

NOTES

COURTS AND GOVERNMENT COMPELLED URINALYSIS: JUMPING TO FOURTH AMENDMENT CONCLUSIONS

Whether the government¹ should or can subject its employees to urinalysis to detect illegal drug use ("compelled urinalysis") has been an issue of great public controversy in recent years.² In general, the courts have held that the fourth amendment protects government employees

1. The Fourth Amendment prohibits only *government* procedures that constitute unreasonable "searches" or "seizures." See *infra* note 3 for the text of the fourth amendment. Private employers can implement arbitrary drug testing procedures both as a pre-employment screening device and as a condition of continuing employment. Private employers, however, must ensure that any drug testing procedures they implement are consistent with their collective bargaining agreement(s) with employee unions, anti-discrimination laws and certain common law rights employees may have. Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPLOYEE REL. L.J. 422, 427-33 (1985). See the National Labor Relations Act, 29 U.S.C. §§ 158 (a), (b)(3), (d)(1984) (under this act an employer's drug testing program constitutes a "working condition" and is subject to the act's good faith collective bargaining requirements); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1984) and *Davis v. Bucher*, 451 F. Supp. 791, 799 (E.D. Pa. 1978) (while the act does not protect the employment interests of current alcoholics or illegal drug users, it does protect controlled alcoholics and former illegal drug users); See Rothstein, *supra*, at 433 for a discussion of common law rights that may be violated by an employer's drug testing program.

Although states may contract away the power to tax or to make contracts regarding financial matters, they cannot contract away their police power or their power of eminent domain. McGarry, *Public Sector Collective Bargaining and the Contract Clause*, 31 LAB. L.J. 67, 68 (1980). Therefore, the government probably cannot through collective bargaining (with unionized public employees) contract away whatever power it has to compel employees to submit to urinalysis drug testing.

2. The emphasis of this Note is on government urinalysis drug testing of its employees ("compelled urinalysis"). Urinalysis is the most widely used method of testing persons to detect illegal drug use. T. Scrivner, LEGAL ISSUES SURROUNDING DRUG TESTING IN EMPLOYMENT 4 (Jan. 30, 1987) (available in St. Louis University Law Library). Other available tests analyze blood, saliva, breath and hair. A test for measuring drug impairment through analysis of brain waves is currently being studied. For a brief assessment of the limits of these latter types of tests, see *id.* at 4.

Urinalysis for detection of illegal drug use also has its limits. The method is sometimes inaccurate, with false positive results occurring in up to 25% of tests given. Also, urinalysis for detection of illegal drug use cannot measure the subject's level of impairment by any illegal drug; it indicates only the *presence* of such substances. Further, urinalysis can detect marijuana and PCP use only after their effect on the subject has worn off. It is also possible that urinalysis for detection of marijuana generates positive results on tests of subjects who have inhaled only "sidestream" smoke. *Id.* at 4-6.

The urinalysis method can detect a subject's consumption of marijuana up to two months after use, and cocaine consumption for two or three days after use. *Id.* at 5. See *supra* note 1 for a brief discussion of drug testing by private employers and *infra* note 6 for a discussion of government drug testing of prisoners and of private employees in "heavily regulated industries."

against unreasonable administration of compelled urinalysis.³ Using the Supreme Court's fourth amendment analysis, these courts have weighed the government employers' interests against the employees' interests to determine whether such testing was reasonable under the circumstances.⁴ Most courts have required that permissible compelled urinalysis must be based, at a minimum, on government officials' "reasonable suspicion" that the specific employees they seek to test are using illegal drugs.⁵ These courts have required reasonable suspicion without explaining why

3. The fourth amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

The fourth amendment prohibits only *unreasonable* searches and seizures, and therefore the test in a fourth amendment case is whether the search or seizure involved was reasonable. *Carroll v. United States*, 267 U.S. 132, 147 (1925); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 201 (2d Cir. 1984). The fourth amendment applies to the states through the due process clause of the fourteenth amendment. *Ker v. California*, 374 U.S. 23, 30-34 (1963).

4. See *infra* notes 52-72 and accompanying text (discussing the fourth amendment balancing test for reasonableness).

5. See, e.g., *Labor R.R. Exec. Assoc. v. Burnley*, 839 F.2d 575 (9th Cir. 1988); *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (court required finding of probable cause); *American Federation of Gov't. Employees v. Weinberger*, 651 F. Supp. 726, 733 (S.D. Ga. 1986); *Lovvorn v. Chattanooga*, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); see also *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa), *modified*, 809 F.2d 1302 (8th Cir. 1987) (modification changed requirement of reasonable suspicion that employee was then under the influence to a reasonable suspicion controlled substances had been used within twenty-four hours prior to the test); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *Davis v. District of Columbia*, 247 A.2d 417 (D.C. 1968); *Ewing v. State*, 160 Ind. App. 138, 149, 310 N.E.2d 571, 578 (1974); *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986); *State v. Locke*, 418 A.2d 843, 847 (R.I. 1980). *Contra* *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 474-77 (D.C. Cir. 1975) (drug testing of all armed services personnel permitted due to members' reduced expectancy of privacy arising from the fundamental necessity of obedience and discipline in the military); *Storms v. Coughlin*, 600 F. Supp. 1214, 1221 (S.D.N.Y. 1984) (no fourth amendment bar to random drug testing of prisoners due to prisoners' reduced expectancy of privacy relative to unincarcerated citizens). *But see* *Jones v. McKenzie* 833 F.2d 335, 340-41 (D.C. Cir. 1987) (no requirement of probable cause).

The court in *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), cited *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985), as an authority that did not require reasonable suspicion for constitutionally compelling urinalysis of public employees engaged in extremely hazardous work. However, although the *Allen* court held that the city had a right to make warrantless searches of its employees for the purpose of determining whether those employees were using illegal drugs, the tests were administered to employees who had actually been seen smoking marijuana by an undercover detective hired by the city. The city hired the detective in response to an unusually high number of accidents experienced by the work crew and to a number of reports that the employees involved were using illegal drugs. *Id.* at 484. Therefore, the city probably administered the tests based on "reasonable suspicion" of the specific workers,

the relative importance or dangerousness of the particular public job involved would not justify the use of a higher or lower standard of suspicion.⁶

This Note, by contrast argues that the courts should develop a "sliding scale" based on the nature of a public employee's position to determine the level of suspicion the government employer must possess before it can permissibly require the employee to submit to urinalysis.

Specifically, Part I of this Note outlines the courts' analyses in holding that compelled urinalysis implicates fourth amendment protections, while also presenting alternative arguments that such tests constitute either fourth amendment searches or seizures. Part II discusses the fourth amendment balancing test for reasonableness and outlines how

and it is not clear how the court might have reacted if the city had truly administered the tests on a random basis.

The Supreme Court has held that other kinds of searches based on a standard less stringent than probable cause are constitutionally permissible. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (visual body cavity searches of federal prisoners based on less than probable cause are not unreasonable); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (stopping a driver to check his license and registration based on reasonable suspicions is reasonable); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (search of a person for weapons based on reasonable suspicion is permissible).

The reasonable suspicion standard requires individualized suspicion, directed specifically at the person who is subject to the search. *See Hunter v Auger*, 672 F.2d 668, 675 (8th Cir. 1982). "Inchoate, unspecified suspicions" do not meet the requirement that officials rely on "specific objective facts and rational inferences they are entitled to draw from those facts in light of their experience." *Id.* at 674. "Factors that may be taken into account in determining reasonable suspicion are (1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of the corroboration; and (4) other facts contributing to the suspicion or lack thereof." *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 205 (2d Cir. 1984).

One commentator has suggested that the most logical and productive standard for employee drug testing, whether the employer is private or public, is whether the employee, if intoxicated on the job, would present a "substantial danger" to himself, other persons, or property. Rothstein, *supra* note 1, at 424-26. The author also argues that "without a showing of substantial danger" in the employees' work, the need for drug testing would not outweigh employees' privacy interests." *Id.* at 425.

6. *See infra* notes 66-68 and accompanying text (listing the four levels of judicially recognized suspicion). The court in *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474-77 (D.C. Cir. 1975), held that drug testing of *all* armed services personnel was permissible due to members' reduced expectancy of privacy arising from the fundamental necessity of obedience and discipline in the military. Tests are also justified on grounds that high drug use in the military reduces efficiency and performance.

Courts have also allowed random drug testing of prison inmates and government compelled urinalysis of private employees in "heavily regulated industries." *See Storms v Coughlin*, 600 F. Supp. 1214, 1216-18 (S.D.N.Y. 1984) (arbitrary drug testing of prisoners). For cases involving heavily regulated industries, *see United States v. Biswell*, 406 U.S. 311, 316 (1972) (heavy regulation of firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (liquor); *Shoemaker v. Handel*, 608 F. Supp. 1151, 1155-56 (D.N.J. 1985) (horse racing); and *Matter of Martin*, 90 N.J. 295, 319-21, 447 A.2d 1290, 1302-03 (N.J. 1982) (casino gambling).

courts have applied the test to specific compelled urinalysis schemes. Part III argues for fourth amendment balancing which responds at least to significant differences in the nature of public jobs, so that courts would require a lower standard of suspicion for permissible testing of public employees holding relatively important or dangerous jobs. Finally, Part IV argues that "reasonable suspicion" is not necessarily the highest standard of suspicion appropriate for constitutionally permissible compelled urinalysis of public employees.

I. DOES COMPELLED URINALYSIS REALLY IMPLICATE FOURTH AMENDMENT PROTECTIONS?

A. Lower Courts Say Yes

The fourth amendment establishes an individual's right against unreasonable searches and seizures by government officials.⁷ Therefore, unless compelled urinalysis constitutes either a search or seizure, the fourth amendment will not protect public employees from unreasonable administration of these tests. Although the Supreme Court has not yet decided whether compelled urinalysis implicates the fourth amendment,⁸ most lower courts confronted with the question have held that these tests constitute fourth amendment searches.⁹ At least one court held that compelled urinalysis was a fourth amendment seizure.¹⁰

7. The fourth amendment does not apply to government procedures not having search or seizure status. Such procedures need not be "reasonable." See *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1984-1985*, 74 GEO. L.J. 499 (1986) [hereinafter *Project*]. See *supra* note 3 (text of fourth amendment and brief discussion).

8. The most analogous Supreme Court decision is *Schmerber v. California*, 384 U.S. 757, 767 (1966), in which the Supreme Court held that a state compelled blood alcohol test constitutes a fourth amendment search. Unlike urinalysis, however, the blood test involves an intrusion beyond the skin's surface. See *infra* notes 11-15 and accompanying text (discussing the *Schmerber* Court's opinion).

9. See, e.g., *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); *American Federation of Gov't. Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Lavvorn v. Chattanooga*, 647 F. Supp. 875, 800 (D. Tenn. 1986); *Capua v. Plainfield*, 643 F. Supp. 1507, 1517 (D. N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. 1985); *Davis v. District of Columbia*, 247 A.2d 417, 419 (D.C. 1968) (the court also held that compelled breathalyzer tests are fourth amendment searches); *Ewing v. State*, 160 Ind. Ct. App. 138, 149, 310 N.E.2d 571, 578 (1974); *State v. Locke*, 418 A.2d 843, 846-47 (R.I. 1980) (the court also held that compelled breathalyzer tests are fourth amendment searches).

10. See *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (the *McDonell* court distinguished the production of a body waste specimen from the blood test in *Schmerber*, observing

Courts using the "search" approach have relied heavily on *Schmerber v. California*.¹¹ In *Schmerber*, the Supreme Court held that a state compelled blood test constituted a fourth amendment search.¹² The Court noted that the fourth amendment expressly provides U.S. citizens with the right to be secure in their *persons* against unreasonable searches and seizures.¹³ The Court concluded that a compelled blood test, which involved a needle's intrusion beyond the body's surface, "plainly" constituted a fourth amendment search.¹⁴ The Court also stated that a person's interest in personal dignity and privacy, protected by the fourth amendment, forbade these intrusions where the police had only a mere chance of obtaining the desired evidence.¹⁵

Many courts applying *Schmerber* to compelled urinalysis do not provide any rationale for that extension of the Supreme Court's holding.¹⁶

that because urine is routinely discharged from the body, no physical intrusion is necessary to obtain a specimen); *cf. City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985) (court deemed compelled urinalysis a fourth amendment "search and seizure" but relied exclusively on *McDonell* which held that the procedure was a fourth amendment seizure) (emphasis added).

11. 384 U.S. 757 (1966). *Schmerber* was taken to a hospital for injuries he sustained when he crashed his car into a tree. He was arrested after a policeman noticed the smell of alcohol on his breath. While at the hospital the policeman told the attending doctor to take a blood sample from *Schmerber* for blood/alcohol analysis. The blood sample was drawn despite *Schmerber's* refusal to consent to the test. *Id.* at 758-59.

12. *Id.* at 767. In addition to *Schmerber's* fourth amendment claim, the Court also considered whether the compelled blood test violated *Schmerber's* fourteenth amendment right to due process of law, his sixth amendment right to counsel, or his fifth amendment privilege against self-incrimination. *Id.* at 759. As to the fifth amendment claim, the Court held that the fifth amendment only protects one from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. The Court held that the withdrawal of blood and use of its composition as evidence was not included in that category of "communicative" evidence. *Id.* at 761. Thus, the Court held that the fifth amendment does not bar the use of the defendant's body or its components as physical or real evidence. *See also United States v. Nesmith*, 121 F. Supp. 758, 762 (D.D.C. 1954); *Davis v. District of Columbia*, 247 A.2d 417, 418-19 (D.C. 1968).

13. 384 U.S. at 767.

14. *Id.*

15. *Id.* at 769-70. While the *Schmerber* Court did not find that compelled blood tests were forbidden by the fourth amendment, it held that the constitutionality of such a procedure depended on whether fourth amendment reasonableness standards were met. *Id.* at 770. For later cases involving physically intrusive searches, *see, e.g., Winston v. Lee*, 470 U.S. 753 (1985) (extensive surgery to remove bullet held unreasonable); *United States v. Crowder*, 543 F.2d 312 (D.C. Cir.), *cert. denied*, 429 U.S. 1062 (1977) (surgical removal of bullet held reasonable); *United States v. Shields*, 453 F.2d 1235 (9th Cir. 1972) (body cavity search held reasonable); *Hughes v. United States*, 429 A.2d 1339 (D.C. 1981) (surgical removal of bullets held reasonable). *See generally Note, Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984).

16. *See, e.g., Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Davis v. District of Columbia*, 247 A.2d, 417, 418 (D.C.

Some courts have drawn an analogy between the compelled blood test in *Schmerber* and compelled urinalysis. Those courts relying on this analogy have focused on the compelled production of body fluid rather than on the procedure¹⁷ used to obtain the sample. For example, after distinguishing compelled urinalysis from the taking of fingerprints, fingernail and hair samples, a district court in *American Federation of Gov't. Employees v. Weinberger*¹⁸ asserted that compelled urinalysis "most closely resembles the taking of a blood sample."¹⁹ The court in *Lovvorn v. Chattanooga*²⁰ concluded that because blood tests were subject to fourth amendment constraints, it was clear that compelled urinalysis likewise involved a fourth amendment search.²¹ In *Storms v. Coughlin*,²² the court noted that both compelled blood tests and compelled urinalysis would require forced extraction of body fluids, and reasoned that compelled urinalysis thus involved an "intrusion beyond the body surface."²³

In *Allen v. City of Marietta*,²⁴ the court stated that a blood test qualitatively differed from compelled urinalysis, but still held that compelled urinalysis was a fourth amendment search.²⁵ The court relied on decisions which had extended *Schmerber* to hold that compelled breathalyzer and urine sample tests were fourth amendment searches.²⁶

At least one court has held that compelled urinalysis was a fourth amendment seizure.²⁷ In *McDonell v. Hunter*,²⁸ the court reasoned that because a person possessed a reasonable and legitimate expectation of privacy in the information contained in his body fluids, compelled urinal-

1968); *Ewing v. State*, 160 Ind. App. 138, 149, 310 N.E.2d 571, 578 (1974); and *State v. Locke*, 418 A.2d 843, 847 (R.I. 1980).

17. *Schmerber*, however, focused on the actual physical intrusion into the body (via hypodermic needle) that occurs when a blood sample is withdrawn from a person. 384 U.S. at 768, 770.

18. 651 F. Supp. 726 (S.D. Ga. 1986).

19. *Id.* at 733.

20. 647 F. Supp. 875 (E.D. Tenn. 1986).

21. *Id.* at 879.

22. 600 F. Supp. 1214 (S.D.N.Y. 1984).

23. *Id.* at 1218.

24. 601 F. Supp. 482 (N.D. Ga. 1985).

25. *Id.* at 488-89. See also *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1512-13 (D.N.J. 1986).

26. 601 F. Supp. at 488-89. In addition to citing *Division 241* and *Ewing v. State*, 160 Ind. App. 138, 310 N.E.2d 571 (1974) for authority holding that compelled urinalysis is a fourth amendment search, the *Allen* court also cited courts which extended *Schmerber* to hold that breathalyzer test are fourth amendment searches, e.g., *State v. Locke*, 418 A.2d 843 (R.I. 1980); *State v. Berker*, 120 R.I. 849, 391 A.2d 107 (1978); and *Davis v. District of Columbia*, 247 A.2d 417 (D.C. 1968).

27. See *supra* note 10.

28. 612 F. Supp. 1122 (S.D. Iowa), *modified*, 809 F.2d 1302 (8th Cir. 1985).

ysis was a fourth amendment seizure.²⁹

*B. Compelled Urinalysis is Not a Search Under
Schmerber v. California*

The Supreme Court's decision in *Schmerber v. California* does not support the conclusion that compelled urinalysis is a fourth amendment search.³⁰ Courts which have relied on *Schmerber* to hold that compelled urinalysis is a fourth amendment search have over-extended the Supreme Court's rule.³¹ In *Schmerber*, the Court emphasized that its holding was narrowly confined to procedures involving actual physical intrusions into the human body.³² Compelled urinalysis does not involve such an intrusion into the body, and therefore is not analogous to *Schmerber's* compelled blood test. This point is best demonstrated by courts' inability to articulate a convincing rationale for extending *Schmerber* to compelled urinalysis.³³

C. Alternative Search and Seizure Arguments

1. Search Approach

Despite *Schmerber's* failure to answer the question, one can still argue that compelled urinalysis is a search.³⁴ In *Boyd v. United States*,³⁵ the Supreme Court held that a procedure whereby government officials compelled a person to surrender documents to be used against him in a property forfeiture hearing was a fourth amendment search.³⁶ The Court reasoned that the compelled production of documents effected "the sole objective and purpose of search and seizure," and was therefore equivalent to an actual physical search of that person's home or business.³⁷ According to the *Boyd* Court, a procedure which amounts to a search or seizure when performed directly by government officials does

29. *Id.* at 1127.

30. *See supra* note 11-15 and accompanying text (discussing *Schmerber*).

31. *See supra* notes 16-26 and accompanying text (discussing cases that rely on *Schmerber* to hold that compelled urinalysis was a fourth amendment search).

32. *Schmerber v. California*, 384 U.S. 757, at 767, 769-70 (1966).

33. *See supra* notes 16-22 and accompanying text (discussing cases which analogized compelled urinalysis to blood tests).

34. *See supra* notes 30-33 and accompanying text (discussing why compelled urinalysis is not a search under *Schmerber*).

35. 116 U.S. 616 (1886).

36. *Id.* at 621-22.

37. *Id.*

not lose fourth amendment search status merely because the government finds that it could use coercion to achieve the same objective indirectly.

Suppose that a more "direct" or forceful alternative method of acquiring a urine sample from an employee would constitute a search. Under *Boyd*, compelling a public employee to submit to urinalysis by threatening to fire him if he refuses should also be a search. For example, if public officials chose to obtain a urine sample from a reluctant employee by a forceful catheterization, it is clear under *Schmerber* that such a procedure would amount to a search because it involves an actual physical intrusion into the person's body.³⁸ Applying *Boyd*, the process of acquiring a urine sample from this reluctant employee should not lose "search status" simply because the government can, as an indirect alternative, compel production of the sample by threatening to fire the employee if he refuses to cooperate.

One might argue that *Boyd* is simply not applicable to the compelled urinalysis situation. While *Boyd* involved compelled production of some documents, compelled urinalysis merely involves the production of a sample of body waste, a substance in which a person has little or no property interest. However, while this reasoning might carry some weight were it asserted that compelled urinalysis involves a "seizure" of a urine sample, it has nothing to do with whether a person subjected to compelled urinalysis has been searched.

Finally, had the *Boyd* ruling been limited to criminal cases, the historical relationship between the fourth and fifth amendments would substantially weaken the suggested analogy between the *Boyd* situation and compelled urinalysis. The *Boyd* Court "relied heavily" on that relationship.³⁹ The Court believed that a government procedure that forced someone to produce incriminating documents implicated that person's fifth amendment rights.⁴⁰ One could therefore argue that *Boyd* is not applicable to compelled urinalysis because the Supreme Court has since held that the human body, body characteristics and body fluids are excluded from the kinds of "communicative materials," which, if produced by state compulsion, would implicate a person's fifth amendment

38. See *supra* notes 11-15 and accompanying text (discussing the physical bodily intrusion in *Schmerber*).

39. See *Frank v. Maryland*, 359 U.S. 360, 364-66 (1959) (discussing *Boyd*).

40. *Id.*

rights.⁴¹ However, the *Boyd* Court did not limit its holding to criminal cases; *Boyd* itself was a noncriminal suit for property forfeiture pursuant to U.S. customs revenue laws.⁴²

2. *Seizure Approach*

Alternatively, courts could rely on a seizure analysis to hold that compelled urinalysis for detection of illegal drug use implicates fourth amendment protections. At least one court held that the procedure constituted a fourth amendment seizure of a person's body fluids.⁴³ However, courts have ignored the basis of the *Schmerber* Court's holding: the government compelled blood test in that case involved a seizure of the *person*, followed by the actual medical procedure which constituted the search.⁴⁴

A fourth amendment seizure results from a significant interference with a person's liberty or property interests.⁴⁵ Although the Supreme Court in *Schmerber* did not elaborate a test for finding a seizure of the person, the Court's test for seizure of the person in recent criminal cases is whether a reasonable person in the circumstances would believe he is not free to leave the scene of "official contact."⁴⁶ "Official contact" in criminal cases involves police contact. Whether the test applies in the compelled urinalysis situation depends on the meaning of the phrase "free to leave."

Obviously, a public employee faced with a government directive to submit to urinalysis drug testing is "free" to refuse the test, but that refusal may cost him his job.⁴⁷ Effectively, a public employee who has the

41. *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966). See *supra* note 12 (discussing *Schmerber*'s fifth amendment claim and the Court's response).

42. 116 U.S. at 619.

43. See *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985). See *supra* notes 27-29 and accompanying text (discussing the "seizure" portion of the *McDonell* opinion).

44. See *Schmerber*, 384 U.S. at 767. ("Such testing procedures plainly constitute searches of 'persons' and depend antecedently upon seizures of 'persons,' within the meaning of" the fourth amendment.) (emphasis added).

45. See *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (interference with individual's liberty).

46. See *supra* note 44 for text of the *Schmerber* opinion concerning seizure of the person. For Supreme Court discussion of the test it employs in determining "seizure of a person," see *Florida v. Royer*, 460 U.S. 491, 501-02 (1983) and *United States v. Mendenhall*, 446 U.S. 544, 554, *reh'g denied*, 448 U.S. 908 (1980).

47. See, e.g., *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976) (court upheld Chicago Transit Authority employee rule providing for disciplinary action against employees refusing to submit to compelled urinalysis based on reasonable suspicion) and

reasonable desire to keep his job has no choice in the matter. Arguably a public employee compelled to submit to urinalysis drug testing by the threat of job loss has been "seized" and is entitled to fourth amendment protections.⁴⁸

One argument against this suggested seizure approach is that the analysis could not differentiate between the situation when a public employer directs that employees submit to urinalysis and any other order to employees concerning their job functions. Consequently, a supervisor in a public office would run the risk of "seizing" an employee any time he required a subordinate to perform some job-related task. An answer to this argument is that compelled urinalysis simply is not a usual job function. A public employer's requirement that an employee perform a task is clearly distinguishable from a requirement that the employee submit to urinalysis for detection of illegal drug use.

D. The Non-Criminal Approach of a Typical Compelled Urinalysis Scheme Should Not Foreclose Fourth Amendment Analysis

To the extent a public employer's drug testing scheme primarily concerns itself with maintaining a work force unimpaired by illegal drugs, rather than with criminal prosecution of drug using employees, it may be tempting to assert that the employees do not need the fourth amendment's protections. However, fourth amendment protections apply to all government searches and seizures, not just to those conducted in law enforcement activity. In *Camara v. Municipal Court of San Francisco*,⁴⁹ the Supreme Court overruled *Frank v. Maryland* to the extent *Frank* allowed warrantless investigatory searches.⁵⁰ In explaining its holding, the *Camara* Court stated that "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."⁵¹

Therefore, if compelled urinalysis constitutes either a search or

Turner v. Fraternal Order of Police, 500 A.2d 1005, 1006, (D.C. 1985) (court upheld police department drug testing program which provided that a refusal by an employee to submit to compelled urinalysis based on reasonable suspicion results in a proposal for termination).

48. Once it is shown that a government procedure implicates fourth amendment protections, a court must then consider whether the procedure is reasonable in the circumstances. See *infra* notes 56-75 and accompanying text (discussing the fourth amendment balancing test for reasonableness).

49. 387 U.S. 523 (1967).

50. *Id.* at 527-28.

51. *Id.* at 530.

seizure, the fact that a particular public employer's drug testing scheme involves only civil sanctions, such as mandatory medical treatment or loss of job, does not allow that employer to avoid the fourth amendment's requirement of reasonableness. It should be noted, on the other hand, that it may be perfectly appropriate for a court to consider the type and extent of sanction imposed when determining the reasonableness of a drug testing scheme under the fourth amendment.

II. COMPELLED URINALYSIS SCHEMES AND COURTS' APPLICATION OF THE FOURTH AMENDMENT BALANCING TEST FOR REASONABLENESS

A. *The Fourth Amendment Balancing Test*

Once a court determines that a government procedure implicates the fourth amendment, it must then decide whether the procedure was reasonable in the circumstances.⁵² Aside from several specifically established exceptions, warrantless searches and seizures are per se unreasonable.⁵³ Absent some emergency or special law enforcement problem, the fourth amendment requires that a search be conducted under a warrant based on probable cause and issued by an impartial judicial officer.⁵⁴ The warrant requirement has two exceptions relevant to compelled urinalysis: 1) searches and seizures conducted upon the reasonable need to prevent the loss or destruction of evidence,⁵⁵ and 2) searches and seizures conducted upon the reasonable need to protect the official performing the search or seizure, the person subjected to the pro-

52. See *supra* notes 3 and 6 (text of fourth amendment and brief discussion).

53. *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984), *reh'g denied*, 469 U.S. 1197 (1985).

54. See *Project, supra* note 7 at 511-12. The Supreme Court in *Texas v. Brown*, 460 U.S. 730, 742 (1983), recites the following definition of "probable cause" for search: "[p]robable cause is a flexible common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief . . ." A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

55. *Schmerber v. California*, 384 U.S. 757 (1966) involved such an exception. See *infra* notes 57-59 and accompanying text (discussing the Court's reliance on the "destruction of evidence" exception to the warrant requirement).

Whether this exception is technically applicable to urinalysis for detection of illegal drug use is questionable due to the substantial length of time such substances remain detectable in a person's urine. This point is strengthened by the fact that urinalysis drug testing cannot measure the *level* of impairment, unlike a blood test for alcohol content. However, the court in *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) suggested the possibility that the "destruction of evidence" exception might be applicable in drug urinalysis cases. *Id.* at 1009 n.8.

cedure, or the public.⁵⁶

A court considering the reasonableness of a search or seizure conducted under an exception to the fourth amendment warrant requirement may still require the procedure to be based on probable cause. For example, in *Schmerber v. California*⁵⁷ a police officer arrested a victim of a car crash on suspicion of drunk driving, and forced him to submit to a blood test for alcohol content.⁵⁸ The Court found that the officer had probable cause in the circumstances to arrest Schmerber, and that those facts surrounding the arrest also constituted probable cause that Schmerber was illegally intoxicated. The Court noted that search warrants are ordinarily required for searches of homes, and that no less could be required for searches of the human body absent some emergency. However, the Court held that it was reasonable for the officer to believe an emergency existed sufficient for him to proceed without a warrant. The delay necessary to obtain a search warrant "threatened the destruction of evidence" because the human body rapidly eliminates alcohol after consumption has ceased.⁵⁹

The Supreme Court has developed a balancing test to determine reasonableness under the fourth amendment. The test involves balancing the need to search ("public interest") against the invasion the search entails ("private interest").⁶⁰ The Supreme Court has noted that the balancing test for reasonableness is susceptible to neither precise definition nor mechanical application.⁶¹ However, the Court has developed some guidelines for applying the test.

First, the public interest in allowing a particular search should be considered in light of the purpose or objective of the search. For example, in

56. Other warrant requirement exceptions include: investigative detentions; public arrests; seizures made after hot pursuit; searches incident to arrest; plain view seizures; searches of vehicles; inventory searches; border searches; inspections at sea; and administrative inspections of certain closely regulated industries. *Project, supra* note 7 at 510 n.58.

57. 384 U.S. 757 (1966).

58. *Id.* at 758.

59. *Id.* at 770-71.

60. The Court apparently first adopted the test in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 536-37, 539 (1967), for purposes of determining the reasonableness of warrantless searches and seizures. The Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) adopted the *Camara* test to determine the appropriate standard of reasonableness for all cases. *Project, supra* note 7 at 514.

61. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). *See also* *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Katz v. United States*, 389 U.S. 347, 354-56 (1967); *Schmerber v. California*, 384 U.S. 757, 768-72 (1966).

Camara v. Municipal Court,⁶² the Supreme Court considered whether searches of private homes for health code violations were reasonable when the search warrants were based on less than probable cause. The Court stated that the public need for such inspections must be weighed in terms of the reasonable goals of health code enforcement. The primary goal of urban health codes is to prevent conditions which foster epidemics or fires. But because significant health code violations are often hidden within buildings, effective health code compliance cannot be achieved without periodic inspections based on a standard of suspicion less than probable cause. Therefore, although the Court required such searches to be conducted upon search warrants, it required a lower standard of suspicion than that usually required in criminal cases.⁶³

Second, when determining relevant private interests, courts assess the degree of invasion the search entails by considering the scope of the search, the manner in which the search is conducted, and whether the individual's interest is supported by a legitimate expectancy of privacy in the circumstances.⁶⁴

When considering the "manner in which a search is conducted," courts note the degree of suspicion that triggered the government decision to perform a search.⁶⁵ Courts recognize four suspicion levels: probable cause,⁶⁶ reasonable suspicion or belief,⁶⁷ a use "of standardized procedures involving neutral criteria"⁶⁸ and *per se* reasonableness.⁶⁹

Courts use the balancing test to determine whether a search, based on the specific level of suspicion by government officials, was reasonable.⁷⁰ If a court finds that a search was unreasonable in the circumstances, it can also use the balancing test to determine whether that same search, if based on a higher level of suspicion, would have been reasonable.⁷¹ Similarly, a more intrusive search requires a higher level of suspicion before officials can constitutionally perform the search. For example, if a strip

62. 387 U.S. 523 (1967).

63. *Id.* at 535-40.

64. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

65. See *infra* notes 66-72 and accompanying text (discussing relationship between the reasonableness of a search and government official's degree of suspicion).

66. See *supra* note 54 for a definition of "probable cause."

67. See *supra* note 5 for a definition of "reasonable suspicion."

68. *Project*, *supra* note 7 at 512-13.

69. *Id.*

70. *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985).

71. See court's discussion in *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D.2d 35, 38-40, 505 N.Y.S.2d 888, 890-91 (1986).

search requires only reasonable suspicion by officials, a highly intrusive body cavity search in the same circumstances might require probable cause.⁷² Thus, as the public interest in or need for the search increases, the amount of official suspicion necessary for a constitutional search decreases.

B. How Courts Have Applied the Test to Compelled Urinalysis Schemes

The court in *Committee for GI Rights v. Callaway*⁷³ considered whether compelled urinalysis of all military personnel without any particularized suspicion was reasonable. Although the court recognized that members of the military were entitled to some level of constitutional protection, it held that such random testing of military personnel was reasonable.⁷⁴ The court based its decision on the conclusion that the fundamental necessity of obedience and discipline in the military rendered such procedures reasonable even though the same procedures would be constitutionally impermissible outside the military.⁷⁵

Courts applying the balancing test to compelled urinalysis of non-military public employees⁷⁶ have recognized the public's interest in having public employees unimpaired by illegal drugs. Courts have noted that this need for chemically unimpaired employees is especially great when employees are working under relatively dangerous conditions. At the same time, courts have also considered compelled urinalysis a significant invasion of employees' interest in privacy.⁷⁷ Litigation over compelled urinalysis drug testing of public employees has included disputed testing of police, firefighters, prison employees, bus drivers, bus attendants, public works employees and public school teachers.⁷⁸

Although the courts in these cases have made efforts to distinguish the

72. See *United States v. McMurray*, 747 F.2d 1417, 1420 (11th Cir. 1984) and *United States v. Des Jardins*, 747 F.2d 499, 504-05 (9th Cir. 1984).

73. 518 F.2d 466 (D.C. Cir. 1975).

74. *Id.* at 474, 478-79.

75. *Id.* at 474.

76. See *supra* note 5.

77. See *supra* note 5 (listing compelled urinalysis cases).

78. See, e.g., *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (bus drivers); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C.), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendants); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985) (prison employees); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) (police); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (public electric and sewer workers); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (police and

degree of danger involved in different non-military public employment positions, they have each required that at a minimum government officials have reasonable suspicion that specific employees are using illegal drugs before testing those employees for drug use.⁷⁹ Some of these courts have required reasonable suspicion by independently applying the balancing test to the specific employment position of those persons the government proposes to test.⁸⁰ Other courts have tied their analysis to other courts' application of the balancing test to different employment positions.⁸¹

For example, in *Turner v. Fraternal Order of Police*,⁸² the court considered the reasonableness of a police department's drug testing policy, which provided for compelled urinalysis of policemen based on reasonable suspicion that the individuals were using illegal drugs.⁸³ The court noted the dangerous situations that police encounter and stated that each individual's privacy interest is shaped by the context in which it is asserted.⁸⁴ The court compared the nature of a police officer's job to military positions. The court concluded that although policemen are engaged in a "para-military" profession, it is not reasonable to subject police to the arbitrary drug testing permitted in *Callaway*.⁸⁵ On the other hand, the court decided that probable cause was not required for constitutionally permissible compelled urinalysis of the policemen. The court asserted that the public's interest in having policemen unimpaired by illegal drugs is significantly greater than the public's interest in unimpaired private citizens. Therefore, the standard for testing policemen need not have been as rigorous as the probable cause standard normally required for investigations of private citizens.⁸⁶

Similarly, the court in *McDonell v. Hunter*,⁸⁷ which considered whether random compelled urinalysis of Iowa prison employees was reasonable, independently applied the balancing test to the specific employ-

firefighters); *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986) (public school teachers).

79. See *supra* note 5.

80. See *infra* notes 82-93 and accompanying text.

81. See *infra* notes 94-100 and accompanying text.

82. 500 A.2d 1005 (D.C. 1985).

83. *Id.* at 1006.

84. *Id.* at 1007.

85. *Id.* at 1008-09.

86. *Id.*

87. 612 F. Supp. 1122 (S.D. Iowa 1985).

ment position.⁸⁸ The *McDonell* court stated that the public's paramount interest in prison security reduced the scope of prison employees' reasonable expectation of privacy. Therefore, the prison employment context makes reasonable some intrusions that would not be reasonable outside the prison facility.⁸⁹ The court concluded that the state's interest in security, though very significant, would not be seriously impaired by requiring reasonable suspicion as the standard for constitutional drug testing of its prison employees.⁹⁰

In *City of Palm Bay v. Bauman*⁹¹ the court addressed whether the city's drug testing policy for police and firemen was reasonable.⁹² The court concluded that requiring policemen and firemen not suspected of drug use to submit to compelled urinalysis or face disciplinary action was unreasonable. The court then stated that such testing was unconstitutional without reasonable suspicion that the specific individuals to be tested were using illegal drugs.⁹³

Using an *a fortiori* analysis, several courts have related the standard of suspicion required for drug testing of public employees in specific positions to the reasonable suspicion standard other courts have required for drug testing of police, firefighters, train engineers and bus drivers.⁹⁴ In *Patchogue-Medford Congress of Teachers v. Board of Education*⁹⁵ a public school official proposed random urinalysis drug testing of all teachers considered for tenure.⁹⁶ The *Patchogue* court discussed the school's significant interest in detecting any teachers impaired by illegal drug use.⁹⁷ But the court asserted that the need for detection of illegal drug use by teachers was not as crucial as the need for detection in such critical public positions as police officer, firefighter, bus driver or train engineer—professions in which the use of illegal drugs creates a much greater threat to public safety. Noting that other courts have held that such tests in-

88. That is, the court in *McDonell* applied the balancing test for reasonableness to the specific facts, including the specific *employment position*, without relying on another court's decision as a benchmark for the suspicion standard.

89. 612 F. Supp. 1122, 1127-28 (S.D. Iowa 1985).

90. *Id.* at 1130.

91. 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

92. *Id.* at 1323.

93. *Id.* at 1325.

94. *See supra* note 78 (indicating employment positions involved in government urinalysis drug testing cases).

95. 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986).

96. 119 A.D.2d at 36, 505 N.Y.S.2d at 889.

97. 119 A.D.2d at 38-49, 505 N.Y.S.2d at 890-91.

volving these critical employees were unconstitutional when there was no reasonable suspicion that they were using illegal drugs, the court concluded that, at a minimum, reasonable suspicion is necessary before public school teachers could be subject to such testing.⁹⁸

Similarly, the court in *Jones v. McKenzie*⁹⁹ required reasonable suspicion as the standard for constitutionally compelling school bus attendants to submit to urinalysis drug testing. The court reasoned that the bus attendants should not be subjected to a drug testing scheme more stringent than that required for police or bus drivers.¹⁰⁰

Finally, the *Patchogue* court cited *Allen v. City of Marietta*¹⁰¹ as an authority which did not require reasonable suspicion for constitutionally compelling urinalysis of public employees engaged in extremely hazardous work.¹⁰² However, although the *Allen* court held that the city had a right to make warrantless searches of its employees for the purpose of determining whether those employees were using drugs, the tests were administered to employees who had actually been seen smoking marijuana by an undercover detective hired by the city.¹⁰³ The city hired the detective in response to an unusually high number of accidents experienced by the work crew and to a number of reports that the employees involved were using illegal drugs.¹⁰⁴ Therefore, the city administered the tests effectively based on reasonable suspicion of specific workers, and it is not clear what the *Allen* court might have held had the city administered the test on an arbitrary basis.¹⁰⁵

III. COURTS' FOURTH AMENDMENT BALANCING SHOULD REFLECT SIGNIFICANT DIFFERENCES IN PUBLIC JOBS

Except for courts' application of the balancing test to compelled

98. 119 A.D.2d at 40, 505 N.Y.S.2d at 891.

99. 628 F. Supp. 1500 (D.D.C.), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987).

100. *Id.* at 1508-09.

101. 601 F. Supp. 482 (N.D. Ga. 1985).

102. 119 A.D.2d at 40, 505 N.Y.S.2d at 891. The *Patchogue* court suggested that the court in *Allen* allowed random testing of public works employees due to the "extremely hazardous occupation of working around high voltage wires." *Id.*

103. 601 F. Supp. at 484-85, 490-91.

104. *Id.* at 484-85.

105. Courts have held that random testing programs are unreasonable searches and seizures. *See, e.g., Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.C.N.J. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Penny v. Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986); and *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986); *Scrivner*, *supra* note 2 at 11.

urinalysis of military personnel,¹⁰⁶ the nature of the specific public employment position considered for testing has not played a significant role in the "public need" side of the balance. Courts have held that reasonable suspicion is a prerequisite to permissible urinalysis of police, firefighters, public works employees and public school teachers.¹⁰⁷

Therefore, when government officials formulate an employee drug testing program they must adhere to that minimum standard of suspicion. Using the current court application of the balancing test, it makes no difference that a firefighter's job may be more dangerous than a policeman's job, or that each of these jobs involves significantly more dangerous situations than does teaching elementary school.¹⁰⁸ Currently, when applying the balancing test courts do not consider such differences significant enough to require a different standard of suspicion.

Courts' application of the balancing test to compelled urinalysis has been too inflexible. A public employee's interest in privacy, though substantial, does not change between dangerous or "nondangerous" jobs. No matter how dangerous his job is, a person enjoys his privacy as much as the person working under the safest conditions. However, the potential for an immediately dangerous situation varies significantly between a firefighter and a schoolteacher using illegal drugs on the job. Therefore, the public's interest in chemically unimpaired employees, and the resulting need for urinalysis drug testing of those employees, changes drastically between relatively dangerous and nondangerous jobs.¹⁰⁹

Courts' application of the balancing test to compelled urinalysis situations should reflect this shifting public interest by requiring a lower level of suspicion for constitutionally permissible compelled urinalysis of public employees in dangerous or critical positions than the suspicion level required to constitutionally test public employees in relatively safer or less critical positions.¹¹⁰

106. See *supra* notes 73-75 and accompanying text (discussing compelled urinalysis of military personnel).

107. See *supra* note 78 (indicating employment positions involved in compelled urinalysis cases).

108. Courts have recognized significant differences in the nature of various public jobs, but have not found the differences sufficient to justify a different degree of suspicion for permissible compelled urinalysis on that basis.

109. Public positions involving access to confidential government information generate concerns of magnitude similar to dangerous jobs. For example, an employee with a drug addiction may be tempted to sell sensitive information in order to finance his habit.

110. See *supra* note 109.

IV. "REASONABLE SUSPICION" IS NOT NECESSARILY THE
MOST RIGOROUS STANDARD APPROPRIATE FOR
COMPELLED URINALYSIS

This Note does not argue which particular standard of suspicion should be required for specific dangerous and relatively nondangerous public employee positions. Rather, it suggests that courts' application of the balancing test for reasonableness should require different standards of suspicion for constitutionally permissible compelled urinalysis of employees in significantly different working situations.¹¹¹

On the other hand, the *Patchogue* court, relying on *Camara*, suggested that "reasonable suspicion" is the highest standard for government urinalysis drug testing of employees, because such searches are "not aimed at the discovery of evidence for use in a criminal trial."¹¹² The *Patchogue* Court reasoned that because the proposed urinalysis drug testing of public school teachers in that case was aimed at discovering which teachers were unfit to teach because of illegal drug use, rather than for prosecution, probable cause was not required.¹¹³

What the *Patchogue* court overlooked was that the facts and circumstances it dealt with differed significantly from those in *Camara*. First, although the *Camara* Court required a level of suspicion lower than probable cause, the court still required that the health code inspections in that case be conducted upon search warrants.¹¹⁴ Therefore, before such health code inspectors could conduct searches in a specified urban area, the inferences to support the searches had to be made by a neutral and detached magistrate.¹¹⁵ Further, the lower level of suspicion required in *Camara* was somewhat offset by the protection provided by a magistrate's independent determination of whether officials have the necessary level of suspicion. In *Patchogue*, the court left to school officials the responsibility of assessing whether reasonable suspicion existed that a particular teacher was using illegal drugs.¹¹⁶ One might argue that, without an independent magistrate's inference of reasonable suspicion from facts tending to indicate a particular teacher was using illegal drugs, probable

111. See *supra* notes 66-68 and accompanying text (listing the four levels of judicially recognized suspicion).

112. 119 A.D.2d at 40, 505 N.Y.S.2d at 891.

113. *Id.*

114. 387 U.S. 523, 538-40 (1967).

115. *Id.*

116. 119 A.D.2d at 40-41, 505 N.Y.S.2d at 891-92.

cause should be required to provide the teachers with a substitute for the safeguards a magistrate's independent inference would provide.

Secondly, the *Camara* Court noted that the health code inspection of homes was not "personal in nature."¹¹⁷ However, compelled urinalysis for detection of illegal drug use is a much more personal intrusion. In *Camara* the health agency's decision to conduct an area inspection was based on an appraisal of conditions in the urban area as a whole, not on agency knowledge of specific conditions of a particular building.¹¹⁸ The *Patchogue* court required that permissible compelled urinalysis of teachers should be based on suspicion that a *particular* teacher is using drugs.¹¹⁹ Further, compelled urinalysis is simply a more personal procedure than a health code inspection of a residence.

Finally, the nature of the evidence sought in compelled urinalysis, as opposed to the nature of the search, is very different from the evidence sought in a health code inspection. A public school teacher subjected to compelled urinalysis for illegal drug use, who has not in fact used illegal drugs, is nevertheless subject to a potentially significant level of social stigma among his peers. In this respect, the distinction of compelled urinalysis as a civil, rather than a criminal procedure, is minimal.

V. CONCLUSION

This Note examines and discusses the law relating to the government's authority to test its employees for illegal drug use. Relying on *Schmerber v. California*, courts have generally held that compelled urinalysis for that purpose implicates the fourth amendment's protection against unreasonable searches. Under the fourth amendment, the government's authority to compel urinalysis to detect employees' illegal drug use turns on courts' application of a balancing test for reasonableness. With the exception of military personnel, courts have held that government officials cannot randomly test public employees for illegal drug use.

Courts which decide that compelled urinalysis implicates fourth amendment protections should offer a convincing basis for that holding. If these tests constitute fourth amendment searches, the Supreme Court's decision in *Schmerber v. California* does not support that conclusion.

117. 387 U.S. at 537.

118. *Id.* at 536.

119. 119 A.D.2d at 40, 505 N.Y.S.2d at 891-92.

This Note presents alternative arguments that compelled urinalysis nevertheless amounts to either a fourth amendment search or seizure.

If compelled urinalysis implicates the fourth amendment, courts' fourth amendment balancing for reasonableness should reflect significant differences in public jobs. Courts should require a lower level of suspicion for constitutionally permissible compelled urinalysis of public employees in dangerous or critical positions than the suspicion required to test public employees in relatively safer or less critical positions.

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