Drug Testing and the Fourth Amendment

Leslie A. Harasym

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
The basic purpose of the fourth amendment of the United States Constitution is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Supreme Court of the United States has interpreted the fourth amendment to afford constitutional protection to an individual's reasonable expectation of privacy from unreasonable state intrusions. In order to determine whether the reasonableness require-

\[1\] U.S. CONST. amend. IV. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Id. The fourth amendment is made applicable to the states through the Due Process Clause of the fourteenth amendment. See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The roots of the fourth amendment can be traced to the sixteenth century when the people of England were first subjected to general warrants. See N. Lasson, History and Development of the Fourth Amendment To The United States Constitution 23-27 (1937). The typical search warrant authorized government agents to search anywhere and "had been used in the course of ordinary criminal administration as well as in customs enforcement and the suppression of seditious libel." Id. at 27. Despite objections to the general warrants by the public and parliament, it was not until two centuries later that they were condemned by Lord Camden in Entick v. Carrington, 19 Howell's State Trials 1029 (1765). Id. at 38. The American counterpart of the general warrant, the writ of assistance, created the first of a series of frictions between England and the Colonies which led directly to the revolution. See Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. Criminology & Police Sci. 393, 397 (1963). Navigation laws granted agents of the crown the right to use writs of assistance to search for smuggled goods. R. Rutland, The Birth of the Bill of Rights 1776-91 (1988); N. Lasson, supra, at 54. Opposition to the writs was so great and so widespread that by the time the Constitutional Convention met in Philadelphia, every state had adopted a declaration or bill of rights containing a provision with regard to searches and seizures. N. Lasson, supra, at 79-82.

\[8\] See, e.g., United States v. Chadwick, 433 U.S. 1, 7 (1977) (respondent had reasonable expectation of privacy in contents of double-locked footlocker). The Court in Davis v. Mississippi, 394 U.S. 721 (1969), observed: "[n]othing is more clear than that the Fourth
ments have been satisfied, courts have generally balanced the interests of society against the interests of the individual.6

Recently, this fourth amendment balancing test has been applied in the highly controversial area of drug testing.4 The judiciary's response to fourth amendment challenges to drug testing has been described as a "tower of Babel of conflicting decisions."8 In considering society's need to combat drug abuse, several courts have acknowledged drug abuse as a serious national problem.6 Many commentators have also pointed out that drug abuse is the cause of tremendous financial loss,7 as well as the loss of human

Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry." Id. at 726.


7 See Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985). In Turner the court held that initiation of the drug testing program in the police department was justified "in the context of current widespread, large scale drug usage in all segments of the population." Id. at 1008. See also Storms v. Coughlin, 600 F. Supp. 1214, 1220 (S.D.N.Y. 1984) (drug use among prisoners "is a serious, disruptive problem within American prisons"); Committee For GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975) (increase of drug abuse in Armed Forces threatens "the readiness and efficiency of our military forces"). Federal experts estimate that between 10% and 23% of U.S. workers use drugs on the job. Castro, Battling the Enemy Within, TIME, Mar. 17, 1986, at 53.

8 See Chineson, supra note 4, at 91. According to the U.S. Chamber of Commerce, worker drug and alcohol abuse costs employers $60 billion annually in lost productivity, accidents, higher medical claims, increased absenteeism, and theft of company property which is used to finance some employees' habits. Id. See also Rust, supra note 4, at 53 (drug abuse costs society about $30 billion a year in absenteeism, production loss and injuries); Schwed, Institutional America Lines Up To Take Drug Tests, L.A. DAILY J., Dec. 5, 1985, at 6, col. 2 (experts say drug abuse on the job costs corporations up to $100 billion a year in lost productivity, increased absenteeism, illness, accidents and theft).
Drug Testing

life. However, in spite of strong public concern over drug use, and the salutary results that some drug testing programs have boasted, courts have insisted that drug testing practices defer to fourth amendment requirements. One court has noted that while the drug abuse problem poses a serious threat to society, "it is important not to permit fear and panic to overcome our fundamental principles and protections."

This article will discuss the major drug testing decisions in the public sector and outline the various factors the courts have

---

* See Rangel, Transit Mishaps Tied to Drugs, N.Y. Times, Sept. 19, 1986, at B2, col. 5. New York transit officials estimate that since 1984, seven incidents, two involving fatalities, occurred in which a subway motorman was found to have been using illegal drugs or alcohol. Id. Since 1975, about 50 train accidents have been drug or alcohol related. In those accidents, 37 people were killed, 80 were injured, and over $34 million worth of property was destroyed. Castro, supra note 6, at 55.

* See Battle Strategies, TIME, Sept. 15, 1986, at 71. Seventy-two percent of people surveyed in a New York Times/CBS News poll said they would be willing to undergo drug testing. Id.; Lamar, supra note 4, at 26 (poll showed that given a choice, 81% of people would agree to be tested for drug use).

* See Edwards, supra note 4, at 34. In 1981 Georgia Power Company employees suffered 5.4 injuries per 200,000 man-hours at its Vogtle nuclear power plant construction site. Id. at 55. In 1985, after instituting a drug testing program, this rate dropped to less than .5 injuries per 200,000 man-hours. Id. Likewise, in 1982, the U.S. Navy identified 48 percent of the enlisted men as having used illicit drugs. Id. As a result of drug testing, this figure dropped to 4 percent in 1985. Id. See also Stille, Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers, NAT'L L.J., April 7, 1986, at 22. Southern Pacific Transportation Co. claims that the institution of random drug testing has reduced its accident rate by 67% and has reduced lost time and injuries by over 25%. Id.

* See, e.g., McDonell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985). The McDonell court observed: Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it - searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one. Id. at 1130.


* Private employers who choose to implement drug testing programs face no constitutional impediments since the fourth amendment only applies to searches conducted by the government. Helsby, supra note 4, at 73; Kaufman, supra note 4, at 69. However, private employers that test for drugs may be vulnerable to tort liability or to liability for breach of contract. See Schachter and Geidt, Controlling Workers' Substance Abuse, Nat't L.J., Feb. 11, 1986, at 1, col. 1. In addition, drug testing in the private sector can be limited by the political process. For example, the city of San Francisco recently passed an ordinance prohibiting mandatory blood or urine testing by private employers unless the employer had reason to believe that the employee's faculties were impaired on the job and such impairment presented a danger to his own safety or the safety of others. Chineson, supra
taken into consideration when deciding the constitutionality of drug testing programs. In light of the developing case law in this area, this article will suggest that the constitutionality of a particular drug testing program may depend on the type of employment the individual is engaged in, and the presence or absence of suspicion that the employee is using controlled substances. While other factors are also considered, these two factors seem to have weighed heavily in the courts’ decisions.

I. The Search

The threshold inquiry in any fourth amendment analysis is whether the state’s conduct constitutes a search within the meaning of the amendment. In *Katz v. United States*, Justice Harlan, in his concurrence, posited a formulation for determining whether a search had indeed been conducted: (1) a person must have exhibited an actual (subjective) expectation of privacy, and (2) the expectation was one that society was prepared to recognize as reasonable. Thus, it has been held that one cannot have a reasonable expectation of privacy in what “a person knowingly exposes to the public, even in his own home.”

Note 4, at 95. For a sampling of the controversy surrounding drug testing in the private sector see Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 Employee Rel. L.J. 422; Bishop, Drug Testing Comes to Work, 6 Calif. Law. 28 (April 1986); Dentzer, Cohn, Raine, Carroll, Quade, Can You Pass The Job Test?, Newsweek, May 5, 1986, at 46; Castro, supra note 6, at 52; Gest, Using Drugs? You May Not Get Hired, U.S. News and World Rep., Dec. 23, 1985, at 58.

See infra notes 31-54 and accompanying text.
See infra notes 70-79 and accompanying text.
See infra notes 56-67 and accompanying text.
389 U.S. 547 (1967).
Id. at 561 (Harlan, J., concurring). In *Katz* the Supreme Court held that the police may not electronically eavesdrop on telephone conversations made from a public booth without first obtaining a warrant supported by probable cause. Id. at 553.
United States v. Dionisio, 410 U.S. 1, 14 (1973) (quoting *Katz* v. United States; 389 U.S. 547, 551 (1967)). Applying the notion that one cannot have a reasonable expectation of privacy in an area knowingly exposed to the public, id., the Supreme Court has concluded that requiring an individual to produce a voice exemplar, United States v. Dionisio, 410 U.S. 1 (1973), or a handwriting sample, United States v. Mars, 410 U.S. 19 (1973), is not a search because there is no justifiable expectation of privacy with respect to speech and handwriting since these are constantly exposed to the public.
Drug Testing

In *Schmerber v. California*, the Supreme Court was faced with a similar problem albeit in another context. The Court concluded that extraction of a blood sample from defendant for purposes of determining his state of intoxication was a search which would have to come within the parameters of the fourth amendment.

Relying primarily on the analysis in *Schmerber*, several courts have concluded that it is a search to require an individual to submit a urine sample for the purpose of detecting the use of controlled substances.

II. THE REASONABLENESS REQUIREMENT

Upon a finding that the state's conduct amounts to a search, the next question to be addressed is whether such a search is reasonable. Typically, a search is considered reasonable where a warrant based on probable cause has been sought before the search is conducted, but exceptions have been carved out where the intrusion.

---

81 384 U.S. 757 (1966). In *Schmerber* petitioner had been arrested at a hospital while receiving treatment for injuries he had sustained in a car accident. *Id.* at 758. At the direction of a police officer, a blood sample was taken by a physician. *Id.* Analysis of the sample revealed that petitioner had been intoxicated at the time of the accident. *Id.* at 759. This evidence was admitted at petitioner's trial for the criminal offense of driving while under the influence of intoxicating liquor. *Id.*

81 *Id.* Likewise in *Cupp v. Murphy*, 412 U.S. 291 (1973), the Supreme Court held that the taking of fingernail scrapings constituted a search. *Id.* at 295. The Court stated that "the Fourth Amendment guarantee of freedom from 'unreasonable searches and seizures' is clearly implicated." *Id.* at 294.


Different views concerning the necessity of obtaining a search warrant have been adhered to throughout the history of the fourth amendment. See Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M.L. Rev. 33 (1979). The classic expression of these conflicting views is found in the majority opinion of Justice Minton and in
seems reasonable in light of the governmental purpose.\textsuperscript{86} In the case of testing of body fluids, courts have held that a warrant is not necessary where delay may cause the drug or alcohol tracings to dissipate.\textsuperscript{87} Thus, urinalysis must be tested by the fourth amendment’s general proscription against unreasonable searches and seizures.\textsuperscript{88} In determining whether an individual has exhibited a reasonable expectation of privacy, courts have generally weighed society’s need to search against the invasion which the search entails.\textsuperscript{89}

Justice Frankfurter’s dissent in United States v. Rabinowitz, 339 U.S. 56 (1950). Justice Minton observed that “it is unreasonable searches that are prohibited by the Fourth Amendment. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required.” \textit{Id.} at 60. Dissenting in \textit{Rabinowitz}, Justice Frankfurter wrote:

When the Fourth Amendment outlawed “unreasonable searches” and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is “unreasonable” unless a warrant authorizes it, barring only exceptions justified by absolute necessity. \textit{Id.} at 70 (Frankfurter, J., dissenting). Although Minton’s majority opinion has been overruled by Chimel v. California, 395 U.S. 752 (1969), the modern counterpart of the controversy focuses on the issue of when and under what circumstances the Supreme Court will allow relaxation of the warrant requirement. \textit{See} Stelzner, supra, at 35.


As the Supreme Court noted in Camara v. Municipal Court, 387 U.S. 529, 533 (1967): In assessing whether the public interest demands creation of a general exception to the Fourth Amendment’s warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. \textit{Id.}

\textsuperscript{87} \textit{See} Schmerber v. California, 384 U.S. 757 (1966) (no warrant necessary to take blood from person in car accident to test for intoxication); Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 358 F.2d 1264, 1267 (7th Cir.), \textit{cert. denied}, 429 U.S. 1029 (1976). \textit{But see} Turner v. Fraternal Order of Police, 500 A.2d 1005, 1011 (D.C. 1985) (Nebeker, J. concurring) (urinalysis can detect narcotics seven days after use thus officer does not have to give on-the-spot sample).

\textsuperscript{88} \textit{See} Terry v. Ohio, 392 U.S. 1, 20 (1967).

\textsuperscript{89} \textit{See} supra note 3 and accompanying text. For a sampling of drug testing cases which balance society’s need to search against the invasion which the search entails see Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Shoemaker v. Handel, 619 F. Supp. 1089, 1100 (D.N.J. 1985), \textit{aff’d}, 795 F.2d 1136 (3d Cir.), \textit{cert. denied}, 107 S. Ct. 577 (1986);
Drug Testing

A. Needs of Society

Each individual's privacy interest is shaped by the context in which it is asserted. Thus, whether employee drug testing is reasonable must be evaluated with reference to the environment in the different places of employment. In light of this principle, courts have been particularly sensitive to the needs of society when the governmental drug testing occurs in one of the following situations: when the main function of the employee is to stand guard over the interests of society, when the employee is engaged in an extremely hazardous profession, or when the drug testing takes place in an area that has traditionally been highly regulated by the government. Although the existence of one of these characteristics is not dispositive of the issue of constitutionality, it is suggested that the presence of one or more of these characteristics weighs heavily in the balance.

Courts have more readily approved of urinalysis where the employee has been responsible for protecting the safety of others and where that employee is frequently confronted with emergency situations. Thus, a drug abuse prevention plan which involved urinalysis of soldiers was upheld because "the military forces are charged with the responsibility of continuously protecting the nation's interests" and drug abuse "poses a substantial threat to the readiness and efficiency of our military forces." Likewise in Turner v. Fraternal Order of Police, the court upheld urinalysis of


See infra notes 36-41 and accompanying text.

See infra notes 42-47 and accompanying text.

See infra notes 48-54 and accompanying text.

See infra notes 36-41 and accompanying text.

Committee For GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).

Id.

police officers, noting that "given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head unabefuddled by narcotics becomes self-evident." In Everett v. Napper, the court upheld drug testing of firefighters since "drug use among firefighters could impact negatively on their job fitness and performance, thereby threatening the safety of the community."

When an employee is engaged in very dangerous work which could cause severe injury to the employee, his coworkers, or the public, courts have also been more likely to uphold urinalysis as reasonable. Thus, urinalysis of bus and train operators as well as correctional officers who drive prison vans and buses has been held to be reasonable. Likewise, drug testing of city employees who worked around high voltage electric wires has been held constitutional under the fourth amendment. Using similar logic,

---

40 Id. at 1008. See also City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985). In City of Palm Bay the court noted:

Police officers use weapons, drive vehicles and make instant judgements involving life and death. They, too, must be possessed of all their normal faculties. In addition, they are sworn to enforce the law and must have credibility if public confidence and respect is to be maintained. Known use of illegal substances would undermine that confidence and respect.

Id. at 1524. However, even after considering this important state interest, the court still concluded that the drug testing program in question was unconstitutional. Id.

41 Id. at 1485. See also City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985) (firefighters must be able to think clearly on the job since their lives and the lives of others are at stake); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (court noted that while the deleterious effects of drug consumption on firefighters' ability to perform their duties is an issue legitimately within the city's concern, the means chosen to achieve the city's goal were not reasonable).

42 See infra notes 43-47 and accompanying text.

43 Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir.) (public interest outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse), cert. denied, 429 U.S. 1029 (1976).

44 See Seelig v. McMickens, N.Y.L.J., Aug. 7, 1986, at 7, col. 2 (Sup. Ct. N.Y. County Aug. 7, 1986). The court in Seelig noted the risk to the public from prisoners who escape after a bus accident caused by a driver who was impaired by alcohol or drugs. Id.

45 See Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985). The court held that the city of Marietta had the right to make warrantless searches of its employees to discover if they were using drugs which would affect their ability to work with hazardous materials. Id. See also Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795
Drug Testing

courts have struck down drug testing when a particular job does not pose a substantial threat of injury to the employee or to the public. Thus, society's interest in detecting drug users in the teaching profession was not strong enough to withstand constitutional attack.

Yet another area where courts have been sympathetic to the public's need to ferret out drug users involves highly regulated sectors of society whose members are deemed to have a diminished expectation of privacy. Members of the military, for example, have been considered to have a lower expectation of privacy than the average citizen. Individuals who work or live in a

F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986). The Shoemaker court reasoned:

A jockey must be in full possession of his mental faculties and physical capabilities,—his coordination, skill, and reflex ability are critical to good performance. The risk of serious injury is apparent, given the speed and closeness with which large numbers of horses run during a race. Even the slightest decrease in alertness and reflex ability increases the danger of accidents, including multiple horse and jockey accidents causing grave injury and death.

Id. at 1102.

Sees infra note 47 and accompanying text.


We are cognizant of the fact that illegal drug usage can have an adverse impact upon a teacher's ability to safeguard and supervise pupils in his or her charge. However, the need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, firefighter, bus driver, or train engineer, where, given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.

Id. See also Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986). In Jones the District Court for the District of Columbia held unreasonable, as applied to plaintiff, a drug testing program which tested all Transportation Department employees whether or not they were suspected of drug use. Plaintiff was a bus attendant whose duties involved helping handicapped students on and off the school bus and assisting them in transit. Id. at 1508.

See infra notes 49-54 and accompanying text.

See Committee For GI Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975) (the soldier unlike his civilian counterpart, is subject to "extensive regulation by his military superiors"). Cf. Parker v. Levy, 417 U.S. 735, 787 (1974) (some of serviceman's rights may be overridden by needs of military); Carlson v. Schlesinger, 511 F.2d 1327, 1332 (D.C. Cir. 1975) (courts must balance needs of military against serviceman's rights).

See King v. McMickens, 120 App. Div. 2d 351, 501 N.Y.S.2d 679 (1st Dep't 1986) (prison guards must submit to urinalysis since they are subject to "paramilitary discipline"). Cf. Armstrong v. New York State Comm'r of Corrections, 545 F. Supp. 728 (N.D.N.Y. 1982) (warrantless search of prison guard acceptable if found to be reasonable under the circumstances). But see McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985). In McDonell, the court held that Iowa's objective in discovering which officers were using drugs and therefore might be more likely than others to smuggle drugs to prisoners is far too attenuated to make the search reasonable. Id. at 1130.

See Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (prisoners may be sub-
correctional facility, "a unique place fraught with serious security dangers," also have a diminished expectation of privacy. In addition, since "horse racing is one of a special class of relatively unique industries which have been subject to pervasive and continuous regulation by the state," random urinalysis and breathalyzer tests of jockeys have been upheld as reasonable.

B. The Invasion Which the Search Entails

When evaluating the invasion which the search entails, courts are in agreement that urinalysis is "not an extreme body invasion." In evaluating the intrusiveness of the search, courts have

jected to random drug testing to insure safety of institution); Hampson v. Satran, 319 N.W.2d 796, 799 (N.D. 1982) (state penitentiary urinalysis program dealt with institution's drug problem reasonably and did not intrude on inmates' rights).

Courts have also noted that probationers have a diminished expectation of privacy. See United States v. Williams, 787 F.2d 1182, 1185 (7th Cir. 1986) (upheld urinalysis as condition of probation since probation is "penal alternative to incarceration"); Macias v. State, 649 S.W.2d 150, 153 (Tex. Crim. App. 1983) (requiring weekly urinalysis as condition of probation does not constitute unreasonable search and seizure).

Bell v. Wolfish, 441 U.S. 520, 559 (1979). At issue in Bell was a New York City federal jail policy that required all prisoners to expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with outsiders. Id. at 558. After weighing the "significant and legitimate security interests of the institution against the privacy interests of the inmates," the court concluded that the search was reasonable. Id. at 560.


Drug Testing

considered the testing procedure itself and the degree of individualized suspicion present before conducting the search.  

1. The Testing Procedure

One aspect of the drug testing procedure involves the accuracy of the particular test used. The most commonly used urine test is known as EMIT (Enzyme Multiplied Immunoassay Test). The Center for Disease Control in Atlanta, Georgia found EMIT to be 97 to 99% accurate. The question of reliability usually arises when the EMIT test is not confirmed by the use of a more sophisticated test as the manufacturer of EMIT recommends.

---

**See Alderman, supra note 17, at 864-74.** One commentator has outlined three factors relating to the substance of the search: the intrusiveness of the search, the efficacy of the search, and whether the subject of the search otherwise generates articulable grounds for suspicion. *Id.* He has also posited two procedural factors: the nature of the statutory and regulatory scheme authorizing the search, and the limit on the discretion of the official conducting the search. *Id.*

**See Rust, supra note 4, at 51.** EMIT (Enzyme Multiplied Immunoassay Test) has been criticized for being unable to detect whether the subject of the test is under the influence at the time the test is administered. Alderman, *supra* note 17, at 854. Alcohol can be detected in an individual's system for twelve hours, cocaine for two or three days after consumption, and marijuana for two weeks to two months. See Schwed, *supra* note 7, at 6; Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., April 7, 1986, at 24. One court noted that the urinalysis program in question guarded against tests which might punish the individual for his private behavior off the regulated premises. See Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985) (drug testing of jockeys), aff'd, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986). However, in City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) the court stated: “The City has the right to adopt a policy which prohibits police officers and firefighters from using controlled substances at any time while they are so employed, whether such use is on or off the job.” 475 So. 2d at 1326. EMIT has also been criticized as being unable to distinguish between illegal drugs and over-the-counter medication which often gives a false reading. See Rust, *supra* note 4, at 51.

**See Jensen v. Lick, 589 F. Supp. 35, 38 (D.N.D. 1984).** See also Castro, *supra* note 6, at 58 (EMIT is “97% accurate in the best of circumstances”).

**See Jones v. McKenzie, 628 F. Supp. 1500, 1503 (D.D.C. 1986) (EMIT test first done by computer then repeated manually, but not otherwise confirmed); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (EMIT test performed twice but not confirmed by alternative method). If EMIT is not properly performed or is not confirmed by another method it can have a high rate of error. See Rust, *supra* note 4, at 51 (urine screen gives false readings between 5 and 20 percent of the time); Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., April 7, 1986, at 24 (error rates in various studies fluctuated between 3 and 20 percent); Schwed, *supra* note 7, at 6 (Center for Disease Control study found sloppy laboratory work in isolated cases caused inaccuracy rate of up to 100 percent in urine tests).

**See Chineson, supra note 4, at 91.** However, confirmatory tests cost from $40 to $80 each as compared with $5 for the initial test. *Id.*
Another aspect of the testing procedure that courts have considered in the balancing process is the method of administering the test. Forcing an individual to urinate into a bottle held by another has been described as "purely and simply degrading." In *Capua v. City of Plainfield*, Judge Sarokin compared surveillance during urine collection to a strip search. Yet, in *Shoemaker v. Handel*, the court upheld the Racing Commission's policy of detaining, for as long as an hour, jockeys unable to give a urine sample because of rapid weight loss prior to the race. In *McDonell v. Hunter*, the court noted that a fundamental problem with the Corrections Department drug testing policy was that it failed to identify who had the authority to require an employee to submit to urinalysis, and that it did not provide any written standards to implement the policy.

2. The Degree of Individualized Suspicion Present

To accommodate public and private interests some quantum of

---


The lack of advance notice was compounded by the manner in which the sampling was conducted. Plaintiff was awakened from sleep, handed a container and a note explaining the proceedings in a very cursory fashion, and told to urinate into the container. There does not appear to have been any reason for conducting the sampling in such a fashion, which could only heighten the offensiveness of an already offensive and intrusive procedure.


63 See id. at 1514. Judge Sarokin in *Capua* observed:

The requirement of surveillance during the urine collection forces those tested to expose part of their anatomy to the testing official in a manner akin to strip search . . . A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience.


65 Id. at 1096. The court found the Racing Commission's policy of detaining jockeys unable to give a urine sample because of rapid weight loss reasonable so long as the period of time that the jockey was detained in order to give a sample was minimal. *Id.* at 1104.


67 Id. at 1125 n.4. See City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985); Alderman, *supra* note 17, at 864. One commentator has observed: "Codification of the program is evidence that a legislative or administrative body has approved of the search; it also provides guidelines for those charged with carrying out the search. Alderman, *supra* note 17, at 864.
Drug Testing

individualized suspicion is usually a prerequisite to a constitutional search or seizure. However, such a requirement is not absolute. In balancing the interests involved in drug testing, most courts have placed great weight on the existence of some degree of individualized suspicion. However, other courts have recognized that reasonable suspicion is not necessary if the drug testing program in question has certain procedural safeguards that protect the individual from possible abuses of discretion.

Several courts have explicitly stated that reasonable suspicion is necessary to make drug testing reasonable, even in the face of a vital state interest. In Jones v. McKenzie, the state argued that mandatory urinalysis of Transportation Department employees was justified on the basis of the increase in traffic accidents and

** Delmar vs. Prouse, 440 U.S. 648 (1979). The Prouse Court noted: “the reasonableness standard usually requires at a minimum that the facts upon which an intrusion is based be capable of measurement against an objective standard whether this be probable cause or a less stringent test.” Id. at 654. See United States vs. Martinez-Fuerte, 428 U.S. 543, 560 (1976); Shoemaker v. Handel, 619 F. Supp. 1089, 1100 (D.N.J. 1985), aff’d, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986).

** See Shoemaker v. Handel, 619 F. Supp. 1089, 1100 (D.N.J. 1985), aff’d, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986). See also United States vs. Martinez-Fuerte, 428 U.S. 543, 546 (1976); Camara v. Municipal Court, 387 U.S. 523 (1967). In Camara the Supreme Court stated that “specific knowledge of the condition of the particular dwelling” is not necessary to justify inspection of private residences for the building code violations, only area warrants are necessary. Camara, 387 U.S. at 538.

** See infra note 72 and accompanying text.

** See Rust, supra note 4, at 55. One commentator believes that a “random” drug testing program would pass constitutional challenge. Id.


Under the reasonable suspicion standard a search is justified only if the employer can point to specific objective facts and rational inferences that he is entitled to draw from the facts in light of his experiences. See City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985). The court in City of Palm Bay rejected the requirement of probable cause because it “imposes too severe a standard.” Id. Other courts have rejected the probable cause standard on the ground that it is unnecessary when the search is not aimed at the discovery of evidence for use in a criminal trial. See Camara v. Municipal Court, 387 U.S. 523, 538 (1967); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 App. Div. 2d 35, 503 N.Y.S.2d 888, 891 (2d Dept’1986); King v. McMickens, 120 App. Div. 2d 351, 501 N.Y.S.2d 679 (1st Dept’1986). In Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N. 1986), the court rejected the “mere suspicion” standard because, “the imposition of an individualized, reasonable suspicion standard rather than the more stringent probable cause standard . . . [was] already a significant concession of deference to the state’s legitimate interests.” Id. at 1518.

absenteeism, several incidents of erratic behavior of some Department employees, and the discovery of syringes and bloody needles in Transportation Department restrooms. The court rejected this argument, emphasizing that the Department must suspect a particular employee of using drugs before it can require the employee to submit to urinalysis. Thus, "the reasonable suspicion standard requires individualized suspicion, specifically directed to the person who is targeted for the search." This requirement of reasonable suspicion was found to exist in the drug testing program instituted by the Chicago Transit Authority in *Amalgamated Transit Union (AFL-CIO) v. Suscy.* Under this program, bus operators were required to submit to blood and urine tests when they were involved in "any serious accident" or "suspected of being under the influence" of drugs. In fact, in one case where the drug testing program at issue was unclear as to the degree of individualized suspicion necessary before an employee would be required to submit to urinalysis, the court construed the directive to require reasonable suspicion.

---

*Id.* at 1507-08.  
*Id.* at 1508. However, the court in *Jones* hinted that school bus drivers or mechanics might reasonably be subjected to drug testing without particularized suspicion. *Id.* at 1508.  
538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).  
*Id.* at 1267.  
See *Turner v. Fraternal Order of Police,* 500 A.2d 1005 (D.C. 1985). The *Turner* court noted:

Under Paragraph 2 of Special Order 83-21, all members of the force may be ordered to submit to urinalysis if "suspected of drug use" by a Department official. While it might have been drafted with more precision, the special order's reference to "suspected" drug use does not grant the Department carte blanche to order testing on a purely subjective basis. Rather, the term "suspected" must be construed here as requiring a reasonable, objective basis for medical investigation through urinalysis. *Id.* at 1008-09. See also *King v. McMickens,* 119 App. Div. 2d 351, 501 N.Y.S.2d 679 (1st Dep't 1986). King is a unique case because there was no established drug testing policy at issue. In *King* "the Inspector General's office of the Correction Department received a report from the Office of Special Prosecutor that a confidential informant had alleged that petitioners were involved in illegal drug activities." *Id.* at 680. The court held that the information furnished by the informant provided the basis for a reasonable suspicion that petitioners were engaged in activity inappropriate to their office. *Id.* at 681.
Drug Testing

Although reasonable suspicion is usually the rule, a few courts have upheld drug testing in the absence of any individualized suspicion. In Shoemaker v. Handel, at issue was the Racing Commission's drug testing policy which selected jockeys at random to undergo urinalysis. Under this program the names of all jockeys participating in a given race were placed in an envelope, and the steward drew the names of three to five jockeys for testing. In upholding the program, the court noted that "[s]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted on some degree of individualized suspicion." In fact, the court pointed out that "a testing approach which requires some element of individualized suspicion would actually increase the ability of the steward to act in an arbitrary and unreasonable manner by enabling him to select jockeys for testing without any clearly defined and objective behavioral criteria for detecting impairment."


In Prouse the Supreme Court held that stopping an automobile to check the driver's license and registration in the absence of at least "articulable suspicion" is unreasonable under the fourth amendment. 440 U.S. at 662. However, the Court pointed out:

"This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at road-block-type stops is one possible alternative. 440 U.S. at 662. Therefore, the Court pointed out:"

The Court considered fixed checkpoint-type stops reasonable and declared that "since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." 440 U.S. at 562. See also United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In Martinez-Fuerte, border patrol agents stopped all passing motorists at a permanent fixed checkpoint for questioning of the vehicle's occupants to determine if they were illegal aliens. Id. at 545-47.

In upholding the propriety of the stop the Supreme Court held that such stops "may be made in the absence of any individualized suspicion at reasonably located checkpoints." Id. at 559.

One commentator has pointed out: "a drug testing program may appear more reasonable when it applies to all employees within a
The court in *Storms v. Coughlin*, was similarly concerned about the potential for abuse and harassment in a drug testing program. In *Storms*, the Ossining Correctional Facility instituted a drug testing policy which tested two groups of inmates each day. One group consisted of those inmates suspected of drug use and the other group consisted of prisoners selected at random from the entire population of the facility. The name of each prisoner was written on a card and pinned to a board in the watch commander's office. Those inmates whose cards were picked off the board by the watch commander were ordered to report for urinalysis. Although the court upheld the drug testing program in *Storms* as reasonable, the court condemned the method by which the prisoners were selected for testing because it carried an "unnecessary risk of harassment." The court granted injunctive relief to the extent that the prison official could not be aware of the identity of the prisoners while he was selecting them. The inmates had to be "chosen blindly."

Although *Shoemaker* and *Storms* involved the selection of individuals for drug testing by lottery, testing individuals for drug use given group, not just those who stir the boss's whimsy." Kaufman, *supra* note 4, at 66.


Id. at 1223.

Id. at 1216.

Id. As to the group of prisoners selected at random from the entire population of the facility, the court in *Storms* did not demand any degree of individualized suspicion before a prison official could require an inmate to submit to urinalysis. In coming to this conclusion the court relied on *Bell v. Wolfish*, 441 U.S. 520 (1979), which upheld highly intrusive body cavity searches of prisoners after they had any contact with a visitor. *Storms*, 600 F. Supp. at 1219-20. The court pointed out in *Bell* that visitors were searched before entry, and during the visits the inmates were required to wear one-piece jumpsuits. Id. at 1220. Also, the visits took place in a glass enclosed room under the scrutiny of officers. Id. Thus the court concluded:

The level of drug use is high enough in all prisons that it seems much more likely that any inmate picked at random from the Ossining prison population would be under their influence than that a *Bell* inmate could successfully maneuver contraband into his or her body cavities. It is this level of probability which lies at the heart of "cause."

Id.

Id. at 1216.

Id.

Id.

Id. at 1226.

Id.

Id.
Drug Testing
during their regular physical examination has also been upheld as reasonable. In Seelig v. McMickens, corrections officers assigned
to driving prison buses were required to undergo a biennial physi-
cal examination. Controversy arose when the Department of Correction wished to run drug tests on the urine already collected
for other tests. Applying the balancing test, the court held the Department's policy reasonable under the fourth amendment.

Another rationale for upholding drug testing in the absence of individualized suspicion was expounded by the court in Allen v. City of Marietta. Without discussing the existence of reasonable suspicion, the court concluded that drug testing of city electrical workers was reasonable because "the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties."

CONCLUSION

"In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle." This can be avoided by carefully considering the interests of society and the fourth amendment interests of the individual in the context of the special circumstances surrounding the drug testing program.

Leslie A. Harasym

---

Id. at 491.