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Probative Value and the Unreasonable Search: A Constitutional Perspective on Workplace Drug Testing

Allan Adler†

Although it has been a topic of considerable discussion within the scientific and medical communities, the probative value of the results of urinalysis drug testing has received scant judicial consideration. On the whole, courts have not regarded probative value as a significant factor in determining whether an employer's legitimate interest in a "drug-free workplace" justifies mandatory testing of employees to identify the users of illegal drugs.

Even where employment testing has been mandated by the government, and courts have consequently determined whether the tests constitute "unreasonable searches" within the meaning of the Fourth Amendment, the relationship between the evidentiary capacity of urinalysis drug tests and the government's workplace objective in requiring them has been seldom considered relevant and rarely determinative.¹

To some extent, the courts' failure to focus on the significance

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of this issue in government-mandated drug testing cases may be attributed to the relentless debate, among litigants and judges alike, over the question which many view as determinative in the application of traditional Fourth Amendment doctrine; that is, whether probable cause, in the form of "individualized reasonable suspicion" of drug use, is a prerequisite of a "reasonable" testing requirement. With only one little-noticed exception, court decisions under the Fourth Amendment invariably turn upon the court's resolution of this question as a predicate to balancing the government's interest in requiring the tests against the intrusion into protected privacy interests that results from conducting them.

Despite its current prevalence, this approach to determining the Fourth Amendment "reasonableness" of such workplace testing is flawed in a pragmatical sense. An understanding of these flaws should lead the courts to base their determinations, at least in significant part, on an assessment of the probative value of urinalysis drug testing.

One problem with the prevailing approach is that it unrealistically fails to acknowledge that the Supreme Court, in its most recent decisions relative to the "search" issues raised by workplace drug testing, has perfunctorily bypassed the "probable cause" question. Instead, the Court has proceeded directly to a "balancing" analysis in which the "reasonableness" of the search may be foreordained by the Court's generous characterization and solicitous view of the government's interest in requiring it. Because the searches at issue in both New Jersey v. T.L.O. and O'Connor v. Ortega were based upon individualized suspicion of wrong-doing, the Court did not decide "whether individualized suspicion is an essential element of the standard of reasonableness." However, the general thrust of these decisions and the Court's explicit language in other contexts make clear that "the Fourth Amendment

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For a summary of the jurisprudence on "individualized suspicion," see Feliciano v. City of Cleveland, 661 F. Supp. at 590 (cited in note 1) ("the overwhelming majority of cases challenging urinalysis has concluded with decisions either that testing is unconstitutional in the absence of individualized suspicion, or that testing was proper because individualized suspicion was present" (emphasis added)).


See generally O'Connor, 94 L. Ed.2d at 741 (Blackmun, with Brennan, Marshall, and Stevens, dissenting).

O'Connor, 94 L. Ed.2d at 729; T.L.O., 469 U.S. at 342 n. 8.
imposes no irreducible requirement of such suspicion.'"

Equally troubling is the fact that, since the Third Circuit's decision in Shoemaker v. Handel, there has been a tendency among testing proponents, as well as a temptation within the judiciary, to measure the weight of the asserted government interest in other drug testing cases by comparison to the asserted government interest which prevailed over individual privacy interests in Shoemaker. Although relatively few courts have been persuaded to follow Shoemaker's Fourth Amendment analysis, the deferential findings in Shoemaker regarding the state's interest in "assuring the public of the integrity of the persons engaged in the horse racing industry" have established an extremely low comparative threshold for government justification of testing requirements in other areas of employment. Under the current "balancing" approach, there is a real risk that the interest in requiring testing for employees in safety or security-related fields may be deemed

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7 T.L.O., 469 U.S. at 342 n. 8, quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976). See also Delaware v. Prouse, 440 U.S. 648, 654-55 (1979) ("In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field,'" citing Camara v. Municipal Court, 387 U.S. 523, 532 (1967)).

* See, for example, McDonell, 809 F.2d at 1308 (cited in note 1) (testing of certain prison employees without individualized suspicion was justified on the grounds that "the state's interest in safeguarding the security of its correctional institutions is at least as strong as its interest in safeguarding the integrity of, and the public confidence in, the horse racing industry"); Rushton, 653 F.Supp. at 1525 (cited in note 1) (relied on Shoemaker and McDonell in finding comparable state "strong interest in maintaining public confidence" in nuclear plant safety and security); National Ass'n of Air Traffic Specialists v. Dole, No. A87-073, slip op. at 34 (D. Alaska March 27, 1987) ("The rationale of the Third Circuit upholding drug urinalysis for jockeys in order to protect the integrity of horse racing is even more compelling when the public need for air safety is considered"). But see Capua, 643 F. Supp. at 1520 (cited in note 1) (firefighters); Patchogue-Medford Congress of Teachers v. Board of Education, 119 A.D.2d 35, 505 N.Y.S.2d 888, 890 (1986), aff'd, 70 N.Y.2d 57, 517 N.Y.S.2d 456 (1987) (public school teachers).

10 The court in Shoemaker held that the "administrative search exception" to the warrant and "probable cause" requirements of the Fourth Amendment applied to employees voluntarily participating in the "heavily-regulated" horse racing industry. 795 F.2d at 1142. While it is not within the scope of this article to evaluate the propriety of this holding, it is relevant to note simply that numerous other courts have either distinguished Shoemaker on its facts or found its reasoning inapplicable. See, for example, Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), cert. granted, 108 S.Ct. 2033 (1988); Feliciano, 661 F. Supp. at 591 (cited in note 1); American Federation of Government Employees v. Weinberger, 651 F. Supp. at 734 (cited in note 1); Capua, 643 F. Supp. at 1522 (cited in note 1); Fraternal Order of Police, 524 A.2d at 434-35 (cited in note 1); Caruso, 506 N.Y.S.2d at 798 (cited in note 1). But see Rushton, 653 F. Supp. at 1525 (cited in note 1); McDonell, 809 F.2d at 1308 (cited in note 1).
"compelling," while the interest in testing in other occupations may at least be deemed "substantial," by conclusory comparison to the one at issue in Shoemaker.

Assessing the "probative value" of urinalysis drug testing in relation to the government's objective in requiring such testing is a more sensible measure of its "reasonableness" under the Fourth Amendment because it avoids these pitfalls in the prevailing approach. After all, if a particular method of search is inherently incapable of producing the type of evidence which will serve the objective that justifies its initiation, then utilizing that method of search in pursuit of that objective must be "unreasonable," regardless of whether the search is or is not conditioned upon a requirement of "reasonable suspicion."

Moreover, as this reasoning implies, the probative value of the search method derives its significance from its relationship to the stated objective in initiating the search. Thus, a by-product of an analysis of the probative value of urinalysis drug testing is a more rigorous examination of the asserted government interest that justifies requiring the tests. This, in turn, would require the asserted government interest to be articulated with a more exacting specificity than has been necessary under the current "balancing" approach—a development which could, in the case of the often-invoked but seldom examined employer's interest in a "drug-free workplace," raise questions about the "reasonableness" of the end as well as the means used to attain it.

In anticipation of the Supreme Court's rulings on government-mandated workplace drug testing, Part I of this article demonstrates that the probative value of a particular method of search has been an important albeit implicit and understated part of the Supreme Court's Fourth Amendment "reasonableness" analysis.

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11 Since even a truly probative method of search may be "unreasonable" in the circumstances in which it is utilized, the author does not contend that the probative value of a particular search method should become the sole and exclusive measure of Fourth Amendment "reasonableness." In the context of urinalysis workplace drug testing, however, this issue may be dispositive, rather than merely relevant, depending upon the specific government interest which is asserted to justify the search requirement.

12 On February 29, 1988, the Supreme Court granted certiorari in National Treasury Employees Union v. Von Raab, 816 F.2d 170 (cited in note 1), a case in which the Court of Appeals upheld testing without a requirement of reasonable individualized suspicion for U.S. Customs Service employees seeking transfer into certain "sensitive positions." Then, on June 6, 1988, the Court granted certiorari in Burnley v. Railway Labor Executives Ass'n, 839 F.2d 575 (cited in note 1), wherein a Federal Railroad Administration regulation requiring post-accident testing was struck down because testing was not predicated on individualized suspicion. 108 S. Ct. 2033 (1988).
Part II of the article argues that the limited probative value of a "positive" urinalysis drug test, in relation to the employer's legitimate interest in "work-related" drug abuse, significantly undercuts the government's justification for such tests. It will conclude on these grounds that such tests, even when predicated on reasonable suspicion, generally constitute "unreasonable searches" within the meaning of the Fourth Amendment.

I. CURRENT FOURTH AMENDMENT DOCTRINE AND PROBATIVE VALUE

A. Probative Value and Schmerber

Many courts that have found government-mandated urinalysis drug testing in the workplace to constitute a "search" within the meaning of the Fourth Amendment have reached this conclusion in reliance upon the Supreme Court's holding in Schmerber v. California regarding involuntary blood-alcohol testing. Virtually all of these decisions, however, have unaccountably failed to recognize the significance which the Schmerber Court attached to the probative value of such testing in assessing its "reasonableness" under the circumstances that brought it about.

In analyzing the reasonableness of the blood test in Schmerber, the Court posed a two-step inquiry. It asked first "whether the police were justified in requiring petitioner to submit to the blood test," and then "whether the means and procedures em-
ployed in taking his blood respected relevant Fourth Amendment standards of reasonableness."

Although the Court found that the elements of probable cause and exigency were sufficiently demonstrated to meet traditional Fourth Amendment standards under the first part of its analysis, the Court refused to find that the police were justified in requiring the petitioner to submit to the blood test until it first concluded that "the test chosen to measure petitioner's blood-alcohol level was a reasonable one."

Citing its earlier ruling in *Breithaupt v. Abram*, the Court concluded that this type of evidentiary search was reasonable because "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."

The Court's due process examination in *Breithaupt* went to the reasons why the blood test procedure "has become routine in our everyday life" and why the blood-alcohol test was a valid and acceptable one to employ in the circumstances in which it was used. "The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application," the Court concluded, "but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication."

*Schmerber* was the first Supreme Court decision to examine a

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16 Id. at 768.
17 Id. at 770-71.
18 Id. at 771.
19 352 U.S. 432 (1957). *Breithaupt* had not involved a Fourth Amendment issue, but, instead, confronted the Court with a "due process" challenge to a blood-alcohol test which provided evidence of intoxication to help convict a truck driver of involuntary manslaughter in connection with a highway accident. A Fourth Amendment claim, similar to the one considered by the Court in *Schmerber*, was rejected in *Breithaupt* because the Court had not yet held that the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. Id. at 434. After *Breithaupt* and prior to *Schmerber*, the Court extended the reach of the Fourth Amendment to state officers in *Mapp v. Ohio*, 367 U.S. 643 (1961).
20 *Schmerber*, 384 U.S. at 771 (cited in note 13).
21 352 U.S. at 436. The blood sample used for the test had been taken by an attending physician in a hospital emergency room at the request of a state patrolman while the truck driver was unconscious. The driver argued that seeking to collect evidence in this manner was analogous to the forcible use of a stomach pump which had "shocked the conscience" of the Court in *Rochin v. California*, 342 U.S. 165 (1952). The Court in *Breithaupt* distinguished the facts in *Rochin* and refused to apply the "due process" rationale from that case on the grounds that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician." 352 U.S. at 435.
22 Id. at 439.
Fourth Amendment search of one’s “person” involving governmental intrusion into the bodily integrity of the individual. More than twenty years later, Schmerber remains the touchstone for Fourth Amendment analysis of searches that violate bodily integrity, and its appreciation of the significance of the probative value of the evidence which may be obtained by the particular type of search at issue is reflected clearly, if not explicitly, in its progeny.

In Winston v. Lee,\(^2\) for example, the Court, without dissent, held that requiring a robbery suspect to undergo surgery under a local anesthetic, in order to remove a bullet which might identify him as the perpetrator of the crime, would constitute an unreasonable search under the Fourth Amendment analysis derived from Schmerber.\(^4\)

Justice Brennan, the author of the opinions in both Schmerber and Lee, distinguished the reasonableness of the search at issue in the former case from that of the one before the Court in Lee. The distinctions were primarily based upon the degree of intrusiveness and the need for the evidence that could be obtained in each case. Brennan noted that in Lee, as in Schmerber, the Court was required to weigh the intrusion of the search upon the individual's personal privacy and bodily integrity against “the community's interest in fairly and accurately determining guilt or innocence.”\(^2\)\(^5\)

The Court in Lee noted that the far greater degree of intrusiveness associated with the surgical search sought in that case could not be justified by the claimed need of the bullet to identify its bearer as the perpetrator of the crime in question, since authorities already possessed substantial evidence of the origin of the bullet through the identification of the suspect by the robbery victim who had fired at his assailant.\(^2\)\(^6\)

Brennan explained that the blood test in Schmerber directly served the “community’s interest” which justified its initiation because it is “a highly effective means of determining the degree to which a person is under the influence of alcohol.”\(^2\)\(^7\) He emphasized, among other things, that the authorities in Schmerber “clearly had probable cause to believe that [the petitioner] had been driving while intoxicated, and to believe that a blood test would provide

\(^{4}\) Id. at 755.
\(^{5}\) Id. at 762.
\(^{6}\) Id. at 765-66.
\(^{7}\) Id. at 762-63.
evidence that was exceptionally probative in confirming this belief.”

Significantly, the Court also noted the existence of “questions concerning the probative value of the bullet, even if it could be retrieved.” The Court recognized that the “evidentiary value of the bullet” was dependent upon ballistics tests which might be hampered by a number of factors, including corrosion of the bullet’s markings in the time it had been in the suspect’s shoulder and the fact that “any given gun may be incapable of firing bullets that have a consistent set of markings.” Such problems, the Court recognized, could make it impossible to compare the markings, if any, on the bullet in the suspect’s shoulder and the markings, if any, found on a test bullet that police could fire from the victim’s gun.

Ultimately, the fact that “the courts below made no findings on this point” led the Court to “hesitate to give it significant weight in our analysis.” Nevertheless, the Court’s observations reinforce the conclusion that the probative value of the evidence obtained through a particular method of search is a salient factor in evaluating Fourth Amendment “reasonableness.”

B. Probative Value and the “Dual Inquiry” Standard in Terry

Two years after the Supreme Court decided Schmerber v. California, its landmark decision in Terry v. Ohio established a two-pronged inquiry for determining Fourth Amendment “reasonableness” in circumstances where “the particular governmental invasion of a citizen’s personal security” stops short of a “full-blown search.” Although Terry involved a specific question regarding police investigative conduct, the standards set forth in that decision have now become the Court’s analytical guideposts for determining the Fourth Amendment “reasonableness” of government “searches” in noncriminal cases. In so doing, they provide the ba-

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28 Id. at 759 (emphasis added).
29 Id. at 766 n. 10.
30 Id.
31 Id.
32 392 U.S. 1 (1968).
33 Id. at 19. In Terry, the Court considered what it characterized as the “quite narrow question” of “whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.” Id. at 15. As a predicate for this inquiry, the Court first concluded that Police Officer McFadden’s “stop-and-frisk” confrontation with petitioner Terry, which resulted in the officer’s discovery of a gun and Terry’s arrest on a charge of carrying a concealed weapon, constituted a “search and seizure” within the meaning of the Fourth Amendment. Id. at 19.
34 See T.L.O., 469 U.S. at 341-42 (cited in note 4); O’Connor, 94 L. Ed.2d at 728-29
ses for concluding that the “probative value” analysis is at least an implicit part of the Court’s most recent decisions of relevance to its upcoming review of government-mandated drug testing in the workplace.\textsuperscript{35}

In proceeding to determine whether the seizure and search of petitioner were “unreasonable,” the Court in \textit{Terry} stated that “our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”\textsuperscript{36} In addressing the first prong of the inquiry, the Court began by examining the governmental interest “which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.”\textsuperscript{37} To justify the search, the Court focused on the “immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”\textsuperscript{38} The Court concluded that on the facts and circumstances detailed at trial “a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer’s safety while he was investigating his suspicious behavior.”\textsuperscript{39}

\textsuperscript{35} See O’Connor, 94 L. Ed.2d at 728-29; T.L.O., 469 U.S. at 341.

\textsuperscript{36} \textit{Terry}, 392 U.S. at 19-20 (cited in note 32). The Court, in preparing to rely on “reasonableness” as the measure of Fourth Amendment constitutionality, denied any “retreat” from prior holdings that “police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,” and distinguished the case before it as dealing with “an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.” Id. at 20.

\textsuperscript{37} Id. at 20-21, quoting \textit{Camara}, 387 U.S. at 534-35, 536-37. Although the Court noted a general governmental interest in “effective crime prevention and detection . . . which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest,” it reasoned that this general interest went only to “the propriety of Officer McFadden’s taking steps to investigate petitioner’s suspicious behavior,” and not to whether there was “justification for McFadden’s invasion of Terry’s personal security by searching him for weapons in the course of that investigation.” \textit{Terry}, 392 U.S. at 22-23.

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 28. The Court reviewed at length the “suspicious behavior” of petitioner and
Finding a legitimate government interest to justify the search satisfied the first prong of the Court’s inquiry, that is, whether the search was “justified in its inception;” however, the second prong, concerning the “scope” of the search, remained at issue, since “a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.”

“The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation,” and for this reason, “reasonableness” also requires that “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”

Based on its view of the justification for the search at issue in Terry, the Court concluded that the search itself “must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” More specifically, the search must be “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”

Unlike the blood-alcohol content test in Schmerber v. California or the surgical and ballistics techniques discussed in Winston v. Lee, the search methodology at issue in Terry did not consist of standardized procedures developed through empirical testing of scientific principles and technological capabilities which permitted their probative value in relation to specific justifying interests to be objectively ascertained prior to initiation. The scope of Officer McFadden’s “frisk” was not restricted by any inherent limitation in the probative capability of the available technique, but by the principle of “reasonableness” which required that it be narrowly

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his companions, and concluded that it was “consistent with [Officer] McFadden’s hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons.”

"Id. at 18 (cites omitted)."

"Id. at 28-29."

"Id. at 19 (cites omitted)."

"Id. at 26."

"Id. at 29. The Court's review of the record indicated that Officer McFadden patted down the outer clothing of petitioner and his two companions, but did not place his hands in their pockets or under the outer surface of their garments until he felt weapons. The Court thus found that "Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." Id. at 30. It emphasized that he "did not conduct a general exploratory search for whatever evidence of criminal activity he might find," but instead "carefully restricted his search to what was appropriate to the discovery of the particular items which he sought." Id."
gauged to what was "necessary" to produce evidence that would be probative of the protective interests which justified the intrusion in the first place. Still, the concerns of the Court in all three cases were closely related, and it seems clear from the Court's statements that limiting a search to that which is capable of producing probative evidence is as much a part of the "scope" element in Terry's "reasonableness" standard as is limiting the search to what is necessary for that purpose.

The relevance of this conclusion for government-mandated urinalysis drug testing in the workplace stems from the fact that, as indicated earlier, the Terry Court's "dual inquiry" standard has become the analytical framework for determining the "reasonableness" of a Fourth Amendment search in noncriminal contexts.

C. T.L.O. and O'Connor: Extending Terry and Probative Value

In New Jersey v. T.L.O., the Court engaged in the "dual inquiry" analysis as a means of implementing its ruling that the legality of a search of a student by school officials "should depend simply on the reasonableness, under all the circumstances, of the search." The Court explained:

Under ordinary circumstances a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Five members of the Court, in an opinion written by Justice

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469 U.S. 325 (cited in note 4).
45 Id. at 341. T.L.O. arose from a school official's demand to see a student's purse after the student, accused of violating school rules by smoking in the lavatory, claimed that she never used cigarettes at all. Upon opening T.L.O.'s purse and seeing a pack of cigarettes, the official removed the pack to confront her with it. In the process, he noticed a pack of cigarette rolling papers, which led him to suspect that T.L.O. was using marijuana. Proceeding with a full search of the purse he found a small amount of marijuana, a pipe, and a number of other items, including two letters, which he read in the belief that they implicated T.L.O. in drug trafficking. The official turned the evidence of suspected drug dealing over to the police precipitating actions which eventually lead to T.L.O. being sentenced to one year's probation in juvenile court on a charge of delinquency.
47 Id. at 341-42.
White, concluded that the school official’s actions had been “in no sense unreasonable for Fourth Amendment purposes.” In what could have been the basis for a holding in the opposite direction, the majority conceded that the discovery of the cigarettes in her purse “would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all.” But then, measuring the value of this disclosure under the standards of the Federal Rules of Evidence, the majority concluded that “[t]he relevance of T.L.O.’s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary ‘nexus’ between the item searched for and the infraction under investigation.”

The majority’s reference to the Federal Rules makes clear that its discussion of “relevance” is, in fact, an analysis of “probative value.” The standard for probative value, as established by Rule 401, is a broad one insofar as “it is universally recognized that evidence to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” The same thing, however, can be said for the majority’s conclusion that the accusation of smoking in the lavatory justified the search by establishing reason to suspect that T.L.O. had cigarettes in her purse.

The majority noted that “T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms

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48 Id. at 343.
49 Id. at 345.
50 Id. Upon finding the initial portion of the search to be reasonable, the majority proceeded to find that the extended search for evidence of drug use, which followed from the removal of the cigarettes and the disclosure of the rolling paper, was also reasonable. Id. at 347. The majority dismissed, as “hairsplitting argumentation,” T.L.O.’s contention that the school official was not justified in removing the cigarettes from the purse, even if he was justified in opening the purse to see if they were there. Id. at 346 n. 12. In equally conclusory fashion, the majority determined that the discovery of the rolling papers gave rise to a reasonable suspicion that T.L.O. was carrying marijuana which, in turn, justified “further exploration” of T.L.O.’s purse, including the extension to a separate zippered compartment from which T.L.O.’s letters and index card were taken and examined. Id. at 347.
51 “Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence.” Notes of Advisory Committee on Proposed Rules, Fed. Rule Evid. 401.
52 T.L.O., 469 U.S. at 345 (cited in note 4).
when she stated that she did not smoke at all." Under those circumstance, it concluded, "T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking."

In concluding that the evidence discovered by the school official's search had "probative value" to qualify as "relevant" evidence under the Federal Rules standard, the majority in T.L.O. must have concluded, if only by implication, that the actual search conducted, that is, opening and visually inspecting the contents of T.L.O.'s purse, had the requisite "probative value" to be considered a reasonable method of search within the meaning of both the "inception" and "scope" prongs of the Terry "dual inquiry" into Fourth Amendment reasonableness.

In the end, however, the majority's discussion of "relevance" shed more light on the "probative value" of the evidence that is obtained than on the "probative value" of the search method used to obtain it; whatever the relationship between the two concepts of "probative value" might be, the majority in T.L.O. offered nothing to elucidate it. Similarly, while it extended the "dual inquiry" standard of Terry, the majority failed to grasp the significance of that standard in terms of the "probative value" rationale it embodies.

If the T.L.O. decision is an example of the Terry standard fairly stated but somewhat obscurely applied, the Court's more recent decision in O'Connor v. Ortega presents an extension of that standard to the workplace context with its application to specific facts held in abeyance.
In *O'Connor*, a plurality of the Court took the analytical framework which the *T.L.O.* majority fashioned for determining the reasonableness of searches by officials in schools, and announced its adoption as the standard for determining the reasonableness of workplace searches by public employers.69

"Ordinarily," the plurality stated, "a search of an employee's office . . . will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory, work-related purpose such as to retrieve a needed file."70 As in *T.L.O.*, "the search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'"71

Although the Court in *O'Connor* sought to discourage any anticipation of its views on workplace drug testing,72 its continuing validation of the "dual inquiry" standard from *Terry* and its characterization of the public employer's interests in "work-related searches" may provide some insight to its disposition toward that issue.

"The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace," the plurality stated;73 even when employers conduct an investigation of work-related employee misconduct, their interest is substantially different from that which the government has in law enforcement."74 The plurality in *O'Connor* repeatedly con-

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related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." Id. at 728. Justice Scalia, concurring in the judgment, would have gone further than the plurality to hold that "government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." Id. at 732-33.

69 Id. at 729.
70 Id.
71 Id., citing *T.L.O.*, 469 U.S. at 342 (cited in note 4). Over a sharp dissent, a majority of the Court declined to determine whether the specific search at issue satisfied this standard of reasonableness, believing that a remand to the district court was necessary in order to determine the specific justification for the search.
72 Parenthetically, the plurality noted a number of other issues that it did not address, including "the proper Fourth Amendment analysis for drug and alcohol testing of employees." Id. at 730-31 n. *
73 Id. at 727.
74 "While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct . . . Rather, work-related
trasted the government's interests as employer and as law enforcer primarily in support of its view that, as with the school searches in *T.L.O.*, there is no need to require that workplace searches be predicated upon obtaining a warrant or otherwise demonstrating probable cause. Nevertheless, as will be discussed below, the distinction is relevant to the “reasonableness” of urinalysis drug testing from the “probative value” perspective.

II. URINE DRUG TESTING AND PROBATIVE VALUE

A. Toxicological Analysis: What Do Results Prove?

In contrast to the oft-debated questions regarding the “accuracy” and “reliability” of the various methods of urinalysis drug testing, the “probative value” of a properly confirmed “positive” result from such testing has not been the subject of dispute within the scientific and legal communities.

The consensus of opinion concerning the interpretive limits of urinalysis drug testing, as reflected in the views of the published scientific literature, was succinctly summarized in a statement of the American Medical Association’s Council on Scientific Affairs as part of the report on “Scientific Issues in Drug Testing” that was adopted by the AMA’s House of Delegates at its 1986 Interim Meeting and reprinted in the June 12, 1987 issue of the Journal of the American Medical Association:

> Within the limits of accuracy of the tests that are used and the administrative security of the program in which these tests are carried out, drug testing only differentiates between persons who have exposed themselves to the drugs being tested for and those who have not. The results do not give any indication of the pattern of drug use (method of administration, frequency of use, time of last use, or amount used), of whether the individual abuses or is dependent on a drug, or of whether an individual is impaired physically or mentally by the use of the drug.⁶⁵

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⁶⁵ See Scientific Issues in Drug Testing, Report J of the Council on Scientific Affairs, American Medical Association (December 1986), reprinted in 257 J. A.M.A. 3110, 3110-3114 (June 12, 1987). The statement by AMA’s Council on Scientific Affairs was cited with approval in Congressional testimony presented on behalf of the College of American Patholo-
As stated at the beginning of this article, the significance of these limitations in determining the reasonableness of government-mandated urinalysis drug testing in the workplace is derived from a close examination of the asserted governmental objective in requiring such testing. Such an analysis has no meaning when the government's interest is generalized into slogans about achieving a "Drug-Free Federal Workplace."66 "Reasonableness," in a practical as well as constitutional sense, demands that the initiation and scope of a particular search must be justified with some particularity of purpose, in order to provide a context in which the chosen method of the search can be assessed for probative value.

B. Probative Value and Drug Testing in School

Anable v. Ford,67 a student drug testing case which was decided after and in reliance on the Supreme Court's decision in New Jersey v. T.L.O., provides a clear illustration of the results of the "probative value" analysis in the context of an explicit statement of the justifying government interest.

Anable concerned a high school student, Laura Balch, and two friends who were all suspected of smoking marijuana in the school restroom in violation of a school board policy prohibiting the sale, distribution, use or possession of marijuana by students "in school buildings, on school property, or at school functions."68 The policy stated that a trace of illegal drugs in one's body" is a violation of its proscriptions, and noted that students "may be required" to submit to different tests, including urinalysis.69

Balch and her friends submitted to urinalysis several days after the restroom allegation was made. When she tested "positive" for marijuana use, Balch admitted that she had smoked marijuana at home during the interim period before the test, but continued to deny that she had smoked it in the school restroom as alleged.70
Nevertheless, to avoid the possibility of expulsion, Balch "withdrew" from school and gave up all of her credits for the semester. Based on "negative" test results, however, her friends were "exonerated." At trial, the school superintendent admitted that Balch would not have been expelled or asked to withdraw in the absence of the "positive" test results.\footnote{Id. at 28.}

The district court looked to \textit{T.L.O.} for its statement of the general interest of teachers and administrators in "maintaining discipline in the classroom and on school grounds" as part of preserving a "proper educational environment."\footnote{Id. at 38. See \textit{T.L.O.}, 469 U.S. at 338-39 (cited in note 4).} "Nonetheless," the court reasoned, "teachers and school officials are not law enforcement personnel and their task is to educate, not to ferret out crime or other nefarious activity."\footnote{Anable, 653 F. Supp. at 38 (cited in note 2).}

Since the clear purpose of the urinalysis testing had been to determine whether Balch and her friends had used marijuana at school, the court considered expert testimony from a Board Certified Toxicologist regarding the probative value of the test results and, based upon the stated limitations, concluded that, since the test "provides no information as to whether any given student has used marijuana while at school, possessed marijuana at school, or was under the influence of marijuana while at school," the school's "use of the test to confirm or deny the version of events that plaintiff Balch conveyed to school officials was irrational, arbitrary and capricious."\footnote{Id. at 40.} In explicit reliance on \textit{T.L.O.}, the court rejected the argument that the school officials may impose sanctions based upon the test result notwithstanding its incapability of establishing whether a student used or was under the influence of marijuana at school. "[U]se of the test is not reasonably related to the maintenance of order and security in the schools nor to the preservation of the educational environment and processes."\footnote{Id. at 40.}

The court made clear that, regardless of other more general social benefits that might flow from the identification of drug users, the school's need to identify them had to stand or fall on the particulars of its own more specific institutional justifications. "Certainly it would be beneficial to the vast majority of students who do not use drugs or alcohol, even at home or on the streets, to segregate users from the halls of education . . . Nonetheless," the
court reasoned, "such conduct is within the realm of parents and law enforcement officials, not teachers and educational administrators." 76

What is particularly noteworthy about the court’s conclusions in Anable is how directly they were drawn from its reading of the Terry “dual inquiry” standard in the institutional context of T.L.O.. 77 Yet, curiously, while it was not overruled and does not even appear to have been appealed, Anable has not served as a precedent to encourage other courts to utilize the “probative value” analysis in the workplace drug testing context. This is not to say, however, that this field lies completely fallow.

C. Probative Value and “Work-Related” Drug Use

In National Federation of Federal Employees v. Weinberger (hereafter NFFE), 78 the District of Columbia Circuit reviewed the dismissal of a suit to enjoin the Department of Defense from implementing a mandatory urinalysis drug testing program for certain of its civilian employees. The appellate panel, in an opinion by Judge Harry Edwards, rejected the lower court’s jurisdictional basis for throwing out the suit, 79 and sent it back to the district court with “some guidance for the task to be tackled on remand.” 80

The “guidance” provided by the appellate panel in NFFE was largely drawn directly from the explications of Terry’s “dual inquiry” standard of “reasonableness” in T.L.O. and O’Connor. 81 There were, however, two significant refinements which steered the court’s analysis toward the question of the probative value of urinalysis drug test results.

In explaining the first prong of the Terry “dual inquiry,” i.e., “whether the search was justified at its inception,” the NFFE court placed its meaning as “whether ‘reasonable grounds [exist] for suspecting that the search will turn up evidence’ of work-related drug use.” 82 Then, in the course of completing its citation to T.L.O.’s characterization of the “scope” prong of the Terry in-

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76 Id.
77 See, for example, id. at 40-43.
78 818 F.2d 935 (cited in note 1).
79 Id. at 942-43.
80 Id. at 940.
81 Id. at 942-43.
82 Id. (emphasis added).
quiry, the court, in a final footnote, emphasized the importance of clarity in distinguishing between the government's interests as employer and law enforcer where the reasonableness of warrantless drug testing was at issue. "The government," stated the court, "may not take advantage of any arguably relaxed 'employer' standard for warrantless searches to impose drug testing when its true purpose is to obtain evidence of criminal activity without complying with the more stringent standards that normally protect citizens against unreasonable intrusive evidence-gathering."83

Taken together, the two statements cited from the NFFE decision would seem to substantiate the following propositions: First, that some drug use is "work-related" and some is not, requiring a rejection of the assertion that "any and all" drug use is within the scope of the government's legitimate concerns as an employer. This, of course, raises questions about the precise nature of "work-related" drug use and the reasonableness of a workplace drug testing procedure which cannot distinguish between "work-related" and non-"work-related" drug use. Second, drug use is not made "work-related" simply because the drugs in question are illegal to use, sell, or possess. The "reasonableness" of government-mandated drug testing is not, therefore, derived from the illegality of the drug use that it is designed to detect.84

More recently, in another D.C. Circuit panel decision written by Judge Edwards, the Court in Jones v. McKenzie85 explicitly rejected a particular method of urinalysis testing as lacking probative value in relation to the asserted government interest in requiring the tests. At the same time, it upheld the reasonableness of testing without individualized suspicion when required in the context of a regular medical examination for employment purposes.

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83 Id. at 943 n. 12 (cites omitted) (emphasis added).
84 The Fifth Circuit took a different view when it upheld testing of Customs Services officers based not upon individualized reasonable suspicion but upon the individual's application for a promotion to certain specified positions. Von Raab, 816 F.2d at 178 (cited in note 1) ("[A]n employee's use of the substances he has been hired to interdict casts substantial doubt upon his ability to carry out his duties honestly and vigorously, and undermines public confidence in the integrity of the Service"). But see, for example, Caruso, 506 N.Y.S.2d 789 (cited in note 1) (distinguishing Von Raab in striking random testing of members of elite NYPD Organized Crime Control Bureau). Moreover, any asserted exception to this proposition for law enforcement personnel directly involved in the interdiction of illegal drug trafficking could not premise the reasonableness of testing all law enforcement officers based on the illegal status of the drug use to be detected. See, for example, Feliciano, 661 F. Supp. 578 (cited in note 1); Penny v. Kennedy, 648 F. Supp. 815 (E.D. Tenn 1986), aff'd No. 86-6280, slip op. (6th Cir., May 23, 1988); Capua, 643 F. Supp. 1507 (cited in note 1) (all requiring individualized reasonable suspicion of drug use in order to justify testing).
85 833 F.2d 335 (cited in note 1).
The case involved a school bus attendant whose job required her to assist handicapped children on and off the school bus. Although not suspected of having ever used drugs, Juanita Jones was required to submit to urinalysis as part of a physical examination mandated by the D.C. Public School System. The notification that she and other employees received explained that the purpose of the urinalysis test was the enforcement of a School System directive prohibiting school personnel “to possess, use or be under the influence of intoxicating liquors, narcotics, or other drugs such as LSD, marijuana and the like, while on school premises.”

After testing “positive” for THC metabolites, an indicator of marijuana use, Jones was dismissed and brought suit. The district court held that termination on the basis of a single, unconfirmed EMIT test was arbitrary and capricious, and that requiring the test “in the absence of particularized probable cause” constituted an unreasonable search. As he had in NFFE, Judge Edwards based the panel’s Fourth Amendment analysis squarely on the prescriptions of T.L.O. and O’Connor. In weighing the government’s interest, the court had “no doubt whatsoever that the School System’s mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs.”

The court also found that this safety concern was prompted not only by the nature of the jobs, but by strong evidence of “a veritable ‘drug culture’ among Transportation Branch employees.”

Having found that the testing was “justified at its inception,” the court was similarly persuaded by two significant factors that “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive.” The first factor was that they involved “only testing that is conducted as part of a routine, reasonably required, annual medical examination,” thus “ensuring that the intrusion on the employee’s privacy is minimized.” The second factor was that the government did not contest that “any compulsory drug test employed by the School

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* Id. at 337.
* Id.
* Id. at 338.
* Id. at 340.
* Id.
* Id.
* Id.
System, in order to be lawful, must show a nexus to the employer's safety concern.93

On the latter point, the court referred to the School System's concession in the lower court that the EMIT Cannabinoid Urine Assay, with which the plaintiff had been tested, is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test, and therefore "lacks a sufficient nexus" to the government's legitimate concern that employees involved in the transportation of handicapped children "not be under the influence of drugs while on duty."94

Because of the concession, the test administered to the plaintiff Jones was no longer in issue. "The only point left to be made in this case," concluded the court, "is that any drug test the School System employs in the future must be one that validly detects the activity with which the School System is legitimately concerned."95

D. Probative Value and Particularized Suspicion

In Railway Labor Executives Ass'n v. Burnley,96 a divided panel of the U.S. Court of Appeals for the Ninth Circuit struck down portions of Federal Railroad Administration (FRA) regulations requiring post-accident and post-incident blood and urine testing of railroad employees as "unreasonable" under the "dual inquiry" analysis of Terry and the balancing in T.L.O. and O'Connor.97

As instructed by those decisions, the majority viewed the "justified at its inception" prong of the Terry inquiry as a function of "whether there are reasonable grounds for suspecting that the search will turn up the evidence sought." For purposes of the FRA testing requirement, the majority concluded that this meant there must be reasonable grounds for suspecting the search will turn up evidence that "the employee has violated the industry rule and federal regulation ... prohibiting possession or use of alcohol and controlled substances on the job and prohibiting working while under the influence of alcohol or drugs."98

The majority noted that the Supreme Court had not determined in T.L.O. or O'Connor whether "reasonable grounds for suspicion" necessarily means that there must be individualized or

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93 Id.
94 Id. at 341.
95 Id.
96 839 F.2d 575 (cited in note 1).
97 Id. at 587-589. See 49 C.F.R. sec. 219.203(a) (1986).
particularized suspicion. Nevertheless, apparently influenced by the fact that "these cases both involved searches of property, not persons, and in both cases individualized suspicion did exist," the majority held that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception."100

Its reasoning in this regard was straightforward: "Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew."101 Yet, it still left two questions: Could the tests demonstrate impairment if they are undertaken when there is individualized suspicion? If not, does the predicate of individualized suspicion nevertheless make the testing reasonable?

Citing the decision of the D.C. Circuit panel in Jones v. McKenzie, the majority of the Ninth Circuit panel concluded that "urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug impairment."102 "For this reason," it added, somewhat paradoxically, "we think it imperative that drug testing be undertaken only when there is individualized suspicion because the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action."103

But would it? If one accepts the view of the majority in T.L.O. and considers a method of search to be reasonable even though it is only capable of producing "mere evidence," one might be willing to infer what tests cannot prove, i.e., that the drug use evidenced by the test is the cause of the "observable symptoms of impairment."

Would such an inference be reasonable? The district court did not think so in Anable v. Ford, and its reasoning considered both the intrusiveness of the tests and their relevance to the ability of officials to respond to suspected rule violations. In the district

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98 Id. (cites omitted).
99 Id. The dissent would follow the Third Circuit's rationale in Shoemaker, applying the "administrative search" exception to the warrant and probable cause requirements of the Fourth Amendment on the grounds that the railroad is a "closely regulated industry" whose employees have a diminished expectation of privacy where the promotion of safety is involved. See id. at 583.
100 Id.
101 Id. at 588, citing Jones v. McKenzie, 833 F.2d at 339 (cited in note 1).
102 Id.
court's view, the search of students by urinalysis was not "reasonable under the circumstances, within the meaning of T.L.O.," because the "excessively intrusive nature of the search is not justified by its 'need.'" Cit ing both Schmerber and T.L.O., it concluded that "there must be a 'high probability' that the search would disclose evidence of a violation of school rules or the criminal laws." But if such a search would not, in fact, be conducted absent recognizable symptoms of recent use by a student sufficient to justify dismissal (as was conceded by the principal and Superintendent of Schools in Anable) then such a test is unnecessary. "Put another way, if there is a 'clear indication' that such evidence will be found, the urine test is far too invasive in the school setting to justify its need, because the overt manifestations of recent use, plus a 'clear indication' that incriminating evidence will be found in the urine, will be sufficient to justify the imposition of policy sanctions without a test."

The rationale in Anable, regarding the irrelevance of drug tests when school policy sanctions can be properly imposed on the basis of "overt manifestations" of recent drug use, would clearly apply with even greater force in the workplace. If, as is likely, an employee's "overt manifestations" of recent drug use meet criteria of unsatisfactory job performance or unacceptable workplace behavior independent of any attribution to drug use, the employer would not be required to establish drug use or any other specific cause in order to have a basis for taking appropriate disciplinary or other adverse personnel actions. Indeed, even if urinalysis results had substantial probative evidentiary use, they would neither be necessary nor significantly supplemental for purposes of establishing or implementing the employer's interests in addressing unsatisfactory workplace performance or behavior by employees.

The majority in Burnley did not consider the questionable relevance of urinalysis tests where individualized suspicion was premised directly or indirectly on matters that would constitute unsatisfactory job performance or workplace behavior independent of any link to drug use. But it did evidently believe that the added factor of "observable symptoms of impairment" somehow permits the "positive" result of a urinalysis drug test to be affirmatively read as evidence of current intoxication, thus mitigating the lack of probative evidentiary value in the test result standing alone, and

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105 Id.
106 Id.
transforming what would otherwise be an "unreasonable search" into a "reasonable" one. However, this proposition is untenable because the ostensible justification for requiring the tests is based on a supposition which is exactly the reverse: That the results of the test will help to explain the "observable symptoms of impairment" by confirming that they are the consequence of drug use detected by the test.\textsuperscript{107}

Ultimately, the majority's opinion in *Burnley* remains a paradox. Its conclusion that "the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action"\textsuperscript{108} brushes aside the lack of probative evidentiary value to permit urinalysis drug testing based on individualized suspicion, while its conclusion that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment"\textsuperscript{109} would appear to disqualify all urinalysis testing for lack of probative evidentiary value. Perhaps the inconsistency in these statements reflects an ambivalence on the part of the majority regarding the weight and priority to be accorded to myriad considerations in applying traditional Fourth Amendment criteria to a very untraditional method of search.\textsuperscript{110} If so, the majority in *Burnley* reflects a pervasive uncertainty within the growing jurisprudence of workplace drug testing, and clearly illustrates the anxious expectations that are now laid at the door of the Supreme Court.

\textsuperscript{107} The FRA regulations take a similar position, conceding that the urinalysis drug test "cannot distinguish between recent use off the job and current impairment," but nevertheless providing that "a positive finding on the test will support a presumption that [the employee was] impaired at the time the sample was taken." 49 C.F.R. sec. 219.309(b)(2). *Burnley*, 839 F.2d at 597 (cited in note 1). Because the regulation permits the employee to "avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected," the dissent in *Burnley* believed that the regulation provides "adequate safeguards to counter the problem of overbreadth" in the testing. Id. Whatever may be true about the probative evidentiary capability of blood tests, this approach, like that of the majority, merely props up the validity of the tests by shifting the ultimate evidentiary responsibility somewhere else. It cannot excuse the lack of probative evidentiary value in the test results for the purpose of making their use "reasonable."

\textsuperscript{108} Id. at 589.

\textsuperscript{109} Id. at 592.

\textsuperscript{110} Another example of inconsistent statements: "If individualized suspicion is included in the preconditions for testing, we would conclude that the least intrusive means have been selected to meet the legitimate governmental objectives of the tests . . . We are less convinced of the effectiveness of the tests in detecting drug impairment, but think the program will serve reasonably well as a deterrence to on-the-job use of drugs and alcohol." Id. at 589.
III. Conclusions

From this review, the author argues, the following conclusions may be drawn:

1) Whether government-mandated urinalysis drug testing in the workplace constitutes an “unreasonable search” within the meaning of the Fourth Amendment must be determined, in significant part, on an assessment of the probative evidentiary capacity of such tests in relation to the government’s workplace objective in requiring them.

2) The importance of determining the relationship between the probative value of the evidence which can be provided by a particular type of search and the government interest which justifies the requirement of the search has been implicitly acknowledged by the Supreme Court in assessing the reasonableness of bodily-intrusive “search methods” based on analogously standardized scientific and technical procedures in *Schmerber v. California* and *Winston v. Lee*. Moreover, the relationship between the probative value of the evidence which can be provided by a particular method of search and the government interest which justifies its requirement is logically intertwined with both prongs of the “dual inquiry” standard adopted by the Court in *Terry v. Ohio* for determining the reasonableness of warrantless Fourth Amendment searches based upon “reasonable suspicion.” This standard, requiring courts to determine whether a search is both “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place,” has become the analytical framework for determining the reasonableness of a Fourth Amendment search in noncriminal contexts through the Supreme Court’s decisions in *New Jersey v. T.L.O.*, involving searches of students at school, and *O’Connor v. Ortega*, addressing the searches of employees in the workplace. The Court did not indicate whether “individualized suspicion” is an element of the standard of reasonableness adopted in these decisions.

3) The governmental interest justifying workplace searches by public employers, or by private employers under government mandate, is “the efficient and proper operation of the workplace.” In contrast to law enforcement officials, neither public employers nor private employers acting under government direction are enforcers of the criminal law, and therefore government-mandated searches of employees must be for work-related reasons which are not dependent solely upon the illegality of the conduct at issue.

4) Therefore, in order for government-mandated workplace
drug testing to be considered “justified at its inception,” there
must be reasonable grounds for suspecting that this method of
search will turn up evidence of “work-related drug use.”

5) “Work-related drug use” has not been authoritatively de-
defined, but it arguably encompasses: (a) Drug use while on-duty or,
at least, on workplace premises; (b) drug use at any time or place
that causes the individual to be “under the influence of drugs”
while on-duty or on workplace premises; and, (c) drug use which
did not occur or cause the individual to be “under the influence of
drugs” while on-duty or on workplace premises, but which involves
illegal conduct that raises questions regarding the individual’s ethi-
cal or moral fitness for particular employment.

6) Present methods of urinalysis drug testing only differenti-
ate between persons who have exposed themselves to the drugs be-
ing tested and those who have not. The results do not give any
indication of the pattern of drug use (method of administration,
frequency of use, time of last use, or amount used), of whether the
individual abuses or is dependent on a drug, or of whether an indi-
vidual is impaired physically or mentally by the use of the drug.

7) A confirmed “positive” urinalysis test lacks probative evi-
dentiary value for determining whether the detected drug use oc-
curred on or off-duty/workplace premises; similarly, it can offer no
probative evidence to determine whether an individual is or was, at
any determinate time or place, “under the influence” of the drug
detected. Therefore, the results of such testing cannot provide pro-
bative evidence for either of these concepts of “work-related drug
use,” and the testing must be considered an “unreasonable
search.”

8) A confirmed “positive” urinalysis test will provide probative
evidence for determining whether a particular individual has been
exposed to a particular illegal drug for purposes of assessing the
tested individual’s ethical or moral fitness for employment as a
function of the individual’s use of the illegal drug detected. How-
ever, this rationale for testing focuses solely on its probative value
in obtaining evidence of illegal conduct. It deals only with drug use
which cannot be proven to be “work-related” in any sense other
than its criminality. Given the clear distinction that must be
drawn between the government’s interests as employer and law en-
forcer in justifying a Fourth Amendment search, it is unreasonable
to characterize drug use as “work-related” based solely on its ille-
gality, for this would permit the government as law enforcer to
abuse the greater latitude that the Fourth Amendment gives to the
government as employer in order to obtain evidence of criminal
activity by means which would not be permissible if it were clearly acting in its capacity as law enforcer.

9) The presence of individualized suspicion does not enhance the probative value of the results of urinalysis drug testing. The predicate of "individualized suspicion" does not permit a "positive" test result to be affirmatively read as evidence of current intoxication, any more than the results of the test can validate "observable symptoms of impairment" by confirming that they are in fact the consequence of drug use detected by the test.