

RANDOM URINALYSIS AND THE FOURTH AMENDMENT: CAN THEY COEXIST?

To eradicate the widespread use of drugs in the workplace,¹ many government entities² have followed private employers³ by instituting drug testing programs. Government has a valid interest in ensuring a drug-free work force, particularly when impaired employees endanger public safety.⁴ Yet the intrusive nature of mandatory urinalysis⁵ of

1. Bensinger, *Drugs in the Workplace: A Commentary*, 3 *Behavioral Sciences and the Law* 441 (Autumn 1985). An estimated twenty-two million Americans use marijuana, four million people abuse cocaine, and ten million abuse prescription drugs. *Id.* National surveys estimate that drug abusers will have three to four times more accidents on the job compared with drug-free employees. *Id.* at 442. According to the National Triangle Research Institute survey of 1982 documents, due to alcohol and drug abuse employers lose 100 billion dollars every year in the form of reduced productivity and expenses from treatment, law enforcement, accidents, and health care. *Id.*

2. Some governmental entities requiring employee drug testing include city police departments, school teachers, firefighters and the U.S. Army. *See, e.g.*, *National Federation of Federal Empl. v. Weinberger*, 640 F. Supp. 642 (D.D.C. 1986) (the United States Army); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. App. 1985) (police departments); *Matter of Patchogue - Medford Congress of Teachers v. Board of Educ.*, 55 U.L.L.W. 2213 (N.Y. App. Div. 1986) (school teachers); and *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (firefighters).

3. Approximately twenty-five percent of Fortune 500 companies require job applicants or current employees suspected of drug use to undergo drug testing. *Omestad, Drug Tests at 3M Plant Yield Constitutional Debate*, L.A. Times, Feb. 23, 1986, pt. II, at 6, col. 1 (1985 survey). Other private employers with drug testing programs include International Business Machines (IBM), N.Y. Times, Feb. 24, 1985, § III, at F-17, col. 2, and General Motors Corporation, *Stille, Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, NAT'L L.J., Apr. 7, 1986, at 23, col. 3.

4. Commentators have focused on the employer's interest in guaranteeing job safety and security in the face of an increasing number of on-the-job accidents. *See Lacayo, Putting Them All To the Test*, Time, Oct. 21, 1985, at 61; *see also Press, First the Lie*

public employees implicates the Consitution's fourth amendment prohibition against "unreasonable searches and seizures."⁶

Recently, several federal courts examined the constitutionality of mandatory mass urinalysis of public sector employees.⁷ This Recent Development will survey the courts' attempts to establish standards for permissible drug testing and will examine the application of current fourth amendment analysis.

I. URINALYSIS DEFINED

The EMIT (Enzyme Multiplied Immunoassay Technique) system⁸ is the most prevalent test currently used to detect employee drug use.⁹

Detector, Then the Chemicals: Is There a Right to Privacy in the Private Sector? Newsweek, Jan. 27, 1986, at 56. Other employer interests that created the perceived need for drug testing include: absenteeism, property law, increased health insurance costs, and increased worker's compensation claims. Husband, *Drug and Alcohol Abuse in the Workplace*, *Labor and Employment Review*, 15 COLO. LAWYER 31 (Jan. 1986). Courts often focus on the public safety interests involved in assuring drug-free employees. *See, e.g.*, Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (public safety of mass transit riders outweighed privacy interests of bus and train operators so as to allow drug testing); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (valid state interest in public safety of workers engaged in extremely hazardous occupation of high-voltage wire technician justified mandatory drug testing).

5. *See infra*, notes 24, 125, 147, 153 and accompanying text.

6. The fourth amendment states:

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

U.S. CONST. amend. IV. The fourth amendment applies to the states through the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

7. *See Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) (New Jersey Ruling Commission testing of jockeys, trainers, and grooms); *Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986) (urinalysis of police officers); *National Fed'n of Fed'l Empl., Local 2058 v. Weinberger*, 640 F. Supp. 642 (D.D.C. 1986) (testing of Civilian Guard Division at military post); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (urinalysis of firefighters); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986) (drug testing of United States Customs workers); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (urinalysis of firefighters); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (drug testing of power and light employees working with high voltage wires).

8. The EMIT test consists of antibodies that attach themselves to drugs or drug metabolites (products resulting from drug breakdown in the body) in an individual's urine sample. Syva, a Syntex Co., *Frequently Asked Questions About Syva and Drug Abuse Testing 3* (March 1983).

9. Note, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitu-*

Technicians typically administer EMIT as a preliminary drug test.¹⁰ Designed merely to indicate the presence of drug metabolites¹¹ in a person's body at a detectable level,¹² EMIT is incapable of measuring the drug's concentration in the body, or indicating when the subject took the drug.¹³ Although the EMIT System detects the presence of most drugs as long as three days after ingestion,¹⁴ marijuana can leave traces of tetrahydrocannabinol¹⁵ (THC) in the body for two to three weeks.¹⁶ Other drugs such as amphetamines and secobarbital may pass through the body so quickly as to escape detection altogether.¹⁷ Further, EMIT fails to correlate the presence of drug metabolites to the level of intoxication.¹⁸ Due to shortcomings of the EMIT System, most employers do not rely on this preliminary test to make employment decisions.¹⁹

tional in California? 19 LOYOLA L.A. LAW REV. 1451, 1455 (June 1986). Non-technical personnel may administer the portable EMIT test and determine results in a matter of minutes. *Syva Co., Marijuana and the EMIT Cannabinoid Assay* 5 (June 1981). The possibility of improper testing may arise when non-technical personnel implement it. Note, *supra* at 1459-60.

10. See *Jones v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986).

11. After the drug is in the body, the liver converts it into chemical elements called "metabolites." *Syva Co., supra* note 9, at 2.

12. The "detectable level" varies with factors such as body weight, stress, menstrual cycle, diet, and mood, which all affect the excretion rate. *Id.* at 3.

13. *Id.*

14. *Syva, a Syntex Co., supra* note 8, at 4.

15. THC, tetrahydrocannabinol, is the psychoactive component of marijuana. *James v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986).

16. *Syva, a Syntex Co., supra* note 8, at 2.

17. *Syva Co., supra* note 9, at 4.

18. It is impossible to correlate intoxication to the amount of metabolites excreted because individual physical and psychological factors affect the rate of excretion in urine. See *supra*, note 12. Thus, a person passively or actively exposed to marijuana smoke off the job site may test positive under EMIT long after intoxication. False positives from passive inhalation have been reported. See Zeese, *Marijuana Urinalysis Tests*, 1 DRUG. L. REP. 25 (1983). Experts indicate that marijuana intoxication occurs within twenty to thirty minutes after smoking and lasts about two hours. *Syva Report, Frequently Asked Questions, supra* note 8, at 1.

19. The Syva Company expressly requires a confirmation test subsequent to positive EMIT test results. *Syva Co., supra* note 9 at 17; *Jones v. McKenzie*, 628 F. Supp. 1500, 1505 (D.D.C. 1986). Independent Toxicologists, the Center for Disease Control, and a scientific study conducted by the Air Force School of Aerospace Medicine require confirmation tests prior to disciplinary action. *Id.* at 1506.

Typically, employers administer a confirmation urinalysis test²⁰ before taking further action. The United States Government considers the GC/MS (Gas-Chromotography/Mass Spectometry) test²¹ to be the most reliable method of confirmation and drug identification.²² If a urine sample indicates the presence of a drug,²³ supervisory technicians separate the particular drug metabolites from the individual's urine.²⁴ Since the GC/MS test and other confirmation stage procedures involve analysis of chemical compounds in urine, technicians can accidentally uncover physical disorders such as epilepsy and diabetes, thereby heightening the privacy invasion.²⁵

II. FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The fourth amendment requires searches and seizures to be "reasonable."²⁶ Reasonableness in a particular case depends on the context of the search.²⁷ Generally, a "reasonable" fourth amendment search requires both a warrant and probable cause.²⁸ A court may, however, consider a search valid in the absence of the elements.²⁹ The Supreme Court has been unable to precisely define the reasonableness of a search.³⁰ Instead, courts must use a case by case approach, balancing the degree of intrusion on personal rights against the need for the par-

20. Repeating the EMIT procedure manually is an unacceptable method of confirmation. *James v. McKenzie*, 628 F. Supp. 1500, 1505 (D.D.C. 1986).

21. The test is also called "gas liquid chromatography." *Id.* at 1506.

22. *National Fed'n of Fed'l Employees, Local 2058 v. Weinberger*, 640 F. Supp. 642 (D.D.C. 1986).

23. *See supra* note 12 and accompanying text.

24. *Weinberger*, 640 F. Supp. at 648.

25. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986). These disclosures implicate the constitutional right to privacy in medical information. *See infra*, note 34.

26. *New Jersey v. T.L.O.*, 105 S. Ct. 733, 743 (1985).

27. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

28. Probable cause requires reasonable suspicion directed at the particular person to be searched. *Ybarra v. Illinois*, 444 U.S. 85, 89-91 (1979); *see also United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978). Reasonable suspicion must be specifically directed to the person to be searched and may not be "transferred" to others. *Afanador*, 567 F.2d at 1331.

29. *New Jersey v. T.L.O.*, 105 S. Ct. at 743.

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

ticular search.³¹

Traditionally, courts determine a search's intrusiveness by examining the individual's expectation of privacy.³² In fourth amendment cases, courts examine whether the person has an objectively reasonable³³ subjective expectation of privacy.³⁴

Courts exempt agency searches of participants in pervasively regulated industries³⁵ from the warrant requirement.³⁶ This "administra-

31. *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

To determine the reasonableness of a search, courts measure the degree of intrusion against the individual's expectation of privacy. Courts generally consider inspections of personal items the least intrusive. Searches that breach the integrity of the body create the greatest privacy invasion. *Schmerber v. California*, 384 U.S. 757, 770 (1966). *Schmerber* involved a policeman's detection of alcohol on the defendant's breath. After arresting the defendant, the officer directed a physician to obtain a sample of the suspect's blood over the latter's objections. *Id.* Since the search in *Schmerber* involved an intrusion beyond the body's surface, the Court held that reasonableness depended upon whether the officer clearly believed that he would find the incriminating evidence. *Id.* at 769-70.

32. *See, e.g., McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985) (individuals have a reasonable expectation of privacy in personal information contained in urine samples). *See also Terry v. Ohio*, 392 U.S. 1, 9 (1968).

33. *Katz v. United States*, 389 U.S. 347, 367. For example, it would be unreasonable for an individual to claim privacy for remarks spoken openly in public. *Id.* The Court in *Katz*, however, held that an individual has a constitutionally reasonable expectation of privacy in his conversations from a telephone booth. *Id.* at 359.

The Supreme Court and other federal courts recognize a right to privacy in medical information. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 600 (1977) (New York statute requiring those taking certain prescription drugs to report to State Health Department held sufficiently circumscribed to protect legitimate privacy interests). When the government advances a need to acquire medical information to develop treatment programs or control public health threats, courts are more willing to uphold reporting requirements. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980). The disclosure of personal medical information is constitutional only if society's interest in disclosure outweighs the specific privacy interests involved. *Id.* Bodily fluids such as blood and urine may contain confidential medical information. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1515 (D.N.J. 1986). *Accord McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985).

34. *Katz*, 389 U.S. at 361 (1967) (Harlan, J., concurring) (although individuals expect privacy in their home, statements, actions, or things people expose to the "plain view" of others indicate intent to waive protection).

35. For examples of closely regulated industries in the context of administrative searches, *see Donovan v. Dewey*, 452 U.S. 594, 602-605 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 316-317 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor industry); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) (horse racing); *Matter of Martin*, 447 A.2d 1290, 1300 (N.J. 1982) (casino gambling).

tive search" exception³⁷ contains two conditions precedent to its application. First, the state must articulate a compelling interest in conducting the unannounced search.³⁸ Examples of such interests include preservation of public health and safety³⁹ and protection of industry employees from inherent occupational hazards.⁴⁰ Second, the search must involve an industry accustomed to pervasive regulation.⁴¹ Such extensive regulation reduces an individual's legitimate expectation of privacy.⁴² In the context of an administrative search of a highly regulated industry, courts imply consent from participation in the enterprise.⁴³

Even in the context of an administrative search, the Supreme Court applied a reasonableness standard to protect an individual's privacy when government officials possess unlimited discretion to impose a search.⁴⁴ In *Marshall v. Barlow's, Inc.*⁴⁵ the Supreme Court held that the Occupational Safety and Health Act's (OSHA)⁴⁶ administrative inspection provisions insufficiently restricted the scope and frequency of

36. See *Donovan v. Dewey*, 452 U.S. 594, 602-605 (1981). In *Donovan*, the Court deferred to Congress' express findings that a warrant requirement for searches conducted pursuant to the Mine Safety and Health Act would seriously frustrate enforcement. *Id.* at 603. The Act required inspections of all mines and specifically defined the frequency and scope of the inspections. *Id.* at 603-604. The Court held that the Act provided a predictable and carefully tailored regulatory inspection scheme. *Id.*

37. An "administrative search" is one conducted pursuant to a statutory administrative inspection scheme. *Shoemaker*, 795 F.2d at 1142.

38. *Id.* at 1142. In *Biswell* the Court held that effective deterrence of gun sales to undesirables, a compelling governmental interest, required warrantless searches under the Gun Control Act, 18 U.S.C. § 921 (1968). *Biswell*, 406 U.S. at 316-317.

39. See, e.g., *Biswell*, 406 U.S. at 315-317 (warrantless searches of gun dealers required to promote federal efforts to prevent violent crime).

40. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (inspection scheme designed to further federal interest in ameliorating health and safety in both underground and surface mines).

41. *Id.* at 600. The *Donovan* Court, however, held that the regularity and pervasiveness of the regulation had more significance than merely its longevity. *Id.* at 606.

42. *Id.* at 600.

43. See, e.g., *United States v. Biswell*, 406 U.S. 311, 316 (1972). In *Biswell* the Court implied consent to warrantless searches and observed that the federal government annually provides gun dealer licensees a revised compilation of gun control laws. *Id.*

44. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

45. 436 U.S. 307 (1978).

46. 29 U.S.C. § 657(a) (1970). The statute imposes health and safety standards on all businesses engaged in or affecting interstate employees and authorizes representatives of the Secretary to conduct inspections to enforce the Act. *Id.* at §§ 652(5), 657(a).

searches in regulated businesses.⁴⁷ The Court concluded that OSHA's failure to provide detailed search standards⁴⁸ gave few assurances that the search was fair and neutral.⁴⁹ Accordingly, the Supreme Court held that the employee's privacy interests outweighed the need for surprise inspections and required a warrant for OSHA searches.⁵⁰

Recently, a few courts articulated an additional exception to the warrant requirement in cases involving government employer searches pertaining to an employee's job performance. In *Allen v. City of Marietta*,⁵¹ a federal district court held that a city could conduct warrantless searches of electrical workers to determine drug use.⁵² Purporting to apply a balancing test,⁵³ the court concluded that a governmental employer, like its private counterpart, has a right to supervise its employees and investigate job-related misconduct.⁵⁴ Thus, the court held

47. *Marshall*, 436 U.S. at 323-324 n.20-22.

48. *Id.* at 323-324 n.21-22.

49. *Cf. Donovan*, 452 U.S. 594, 603-605 (1981). The *Donovan* Court held that the Mine Safety and Health Act contained detailed provisions curtailing agency discretion and delineating search procedures. *Id.* at 603-605. Specifically, the Act notified mine operators of regular inspections, articulated health and safety standards, and prohibited forcible entry. *Id.*

50. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978).

51. 601 F. Supp. 482 (N.D. Ga. 1985).

52. *Id.* at 491. In *Allen* an undercover agent working for the city observed electrical workers smoking marijuana on the job. *Id.* at 484. The Electrical Distribution Superintendent then allegedly correlated the names turned in by the informant with those associated with "unexplained" accidents on the job. Based on information from the supervisor and the informant, Marietta's city manager tested six employees suspected of drug use. *Id.* After all six tested positive for marijuana, the city terminated the employees. *Id.* at 484-85.

53. *Id.* at 491. Although the court addressed the employer's right to oversee its employees and prevent drug abuse from curtailing the agency's ability to perform its duties, it failed to adequately balance employee privacy concerns. *Id.* The court de-emphasized the search's intrusiveness, observing that the city conducted the search in the employment rather than the criminal context. *Id.* Other courts addressing this issue, however, rejected this distinction and held that the fourth amendment protects everyone. *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (fourth amendment safeguards the privacy of all individuals against arbitrary invasions by government officials). See also *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (citing *Camara* and recognizing the potential for future criminal investigations).

54. *Allen*, 601 F. Supp. at 491. The court concluded that a government employer had the right to search an employee's desk or jacket to gather evidence of impropriety related to job performance. *Id.* For a discussion concerning the rights of California private employers to conduct urinalysis, see Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* 19 LOYOLA L.A. LAW REV. 1451 (1986).

that a governmental employee cannot legitimately expect exemption from searches relating to job performance.⁵⁵

Holding the city's urinalysis program constitutional in *Allen*, the court relied on the fact that the city conducted tests for reasons other than criminal investigations.⁵⁶ Significantly, *Allen* and other cases relying on the government employment exception to uphold warrantless searches⁵⁷ involved prior suspicion of individual employee's misconduct.⁵⁸ The *Allen* court recognized that although government employees work in the public sector they retain their fourth amendment rights.⁵⁹ Courts, therefore, must balance expectations and interests in the government employment search context⁶⁰ while recognizing that inquiries into employee misconduct have potential to become criminal investigations.⁶¹

III. THE FOURTH AMENDMENT AND EMPLOYMENT DRUG TESTING

Several federal courts recently addressed the issue of the fourth amendment's reasonable search and seizure requirement in the context of public employee drug testing.⁶² The courts in *Shoemaker v. Handel*,⁶³ *Capua v. City of Plainfield*,⁶⁴ *National Treasury Employees Union*

55. *Allen*, 601 F. Supp. at 491.

56. *Id.* For contrary authority, see *supra* note 53.

57. See Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (8th Cir. 1976) (blood and urinalysis tests of bus drivers directly involved in serious accidents or suspected of drug abuse held reasonable).

58. See *supra* notes 52, 57. In both *Allen* and *Suscy*, the city minimized the intrusiveness of the searches by requiring an individualized basis for the search and by limiting the scope of the search. See *supra* notes 52, 57; cf. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1516 (D.N.J. 1986) (the city conducted urinalysis without prior individualized suspicion or general complaints of inadequate fire protection due to drug impairment).

59. *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985). See also *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983); *Cheyney State College Faculty v. Hufstедler*, 703 F.2d 732, 737 (3d Cir. 1983).

60. *Allen*, 601 F. Supp. at 491; accord *Capua v. City of Plainfield*, 643 F. Supp. at 1516.

61. See *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 n.2 (D. Iowa 1985) (although primary purpose of search may be for prison security reasons, a criminal investigation will follow the discovery of drugs or weapons).

62. This Recent Development addresses only drug testing of public employees. For a discussion of drug urinalysis of private employees, see generally Note, *supra* note 9.

63. 795 F.2d 1136 (3d Cir. 1986).

v. *Von Raab*,⁶⁵ and *Lovvorn v. City of Chattanooga*,⁶⁶ balanced employee privacy concerns against the government's interest in a drug-free workplace.⁶⁷ Each found urinalysis to be a fourth amendment search.⁶⁸ The *Shoemaker* and *Von Raab* courts analogized searches of public employees to administrative searches, holding random urinalysis reasonable in certain highly regulated and sensitive positions.⁶⁹

A. *Urinalysis as a Search*

In *Schmerber v. California*⁷⁰ the Supreme Court held that the involuntary extraction of blood for a blood-alcohol test⁷¹ constituted a search for fourth amendment purposes.⁷² By applying fourth amendment principles to bodily intrusions, the Court implied that an individual has a reasonable expectation of privacy in the "information" contained in the blood.⁷³

Like blood, laboratories can analyze urine to discover physiological

64. 643 F. Supp. 1507 (D.N.J. 1986).

65. 816 F.2d 170 (5th Cir. 1987).

66. 647 F. Supp. 875 (E.D. Tenn. 1986).

67. *Shoemaker*, 795 F.2d at 1142-1143; *Capua*, 643 F. Supp. at 1513; *Von Raab*, 816 F.2d at 180; *Lovvorn*, 647 F. Supp. at 879-880.

68. *Shoemaker*, 795 F.2d at 1142; *Von Raab*, 816 F.2d at 175; *Capua*, 642 F. Supp. at 1513; *Lovvorn*, 647 F. Supp. at 879.

69. *Shoemaker*, 795 F.2d at 1142; *Von Raab*, 816 F.2d at 179.

70. 384 U.S. 757 (1966).

71. In *Schmerber*, the petitioner was hospitalized after an automobile accident. At the accident scene and later at the hospital, a police officer smelled liquor on the man's breath and placed him under arrest. After informing the man of his rights, the officer directed a physician to take the petitioner's blood sample over the latter's objection. *Id.* at 758-59. In petitioner's trial for driving under the influence, the trial court admitted into evidence the blood test showing intoxication. *Id.* at 759. Before the Supreme Court, the petitioner argued that the officer subjected him to an unreasonable search and seizure in violation of the fourth amendment. *Id.*

72. *Id.* at 767. In holding the fourth amendment applicable to involuntary extractions of blood, the Court relied on the amendment's explicit provision protecting an individual's right to be secure in his or her person. *Id.*

73. *Id.* at 769-70. Invoking an individual's interests in privacy and dignity, the Court held that a police officer must have probable cause and a belief in the likely success of a blood-alcohol test before he or she can require a search. *Id.* at 770. In the blood-alcohol context, the information contained in the blood is potential evidence of the person's guilt or innocence. *Id.* Absent probable cause to search the individual in this manner, the person's privacy interests would outweigh the need for an immediate search. *Id.* The *Schmerber* Court found the particular search in question reasonable because medical personnel in a hospital performed it following the police officer's reasonable suspicion of the petitioner's intoxication. *Id.* at 771-72.

information, including the recent use of alcohol or drugs.⁷⁴ In *McDonnell v. Hunter*⁷⁵ the federal district court, relying on *Schmerber*,⁷⁶ found that the taking of a urine sample by a government official is a search and seizure within the fourth amendment.⁷⁷ Unlike blood, urine is routinely discharged, requiring no bodily intrusion for its seizure.⁷⁸ Yet, the *McDonnell* court found that an individual normally discharges urine under circumstances indicating a reasonable expectation of privacy.⁷⁹ Therefore, the court held that an individual's interests in safeguarding the personal information contained in a urine sample⁸⁰ are sufficiently important to merit fourth amendment protection from arbitrary interference.⁸¹

B. Shoemaker v. Handel—*Administrative Search Exception Applied to Mass Urinalysis*

In *Shoemaker v. Handel*,⁸² the Third Circuit Court of Appeals up-

74. *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985); see *supra* notes 8-21 and accompanying text.

75. 612 F. Supp. 1122 (D. Iowa 1985).

76. *Id.* at 1127, citing *Schmerber*, 384 U.S. at 767.

77. *McDonnell*, 612 F. Supp. at 1127, citing *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984).

In *Storms*, prison officials conducted random urinalysis of prisoners for marijuana and narcotics. *Id.* at 1216. The *Storms* court found urinalysis analogous to the blood testing in *Schmerber* because both involved the involuntary taking of bodily fluids. *Id.* at 1218. Since urinalysis involves an intrusion into the body, the court found it more intrusive than traditional searches. *Id.* at 1218. Finding urination in the presence of prison officials even more intrusive and degrading than blood tests, the *Storms* court held that urinalysis should receive the same level of scrutiny as blood testing. *Id.* Therefore, the court required a clear indication of drug usage before government officials could perform urinalysis. *Id.* However, the *Storms* court held that the "clear indication" requirement did not apply to prisoners because of the special security needs of penitentiaries. *Id.* The court held that the mere likelihood of finding drugs was sufficient to support a finding of cause given an inmate's limited constitutional rights. *Id.* Since prison inmates have a lower expectation of privacy than the general population, the *Storms* court explicitly restricted its holding to prisoners. Those not incarcerated, however, can legitimately expect a higher showing of cause before state officials can perform urinalysis. *Id.*

78. *McDonnell*, 612 F. Supp. at 1127.

79. *Id.* The court concluded that only pursuant to a medical examination does one reasonably expect to donate urine for chemical analysis. *Id.*

80. See *supra* note 34, and accompanying text for discussion of an individual's right to privacy in personal medical information.

81. *McDonnell*, 612 F. Supp. at 1127.

82. 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 577 (1986).

held a breath and urine testing program for horse racing jockeys, trainers, and grooms.⁸³ The New Jersey Racing Commission⁸⁴ required drug testing of horse racing employees to preserve the appearance of integrity in the sport.⁸⁵ The *Shoemaker* court found that New Jersey had a valid interest in maintaining public confidence in the industry⁸⁶ because the state received substantial revenue from horse racing.⁸⁷

Challenging the drug testing program in *Shoemaker*, the jockeys argued that absent individualized suspicion of drug use, random urinalysis and warrantless production of breath samples violated the fourth amendment.⁸⁸ The Racing Commission conceded that the mandatory tests involved a search and seizure,⁸⁹ but contended that the searches were reasonable because the employees voluntarily participated in a highly regulated industry.⁹⁰

Addressing the fourth amendment claim,⁹¹ the *Shoemaker* court rec-

83. Pursuant to a New Jersey Racing Commission regulation, N.J. ADMIN. CODE tit. 13, §§ 70-14A.1 to 14A.11 (1985), the Commission required jockeys to submit to random daily blood-alcohol and urinalysis. *Shoemaker*, 795 F.2d at 1139-1140. The regulation prohibited the use of controlled substances regardless of whether the drug use occurred during work hours. *Id.* at 1140-41.

84. The Racing Commission regulates horse racing in New Jersey. Its powers include promulgating rules and regulations for the industry. N.J. STAT. ANN. § 5:5-30 (West 1973).

85. *Shoemaker*, 795 F.2d at 1138. In an effort to promote the appearance of integrity, the Commission required horse trainers to prevent persons from administering drugs altering the animal's performance. Commission regulations require post-race drug testing of horses and also allow warrantless searches of stables. N.J. STAT. ANN. tit. 13, §§ 70-14A.1 to 70-14A.11 (1985).

86. *Shoemaker*, 795 F.2d at 1142.

87. N.J. STAT. ANN. §§ 5:5-64, 5:5-64.1 (West Supp. 1985). The court found that the vulnerability of horse racing to criminal influence bolstered the state's need to uphold the industry's appearance of integrity. 795 F.2d at 1141. State statutes also prohibit racetracks from hiring individuals convicted of a crime involving moral turpitude. N.J. STAT. ANN. § 5:5-34 (1985).

88. 795 F.2d at 1141. The jockeys further argued that the drug testing regulation vested too much discretion in commission officials. *Id.*

89. *Id.*

90. *Id.* See *supra* notes 35-43 and accompanying text for discussion of "administrative search exception."

91. The jockeys also claimed violations of equal protection and the right to privacy of medical information. *Id.* at 1143-1144. The court held that case law limited to confidentiality concerns any separate cause of action based on penumbral constitutional rights to privacy. *Id.* at 1144, citing *Whalen v. Roe*, 429 U.S. 589, 602 (1977) and *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); see *supra* note 34 for discussion of the right to privacy in medical information. Since the Racing

ognized that the New Jersey horse racing industry is closely regulated.⁹² Next, the court addressed the question whether the administrative search exception applied to warrantless drug testing of persons engaged in a pervasively regulated occupation.⁹³ The court examined the requirements for applying this exception. First, a strong state interest must exist for conducting a search.⁹⁴ Second, the subjects of the search must have a reduced expectation of personal privacy from pervasive regulation of the industry.⁹⁵ The court found both of these requirements satisfied⁹⁶ and accepted the state's interest in maintaining public confidence in horse racing.⁹⁷ Noting the existence of Racing Commission regulations permitting searches of stables to find evidence of horse drugging,⁹⁸ the court found horse racing employees had a reduced expectation of privacy on the job.⁹⁹

Although the drug testing of jockeys was within the administrative search exception,¹⁰⁰ the *Shoemaker* court recognized that the search must also withstand a reasonableness test.¹⁰¹ In assessing the jockeys' claim that the testing was arbitrary,¹⁰² the court held that the adminis-

Commission promulgated confidentiality regulations when the action was pending, the *Shoemaker* court held the privacy cause of action not ripe for review. 795 F.2d at 1144.

92. *Id.* at 1142. For a discussion of other cases holding an industry "closely regulated" for purposes of the "administrative search exception," see *supra* notes 35-43 and accompanying text.

93. 795 F.2d at 1142. The court acknowledged that previous "administrative search" exception cases involved searches of premises rather than persons. *Id.* Generally, courts apply a higher level of scrutiny to searches involving bodily intrusions because of a greater expectation of privacy. See *supra* note 31. The *Shoemaker* court concluded, however, that because the chief regulatory concerns involved persons engaged in horse racing, the distinction did not make the testing unreasonable. 795 F.2d at 1142.

94. *Id.* See *supra* notes 38-40 and accompanying text for examples of compelling state interests justifying the application of the "administrative search" exception.

95. 795 F.2d at 1142. See *supra* notes 33, 34, 42, 43 for discussion of an individual's expectation of privacy for fourth amendment purposes.

96. 795 F.2d at 1142.

97. *Id.* The court found periodic drug testing to be the most effective way to demonstrate the industry's integrity and autonomy to the public. *Id.* at 1142, 1143.

98. See *supra* note 85.

99. 795 F.2d at 1142. The court further observed that, unlike other cases involving warrantless searches, the Racing Commission warned the jockeys of drug testing after a specified date. *Id.*

100. *Id.* at 1142-43.

101. *Id.* at 1143.

102. *Id.* The jockeys argued that the regulation vested standardless discretion in

trative regulations sufficiently limited the Racing Commission's discretion in conducting the searches.¹⁰³ In contrast with the OSHA regulations in *Marshall v. Barlow's, Inc.*,¹⁰⁴ the Racing Commission regulations vested no discretion in the state field testing officer¹⁰⁵ to conduct the tests and choose the subjects.¹⁰⁶ In sum, the court found the testing reasonable in *Shoemaker* because it protected the jockeys from arbitrary, standardless intrusions into their privacy.¹⁰⁷

Significantly, *Shoemaker* is the first federal circuit court decision on

testing officers and therefore (following *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), discussed *supra* notes 45-50 and accompanying text) should be invalidated. 795 F.2d at 1143.

103. *Id.* at 1143.

104. *See supra* note 46.

105. The names of all jockeys participating in a particular race are placed in an envelope. The state field testing officer then draws the names of three to five jockeys for drug testing. 795 F.2d at 1143. If the officer draws a jockey's name more than three times in one week, he disregards the choice and draws another name. *Id.* After their last race of the day, the selected jockeys must fill out a form listing all prescription or non-prescription drugs recently taken. Then, the jockeys must provide a urine sample for testing. *Id.* The Racing Commission may use test results only in an administrative or judicial ruling following a hearing. *Id.* N.J. ADMIN. CODE tit. 13, § 70-14A.11(e) (1985).

106. *Id.* at 1143. The *Shoemaker* court held that the lottery system employed by the Racing Commission effectively eliminated the opportunity for the officers to make arbitrary or biased selections. Approving random selection for testing, the court cited *United States v. Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976) (holding constitutional a random search at a border check-point selected by law enforcement officials). *Id.* The *Shoemaker* court declined to follow the reasoning in *Security and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187 (2d Cir. 1984) in which the court held unconstitutional random strip and body cavity searches of prison employees for contraband. 795 F.2d at 1143 n.7. *But cf.* *Storms v. Coughlin*, 600 F. Supp. 1214, (S.D. N.Y. 1984), in which the court held constitutional random urinalysis of prisoners. The *Shoemaker* court limited its holding to random searches of voluntary participants in a highly regulated industry. 795 F.2d at 1143, n.7. The implied consent to warrantless searches by participants in a regulated industry is analogous to random searches of prisoners. In both contexts, the subjects have a reduced expectation of privacy. *See supra* notes 43 and 77. Therefore, the constitutionality of random selection of urinalysis subjects through lottery without prior suspicion of drug use may be limited to situations in which the subject's expectation of privacy is limited. *Cf.* *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975) in which the court held that the armed forces could subject personnel to warrantless drug testing. Members of the armed forces have a significantly lower expectation of privacy because they are subjected to frequent mandatory inspections. *Id.* at 477. *See also* *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 882 (E.D. Tenn. 1986) (distinguishing firefighters' privacy expectations from soldiers').

107. *Shoemaker*, 795 F.2d at 1143.

the constitutionality of public sector drug testing.¹⁰⁸ Further, *Shoemaker* is the first application of the administrative search exception in the drug testing context.¹⁰⁹

C. Capua v. City of Plainfield

In *Capua v. City of Plainfield*¹¹⁰ the federal district court for New Jersey struck down a random and unannounced mandatory drug testing program directed at firefighters.¹¹¹ Plainfield's city agents administered a urinalysis program without notice¹¹² and without the guidance of regulation or directive.¹¹³ The city failed to provide either a written basis for the testing,¹¹⁴ or procedures for collecting, testing, and utilizing the information.¹¹⁵ The city immediately terminated sixteen firefighters whose tests indicated the presence of a controlled sub-

108. The city appealed the ruling in *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) holding unconstitutional urinalysis of firefighters. See Shipp, *Can Drug Testing Coexist with Fourth Amendment?* St. Louis Post-Dispatch, Sept. 20, 1986, § B, at 1, col. 1.

109. See *supra* notes 93-100 and accompanying text. With the Fifth Circuit's decision in national Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), an additional circuit has elaborated on the application of the administrative search exception analogy regarding urinalysis of public employees. See *infra* text accompanying notes 139-160.

110. 643 F. Supp. 1507 (D.N.J. 1986).

111. *Id.* at 1522.

112. The city required each fire department employee to urinate under the surveillance and supervision of bonded testing agents. *Id.* at 1511. None of the 103 firefighters tested received prior notice of sub-standard job performance or were under investigation for drug use. *Id.* at 1516. The city failed to provide written procedures for collecting, testing and utilizing the information gathered. The city also failed to inform the terminated employees of the particular substance found in their samples. *Id.* at 1511-12.

113. *Cf.* *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *supra* notes 83, 105 and accompanying text.

114. 643 F. Supp. at 1511. The collective bargaining agreement between the firefighters and the city failed to provide for urinalysis. *Id.* The lack of written regulations mandating drug testing is relevant to the firefighters' legitimate expectation of privacy. In *Shoemaker*, the existence of extensive prior regulation of the horse racing industry lowered the jockeys' expectations of privacy so as to permit warrantless drug testing.

115. The lack of procedural safeguards triggered procedural due process concerns. 643 F. Supp. at 1521. Since the court subsequently held that the city lacked just cause to terminate the firefighters, their discharge violated fourteenth amendment due process rights. *Id.* at 1521-22. The court found that requiring urinalysis under the threat of termination coerced a waiver of the rights against self-incrimination found in the collective bargaining agreement. *Id.* at 1521.

stance¹¹⁶ and charged them with “commission of a criminal act.”¹¹⁷

The court found that urinalysis constituted a search and seizure under the fourth amendment,¹¹⁸ and then examined the reasonableness of the testing.¹¹⁹ The court balanced Plainfield’s valid concern with eradicating drug use¹²⁰ against the degree of intrusion engendered by the search.¹²¹

By examining the firefighters’ privacy interests,¹²² the court initially assessed the degree of intrusion. Recognizing that urination is traditionally a private function,¹²³ the court noted that most municipalities prohibit the act in public.¹²⁴ Like strip search exposure, the court found surveillance of employee urination highly intrusive,¹²⁵ regardless of how professionally and courteously conducted.¹²⁶ Furthermore, the court held that compulsory urinalysis forces subjects to divulge private medical information unrelated to drug abuse on the job.¹²⁷

The court addressed the application of the “administrative search exception” to Plainfield’s urinalysis program.¹²⁸ Distinguishing *Shoe-*

116. *Id.* at 1512. The city failed to provide a confirmation test to corroborate the initial test results. *Id.* at 1521. *See supra* notes 18-20 and accompanying text discussing the necessity of confirmation tests.

117. 643 F. Supp. at 1512. The court held that the ten day delay before issuing the complaints and the failure of the complaints to mention hearing procedures contributed to the procedural due process violation. *Id.* at 1521.

118. *Id.* at 1513.

119. *Id.*

120. *Id.* at 1514.

121. *Id.* *See supra* note 31 and accompanying text for fourth amendment balancing test.

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

123. *Id.* The court noted that both private and public restroom facilities account for the private nature of urination. *Id.*

124. *Id.*

125. *Id.* In *Shoemaker v. Handel*, by contrast, the district court concluded that urinalysis was less intrusive than either blood testing or body cavity and strip searches. 608 F. Supp. 1151 (D.N.J. 1985), *aff’d*, 795 F.2d 1136 (3d Cir. 1986). Unlike the city in *Capua*, the Racing Commission did not impose surveillance on jockeys while they urinated. *See supra* note 105.

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

127. *Id.* at 1515. The court held that the government failed to advance a countervailing legitimate need for plaintiffs’ personal medical data. *Id.* *See supra* note 34 for discussion of right to privacy in personal medical information. Rather than insuring the confidentiality of the urinalysis results, the city publicized its actions in the news media. *Capua*, 643 F. Supp. at 1515.

128. *Id.* at 1515, 1518. The court quickly distinguished employment search excep-

maker v. Handel, the court held that the regulation of firefighting, unlike horse racing, is not so intense as to diminish the firefighters' legitimate expectations of privacy.¹²⁹ The court emphasized that neither the initial employment agreement with the city nor any civil service requirement called for drug testing.¹³⁰

The *Capua* court further distinguished *Shoemaker* on the ground that the state's interest in horse racing justified mass urinalysis more readily than the city's interests in *Capua*.¹³¹ The *Shoemaker* court based its decision on the state's interest in upholding the perception of integrity in the racing industry in the face of public suspicion of criminal influences.¹³² The Plainfield firefighters' job performance, on the other hand, did not depend upon the public's perception of their integrity.¹³³ After ruling that the city's determination of job capability did not require mandatory urinalysis,¹³⁴ the court stated that the individualized suspicion standard was the only safe, constitutional manner of protecting governmental interests.¹³⁵

The *Capua* court found individualized suspicion absent and held Plainfield's drug testing program unconstitutionally overinclusive.¹³⁶ The court permanently enjoined the city from further urine testing,

tion cases such as *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985), *supra* notes 52-55 and accompanying text, and *Division 24, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (8th Cir. 1976), *supra* notes 57-58, recognizing that they involved prior reasonable suspicion of drug use.

129. 643 F. Supp. at 1518-19.

130. *Id.* at 1519. Therefore, the court concluded that the Plainfield firefighters enjoyed more privacy on the job than did race horse jockeys. *Id.*

131. *Id.* at 1519. The mass urinalysis in *Shoemaker* permitted the Racing Commission to uphold the industry's integrity against public scrutiny. *See supra* notes 87, 97 and accompanying text. In *Capua*, the publication of the test results in the media caused public suspicion and degradation. 643 F. Supp. at 1519.

132. *See supra* note 87.

133. The *Capua* court concluded that the Plainfield firefighters, unlike jockeys, can perform their jobs effectively when faced with unfavorable public opinion. 643 F. Supp. at 1519.

134. The court found that the city's screening test for applicants and extensive fire fighting training ensured job capability. *Id.*

135. *Id.* at 1520.

136. *Id.* The court further distinguished *Shoemaker v. Handel*. In *Capua*, the lack of procedural safeguards created a greater potential for criminal prosecution. *Id.* This increased risk of criminal prosecution for drug use subjected the firefighters to a greater degree of intrusion from the urinalysis. In *Shoemaker*, the jockeys obtained a specific agreement to keep test results confidential from law enforcement agents. *Shoemaker v. Handel*, 795 F.2d 1136, 1140 (3d Cir. 1986).

ordered the immediate reinstatement of the suspended firefighters,¹³⁷ and approved the plaintiff's 42 U.S.C. § 1983 action against city officials.¹³⁸

D. National Treasury Employees Union v. Von Raab

In *National Treasury Employees Union v. Von Raab*¹³⁹ the Fifth Circuit considered the constitutionality of mandatory urinalysis as a condition of promotion to certain positions with the United States Customs Service.¹⁴⁰ Under the Customs program, employees who tested positive through drug screening¹⁴¹ could not be considered for promotion and faced possible termination.¹⁴² The Service also refused to promote employees who refused to submit to the test.¹⁴³

Addressing whether the fourth amendment applied to urinalysis,¹⁴⁴ the *Von Raab* court held that urinalysis constitutes a search and seizure.¹⁴⁵ The court found that because urinalysis infringes on an employee's right to privacy, the test is a "search."¹⁴⁶ This expectation of

137. 643 F. Supp. at 1522.

138. *Id.*

139. 816 F.2d 170 (5th Cir. 1987). The Fifth Circuit vacated a stay granted by the district court. *See* 649 F. Supp. 380 (E.D. La. 1986).

140. 649 F. Supp. at 382. The court did not specify the nature of the "covered positions" within the Customs Service.

141. Pursuant to the drug testing scheme, the Customs Service first required subjects to fill out a pre-test form describing medications taken within the last thirty days and any contact with illegal drugs within that time. Next, the agency required employees to urinate into a sample jar while under the direct observation of a laboratory representative standing behind a partition. *Id.* The laboratory technician was able to observe subjects from the shoulder up. *Id.*

142. *Id.*

143. *Id.*

144. The key inquiry involves whether urinalysis constitutes a search for fourth amendment purposes. *See supra* notes 70-81 and accompanying text.

145. 816 F.2d at 175.

146. *Id.* at 175. *See also* the district court's opinion stating that drug testing is a full-scale search of the person, and thus more intrusive than pat-down searches or searches of the home. 649 F. Supp. at 386. Courts addressing "pat-down" or "frisk" searches in the Customs context applied a lesser standard for justification. In *United States v. Sandler*, 644 F.2d 1163 (5th Cir. 1981), the court held that Customs workers could conduct frisk searches of individuals crossing the border without any justification. *Id.* at 1169. The court specifically limited its holding to pat-down searches, refusing to address more intrusive searches, such as those involving breaches of the body's surface. *Id.* The *Sandler* court believed that as the intrusiveness of the search increases so does the justification required for the search. *Id.* at 1166, citing *United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978). Courts traditionally require at least reasonable

privacy is unimpaired by the fact that a person chooses to use a public facility, and is evidenced by the prohibition of public urination.¹⁴⁷ In addition, the court emphasized that urinalysis reveals more personal information than mere illicit drug use.¹⁴⁸ Giving a jar of bodily wastes to Customs officials, according to the court, constituted a seizure for fourth amendment purposes.¹⁴⁹

After determining that the fourth amendment applies to Customs Service testing, the court considered the reasonableness of the search.¹⁵⁰ The court balanced the need for the search against the infringement of the employee's privacy.¹⁵¹ Ultimately, the court found the government's interest stronger and vacated the stay granted by the district court in favor of the employees.¹⁵²

Examining the scope and manner of the search, the court stated that since only employees seeking promotion to sensitive positions are subject to urinalysis and since the test results are not discretionary, the program's scope is limited enough to be "reasonable" under the fourth amendment.¹⁵³ The court found that the service could justify its program because the agency had a "strong interest" in ensuring the effective operation of employees in potentially sensitive job positions.¹⁵⁴ The court found that the test is consensual to a small degree since only those employees seeking advancement are subject to the test.¹⁵⁵

The Fifth Circuit examined the nature of federal employment, finding that, within limits, government employees may be subject to restraints that would be impermissible absent the employment relationship.¹⁵⁶ The fact that the search is required for an administra-

suspicion to justify strip searches. *See* *United States v. Asbury*, 586 F.2d 973, 975 (2d Cir. 1978).

147. 816 F.2d at 175.

148. *Id.* at 176.

149. *Id.* at 176.

150. *Id.* at 176-82.

151. *Id.* at 176 citing *O'Connor v. Ortega*, — US —, 107 S. Ct. 1492, 1500 (1987).

152. *Id.* at 182.

153. *Id.* at 177. The court stated that urinalysis is less intrusive than an invasion of "bodily integrity" of the home, or than strip or body cavity searches. *Id.*

154. *Id.* at 178. The court found that drug use by the Service would seriously undermine the agency's reputation and ability to conduct its work. *Id.*

155. *Id.* The court also found that "[t]he place in which the search is conducted, a restroom, is the most private facility practicable." *Id.*

156. *Id.* at 178-79. As long as the search is a "reasonable condition of employment," it is an appropriate condition of employment. *Id.* at 179.

tive purpose is acceptable if the government demonstrates a need for the testing to preserve the service's reputation.¹⁵⁷

The court stated that although this is not a highly regulated industry, it would employ the balancing test used in those industries.¹⁵⁸ The court further found that urinalysis is an effective means of determining if an employee is a drug addict.¹⁵⁹ Thus, the court vacated the district court's stay and allowed the drug screening program to continue.¹⁶⁰

E. *Lovvorn v. City of Chattanooga*

In *Lovvorn v. City of Chattanooga*,¹⁶¹ the court considered a constitutional challenge to a mandatory urinalysis program of city firefighters.¹⁶² Fire department officials in *Lovvorn* lacked individualized suspicion of drug use among firefighters.¹⁶³ The fire commissioner, upon hearing rumors that firefighters taking an earlier drug test¹⁶⁴ switched urine samples, retested the entire department.¹⁶⁵

As in *Capua*, the Chattanooga fire commissioner instituted the mass urinalysis without published or uniform standards and testing procedures.¹⁶⁶ Although the commissioner performed a GC/MS confirma-

157. *Id.*

158. *Id.* at 179-80.

159. *Id.* at 180-81. In addition, the court found that there are no less intrusive measures available to reach the same end. *Id.* at 180.

160. *Id.* at 182. The court also briefly addressed due process and quality assurance issues. *Id.* at 181-82.

161. 647 F. Supp. 875 (E.D. Tenn. 1986).

162. *Id.* at 879. In 1984 the Chattanooga fire and police commissioner administered the urine tests after supervisors found "civilian" employees smoking marijuana. In early 1985 the fire chief sent notice to all firefighters directing them to report to an independent laboratory for blood and urine testing. The urinalysis consisted of urination under direct observation of an assistant fire chief followed by EMIT testing. *Id.* at 877. Without conducting a confirmation test other than a follow-up EMIT test, the department suspended several firefighters and released their names to the press. *Id.* at 878. The fire department failed to provide written guidelines regarding testing procedure, standards for disciplinary action, and confidentiality of test results. *Id.* at 878-79. After the department completed its initial testing and fired ten employees, it performed confirmation tests on the samples. *Id.* See *supra* notes 20-24 for discussion of the GC/MS confirmation test.

163. *Lovvorn*, 647 F. Supp. at 878.

164. See *supra* note 166.

165. 647 F. Supp. at 878. This proposed retesting of the entire department is the subject of the lawsuit.

166. The department decided that a "positive" test result for the 1985 testing was 100 nanograms of cannabinoids per milliliter with "trace" (50 to 100 ng/ml) and "mi-

tion test during the 1985 testing,¹⁶⁷ it was unclear whether the proposed new tests would include this vital secondary procedure.¹⁶⁸

After the parties stipulated that the urinalysis constituted a search and seizure,¹⁶⁹ the court examined the reasonableness of the test.¹⁷⁰ Following the approach taken in *Capua* and *Von Raab*, the court balanced the need for the search against the intrusion of privacy.¹⁷¹ The court recognized the city's compelling interest in a drug-free work force, arising from fire fighting's hazardous nature¹⁷² and the need for quick thinking.¹⁷³ Next, the court addressed the degree of the test's intrusiveness.¹⁷⁴ Finding that forced urination under the direct observation of city agents would offend some firefighters,¹⁷⁵ the court held that urinalysis interferes with the firefighters' subjective expectation of privacy.¹⁷⁶ The court, however, held that observation of the donation does not by itself make the urinalysis unconstitutional.¹⁷⁷

The court next considered whether the firefighters' expectation of

mus trace" (20-50 ng/ml) categories. The fire department retested all those testing at "minus trace" or above. *Id.* In the proposed new tests, the Commissioner suggested the 50 ng/ml as a benchmark for passing or failing. *Id.* at 879. The department failed to write down the standards. *Id.*

167. *See supra* note 165.

168. *Id.*

169. *Id.*

170. *Id.* at 878-80.

171. *Id.*; *see supra* note 31 and accompanying text.

172. 647 F. Supp. at 879, *cf.* hazardous electric power work in *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985), *supra* notes 51-53 and accompanying text.

173. 647 F. Supp. at 879. The court recognized that firefighters must make quick decisions and remember the location of hydrants and hazardous chemicals. The court accepted expert testimony demonstrating that marijuana can diminish short-term memory, perception, and motor-skills. *Id.*

174. *Id.* at 880.

175. *Id.* The court concluded that the degree of intrusion caused by urinalysis varied significantly among different individuals. *Id.* The city argued that because the firefighters typically shared restroom facilities, lived together and routinely undressed in each other's presence, urination under observation of someone of the same sex was unoffensive. *Id.* Nevertheless, the court found that some of the firefighters would be offended. *Id.*

176. *Id.*

177. *Id.* at n.5. Since the city demonstrated that it had no less intrusive means of conducting effective urinalysis, direct observation of urination alone was constitutional. *Id.* The court's conclusions regarding the intrusiveness of direct observation of urination are contrary to those in *Capua*. *See Capua*, 643 F. Supp. at 1514; But compare *Von Raab*, 649 F. Supp. at 387 ("close" not direct, observation found less intrusive than strip or body cavity searches). Similarly, the *Von Raab* court found that the bathroom

privacy was reasonable under the circumstances.¹⁷⁸ Although the court acknowledged that firefighters, as city employees engaged in a hazardous activity, have a somewhat diminished privacy expectation,¹⁷⁹ it nevertheless required individualized suspicion prior to mandatory urinalysis.¹⁸⁰ In defense, the city urged the court to follow *Shoemaker* and create an exception to the reasonable suspicion standard announced in *Capua*, *Von Raab*, and *McDonnell*.¹⁸¹ The court rejected the administrative search analogy and held that Chattanooga's plan lacked the substantive and procedural safeguards present in *Shoemaker*.¹⁸² The court also found that firefighting was not a pervasively regulated industry. Thus, the city's plan was a victim of the standardless discretion denounced in *Marshall v. Barlow's, Inc.*¹⁸³

Next, the city analogized the case to those cases upholding drug testing in the armed forces.¹⁸⁴ The court held the "military exception" to the reasonable suspicion standard inapplicable,¹⁸⁵ reasoning that the military instituted drug testing following an increased incidence of drug abuse which created a significant threat to national security.¹⁸⁶ In addition, the court observed that, unlike firefighters, the military immediately subjects soldiers to strict military inspection.¹⁸⁷

The *Lovvorn* court delineated requirements for a valid drug testing program.¹⁸⁸ The city must obtain a reasonable individualized suspicion of drug use from observation of inadequate job performance or physical or mental deficiencies.¹⁸⁹ The court suggested that the fire department could implement personnel procedures to uncover drug

in which "close" observation occurred was the most private facility practicable. *Von Raab*, 816 F.2d at 178.

178. *Lovvorn*, 647 F. Supp. at 880.

179. *Id.*, citing *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

180. *Lovvorn*, 647 F. Supp. at 880.

181. *Id.* at 881.

182. *Id.*

183. *Id.* See *supra* notes 44-50 and accompanying text.

184. 647 F. Supp. at 882. See, e.g., *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975).

185. *Lovvorn*, 647 F. Supp. at 882.

186. *Callaway*, 518 F.2d at 476.

187. *Id.* at 477. In this respect, military service is analogous to participation in a highly regulated industry. See *supra* note 106.

188. *Lovvorn*, 647 F. Supp. at 883.

189. *Id.* Cf. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1518 (D.N.J. 1986) (requiring manifestation of outward symptoms of drug use).

abuse symptoms such as absenteeism, irregular conduct, and financial problems.¹⁹⁰ Finally, the court held that the testing must be narrowly tailored and as unintrusive as feasible.¹⁹¹

Finding reasonable suspicion of drug use entirely absent in *Lovvorn*, the court enjoined Chattanooga from implementing drug testing of firefighters except in accordance with the court's opinion.¹⁹²

IV. CONCLUSION

The *Capua*, *Shoemaker*, *Von Raab*, and *Lovvorn* cases, together provide guidance regarding constitutionally permissible drug testing programs. First, if the industry is highly regulated,¹⁹³ the administrative search exception may permit mass drug testing without individualized suspicion if instituted pursuant to a detailed, published regulatory scheme.¹⁹⁴ An analogy to warrantless armed services drug testing may fail because extensive government supervision significantly reduces the privacy expectations of military personnel.¹⁹⁵ Even with a highly regulated industry, the state has a strong interest to support mandatory drug testing.¹⁹⁶

In cases not involving a pervasively regulated industry, case law instructs that reasonable, individualized suspicion of drug use is a minimum requirement.¹⁹⁷ Even with particularized suspicion, drug testing schemes must provide reasonable procedures for collection,¹⁹⁸ testing,¹⁹⁹ utilization of results,²⁰⁰ and confidentiality of personal medical

190. 647 F. Supp. at 883.

191. *Id.* The court held testing of the entire fire department after learning of the substituted urine samples of only fifteen firefighters impermissible. *Id.*

192. *Id.*

193. *See supra* notes 35-50 and accompanying text.

194. *See Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986).

195. *See supra* notes 106, 192 and accompanying text.

196. *See supra* notes 38-40 and accompanying text.

197. *See, e.g., Capua v. City of Plainfield*, 643 F. Supp. 1507, 1518 (D.N.J. 1986).

198. *See Shoemaker*, 795 F.2d at 1140. Although direct observation of urine donation is essential for proper test administration, the *Capua* court found it highly intrusive. *Capua*, 643 F. Supp. at 1514. *But cf. supra* note 182. It is unclear, therefore, whether courts would hold un-observed urine collection the only reasonable collection method. *See Shoemaker v. Handel*, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986).

199. Courts will probably require some confirmation testing methods, such as GC/MS, to uphold a drug testing plan. *See Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 878-79 (E.D. Tenn. 1986).

information received.²⁰¹

As a result of the growing number of cases striking down drug testing of public employees,²⁰² government employers should pursue the issue at the bargaining table rather than in court.²⁰³ Although surprise testing has advantages,²⁰⁴ the recent cases require particularized standards embodied in administrative regulations or a collective bargaining agreement.²⁰⁵

The requirements enunciated in the federal cases from *Shoemaker* to *Lovvorn* will prove burdensome to the federal government in light of its current plan for widespread drug testing of federal employees. By executive order,²⁰⁶ President Reagan called for mandatory testing of employees in "sensitive positions."²⁰⁷ The order apparently allows agency executives to implement drug testing without individualized suspicion of drug use.²⁰⁸ Further, the order allows the administrators considerable discretion in determining the criteria and scope of such testing.²⁰⁹ To its credit, the executive order contains guidelines for proper notice of testing,²¹⁰ custodial safeguards,²¹¹ and mandatory confirmation tests.²¹² In addition, the order requires that urine donation procedures

200 The testing agency must proceed pursuant to detailed, written procedures regarding test results leading to termination. *See Lovvorn*, 647 F. Supp. at 883. The absence of written guidelines may lead to invalidation on procedural due process grounds. *Id.*

201. *See Capua*, 643 F. Supp. at 1515. The confidentiality guidelines contained in the New Jersey Racing Commission regulations may provide adequate protection for these concerns. *See supra* note 105; and *Shoemaker*, 795 F.2d at 1138 n.2.

202. *Capua*, *Von Raab*, and *Lovvorn*, holding mandatory mass urinalysis unconstitutional, were decided in the last four months of 1986.

203. Drug testing contained in a collective bargaining agreement would provide the necessary guidelines for proper testing procedures, would apprise employees of grounds for termination, and would provide an avenue for dispute resolution.

204. *See, e.g., Capua v. City of Plainfield*, 643 F. Supp. at 1507, 1511 (D.N.J. 1986).

205. *Id.*

206. Exec. Order No. 12564, *reprinted in* 55 U.S.L.W. 2177 (Sept. 30, 1986).

207. Exec. Order No. 12564. The order leaves "sensitive positions" undefined.

208. *Id.* at § 3.

209. *Id.* The order also appears to allow agency heads to conduct both voluntary drug testing and urinalysis based on reasonable suspicion of drug use. *Id.* The agency head must base his decision on considerations of the agency's duties, public health and safety concerns, and national security. *Id.*

210. *Id.* at § 4. The order provides sixty days notice prior to implementation of a plan. § 4(a).

211. *Id.* at 2178, § 4(c).

212. *Id.* at § 5(e).

respect individual privacy.²¹³

To the extent that the president's plan allows urinalysis without reasonable suspicion of drug use, its constitutionality is suspect.²¹⁴ The order may also grant excessive discretion to agency officials regarding the scope and frequency of the tests.²¹⁵ Such a finding would defeat the use of the administrative search exception to the probable cause requirement.²¹⁶ Regardless of the outcome, the executive order is likely to be the subject of considerable future litigation.²¹⁷

The reasonable suspicion requirement will result in greater administrative costs in monitoring employee behavior,²¹⁸ and decreased success in the "war on drugs."²¹⁹ Yet, as the *Capua* court admonished,²²⁰ society should not disregard the constitutional rights of the innocent to discover the guilty.²²¹

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213. *Id.* at § 4(c).

214. *See supra* note 201 and accompanying text.

215. *See supra* notes 46-52 and accompanying text.

216. *Shoemaker v. Handel*, 795 F.2d 1136, 1143 (3d Cir. 1986).

217. The testing of customs employees in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), may be an example of government testing of "sensitive position" employment. *See supra* note 144.

218. *See supra* notes 194-97 and accompanying text for personnel procedures aimed at detecting drug abuse on the job.

219. In *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), the court observed that even mass urine testing does not guarantee that drug users will not escape detection and pose safety problems. *Id.* at 883.

220. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1522 (D.N.J. 1986).

221. Although the *Capua* court concluded that education and treatment were important weapons in the war on drugs, it stated that even reduced drug use fails to justify infringements on constitutional rights. *Id.* at 1522.

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