy.\textsuperscript{297} \textit{Skinner} should not be interpreted as holding that the privacy intrusions caused by urinalysis to detect drug use are minimal. Rather, \textit{Skinner} considered the procedures surrounding the testing as described in governmental regulations.\textsuperscript{298} Certain regulations were key to the Court's determination not to require an individualized suspicion; the regulations did not require the direct observation of employees when producing the urine sample, and the sample was collected and tested in a medical environment by personnel unrelated to the railroad employer.\textsuperscript{299} These regulations were found to reduce the privacy intrusions.\textsuperscript{300}

\textit{Skinner} also considered whether privacy expectations were diminished to such an extent that urinalysis which ordinarily might have been considered a substantial intrusion should be deemed a "minimal" intrusion.\textsuperscript{301} However, the reasoning in \textit{Skinner} allowed the government, by regulation, to reduce expectations of privacy. This approach raises concerns that government intrusions which reduce privacy could simply set the stage for greater intrusions so that the government through regulation could extinguish privacy interests. This scheme would be at odds with the intentions of the Framers who drafted the fourth amendment to respond to governmental "regulations" in the form of writs of assistance which practically extinguished privacy interests of the colonists. Governmental procedures should be considered to determine the extent to which they minimize or increase the intrusion upon privacy. However, it is inconsistent with the original intentions of the Framers of the fourth amendment to allow government regulation to diminish privacy expectations.\textsuperscript{302}

\begin{itemize}
    \item \textsuperscript{296} \textit{See Skinner}, 489 U.S. \textsuperscript{-}, 109 S. Ct. 1402 (1989).
    \item \textsuperscript{297} \textit{Id.}
    \item \textsuperscript{298} \textit{Id. at \textsuperscript{-}}, 109 S. Ct. at 1420.
    \item \textsuperscript{299} \textit{Id. at \textsuperscript{-}}, 109 S. Ct. at 1418.
    \item \textsuperscript{300} \textit{Id.}
    \item \textsuperscript{301} \textit{Id.}
    \item \textsuperscript{302} \textit{See supra text accompanying notes 247-66.}
\end{itemize}
C. Should Employment Drug Testing be Subject to Warrant/Probable Cause Requirements

1. Introduction.—Courts usually ignore or gloss over the question as to whether the warrant clause’s probable cause provision of the fourth amendment should control employment urine testing for drug use. Divergent approaches to fourth amendment analysis may explain these practices.

The fourth amendment is generally divided into two provisions, the “reasonableness” provision and the warrant clause’s probable cause provision. With the two provisions,

[t]he question arises whether the Fourth Amendment’s two clauses must be read together to mean that the only searches and seizures which are ‘reasonable’ are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are ‘reasonable’ searches under the first clause which need not comply with the second clause.

Two standards have emerged in fourth amendment jurisprudence, the “reasonableness” standard and a “warrants with-narrow-exceptions” standard. There has been substantial disagreement among members of the Supreme Court as to which standard should apply. However, a governing rule has emerged “that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions.”

303. See, e.g., National Fed’n of Fed. Employees, 818 F.2d 934, 942-43 (D.C. Cir. 1987); Jones v. McKenzie, 833 F.2d 335, 338-39 (D.C. Cir. 1987); see also National Treasury Employees Union v. Lyng, 706 F.Supp. 934, 949 (D.D.C. 1988) (adopting a two-pronged inquiry which considers if the search was justified at its inception and reasonably related in scope to the circumstances justifying the interference). The court “implicitly ruled that both the probable cause and warrant requirements are inappropriate in the context of mandatory urinalysis testing of public employees.” Lyng, 706 F.Supp. at 949.


305. Id.

306. Id. at 1159.

307. Id.

Whether a court adopts the "reasonableness" standard or the "warrants with-narrow-exceptions" standard, courts should consider the propriety of requiring a governmental employer to obtain a warrant or meet the probable cause standard before engaging in urinalysis drug testing. Recent formulations of the fourth amendment standards for governmental searches favor this approach.  

2. The Warrant Requirement as Applied in Employment Urinalysis Drug Testing Cases.—In employment urinalysis drug testing cases, lower courts have summarily concluded that search warrants were not appropriate, have failed to analyze the warrant requirement under the administrative search exception, and have not considered whether other exceptions apply to the warrant requirement.

'except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.'") (quoting Mancusi v. Deforte, 392 U.S. 364, 370 (1968)).

309. See, e.g., O'Connor v. Ortega, 480 U.S. 709, 714 (1987) (plurality opinion) (stating that the standard of reasonableness necessary for work-related investigatory and non-investigatory searches included consideration of warrant and probable cause requirements); New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985) (balancing a student's legitimate expectations of privacy against a school's legitimate need to maintain an environment in which learning could take place, which included consideration of warrant probable cause requirements).

310. See, e.g., Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) (suggesting that because of the nature of the tests required, no warrant was necessary).

311. See, e.g., Alverado v. Washington Pub. Power Supply Sys., 111 Wash.2d 424, 759 P.2d 427 (1988) (stating that the administrative search exception applies to testing employees who work in the nuclear power industry); Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 583-84 (9th Cir. 1988), rev'd sub nom., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 347, 109 S. Ct. 1402 (1989) (stating that the administrative search exception does not apply to personal searches where the industry regulation was directed towards the owners, not the persons employed); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 566-69 (8th Cir. 1988) (stating that the urinalysis testing of employees working under direct observation in the heavily regulated nuclear power industry falls under the administrative search exception). But see Lovorn v. City of Chattanooga, 846 F.2d 1539, 1547-48 (6th Cir. 1988) (criticizing the application of administrative search exception to urinalyses testing of fire fighters because the testing is personal in nature).

312. See Burnley, 839 F.2d at 583 (concluding that alcohol and drug testing did not fit within one of ten enumerated classes of cases which are exceptions to the warrant requirement, but holding exigent circumstances associated with the elimination of drugs from bodily fluids required prompt action which precluded obtaining a warrant); Allen v. City of Marietta, 601 F. Supp. 482, 489-91 (N.D. Ga. 1983) (discussing a work-related warrantless search exception and concluding that the governmental employer had the right to make a warrantless search of its employees to determine if they were using or abusing drugs which would affect their ability to safely perform their work with hazardous materials); Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560, 1567 (C.D. Cal. 1987) (concluding that difficulties of timing and evanescent evidence render the warrant unsuitable for alcohol and drug testing of bus drivers); Miller, The Exceptions for the Warrant Requirement of the Fourth Amendment, 17 DAILY J. REP. 3 (1988) (enumerating thirteen exceptions to the war-

http://scholarlycommons.law.hofstra.edu/hlelj/vol8/iss1/1
It is instructive to evaluate two exceptions to the warrant re-
requirement which the Ninth Circuit Court of Appeals recognized
when considering the constitutionality of warrantless post accident
urine testing by railroad employers in Railway Labor Executive's
Association v. Burnley. The first exception exempts governmental
officials from warrant procedures because they would impose bur-
dens which would frustrate the agencies' purposes for drug testing.
This approach was initially used by the Supreme Court in Camara v.
Municipal Court. The second exception exempts governmental of-
ficials from warrant requirements because of concerns that delays
associated with the warrant process could result in the destruction of
evidence. This approach was initially articulated in Schmerber v.
California. Under this rationale, drug metabolites in urine are
considered as evanescent, thus creating an emergency requiring test-
ing as soon as practical.

The Supreme Court considered both of these rationales when
deciding to exempt governmental employers in Skinner and Von
Raab from warrant procedures. Questions arise as to whether the
Supreme Court should have applied either of the above exceptions to
urine testing and if so, if the exceptions were applied correctly.

a. The Decision to Apply the Camara and Schmerber Anal-
yses in Drug Testing Cases.—In Camara v. Municipal Court, the
Court required city housing officials to obtain a warrant to inspect
private dwellings for code violations if the occupant refused to con-
sent to the search. The Camara rationale focused on two inquiries,
whether when considering the context of the search, warrant proce-
dures provided protections which were necessary to protect the indi-
vidual privacy interests intruded upon by the search, and whether
the burden of obtaining a warrant would likely frustrate the govern-
mental purpose behind the search.

When the additional protections would warrant protection of in-

313. Burnley, 839 F.2d 575 (9th Cir. 1988).
314. Id. at 595-96.
316. Burnley, 839 F.2d at 583.
318. Burnley, 839 F.2d at 583.
319. Skinner, 489 U.S. at ____, 109 S. Ct. at 1415-16; Von Raab, 489 U.S. at ____,
109 S. Ct. at 1391.
321. Id.
322. Id.
323. Id.
individual privacy interests, the Court focused on the functions a neutral magistrate could perform when reviewing the request for a warrant.\textsuperscript{324} The Court concluded a magistrate could review questions such as whether the enforcement code required inspection of the particular individual’s premises, the lawful limits of the inspector’s power to search, and the inspector’s authorization to search the particular premises.\textsuperscript{325}

When evaluating the burdens that the warrant process placed on housing officials’ area inspection programs, the Court concluded that code enforcement inspections would not be hampered by the warrant requirement.\textsuperscript{326} In reaching this conclusion, the Court focused on whether the government code inspection programs could achieve their goal of assessing compliance with housing codes within the confines of a reasonable search warrant requirement.\textsuperscript{327} Since the government had not even argued that this goal would be jeopardized by the warrant process, the Court could not conclude that warrant procedures would burden the government’s inspection programs.\textsuperscript{328}

Subsequent to \textit{Camara}, the Supreme Court decided two cases, \textit{New Jersey v. T.L.O.},\textsuperscript{329} and \textit{O’Connor v. Ortega},\textsuperscript{330} which appear to have abbreviated the \textit{Camara} approach. In both cases the Court exempted the government from warrant requirements prior to the search by focusing solely on the burdens warrant procedures placed upon the government’s goals behind the search.\textsuperscript{331}

\textit{T.L.O.} involved a motion to suppress evidence of marijuana dealing which was obtained by school officials after conducting a warrantless search of a student’s purse.\textsuperscript{332} Acknowledging school officials’ needs to maintain swift and informal disciplinary procedures in order to preserve order and create a proper educational environment, the Supreme Court concluded that warrant procedures would unduly interfere with accomplishing these goals.\textsuperscript{333}

\textit{O’Connor} involved a warrantless search, by governmental-employer hospital officials of an employee’s desk, office and file cabinets for either evidence of misconduct or inventory of governmental prop-

\begin{thebibliography}{99}
\bibitem{324} Id. at 532.
\bibitem{325} Id.
\bibitem{326} Id. at 538.
\bibitem{327} Id. at 533.
\bibitem{328} Id.
\bibitem{331} See \textit{T.L.O.}, 469 U.S. at 339-40; \textit{O’Connor}, 480 U.S. at 721-22.
\bibitem{332} 469 U.S. at 329.
\bibitem{333} Id. at 339-40.
\end{thebibliography}
Acknowledging the government's need to promptly and efficiently complete its work, the plurality concluded that warrant procedures would "seriously disrupt the routine conduct of business." Further, it would be unreasonable to impose "unwieldy warrant procedures" upon supervisors who would otherwise have no reason to be familiar with such procedures.

Relying on T.L.O. and/or O'Connor, lower courts in drug testing cases tended to focus on only one aspect of the Camara analysis: the burdens the warrant process would place on governmental objectives. However, application of the Camara analysis by lower courts to drug testing in this fashion was inappropriate for several reasons. The residential inspections in Camara were not personal in nature and involved a "relatively limited invasion upon the individual's privacy." Drug testing implicates privacy interests which are personal in nature and arguably more intrusive. Thus, courts should not have applied the reasoning in Camara without explaining why it should also justify more intrusive searches. Further, lower courts generally ignored the Camara inquiry into the role a magistrate could play to protect the privacy interests implicated by the search.

In Skinner and Von Raab the Supreme Court appropriately considered both aspects of the Camara analysis. However, questions remain as to whether the Camara principles should have been applied to drug testing searches and if the Court's application was consistent with the Camara rationale.

Skinner involved a challenge to governmental regulations requiring private railroad employers to obtain blood and urine tests of employees involved in certain train accidents. The government also authorized railroad employers to administer breath or urine

335. Id. at 722.
336. Id.
338. Camara, 387 U.S. at 537.
339. Id.; see also supra text accompanying note 337.
tests after certain accidents or incidents where a supervisor had a reasonable suspicion that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident.\(^ {342}\) These tests could be utilized in the event of certain rule violations, like excessive speeding or noncompliance with a signal, or where the supervisor had a reasonable suspicion the employee was under the influence of alcohol based upon specific, personal observations concerning the appearance, behavior, speech or body odors of the employee.\(^ {343}\) Where impairment was suspected, the railroad could require urinalysis only if two supervisors made the appropriate determination.\(^ {344}\) If the employee was suspected of controlled substance impairment, one of the supervisors must have received specialized training in detecting signs of drug intoxication.\(^ {345}\) Under the regulation, if either the breath or urine tests were to be used in a disciplinary proceeding, the employee must have been given the opportunity to provide a blood sample.\(^ {346}\) Where the employee declined to give a blood sample the railroad could, absent persuasive evidence to the contrary, presume impairment from a positive showing of controlled substance residues in the urine.\(^ {347}\)

The Ninth Circuit Court of Appeals had invalidated the regulations, concluding that a particularized suspicion was essential to a finding that toxicological testing of railroad employees was reasonable.\(^ {348}\) According to the Ninth Circuit, a requirement of some form of individualized suspicion would not impose an "insuperable burden" on the government.\(^ {349}\) The court agreed that the "exigencies of testing for the presence of alcohol and drugs in the blood, urine or breath" required prompt action which precluded obtaining a warrant.\(^ {350}\) The court further held that an accommodation of railroad employees' privacy concerns with the government's significant safety concerns did not require adherence to the probable cause requirement.\(^ {351}\) However, the court invalidated mass post-accident testing, allowing only drug testing based on a reasonable suspicion that the

\(^{342}\) Id.
\(^{343}\) Id. at \(\_\_\_\_\_\), 109 S. Ct. at 1409.
\(^{344}\) Id.
\(^{345}\) Id.
\(^{346}\) Id.
\(^{347}\) Id. at \(\_\_\_\_\_\), 109 S. Ct. at 1410.
\(^{348}\) Id. (citing Burnley, 839 F.2d at 587).
\(^{349}\) Id. (citing Burnley, 839 F.2d at 588).
\(^{350}\) Id. (quoting Burnley, 839 F.2d at 583).
\(^{351}\) Id. (citing Burnley, 839 F.2d at 587).
employee was impaired due to drug use while on duty.\textsuperscript{352}

On appeal, the Supreme Court had to address the question of whether the government's need to monitor compliance with governmental restrictions, prohibiting employees from using alcohol or controlled substances on duty or while being subject to call for duty, justified the privacy intrusions accompanying the testing absent a warrant or individualized suspicion.\textsuperscript{353} When considering the warrant requirement, the Court acknowledged the protections a warrant would supply to individuals subject to a governmental search. An essential purpose of the warrant requirement was to protect privacy interests by assuring citizens subject to a search or seizure, that such intrusions were not random or arbitrary acts of government agents.\textsuperscript{354} A warrant could assure the individual that the intrusion was authorized by law and that it was narrowly limited in its objectives and scope.\textsuperscript{355} The warrant could also provide for the detached scrutiny of a neutral magistrate, thus ensuring an objective determination that the intrusion was justified in a given case. The Court then applied the \textit{Camara} rational and concluded that a warrant would "do little" to further the protections afforded by the fourth amendment.\textsuperscript{356}

The Court did not explain why the concepts set forth in \textit{Camara} should apply to the personal intrusions associated with testing urine for drug use. Likewise the majority in \textit{Skinner} did not acknowledge the distinction between urine testing searches and the searches involved in \textit{Camara} and the subsequent decisions applying its concepts, \textit{T.L.O.} and \textit{O'Connor}.\textsuperscript{357}

In \textit{Camara}, the Supreme Court expressly circumscribed the application of its principles to those searches, which were other than personal searches, and concluded that the housing inspection searches must be supported by a warrant based upon administrative probable cause.\textsuperscript{358} In \textit{Burnley}, the Ninth Circuit recognized this limitation and rejected the \textit{Camara} analysis as a basis to excuse the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{352} \textit{Id.} (citing \textit{Burnley}, 839 F.2d at 587).
\item \textsuperscript{353} \textit{Id.} at \textit{____}, 109 S. Ct. at 1415.
\item \textsuperscript{354} \textit{Id.}
\item \textsuperscript{355} \textit{Id.}
\item \textsuperscript{356} \textit{Id.} at \textit{____}, 109 S. Ct. at 1416.
\item \textsuperscript{358} \textit{Camara}, 387 U.S. at 537. "Finally, because the searchers are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." \textit{Id.}
\end{itemize}
\end{footnotesize}
warrant requirement, reasoning that *Camara* "only approved inspections of property which [were] not personal in nature." The Ninth Circuit had also refused to apply to the railroad's post-accident drug testing program the "pervasively regulated" industry exception to *Camara*'s administrative search warrant requirement. The court reasoned that the exception had not been applied to "searches of persons" even when employed by those industries.

Perhaps a reasonable explanation for the Supreme Court's discussion of the concepts in *Camara* within the context of drug testing is that the Court in *Skinner* was implicitly acknowledging an exception to the *Camara* administrative search warrant requirement, the "special needs" exception. The Court in *Skinner* did not attempt to fit drug testing into one of the other "well-defined circumstances" which the Supreme Court had previously recognized to exempt the government from warrant requirements or require the government to obtain an administrative search warrant. It can be posited therefore, that *Skinner* extended to personal searches the broad exemption from the warrant clause's probable cause requirements it had previously applied in other cases, "special needs, beyond the normal need for law enforcement, [made] the warrant and probable cause requirement impracticable."

The Court purported to apply a balancing test when applying the "special needs" exemption, stating that "when faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicability of the warrant and probable cause requirements in the particular context." However, in-

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360. *Id.* at 585.
361. *Id.*
363. See *Burnley*, 839 F.2d at 583 n.11.
364. *Id.; see also Skinner*, 489 U.S. at ___, 109 S. Ct. at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The "special need" acknowledged was the government's interest in regulating the conduct of railroad employees to ensure safety. *Skinner*, 489 U.S. at ___, 109 S. Ct. at 1414.
365. *Id.* (citations omitted).
fused upon any balancing of individual and governmental interests, were the concepts applied in *Camara* and *Schmerber*\(^\text{366}\). Their analytic framework governed the Court’s examination of the practicality of the warrant requirement within the context of urine testing more so than any balancing of interests.\(^\text{367}\)

Justice Marshall, dissenting in *Skinner*, objected to the majority’s dispensation of constitutional requirements based on an assessment of the impracticalities of requiring a warrant.\(^\text{368}\) Examining the feasibility of requiring the government to obtain a warrant was less exact than determining if the circumstances fit within one of the “well defined” exceptions to the warrant requirement. *Skinner* applied a more relaxed inquiry into the circumstances surrounding the government’s search when determining the necessity for a warrant.

The paucity of scrutiny associated with assessing the feasibility of requiring a warrant is exemplified by the Supreme Court’s rationale for dispensing with the warrant in *National Treasury Employees Union v. Von Raab*.\(^\text{369}\) *Von Raab*, decided the same day as *Skinner*, involved requirements for urinalysis to detect drug use by employees applying for promotion to certain positions with the United States Customs Service. The Court agreed that the Customs employer could conduct warrantless urine testing on those employees applying for positions directly involved with drug interdiction or enforcement, or on those employees working in positions which required the carrying of firearms.\(^\text{370}\)

Admittedly in *Von Raab*, the union had not argued that the government should have been required to obtain a warrant,\(^\text{371}\) so arguably, the issue did not deserve extensive analysis. But, since the Court purported to apply the standard articulated in *Skinner*, the Court’s analysis is subject to examination.

In *Von Raab*, the Court questioned the common sense of requiring the government to procure a warrant for every work-related intrusion.\(^\text{372}\) Observing that the government could not function “if every employment decision became a constitutional matter,"\(^\text{373}\) the Court reasoned that even if Customs Service employees were more

\(^{366}\) *Id.*

\(^{367}\) *Id.; see infra* text accompanying notes 401-13 (discussing the Court’s application of the *Schmerber* analysis).

\(^{368}\) *Skinner*, 489 U.S. at ___, 109 S. Ct. at 1423 (Marshall, J., dissenting).


\(^{370}\) *Id.* at ___, 109 S. Ct. at 1397.

\(^{371}\) *Id.* at ___, 109 S. Ct. at 1391.

\(^{372}\) *Id.*

\(^{373}\) *Id.* (citing O’Connor v. Ortega, 480 U.S. 709 (1987)).
likely than, for example, the school officials in New Jersey v. T.L.O., to be familiar with warrant procedures, “requiring a warrant in this context would serve only to divert valuable agency resources from the service’s primary mission.”⁷⁴ This reasoning illustrates the paucity of scrutiny associated with assessing the practicality of obtaining a warrant. The Von Raab rationale, that employment decisions should not become “constitutional matter[s],”⁷⁵ was inconsistent with its prior determination that the drug testing implicated a fourth amendment search. Once the Court decided that urine testing by the Customs Service was a fourth amendment search, the testing became a “constitutional matter.”⁷⁶ The Court, in deciding the warrant issue, was needlessly influenced by concerns over whether its decision would elevate drug testing to a “constitutional matter.”⁷⁷ Equally troubling was the Court’s rationale for dispensing with warrant procedures because they would “divert valuable agency resources from the Service’s primary mission.”⁷⁸ The Court neither identified the resources diverted nor explained the extent of the diversion.⁷⁹ Its reasoning now permits relaxation of constitutional protections based on broad unsubstantiated assertions of administrative inconvenience.

b. The Skinner and Von Raab Application of the Camara and Schmerber Reasonings to Drug Testing.—Assuming arguendo, it was appropriate to examine the feasibility of requiring a warrant within the framework of the Supreme Court’s reasoning in Camara and Schmerber, the question remains whether Skinner and Von Raab properly applied the Camara and Schmerber principles to the drug testing cases.

In Camara, the Court required housing officials to obtain administrative warrants prior to governmental inspections of private residences after concluding the protections afforded by a warrant were necessary to protect privacy interests guaranteed under the fourth amendment.⁸⁰ “Broad statutory safeguards [were] no substitute for individualized review.”⁸¹ The Court was concerned that the

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⁷⁴. Id.
⁷⁵. Id.
⁷⁶. Id.
⁷⁷. Id.
⁷⁸. Id.
⁷⁹. Id.
⁸⁰. Id. Cf. supra note 338 (discussing the diversion of teachers from the task of education which would result if teachers were required to make significant observations to meet the probable cause standard).
⁸¹. Camara, 387 U.S. at 533.
⁸². Id.
resident had no way of knowing whether the enforcement code required inspection of his premises, no way of knowing the lawful limits of the inspector’s power to search and no way of knowing if the inspector himself was acting under proper authorization. The Court reasoned, could be addressed by a neutral magistrate. The Court was particularly impressed that only by refusing entry and risking a criminal conviction could the occupant challenge the inspector’s decision to search. In order to justify a generalized exception to the warrant requirement, the Court needed to know if the housing code inspection programs could not achieve their goals within the context of the warrant requirements. Since the government had not argued that it could not, the Court made the inspections subject to warrants based on administrative probable cause.

In Schmerber, the Court agreed that police officials did not have to obtain a warrant before testing the blood alcohol levels of an individual arrested for driving while intoxicated. The Court permitted this warrantless testing because the police had a “clear indication” or probable cause to believe evidence of intoxication would disappear during the time it would take police officials to obtain a warrant. Otherwise, the Court was inclined to require the officers to “suffer the risk” that such evidence might disappear. There was a need for an immediate search. This need was established by the officer’s reasonable belief that he was confronted with an emergency and that an emergency, threatening the “destruction of evidence” actually existed. Acknowledging that the percentage of alcohol in the blood began to diminish shortly after drinking ceased and time had already elapsed while transporting the arrestee to the medical facility, the Court agreed there was “no time to seek out a magistrate and secure a warrant.”

As in Camara, the Court in Skinner and Von Raab considered the protections the warrant would afford to employees subject to al-

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382. See id. at 532.
383. Id.
384. Id.
385. See id. at 533.
386. See id. at 534-39.
387. Schmerber, 384 U.S. at 758.
388. See id. at 770.
389. Id.
390. Id.
391. Id. (citing Preston v. United States, 376 U.S. 364, 367 (1985)).
392. 384 U.S. at 771. The officer reasonably believed that evidence of the arrested individual’s intoxication could disappear. Id.
cohol and drug testing under the regulations. Unlike *Camara*, both the *Skinner* and *Von Raab* majorities allowed regulatory safeguards to substitute for the protections afforded by individual review under the warrant process. The statutory protections in *Camara* were described as “broad.” These were arguably distinguished from those in *Skinner* and *Von Raab* which the Court characterized as narrowly defined and specific. Nevertheless, the Court’s assumption that the employees in question could readily determine that the regulatory provisions should apply to them was troubling. The reasoning in *Skinner* assumes railroad employees are capable of determining that railroad investigators are not exceeding the limits of their power and are properly authorized to require the testing. However, these determinations will have to be made subsequent to major train accidents. Accident victims will have to assess the applicability of regulatory standards to their personal situations. This assessment may require the employee to discern whether there is damage of $500,000 to railroad property or a “reportable injury” while in the midst of a “chaotic” environment or in a state of injury.

The Court understated the burden it placed on railroad employees. The analysis in *Von Raab* illustrates an even more attenuated application of the *Camara* concept than *Skinner*. In *Von Raab* the Court concluded that “the circumstances justifying toxicological testing . . . doubtless [were] well known to covered employees.” This conclusion ignored problems the Court later acknowledged when remanding portions of the case to the Ninth Circuit to determine which employees were subject to mass urine testing under the Customs Service regulations.

The Court’s application of the *Schmerber* rationale to urine...
testing also deserves critique. It was not consistent with Schmerber. It expanded Schmerber beyond the restraints that the Court in Schmerber placed upon its application.

In Schmerber, the Court required the police to have a "clear indication" that toxicological testing of the arrestee would produce evidence of intoxication, otherwise it was willing to have the police "suffer the risk" that such evidence might disappear. In Skinner the Court did not require railroad officials to have a "clear indication" that through testing they would find evidence that the crew members tested were impaired or that the accident was caused by a drug impaired individual. Had the Supreme Court in Skinner applied rather than extended the Schmerber rationale, railroad employers would have had to "suffer the risk" that the metabolites in a crew member's urine might disappear.

In Schmerber, the Court focused on the specific circumstances which created an emergency to test the arrestee. There had been an accident and the individual tested had been arrested for driving while intoxicated due to alcohol. Blood alcohol test results could establish the presence of sufficient levels of alcohol in the arrestee's blood which would demonstrate he was driving while intoxicated, and that evidence was in fact rapidly disappearing.

In Skinner there were no specific circumstances which created an emergency to test a particular crew member after the serious train accident. Under the regulations railroad officials did not have to formulate a prior conclusion that the accident was probably caused by a drug impaired employee or that the employee tested was probably impaired. Even if the railroad had reached such a conclusion, the results of testing urine for drug use would not have, contrary to the Court's suggestion, necessarily correlated with impairment. The circumstances in Skinner differed substantially from those presented in Schmerber. Likewise, the outcome of Skinner should have been different or the Court should have acknowledged an intent to extend Schmerber.

Skinner implicitly extends Schmerber in two respects. Under Skinner, governmental employers are exempted from warrant proce-
dure because the possibility exists that evidence may be destroyed due to delays associated with warrant procedures.\textsuperscript{408} Exigent circumstances do not have to exist. Further, the governmental employer does not have to have any indication that the employees tested are impaired or that urinalysis would reveal evidence of drug impairment.\textsuperscript{409} It is now sufficient that the governmental search, in this instance urine testing, disclose evidence which might lead to further investigation that the employee used drugs at relevant times.\textsuperscript{410} This situation is analogous to allowing police officials to first determine the blood alcohol levels of accident victims and then investigate the causes of the accident using this information.

The application of the rationale in \textit{Schmerber} to \textit{Skinner} with respect to urinalysis to determine drug use is problematic in another respect. While the Court acknowledged that blood alcohol testing and urine testing differ,\textsuperscript{411} its discussion of the two procedures suggests little appreciation for crucial distinctions between them. These distinctions should have impacted on the Court's rationale.\textsuperscript{412}

Generally, the Court's inferences about the utility of urinalysis results are unsupported by the reference to which it cites, and are contradicted by other judicial and medical authority. In \textit{Skinner}, the Court concluded from its reading of Federal Railroad Administration regulations (FRA) that "the metabolites of some drugs remain in the urine for longer periods of time and may enable the agency to estimate whether the employee was impaired by those drugs at the time of a covered accident, incident, or rule violation."\textsuperscript{413} To the extent this conclusion suggests a positive urine test correlates with impairment, it contradicts the regulation to which the Court cited for support, and previous judicial and scientific authority. Contrary to the Court's conclusion, the FRA regulations state that "[b]lood is the only available body fluid that can be drawn from a living subject that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects."\textsuperscript{414} The railroad acknowledged that "urine [was] not an adequate substitute for blood for present purposes, since the quantity of a drug or drugs metabolite in the urine does not necessarily correlate with the quantity of

\begin{itemize}
\item \textsuperscript{408} \textit{Id.}
\item \textsuperscript{409} \textit{Id.}
\item \textsuperscript{410} \textit{Id.} at \_\_, 109 S. Ct. at 1421.
\item \textsuperscript{411} \textit{Id.} at \_\_, 109 S. Ct. at 1418.
\item \textsuperscript{412} \textit{Id.} at \_\_, 109 S. Ct. at 1417.
\item \textsuperscript{413} \textit{Id.} at \_\_, 109 S. Ct. at 1416 (citing 49 Fed. Reg. 24,291 (1984)).
\end{itemize}
the substance in the blood at any given time."\textsuperscript{415}

Courts have generally agreed that urinalysis does not measure impairment.\textsuperscript{416} Likewise, medical commentators have reached similar conclusions.\textsuperscript{417} Yet, the Court in \textit{Skinner} speculated that urinalysis results would be useful for demonstrating impairment due to consumption of illicit substances.\textsuperscript{418}

\textbf{D. Probable Cause as Applied to Employment Urinalysis Drug Testing}

Assuming governmental employers can consistently with the fourth amendment test an employee’s urine for drug use without obtaining a warrant, the question arises whether probable cause is necessary for the search to comply with the fourth amendment. The Supreme Court has concluded, "[o]rdinarily, a search . . . even one that may permissibly be carried out without a warrant . . . must be based upon ‘probable cause’ to believe that a violation of the law has occurred."\textsuperscript{419} Thus, when determining if urinalysis testing violates the fourth amendment, consideration must be given to the probable cause requirement.

In \textit{New Jersey v. T.L.O.}, the Court balanced the governmental interests and the privacy interests to determine if the public interest was best served by a fourth amendment standard of reasonableness that stopped short of probable cause.\textsuperscript{420} The Court then "joined the majority of courts that had examined this issue" and concluded that accommodating the privacy interest of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools did not require strict adherence to the probable cause requirement.

\hspace{1em} \textsuperscript{415.} \textit{Id.}
\hspace{1em} \textsuperscript{417.} \textit{See supra} text accompanying notes 181-83.
\hspace{1em} \textsuperscript{418.} \textit{Id.}
\hspace{1em} \textsuperscript{419.} \textit{Skinner}, 489 U.S. \textit{at} \textsuperscript{416}, 109 S. Ct. \textit{at} 1416; \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 340 (1985). The Court added, however, that probable cause was not an irreconcilable requirement for a valid search and in certain limited circumstances was not required. \textit{T.L.O.}, 469 U.S. \textit{at} 340.
\hspace{1em} \textsuperscript{420.} 469 U.S. \textit{at} 341.
Consistent with the Supreme Court’s approach in T.L.O., a plurality of the Court in O’Connor v. Ortega, also balanced the governmental and private interests to determine if the public interest was best served by a fourth amendment standard that stopped short of probable cause. The plurality limited its determination to two types of searches, non-investigatory, work-related inventory searches or investigatory searches for evidence of suspected work-related employee misfeasance. Identifying the governmental interest as the efficient and proper operation of the work place and considering the privacy interests of governmental employees in their place of work as incurring “relatively limited invasion[s],” the plurality concluded the special needs of the employer made the probable cause requirement impractical for both types of searches.

When balancing the governmental and private interests, the O’Connor plurality made several findings. The work of governmental agencies would suffer if employers were required to have probable cause before entering an employee’s desk for the purpose of finding a file or piece of office correspondence. The concept of probable cause, which was rooted in the criminal investigatory context, did not have much meaning when the purpose of the search was to retrieve a file for work-related reasons or conduct a routine inventory to secure state property.

1. Judicial Treatment of the Probable Cause Standard in Drug Testing Cases.—In one of the earliest cases challenging the use of blood and urine tests to detect alcohol or drug impairment of bus drivers, Amalgamated Transit Union v. Suscy, the Seventh Circuit Court of Appeals concluded that under the employer’s rules the government had probable cause. In Suscy, the employer required testing of any bus driver involved in a “serious accident” or “suspected of being under the influence while on duty.” Without any discussion the Seventh Circuit simply equated the occurrence of an

421. Id.
422. O’Connor, 480 U.S. at 722-23.
423. Id. at 723.
424. Id. at 725.
425. Id. at 723.
426. Id.
427. Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976). “Probable cause exists” and testing is justified where a valid public interest is the topic. Id. at 1267.
428. Id. at 1266.
429. Id.
accident and a suspicion of being under the influence with probable cause. Of course the probable cause standard requires more than the occurrence of an accident or a mere suspicion.

In a later drug testing case, *Allen v. City of Marietta*, a Georgia district court did not address the probable cause standard or determine if the employer had to have an individualized suspicion to support his decision to drug test. *Allen v. City of Marietta* involved drug testing by a power company of employees working around high voltage electrical wires. The employees in question were subjected to urinalysis screening to determine drug use. An informant hired by the employer reported observing the employees smoking marijuana both on and off the job. The informant had records of these observations and his report correlated with unexplained accidents involving the individuals tested. The court considered the warrant issue. It concluded that the case fell within a class of cases which exempted government employers from obtaining warrants where the search was for employment-related reasons rather than for evidence of a crime. Upon dispensing with the need for a warrant, the court concluded the search was reasonable. The question of probable cause was not addressed. Had the court considered this issue, the employer’s evidence for searching may have met this requisite level of suspicion for probable cause or at least satisfied the reasonable suspicion standard.

In *Jones v. McKenzie* the district court of the District of Co-

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430. *Id.* at 1267

431. *New Jersey v. T.L.O.*, 469 U.S. 325, 358-59 (1985) (Brennan, J., concurring in part and dissenting in part) (stating that "probable cause . . . exists where 'the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that a criminal offense had occurred and the evidence would be found in the suspected place."). *Id.* (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).


433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 489-91.

439. *Id.* at 491.

440. *Id.*

441. *See McDonnell v. Hunter*, 612 F. Supp. 1122, 1129 n.5 (S.D. Iowa) (stating that a tip from a reliable informant who provides detailed information will create a reasonable suspicion and depending on the circumstances may create a probable cause), *aff'd as modified*, 809 F.2d 1032 (8th Cir. 1987).

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Columbia considered whether subjecting a bus attendant to urinalysis "without probable cause or any individualized consideration" was an unreasonable search under the fourth amendment.\textsuperscript{443} This case involved testing school bus attendants for drug use during routine medical examinations.\textsuperscript{444} Distinguishing \textit{Allen} and \textit{Suscy}, the district court concluded that the public safety considerations did not outweigh the employee's privacy expectations so that the testing could not proceed without "particularized probable cause."\textsuperscript{446}

The Court of Appeals for the District of Columbia Circuit disagreed with the district court's distinction of the safety concerns raised by the school bus attendants from those raised by the bus drivers in \textit{Suscy}.\textsuperscript{448} Finding the safety concerns raised by impaired bus attendants working with handicapped children were significant, the court concluded that the testing of attendants during employment-related medical examinations outweighed the employee's privacy interests.\textsuperscript{447} The court of appeals reversed the lower court's judgment pertaining to "probable cause."\textsuperscript{448}

After \textit{Suscy} and \textit{Allen}, courts tended to ignore the probable cause issue. The constitutionality of drug testing under the fourth amendment was evaluated under a general concept of "reasonableness."\textsuperscript{449} In other cases, after courts exempted governmental employees from warrant requirements based on determinations that the search fell within one of the classes of cases creating exemptions from warrant requirements, there was no independent consideration of the probable cause standard.\textsuperscript{450}

\begin{itemize}
  \item \textsuperscript{443} Id.
  \item \textsuperscript{444} Id.
  \item \textsuperscript{445} Jones, 628 F. Supp. at 1509.
  \item \textsuperscript{446} 833 F.2d at 340.
  \item \textsuperscript{447} Id.
  \item \textsuperscript{448} Id. at 341.
  \item \textsuperscript{449} See, e.g., Penny v. Kennedy, 846 F.2d 1563 (holding drug testing of police officer's urine without an individualized suspicion of drug use was unreasonable), vacated, 862 F.2d 567 (6th Cir. 1988); Lovorn v. City of Chattanooga, 846 F.2d 1539, 1543 (6th Cir. 1988) (evaluating drug testing of the urine of fire fighters under a standard of reasonableness), vacated, 861 F.2d 1388 (6th Cir. 1988); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 566 (8th Cir. 1988) (determining the reasonableness of using urinalysis for nuclear power plant employees by evaluating the context in which the search takes place and balancing the individual's legitimate expectation of privacy and personal security against the government's need for the search); Capua v. City of Plainfield, 643 F. Supp. 1507, 1516 (D.N.J. 1986).

\url{http://scholarlycommons.law.hofstra.edu/hlelj/vol8/iss1/1}
With existing precedent deeming the probable cause requirement impractical or ignoring it completely, it is not surprising the Supreme Court in *Skinner* and *Von Raab* dispensed with the question of probable cause without significant discussion. Unlike many lower courts, the Supreme Court at least acknowledged the efficacy of considering the probable cause standard by stating that “even a search that may be performed without a warrant must be based, as a general matter on probable cause to believe the person to be searched has violated the law.” But acknowledgement was the extent of the Courts’ examination as it did not extensively discuss the propriety of requiring probable cause. Rather, the Court’s rationale focused on whether any level of individual suspicion was necessary to justify the urine drug testing.

In *Von Raab* the Court went a step further. Probable cause was implicitly relegated to criminal investigations, but “[o]ur cases teach however, that the probable cause standard is peculiarly related to criminal investigation.” *Skinner* and *Von Raab* may have effectively eliminated probable cause considerations from employment urine testing analysis.

**E. Suspectionless Testing to Detect Drug Impaired or Drug Using Employees**

Prior to *Skinner* and *Von Raab*, a number of courts had concluded that the testing of urine to detect drug use without any prior suspicion that the individual tested used drugs or was impaired from drugs violated the fourth amendment prohibition against unreasonable searches. Several appellate courts, however, had upheld suspicionless drug testing programs, generally relying upon the adminis-

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administrative search exceptions to uphold alcohol and drug testing of jockeys), cert. denied, 479 U.S. 986 (1986).


453. *Id.* at ----, 109 S. Ct. at 1420.


455. *Id.* at ----, 109 S. Ct. at 1398 (Marshall, J., dissenting). Justice Marshall disagreed with the Court and stated that “the court’s abandonment of the fourth amendment’s express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable.” *Id.*

456. See *Lovorn*, 846 F.2d at 1547 (holding that random testing of fire fighters was unreasonable); *Penny*, 846 F.2d at 1563 (holding that random testing of police officers was unreasonable), *Amalgamated Transit Union Local 1277*, 663 F. Supp. at 1560 (holding that random testing of bus drivers was unreasonable); *Feliciano v. City of Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).
trative search exception to the warrant requirement to justify warrantless and suspicionless drug testing policies. Some courts justified suspicionless drug testing programs by reasoning that the individuals involved participated in highly regulated industries. In most instances, courts required at least a reasonable individualized suspicion of drug use to justify employment policies requiring urine testing for illicit drugs.

**Skinner** and **Von Raab** brought before the Supreme Court the issue of the constitutionality under the fourth amendment of suspicionless employment drug testing programs. In both cases, the Court upheld suspicionless drug testing governmental policies. In both cases the Court allowed "important" governmental interests to outweigh the privacy intrusions resulting from the employment urinalysis drug testing policies.

Citing to no specific precedent, the Court in **Skinner** held that "[in] limited circumstances where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Similarly, the Court in **Von Raab** concluded, "[o]ur precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."

In **Skinner**, the Court cited United States v. Martinez-Fuerte

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458. See, e.g., Shoemaker, 795 F.2d at 1142 (discussing horseracing); Rushton, 844 F.2d at 566 (discussing nuclear power plants); McDonnell, 809 F.2d at 1302 (discussing correctional institutions).


460. See **Skinner**, 489 U.S. at ____, 109 S. Ct. at 1417. See also **Von Raab**, 489 U.S. at ____. 109 S. Ct. at 1392.

461. Id.

462. Id.


for the proposition that a showing of individualized suspicion "is not a constitutional floor, below which a search must be presumed unreasonable." 465 *Martinez-Fuerte* involved brief fourth amendment "seizures". 466 Individuals in vehicles were routinely stopped at designated checkpoints for visual inspections of the vehicle, which could be seen without a search, and questioning 467 to determine if the vehicle contained illegal aliens. 468 Unlike *Skinner* and *Von Raab*, which implicated fourth amendment "searches" involving in some respects significant intrusions upon personal privacy, 469 *Martinez-Fuerte* involved only brief detentions or fourth amendment "seizures". The visual inspections did not even rise to the level of a "search". 470

In *Martinez-Fuerte*, the Court emphasized that had the "seizure" gone beyond the brief detention associated with the type of stop described in the opinion, the additional detention would have had to been based on consent or probable cause. 471 In light of this limitation the *Martinez-Fuerte* holding provided scant support for the constitutional standard articulated in *Skinner* and *Von Raab*, unless the Supreme Court could equate the intrusiveness associated with urine testing in *Skinner* and *Von Raab* with the brief detentions which occurred in *Martinez-Fuerte*. While the Court minimalized and reduced the intrusiveness associated with the urine testing policies under review in *Skinner* and *Von Raab*, it did not trivialize the intrusion to such an extent that one would equate it to a car stop. 472 Contrary to the Court's suggestion that it relied upon settled precedent, the Court's holdings in *Skinner* and *Von Raab* traversed new ground, extending fourth amendment jurisprudence beyond previously established parameters. 473

F. Applying the Constitutional Standards Articulated in *Skinner* and *Von Raab* for Suspicionless Testing

1. Whether the Testing Procedures in *Skinner* and *Von Raab* Implicated Minimal Privacy Interests.—While the Court did not expressly conclude that the privacy interests of the employees subject to urine drug testing were minimal, this conclusion is implicit in its...
decision to allow suspicionless testing under the standard articulated. As concluded earlier, the Court appropriately focused on regulations governing the testing procedures when determining the extent to which the testing intruded upon employees' privacy interests. There were problems, however, with the Court's scrutiny of the testing regulations which bring into question the soundness of the Court's conclusions that the testing regulations resulted in minimal intrusions. The Court scrutinized the regulations to determine the extent to which they reduced, limited or minimized privacy intrusions associated with the testing and focused on various select regulations. However, the Court should have performed a comprehensive examination of the drug testing regulations to consider the extent that they intruded upon privacy interests from a number of perspectives. This would include whether specimen production was observed, the professional status of the observer, the restrictions on toxicological examination, who performed the examination, and whether privacy intrusions, pat downs, and medication disclosures accompanied the urinalysis.

In *Skinner* the Court concluded that certain regulations reduced the intrusiveness of the drug testing for railroad employees. For example, the urine sample was not required to be produced under direct observation. The sample was collected in a medical environment by personnel unrelated to the railroad employer. While regulations requiring disclosure of any medications taken within the past thirty days increased the intrusion, confidentiality requirements kept this procedure from being a significant invasion of privacy. These regulations limited the privacy intrusions upon railroad employees.

However, rather than examining the regulations to determine the extent they "reduced" the intrusiveness of the collection process, the regulations should have also been scrutinized to determine the extent they protected the employees tested from significant intrusions. Regulations governing both specimen collection and examination should have been subjected to this standard.

Had the Court considered whether the regulations protected employees against the type of intrusions the fourth amendment
sought to avoid, certain regulations may have been found lacking. For example, the regulation in *Skinner* which provided that observation during urination was not required, hardly assured employees adequate protection against a substantial intrusion upon the privacy interests, of urination under observation.\(^{479}\) This intrusion was hardly minimal and should have been proscribed absent individualized suspicion that the individual would attempt to subvert the testing process. Under the railroad regulations, the person watching another urinate is a medical professional. Admittedly this reduces the intrusion. Nevertheless, *Skinner* implicitly approved one of the more substantial types of privacy intrusions, required protection of a urine specimen under direct observation by medical personnel, without considering if the regulations specifically described the conditions which would justify this severe intrusion.\(^ {480}\) Production of a urine specimen under direct observation by anyone is hardly a commonplace occurrence even during a routine medical examination. Yet, *Skinner* approved this procedure without discussion.\(^ {481}\)

The regulations cited by the Court in *Von Raab* did not allow the same types of intrusions as those approved in *Skinner*. The employee was given advance notice of the testing.\(^ {482}\) There was no direct observation of the act of urination.\(^ {483}\) The samples were examined only for specified drugs.\(^ {484}\) The employee was asked to disclose medical information only when the test was positive.\(^ {485}\) This information, if disclosed, was given to a licensed physician.\(^ {486}\) *Von Raab*, like *Skinner*, examined Customs Department regulations to determine the extent to which they minimized privacy intrusions associated with the testing.\(^ {487}\) Nevertheless, the Court’s scrutiny was incomplete.

Rather than considering each aspect of the testing regulations which intruded upon the privacy interests of the employees, the Court focused on select regulations.\(^ {488}\) Had the Court considered each aspect of the testing process, the *Von Raab* analysis would have discussed the testing environment which permitted specimen collec-

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480. *Id.* at ____., 109 S. Ct. at 1428 (Marshall, J., dissenting).
482. *Von Raab*, 489 U.S. at ____., 109 S. Ct. at 1394 n.2.
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*
488. See *Von Raab*, 489 U.S. at ____., 109 S. Ct. at 1392.
From the Skinner and Von Raab decisions, courts may be left with the impression that it is appropriate to focus only on those regulations which reduce the privacy intrusion and ignore those which increase it.

When deciding that only minimal privacy interests were implicated by the urine testing for illicit substances, both Skinner and Von Raab considered the degree to which employees' expectations of privacy had been diminished by prior governmental intrusions. Both Skinner and Von Raab concluded employees had diminished expectations of privacy.

In Skinner railroad employees had diminished expectations of privacy in their personal integrity because safety regulations had already required them to submit to periodic physical examinations. Additionally, railroad employees had diminished expectations of privacy about information related to their physical condition and "this reasonable means" of procuring such information. One wonders how often railroad employees, prior to implementation of drug testing policies, had been forced to urinate in the presence of an observer? In Von Raab, employees' expectations of privacy were diminished because substantial probes had already occurred to determine their fitness and probity to engage in employment involving drug interdiction and carrying firearms. Again, one wonders if Customs employees prior to urine testing policies were ever required to produce urine specimens in a nonmedical environment?

Rather than a "diminished expectation" of privacy analysis, judicial determinations, that individuals employed in some jobs will need to sacrifice significant privacy interests in order to ensure their successful performance of certain job tasks, would provide a better rationale for deeper excursions into private areas of an employee's personal life than diminishing significant intrusions. This standard at least requires a nexus between the necessity for the privacy intrusion and the person's job performance rather than bootstrapping future privacy intrusions upon past intrusions. The "diminished expectation" approach penalizes those employees who have willingly sacrificed privacy interests for the sake of obtaining employment or ad-

491. Id.
493. Id.
vancing employers’ interests. Such policies promoting cooperation rather than litigation ought to be encouraged, but once employees understand the adverse effects of their cooperation under the “diminished expectations” analysis they may feel compelled to resort to litigation to prevent greater intrusions.

2. Important Governmental Interests Furthered by Urine Testing but Jeopardized by Requirements for an Individual Suspicion

a. Important Governmental Interests Recognized in Skinner.—Skinner considered ensuring safe railway transportation for the traveling public to be an important governmental interest. Accomplishing this goal depended in part on the health and fitness of railroad employees. Identifying drug impaired employees working in safety sensitive positions was also necessary for accomplishing this goal. Deterring employee drug use, whether while on duty or on call, was necessary to achieve the goal of a fit workforce. Determining the causes of major accidents assisted the government with reaching its goal of providing safe transportation. Railroads could use this information to take appropriate steps to avoid similar accidents.

It was undisputed that the above goals and the antecedent means to accomplish them were important governmental objectives. But, denial of fourth amendment protections required more than articulation of important governmental interests. Under the standard announced by the Court, the government also needed to demonstrate that the fourth amendment search, urine testing, advanced these goals.

While the Court concluded urine testing advanced the goal of safe transportation, the rationale used to support this conclusion was based neither upon precedent, nor the record, or scientific literature. Ignoring scientific commentary, which concluded that urine test results did not demonstrate impairment, the Court essentially treated urine test results as if they were probative evidence of both impairment and the causes of major accidents.

496. *Id.* at ____, 109 S. Ct. at 1419.
497. *Id.*
498. *Id.*
499. *Id.* at ____, 109 S. Ct. at 1420.
500. *Id.*
501. *Id.*
502. *Id.*
503. *Id.* at ____, 109 S. Ct. at 1421. “The record makes clear, for example, that a positive test result, coupled with known information concerning the pattern of elimination for
Skinner was before the Court because of rulings on motions for summary judgment regarding a facial challenge to the railroad's regulations.\textsuperscript{504} The Ninth Circuit had concluded the urine test results did not measure current drug intoxication or degree of impairment.\textsuperscript{505} The government had conceded that urine testing could not distinguish between recent use off the job and current impairment.\textsuperscript{506} Yet the Supreme Court treated urine test results as if they would provide relevant evidence of impairment or even the cause of accidents,\textsuperscript{507} even though the Ninth Circuit had not addressed the evidentiary issue.\textsuperscript{508} The Court opined as to both the relevance and probativeness of urinalysis results without argument of that specific issue.\textsuperscript{509}

It would seem that the question concerning the relevance of urine test results would be influenced by a number of variables including the substance detected, the test used, and a host of other variables likely to be resolved only by expert testimony. To the extent Skinner suggests urinalysis results are relevant evidence for demonstrations of impairment or causation, the Court's observations are dicta.\textsuperscript{510} To the extent Skinner justifies suspicionless urine testing based on the relevance of urine test results, the Court's reasoning is speculation.

Using a common sense approach, the Court in Skinner also concluded that urine testing furthered the government's goal to deter drug use by employees while on call or on duty.\textsuperscript{511} The Court deferred to the governmental agency's assertions about the deterrent effects of urine testing.\textsuperscript{512} It considered the agency's lack of success in detecting employees under previous regulations which did not use toxicological testing of bodily fluids and agreed the government

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the particular drug and information that may be gathered from other sources about the employee's activities, may allow the Agency to reach an informed judgment as to how a particular accident occurred." \textit{Id.} at \textsuperscript{505}, 109 S. Ct. at 1409. \textit{Cf.} Adler, \textit{Probative Value and the Unreasonable Search: A Constitutional Perspective on Workplace Drug Testing}, 1988 U. Chi. LEG. F. 113, 136. See also National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.D.C. 1989) (holding that Skinner was read as justifying the use of urinalysis to discern on-the-job impairment).
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\textsuperscript{504} \textit{Skinner}, 489 U.S. at \textsuperscript{505}, 109 S. Ct. at 1409.
\textsuperscript{505} \textit{Burnley}, 839 F.2d at 588.
\textsuperscript{506} \textit{Id.} at 497 n.1.
\textsuperscript{507} \textit{Skinner}, 489 U.S. at \textsuperscript{508}, 109 S. Ct. at 1421.
\textsuperscript{508} \textit{See} Adler, \textit{supra} note 503, at 136 n.165 (characterizing the Ninth Circuit opinion as paradoxical).
\textsuperscript{509} \textit{Skinner}, 489 U.S. at \textsuperscript{510}, 109 S. Ct. at 1421.
\textsuperscript{510} \textit{Id.}
\textsuperscript{511} \textit{Id.} at \textsuperscript{512}, 109 S. Ct. at 1419.
\textsuperscript{512} \textit{Id.}
needed the threat of urine tests to deter drug use. Justice Stevens concluded this was a "dubious proposition". It made sense to Justice Stevens that if the risk of serious personal injury did not deter individuals' use of illicit substances, then it was highly unlikely the additional threat of loss employment would affect their behavior.

The Court in *Skinner* accepted plausible and speculative arguments that urine testing advanced governmental interests. These arguments were not subject to critical scrutiny even though relinquishment of important fourth amendment protections was at stake.

Perhaps the most important protection denied railroad workers under the federal program concerns the circumstances under which accidents will be investigated to determine if they were due to employee wrongdoing. The Court envisioned that urine tests "would provide the basis for further investigative work designed to determine if the employee used drugs at the relevant times." Under these procedures, behavioral observations, responses to the accident or emergency may be viewed in light of positive test results. There is a risk the perceptions of accident investigators will be unduly distorted by knowledge of positive test results. Innocent errors or mistakes due to cognitive or physical dysfunction not caused by drug use, may be considered as evidence of drug impaired behavior.

The Court also had to consider the extent to which individualized suspicion requirements jeopardized important governmental interests. The Court envisioned endangerment by reasonable suspicion requirements to governmental interests in identifying drug impaired employees, deterring job-related drug use, and determining the causes of major accidents. It concluded that during the time it would take to gather evidence of possible impairment there would be a loss or deterioration of the evidence furnished by the tests. But unlike *Schmerber*, the evanescent nature of the evidence of drug use contained in urine was not conclusively demonstrated. *Skinner* ac-

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513. *Id.*
514. *Id.* at ___, 109 S. Ct. at 1422 (Stevens, J., concurring).
515. *Id.*
516. *Id.* at ___, 109 S. Ct. at 1421 (citing Field Manual B-4).
517. See *id.* at ___, 109 S. Ct. at 1420. "Positive test results would point toward drug or alcohol impairment on the part of members of the crew as a possible cause of an accident, and may help to establish whether a particular accident, otherwise not related, was made worse by the inability of impaired employees to respond appropriately." *Id.*
519. *Id.*
520. *Id.*
521. *Id.; see also id.* at ___, 109 S. Ct. at 1426 (Marshall, J., dissenting) (remarking that urine specimens may be preserved for later toxicological examination).
cepted the position that it was possible the evidence might disappear.

Skinner also discussed the impracticability of determining objective evidence of impairment following serious railroad accidents. According to the Court, such determinations were not feasible after an accident. Yet, the Court's conclusions that urine test results will be considered along with "the behavior of the employee and the circumstances of the accident" acknowledge that investigators will be making contemporaneous observations while at the scene of the accident. Skinner does not relieve railroad investigators of the necessity for making contemporaneous observations. It only relieves the government of the responsibility for determining the significance of post accident observations prior to testing. While such decisions may be time consuming, considerations of accident observations in light of urine test results create ominous impediments to the fairness of the investigative process. Justice Marshall's suggestion that railroad officials could secure a warrant before toxicological examination of preserved urine samples would attenuate these concerns. Railroad urine testing procedures may be procedurally unfair, and if so, the search under those circumstances is unconstitutional.

b. Important Governmental Interests Recognized in Von Raab.—Von Raab, like Skinner, recognized as an important governmental interest the elimination of safety risks due to a physically unfit workforce. But, Von Raab also acknowledged another governmental interest, the need for persons employed in drug interdiction to have "impeccable integrity and judgment." The Court considered drug users to be "unsympathetic to their mission of interdicting narcotics." Drug users could be indifferent to the customs agency's basic mission or active accomplices with malefactors. Urine testing deterred drug users from applying for promotions to security sensitive jobs.

As in Skinner, the legitimacy of the above goals was unchal-

522. Id.
523. Id.
524. Id. at ____, 109 S. Ct. at 1409.
525. Id.
526. Id.
527. Id. at ____, 109 S. Ct. 1426 (Marshall, J., dissenting).
528. Von Raab, 489 U.S. at ____, 109 S. Ct. at 1393.
529. Id.
530. Id.
531. Id.
532. Id. at ____, 109 S. Ct. at 1396.
lenged. The customs agency needs to demonstrate the government-

533. Id. at ____, 109 S. Ct. at 1394.

534. Id.

535. Id. at ____, 109 S. Ct. at 1396.

536. Id.

537. Id.

538. Id.

539. Id. at _____. 109 S. Ct. at 1390; see also Harmon v. Thornburgh, 878 F.2d 484, 489-90 (D.C. Cir. 1989).
Raab and Skinner holdings, the analytical framework for evaluating the constitutionality of suspicionless testing programs remains unclear. Such programs may be evaluated under one of two constitutional standards - a balancing test or the test articulated in Skinner. Thus the standard for suspicionless testing is still unclear because fourth amendment jurisprudence continues to reflect conflicting approaches and standards for addressing the constitutionality of employment urine testing programs.

VII. CONCLUSION

Drug testing jurisprudence addressing fourth amendment search issues remains plagued with conceptual and analytical flaws. They surface at each stage of the analytical process. At the search stage, resolution of that issue depends too heavily on judicial perceptions of societal understandings of expectations of privacy. Upon determining that urine testing is a search, the next step should be to assess the extent the urinalysis policies and procedures invade individual privacy. This examination should consist of comprehensive assessment of each potential intrusion implicated by the policy. Probable cause and warrant requirements are ill-served by the “special needs” examination which permits the practicalities of governmental circumstances to dominate and control questions concerning relinquishment of important fourth amendment protections. Drug testing jurisprudence would benefit by a return to the analytical framework developed in traditional fourth amendment analysis: seriatim consideration of search, the extent of intrusion, warrant, probable cause and reasonable suspicion issues. Imposed upon traditional analysis is a threshold determination of the extent the search intrudes upon privacy interests by comprehensively examining the procedures governing the urine testing program. This approach avoids inadvertent submersion of important privacy interests by weighty governmental

The Von Raab majority made no effort to articulate an analytical rule by which legitimate drug testing programs could be distinguished from the illegitimate ones. It simply weighed individual privacy interests against the government's policy objectives, enumerating several factors that it deemed relevant in performing this balancing process. The Court did not, however indicate whether it deemed the case a close one, in the sense that minor variations in the facts would have tipped the balance in the other direction. Nor did it indicate which (if any) of the relevant factors would be essential to a constitutional testing plan. Harmon, 878 F.2d at 489-90. See also American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 889 (D.C. Cir. 1989) (reading the Supreme Court's decisions in Von Raab and Skinner as holding that where “the testing plan serves needs other than law enforcement ... [it] need not necessarily be supported by any level of particularized suspicion.”).
concerns and conflicting views of the extent of the intrusion during different stages in the analysis.

Suspicionless testing is now constitutionally justified by rationale that is neither firmly rooted nor planted in legal doctrine, empirical knowledge, technological data or historical traditions. Hopefully, the seeds planted by *Skinner* and *Von Raab* will not germinate and take root in fourth amendment jurisprudence.