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Some Traditional Thinking about Non-Traditional Searches: Mandatory Drug Testing, the Fourth Amendment and the Supreme Court's Balancing Methodology

David Siegel†

Drug testing of public employees is now an issue of considerable political importance because the current administration has made it one of major public concern.1 It is also an issue of considerable constitutional importance because it implicates the rights of several million people protected by the Fourth Amendment.2 It will remain an important constitutional issue, even if it fades from


2 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.

U.S. Const. amend. IV. The text of the Amendment does not distinguish between civil and criminal searches and seizures. "Every court that has considered the matter has similarly concluded that urine tests . . . are searches for [F]ourth [A]mendment purposes." Burnley, 839 F.2d at 580.

The number of persons affected by potential federal drug testing programs is large. There are thousands of civilian federal employees, and military personnel are already subject to random drug testing. See Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (upholding random drug testing of military personnel). Many private employees in heavily regulated industries might also be subject to federal drug testing programs; railroad employees, for example, are subject to the Federal Railroad Administration's testing program. These testing programs present Fourth Amendment issues because they are administered by state actors. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).
public consciousness under future administrations, because the Supreme Court will soon consider the constitutionality of a program of mandatory drug tests for certain federal employees.\(^3\)

The Court will consider drug testing when its own Fourth Amendment jurisprudence addressing searches outside the traditional context of criminal law enforcement has become controversial both on and off the bench.\(^4\) In these cases a government official whose duties do not include criminal law enforcement conducts a search. The search may examine a person, personal effects, a home or an office.\(^5\) Although these searches are not designed to locate evidence of criminal activity, they have at least an investigative "flavor" because they often proceed in an area that is not open to the public. Their purposes, either declared by the official conducting the search or divined after the fact by the Court, vary widely.\(^6\)

Under the Court's Fourth Amendment jurisprudence, "non-traditional" searches can withstand constitutional scrutiny despite being made without probable cause or a warrant.\(^7\) In these cases

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\(^3\) \textit{Von Raab}, 816 F.2d 170 (cited in note 1) (reviewing U.S. Customs Service program of mandatory drug tests for employees seeking transfers to positions involving drug interdiction, access to classified information or the carrying of a firearm). See notes 65-75 and accompanying text.


\(^7\) The plain words of the Fourth Amendment require that a search be made only with a warrant supported by probable cause. The Supreme Court has interpreted this as not applying to brief investigative stops made by police, which may be made on the basis of reasonable suspicion. \textit{Terry v. Ohio}, 392 U.S. 1, 20 (1968). Before \textit{Terry}, a search without a warrant
the Court “balances” the interests in privacy and personal security against the government's interest in addressing the problem that the search is ostensibly designed to remedy. Under this approach, the search is constitutional if it meets an overall test of “reasonableness” or “reasonableness under the circumstances.”

The Court has routinely balanced in favor of the asserted governmental interest and upheld the search.

The Court's analysis of non-traditional searches has lacked consistency and has produced distinctions between what are often quite similar situations. These incongruities provide inadequate or probable cause was per se unreasonable, subject to an exception for exigent circumstances. In Terry, the Court divided the Fourth Amendment into the “warrant” and “reasonableness” clauses, holding that the warrant requirement applies only to full-blown searches and seizures and not to “stop-and-frisk” searches, which merely require reasonable suspicion.

None of the traditional exceptions to the warrant requirement, which arise in the context of ordinary police work, are applicable to non-traditional searches. These exceptions include: Searches incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); exigent circumstances, Carroll v. United States, 267 U.S. 132 (1925), later expanded to include the “automobile exception”, Cady v. Dombrowski, 413 U.S. 433 (1973); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); or plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971). “Except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” Camara, 387 U.S. at 528-29 (cited in note 5), cited in Almeida-Sanchez v. United States, 413 U.S. 266, 279-80 (1973).

In considering non-traditional searches, the Court “balanc[es] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” Place, 462 U.S. at 703 (cited in note 4), quoted in O'Connor, 107 S. Ct. at 1499 (cited in note 4). “[P]ermissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” Delaware v. Prouse, 440 U.S. 648, 654 (1979) (footnote omitted). “Balancing” is really a misnomer, because the Court does not actually engage in a weighing process but in an ordered consideration of different interests. For a discussion of the “balancing” process, see notes 21-28 and accompanying text.

The Court developed the test for “reasonableness” in Terry, 392 U.S. 1 (cited in note 7). In T.L.O., the Court described the Terry test as involving a two-fold inquiry: “[F]irst, one must consider ‘whether the . . . action was justified at its inception,’ . . . ; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place . . . .’” 469 U.S. at 341 (cited in note 4) (cites omitted). The reasonableness inquiry was characterized in T.L.O. as a test for “reasonableness, under all the circumstances.” Id.

A balancing approach to reasonableness has occasionally been considered by the Court in disputes involving traditional searches and seizures by police. See Tennessee v. Garner, 105 S. Ct. 1694, 1700-01 (1985) (despite a strong government interest in effective law enforcement, “the use of deadly force is [not] a sufficiently productive means of . . . [achieving the interest] to justify the killing of non-violent suspects . . . . The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable”) (cites omitted).

See administrative search cases cited in note 5.
guidance to lower courts and leave them particularly susceptible to improper decisionmaking considerations, such as the recent political furor over drug use. The use of a balancing test in drug testing cases also has caused an undervaluation of the interests of individuals; simultaneously, some courts have overemphasized the interests of the government by aggregating the interests of society in preventing drug use without aggregating the privacy interests of individuals subjected to testing. What has resulted from courts’ use of the balancing methodology is an emerging presumption that non-traditional searches, made without a warrant or probable cause, are in fact constitutional.

The element missing from current analysis of non-traditional searches is the opposite presumption, consistent with at least the text of the Fourth Amendment, that warrantless searches without probable cause are unconstitutional. It makes little sense to argue that the Fourth Amendment protects individuals from “unreasonable” searches yet in the same breath admit that, in cases involving the types of searches to which the largest proportion of the population is realistically susceptible, the individual citizen must prove an interest in not being searched that outweighs the government’s interest in conducting the search.

Several cases examining the constitutionality of mandatory drug testing have cited increased public concern about drug use, the increased federal commitment to its eradication, or both. See Von Raab, 816 F.2d at 172 (cited in note 1); Burnley, 839 F.2d at 582 (cited in note 1). See also Wayne R. LaFave, Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 J. Crim. L. & Criminology 1171, 1223 (1983) (suggesting that all nine Fourth Amendment decisions of the 1982 Supreme Court term which upheld the searches at issue were “attributable in part to a perception by the Court that more law enforcement tools are essential to combat the drug traffic”). See also Steven Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 Hastings L.J. 889 (1987).

The Court has found that, although the Fourth Amendment applies to non-traditional searches, it demands less scrutiny than when it is applied to traditional searches made for the purposes of locating evidence of criminal activity. See T.L.O., 469 U.S. at 337 (cited in note 4) (“It]o hold that the Fourth Amendment applies to [certain] searches . . . is only to begin the inquiry into the standards governing such searches . . . . [W]hat is reasonable depends on the context within which a search takes place”).

“It is by now axiomatic that the Fourth Amendment’s proscription of ‘unreasonable searches and seizures’ is to be read in conjunction with its command that ‘no Warrants shall issue, but upon probable cause.’ Under our cases, both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required.” Id. at 340, quoting Almeida-Sanchez, 413 U.S. at 277 (cited in note 7) (Powell, concurring). The restrictive clause that inevitably accompanies this “axiom” is that “probable cause’ is not an irreducible requirement of a valid search.” T.L.O., 469 U.S. at 340.

See Camara, 387 U.S. at 530 (cited in note 5) (“[i]t is surely anomalous to say that
The balancing methodology, as applied to non-traditional searches, has two shortcomings: First, it is not a neutral weighing of interests that relies on an objective, universally agreed upon metric; second, even if balancing involved an objective weighing of interests, the Fourth Amendment protects precisely the sort of unbalanced preference for an individual’s Fourth Amendment rights against legitimate, perhaps even overwhelming societal interests.

This Comment will argue that the Court should employ, in place of its current balancing approach, a methodology that considers the privacy interests of all individuals instead of merely the governmental interests behind the search. According to this methodology, a drug test is reasonable for Fourth Amendment purposes if it is based on individualized, reasonable suspicion of on-the-job drug use or impairment; it is the least intrusive means available; and it is conducted with a minimum of administrative discretion.

This Comment has four parts. Part I details the history of the Supreme Court’s treatment of non-traditional searches and its development of the balancing test; Part II examines the Fourth Amendment values implicated by drug testing; Part III identifies the inadequate protection the balancing methodology affords these values in the case of drug testing; and Part IV proposes a constitutional drug testing program that avoids these pitfalls.

I. THE HISTORY OF THE NON-TRADITIONAL SEARCH AND THE BALANCING METHODOLOGY

The Supreme Court first explained the Fourth Amendment’s purpose as providing ‘self-protection’ against overly aggressive law enforcement activities which might threaten political liberty. This early understanding of the Amendment linked its protections to those of the Fifth Amendment. Another view of the Fourth

the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior”) (footnote omitted). See also Wyman, 400 U.S. at 317 (cited in note 5).

17 See notes 65-73 and accompanying text.


19 Boyd v. United States, 116 U.S. 616 (1886). The Court incidentally touched on the Fourth Amendment in Ex Parte Jackson, 96 U.S. 727 (1877), where it held that the Fourth Amendment’s warrant requirement for seizure of personal papers extended to papers in the public mails.
Amendment, increasingly recognized in recent years, is as a right of privacy from unreasonable government intrusion. In *Camara v. Municipal Court*, however, the Court introduced an interpretation of the Fourth Amendment which limited its protections in situations where neither potentially abusive law enforcement activities nor significant invasions of privacy were involved and where the search would serve some great public interest. *Camara* involved a program of housing code inspections which proceeded on less than probable cause. In upholding the program, the Court developed a new type of "administrative warrant" search that could be issued on less than traditional probable cause "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."

The Court's analysis began with the presumption that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Although the warrantless searches in dispute did not fall into one of the prescribed exceptions to the warrant requirement, the Court did not find them per se unconstitutional. The Court first distinguished housing code inspections from traditional police searches. Because the inspections were not searches for evidence of criminal action, they did not implicate the "historic interests of 'self-protection,'" but affected "only the less intense 'right to be secure from intrusion into personal privacy.'"

Next, the Court provided three reasons why area-wide inspections conducted without probable cause to believe violations existed at individual residences were not unreasonable searches. First, it cited the long history of judicial and public acceptance of housing inspection programs. Second, the Court determined that the public interest demanded "that all dangerous conditions be prevented or abated" and that it was "doubtful that any other can-

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20 Schmerber v. California, 384 U.S. 757, 767 (1966) ("[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State").
21 387 U.S. 523 (cited in note 5).
22 Id. at 538.
23 Id. at 528-29 (cites omitted).
24 Id. at 530, citing Frank v. Maryland, 359 U.S. 360 (1959) (upholding a warrantless inspection for housing code violations made by a health inspector). As the Court pointed out in *Camara*, most such codes were enforced by criminal penalties despite their stated intent of self-protection. 387 U.S. at 531.
25 Id. at 536-37.
vassing technique would achieve acceptable results."

Finally, the Court described the searches as "a relatively limited invasion of the urban citizen's privacy" because they were "neither personal in nature nor aimed at the discovery of evidence of crime."

The Court's reasoning in Camara changed the nature of the inquiry into the reasonableness of searches. The traditional approach of evaluating the sufficiency of information on which investigating officials based searches gave way to a balancing of the respective interests of the state and the individual. With Camara, "balancing the need to search against the invasion which the search entails," became the principal analytic tool in all warrantless search cases.

Since Camara, the Court has identified several characteristics of non-traditional searches which distinguish them from traditional searches and which justify subjecting them to a less demanding constitutional standard. Non-traditional searches, according to the Court, are different because: They are conducted for purposes of administration or regulation and not for purposes of enforcing criminal laws; they are conducted in circumstances where the individual's expectation of privacy is already reduced; or they are conducted pursuant to some "special need, beyond the normal need for criminal law enforcement."

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26 Id. at 537. All constitutional restrictions on enforcement techniques represent some sacrifice of potential enforcement mechanisms, but the very idea of a constitutional limitation implies such sacrifices. See Wayne R. LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment sec. 10.1(b) at 186 (1978).

27 Camara, 387 U.S. at 537.

28 Id.

29 "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." Id. at 530; Wyman, 400 U.S. at 322 (cited in note 5) (welfare caseworker's home visit "is not one by police or uniformed authority"); Almeida-Sanchez, 413 U.S. at 278 (cited in note 7) (Powell, concurring) (roving patrols along the border "are undertaken primarily for administrative rather than prosecutorial purposes"). But see O'Connor, 107 S. Ct. at 1505 (cited in note 4); Burger, 107 S. Ct. at 2651 (cited in note 5) (no constitutional significance attaches to fact that police rather than "administrative" agents conduct search). "It should be emphasized that . . . [administrative search cases involving home visits by welfare caseworkers and regulated industry inspections] . . . are not distinguishable from police search cases because the police are not involved or because no criminal proceeding results, but because the government intrusion is less severe and enforcement problems are more formidable." Peter S. Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 Cal. L. Rev. 1011, 1035 (1973).


31 T.L.O., 105 S. Ct. at 749 (cited in note 4) (Blackmun, dissenting).
The "administrative" or "non-criminal" search distinction is faulty for several reasons. First, a search conducted for purely "administrative" or "regulatory" purposes should not be any less constitutionally suspect than an ordinary criminal search, because ensuring compliance with a building code or an occupational safety rule is no less an exercise of state authority than protecting property rights through enforcement of a law against theft. Second, there is often no principled reason certain infractions result in civil rather than criminal penalties (or vice versa). Third, many offenses are penalized by both types of sanctions, a point the Court recognized when it first employed the distinction in a non-traditional search case.32

Although some of these non-criminal searches may occur in circumstances of reduced expectations of privacy, they still have the same potential for abusive law enforcement practices that arises whenever a government official—even one whose duty is not criminal law enforcement—conducts a search. Granted, such searches might be less constitutionally suspect because they are conducted according to a predetermined scheme which ensures procedural regularity.33 The regularity that cannot be demanded of police officers dealing with unpredictable situations can be demanded of administrative officers by requiring a policy delineating the purposes and procedures of the non-criminal search. Even minimally intrusive searches to enforce civil laws can be applied in a discriminatory fashion.34

II. FOURTH AMENDMENT IMPLICATIONS OF DRUG TESTING

Regardless of what interests justify or fail to justify testing, any search implicates certain values that are protected or advanced by the Fourth Amendment. Identifying these values is a prerequisite to determining the validity of the interests that support or oppose the search. Moreover, the highly fact-specific nature of Fourth Amendment cases35 makes it especially important to ascer-

32 Camara, 387 U.S. at 527 (cited in note 5) (maximum penalty for refusing inspection was $500 fine and/or six months imprisonment). But see Burger, 107 S. Ct. at 2649 (cited in note 5) (administrative scheme employing searches made on less than probable cause upheld despite imposition of penal sanctions).

33 In Camara the Court held as reasonable housing inspections based on administrative warrants. 387 U.S. at 538.

34 The Court recognized this in Delaware v. Prouse, 440 U.S. 648 (1979) (warrantless, discretionary roving stops of cars for license checks are unreasonable).

35 One former Solicitor General has noted:
In dealing with search and seizure cases, the Court is ... confronted with a mas-
tain how a particular search compromises these identified values and advances the asserted government interest in conducting the search.

A. Restriction of Potentially Abusive Law Enforcement Techniques

A principal value advanced by the Fourth Amendment is the restriction of abusive law enforcement techniques. Under current Fourth Amendment doctrine, the reasonableness of non-traditional searches depends upon the government's purpose for conducting the search. The Amendment itself, though, is directed not at the minds of legislators, administrators or law enforcement personnel, but at their actions. It restricts the use of a law enforcement technique—the search. In this respect, the Court's non-traditional search jurisprudence ignores a principal value of the Amendment.

Concerns about the limits of appropriate law enforcement and the potential for abuse of government authority arise whenever the government acts to identify or examine individuals for wrongdoing. Although a drug test is said to enforce only an employment rule (against using illicit drugs on the job) rather than a law against possessing drugs, testing by government officials has the same potential for abuse as law enforcement techniques.

B. Privacy

To the extent that the Supreme Court has emphasized one purpose of the Fourth Amendment, it is that of protecting individual's rights of privacy. Drug testing intrudes on one's reasonable
expectation of privacy in at least three ways. First, drug testing by urinalysis intrudes on the privacy of one's bodily integrity and personal modesty. This intrusion is exacerbated when employees must provide urine samples in the presence of an observer, who may be their supervisor. Second, drug testing intrudes on reasonable expectations of privacy by disclosing information about one's medical conditions, such as epilepsy, pregnancy or drug treatments for mental illness.

A third way in which drug tests infringe on reasonable expectations of privacy is by disclosing conduct to which the tester has no legitimate claim. In general, employees presumably have a reasonable expectation that their off-the-job behavior, which can be detected by drug tests, will remain private; this reasonable expectation of privacy must be examined in the circumstances of the particular search. For example, if legitimate employment qualifications proscribe off-the-job use of certain substances, such a

40 While providing a urine sample does not physically break the integrity of the body (as does, for example, a blood test), urine is a fluid most people ordinarily expect to keep from public view. In Schmerber, 384 U.S. 757 (cited in note 20), the Court upheld the warrantless removal of blood from an unconscious arrestee in order to perform a blood-alcohol test, finding that the Fourth Amendment was satisfied because of two factors: The arrest had been made with probable cause to believe the defendant was intoxicated, and the police could reasonably believe the evidence would soon be destroyed without quick action. Neither factor applies in the case of a random drug test made without individualized suspicion.

41 See note 61 and accompanying text. The ability of a particular search to recognize more than just contraband necessarily changes its implications with respect to an individual's privacy. See James J. Tomkovicz, Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 Hastings L.J. 645, 723 (1985) (distinguishing between canine sniff searches of luggage that detect both legal and illegal drugs and searches that identify only contraband, arguing that the former threatens "our interests in secrecy and . . . the further benefits afforded by informational privacy preservation [which] might well furnish legitimate bases for recognizing privacy needs").

42 "The reasonableness of the employee's expectation of privacy and the appropriateness of a proposed search must therefore be analyzed in the context of each employment setting." Policemen's Benev. Ass'n. of N.J. v. Washington Tp., 672 F. Supp. 779, 787 (D.N.J. 1987), judgment reversed on other grounds by 850 F.2d 133 (3d Cir. 1988) (finding that police are a regulated industry and therefore Fourth Amendment warrant and probable cause requirements did not apply).
search might not intrude on reasonable expectations of privacy.\textsuperscript{43} However, when employers use drug tests merely to evaluate ethical demeanor or personal integrity,\textsuperscript{44} the intrusion on employee privacy seems unjustified.\textsuperscript{45} In other words, the less the conduct being tested is related to an employee’s behavior on the job, the lesser the claim the government legitimately can make to examine the conduct.\textsuperscript{46}

Several courts have questioned whether one can have any expectation of privacy in urine by noting that there is no reasonable expectation of privacy in blood, breath, fingernail scrapings or garbage.\textsuperscript{47} These analogies misconstrue the reasonable expectation of privacy analysis, a case-by-case approach, and attempt to transform it into a per se rule. A per se rule, however, squarely contra-

\textsuperscript{43} Professional athletes might be an example of such employees, provided that their job qualifications include, for health reasons, restrictions on conduct off the job.

\textsuperscript{44} See, in this context, Von Raab, 816 F.2d 170 (cited in note 1) (justifying random mandatory drug tests on ground that off-the-job drug use by employees necessarily impugned integrity).

\textsuperscript{45} Unlike searches, such as airport or courtroom magnetometers, that arguably identify contraband or detect ongoing illegal activities and so enforce some law, drug tests at best indicate only past activities that may have been illegal. Accordingly, cases upholding courthouse and airport searches conducted on a mass basis without either probable cause or reasonable suspicion are readily distinguishable. See McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978) (courthouse searches constitutional because entrant consents to be searched); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (courthouse searches held not unreasonable); United States v. Doran, 482 F.2d 929 (9th Cir. 1973) (airport magnetometer searches are consensual); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) (upheld airport magnetometer searches conducted without warrant or probable cause because of public safety concerns and minimal intrusiveness of the search). See also Wilkinson v. Forst, 832 F.2d 1330 (2d Cir. 1987) (upholding general magnetometer searches conducted without individualized suspicion at Ku Klux Klan rallies).

\textsuperscript{46} Testing for on-the-job impairment, unlike testing for off-the-job drug use, presents no concerns about intruding on an individual’s legitimate expectation of privacy in off-the-job conduct where the testing proceeds on reasonable suspicion of impairment. Nevertheless, such testing raises concerns about an employee’s legitimate expectation of privacy with respect to humiliation and disclosure of physiological secrets.

\textsuperscript{47} See Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (urine testing likened to involuntary blood test); Amalgamated Tran. U., 1277 v. Sunline Tran. Agcy., 663 F. Supp. 1560 (C.D. Cal. 1987) (destructibility of “evidence” found in urine samples similar to information obtained through involuntary fingernail scrapings of murder suspect). But see Von Raab, 816 F.2d at 177 (cited in note 1) (urinalysis less intrusive than blood sample because it requires no invasion of bodily integrity).

But see also Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987) (“a characterization of an intrusion as ‘major’ or ‘minor’ is not critical to deciding whether a ‘legitimate expectation of privacy’ exists. Instead, Schmerber rests upon the well-established proposition that that which is exposed to public perception is not protected by the [F]ourth [A]mendment, while that which requires action to expose legitimately concealed contents is so protected”) (cites omitted).
dicts the principle set forth in *Katz v. United States*, where the notion of reasonable expectation of privacy was recognized. In *Katz* the Court held that an individual has a reasonable expectation of privacy in a telephone conversation made from a public phone booth. Rejecting the formalistic analysis which examined whether a phone booth was a constitutionally protected area, the Court constructed a more realistic approach to Fourth Amendment protections: "*[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

According to *Katz*, the focus of the inquiry into the reasonable expectation of privacy is not the object being tested (e.g., urine, blood or breath), but the circumstances under which the testing, and the information retrieval, occur.

Privacy concerns do not point in one direction for all drug testing scenarios. Random testing of all employees for evidence of drug use, without even reasonable suspicion, invades the privacy of all employees in their non-employment related behavior. Immediate post-accident testing for impairment of employees whose actions could have contributed to the accident, by contrast, invades only the tested employees' lesser claim to privacy in their present, on-the-job conduct. A harder case is that of post-accident testing for past drug use. A situation in which an employee's involvement in an accident is itself grounds for reasonable suspicion is arguably analogous to a case of an ordinary search based on probable cause. At some point, the degree of individuation of the suspicion affects its reasonableness as a predicate for testing.

A requirement of sufficiently individuated suspicion also operates to minimize the intrusion necessary for an employer legitimately to maintain standards of employee behavior on the job. At the very least the Fourth Amendment protects employees against totally unnecessary searches. It must be understood as requiring

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**8** 389 U.S. 347 (1967).
**8** 48 Id. at 351.
**8** However, even this form of testing was invalidated by one court. See *Burnley*, 839 F.2d 575 (cited in note 1).
**8** 50 See, for example, id. (testing entire train crew after accident held unconstitutional because "particularized suspicion is essential to finding toxicological testing ... justified at its inception. Accident, 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"). See also *Feliciano v. City of Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987) (reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable).

**8** Even if the Fourth Amendment imposes no requirement that officials conducting a
that the government provide evidence indicating drug use among certain employees or a discrete group of employees. The government cannot circumvent the Fourth Amendment by asserting some interest in searching without demonstrating a connection between the individuals searched and the "drug problem" it seeks to remedy.

C. Procedural Regularity

In the interest of maintaining procedural regularity, the warrant and probable cause requirements of the Fourth Amendment ensure that a search is justified and that it is not arbitrary. Any bright line standard, in contrast to a balancing test, provides a benchmark by which official action can be judged more easily than according to a case-by-case analysis. Objective indicia of drug use or impairment, or reasonable suspicion based on specific articulable facts and reasonable inferences therefrom, further the purpose of procedural regularity.

III. THE CHALLENGE TO THE COURT'S NON-TRADITIONAL SEARCH JURISPRUDENCEPOSED BY DRUG TESTING OF PUBLIC EMPLOYEES

Recent cases examining the constitutionality of several different mandatory drug testing programs reveal the shortcomings of the Court's Fourth Amendment jurisprudence. Mandatory urinalysis testing of public employees raises legitimate concerns on the part of both the individual being tested and the government em-

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search use the least intrusive means available, under a balancing test the government must be able at least to justify the search on the basis of some interest. See discussion at note 100, concerning requirement that search use least intrusive means available.

53 At least one court adopted this approach. See Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987) (upholding drug testing of school bus drivers and attendants after school officials noted evidence of a "drug culture," including drug paraphernalia and impaired employees, among the group of employees to be tested).

54 See Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 411 (1974).

55 Terry, 392 U.S. at 21 (cited in note 7) ("in justifying the particular intrusion the police officers must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion") (footnote omitted).

56 Challenged testing procedures have ranged from post-accident testing, Division 241 Amalgamated Transit U. v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Burnley, 839 F.2d 575 (cited in note 1); or impairment testing based on the reasonable suspicion of two superiors, id., to applicant or random individualized testing of current employees, Von Raab, 816 F.2d 170 (cited in note 1); Jones, 833 F.2d 335 (cited in note 53); to mass random urinalysis tests of all employees without any suspicion, Capua, 643 F. Supp. 1507 (cited in note 47); Sunline Transit, 663 F. Supp. 1560 (cited in note 47).
ployer who conducts the test. In addition, drug tests challenge the Court's approach to non-traditional searches because, although drug tests fit within many of the Court's categories of permissible non-traditional searches, drug testing also implicates many of the Fourth Amendment values specifically protected in the context of traditional searches.

Courts have upheld employee drug testing programs by including them under non-traditional search exceptions to the probable cause requirement, such as the exceptions for searches in regulated industries than or searches in response to "special needs" beyond ordinary law enforcement. Unlike typical non-traditional searches, however, drug testing is not directed toward finding actual contraband or detecting illegal conduct. Rather, drug testing merely chronicles the past presence of illegal substances. While the purpose of these searches is not the enforcement of laws, positive test results can cause employee dismissals and damage employment records. And while the government can hardly be considered a regulated industry for purposes of Fourth Amendment analysis, some courts evaluating drug testing programs have analogized it to one.

Because public employees execute a public trust when they

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67 Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) (jockeys considered employees in a "regulated industry").

68 The Court has upheld various non-traditional searches directed at uncovering contraband or illegal conduct. See, for example, Burger, 107 S. Ct. 2636 (cited in note 5) (search designed to find stolen goods); Wyman, 400 U.S. 309 (cited in note 5) (welfare caseworker's home visit designed to identify recipients no longer entitled to receive assistance).

69 Drug tests can also detect current impairment or the use of legal substances, such as alcohol, which is otherwise prohibited by workplace rules. Impairment tests raise some of the same Fourth Amendment concerns that are raised by testing for past use (such as the restriction of potentially abusive law enforcement techniques, procedural regularity and accountability) as well as some different Fourth Amendment issues (principally concerning privacy). See generally Section II.

70 Virtually no employee drug tests are administered by traditional law enforcement personnel, and the test results are almost never given to the police.

71 The test also involves humiliation, and can yield information concerning "physiological secrets" of the employee that is unrelated to illegal drug use and to which the employer has no legitimate claim. Much of this information can be used to discriminate against employees. See Note, Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs, 39 Stan. L. Rev. 1453, 1458 (1987) (drug tests can reveal too much information, tempting employers to eliminate employees with medical problems); David A. Miller, Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment, 48 U. Pitt. L. Rev. 201, 207 ("a urine specimen can be analyzed to reveal whether an employee is pregnant, is using illicit medication, or is being treated for a heart condition, manic-depression, epilepsy, diabetes or schizophrenia") (footnote omitted).

72 Von Raab, 816 F.2d at 179-80 (cited in note 1).
perform their jobs, they arguably have a lower expectation of privacy than employees in the private sector.\textsuperscript{63} Moreover, the government’s “special needs,” beyond ordinary law enforcement, may be held to justify drug testing programs.\textsuperscript{64} But drug testing is explicitly not designed for either ordinary or extraordinary law enforcement purposes; testing is designed to improve safety, efficiency or integrity in the workplace. In practice, however, drug testing programs are attempts to enforce criminal laws against drug possession by making tested individuals prove their innocence. This is a traditional search for evidence of criminal activity and plainly violates the Fourth Amendment.

The Fourth Amendment issues raised by employee drug testing are illustrated in a drug testing decision now before the Supreme Court, \textit{National Treasury Employees Union v. Von Raab}.\textsuperscript{65} In \textit{Von Raab}, the U.S. Customs Service sought to test employees applying for certain “sensitive” positions.\textsuperscript{66} The Court of Appeals for the Fifth Circuit first found drug testing to be a search under the Fourth Amendment,\textsuperscript{67} then examined the reasonableness of the search under an extremely broad balancing formula: “[E]ach different kind of search must be assessed by balancing the social and government need for it against the risk that the search will itself undermine the social order by unduly invading personal rights of privacy.”\textsuperscript{68} In a sweeping characterization of the government’s need to search, the Fifth Circuit accepted as justification for the testing program the “major national concern” about preventing illegal drug use towards which Congress had “appropriated unprecedented sums.”\textsuperscript{69}

\textsuperscript{63} See, for example, id. at 178.

\textsuperscript{64} These “special needs” also result in lowered expectations of privacy for schoolchildren, \textit{T.L.O.}, 469 U.S. 325 (cited in note 4); probationers, \textit{Griffin}, 107 S. Ct. 3164 (cited in note 5); and public employees, \textit{O’Connor}, 107 S. Ct. 1492 (cited in note 4).

\textsuperscript{65} 816 F.2d 170 (cited in note 1).

\textsuperscript{66} “Sensitive” positions include those involving interdiction of illicit drugs, carrying a firearm or access to classified information; covered employees range from “top administrative posts” to “even those clerical workers assigned to the tasks described.” \textit{Von Raab}, 816 F.2d at 173 (cited in note 1). Although the drug testing program provided for urinalysis of both applicants and current employees seeking a transfer to a sensitive position, the suit concerned only employees seeking a transfer.

\textsuperscript{67} The court found drug tests to be a search because of the reasonable expectation of privacy people ordinarily have in urination, their reasonable expectation of privacy in the physiological information contained in their urine and the fact that urine is not a personal characteristic one expects to display to the government (unlike hair or handwriting). Id. at 175-76.

\textsuperscript{68} Id. at 176 (footnote omitted) (emphasis added).

\textsuperscript{69} Id. at 172.
These considerations, however, are unrelated to the reasonableness of any particular drug testing program and indicate the degree to which balancing has converted a fact-dependent Fourth Amendment inquiry into an assessment of broad policy issues. Without explaining why random searches without any suspicion of a drug problem—let alone individualized suspicion of drug use by particular employees—were necessary and proper, the court merely reviewed the justifications for testing against the backdrop of the rubrics under which the Supreme Court has considered non-traditional searches.

First, the court found that the search minimized administrative discretion and, in turn the potential for abuse or employee harassment, because drug test results are either positive or negative. The danger of excessive administrative discretion, however, exists only when the class of persons who might be searched or the type of search to which they might be subjected is at all discretionary. When all employees must submit to an identical search there is, unquestionably, no administrative discretion as to the subjects of the test. But reducing searchers to automatons begs the initial constitutional question of whether the search is justified.

Second, the court in Von Raab found the government’s interest in conducting the search justified in part by the enormity of the nation’s drug problem. Even if true as a policy matter, this factor was both irrelevant to the Fourth Amendment analysis and inaccurate given the facts of the case. The Customs Service suspected no significant drug use among its employees. The court also reasoned that because drug use by Customs Service employees impugns the employee’s honesty, undermines the public’s trust in the agency and makes the employee particularly susceptible to blackmail or bribery, the drug testing program was fully justified.

The Supreme Court’s non-traditional search jurisprudence supports searches for objects or conduct on less than probable cause, but it does not support searches designed simply to dissuade

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70 Id. at 177.
71 The Commissioner had described the Customs Service as predominantly drug free, a claim borne out by several months of testing. Id. at 173.
72 Although drug use is currently perceived as a problem of national proportions, it is difficult to see why the possibility of drug use should undermine public confidence in law enforcement any more than any number of possible illegalities by police officers would undermine public confidence. Yet it has not been suggested that police officers’ homes could be systematically searched for signs of other possible illegalities in order to sustain public confidence. Feliciano, 661 F. Supp at 588 (cited in note 47).
73 Von Raab, 816 F.2d at 178 (cited in note 1).
people from engaging in certain conduct or from possessing certain objects. In considering each of these rationales, the court in Von Raab repeatedly examined the policy justification for the challenged testing, rather than the much narrower, more fact-specific situation that was actually before it: Drug testing in a particular employment setting without any individualized suspicion.

Finally, the court fit the testing program into several of the rubrics established by the Supreme Court in cases of non-traditional searches. The Fifth Circuit noted that the government had greater latitude to search as an employer than as law enforcer. It likened the search to a purely "administrative" one, "neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated," that resembled a police inventory search of a vehicle, or a welfare caseworker's visit to a client's home. It analogized the Customs Service to a regulated industry, in which employees' expectations of privacy are reduced by the government's need to search for purposes of effective regulation. The court found no less intrusive measures available to the Customs Service, reasoning that neither performance evaluations nor background checks would be adequate for protecting the integrity of "sensitive" positions.

The opinion in Von Raab epitomizes three shortcomings of the Court's balancing methodology. First, it provides insufficient procedural regularity. In theory, a balancing analysis is capable of maintaining procedural regularity provided that the respective interests of the government and the tested employees are clearly delineated prior to being weighed. As practiced, however, Fourth Amendment balancing is simply case-by-case determination.

74 Id. at 178-79.
75 Id. at 179.
76 Consider for example the border search cases, in which the Court sought to delineate what suspicion a border official (or other law enforcement official near the border) must demonstrate in order to stop or search a vehicle. In Almeida-Sanchez, 413 U.S. 266 (cited in note 7), the Court rejected the administrative search and regulated industries analogies and held that a policy allowing roving stops and searches within 100 miles of the border without any articulable suspicion was unreasonable because it involved unfettered discretion. Probable cause or consent was required for the policy to withstand constitutional scrutiny. The following year, in United States v. Ortiz, 422 U.S. 891 (1975), the Court affirmed Almeida-Sanchez and required probable cause for stops and searches conducted at fixed checkpoints approximately 60 miles from the border, despite the reduced administrative discretion imposed by operating at a checkpoint, because of the excessive discretion retained by individual officers to select vehicles. The same day, however, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Court upheld roving stops for questioning because it found roving stops for questioning less intrusive than the roving searches at issue in Almeida-Sanchez. The articulable suspicion affording a check on the officer's discretion that had been missing
Absent an identifiable event that employees know will raise a reasonable suspicion and trigger a government intrusion against them, it is very difficult to minimize the potential for unjustified searches. Such searches contradict the very text of the Fourth Amendment. The Amendment, through the warrant requirement, sacrifices flexibility on the part of law enforcement personnel for procedural regularity. The Court should not circumvent this fundamental, textual choice by evaluating the constitutionality of searches in a way that stresses doctrinal flexibility and, thus, provides additional after the fact flexibility for law enforcement personnel. Further, the increased flexibility for law enforcement personnel is least necessary when the subjects, purposes and procedures of the search can be determined prior to its occurrence. The exigencies of ordinary, “reactive” police work, which fostered the development of a more flexible warrant requirement, do not apply in the non-traditional search cases.

in Ortiz was that the petitioners appeared to be of Mexican ancestry.

Administrative discretion is dangerous because it may be used in a harassing or discriminatory fashion. As the Court points out, Mexican ancestry, “standing alone . . . does not justify stopping all Mexican-Americans to ask if they are aliens.” Brignoni-Ponce, 422 U.S. at 887. Nevertheless, the Court later held in Martinez-Fuerte, 428 U.S. 543 (cited in note 4) that random stops without individualized suspicion at fixed checkpoints 60-90 miles from the border were reasonable, because they were no more intrusive than the stops upheld in Brignoni-Ponce. Confining discretion just by the use of a fixed checkpoint, was precisely the same reduction in discretion that the Court had found inadequate in the searches described in Ortiz.

These cases may be organized logically. A “search” is more intrusive than a “stop,” so it requires more suspicion. Similarly, roving stops involve greater administrative discretion than stops at fixed checkpoints, so they require more suspicion. Nevertheless, these cases provide little predictability. In United States v. Montoya de Hernandez, 473 U.S. 531 (1985) the seizure and attempted search of an international traveler’s alimentary canal (at a border in an international airport), a search clearly as intrusive as the search of a car, was upheld on at most “reasonable suspicion.”


77 Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance void for vagueness because the ordinance did not provide adequate notice that contemplated conduct is illegal, and it encouraged arbitrary and erratic enforcement).

78 Virtually all non-traditional searches have been held not to require a warrant, or at most to require only an “administrative warrant” as in Camara. Removing the warrant requirement for administrative searches does not remove the interests the requirement advances, especially when many non-traditional searches are conducted by law enforcement personnel for enforcement of criminal law. See, for example, Burger, 107 S. Ct. 2636 (cited in note 20) (warrantless administrative search of junkyard for stolen auto parts held reasonable, though conducted by police and fruits of the search resulted in penal sanctions, because goal of the administrative scheme reflected a “substantial interest,” the scheme “reasonably advanced” this interest and the scheme provided an adequate warrant substitute).

79 The identification of exigencies began with the application of the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). Examples of these extensions of the permissible reach of searches and seizures undertaken by local law enforcement officials include Schmerber, 384 U.S. 757 (cited in note 20) (results of warrantless blood test admissible
A third problem with the Court's balancing approach is that it fails to examine whether a discretionary standard is necessary in each case.80 The Court has declined to ensure that searches made under a discretionary standard are actually the least intrusive ones available.81 If balancing is a constitutional exception, the government should be required to demonstrate as a threshold matter why the exception is required in a particular case.

Finally, the Court has generally assumed that the problem which the government seeks to remedy by a search actually exists, without requiring any sort of concrete factual showing.82 When the objects of the search may be objects of moral opprobrium, the requirement of concrete fact finding serves the important function of distinguishing the presence of genuine societal ills from mere hysteria.

IV. A PROPOSED CONSTITUTIONAL DRUG TESTING PROGRAM

A. The Need for Fully "Generalized" Balancing in Searches That Proceed on Less than Probable Cause

The balancing methodology is inadequate, at least for an ini-

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80 Any new form of search, particularly one designed to replace other already constitutional forms of searches, should be an improvement either in effectiveness at identifying the targeted objects or in minimizing intrusiveness. This is an important component of other Supreme Court balancing analyses, such as First Amendment issues. See Central Hudson Gas & Elec. v. Public Serv. Comm'n., 447 U.S. 557, 566 (1980) (final prong of four part test addressing restrictions on commercial speech is "whether . . . [the regulation] is not more extensive that is necessary").

81 See cases cited in note 4.

82 Sometimes the Court is uninterested in the government's ability to demonstrate that a problem exists which a search might remedy. See O'Connor, 107 S. Ct. at 1496 (cited in note 4) ("[t]he specific reason for the entry into [petitioner's] office [to search] is unclear from the record").
tial evaluation of a Fourth Amendment claim, because it never
gives content to an individual’s Fourth Amendment rights. When
the Court “balances” it often “weighs” conceptions of searches in
general, ignoring the facts of the particular search in question. Under this form of balancing, the Court generalizes and speculates
far more widely to identify interests in conducting the search than
it does to identify the interests in not conducting the search. This
readiness to generalize interests in favor of testing might be under-
standable considering that whenever the government seeks to
search it is presumably acting for the benefit of all non-tested indi-
viduals. As this “balancing” is practiced, however, no individual
can defeat this substantial interest in conducting a search.

The high threshold for individual interest makes sense when
the government demonstrates the presence, or the likely presence,
of evidence of illegal conduct. Conversely, when the government
cannot demonstrate the likely presence of evidence of illegal con-
duct, all individuals become possible targets of the search, and, ac-
cordingly, have a privacy interest in preventing it. Where the gov-
ernment cannot show probable cause, its interest in conducting the
search should be weighed not against the interest of the individual
who will be searched but against the interests of all similarly situ-
ated individuals who might be searched. For example, if the gov-
ernment conducts a random search without any articulable suspi-

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83 See Peter S. Greenberg, 61 Cal. L. Rev. at 1047 (cited in note 29) (“it is necessary to
recognize the danger that the balancing theory can be used to balance away important

84 For example, in T.L.O., the Court decided the appropriate standard for searches of
students by a teacher or school official, although the search at issue had not been conducted
pursuant to any sort of policy and had been designed to locate an object other than what it
actually revealed, 469 U.S. at 328 (cited in note 4); in O’Connor the Court determined the
“appropriate Fourth Amendment standard of reasonableness for a public employer’s work
related search of its employee’s offices, desks, or file cabinets,” 107 S. Ct. at 1500 (cited in
note 4).

85 See T.L.O., 469 U.S. at 339 (“against the child’s interest in privacy must be set the
substantial interest of teachers and administrators in maintaining discipline in the class-
room”); O’Connor, 107 S. Ct. at 1501-02 (cited in note 4) (employer’s interest in “efficient
and proper operation of the workplace,” weighed against employee’s privacy interests in
their place of work, privacy interests which “are far less than those found at home or in
some other contexts”); Griffin, 107 S. Ct. 3164 (cited in note 5); Camara, 387 U.S. 523 (cited
in note 5).

86 The Court treats presumptions such as these as “constitutional” facts, or facts about
which there is no evidence on the record, but of which there must be judicial recognition in
order for the constitutional inquiry to be meaningful. See Rachel N. Pine, Speculation and
655, 661-65 (1988); Jeffrey M. Shaman, Constitutional Fact: The Perception of Reality by
cian, all individuals would oppose the search because they will have no notice prior to being searched. By comparison, it is in the interests of more individuals that a search be conducted as the government makes an increasingly clear and specific demonstration of the likelihood of obtaining relevant and necessary information through a search. The balancing analysis, therefore, should "generalize" the Fourth Amendment interests of individuals who oppose a search in a manner equivalent to the Court's generalization of the government's interest in conducting the search.

B. The Need for Concrete Fact-finding to Justify a Search

When the Court generalizes the interests that are implicated by a particular class of searches, it considers the balance of interests as a policy matter. It asks, "What are the government's interests in conducting a search in this situation, and do they justify allowing it on less than probable cause?" What is to be demonstrated by the government through the use of drug testing is as relevant to the Fourth Amendment inquiry as the weight of the interests that enter into the balancing calculus.

The need for a court to identify facts indicating a drug problem is especially great given the highly fluid nature of the generalizations supporting the government's interest in conducting the search. The Amendment's protections are fluid not because a

87 This is the classic "legislative fact" inquiry described by Professor Davis. See Kenneth C. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402 (1942), and Kenneth C. Davis, 2 Administrative Law Treatise sec. 12:3 (2d ed. 1979). Even modern commentators who reject the distinction between simply "legislative" and "adjudicative" fact-finding recognize similar divisions between data or derivations that are of general application and those that are applicable only to the circumstances of the inquiry at hand. See, for example, John Monahan and Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. Pa. L. Rev. 477, 490-91 (1986) (proposal that social science research, with its attributes of generality, be considered as "law" rather than "fact" provided it meets criteria similar to those applied in evaluating the usefulness of judicial decisions as informative precedent).

Monahan and Walker recognize that the "social authority" concept is "not applicable where social science is used only as evidence in a specific case. In that instance, the fact classification, is . . . entirely appropriate." Id. at 488 n. 40. They distinguish precedential or forward looking use of social science data (to determine, for example, whether segregation stigmatizes minority students with inferiority, or whether random mandatory drug testing reduces drug use among employees) from its use to adjudicate an issue in a settled legal context (such as whether consumers were confused by a particular contested trademark, or whether there is on-the-job drug use among a particular group of employees).

88 Some believe the protections of the Fourth Amendment are also fluid. See, Comment, Random Drug Testing of Government Employees: A Constitutional Procedure, 54 U. Chi. L. Rev. 1335, 1343 (1987) (arguing "fluctuant" nature of Fourth Amendment suggests that all drug testing of public employees cannot be a per se constitutional violation). To the
search that is unreasonable today may be reasonable tomorrow, but because a search that is unreasonable under one set of facts may be reasonable under a different set of facts. A court therefore must determine the circumstances of testing anew in each case.**

C. Elements of a Constitutionally “Reasonable” Drug Testing Program

A constitutionally reasonable drug testing program should include several components, the adequacy of which should be examined through a methodology of fully generalized balancing supported by concrete fact-finding. The components of such a permissible testing program are: (1) An adequate degree of suspicion of on-the-job drug use or impairment; (2) sufficiently individuated suspicion; (3) the lack of feasible, less intrusive alternatives; (4) minimal discretion in administration of the test; and (5) a legitimate justification for testing.**

extent that Fourth Amendment protections are not absolute, this is true, as it is true of virtually every other individual right under the constitution. Nevertheless, the inherent “fluidity” of the Amendment, embodied in the reasonableness requirement, must be measured against the requirement that the government demonstrate something about the likelihood that it will find a legitimate object of a search.

** Courts that have made such findings include: Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987) (urinalysis of prison guards unreasonable where there was no direct evidence of on the job drug use and less intrusive, more effective procedures to remedy any drug problem were available); Guiney v. Roache, 833 F.2d 1079, 1085 (1st Cir. 1987) (vacating district court's abstention in drug testing case and instructing it to conduct traditional fact-finding concerning degree of local drug problem among public employees); American Fed'n of Gov't Employees (AFGE) v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (Army enjoined from urinalysis testing of civilian police officers absent reasonable suspicion of drug use); McDonell v. Hunter, 612 F. Supp. 1122 (D. Iowa 1985) (despite government's goal of identifying possible drug smugglers, drug test of Corrections Department employees absent reasonable suspicion is impermissible under the Fourth Amendment); Rushton v. Nebraska Public Power District, 653 F. Supp. 1510, 1524 (D. Neb. 1987) ("pervasive and comprehensive regulatory scheme" to which a nuclear power plant was subject gave plant employees a diminished expectation of privacy and hence made random drug screening program reasonable); Feliciano, 661 F. Supp. at 587-88 (cited in note 47) ("the City must demonstrate a nexus between its need for drug testing and work-related misconduct which adversely affects its operations as an employer of police officers. This showing can be made by two methods of fact-finding: non-adjudicative fact-finding of a compelling need on a national level for urinalysis of police officers, or adjudicative fact-finding, by evidence offered in this case, of a compelling need created by circumstances distinctive to this case").

** Many of these components have been suggested as part of a well-planned drug testing program. See Mark A. Rothstein, Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law, 63 Chi.-Kent L. Rev. 683, 734-43 (1987) (suggesting all these as elements of a “legal, ethical, and effective drug testing program,” with an additional requirement that “test procedures or resulting personnel actions do not violate applicable legal rights of applicants and employees”).
1. **Degree of Suspicion.** The hallmark of a non-traditional search is that it proceeds on less than probable cause and that this reduced degree of suspicion is necessary to deter the prohibited activity effectively or to identify the contraband material.\(^9\) While drug testing conducted without probable cause and designed solely to enforce laws prohibiting drug use or possession is clearly unconstitutional,\(^9\) drug testing of public employees is presumably, and often explicitly, not given for this purpose.\(^9\) Because testing for on-the-job impairment need only be based on reasonable suspicion,\(^9\) the degree of suspicion is most important in cases involving

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\(^9\) In *Camara*, the Court upheld housing inspections without probable cause because the public interest demanded both “a relatively limited invasion of the urban citizen’s privacy” that was neither “personal in nature nor aimed at the discovery of evidence of crime” and “that all dangerous conditions be prevented or abated.” 387 U.S. at 537 (cited in note 5).

All constitutional restrictions on enforcement techniques represent a sacrifice of potential enforcement activities, but the very idea of a constitutional limitation demands such sacrifices. See Wayne R. LaFave, 3 Search and Seizure sec. 10.1(b) at 186 (cited in note 26) (emphasis added):

A more fruitful line of analysis, compared to this overstated need for 100 per cent enforcement [in *Camara*], is to consider whether the traditional probable cause test will permit an acceptable level of enforcement. Although the Court’s opinion does not reflect a careful consideration of this question, thinking along these lines may lie behind the expressed concern for acceptable results and the observation that dangerous conditions may not be observable from outside the building. See also, for example, *Martinez-Fuerte*, 428 U.S. at 557 (cited in note 4) (requirement of reasonable suspicion for stops at border checkpoints would “largely eliminate any deterrent to the conduct of well-disguised smuggling operations”).

\(^9\) See *Schmerber*, 384 U.S. 757 (cited in note 20) (upholding warrantless withdrawal of blood from individual arrested for driving while intoxicated only where arrest was made with probable cause). *Schmerber* relied on probable cause based on individualized suspicion. See *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985) (explaining *Schmerber* required police have a particularized suspicion that the evidence sought would be found within an individual’s body) (cited in *Railway Labor Executives’ Ass’n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), cert. granted 108 S. Ct. 2033). A search made on probable cause without individualized suspicion (such as probable cause to suspect drug use among a given group of employees) would a fortiori be unconstitutional. See *Camara*, 387 U.S. at 536-37 (cited in note 5) (housing inspections made on such “administrative probable cause” reasonable because they were neither “personal in nature nor aimed at the uncovering of evidence of a crime”).

\(^9\) The regulations at issue in drug testing cases often prohibited the use of test results in non-employment disciplinary or criminal proceedings against the employee. See, for example, *Mulholland v. Department of Army*, 660 F. Supp. 1565, 1569 (E.D. Va. 1987) (“[t]he only possible adverse results following a confirmed positive urinalysis test . . . are reassignment to an available, non-critical position for which the subject is qualified”).

\(^9\) Some have argued that the difficulty of observing even on-the-job impairment requires impairment testing with no reasonable suspicion. See Comment, 54 U. Chi. L. Rev. 1335 (cited in note 88). Most impairment testing programs that have been challenged, however, do not involve testing conducted upon less than reasonable suspicion. See, for example, *Burnley*, 839 F.2d 575 (cited in note 1).
testing for past drug use.\textsuperscript{98} The most stringent pre-test evidentiary requirement is sometimes described as “individualized suspicion based on probable cause,” but there is no necessary relationship between the degree of suspicion and the degree of individuation.\textsuperscript{96} Recent non-traditional search cases have involved searches made upon individualized suspicion though with less than probable cause.\textsuperscript{97} It does not follow, however, that allowing a test on less than probable cause also requires allowing it on less than individualized suspicion. In order to be reasonable, employee drug testing programs should require at least reasonable suspicion based upon specific, articulable facts, the existence of which an employer which conducts testing must demonstrate to the satisfaction of a court.

2. Individuated Suspicion. Given the variety of workplace environments, there can be no simple rule concerning the degree of individuation of suspicion that is constitutionally “reasonable.” Individuation depends on two factors: The number of employees sus-

\textsuperscript{98} Existing drug tests only identify the presence of drug metabolites. These substances are produced by past drug use; they are not correlated with current impairment. There is now no urinalysis test that can identify impairment when tested. See Lance Liebman, Too Much Information: Predictions of Employee Disease and the Fringe Benefit System, 1988 U. Chi. Legal F. 57.

\textsuperscript{96} See, for example, McDonell, 809 F.2d at 1308 (urinalysis of prison personnel upheld testing through non-individuated uniform or “systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons,” while requiring that any additional testing of these and any testing of other employees proceed only on “reasonable suspicion . . . [that] controlled substance[s have been used] within the twenty-four hour period prior to the required test.”)

But see Feliciano, 661 F. Supp. 578 (cited in note 47) (invalidating urinalysis tests of entire class of police cadets that was arguably made on reasonable suspicion because there was no individualized suspicion); Burnley, 839 F.2d at 587 (cited in note 1) (invalidating post-accident testing for entire crew of a train because “[a]ccidents, 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); Jones, 833 F.2d at 393 (cited in note 53) (upholding on less than probable cause urinalysis tests, in the context of regular medical exams, and specifically not considering “what level of suspicion might be required for random or individualized testing”); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986), aff’d 846 F.2d 1539 (6th Cir. 1988) (fire fighters had diminished expectation of privacy, but though probable cause not required, balancing of interests requires “some quantum of individualized suspicion before the tests can be carried out”); Penny v. Kennedy, 648 F. Supp. 815 (E.D. Tenn. 1986), aff’d, 846 F.2d 1563 (6th Cir. 1988) (no reasonable suspicion was presented to justify urine tests for every police officer in Chattanooga, Tennessee).

\textsuperscript{97} See for example, T.L.O., 469 U.S. 325 (cited in note 4); O’Connor, 107 S. Ct. 1492 (cited in note 4); Griffin, 107 S. Ct. 3164 (cited in note 5); and Burger, 107 S. Ct. 2636 (cited in note 5). The Court has sometimes expressly avoided reaching the issue of whether individualized suspicion is necessary. See T.L.O., 469 U.S. at 342 n. 8.
pected of using drugs at work or being impaired, relative to the total number of employees, and the relative danger to others posed by an impaired employee. A requirement of individuation means that an employer must at least attempt to isolate the employee or group of employees about whom it has a reasonable suspicion of on-the-job drug use or impairment. Although "reasonable suspicion" is an elastic concept, at a minimum it requires one instance of positively individualized suspicion, unless the individual or individuals impaired on the job present overwhelming danger to others. Even in these circumstances, reasonable suspicion that is not individualized should still be supported by concrete evidence of on-the-job drug use. Increased individuation of suspicion, especially to the extent that it can be achieved through heightened supervision or more thorough performance evaluations, is preferable for purposes of protecting employees' rights.

3. Availability of less intrusive alternatives. The Supreme Court has stated that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." In this context, the Court has held that "reactive" police activities need not always meet a least intrusive means test. The demands of "reactive" police work, however, do not apply to employee drug testing programs. Police admittedly have no particular facility for evaluating, without a search, the contents of an arrestee's personal effects or a car's passengers or cargo. Employers, by contrast, legitimately can be expected to monitor and review an employee's performance

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99 At least one court has recognized this. Sunline Tran. Agcy., 663 F. Supp. at 1568 n. 4 (cited in note 47) ("The Court does not determine whether individualized suspicion is constitutionally required under the overall reasonableness standard adopted for chemical testing of public transportation employees. However, this court can conceive of certain mass-transit settings where mandatory drug and alcohol testing would be reasonable under a more generalized quantum of proof. Individualized suspicion, though a usual prerequisite, is not an 'irreducible requirement' of the Fourth Amendment. Mandatory drug and alcohol testing based on a generalized reasonable suspicion standard would only be appropriate where the search implicated minimal privacy interests and where 'other safeguards' were available to ensure that the employee's expectation of privacy was 'not subject to the discretion of the officer in the field' ") (cites omitted).

100 Application of an individuation requirement would make "mass" searches, without concrete evidence implicating a significant number (or, sometimes, any) employees in on-the-job drug use or impairment, per se unreasonable.

101 Lafayette, 462 U.S. at 647 (cited in note 81).

102 Id. at 647-48 (unreasonable to expect police officers to make "fine and subtle distinctions" concerning items that may be legally searched).

103 Id. (citing stationhouse searches, random border stops and searches of a car incident to an arrest).
on the job effectively without resort to a drug test. The Court should require, therefore, that the government as employer use such non-intrusive and proven methods before embarking upon a drug testing program.

4. Minimal discretion in administration. Early drug testing cases often involved standardless programs with procedures determined on an ad-hoc basis by the test administrator. More recent testing programs generally contain detailed procedures for selecting employees for testing and conducting the tests. Such procedural restrictions on administrative discretion should be required for every drug testing program.

5. Justification for drug testing. Recent drug testing cases and related commentary have suggested several justifications for testing, which include maintaining the integrity and credibility of law enforcement personnel, improving the productivity of public employees, and reducing the likelihood that public employees will undertake illegal activities associated with drug use. These rationales, however, fail a balancing inquiry that takes into account fully generalized interests. Although all three are legitimate em-

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103 See for example, Capua, 643 F. Supp. at 1511-12 (cited in note 47) (testing of fire fighters in which no "written directive, order, departmental policy or regulation [was] promulgated establishing the basis for such testing and prescribing appropriate standards and procedures for collecting, testing, and utilizing the information derived").

104 See Burnley, 839 F.2d 575 (cited in note 1).

105 Confined discretion is already required in administrative searches that are conducted in less sensitive contexts. See Wyman, 400 U.S. 309 (cited in note 5) (welfare caseworker's home visits).


107 Feliciano, 661 F. Supp. at 588 (cited in note 47).

108 Von Raab, 816 F.2d at 178; Feliciano, 661 F. Supp. at 588.

109 Integrity and credibility are important components of effective law enforcement, yet there is no reason to distinguish drug use from any other illicit activity in which trusted public servants might engage. Some commentators have argued that drug testing is actually not very intrusive, and this low level of intrusiveness provides a basis for distinguishing justifiable searches which ensure the integrity of public employees. See Comment, 54 U. Chi. L. Rev. at 1362 (cited in note 88). If this is correct, it challenges the assertion that public credibility of law enforcement personnel is in fact questioned when no drug testing program exists. If the tests measure drug use otherwise not observable on the job, there is no reason to suspect that the public questions the integrity of law enforcement personnel concerning whom it has no objective, observable basis to be suspicious. To the extent that the public may have an unsubstantiated suspicion that law enforcement personnel use illicit drugs, objective test results will not upend this suspicion.

Increased efficiency or productivity present similar shortcomings as rationales for testing. Tests for a variety of activities, such as smoking, proper diet, adequate rest or exercise might be given because any of these activities could reduce productivity. The fact that none of these activities is illegal is constitutionally irrelevant.

Increased propensity to engage in other illegal activities because of drug use is also a
ployer interests, absent a concrete basis for believing a drug problem actually exists among particular employees, it seems extraordinarily unlikely that the interest in preserving employees' integrity and productivity, or in eliminating propensity to commit other illegal acts, outweighs the privacy interests of all similarly situated employees who might be tested.

The only legitimate justification underlying testing for on-the-job impairment or drug use is workplace safety. In addition, concrete evidence of drug use that generates a reasonable suspicion, even if it cannot be highly individuated, might justify random testing if the nature of the job precludes increased supervision as an adequate check on drug use and made very low degrees of impairment highly significant.

V. CONCLUSION

In considering employee drug testing programs, the Supreme Court faces an opportunity to set right a confused area of Fourth Amendment jurisprudence. The Court should state simply that the reach of Camara was never meant to extend to non-traditional searches of the person. If the Court extends Camara's reach, it will undermine Camara's rationale that a non-traditional search is "reasonable" because it involves a limited invasion of privacy. The Court can preserve Camara by requiring that, in order for a testing program to be "reasonable" under the Fourth Amendment, the government demonstrate, through concrete facts and at least one instance of individuation, a reasonable suspicion of on-the-job impairment or drug use among a distinct group of employees. The Court should also ensure that the program as conducted, rather than as conceived, employed any less intrusive means and included a minimum of discretion in administration. Not only were no such findings made in Von Raab, but the absence of a drug problem was recognized. The Court should find drug testing programs implemented as in Von Raab "unreasonable" under the Fourth Amendment.

flawed justification for testing. Susceptibility to blackmail or the need for large quantities of money accompanies many illegal activities other than illicit drug use. Again, there is no reason employees might not be better in some sense if they did not use illicit drugs, but there is no principled reason to distinguish this improvement from an almost infinite number of others.

110 See, for example, Jones, 833 F.2d 335 (cited in note 53).
111 387 U.S. 523 (cited in note 5).