

# PRISONER DRUG TESTING UNDER THE FOURTH AMENDMENT

## INTRODUCTION

To combat narcotics use within penal institutions, several states have adopted programs to subject prisoners' urine samples to testing techniques which provide qualitative readings of the existence of drugs within the test subject's system.<sup>1</sup> Prison authorities require inmates in these states to provide a urine sample in the presence of prison authorities for testing if the prison has chosen the inmate as part of a routine or random "urine surveillance" program or the inmate has aroused suspicion of drug intoxication.<sup>2</sup> Although many methods in analytical drug screening technology are currently available,<sup>3</sup> the urine sample generally is subjected to on-site testing devices which rely on immunochemistry<sup>4</sup> to detect the presence of various drugs in the body fluids.<sup>5</sup>

Immunochemistry devices are used widely in prison drug screening because the technique is marketed as a urinalysis test to be performed on-site by personnel not trained primarily as laboratory workers<sup>6</sup> — in other words, by prison staff members. Prisons favor such on-site testing because it is cheaper and provides results more quickly than outside labs.<sup>7</sup> The prison staff member who performs the scientific procedure need not exercise discretion, read graphs, or make any subjective interpretations,<sup>8</sup> for the test generally provides a basic "positive" or "negative" readout, with no qualitative data.

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<sup>1</sup> For a description of the technique employed, see *infra* notes 223–34 and accompanying text. For a description of various drug testing programs, see, e.g., *Higgs v. Wilson*, 616 F. Supp. 226, 227–30 (W.D. Ky. 1985); *Wykoff v. Resig*, 613 F. Supp. 1504, 1506–07 (N.D. Ind. 1985); *Tucker v. Dickey*, 613 F. Supp. 1124, 1126–27 (D. Wis. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1216–17 (S.D.N.Y. 1984); *Denike v. Fauver*, No. 83-2737, slip op. at 1–5 (D.N.J. April 6, 1984); *Hunt v. State*, 173 Ga. App. 638, 638–39, 327 S.E.2d 500, 500 (1985) (probationers); *Kane v. Fair*, Civ. No. 136229, slip op. at 8–9 (Super. Ct. Mass. Aug. 5, 1983); *Hampson v. Satran*, 319 N.W.2d 796, 797, 799 n.2 (N.D. 1982); *Isaacks v. State*, 646 S.W.2d 602, 602–03 (Tex. Crim. App. 1983) (probationers), *review refused*.

<sup>2</sup> See, e.g., *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1506 (S.D.N.Y. 1985).

<sup>3</sup> The tests, which manufacturers are now marketing for urinalysis testing include thin layer chromatography (TLC) and high performance TLC, gas chromatography/mass spectrometry (GC/MS) and high press liquid chromatography, and immunochemical techniques discussed *infra* notes 223–50 and accompanying text. For a good discussion of the types of tests available see *McBay, Cannabinoid Testing: Forensic and Analytical Aspects*, LABORATORY MGMT., Vol. 23, No. 1, 36, 38 (Jan. 1985). See also *Zeese, Marijuana Urinalysis Tests*, DRUG L. REP., Vol. 1, No. 3, 25, 26 (May–June 1983).

<sup>4</sup> Immunochemistry is the branch of chemistry dealing with substances (as antibodies, antigens, or haptens) and reactions (as concerned in the phenomenon of immunity-antibody production). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (4th ed. 1976).

<sup>5</sup> Syva Corporation, of Palo Alto, California, manufactures the most commonly used technique, which employs immunochemistry. Syva's Enzyme Multiplied Immunoassay Technique (hereinafter EMIT) is discussed *infra* notes 223–50 and accompanying text.

<sup>6</sup> *Morgan, Problems of Mass Urine Screening for Misused Drugs*, J. PSYCHOACTIVE DRUGS, Vol. 16(4), 305, 306 (Oct.–Dec. 1984).

<sup>7</sup> Affidavit of George Vose at 3, *Kane v. Fair*, Civ. No. 136229 (Super. Ct. Mass. Aug. 5, 1983).

<sup>8</sup> *Morgan, supra* note 6, at 306. Another commonly used urine screening test is a radio immunoassay (RIA) screen, *Roch Diagnostic ABUSCREEN THC*, which also uses immunochemistry

If the device displays a "positive" on the testing of an inmate's urine sample, the prison automatically will charge the inmate with a major disciplinary infraction — the introduction or use of a controlled substance.<sup>9</sup> At a disciplinary hearing, the government then will use a positive urinalysis result as evidence of the inmate's illicit use of the drug indicated by the result.<sup>10</sup> While both the state and the inmate generally can introduce certain additional inculpatory or exculpatory evidence, the prison may impose disciplinary sanctions solely on the basis of the single, positive reading.<sup>11</sup> The disciplinary sanction may include confinement to one's cell ("keep lock"),<sup>12</sup> loss of good behavior time credits ("good time"),<sup>13</sup> or an upgrade in security classification from, for example, minimum to maximum custody status.<sup>14</sup> In addition, given the positive test result on the inmate's record, the inmate may suffer future reduced opportunities for parole.<sup>15</sup>

A state's imposition of sanctions based upon evidence gathered from the mandatory scientific testing of an individual's body fluids necessarily raises serious questions as to the constitutionality of those sanctions under the fourth amendment's prohibition against unreasonable search and seizure.<sup>16</sup> The fourth amendment provides that the government shall not subject individuals to unwarranted and unreasonable searches of their persons, homes, papers, and effects.<sup>17</sup> The overriding purpose of the amendment is to safeguard the personal privacy and dignity of the individual from governmental intrusion.<sup>18</sup> The

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techniques equivalent to the EMIT system. An RIA screen differs significantly from an EMIT because the RIA relies upon the operator's subjective interpretation of agglutination and thus the RIA requires more operator training. Zeese, *supra* note 3, at 26.

<sup>9</sup> Most prisons stipulate that drug use is a serious offense and a sample which indicates drug use results in an automatic disciplinary hearing. See, e.g., *Peranzo*, 608 F. Supp. at 1506 (positive test result automatically results in a "Misbehavior Report," which results in a disciplinary hearing); *Jensen v. Lick*, 589 F. Supp. 35, 36 (D.N.D. 1984) (positive sample results in filing of an "incident report" reference for disciplinary action). Refusal to take the test also results in a disciplinary charge for a serious offense. See, e.g., *id.*; *Hampson*, 319 N.W.2d at 797.

<sup>10</sup> See, e.g., *Hampson*, 319 N.W.2d at 797.

<sup>11</sup> See, e.g., *Jensen*, 589 F. Supp. at 38-39.

<sup>12</sup> *Peranzo*, 608 F. Supp. at 1506.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1506 n.6.

<sup>16</sup> U.S. CONST. amend. IV. The fourth amendment provides:

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

*Id.* The fourth amendment to the United States Constitution is applicable to the states through the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

The Supreme Court eliminated any fifth amendment challenges to these tests, in effect, in *Schmerber v. California*, 384 U.S. 757, 765 (1966). The fifth amendment to the United States Constitution protects an individual from being compelled to testify against himself or herself or to otherwise provide the prosecution with evidence of a testimonial or communicative nature. *Id.* at 760-61. The fourteenth amendment, which is applicable to the states, embraces the fifth amendment privilege. *Id.* at 760. In *Schmerber*, the Court upheld the admission of blood tests taken against the defendant's will while under arrest and being treated at a hospital for injuries, although the state extracted blood without a warrant. *Id.* at 772. The Court held that the fifth amendment only protected against communicative self-incrimination and not physical evidence. *Id.* at 765.

<sup>17</sup> For the text of the fourth amendment, see *supra* note 16.

<sup>18</sup> *Schmerber*, 384 U.S. at 767. As stated by the Court in an early Supreme Court case, the framers intended the amendment to protect "the sanctity of a man's home and the privacies of life"

words "unreasonable" and "searches and seizures" are terms of limitation;<sup>19</sup> the amendment covers only government practices which constitute searches or seizures and proscribes only unreasonable searches.<sup>20</sup> Moreover, an individual must have a reasonable expectation of privacy in the area to be searched to invoke the protections of the amendment.<sup>21</sup>

Within the prison context, a unanimous United States Supreme Court has held that individuals are not stripped of all constitutional protections upon incarceration.<sup>22</sup> Accordingly, many courts have held that prisoners are entitled to some measure of fourth amendment protection,<sup>23</sup> particularly with regard to searches of the person.<sup>24</sup> In the 1984 case of *Hudson v. Palmer*,<sup>25</sup> however, the Court severely limited the protection available to prisoners under the fourth amendment. The *Hudson* Court held that prisoners do not have a reasonable and legitimate expectation of privacy in their cells and thus are not entitled to fourth amendment protection against unreasonable searches and seizures of their individual cells and personal effects located therein.<sup>26</sup> Although the Court appeared to limit its holding to the prisoner's cell and belongings,<sup>27</sup> the scope of

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from searches under unchecked general authority. *Boyd v. United States*, 116 U.S. 616, 630 (1886). For a discussion of the history of the circumstances motivating the adoption of the fourth amendment, see *id.* at 624-30.

<sup>19</sup> Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974).

<sup>20</sup> *Carroll v. United States*, 267 U.S. 132, 147 (1925). See also Amsterdam, *supra* note 19, at 356.

<sup>21</sup> *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>22</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). The Court in *Wolff* held that before the government could deprive a prisoner of good time or confine the prisoner in disciplinary segregation, it must conduct a hearing that comports with due process. *Id.* at 558. The due process standards set forth by the *Wolff* Court are discussed *infra* note 73. The Court stated that although the "needs and exigencies" of the institutional environment may diminish a prisoner's rights, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." *Wolff*, 418 U.S. at 555.

In keeping with the general principle in *Wolff* that prisoners do not forfeit all of their rights upon entering the prison, the Court has held that prisoners enjoy freedom of speech and religion under the first amendment, see, e.g., *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (freedom of speech); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (freedom of religion), are protected against invidious discrimination on the basis of race under the equal protection clause of the fourteenth amendment, *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam), and have the right to reasonable access to the courts, *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

<sup>23</sup> See, e.g., *Lyon v. Farrier*, 727 F.2d 766, 769 (8th Cir.), *cert. denied*, 469 U.S. 839 (1984); *United States v. Mills*, 704 F.2d 1553, 1560-61 (11th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984); *United States v. Chamorro*, 687 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Hinckley*, 672 F.2d 115, 128-29 (D.C. Cir. 1982); *United States v. Lilly*, 576 F.2d 1240, 1245 (5th Cir. 1978), *reh'g denied*, 599 F.2d 619 (5th Cir. 1979); *United States v. Ready*, 574 F.2d 1009, 1013 (10th Cir. 1978); *Bonner v. Coughlin*, 517 F.2d 1311, 1316 (7th Cir. 1975), *modified on other grounds*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978); *Sostre v. Preiser*, 519 F.2d 763, 764 (2d Cir. 1975); *United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973) *cert. denied*, 415 U.S. 932 (1974); *Daugherty v. Harris*, 476 F.2d 292, 294 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973).

<sup>24</sup> See, e.g., *Storms*, 600 F. Supp. at 1223-24 (searches of the person distinctly different from cell searches).

<sup>25</sup> *Hudson v. Palmer*, 468 U.S. 517 (1984), *on remand*, *Palmer v. Hudson*, 744 F.2d 22 (4th Cir. 1984).

<sup>26</sup> *Id.* at 525-26.

<sup>27</sup> As the *Hudson* dissent notes, the majority "appears to limit its holding to a prisoner's 'papers and effects' located in his cell" and a prisoner's person would appear to be "secure from unreasonable search and seizure." *Id.* at 555 n.31 (Stevens, J., concurring in part, dissenting in part). Yet, as

fourth amendment protection against searches of the person to which a prisoner is entitled remains unclear.

This note examines the constitutional limitations on the government's power to conduct urine surveillance testing in the prisons. Section one examines the factors that indicate that a urinalysis is a search within the meaning of the fourth amendment and concludes that urinalysis tests are searches and therefore subject to the fourth amendment's limitations.<sup>28</sup> Section two examines the factors that indicate whether a urinalysis search of prisoners is reasonable. This section draws from the jurisprudence of criminal, administrative, and bodily intrusion searches, because the prison context shares features of all three settings.<sup>29</sup> Section two addresses methods by which courts have evaluated the reasonableness of prison urinalysis programs.<sup>30</sup> Section two concludes with a look at the reliability of the most widely used drug-screening technology as it reflects on the reasonableness inquiry.<sup>31</sup>

In the final section, this note examines the fundamental societal interests and special factors in the prison setting that necessitate a thoughtful and principled evaluation of the reasonableness of prison searches.<sup>32</sup> This final section argues that an inquiry into reasonableness should begin with courts requiring prisons to establish written policies justifying and outlining the search program. Written regulations would provide an objective set of rules by which to measure reasonableness, decrease the discretion of prison authorities, and consequently provide greater protection for inmates' privacy rights.<sup>33</sup> Courts then should examine closely individual searches against the prison's own rules, evaluating both the reasonableness of the search and the regulations upon which it is based.<sup>34</sup>

## I. URINALYSIS TESTS AS SEARCHES OF THE PERSON

### A. *Urinalysis Tests as Searches*

The fourth amendment protects individuals' human dignity and privacy interests<sup>35</sup> against unreasonable search and seizure.<sup>36</sup> One's anatomy in particular is "draped with constitutional protections."<sup>37</sup> The extension of the fourth amendment's protection to prisoners subject to urinalysis testing thus requires an initial determination of whether these tests are "searches" in the constitutional sense. Furthermore, even if the intrusion

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one commentator notes, no such assurance appears in the majority opinion and the majority states, in addition, that prison safety requires close and continual surveillance of inmates and their cells. W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.9 at 212 (1978 & Supp. 1985).

<sup>28</sup> See *infra* notes 35-106 and accompanying text.

<sup>29</sup> See *infra* notes 107-64 and accompanying text.

<sup>30</sup> See *infra* notes 177-211 and accompanying text.

<sup>31</sup> See *infra* notes 213-70 and accompanying text.

<sup>32</sup> See *infra* notes 277-309 and accompanying text.

<sup>33</sup> See *infra* notes 311-42 and accompanying text.

<sup>34</sup> See *infra* notes 344-45 and accompanying text.

<sup>35</sup> *Schmerber v. California*, 384 U.S. 757, 769-70 (1966).

<sup>36</sup> U.S. CONST. amend. IV. For the text of the fourth amendment, see *supra* note 16.

<sup>37</sup> *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978).

is a search, constitutional protections pertain only to those searches which infringe on an area in which a person has a reasonable and legitimate expectation of privacy.<sup>38</sup>

Although urine testing may not resemble traditional searches of the person, which involve physical touching of the individual's body or clothing,<sup>39</sup> such a procedure is analogous to other governmental searches which involve the search and seizure of an individual's body components and are intended to reveal hidden matters or objects.<sup>40</sup> The seminal case protecting fourth amendment interests in human dignity and privacy from practices involving the seizure and subsequent analysis of material coming from within a suspect's body is the 1966 case of *Schmerber v. California*.<sup>41</sup> The Supreme Court in *Schmerber* determined that a bodily intrusion involving medical personnel extracting a blood sample from an unconsenting defendant constituted a search within the meaning of the fourth amendment.<sup>42</sup> The police had arrested the defendant in *Schmerber* for driving while intoxicated, and medical personnel had drawn his blood to test for blood alcohol content.<sup>43</sup> The Court distinguished the body intrusion in *Schmerber* from governmental interferences with an individual's property interest.<sup>44</sup> The Court stressed an overriding concern with human dignity and privacy,<sup>45</sup> and placed the forced body-fluid extraction within the "broadly conceived reach" of the fourth amendment.<sup>46</sup>

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<sup>38</sup> *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For a discussion of *Katz* and the "reasonable expectation of privacy" test, see *infra* notes 59-66 and accompanying text.

<sup>39</sup> *Amsterdam*, *supra* note 19, at 356. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("frisk" search); *Afanador*, 567 F.2d at 1328, 1331 (strip search); *Sibron v. New York*, 392 U.S. 40, 64 (1968) (clothing search).

<sup>40</sup> Practices which courts have deemed searches within the meaning of the fourth amendment include the collection of blood samples, see *infra* notes 41-46 and accompanying text, breath samples, see *infra* note 50 and accompanying text, fingernail scrapings, *Cupp v. Murphy*, 412 U.S. 291, 293 (1973), and pubic hair, *Bouse v. Bussey*, 573 F.2d 548, 550 (7th Cir. 1977). In addition, a search and seizure occurs when the government x-rays an individual, *United States v. Allen*, 337 F. Supp. 1041, 1043 (E.D. Pa. 1972), and when the government detains an individual until he or she expels suspected contraband in a bowel movement, *United States v. Mosquera-Ramirez*, 729 F.2d 1352, 1356 (11th Cir. 1984).

A search does not occur, however, upon the seizure of physical characteristics which the individual exposes constantly to the public, such as when the government compels an individual to furnish a handwriting sample, *United States v. Mara*, 410 U.S. 19, 21 (1973), or a voice exemplar, *United States v. Dionisio*, 410 U.S. 1, 13-16 (1973).

<sup>41</sup> 384 U.S. 757 (1966). The defendant in *Schmerber* challenged the government's extraction of his blood on both fourth and fifth amendment grounds. *Id.* at 759. The Court rejected *Schmerber*'s claim that the search violated his privilege against self-incrimination under the fifth amendment. *Id.* at 761. For a discussion of the Court's reasoning, see *supra* note 16.

<sup>42</sup> *Schmerber*, 384 U.S. at 767.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 767-68.

<sup>45</sup> *Id.* at 769-70. Indeed the Court emphasized the individual's privacy interest above any discussion of the actual physical invasion involved in inserting a needle to extract blood. *Id.* For a good discussion of the Court's concerns in *Schmerber*, see *Winston v. Lee*, 470 U.S. 753, 760-63 (1985). The Court in *Winston* stated that "[t]he intrusion [in *Schmerber*] perhaps implicated *Schmerber*'s most personal and deep-rooted expectations of privacy." *Id.* at 760.

<sup>46</sup> *Schmerber*, 384 U.S. at 767. The Court ultimately upheld the search as reasonable. *Id.* at 772. The Court reasoned in part that a blood test is a routine procedure causing minimal risk, pain, or trauma. *Id.* at 771. The Court's finding that the intrusion associated with a blood test is reasonable and "routine", *id.* at 771 n.13, however, did not preclude the Court's characterization of the procedure as a search. *Id.* at 767. For a discussion of the Court's analysis of the reasonableness of the blood test in *Schmerber* see *infra* notes 147-64 and accompanying text.

In later cases, lower courts extended the *Schmerber* holding and found a search of the person where the governmental practices contemplated involved arguably nonphysical intrusions, such as performing an x-ray<sup>47</sup> or collecting a breath sample.<sup>48</sup> By analogy to *Schmerber*, these courts have focused on the mandatory seizure of a person's body components to hold that such practices constitute searches.<sup>49</sup> For example, a Pennsylvania superior court in *Commonwealth v. Quarles* viewed the difference between a blood and a breath test as insignificant where both involved seizure, of blood or air, and the material seized came from within the suspect's body.<sup>50</sup>

In keeping with the *Schmerber* decision and its progeny, lower courts similarly have analogized, if at times reluctantly,<sup>51</sup> urinalysis testing procedures to the blood extraction in *Schmerber* and have characterized the procedure as a search of the person. In 1984, a New York federal district court in *Storms v. Coughlin* noted that a urinalysis does not require a penetration of the skin, as does the extraction of blood, but nevertheless viewed the forced extraction of urine as an intrusion beyond the body's surface similar to that in *Schmerber*.<sup>52</sup> In 1985, a federal district court in Iowa, in *McDonnell v. Hunter*, stated that like a blood test, a urinalysis procedure requires the removal and analysis of fluids contained within an individual's body.<sup>53</sup>

In addition, courts have invoked the human dignity and privacy bases of the *Schmerber* decision to characterize as a search the forced performance before authorities<sup>54</sup> of what is regarded ordinarily as a private bodily function. The *Storms* court found such a test particularly degrading where the prison forced the individual under threat of punishment to urinate into a container held by another.<sup>55</sup> The *McDonnell* court acknowledged that urine testing, unlike blood testing, did not require a governmental intrusion

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<sup>47</sup> See, e.g., *United States v. Allen*, 337 F. Supp. 1041, 1043 (E.D. Pa. 1972). The *Allen* court, in finding that an x-ray constituted a search, viewed *Schmerber* as leading to the conclusion that "blood, hair and other bodily components are objects to be seized only through the warrant process or one of the recognized exceptions thereto." *Id.* at 1043. The court went on to add that although the government does not actually seize x-rays from the person, x-rays do penetrate the body and the government uses the individual's own body to make the x-ray. *Id.*

<sup>48</sup> See, e.g., *Commonwealth v. Quarles*, 229 Pa. Super. 363, 377 n.4, 324 A.2d 452, 460 n.4 (1974).

<sup>49</sup> See *id.*; *Allen*, 337 F. Supp. at 1043.

<sup>50</sup> 229 Pa. Super. 363, 377 n.4, 324 A.2d 452, 460 n.4 (1974).

<sup>51</sup> See, e.g., *Allen v. City of Marietta*, 601 F. Supp. 482, 488 (N.D. Ga. 1985). The *Marietta* court stated that while it had "some doubts whether requiring a person to provide a sample of his urine for analysis is the kind of 'search' contemplated by the framers of the fourth amendment, the court feels constrained by current law to hold that a urinalysis is a search within the meaning of that amendment." *Id.* The *Marietta* court then went on to cite *Schmerber* as controlling. *Id.* at 488-89.

<sup>52</sup> 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984). The *Storms* court found a urinalysis test "indistinguishable" from the blood test covered by the fourth amendment in *Schmerber*. *Id.* The court reasoned that both tests involved involuntary forced extraction of bodily fluids or, in effect, intrusions, "if not literally," beyond the body surface. *Id.* at 1218.

<sup>53</sup> 612 F. Supp. 1122, 1127 (D. Iowa 1985).

<sup>54</sup> Prisons conduct urine tests in the presence of prison staff to assure that prisoners do not tamper with the sample. See, e.g., 28 C.F.R. § 550.30(c) (1986) (federal prison regulations dictate official to be present to assure sample is not diluted). See also *Storms*, 600 F. Supp. at 1218 (prisoner performs test in presence of prison guard).

<sup>55</sup> *Storms*, 600 F. Supp. at 1218. The *Storms* court found that such a procedure is "purely and simply degrading" and plainly implicates interest protected by the fourth amendment. *Id.*

into the body but nevertheless characterized such a test as a search because an individual generally discharges and disposes of urine in private.<sup>56</sup>

In sum, although a urinalysis involves no literal governmental intrusion into the body, a court likely will characterize a mandatory urinalysis test as a search because it closely resembles a blood test. In *Schmerber*, the Supreme Court found a blood test to be a search because it intruded on an individual's interests in body integrity, personal privacy, and dignity.<sup>57</sup> In recent decisions, courts have drawn from the *Schmerber* Court's analysis to find that urinalysis programs invoke the same fundamental human interests which the *Schmerber* Court set forth with regard to blood testing. Accordingly, these courts have treated the practice as a search and examined whether these urinalysis tests violate the fourth amendment's prohibition against search and seizures.<sup>58</sup>

### B. Interests Protected by the Fourth Amendment

A search will not violate the fourth amendment unless it infringes on an area in which an individual harbors a reasonable and legitimate expectation of privacy.<sup>59</sup> Justice Harlan set forth this "reasonable expectation of privacy" requirement in his 1967 concurring opinion in *United States v. Katz*.<sup>60</sup> In *Katz*, the Court examined an individual's

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<sup>56</sup> *McDonell*, 612 F. Supp. at 1127. The *McDonell* court addressed the reasonableness of urinalysis testing of prison guards and concluded that the prison could conduct such tests only upon reasonable suspicion. *Id.* at 1130.

<sup>57</sup> *Schmerber*, 384 U.S. at 767. See *supra* notes 41-46 and accompanying text.

<sup>58</sup> Other courts have simply treated the practice as a search, see, e.g., *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975); *Shoemaker v. Handel*, 608 F. Supp. 1151, 1156 (D.N.J.), later proceeding, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd* 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986); *Hampson*, 319 N.W.2d at 799-800; *Ewing v. State*, 160 Ind. App. 138, 149, 310 N.E.2d 571, 578 (1974) (en banc), or have grounded their finding on precedent, without independent analysis of the factors that indicate that the urinalysis is a search. See, e.g., *Tucker*, 613 F. Supp. at 1127 (citing *Schmerber* as precedent); *Marietta*, 601 F. Supp. at 488-89 (citing *Schmerber* as precedent); *Murray v. Haldeman*, 16 M.J. 74, 81 (CMA 1983) (citing *Committee for GI Rights* as precedent).

<sup>59</sup> *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>60</sup> *Id.* (Harlan, J., concurring). The original expectation of privacy test which emerged from Justice Harlan's concurring opinion to *Katz* included two prongs. To establish a fourth amendment claim, an individual first would have to exhibit "an actual (subjective) expectation of privacy." *Id.* (Harlan, J., concurring). Second, the expectation of privacy would have to "be one that society is prepared to recognize as 'reasonable.'" *Id.* (Harlan, J., concurring). Some courts later used the subjective prong to deny prisoners fourth amendment protections. See Gianelli and Gilligan, *Prison Searches and Seizures: "Locking" The Fourth Amendment Out Of Correctional Facilities*, 62 VA. L. REV. 1045, 1059 (1976) (discussing series of cases which applied the subjective prong). For example, a California Court of Appeal used the subjective prong approach to deny fourth amendment protection to prisoners based on the argument that if a prisoner knows the prison will search him or her, the prisoner cannot claim that he or she expected privacy. *People v. Califano*, 5 Cal. App. 3d 476, 482, 85 Cal. Rptr. 292, 296 (2d Dist. 1970). The *Califano* court reasoned that because the tape recorded conversation of two co-defendants in the jail's interview room began with the defendant's comment "[t]hey [the police] are probably listening right now," the defendants had demonstrated no subjective expectation of privacy. *Id.* One commentator terms the *Califano* case "incredible" and asserts, "the proposition that a prisoner has less privacy because everyone knows that there is less privacy in jail, and therefore he has no reasonable expectation of privacy is one of the most outrageous examples of tautological thinking espoused in many years." Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process*

claim that the fourth amendment protected him from governmental electronic surveillance of his conversations in a public phone booth.<sup>61</sup> The government in *Katz* argued that *Katz* was not entitled to fourth amendment protection because a public phone booth was not a "constitutionally protected area."<sup>62</sup> The *Katz* Court rejected the government's "constitutionally protected area" argument and emphasized that the fourth amendment protects people, not places.<sup>63</sup> The Court in *Katz* found that the fourth amendment may protect matters which an individual reasonably seeks to preserve as private, even in a public area.<sup>64</sup> Thus, the Court in *Katz* held that an individual who entered a public phone booth, closed the door, and paid the toll reasonably could expect that governmental electronic surveillance would not monitor his or her conversation.<sup>65</sup> In his concurring opinion, Justice Harlan noted that for an individual's expectation of privacy to be constitutionally justifiable, it must be one that "society is prepared to recognize as 'reasonable.'"<sup>66</sup>

In the context of the prison environment, the question then becomes whether society is willing to recognize as reasonable prisoners' expectations of privacy in their body areas, living quarters, and belongings. The traditional view of prisoners' fourth amendment rights generally assumed that the fourth amendment did not apply to prisoners.<sup>67</sup> A

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in *Our Prisons*, 21 BUFFALO L. REV. 669, 678 n.26 (1971-72). As another commentator notes, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance." Amsterdam, *supra* note 19, at 384. Thus Justice Harlan's subjective expectation test raises serious questions as to what the government can or cannot take away by simply notifying an individual or the community at large that conversations or certain activities are not private.

The Supreme Court in 1971 — four years after *Katz* and one year after *Califano* — stressed the controlling importance of the second prong of the *Katz* test in *United States v. White*, 401 U.S. 745, 751-52 (1971). In effect, the Court refused to adopt the subjective expectation prong. See *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984) (the Court recounts its rejection of the *Katz* test in the *White* decision).

<sup>61</sup> *Katz*, 389 U.S. at 348.

<sup>62</sup> *Id.* at 351.

<sup>63</sup> *Id.* Prior to *Katz*, the Court had described some of its fourth amendment conclusions in terms of "constitutionally protected" areas. See, e.g., *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961).

<sup>64</sup> *Katz*, 389 U.S. at 351-52.

<sup>65</sup> *Id.* at 350, 352. The Court concluded that the government's electronic surveillance without a warrant was unreasonable. *Id.* at 357-59.

<sup>66</sup> *Id.* at 361 (Harlan, J., concurring). For example, the Court has noted that some containers, such as a gun case, cannot support any reasonable expectation of privacy because observers can infer the container's contents from its outside appearance. See *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). In contrast, an individual does have a reasonable expectation of privacy in luggage, because luggage typically holds personal effects and closed pieces of luggage hide their contents from view. See *Robbins v. California*, 453 U.S. 420, 424-25 (1981).

<sup>67</sup> W. LAFAVE, *supra* note 27, § 10.9 at 397. In 1919, in *Stroud v. United States* the Court held that a prison warden could seize and search a prisoner's letters without a warrant or probable cause. 251 U.S. 15, 21-22 (1919). The state later could use the letters in a criminal case against the defendant without violating the fourth amendment. *Id.* Forty-three years later, in 1962, the Court commented in *Lanza v. New York*, that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room" and that "official surveillance has traditionally been the order of the day" in prison. 370 U.S. 139, 143 (1962). The defendant in *Lanza* refused to answer the questions of a state legislative committee investigating corruption in the state parole system, and the lower court had convicted him for contempt. *Id.* at 140. The defendant challenged the conviction, contending that the questions were based on information gathered from a conversation

unanimous Supreme Court in *Wolff v. McDonnell*,<sup>68</sup> addressing a prisoner's claim that disciplinary proceedings at the prison violated his due process rights,<sup>69</sup> seemingly altered this position in 1974, when it stated that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."<sup>70</sup> The *Wolff* Court rejected a "hands off" approach to prison practices, whereby courts accorded absolute discretion to prison officials.<sup>71</sup> Instead, the *Wolff* Court held that prisoners' rights should be an accommodation between the "institutional needs and objectives and the provisions of the Constitution."<sup>72</sup> Thus, according to the *Wolff* Court, the state must conduct a hearing that comports with due process before it can deprive a prisoner of good time or confine the

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between the defendant and his brother, who was in jail, that jail officers secretly had monitored. *Id.* at 141. The Court in *Lanza* upheld the conviction because the state had derived some of the questions from information independent of the conversation. *Id.* at 145, 147. Thus, the plurality did not ground its decision on the earlier quoted language, which essentially had espoused the view that a jail is not a "constitutionally protected area." See Gianelli and Gilligan, *supra* note 60, at 1055 (*Lanza* is the "leading case" in support of the application of the "constitutionally protected area" analysis to jails to deny prisoners constitutional protections). Although *Katz* rejected the use of the "constitutionally protected area" analysis, see *supra* notes 62-64 and accompanying text, references to *Lanza* continue to appear in recent prison search cases. See, e.g., *Hudson*, 468 U.S. at 538 (O'Connor, J., concurring) (quoting and citing *Lanza*); *Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979) (citing *Lanza*). See also *State v. Brotherton*, 2 Ore. App. 157, 160, 465 P.2d 749, 750 (1970) ("Prison authorities may subject inmates to institutional searches unimpeded by fourth amendment barriers.") (citations omitted). The lower courts subsequently relied on these two Supreme Court decisions to conclude that prison authorities could subject prisoners to intense surveillance and searches "unimpeded by fourth amendment barriers." See the same language in *Califano*, 5 Cal. App. 3d at 481, 85 Cal. Rptr. at 296; *People v. Chandler*, 262 Cal. App. 2d 350, 356, 68 Cal. Rptr. 645, 648 (1968), cert. denied, 393 U.S. 1043 (1969). But cf. *Storms*, 600 F. Supp. at 1223-24 (distinguishing *Lanza* as precedent in prison body search area). One commentator objects to the *Bell* Court's citation of *Lanza* and *Stroud* and further questions the precedential value of these cases in the fourth amendment context. See Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1044 n.84 (1982) [hereinafter Note, *Body Searches*] (citing Gianelli and Gilligan, *supra* note 60, at 1055-58; Singer, *supra* note 60, at 673-75; Annot., 32 A.L.R. FED. 601, 612-14 (1977 & Supp. Oct. 1985)).

<sup>68</sup> 418 U.S. 539 (1974).

<sup>69</sup> The due process clause of the fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

<sup>70</sup> *Wolff*, 418 U.S. at 555.

<sup>71</sup> See *id.* at 555-56. Courts had held under the "hands off" doctrine that they lacked jurisdiction to adjudicate prisoner complaints. See Gianelli and Gilligan, *supra* note 60, at 1047 and n.18. In *Procunier v. Martinez*, the Court expressly rejected this approach: "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." 416 U.S. 396, 405-06 (1974). Although the Court rejected this policy of judicial restraint, it nevertheless has accorded significant judicial deference to prison officials. See, e.g., *Bell*, 441 U.S. at 546-48. As commentators point out, the Court's deference doctrine could lead to the same "immunization" of correctional officials from judicial scrutiny as did the "hands off" doctrine. See Gianelli and Gilligan, *supra* note 60, at 1047 n.18. The dissent in *Hudson* appears to share this concern when it states that the majority's absolute discretion accorded prison officials to conduct cell searches is a return to the "'hands off' approach to prison administration." *Hudson*, 468 U.S. at 555 (Stevens, J., concurring in part and dissenting in part). For discussions of the "hands off" doctrine, see Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

<sup>72</sup> *Wolff*, 418 U.S. at 556. The Court commented in *Wolff* that "the needs and exigencies" of the penal environment necessarily could restrict a prisoner's constitutional rights. *Id.* at 555.

prisoner in disciplinary segregation.<sup>73</sup> In defining the extent of the constitutional protections suggested by *Wolff*, however, the Court has appeared reluctant to take an expansive view of the expectation of privacy to be accorded a prisoner. Consequently, a prisoner's fourth amendment protection from searches of the person remains unclear despite *Wolff*.

Four years after *Wolff*, in 1978, the Court in *Bell v. Wolfish*<sup>74</sup> addressed its first fourth amendment prison claim since its decision in *Wolff*. *Bell* evaluated the constitutionality of visual body cavity searches of prisoners.<sup>75</sup> The challenged search practices in *Bell* included cell searches conducted in the prisoner's absence and routine body cavity searches following contact visits with persons from outside the institution.<sup>76</sup> Although the Court reiterated *Wolff*'s assertion that prisoners do not forfeit all constitutional protections,<sup>77</sup> it also commented that the fourth amendment may provide no protection for a person confined in a detention facility.<sup>78</sup> The Court nevertheless assumed "for present purposes"<sup>79</sup> that the fourth amendment did apply and subsequently upheld both search practices as reasonable.<sup>80</sup>

Significantly, the *Bell* majority did concede that the practice of conducting body cavity searches "instinctively gives us the most pause."<sup>81</sup> Furthermore, while not specifically holding that prisoners have legitimate expectations of privacy in their person, the Court did subject the searches to a fourth amendment reasonableness inquiry. The Court stated that the prison must conduct the practice in a reasonable manner,<sup>82</sup> citing *Schmerber*, where the Court found that administering a mandatory blood test implicates a criminal defendant's reasonable and legitimate expectation of privacy.<sup>83</sup> In addition, the decision to uphold the body searches was far from unanimous, with four justices dissenting.<sup>84</sup> Justice Marshall viewed these searches as representative of "one of the most

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<sup>73</sup> *Id.* at 558. Under the standards set forth in *Wolff*, minimum standards of procedural due process require advance written notice of the violation, a written statement by the factfinders of the evidence relied on and the reasons for the disciplinary action taken, and the opportunity to call witnesses and present evidence in his or her defense. *Id.* at 563-66.

<sup>74</sup> 441 U.S. 520 (1979).

<sup>75</sup> *Id.* at 558-60.

<sup>76</sup> *Id.* at 528-29. The *Bell* case involved practices imposed on "pre-trial detainees," or individuals not convicted of crimes yet committed to a detention facility. *Id.* at 531. The challenged conditions included, in addition to cell and person searches, prison overcrowding and restrictions on the receipt of books and personal items. *Id.* at 528. The lower court had found the practices unconstitutional on due process grounds, holding that the government could only subject pretrial detainees to deprivations for which it could demonstrate a "compelling necessity." *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>77</sup> *Bell*, 441 U.S. at 545.

<sup>78</sup> *Id.* at 556-57 (citing *Lanza*, 370 U.S. at 143-44). The Court in *Bell* stated that "it may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." *Id.* For a discussion of *Lanza*, see *supra* note 67.

<sup>79</sup> *Bell*, 441 U.S. at 558.

<sup>80</sup> *Id.* at 560.

<sup>81</sup> *Id.* at 558.

<sup>82</sup> *Id.* at 560 (citing *Schmerber*, 384 U.S. at 771-72).

<sup>83</sup> *Schmerber*, 384 U.S. at 767. For a discussion of *Schmerber*, see *supra* notes 41-46 and accompanying text.

<sup>84</sup> Justices Brennan, Marshall, Powell, and Stevens dissented from the majority. Justice Powell found the body cavity searches unreasonable unless based on "some level of cause, such as a reasonable suspicion." *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part).

grievous offenses against personal dignity and common decency."<sup>85</sup> Indeed, Justice Powell, concurring in part and dissenting in part, joined the opinion of the Court with the single exception of the holding with respect to the body cavity searches.<sup>86</sup>

In sum, *Bell* neither requires nor forecloses possible constitutional limitations on the power of prison officials to conduct body searches of prisoners.<sup>87</sup> *Bell* seems to indicate that prisoner body searches implicate the fourth amendment and will be permissible only if reasonable. The Court in *Bell* provides no guidelines, however, for determining the reasonableness of a search.<sup>88</sup> In addition, the *Bell* decision did not turn solely or even predominantly on fourth amendment issues.<sup>89</sup> It remains, however, the only Supreme Court pronouncement in the area of constitutional limitations on body searches in prison.<sup>90</sup>

A full decade after the unanimous decision in *Wolff* and six years after *Bell*, a majority of the Supreme Court in *Hudson v. Palmer* held that prisoners do not have a reasonable and legitimate expectation of privacy in their cells and belongings, and consequently, that the fourth amendment has no application to prisoners' cells or belongings.<sup>91</sup> The prisoner in *Hudson* challenged a prison official's search of his locker and cell in which the official destroyed the prisoner's noncontraband, personal property.<sup>92</sup> Applying the *Katz* "reasonable expectation of privacy" test,<sup>93</sup> the majority reasoned that society recognizes that a prisoner's expectation of privacy always yields to the institution's interests in institutional security.<sup>94</sup> Thus, although the majority held only that society is

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Justice Marshall would permit body cavity searches only if they were of compelling necessity. *Id.* at 578 (Marshall, J., dissenting). Justices Stevens and Brennan viewed such practices as punishment of pretrial detainees, whom the government had not adjudicated as guilty in accordance with due process of law. *Id.* at 580-84 (Stevens, J., joined by Brennan, J., dissenting).

<sup>85</sup> *Id.* at 576-77 (Marshall, J., dissenting).

<sup>86</sup> *Id.* at 563 (Powell, J., concurring in part and dissenting in part). Justice Powell would have the Court require "at least some level of cause." *Id.*

<sup>87</sup> Note, *Body Searches*, *supra* note 67, at 1038 (*Bell* does not foreclose constitutional limitations).

<sup>88</sup> The majority in *Bell* merely states that such searches cannot be conducted "in an abusive fashion" and "must be conducted in a reasonable manner." *Bell*, 441 U.S. at 560. For one district court's comments on the *Bell* Court's failure to provide guidelines, see *infra* note 168.

<sup>89</sup> Note, *Body Searches*, *supra* note 67, at 1034.

<sup>90</sup> *Id.* at 1033.

<sup>91</sup> 468 U.S. 517, 525-26, 528 n.8 (1984).

<sup>92</sup> *Id.* at 520.

<sup>93</sup> See *supra* notes 59-66 for a discussion of the *Katz* test.

<sup>94</sup> *Hudson*, 468 U.S. at 528. The Court stated:

A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[l]oss of freedom of choice and privacy are inherent incidents of confinement."

*Id.* at 527-28 (citing *Bell*, 441 U.S. at 537). Justice Stevens, joined by Justices Brennan, Blackmun, and Marshall, dissented in *Hudson* and challenged the majority's assumption that a prisoner has no legitimate privacy expectation in his or her personal effects. *Id.* at 542 (Stevens, J., concurring in part and dissenting in part). The dissent contended that the majority's "perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather it merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored." *Id.* at 549 (Stevens, J., concurring in part and dissenting in part) (emphasis

not prepared to recognize a prisoner's expectation of privacy in his cell, the *Hudson* language concerning a prisoner's expectation of privacy leaves open the question of whether a prisoner maintains a legitimate and reasonable expectation of privacy in his person.

Despite the possible interpretation of the majority's language in *Hudson* and the absence in *Bell* of a clear holding that prisoners have fourth amendment rights with regard to body searches,<sup>95</sup> lower courts continue to rule that a prisoner retains a legitimate and reasonable expectation of privacy with regard to searches of the person.<sup>96</sup> In

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original). The dissent viewed a consensus in the lower courts "of some significance. Virtually every federal judge to address the question over the past decade has concluded that the Fourth Amendment does apply to a prison cell. There is similar unanimity among the commentators." *Id.* at 549-50 (Stevens, J., concurring in part and dissenting in part). The dissent then listed as support for this proposition sixteen circuit court decisions, including all but the Third, Fourth, and Sixth Circuits and five commentaries. *Id.* at 549, n.19, 550 n.20 (Stevens, J., concurring in part and dissenting in part). In addition, the dissent noted its assumption that the majority "appears to limit its holding to a prisoner's 'papers and effects' located in his cell and apparently believes that at least a prisoner's 'person' is secure from unreasonable search and seizure." *Id.* at 555 n.31 (Stevens, J., concurring in part and dissenting in part).

Indeed both Justice Stevens and Chief Justice Burger have recognized that some expectation of privacy continues in prison. Before appointment to the United States Supreme Court, Justice Stevens, as Circuit Judge for the Seventh Circuit, addressed a state prisoner's claim that guards had violated his constitutionally protected interests in privacy and property when a prisoner lost his trial transcript in a shakedown search of his cell. See *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 435 U.S. 932 (1978). Justice Stevens wrote "[w]e are persuaded . . . that the surrender of privacy is not total and that some residuum meriting the protection of the Fourth Amendment survives the transfer into custody." *Id.* at 1316. The court concluded, "[w]e hold that a prisoner enjoys the protections of the fourth amendment against unreasonable searches, at least to some minimal extent." *Id.* at 1317.

Chief Justice Burger recognized that prisoners have some residuum of privacy in a 1978 decision rejecting members of the news media's first amendment challenge to government policies restricting their access to a county prison:

It is true that inmates lose some rights when they are lawfully confined, but they do not lose all civil rights . . . . Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however "educational" the process may be for others.

*Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978). Although the Chief Justice's assertion appeared in a context other than a fourth amendment analysis, the *Hudson* dissent quoted the above passage in support of its assertion that the majority should recognize that a prisoner retains some residuum of privacy under the fourth amendment in his cell and belongings. *Hudson*, 468 U.S. at 542 (Stevens, J., concurring in part and dissenting in part). See also W. LaFAVE, *supra* note 27, at 211-12 (Supp. 1985). Professor LaFave comments:

*Hudson* merely finds that the Fourth Amendment affords no protection for the prisoner's privacy interest in his cell or his possessory interest in his effects kept there, and thus arguably has no application to searches and seizures of the person of a prisoner, which would remain subject to the minimal Fourth Amendment protections discussed herein . . . . Hopefully this will turn out to be the case, for, as unfortunate as the *Hudson* holding is, it would be even more intolerable if prisoners were also lacking any Fourth Amendment protection against even serious, repeated and degrading intrusions upon their persons.

*Id.*

<sup>95</sup> See *supra* notes 74-86 and accompanying text.

<sup>96</sup> See, e.g., *Tucker*, 613 F. Supp. at 1128 ("*Hudson* neither held nor implied that prisoners have no justifiable expectation of privacy in their persons"); *Smith v. Montgomery County, MD*, 607 F.

the specific area of urinalysis searches, two courts expressly have rejected the argument that *Hudson* stands for the proposition that prisoners retain no reasonable expectation of privacy from searches of the person.<sup>97</sup> For example, the New York federal district court in *Storms v. Coughlin*<sup>98</sup> stressed that *Hudson* did not address the prisoner's body privacy interests.<sup>99</sup> The court reasoned that the fundamental change which occurs when a prisoner exchanges his or her home outside the prison for a cell inherently diminishes the prisoner's expectation of privacy in his or her immediate surroundings. The *Storms* court stated that the body, however, undergoes no change upon incarceration.<sup>100</sup> The *Storms* court concluded, despite *Hudson*, that prisoners retain reasonable and legitimate expectations of privacy in their persons.<sup>101</sup>

Thus, lower courts have refused to extend the Supreme Court's holding in *Hudson* that prisoners do not retain reasonable expectations of privacy in their cells and effects to cases involving body searches or urinalysis testing of prisoners. These courts reason that *Hudson* did not address person searches and that prisoners' privacy interests in their cells and effects clearly are distinguishable from their privacy interest in their own persons. In addition, although the Court in the earlier body cavity search decision, *Bell*,<sup>102</sup> did not hold specifically that prisoners have reasonable expectations of privacy in their persons, it did subject the searches to a fourth amendment analysis.<sup>103</sup>

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Supp. 1303, 1306-07 (D. Md. 1985) (*Hudson* applies to cell searches, not searches of the person). See also *Storms*, 600 F. Supp. at 1223. In *Storms*, the state of New York contended that *Hudson* forbade any reasonableness inquiry regarding the state's practice of conducting mandatory urine testing. *Id.* The *Storms* court, in rejecting the state's argument, noted that *Hudson* held that "in effect, . . . Fourth Amendment protection stops at the cell door . . . [but that] [t]his, however, is distinctly different from holding that it stops at the prison door." *Id.* The *Storms* court found that *Bell* expressly reserved this issue of the prisoner's privacy interest in his or her person and that the Court in *Hudson* did not address this issue. *Id.* (citing *Bell*, 441 U.S. at 558). Professor LaFave also comments that the *Hudson* decision "merely finds that the Fourth Amendment affords no protection for the prisoner's privacy interest in his cell or . . . effects." W. LaFAVE, *supra* note 27, at 211 (Supp. 1985). See *supra* note 94 for Professor LaFave's additional comments on the *Hudson* holding. For a periodically updated compilation of cases holding that the fourth amendment applies in prison to searches of the person, see generally Annot., 32 A.L.R. FED. 601, § 8 (1977 & Supp. Oct. 1985).

<sup>97</sup> See *Tucker*, 613 F. Supp. at 1128; *Storms*, 600 F. Supp. at 1223.

<sup>98</sup> 600 F. Supp. 1214.

<sup>99</sup> *Id.* at 1223.

<sup>100</sup> *Id.* The *Storms* court noted:

Unlike the cell which, as *Hudson* noted, "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room," [citations omitted], a prisoner's body remains the same whether in or out of prison. There is an inherent diminution in the privacy interest adhering in an individual's immediate surroundings when he or she exchanges apartments for a cell. The body undergoes no such fundamental change when incarcerated. The surroundings become less private; the body remains the same.

Thus the *Hudson* balancing of interests between the prisoners' interests and those of the institution is not so readily struck wholly in favor of the institution.

*Id.* at 1223-24. Accord *Tucker*, 613 F. Supp. at 1128 (quoting same passage in *Storms*). The *Storms* analysis appears consistent with the Court's distinction in *Schmerber* between an individual's body and property interests. See *supra* notes 44-45 and accompanying text.

<sup>101</sup> *Storms*, 600 F. Supp. at 1224. The *Storms* court thus went on to evaluate the reasonableness of the urine program and issued a preliminary injunction enjoining the prison's program because the tests as implemented included an unjustified potential for abuse. *Id.* at 1226. See *infra* notes 198-202 and accompanying text.

<sup>102</sup> 441 U.S. 520 (1979). For a discussion of *Bell*, see *supra* notes 74-88 and accompanying text.

<sup>103</sup> *Bell*, 441 U.S. at 558-60. Moreover, the Court in *Bell* expressed some hesitation before

In conclusion, urinalysis tests of prisoners are searches in the constitutional sense. Urinalysis tests are closely analogous to blood test extractions. Like blood tests, urinalysis tests implicate human dignity and privacy and bodily integrity interests which the fourth amendment protects.<sup>104</sup> In addition, prisoners, despite incarceration, retain a reasonable and legitimate expectation of privacy with regard to governmental searches of the person.<sup>105</sup> Because urinalysis tests of prisoners are searches for fourth amendment purposes, they are subject to the fourth amendment's prohibition against unreasonable search and seizure.<sup>106</sup>

## II. AN ASSESSMENT OF THE REQUIREMENT OF REASONABLENESS UNDER THE FOURTH AMENDMENT

Once an individual has adequately alleged a search, the question then becomes whether the government's conduct was unreasonable.<sup>107</sup> An analysis of the reasonableness of a search requires a balancing of the significance of the intrusiveness of the search on the individual's constitutionally protected interests in personal privacy and bodily integrity against the promotion of legitimate government interests.<sup>108</sup> Ultimately, the reasonable search must be no greater an intrusion than is reasonably necessary.<sup>109</sup>

In setting forth the parameters of a reasonable search, the Supreme Court traditionally has emphasized that the definition of reasonableness turns on the existence of three protections: probable cause, warrants, and specificity.<sup>110</sup> In the criminal context, where the government searches to discover evidence of guilt for a crime committed,<sup>111</sup> these protections are the threshold requirements, with limited exceptions,<sup>112</sup> for conducting a reasonable search and seizure. In the administrative search context, where the government searches to prevent or abate health and safety hazards,<sup>113</sup> the Court has established less stringent standards. In this area, the Court has reasoned that inspections

upholding as reasonable the prison's practice of conducting body cavity searches. *Id.* at 558. See *supra* notes 81-86 and accompanying text.

<sup>104</sup> See *supra* notes 41-56 and accompanying text.

<sup>105</sup> See *supra* notes 95-103 and accompanying text.

<sup>106</sup> See *supra* notes 17-21 and accompanying text.

<sup>107</sup> See *supra* note 20 and accompanying text.

<sup>108</sup> *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

<sup>109</sup> *Id.* at 21.

<sup>110</sup> *Gianelli & Gilligan*, *supra* note 60, at 1066; *Amsterdam*, *supra* note 19, at 358. See *United States v. Ortiz*, 422 U.S. 891, 896 (1975) (Court always has regarded probable cause as the minimum requirement for lawful search); *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964) (reasons for preferring warrants go to the foundations of the fourth amendment); *Terry*, 392 U.S. at 21 n.18 (specificity is a "central teaching of this Court's Fourth Amendment jurisprudence").

<sup>111</sup> See, e.g., *Winston v. Lee*, 470 U.S. 753, 760 (1985).

<sup>112</sup> See *infra* note 123 for exceptions to the standard fourth amendment warrant requirement.

<sup>113</sup> *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967). The Court in *Camara* addressed the constitutionality of housing code enforcement inspection programs. For a discussion of *Camara*, see *infra* notes 131-35 and accompanying text. In distinguishing administrative from criminal searches, the Court stated:

[u]nlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.

*Camara*, 387 U.S. at 535.

may be the only effective way to achieve compliance with health and safety standards<sup>114</sup> and traditional fourth amendment requirements might frustrate the governmental purpose behind the search.<sup>115</sup> Furthermore, in addition to the requirements of reasonableness that obtain in an administrative or criminal context, courts have looked to the factors of reasonableness that the Supreme Court emphasized in evaluating the reasonableness of a blood extraction search when evaluating a search which intrudes on an individual's right to be secure in his or her person.<sup>116</sup> In sum, an assessment of the reasonableness of a urinalysis search of a prisoner requires a multifaceted inquiry which considers the context in which the search takes place and the special concerns that a search of the person presents.

*A. The Reasonableness of Searches in the Criminal and Administrative Settings*

In the prison context, the distinction between prison searches as law enforcement or administrative is blurred.<sup>117</sup> The Court in *Bell v. Wolfish*, however, established that prison officials can conduct warrantless body cavity searches on a routine basis, based on no individual suspicion of misconduct.<sup>118</sup> Thus, a determination of a principled basis upon which to evaluate the reasonableness of prison urinalysis search programs requires an understanding of the protective objectives of the traditional fourth amendment requirements in the criminal setting. In addition, although the Court has departed from traditional fourth amendment restrictions, particularly in the administrative search context, it has not abandoned the objectives of those traditional protections. Rather, the Court has set forth less restrictive substitutes which support the same objectives.

The traditional fourth amendment requirements — probable cause, warrants, and specificity — provide fundamental safeguards against unreasonable searches and seizures. First, the probable cause standard requires that officials wishing to search have antecedent justification for a search.<sup>119</sup> Officials must show sufficient indicia of suspicion — termed probable cause — that they will find inculpatory evidence in the place or on the person they will search.<sup>120</sup> Second, the probable cause standard ensures that the facts which give rise to the suspicion are capable of measurement and hence reviewable against an objective standard.<sup>121</sup>

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<sup>114</sup> *Camara*, 387 U.S. at 535.

<sup>115</sup> *Id.* at 533.

<sup>116</sup> See *Schmerber*, 384 U.S. 757. See *infra* notes 147–64 and accompanying text for a discussion of courts that have looked to *Schmerber* in assessing the reasonableness of a person search. The Court in *Schmerber* highlighted the distinction between searches of the person and searches of an individual's property interests — that is, an individual's papers or apartment.

<sup>117</sup> *Gianelli and Gilligan*, *supra* note 60, at 1083. See *infra* notes 297–302 and accompanying text.

<sup>118</sup> 441 U.S. 520, 560 (1979).

<sup>119</sup> See, e.g., *United States v. Ortiz*, 422 U.S. 891, 896 (1975); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

<sup>120</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) ("some quantum of individualized suspicion" required). See also Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961) (Probable cause requires that "two conclusions . . . must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched.").

<sup>121</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) ("the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement

The warrant standard requires that officials seek search warrants, authorizing the search, issued by a "neutral and detached magistrate."<sup>122</sup> The Court has deemed warrantless searches unreasonable, with only limited "jealously and carefully drawn" exceptions.<sup>123</sup> The significance of the warrant requirement lies in its imposition of a judicial decisionmaker between the privacy interests of the person to be searched and the official "in the field."<sup>124</sup> Thus, the warrant requirement provides a check on the ability of low-level officials to exercise arbitrary power. In addition, warrants provide the individual to be searched with the means of verifying the lawful limits of the searcher's power to search.<sup>125</sup> Finally, the courts have required that the warrant particularly describe the item or matters to be seized.<sup>126</sup> The specificity requirement limits the search to the items described in the search warrant<sup>127</sup> and thus limits the search to the intrusion necessitated by the search objectives.

Although the Court has developed these traditional fourth amendment protections — probable cause, warrants, and specificity — primarily in the context of crime investigation, the Court expressly has noted that the protection of the fourth amendment does not apply only when a criminal investigation is under way. According to the Court, the fourth amendment protects the personal privacy of all citizens, and not just those individuals suspected of criminal activity.<sup>128</sup> Thus, under the Court's traditional requirements, the government ordinarily could conduct the search of a person as part of an inspection only pursuant to a search warrant based on probable cause that the particular person to be searched had violated a regulation which the inspection sought to enforce.

The Court has developed departures from the usual fourth amendment restraints, however, in the context of both criminal and administrative searches, where the governmental intrusion is necessary to fulfill a traditional government function ensuring a strong government interest. For example, the Court has upheld warrantless frisk searches based on less than probable cause of those persons reasonably stopped for suspicion of criminal activity because of the governmental law enforcement need to protect the

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against an 'objective standard,' whether this be probable cause or a less stringent test."). Professor LaFave describes the quantum of evidence that constitutes probable cause as "somewhere between bare suspicion and proof beyond a reasonable doubt." W. LaFAVE, *supra* note 27, at 184. The information must "warrant a man of reasonable caution to reach these conclusions." *Id.*

<sup>122</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948).

<sup>123</sup> *Jones v. United States*, 357 U.S. 493, 499 (1958). Professor Amsterdam lists three categories of exceptions: "consent searches, a very limited class of routine searches, and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable." Amsterdam, *supra* note 19, at 358. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (consent of suspect); *Chimel v. California*, 395 U.S. 752, 763 (1969) (searches incident to lawful arrest); *Harris v. United States*, 390 U.S. 234, 236 (1968) (plain view); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring) (hot pursuit); *Schmerber*, 384 U.S. at 770 (exigent circumstances).

<sup>124</sup> *Camara*, 387 U.S. at 532.

<sup>125</sup> *Id.*

<sup>126</sup> See, e.g., *Terry*, 392 U.S. at 21 n.18. The *Terry* Court stated, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.*

<sup>127</sup> Amsterdam, *supra* note 19, at 358.

<sup>128</sup> *Camara*, 387 U.S. at 530 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.").

searcher.<sup>129</sup> Similarly, the Court has upheld housing code inspections based on less than the traditional individualized probable cause standard because of the important governmental need to enforce minimum health and safety housing code regulations.<sup>130</sup> Thus, the Court has upheld practices directed at certain unique problems that the government could not address adequately under the usual fourth amendment limitations.

The departure from traditional fourth amendment search protections finds its theoretical underpinnings in the 1966 case of *Camara v. Municipal Court*.<sup>131</sup> The Supreme Court in *Camara* upheld periodic municipal safety inspections of dwellings without the traditional quantum of individualized probable cause as to conditions in any specific dwelling.<sup>132</sup> The Court reasoned that the city would not be able to accomplish an acceptable level of code enforcement under the traditional probable cause standard.<sup>133</sup>

Significantly, the *Camara* Court held that a balancing process, weighing the degree of intrusion into the personal privacy and dignity that attends a periodic inspection against the need to search, would determine the level of suspicion or probable cause required in these circumstances.<sup>134</sup> Using this balancing approach, the Court found that an area search without specific information as to a particular building could be reasonable.<sup>135</sup> Nevertheless, the Supreme Court later refused to adopt a balancing test to determine the necessary level of antecedent justification to search in all cases.<sup>136</sup> The

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<sup>129</sup> *Terry*, 392 U.S. at 27. The Court in *Terry* created an exception to both the warrant and probable cause requirements to permit brief seizures of the person for investigation and a frisk for weapons incident to the stop. *Id.* The Court stated, "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause to arrest." *Id.* at 24. The Court limited the search, however, to a search for weapons and limited the search further to that which is necessary to discover a weapon — a limited search of the outer clothing. *Id.* at 24–26.

<sup>130</sup> *Camara*, 387 U.S. at 535–37. See *infra* notes 131–46 and accompanying text.

<sup>131</sup> 387 U.S. 523 (1966).

<sup>132</sup> *Id.* at 534.

<sup>133</sup> *Id.* at 536.

<sup>134</sup> *Id.* at 536–37. Professors Gianelli and Gilligan conclude that the Court in recent years has altered the balancing components in *Camara* — the "need to search" and "the invasion which the search entails" — to balance "the public interest" against "the individual's right to personal security free from arbitrary interference by law officers." Gianelli and Gilligan, *supra* note 60, at 1070 n.167 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). As they point out, the individual's interest has thus replaced the scope of the invasion or intrusion "in the balancing calculus." *Id.* The Court in *Winston* appears to have confirmed this replacement, describing the balancing components as the state's need for the evidence and the extent of the intrusion on the individual's privacy interests. *Winston*, 470 U.S. at 763.

<sup>135</sup> *Camara*, 387 U.S. at 538. The "persuasive factors" in the balance included the Court's finding of a long history of judicial and public acceptance of such inspections, the strong public stake in preventing or abating dangerous conditions and the government's inability to achieve acceptable results by any other technique, and the "relatively limited invasion of the urban citizen's privacy" where the inspections were non-personal and non-criminal in nature. *Id.* at 537. At least one commentator has noted that the reasoning behind the first factor is questionable — long standing acceptance easily could be a reflection of long standing acquiescence. W. LaFAVE, *supra* note 27, at 185. For a discussion of the weaknesses inherent in *Camara*'s three persuasive factors, see *id.* at 185–89. Professor LaFave describes the "long history of judicial and public acceptance" as "vulnerable from the point of view of both accuracy and cogency." *Id.* at 185.

<sup>136</sup> See, e.g., *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979). The Court in *Dunaway* stated, "protections intended by the Framers could all too easily disappear in the consideration and

Court did employ thereafter the *Camara* balancing approach in upholding a variety of other searches incident to traditional governmental regulatory functions.<sup>137</sup>

Despite the *Camara* Court's relaxed balancing approach to determine the level of antecedent justification necessary to conduct what have come to be known as "inspections" or "regulatory searches,"<sup>138</sup> the *Camara* Court insisted on measures that would ensure that fourth amendment interests were protected in these cases. Most importantly, the administrative dwelling search contemplated by the Court in *Camara* required a warrant,<sup>139</sup> even if the level of suspicion necessary to support that warrant was less than probable cause for a particular building.<sup>140</sup> The *Camara* Court envisioned that the inspection warrant would issue pursuant to "reasonable legislative or administrative standards" for conducting an area inspection.<sup>141</sup> Thus, a magistrate authorizing a search or a reviewing court would look for an established inspection policy and then decide whether the authority exercised in a particular case was consistent with that policy.<sup>142</sup>

Moreover, the inspections contemplated by the *Camara* Court could occur only if the city followed procedures to ensure that it chose those subject to search on the basis of neutral criteria. Most importantly, the Court noted that the searches were nonpersonal; everyone in the area would be subject to search.<sup>143</sup> The Court stated that the nonpersonal nature of the health and welfare searches would lessen their intrusiveness.<sup>144</sup>

In addition, the Court in *Camara* stipulated that the warrant would be "suitably restricted."<sup>145</sup> In contrast to criminal investigations, the inspections in *Camara* were "housekeeping inspections"<sup>146</sup> designed to ensure compliance with the housing code and thereby detect and prevent fire, health, safety, and sanitation hazards.<sup>147</sup> In other words, the searches were primarily preventative and not for the purpose of gathering evidence expressly in anticipation of criminal prosecution.

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balancing of the multifarious circumstances presented by different cases . . . . A single, familiar standard is essential to guide police officers." *Id.*

<sup>137</sup> See, e.g., *United States v. Ramsay*, 431 U.S. 606 (1977) (upholding search of international mail); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (upholding warrantless inspection of premises with liquor licenses); *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding statute authorizing warrantless inspection of underground and surface mines); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975) (upholding warrantless urine screening of army personnel); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966) (upholding search of international travelers).

<sup>138</sup> See, e.g., W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* 187 (1985).

<sup>139</sup> *Camara*, 387 U.S. at 534. In fact *Camara* overturned the earlier decision in *Frank v. Maryland*, which held that warrantless administrative inspections were constitutional. 359 U.S. 360 (1959). Under *Frank*, one who refused to admit the inspector could be convicted for his or her refusal. *Id.* at 367. *Camara* allowed warrantless housing code inspections only in the event of an emergency. *Camara*, 387 U.S. at 539.

<sup>140</sup> *Camara*, 387 U.S. at 539.

<sup>141</sup> *Id.* at 538.

<sup>142</sup> See *id.*

<sup>143</sup> *Id.* at 537.

<sup>144</sup> *Id.* Professor LaFave comments, "[a] routine inspection that is part of a periodic or area inspection plan does not single out any one person as the object of official suspicion." W. LAFAYE, *supra* note 27, at 190. See also *Tucker*, 613 F. Supp. at 1130-31 (to reduce fears, prison should have informed the prisoners that a substantial number of fellow inmates would be tested).

<sup>145</sup> *Camara*, 387 U.S. at 539.

<sup>146</sup> Gianelli and Gilligan, *supra* note 60, at 1083 n.242 and accompanying text.

<sup>147</sup> *Camara*, 387 U.S. at 535.

In sum, the *Camara* Court held that area-wide health and welfare inspections of dwellings could be reasonable if the city conducted the inspections with a warrant<sup>148</sup> and if the searches were nonpersonal and noncriminal in nature.<sup>149</sup> Most importantly, *Camara* ensured that administrative searches impinging on fourth amendment interests would not be isolated from judicial scrutiny. Such searches would be initiated with judicial approval and their validity would be capable of judicial review against a measurable standard.

### B. Reasonableness in the Context of Body Searches

Beyond the traditional threshold requirements of probable cause and warrants in the criminal context and their less stringent substitutes in the administrative search area, the Court in *Schmerber v. California* considered other factors for determining reasonableness where the governmental invasion intrudes upon an individual's interests in bodily integrity, human dignity, and privacy.<sup>150</sup> In *Schmerber* the Court addressed the reasonableness of extracting a blood sample without a warrant from an unconsenting criminal defendant to detect intoxication.<sup>151</sup> The Court recognized that the standard fourth amendment protections of probable cause and warrants would be the minimal requirements for reasonableness, reasoning that bodily intrusions necessitate informed, detached, and deliberate determinations prior to search.<sup>152</sup> The Court in *Schmerber* considered the level of likelihood that intoxication would be found,<sup>153</sup> the extent of the intrusion upon the individual's personal privacy and bodily integrity,<sup>154</sup> the manner of the blood extraction,<sup>155</sup> and the effectiveness of the test performed.<sup>156</sup>

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<sup>148</sup> *Id.* at 534.

<sup>149</sup> *Id.* at 537. The *Camara* Court stated that "inspections are neither personal in nature nor aimed at the discovery of evidence of crime" — that is, accusatory in nature. *Id.* If a search yielded illegality, however, such as illegal drugs, a criminal prosecution could follow. If the government had obtained the evidence constitutionally, the prosecution could use the evidence. *United States v. Skipwith*, 482 F.2d 1272, 1277-78 (5th Cir. 1973). The District of Columbia Circuit Court described the primary purpose of the military urinalysis searches as health and welfare: "[a]ny punitive actions that might subsequently follow are incidental." *Committee for GI Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975).

<sup>150</sup> 384 U.S. 757, 767-68 (1965). For a discussion of *Schmerber*, see *supra* notes 41-46 and accompanying text. The Court stated that "[b]ecause we are dealing with intrusions into the human body rather than with State interferences with property relationships or private papers — 'houses, papers, and effects' — we write on a clean slate." *Id.* See also *Winston*, where the Court stated that beyond the ordinary requirements of the fourth amendment, "*Schmerber's* inquiry considered a number of other factors in determining the 'reasonableness' of the blood test." 470 U.S. at 761.

<sup>151</sup> *Schmerber*, 384 U.S. at 768-71.

<sup>152</sup> *Id.* at 770. Because probable cause to arrest preceded the blood test, the only fourth amendment protection lacking in *Schmerber* was the existence of a warrant. *Id.* Although the Court held that the threatened destruction of evidence created exigent circumstances permitting a warrant exception, it stressed that the fourth amendment requires search warrants where intrusions into the body are concerned. *Id.*

<sup>153</sup> *Id.* at 768-70.

<sup>154</sup> *Id.* at 771.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The Court also looked at the reasonableness of a warrantless search under the circumstances and found that the metabolism of blood alcohol created exigencies which permitted a warrantless search. *Id.* at 770-71. See also *Bell*, for very similar guidelines in the analysis of body

In response to these inquiries the Court emphasized significant factors that led to the conclusion that the blood extraction search in *Schmerber* was reasonable. First, the likelihood of discovering the evidence of intoxication sought was substantial. The police officers had arrested Schmerber, based upon probable cause, for driving while intoxicated.<sup>157</sup> Second, the Court found that the procedure did not significantly impose upon the individual's sense of personal privacy and security. The Court considered blood extractions commonplace in a society where individuals routinely are asked to give blood samples.<sup>158</sup> Third, medical personnel performed the extraction in a hospital setting.<sup>159</sup> Finally, the Court found that extraction of blood samples for chemical analysis is a highly effective method of determining the degree of alcohol content in a person's blood.<sup>160</sup>

Almost twenty years after *Schmerber*, in *Winston v. Lee*, the Court reemphasized the concerns of the Court in *Schmerber* in evaluating the reasonableness of a state order to compel a criminal defendant to undergo a surgical operation to remove a bullet from his body.<sup>161</sup> The Court in *Winston* expressly adopted a *Schmerber* framework of analysis.<sup>162</sup> The Court in *Winston*, in concluding that the surgical search was unreasonable, placed particular emphasis on the state's possession of substantial evidence which vitiated the need to surgically recover the bullet.<sup>163</sup> In sum, the principal inquiries upon which the

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cavity searches: "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." 441 U.S. at 559.

<sup>157</sup> *Schmerber*, 384 U.S. at 768. Schmerber and a companion had struck a tree with a car that Schmerber was "apparently driving." *Id.* at 758 n.2. The police arrested Schmerber while he was receiving treatment at the hospital. *Id.*

<sup>158</sup> *Id.* at 771. The Court noted that individuals routinely are asked to give blood samples upon entering the military, applying for a marriage license, or undergoing a periodic physical exam. *Id.* at 771 n.13. As the Court later stated in *Winston*, "[i]ntrusions . . . [which] damage the individual's sense of personal privacy and security . . . are thus subject to the Fourth Amendment's dictates. . . . *Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." 470 U.S. at 762. Compare with *Terry*, 392 U.S. at 24-25 (limited search of outer clothing for weapons is likely to be an annoying, frightening, and perhaps humiliating experience).

<sup>159</sup> *Schmerber*, 384 U.S. at 771. The Court noted that:

We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment — for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

*Id.* at 771-72. See also *Bell*, 441 U.S. at 559 (where the search is conducted is an important factor in evaluating the reasonableness of a search).

<sup>160</sup> *Schmerber*, 384 U.S. at 771.

<sup>161</sup> 470 U.S. 753, 755 (1985).

<sup>162</sup> *Id.* at 760. As in *Schmerber*, the *Winston* Court stressed the necessity of prior deliberation and authorization to search in the form of probable cause and a warrant. *Id.* at 760-61. Furthermore, the Court looked to the likelihood that the search would produce evidence of crime, *id.* at 759, the extent of the intrusion on the defendant's privacy interests, *id.* at 761, and the manner of extracting the bullet, *id.* at 763-65. In addition, the Court looked to the state's need, in the face of all the other evidence gathered, to recover the bullet. *Id.* at 765. Indeed, throughout the entire fact and background section of the opinion, the Court refers to *Schmerber*. See *id.* at 755 (opinion begins with description of *Schmerber* facts); *id.* at 759-63 (opinion outlines *Schmerber*'s concerns).

<sup>163</sup> *Id.* at 765-66.

Court focused in *Schmerber* are important to the evaluation of the reasonableness of searches which intrude upon human body, privacy, and dignity interests.<sup>164</sup>

### C. Reasonableness of Urinalysis Searches in the Prison Setting

The lone Supreme Court prison person search decision, *Bell v. Wolfish*, provides little guidance as to what factors indicate reasonableness in the prison setting.<sup>165</sup> *Bell* did establish, however, that prison officials routinely can search prisoners' persons without the traditional fourth amendment requirements for reasonableness — warrants and probable cause — that obtain in a criminal search situation.<sup>166</sup> In *Bell*, the Court held that a prison could conduct warrantless, visual body cavity searches on a routine basis following the person's contact with visitors from outside the prison on less than probable cause.<sup>167</sup> In reaching this decision, however, the Court failed to elaborate as to when or under what conditions such searches could be lawful.<sup>168</sup> The Court did comment, however, that the manner of search should be reasonable, citing *Schmerber v. California*.<sup>169</sup> In addition, the Court noted that courts must conduct the reasonableness inquiry in a spirit of "wide ranging" deference to prison officials in the adoption and implementation of policies needed to preserve prison security.<sup>170</sup>

Because the prison searched the prisoners in *Bell* after contact with visitors,<sup>171</sup> *Bell* arguably leaves open the question of whether courts should uphold periodic prison searches of the person not based on probable cause, reasonable suspicion, or even contact with outsiders, but rather on a generalized, unit-wide security concern.<sup>172</sup> The mere fact of contact with outsiders in *Bell* supplies at least minimal cause to suspect that the prisoner

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<sup>164</sup> See *infra* notes 177–90 for a discussion of cases that apply *Schmerber* considerations to the evaluation of the reasonableness of urine searches.

<sup>165</sup> 441 U.S. 520, 560 (1979). The Court merely stated that a visual body cavity "inspection" must "be conducted in a reasonable manner." *Id.* Searches of cells and belongings therein are not covered by the fourth amendment, and thus traditional fourth amendment protections are not applicable. *Hudson*, 468 U.S. at 525–26, 528 n.8. The Court in *Bell* commented, "even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a [cell] search." *Bell*, 441 U.S. at 557.

<sup>166</sup> *Bell*, 441 U.S. at 558–60.

<sup>167</sup> *Id.* at 560.

<sup>168</sup> *Id.* As the federal district court in *Storms* noted:

The details of this balancing process [to determine reasonableness] were left unstated in *Bell*. Lower courts are left to reason from the ultimate holding: a prisoner's Fourth Amendment expectation of privacy does not extend so far as to shield him or her from a humiliating body cavity search following a contact visit . . . whether or not there is a basis independent of the mere fact of the visit to suspect the prisoner of smuggling contraband.

*Storms*, 600 F. Supp. at 1219.

<sup>169</sup> *Id.* (citing *Schmerber*, 384 U.S. at 768–72). See *supra* notes 150–64 and accompanying text for a discussion of *Schmerber*. The New York federal district court in *Storms* viewed *Bell*'s reference to *Schmerber* as express approval of the *Schmerber* reasonable manner requirement. *Storms*, 600 F. Supp. at 1219.

<sup>170</sup> *Bell*, 441 U.S. at 547. *Accord Tucker*, 613 F. Supp. at 1128 (Court in *Bell* "held that the basic test is one of 'reasonableness'").

<sup>171</sup> *Bell*, 441 U.S. at 559.

<sup>172</sup> See Note, *Body Searches*, *supra* note 67, at 1037.

may be carrying contraband.<sup>173</sup> Outsiders are possible drug or weapon sources.<sup>174</sup> Nevertheless, the courts that have addressed the issue of what fourth amendment protections should obtain when prisons implement urinalysis programs agree that prison officials reasonably can search prisoners without warrants and based on no showing of particular facts that the individual to be searched has aroused probable cause or any articulable level of suspicion.<sup>175</sup> In 1984, the New York federal district court in *Storms v. Coughlin* concluded that if the minimal level of suspicion in *Bell* — contact with visitors — could support routine person searches, then the judicially noted drug problem prevalent amongst prisoners generally could support wholly random urine testing if conducted in a reasonable manner.<sup>176</sup>

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<sup>173</sup> *Id.* at 1052. Consistent with the *Bell* holding are searches of the person undertaken under a policy of routinely searching prisoners without probable cause when they enter incarceration, *United States v. Morin*, 378 F.2d 472, 475 (2d Cir. 1967), before transfer to another institution, *Cline v. United States*, 116 F.2d 275, 276 (5th Cir. 1940) (*per curiam*), after return from certain work areas, *Smith v. State*, 1 Md. App. 297, 300, 229 A.2d 723, 725 (1967), before and after conference visits with attorneys, *Adams v. Carlson*, 488 F.2d 619, 624 (7th Cir. 1973), and before transfer to the custody of a marshal for court appearances, *Daughtery v. Harris*, 476 F.2d 292, 294 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973). All of these routine searches represent situations in which the prisoner's contact with outsiders increases the chances of finding contraband on the prisoner. As one commentator argues, the governmental interest in suspecting and preventing the influx of drugs may be strongest at the point of entry. Note, *Body Searches*, *supra* note 67, at 1054. Internal searches conducted on prisoners who have had no contact with the outside and who were presumably searched on previous occasions — that is, after contact with visitors — are much less likely to yield drugs. *Id. See, e.g., Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (court viewed strip searches conducted before and after non-contact visits with particular concern, although court did not dispose of reasonableness issue), *on remand*, 527 F. Supp. 1182 (S.D. Ill. 1980). A recent Washington case, however, upheld a pat-down search of a prisoner without any suspicion, pursuant to prison regulations permitting a guard to conduct a pat-down of a prisoner at any time. *State v. Baker*, 28 Wash. App. 423, 424–25, 623 P.2d 1172, 1172–73 (1981).

<sup>174</sup> Note, *Body Searches*, *supra* note 67, at 1052.

<sup>175</sup> *See, e.g., Tucker*, 613 F. Supp. at 1128 (court would permit testing if practice served security, order, and discipline objectives, was not an exaggerated response to legitimate institutional needs, and if it reflected an informed judgment of prison administrators); *Storms*, 600 F. Supp. at 1220–21 (court would permit testing if selection procedure completely random); *Jensen*, 589 F. Supp. at 36–39 (upholding program of random urinalysis testing); *Hampson*, 319 N.W.2d at 799 (upholding search program where conducted with notice, in an infirmary); *Ewing v. State*, 160 Ind. App. 138, 149, 310 N.E.2d 571, 578 (1974) (*en banc*) (upholding warrantless testing of probationer under “emergency doctrine”). *But cf. W. LaFAVE*, *supra* note 27, at 407. Professor LaFave doubts that a prison could subject all inmates to blood sample testing as a means of determining which inmates were taking drugs.

One state court decision holds that the government can subject probationers to urinalysis searches based on a destruction or dissipation of evidence rationale. *Ewing*, 160 Ind. App. at 149, 310 N.E.2d at 578 (*en banc*). As one commentator points out, in the prison setting, the argument that prisons are dangerous and are thus continuing emergency situations fails to consider that it may well be that at least some areas in the “free world” pose as much constant danger as the prison. *Singer*, *supra* note 60, at 68.

<sup>176</sup> 600 F. Supp. 1214, 1220–21 (S.D.N.Y. 1984). The *Storms* court reasoned that the body cavity searches in *Bell* were “very nearly gratuitous,” where the prison searched visitors before the visit, required prisoners to wear one-piece jumpsuits which zipped up the front, and visits took place in a glass-enclosed room under officer surveillance. The *Storms* court noted that “[i]n order to lodge contraband in an anal or vaginal cavity, the prisoner would plainly be required to disrobe from the waist up while under the gaze of guards. There was virtually no possibility that contraband would be found . . . . The random urinalyses at Ossining seem more likely to turn up evidence of miscon-

Beyond the threshold determination that prisons can conduct wholly random body searches of prisoners without probable cause and warrants, courts have set forth the basic contours of a reasonable urinalysis search based primarily on the factors which indicate reasonableness in the *Schmerber* Court's evaluation of blood extraction searches.<sup>177</sup> The *Schmerber* considerations most important to the reasonableness of urinalysis testing include the extent of the intrusion upon the individual's personal privacy and bodily integrity, the manner of the urine testing, and the effectiveness of the test performed.<sup>178</sup> For example, the federal district court in *Storms v. Coughlin* expressly adopted a *Schmerber* reasonableness analysis.<sup>179</sup> In support of its use of the *Schmerber* analysis, the *Storms* court described urinalysis tests as analogous to the blood tests conducted in *Schmerber* in their intrusiveness upon both bodily integrity and privacy and dignity interests where the search as conducted involves intimate bodily functions.<sup>180</sup> In addition, the *Storms* court noted that the Supreme Court's decision in *Bell*, upholding body cavity searches of prisoners,<sup>181</sup> expressly approved the *Schmerber* reasonableness manner requirement.<sup>182</sup> Similarly, the federal district court in *Tucker v. Dickey* looked to the manner of testing and scope of the intrusion<sup>183</sup> factors of the *Schmerber* decision.<sup>184</sup>

#### 1. The Manner of Urinalysis Testing as it Reflects upon Reasonableness

Both the *Storms* and *Tucker* courts found the extent of the invasion from urinalysis upon the individual's privacy interests significant, deeming urinalysis tests as equivalent to the intrusion involved in both body cavity and blood searches.<sup>185</sup> Given this important

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duct . . . ." *Id.* at 1220. The dissent in *Bell* pointed out the gratuitous nature of the *Bell* searches when it criticized the majority's finding that justification existed to uphold wholly random searches. *Bell*, 441 U.S. at 577-78 (Marshall, J., dissenting). Professor LaFave agrees with the dissent in *Bell* and questions the majority's showing that there was a sufficient security risk that warranted "such Draconian measures." W. LaFAVE, *supra* note 27, at 217-18 (1985 Supp.). Ironically, the *Storms* court then cited the *Bell* dissent's criticism to uphold random searches at Ossining. *Storms*, 600 F. Supp. at 1220 (citing *Bell*, 441 U.S. at 577-78).

<sup>177</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130; *Storms*, 600 F. Supp. at 1218; *Hampson*, 319 N.W.2d at 799-800.

<sup>178</sup> See *supra* notes 151-64 and accompanying text for a discussion of the *Schmerber* considerations. The likelihood of discovering the evidence sought is an additional concern in *Schmerber*. See *supra* note 157 and accompanying text. This factor is of lessened importance in the prison context because the Supreme Court in *Bell* upheld body cavity searches of prisoners based on the arguably minimal chance of finding contraband. See *supra* note 176 and accompanying text.

<sup>179</sup> 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984).

<sup>180</sup> *Id.* See *supra* notes 52-55 and accompanying text.

<sup>181</sup> See *supra* notes 75-86 and accompanying text.

<sup>182</sup> *Storms*, 600 F. Supp. at 1219. See also *Tucker*, 613 F. Supp. at 1128 (Court in *Bell* "held that the basic test is one of 'reasonableness'").

<sup>183</sup> 613 F. Supp. 1124, 1129-30 (D. Wis. 1985). See also *Hampson*, 319 N.W.2d at 799-800 (quoting *Schmerber*, 384 U.S. at 771) (looks to effectiveness and manner of testing prongs of *Schmerber*, finding manner of testing reasonable where urine tests involve no risk, trauma, or pain).

<sup>184</sup> *Tucker*, 613 F. Supp. at 1129-30. The *Tucker* court cited *Bell* as commanding an inquiry into the scope of the intrusion on personal rights. *Id.* at 1129 (citing *Bell*, 441 U.S. at 559). The court quoted directly, however, the analysis of the *Storms* court in which *Storms* looked to *Schmerber*. *Id.* (quoting *Storms*, 600 F. Supp. at 1218, 1220 (quoting *Schmerber*, 384 U.S. at 769-70)). As the *Storms* court noted, the Supreme Court in *Bell* did not state the details of its balancing process, leaving the lower courts to reason from its holding only. *Storms*, 600 F. Supp. at 1219.

<sup>185</sup> See *Storms*, 600 F. Supp. at 1218 (analogous to blood tests); *id.* at 1220 (entitled to the same level of scrutiny accorded to body cavity searches); *Tucker*, 613 F. Supp. at 1129-30 (quoting *Storms*

underlying consideration, the *Storms* and *Tucker* courts focused particular attention on the manner of testing prong of the *Schmerber* decision, looking at how many guards or fellow prisoners could view the testing,<sup>186</sup> what time of day the prison searched the prisoner,<sup>187</sup> and whether the prison provided the prisoner notice of the search and its purpose.<sup>188</sup> According to the *Storms* court, if these searches were conducted in the view of anyone other than the testing officer, including fellow prisoners, when there is no legitimate security need to do so, they would be unreasonable.<sup>189</sup> Similarly, courts have looked at the reasonableness of the manner of urinalysis programs based partly upon the location in which the prison officer conducts the searches and whether that location ensures maximum privacy.<sup>190</sup> The *Tucker* court found a genuine issue of fact withstanding a grant of summary judgment as to whether the manner in which the prison searched the plaintiff-prisoner violated his rights when the prison never informed the prisoners of a drug testing program, the prisoner was awakened at five a.m., and the guard merely handed him a note explaining the proceedings and told him to urinate into a container.<sup>191</sup>

In addition, courts that have focused on the reasonableness of the prison's manner of testing have stressed concerns that were of significant importance in the Supreme Court's departure from traditional fourth amendment protections in the area of the administrative search. The Court in *Camara v. Municipal Court* held that area-wide health and welfare inspections of dwellings could be reasonable if conducted with a warrant

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analysis). The *Storms* court recognized that debate as to which search is more degrading differs as to degree, not kind. *Storms*, 600 F. Supp. at 1220. The court stated that "[b]oth are degrading. It is this basic offense to human dignity, rather than any particular style of causing offense, which sets this type of search apart from traditional types." *Id.* Accordingly, the court deemed the prisoners' response to the tests as "extremely negative." *Id.* at 1222.

<sup>186</sup> See, e.g., *Storms*, 600 F. Supp. at 1222. See also *Denike v. Fauver*, No. 83-2737, slip op. at 1-2 (D.N.J. April 16, 1984). See *infra* note 189 and accompanying text.

<sup>187</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130-31. See *infra* note 191 and accompanying text.

<sup>188</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130-31.

<sup>189</sup> *Storms*, 600 F. Supp. at 1222. The prisoners in *Storms* had alleged that the prison forced them to urinate in the presence of others and that members of the opposite sex who passed the bathroom where the searches were conducted could view the tests. *Id.* at 1224. The court credited the state's testimony that the prison conducted the searches in the presence of the testing officer only. *Id.* Nevertheless, the court commented that the state's attempt to show that it always conducted tests in the presence of one officer only was in effect an admission that security demands did not require that more than one testing officer conduct the search. *Id.* at 1222. Similarly, the *Bell* dissent found it significant that the prison conducted the body cavity searches upheld by the majority in the presence of other inmates because of time pressures. *Bell*, 441 U.S. at 577 (Marshall, J., dissenting). See also *Denike*, No. 83-2737, slip op. at 1-2 (D.N.J. April 6, 1984) (order dismissing with prejudice a prisoner's claim against the New Jersey department of corrections stipulated that prison must conduct urine testing in presence of officer of the same sex).

<sup>190</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130-31 (manner of testing questionable when prison guard awakened and directed prisoner, while still in his cell, to urinate into a container); *Storms*, 600 F. Supp. at 1216-17 (prison conducted tests in restroom hospital section of prison, in a corner urinal where passerby could not view the searches); *Hampson*, 319 N.W.2d at 799 (infirmary officials conducted tests in the infirmary). See also *Kane v. Fair*, Civ. No. 136229, slip op. at 8 (Super. Ct. Mass. Aug. 5, 1983) (injunction of prison's existing program on due process grounds required, among other protections, that prison test prisoners only in infirmary or place of maximum privacy).

<sup>191</sup> *Tucker*, 613 F. Supp. at 1130-31. The prison in *Tucker* instituted drug testing to study the prisoners' drug use and develop a policy. *Id.* at 1126. The testing thus would be anonymous and not used for disciplinary proceedings. *Id.* *Tucker*, however, was convicted at a disciplinary hearing for refusing to take the test. *Id.* at 1127.

and if nonpersonal and noncriminal in nature.<sup>192</sup> The *Camara* Court stated that the warrant would insure detached deliberation by a judicial officer prior to search, provide notice to the party searched of the appropriate limits of the searcher's authority, and limit the discretion of the searcher.<sup>193</sup>

Courts evaluating the reasonableness of urinalysis programs have not cited *Camara* but have stressed concerns identical to those raised in *Camara*: who has discretion to authorize and conduct searches,<sup>194</sup> what is the objective of the program as implemented,<sup>195</sup> does the prison search the prisoners in a random, nonpersonal fashion,<sup>196</sup> and does the prison give notice of the tests to prisoners.<sup>197</sup> For example, the federal district court in *Storms* concluded that the prison's urinalysis program was unreasonable because the prison could not demonstrate that its procedure was truly random.<sup>198</sup> In the *Storms* prison, the watch commander "randomly" chose cards inscribed with the prisoners' names from a bulletin board to which all the cards were pinned.<sup>199</sup> As the court noted, a guard could quite unconsciously pick the less-favored inmates for these "random" searches.<sup>200</sup> In addition to the potential for conscious or unconscious abuse, the court found this procedure offensive when readily available alternatives existed.<sup>201</sup> The court

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<sup>192</sup> 387 U.S. 523, 534, 537 (1967). Although the courts have not expressly categorized these searches as administrative in nature, commentators agree that the exception to the traditional fourth amendment requirements in the area of prison searches is based upon both *Camara* and *Terry* (discussed *supra* note 129 and accompanying text). See, e.g., Gianelli and Gilligan, *supra* note 60, at 1083 ("The doctrinale basis for regulating prison searches is supplied by *Camara*"); W. LAFAVE, *supra* note 27, at 405 ("under the *Camara-Terry* balancing test, a search of the person of a particular prisoner might be justified"); W. LAFAVE & J. ISRAEL, *supra* note 138, at 198 (under the *Camara* standardized procedures principle, prison can conduct routine or periodic searches); Singer, *supra* note 60, at 681 ("application of the *Camara-See* doctrines to prison might allow a prison to obtain a standing . . . search warrant" to search "every X number of days").

<sup>193</sup> *Camara*, 387 U.S. at 534, 537. For a discussion of *Camara*, see *supra* notes 131-49 and accompanying text.

<sup>194</sup> See, e.g., *Tucker*, 613 F. Supp. at 1128 (practice must be an informed judgment of prison administrators); *Storms*, 600 F. Supp. at 1223 (tests must be truly random — prison cannot allow searcher consciously or unconsciously to pick less favored inmates).

<sup>195</sup> See, e.g., *Tucker*, 613 F. Supp. at 1128 (tests must serve the needs of the institution for security, order, and discipline); *Storms*, 600 F. Supp. at 1223 (prison may not use tests to harass; prison must choose a selection procedure that serves legitimate security purpose); *Denike*, No. 83-2737, slip op. at 4 (D.N.J. April 6, 1984) (order stipulating dismissal requires corrections department to continue "to provide by standard that urine monitoring shall not be conducted as a means of punishment or discipline").

<sup>196</sup> See, e.g., *Storms*, 600 F. Supp. at 1223 (searches must be truly random); *Denike*, No. 83-2737, slip op. at 3-4 (D.N.J. April 6, 1984) (prison must base searches on reasonable suspicion or search all prisoners).

<sup>197</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130-31 (manner of testing potentially unreasonable where prison did not inform prisoners of program in advance); *Denike*, No. 83-2737, slip op. at 4 (D.N.J. April 6, 1984) (order stipulating dismissal requires that only experienced corrections officers of high rank could order all prisoners to be tested); *Hampson*, 319 N.W.2d at 799 (test reasonable where prison notifies prisoner a day in advance of a scheduled urine testing).

<sup>198</sup> *Storms*, 600 F. Supp. at 1223.

<sup>199</sup> *Id.* The state argued that the guard chose cards "with no thought given to the identity of the prisoner selected." *Id.*

<sup>200</sup> *Id.* The court stated "[b]ecause these tests involve both embarrassment and potential for punishment there is . . . the possibility of their abuse for purposes of harassment. In particular, prisoners may be targeted for testing simply to harass them." *Id.*

<sup>201</sup> *Id.* The court noted one simple alternative would be to put the cards into a box and draw them out blindly. *Id.*

concluded that prisoners were entitled to a preliminary injunction enjoining the prison from its method of selecting prisoners.<sup>202</sup> A similar concern with the discretionary power to subject prisoners to urine searches is evident in *Denike v. Fauver*, where a New Jersey federal district court ordered dismissal of a claim against the New Jersey Department of Corrections.<sup>203</sup> The *Denike* court stipulated that the Department of Corrections was required to submit to testing only prisoners who had aroused a "reasonable factual basis" for suspicion or to submit *all* prisoners to testing.<sup>204</sup> The stipulation required that only experienced corrections officers of high rank could order that all prisoners be tested and these officers could not delegate this authority.<sup>205</sup> In addition, the court required that the order be in writing.<sup>206</sup> The stipulation also required that the Department would "continue to provide by standard that urine monitoring shall not be conducted as a means of punishment or discipline" unless part of a disciplinary sanction.<sup>207</sup>

The *Tucker* court's evaluation of the reasonableness of the urinalysis program focused on the lack of notice to the prisoners of the drug testing program, which the prison implemented to study the prison's drug problem.<sup>208</sup> The court reasoned that advance notice of the existence of the testing could have informed the prisoner who was awakened at five a.m. in his cell of the purposes of the testing and that a substantial number of his fellow inmates also would be giving samples, making clear that the prison official had not singled out the prisoner for significantly intrusive testing.<sup>209</sup> The North Dakota Supreme Court upheld urine testing where the prison gave the inmates advance warning the day before their scheduled testing<sup>210</sup> and the penitentiary handbook set forth rules governing the urine screening procedures and the disciplinary sanctions to be imposed.<sup>211</sup>

In sum, courts have relied upon the manner-of-testing prong of the *Schmerber* decision to evaluate whether the prison reasonably has conducted a urinalysis search of

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<sup>202</sup> *Id.* at 1226.

<sup>203</sup> No. 83-2737 (D.N.J. April 6, 1984) (stipulation of dismissal with prejudice). Although the stipulation did not cite case law support for its conclusions, considerations such as authority to search and the preventative purposes of the search were fundamental factors supporting the *Camara* departure from traditional fourth amendment limitations in the area of administrative searches. See *id.* at 3-4.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 4.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Tucker*, 613 F. Supp. at 1130. See also *Hampson*, 319 N.W.2d at 797 (testing reasonable where inmates notified a day in advance of testing); *Kane*, Civ. No. 136229, slip op. at 8 (Super. Ct. Mass. Aug. 5, 1983) (in enjoining prison from using existing drug screening procedure on due process grounds, court ordered the prison to obtain future urine samples only after reasonable advance notice). Although the *Storms* court did not discuss advance notice, the prison in *Storms* had announced the program to prisoners, assuming that knowledge of testing would lessen drug use. *Storms*, 600 F. Supp. at 1216. The *Tucker* court commented that the notice in *Storms* was noteworthy because the *Storms* court upheld the random program, with the exception of its method of selection. *Tucker*, 613 F. Supp. at 1131.

<sup>209</sup> *Tucker*, 613 F. Supp. at 1130-31.

<sup>210</sup> *Hampson*, 319 N.W.2d at 797, 799. See also *Kane*, Civ. No. 136229, slip op. at 8 (Super. Ct. Mass. Aug. 5, 1983) (in enjoining prison from using existing drug screening procedure on due process ground, court ordered that future testing could take place provided prison obtains urine sample after reasonable advance notice).

<sup>211</sup> *Hampson*, 613 F. Supp. at 799 n.2.

a prisoner. These courts have viewed the location and timing of the testing and notice to the prisoners as significant to this inquiry. In addition, courts have focused on concerns expressed by the *Camara* Court, asking whether the prison adequately circumscribes discretion to authorize and conduct searches, chooses prisoners in a random, nonpersonal fashion, and notifies prisoners of the implementation and purposes of testing.

## 2. The Reliability of Urinalysis Testing as it Reflects on Reasonableness Under the Fourth Amendment

One court — the federal district court in *Storms v. Coughlin* — has looked to the effectiveness of the procedure prong of the *Schmerber* decision and has evaluated the reliability of the urinalysis testing equipment as an indication of the reasonableness of the search.<sup>212</sup> The Court in *Schmerber* considered a blood extraction from a criminal defendant reasonable in part because it viewed such testing as a highly effective means of determining the degree to which a person is intoxicated.<sup>213</sup> In addition to the Court's reference in *Schmerber* to the importance of the effectiveness of the test employed, the Court in *Delaware v. Prouse* found the stopping and searching of randomly selected automobiles to be unconstitutional because "[i]n terms of [meeting the governmental interest in discovering and deterring unlicensed drivers], the spot check did not appear sufficiently productive to qualify as a reasonable law enforcement practice under the fourteenth amendment."<sup>214</sup> If the urinalysis device employed is unable to discern drug use accurately and thus, it has the potential to inculcate the innocent and exculpate the guilty, under *Prouse* it would appear that a urinalysis may not be a "sufficiently productive mechanism to justify the intrusion upon fourth amendment interests" that such tests entail.

In this vein and citing *Schmerber*, the *Storms* court evaluated the reliability of the procedure to assess the reasonableness of the Ossining prison's urinalysis testing.<sup>215</sup> To evaluate the reliability of the test, the *Storms* court looked to other courts' evaluation of the reliability of urine-testing technology, in the context of prisoners' claims to denial of due process under the fourteenth amendment to the United States Constitution.<sup>216</sup> The *Storms* court found that evidence concerning the test's reliability did not warrant the

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<sup>212</sup> See *Storms*, 600 F. Supp. at 1221 ("The *Schmerber* Court, in analyzing reasonableness, looked to the reliability of the test . . .").

<sup>213</sup> *Schmerber*, 384 U.S. at 771. The Court, however, did not discuss at any length the reliability of the testing involved therein. For a discussion of *Schmerber*, see *supra* notes 41-46 & 172-89.

<sup>214</sup> 440 U.S. 648, 660 (1979).

<sup>215</sup> *Storms*, 600 F. Supp. at 1218, 1221. The *Storms* prison used the Syva manufacturer's Enzyme Multiplied Immunoassay Technique (hereinafter referred to as EMIT). The Syva Corporation is based in Palo Alto, California. For a discussion of EMIT, see *infra* notes 224-50 and accompanying text.

<sup>216</sup> *Storms*, 600 F. Supp. at 1221-22. For a discussion of the due process clause of the fourteenth amendment, see *supra* note 69 and *infra* notes 218-22 and accompanying text. The *Storms* court looked at *Jensen*, 589 F. Supp. 35 and *Kane*, Civ. No. 136229 (Super. Ct. Mass. Aug. 5, 1983). *Storms*, 600 F. Supp. at 1221. The *Kane* court concluded that the existing testing program was unreliable and violative of the prisoner's rights to due process under the fourteenth amendment to the United States Constitution. *Kane*, Civ. No. 136229, slip op. at 7 (Super. Ct. Mass. Aug. 5, 1983). The *Jensen* court concluded that the existing program was not unreliable and hence did not violate the prisoner's civil rights under 42 U.S.C.A. § 1983 (1982). *Jensen*, 589 F. Supp. at 38-39. Other courts which have evaluated reliability in the context of claims of denial of due process include *Higgs*, 616 F. Supp. 226; *Tucker*, 613 F. Supp. 1124, *Wykoff*, 613 F. Supp. 1504; *Peranzo*, 608 F. Supp. 1504.

issuance of a preliminary injunction but did raise an issue of substance which prevented the court from granting the defendant-prison's motion to dismiss.<sup>217</sup> Given the *Storms* court's analysis, however, the concerns raised by these courts with respect to the accuracy of the testing may shed light on the assessment of the reasonableness under the fourth amendment of a particular urinalysis program.

In determining whether a test is reliable under a due process analysis, the court asks not simply whether the test is reliable, but whether the test is sufficiently reliable such that its use as the basis for imposing sanctions against an individual does not offend constitutional standards.<sup>218</sup> Judicial acceptance of a scientific theory or instrument can only occur when the technology has "gained general acceptance in the particular field in which it belongs."<sup>219</sup> This general rule assures that those experts most qualified in the appropriate scientific community will have a "determinative voice."<sup>220</sup> The test need not be proven infallible, and experts need not unanimously accept it,<sup>221</sup> yet there must not be substantial doubts of the scientific devices' reliability and accuracy.<sup>222</sup>

Although many methods in analytical drug screening technology are currently available,<sup>223</sup> the Syva<sup>224</sup> manufacturer's Enzyme Multiplied Immunoassay Technique (hereinafter referred to as EMIT) is used widely in drug screening<sup>225</sup> because the technique is marketed as a urinalysis test to be performed on site by the prison's own personnel.<sup>226</sup> EMIT systems include all of the instrumentation and reagents needed to perform assays for several groups of substances.<sup>227</sup> Prison administrators particularly favor such on-site testing because it is typically much less costly to train and use prison employees than to use outside laboratories.<sup>228</sup> In addition, the use of outside laboratories can delay the receipt of test results and thereby undermine a stated goal of an effective disciplinary

<sup>217</sup> *Storms*, 600 F. Supp. at 1222.

<sup>218</sup> *Peranzo*, 608 F. Supp. at 1507. The *Peranzo* court noted that courts must evaluate the concept of "procedural adequacy" in light of the particular factual setting with which the state is concerned — that is, a criminal or prison disciplinary proceeding. *Id.* at 1508. The Court in *Wolff* noted that "the full panoply of rights due a defendant in a [criminal prosecution]" does not apply to a prisoner in a prison disciplinary proceeding. *Wolff*, 418 U.S. at 556.

<sup>219</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>220</sup> *Commonwealth v. Lykus*, 367 Mass. 191, 202, 327 N.E.2d 671, 677 (1975).

<sup>221</sup> *Id.* at 198, 327 N.E.2d at 675.

<sup>222</sup> *Commonwealth v. Fatalo*, 346 Mass. 266, 270, 191 N.E.2d 479, 481 (1963). As one court noted, optimal precision is not the constitutional norm, even when an individual's most fundamental right to the accurate determination of guilt in a criminal trial is at stake. *Peranzo*, 608 F. Supp. at 1507.

<sup>223</sup> See *supra* note 3.

<sup>224</sup> Syva Corporation, Palo Alto, California.

<sup>225</sup> For a 1983 non-inclusive list of Syva's customers, see Affidavit of Shenny Hitt at 2-4, *Kane*, Civ. No. 136229 (Super. Ct. Mass. Aug. 5, 1983) (Hitt was deposed as the Market Manager for Syva).

<sup>226</sup> See *supra* notes 6-8 and accompanying text. The EMIT literature states that because the tests "do not require specially licensed personnel, subjective interpretation of results or special handling techniques and safety precautions, they can be run by any trained staff member." Morgan, *supra* note 6, at 306.

<sup>227</sup> Divoll & Greenblatt, *The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, Not Heads*, 5 J. CLINICAL PSYCHOPHARMACOLOGY, 114, 115 (No. 2, April 1985).

<sup>228</sup> Affidavit of George Vose at 3, *Kane*, Civ. No. 136229 (Super. Ct. Mass. Aug. 5, 1983). See also Syva Systems and Services for On-Site Drug Detection, Pamphlet (1983 Syva Corp.) (on site testing offers quick response time, is carried on by "your own staff," can cut costs).

system — the quick and efficient meting out of disciplinary sanctions.<sup>229</sup> In sum, EMIT allows for large-scale screening by prison employees with readily available reagents and instruments at a reasonable cost and with speed.

The EMIT relies on immunochemistry<sup>230</sup> to detect the presence of various drugs in the body fluids.<sup>231</sup> EMIT, in effect, measures changes in light absorbency in the test fluids, once urine is added to the solution.<sup>232</sup> It does not measure the actual concentration of the drug itself.<sup>233</sup> By means of a small computer which compares the substance in question to known values, the device simply indicates on a card printout whether the urine contains the drug in question.<sup>234</sup>

A major source of criticism of the test, as with all scientific techniques relied upon to produce positive or negative indications, is the margin of error reflected in the test's false-positive rate — in other words, the percentage of tests that read positive even though no illicit substance is present in the urine.<sup>235</sup> Although the cause of most false-positives is unknown, the manufacturer and the scientific community at large do not dispute their existence, and contention thus arises as to how wide the margin of error actually is.<sup>236</sup> Because the test does not directly measure the concentration of drugs in

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<sup>229</sup> Affidavit of George Vose at 3, *Kane*, Civ. No. 136229 (Super. Ct. Mass. Aug. 5, 1983).

<sup>230</sup> See *supra* note 4.

<sup>231</sup> For a good description of the immunoassay method see Morgan, *supra* note 6, at 306–08. See also Divoll & Greenblatt, *supra* note 227, at 115. In brief, Doctors Morgan, Divoll, and Greenblatt describe the process as follows: an animal is injected with a drug to provoke the animal to produce immune chemicals, or antibodies. The antibodies will then bind to the drug. The antibodies subsequently are harvested from the animal's blood. An enzyme then is attached to the drug of interest, producing a drug-enzyme complex which is inactivated as a functional enzyme when the animal's drug antibody is placed in the same solution. The antibodies are added to the enzyme solution and the enzyme therefore is inactivated. If, however, a urine sample is added to the inactivated enzyme solution and the urine sample contains the drug in question, then the antibody will bind the free drug in the sample and bind less of the drug-enzyme complex. Any unbound drug-enzyme then becomes active. It in turn dissolves bacteria in suspension in the solution and clears the solution. A spectrophotometer then measures the clearing as a change in absorbence of light. Morgan, *supra* note 6, at 306–08; Divoll & Greenblatt, *supra* note 227, at 115.

<sup>232</sup> See *infra* note 265.

<sup>233</sup> Morgan, *supra* note 6, at 306. Dr. Morgan analogizes the use of a polygraph device, where variations in physiological measurements "may be viewed as if they were a reflection of lying," *id.* (emphasis in original), to urine screening. Dr. Morgan notes, "[u]rine cannot be peered into to see the tiny components of a dissolved drug. Techniques and manipulations are used that reflect and amplify some character of the drug molecule." *Id.* In the prison setting, the test's inability to determine how much or when a drug was taken is of diminished importance, because the use of a drug at any time may not be considered acceptable. The amount of the drug ingested, however, perhaps should be relevant to the proportionality of the disciplinary sanction imposed. *Peranzo*, 608 F. Supp. at 1511 n.13.

<sup>234</sup> *Peranzo*, 608 F. Supp. at 1505.

<sup>235</sup> As Dr. Morgan points out, there is some controversy surrounding the definition of the term "false positive." Morgan, *supra* note 6, at 309. Proponents prefer to use the words "unconfirmed positive." *Id.*

<sup>236</sup> According to one writer, reports of inaccuracies in marijuana testing range from 1–50 percent. Zeese, *supra* note 3, at 25. Mr. Zeese cites several studies, including those conducted by Syva. *Id.* at 26. Dr. Morgan surveys the results of several studies, including those conducted by the United States Armed Services. Morgan, *supra* note 6, at 309–13. A preferred source of the tests' false-positive rate is the degree of specificity of the immunoassay, or the accuracy of the technology in identifying a particular drug. See *id.* at 309 ("The greatest defect of immunoassays is their lack of specificity.").

body fluids and instead relies on immunochemical reactions, a proffered source of the test's false-positive rate is the possibility that other substances may show cross-reactivity.<sup>237</sup> Cross-reactivity occurs when the device mistakes a substance similar in structure to the drug being measured for the tested drug.<sup>238</sup> Studies indicate that certain prescription analgesic drugs and even over-the-counter cough medicines may create false-positives.<sup>239</sup> A cross-reactive substance in the sample always will produce a false-positive, and hence retesting a sample with the same immunoassay technique will not confirm a positive readout.<sup>240</sup> Thus, retesting most likely will correct for human error, but it will not affect machine-generated error.<sup>241</sup>

Although the studies vary widely as to their findings regarding EMIT's false-positive rate — 2.3 to 25 percent<sup>242</sup> — the manufacturer,<sup>243</sup> and its proponents — courtroom experts defending the use of the test<sup>244</sup> — consistently note that where tests will affect substantial rights, the test should be "confirmed," whether by use of the same device or an alternative technology, preferably not based on immunochemistry.<sup>245</sup> Ironically,

<sup>237</sup> For discussions of cross-reactivity and causes generally, see Morgan, *supra* note 6, at 309; Divoll & Greenblatt, *supra* note 227, at 115; McBay, *supra* note 3, at 38; Zeese, *supra* note 3, at 26.

<sup>238</sup> See Zeese, *supra* note 3, at 26. See generally articles cited *supra* note 237.

<sup>239</sup> Morgan, *supra* note 6, at 309. See also Zeese, *supra* note 3, at 26 (lists eleven cross-reactive substances from a Syva study, including aspirin).

<sup>240</sup> Zeese, *supra* note 3, at 26.

<sup>241</sup> *Storms*, 600 F. Supp. at 1225. False positives also may occur in some individuals because they excrete large amounts of endogenous lysozyme or malate dehydrogenase. Morgan, *supra* note 6, at 312. The EMIT manufacturer acknowledges these problems and cautions that operators run a blank with all positive tests employing either of these two enzymes. *Id.* Dr. Morgan also cites a 1982 Syva study which attributes false-positives to carry-overs following a strongly positive preceding sample. *Id.* at 309. See also Peranzo, 608 F. Supp. at 1505 n. 5 (defendant-prison's expert witness testified that failure to adhere to manufacturer's instructions as to temperature conditions may produce false-positives).

<sup>242</sup> Peranzo, 608 F. Supp. at 1511. See generally studies cited *supra* note 237.

<sup>243</sup> The *Higgs* court cites a March 1983 booklet prepared by Syva entitled *Frequently Asked Questions About Syva & Drug Abuse Testing*, which provides "[i]t is good scientific practice to confirm a positive result from any test method in cases where a person's rights, privileges, treatment or employment is at stake." *Higgs*, 616 F. Supp. at 229. Commentators also cite Syva's suggestion that an alternative method of testing confirm EMIT tests. See, e.g., MORBIDITY AND MORTALITY WEEKLY REPORT, *Urine Testing for Detection of Marijuana: An Advisory*, 469, 469 (Sept. 16, 1983) [hereinafter MMWR]; Zeese, *supra* note 3, at 25.

<sup>244</sup> See, e.g., *Higgs*, 616 F. Supp. at 229 (defendant-prison expert testified that another test should back up single EMIT tests although expert did not feel this was necessary with prisoners); Peranzo, 608 F. Supp. at 1510 (defendant-prison expert testified "I definitely believe that there should be a confirmation").

<sup>245</sup> As the court in *Kane* noted,

to permit a man to be found guilty of a serious offense on the basis of evidence from a machine, when the manufacturer itself concedes the device requires outside confirmation, would, in my judgment, deny the inmate admittedly diminished due process guaranteed him by the federal Constitution [citing *Wolff*, 418 U.S. at 556] and by Article XII of the Massachusetts Declaration of Rights.

*Kane*, Civ. No. 136229, slip op. at 7 (Super. Ct. Mass. Aug. 5, 1983). One court, however, rejected the argument that the manufacturer's recommendation rendered the unconfirmed use of the EMIT test unreasonable. Peranzo, 608 F. Supp. at 1514. Several commentators suggest that the confirmatory testing should be other than EMIT and other than RIA, an immunoassay test discussed *supra* note 8. See, e.g., Divoll & Greenblatt, *supra* note 227, at 116; McBay, *supra* note 3, at 38; Morgan, *supra* note 6, at 312; Zeese, *supra* note 3, at 26-27. In addition, in an advisory published by the United States Department of Health and Human Services, the Centers for Disease Control

some courts permit departures from this standard of care recognized by the industry itself.<sup>246</sup>

The use of scientific unspecialized staff and potential problems with the on-site conditions further compound problems with the accuracy of the device.<sup>247</sup> Proponents of the test suggest that EMIT procedures can be performed simply and are essentially "idiot proof,"<sup>248</sup> but failure to follow precisely the manufacturer's instructions increases the likelihood of inaccurate results, and unspecialized individuals may not appreciate fully the significance of constant quality monitoring.<sup>249</sup> In reports surveying the performance of the competence of drug-screening clinical laboratories that are not on-site and which employ persons with training and experience in analytical chemistry, researchers have found the false-positive rates to range from twenty to seventy percent.<sup>250</sup> Thus, personnel that do not have extensive scientific training present an even greater potential for error.

Courts have exhibited widely varying degrees of tolerance for the imprecision inherent in EMIT testing. The crux of the due process analysis has centered on the unconfirmed nature of the test results.<sup>251</sup> Three state courts and one federal district court have held that an additional test must confirm an EMIT test to be admissible in a prison disciplinary proceeding because of the serious questions experts raise concerning the technology's validity.<sup>252</sup> Three of these courts have held that confirmation testing must be by an alternative method of analysis.<sup>253</sup> In addition, the Federal Bureau of

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stressed that "[t]he manufacturer states that any positive test result should be confirmed by an alternative method . . . . Therefore, a positive result by the urine cannabinoid test indicates only the likelihood of prior use." MMWR, *supra* note 243, at 469. For problems with alternative technology available, see *McBay*, *supra* note 3, at 33, 40; *Zeese*, *supra* note 3, at 27.

<sup>246</sup> See, e.g., *Jensen*, 589 F. Supp. at 39.

<sup>247</sup> See *Morgan*, *supra* note 6, at 309 ("Operator error, present to some degree in all technologies, requires emphasis in a proposed on-site system using nonspecialist personnel.").

<sup>248</sup> *Peranzo*, 608 F. Supp. at 1505.

<sup>249</sup> See, e.g., *id.* at 1505 n.5 (defendant-prison's expert testified that failure to adhere to manufacturer's instructions could result in false-positives); see also *Divoll & Greenblatt*, *supra* note 227, at 115 (staff must properly position and calibrate the instrument prior to each assay, follow precise instructions in the event of instrument shutdowns and to prevent sample contamination, and run "blank samples" simultaneously with each run); *McBay*, *supra* note 3, at 38 (testing quality should be monitored continuously); *Morgan*, *supra* note 6, at 313 (cites Einsel Commission Report, which asserts that "poor management, inadequate personnel, broken chain of custody, and faulty maintenance and transmission of reports and records" cause most errors); *id.* at 314 (field studies of accuracy fail to look at most important variable, "the briefly trained workers who are to be the on-site operators").

<sup>250</sup> See *Morgan*, *supra* note 6, at 314.

<sup>251</sup> Unconfirmed tests are positive test results that an additional test with the same equipment or an alternative testing method have not verified. *Id.* at 309.

<sup>252</sup> See *Wykoff*, 613 F. Supp. at 1512; *Denike*, No. 83-2737, slip op. at 2 (D.N.J. April 6, 1984); *Kane*, Civ. No. 136229, slip op. at 9 (Super. Ct. Mass. Aug. 5, 1983); *Johnson v. Walton*, No. S61-84 (Vt. Super. Ct. Feb. 14, 1985) (cited in *Wykoff*, 613 F. Supp. at 1510). See also *Isaacks v. State*, 646 S.W.2d 602, 603 (Tex. Crim. App. 1983). The court in *Isaacks* would not admit EMIT in a revocation of probation proceeding because the state did not meet its burden of proof that the scientific evidence was competent. *Id.* at 603. The court noted that the staff operator of the machine, who testified to its accuracy, had no scientific background and no legislation or appellate cases had dealt with EMIT's admissibility. *Id.* The court stated:

For the results of an EMET [sic] system test to be admissible, it must be shown that the machine has attained scientific acceptance, that properly compounded chemicals were used, that the machine has been periodically checked for accuracy by one who

Prisons requires that federal prisons validate each positive urine test to substantiate a positive result in its random urinalysis testing of inmates.<sup>254</sup> On the other hand, one federal district court has upheld the admissibility of an unconfirmed EMIT test in a prison disciplinary hearing,<sup>255</sup> and two Georgia courts have accepted the unconfirmed EMIT test as reliable and admissible in a probation revocation hearing,<sup>256</sup> without addressing the constitutional implications.<sup>257</sup> Two federal district courts have denied preliminary injunctions against the use of test results confirmed by an additional EMIT test but have held that the evidence raised issues of concern strong enough to survive a motion to dismiss.<sup>258</sup>

understands its scientific theory, and proof must be offered by one qualified to translate and to interpret the result so as to eliminate hearsay.

*Id.*

<sup>253</sup> *Denike*, No. 83-2737, slip op. at 2 (D.N.J. April 6, 1984); *Kane*, Civ. No. 136229, slip op. at 9 (Super. Ct. Mass. Aug. 5, 1983); *Johnson*, No. S61-84 (Vt. Super. Ct. Feb. 14, 1985) (cited in *Wykoff*, 613 F. Supp. at 1510).

<sup>254</sup> 28 C.F.R. § 550.42(c) (1986). The regulations appear to permit a disciplinary report on the basis of an unsubstantiated urine test. 28 C.F.R. § 550.30(b) (1986).

<sup>255</sup> *Jensen*, 589 F. Supp. at 39. The court noted that the Center for Disease Control in Atlanta had found the procedure 97 to 99 percent accurate and concluded that the test's "almost complete certainty" constituted an adequate level of reliability for purposes of imposing administrative punishment in the prison context. *Id.* The court commented that prisoners could claim the test as false through their representative by requiring a confirmatory test or by stressing the state's sole reliance on the test at the disciplinary hearing. *Id.* The court thus implied that preservation of evidence and a hearing that provided the inmate with a meaningful opportunity to contest the test would make up for any deficiencies in the test's accuracy.

<sup>256</sup> *Smith v. State*, 250 Ga. 438, 440, 298 S.E.2d 482, 484 (1983); *Hunt v. State*, 173 Ga. App. 638, 640, 327 S.E.2d 500, 501 (1985).

<sup>257</sup> The Georgia Supreme Court in *Smith* merely held that it was within the judge's discretion whether or not to admit scientific evidence and that the trial court's ruling was supported by the evidence. *Smith*, 250 Ga. at 440, 298 S.E.2d at 484. In *Hunt*, the State revoked the appellant's probation when his EMIT test showed positive. *Hunt*, 173 Ga. App. at 638-39, 327 S.E.2d at 500. At the probation revocation hearing, held six weeks after the positive EMIT test, the probationer filed a handwritten motion for a continuance in order to evaluate independently the test results. *Id.* at 639, 327 S.E.2d at 500. The Georgia Court of Appeals affirmed the lower court's denial of the motion and revocation of the appellant's probation because the defendant's failure to file a timely motion showed lack of due diligence to support denial of the continuance. *Id.* at 639-40, 327 S.E.2d at 501.

<sup>258</sup> See, e.g., *Peranzo*, 608 F. Supp. at 1515 (allegations of EMIT's unreliability "give rise to a cognizable constitutional claim and, at a minimum, raise issues of real concern"); *Storms*, 600 F. Supp. at 1222 ("this record and these authorities raise an issue of substance as to the test's reliability"). The *Peranzo* court denied preliminary injunctive relief but nevertheless expressed hope that the degree of reliability "as conducted by defendants" would be made available to the court before trial. *Peranzo*, 608 F. Supp. at 1515 (emphasis in original). Most significantly, the court added,

We would hope as well that the defendants would give serious consideration to whether, as a matter of policy and prudence, confirmatory testing should be performed at least in those circumstances where there is reason to believe that a misbehavior report will impact severely on an inmate.

*Id.* In *Storms*, the court refused to issue a preliminary injunction on the use of a single EMIT test because the prison had disciplined none of the prisoners on the basis of the positive results. *Storms*, 600 F. Supp. at 1225. The prisoners had asserted that the possibility that the prison would discipline them solely on the basis of an unconfirmed EMIT test violated their constitutional rights to due process. *Id.* at 1216. Yet although the evidence concerning lack of reliability was not strong enough to justify issuance of a preliminary injunction, it did raise "an issue of substance" strong enough to

In addition, courts have expressed concern with the reliability of the prison's own testing methods apart from any inaccuracies inherent in the technology itself.<sup>259</sup> For example, the potential for on-site error led the court in *Peranzo v. Coughlin* to hold that although the prisoner's showing of unreliable testing was insufficient to grant preliminary injunctive relief from such testing, it did "raise issues of real concern."<sup>260</sup> Consequently, the court held that the matter should proceed to trial on the merits but stressed, in addition, that before trial it wished to have more information on the degree of reliability of EMIT testing as conducted by the prison.<sup>261</sup> Indeed the New Jersey Department of Corrections agreed to submit to a dismissal ordering confirmation testing when, in preparation for its defense, it sent four hundred of its own positive test results to a trained laboratory technician and twenty-five percent of the positives remained unconfirmed after two successive confirmatory testings at two laboratories.<sup>262</sup> Other courts similarly have found troublesome the prison's failure adequately to secure samples from possible tampering<sup>263</sup> and to save samples for independent testing at the prisoner's request.<sup>264</sup> The federal district court in *Storms v. Coughlin* reasoned that retesting on the

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survive a motion to dismiss. *Id.* at 1222. The court commented:

[T]he issue [of EMIT reliability] poses a substantial question. It must be remembered that these tests are random; they are done with no reason to think that the particular inmate is using drugs. The EMIT results are thus ordinarily the sole ground for discipline. The question would not be so close if the prisoners were tested only after exhibiting behavior or an appearance consistent with drug use or after having been found to possess drugs.

*Id.* at 1225.

<sup>259</sup> See, e.g., *Higgs*, 616 F. Supp. at 231 (court finds noteworthy evidence that prisoners potentially had access to and could tamper with other prisoners' samples); *Peranzo*, 608 F. Supp. at 1515 (court denied defendant-prison's motion to dismiss and expressed hope that defendant would increase the court's knowledge of "the degree of reliability of EMIT testing as conducted by the defendants" before trial) (emphasis in original); *Storms*, 600 F. Supp. at 1225 (court found troublesome prison's practice of disposing of urine samples and thus precluding prisoners' ability to obtain an independent test). See also *Morgan*, *supra* note 6, at 316 & n.2 (court in *Denike* ordered state to cease unconfirmed tests where field study of prison's program showed twenty-five percent false-positive rate) (citing data given to the author by the state corrections department and not presented or argued by the state in *Denike*, No. 83-2737 (D.N.J. Apr. 6, 1984)).

<sup>260</sup> 608 F. Supp. 1504, 1515 (S.D.N.Y. 1985).

<sup>261</sup> *Id.*

<sup>262</sup> *Morgan*, *supra* note 6, at 316. Of the 400 positives sent to Roche Clinical Laboratories in Raritan, New Jersey, 107 were unconfirmed by RIA (discussed *supra* note 8). *Id.* These 107 unconfirmed samples were then forwarded for retesting by GC/MS (discussed *supra* note 3) at Roche Analytic Laboratories in Richmond, Virginia, and they still remained unconfirmed. *Id.* The corrections department did not present the data at the court hearing and agreed to confirmation testing without argument. *Id.*

<sup>263</sup> *Storms*, 600 F. Supp. 1214.

<sup>264</sup> *Id.* at 1225. The *Storms* court stated,

While [double EMIT testing] will correct for human error in the testing process, it will not affect machine-generated error. Only testing by a different method can do that. This course is made impossible by the prison's practice of disposing of the urine sample after testing, thus denying the prisoners who wish to obtain an independent test the opportunity to do so. This practice too is troublesome.

*Id.*

The Supreme Court in *California v. Trombetta* held that the due process clause of the fourteenth amendment of the United States Constitution does not require that law enforcement agencies preserve breath samples of those charged with driving while intoxicated. 467 U.S. 479, 491 (1984),

same equipment could not correct for machine-generated error and thus one of the prisoner's only opportunities to correct for faulty testing would be to secure independent testing.<sup>265</sup> Hence, courts have stressed that the prison's own accuracy is important in addition to EMIT's proffered accuracy rate and that other procedural safeguards, such as preservation of the urine samples and strict attention to custody of the samples, are important to upholding a prison's urine-testing program.

Thus, most courts have focused on the reliability of a given prison program as it reflects on the prisoner's due process rights. One court, however, has suggested that an examination of the reasonableness of a scientific testing procedure, for purposes of the fourth amendment, is in part based on its reliability as a means of determining misconduct.<sup>266</sup> Concerns with the reliability of the most commonly used urinalysis device, the EMIT, are raised by the technology itself<sup>267</sup> and by its use as an on-site device, to be operated by the prison's own staff.<sup>268</sup> Most courts have not readily admitted EMIT evidence as a scientifically acceptable technique. These courts have allowed its use where the test's positive readout is confirmed by another EMIT test or an alternative method of testing.<sup>269</sup> In addition, courts have focused in part on the prison's own implementation of the on-site technology in assessing prisoners' claims of denial of due process.<sup>270</sup>

In sum, courts that have assessed the reasonableness of prison-urinalysis programs have held that the traditional probable cause and warrant standards of the fourth amendment are not required in the prison setting.<sup>271</sup> Furthermore, courts have upheld wholly random urinalysis searches of prisoners not based on any individualized suspicion

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on remand, 173 Cal. App. 3d 1093, 219 Cal. Rptr. 637 (1985). The Court reasoned that preservation of breath samples ordinarily would be of little exculpatory value where the state conducted two independent tests of the samples, with an intervening blank run designed to purge the machine of previous alcohol traces. *Id.* at 489. Other procedural safeguards included cross-examination of the law enforcement officer who had administered the test and the opportunity to inspect the machine and its weekly results. *Id.* at 490. The federal district court in *Peranzo* stated that the Court's analysis in *Trombetta* "reflects a general recognition that states need not implement all possible procedural safeguards against erroneous deprivations of liberty when utilizing the results of scientific testing devices in accusatory proceedings." *Peranzo*, 608 F. Supp. at 1509.

The *Trombetta* case, however, involved a situation in which a law enforcement officer had reason to suspect the individual had been driving while intoxicated. *Trombetta*, 467 U.S. at 482. As the *Storms* court pointed out, urine tests are random and conducted with no reason to believe the prisoner is using drugs. *Storms*, 600 F. Supp. at 1225. The *Storms* court found the fact that EMIT results ordinarily are the sole ground for discipline, coupled with the prison's practice of disposing of samples, troubling. *Id.* Furthermore, *Trombetta*'s total exposure to the testing process would depend upon his propensity for suspicious driving, but it most likely would not begin to approximate the number of times a prisoner would be subject to a health and welfare urine inspection. *See, e.g., id.* at 1216 (random tests performed daily). In addition, although the Court in *Trombetta* noted that the test had passed various accuracy requirements, it nevertheless commented that "if the Intoxilyzer were truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt." *Trombetta*, 467 U.S. at 489 nn. 9-10 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

<sup>265</sup> 600 F. Supp. at 1225.

<sup>266</sup> *See supra* notes 213-16 and accompanying text.

<sup>267</sup> *See supra* notes 235-46 and accompanying text.

<sup>268</sup> *See supra* notes 247-50 and accompanying text.

<sup>269</sup> *See supra* notes 252-53 and accompanying text. *But cf. supra* notes 255-57.

<sup>270</sup> *See supra* notes 259-65 and accompanying text.

<sup>271</sup> *See supra* notes 175-76 and accompanying text.

of drug use.<sup>272</sup> Courts have found support for random searches in the Supreme Court's holding in *Bell v. Wolfish*<sup>273</sup> — that prison officials can search prisoners routinely after contact visits with outsiders, provided the searches are conducted in a reasonable manner.<sup>274</sup>

Beyond this underlying conclusion, courts have outlined the basic contours of reasonableness based on the Supreme Court's analysis of blood-extraction searches in *Schmerber v. California*.<sup>275</sup> In addition, concerns that the Court has expressed in evaluating the reasonableness of administrative searches based on less than probable cause are evident in the courts' reasonableness assessment.<sup>276</sup> Accordingly, courts have focused primarily on the prison's manner of testing the prisoners. This inquiry has turned on such factors as how privately the prison conducts the searches, whether the prison provides the prisoners with advance notice of the testing program or the individual test, and whether the discretionary power of the searchers is adequately circumscribed. In addition, courts have looked carefully at whether legitimate security needs necessitate the random program and, in the same vein, whether the testing is truly random, and thus nonpersonal in nature. Finally, one court has analyzed the reasonableness of a prison urinalysis program based in part on an assessment of the reliability of the test as evaluated by courts that have addressed prisoner due process challenges to the testing.

### III. CONSTITUTIONAL STANDARDS FOR IMPLEMENTING URINALYSIS SEARCH PROGRAMS

If there is to be "no iron curtain drawn between the Constitution and the prisons,"<sup>277</sup> then courts which evaluate prison urinalysis programs should affirmatively recognize that a prisoner has a legitimate expectation of privacy in his or her person.<sup>278</sup> Furthermore, if courts continue to accept the current proposition that prisons can conduct warrantless searches based on virtually no individualized cause other than a generalized prison security problem, then courts should clarify what constitutional safeguards ultimately will protect prisoners' fourth amendment rights. Without recognized principles to guide the courts' reasonableness inquiry, as in the criminal search area, prisoners are left, in effect, with a balancing approach to assessing reasonableness. Because, as commentators note, all fourth amendment protections can be balanced away<sup>279</sup> — outweighed

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<sup>272</sup> *Id.*

<sup>273</sup> 441 U.S. 520 (1979).

<sup>274</sup> See *supra* notes 165-69 and accompanying text.

<sup>275</sup> 384 U.S. 757 (1966). See *supra* notes 177-90 and accompanying text.

<sup>276</sup> See *supra* notes 192-211 and accompanying text.

<sup>277</sup> *Wolff*, 418 U.S. at 555-56.

<sup>278</sup> The Supreme Court, however, has not affirmatively recognized a prisoner's right to privacy in his or her person. In *Hudson* the Court held that the fourth amendment does not apply to cells; the Court left open the question of whether prisoners' persons are covered by the amendment. 468 U.S. at 525-26. Earlier, in *Bell*, the Court addressed the constitutionality of body cavity searches but assumed the applicability of the fourth amendment to body searches "for present purposes." 441 U.S. at 558. For a discussion of *Hudson* and *Bell*, see *supra* notes 74-88 and accompanying text.

<sup>279</sup> See, e.g., Gianelli and Gilligan, *supra* note 60, at 1073. Professors Gianelli and Gilligan comment that while balancing is "descriptive of the process that courts must perform in making the reasonableness evaluation, the balancing concept does not provide a standard for that evaluation. Since . . . all fourth amendment protections could be 'balanced away,' certain principles must be recognized in order to safeguard prisoners' rights." *Id.* See also Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155, 168. Professor Kitch notes, "[t]he balancing approach to the legality of Fourth Amendment searches has a certain ominous ring. It

in the balance with institutional objectives to which the Court gives great deference — the balancing approach may recognize that prisoners have fourth amendment rights but it may not enhance significantly prisoners' protections.

Accordingly, in evaluating urinalysis programs, courts should seek to develop constitutionally adequate substitutes for the traditional fourth amendment protections to ensure prison institutional security needs at the least possible "cost" to constitutional fourth amendment values. Safeguards are necessary because of the societal interest in keeping the discipline and control of prisoners through body searches within the fourth amendment's coverage. In addition, safeguards are necessary because these searches implicate quasi-criminal concerns and are particularly susceptible to abuse in the prison setting. Towards this end, courts should require one of the major protections envisioned by the *Camara* Court in assessing the reasonableness of administrative housing searches: prisons should conduct urinalysis searches pursuant to and in conformity with established written institutional standards<sup>280</sup> — that is, regulations. In addition, courts should evaluate individual searches and individual programs with an eye towards procedural safeguards. Protections are necessitated by the special circumstances created by the prison environment, which is open to abuse by prison officials who may have participated in misconduct or have personal interests in harassing or disciplining certain prisoners and who have access to the on-site technology employed.

#### A. *Recognition of Prisoners' Expectation of Privacy: The Societal Interest*

Society should be prepared to recognize that prisoners have reasonable and legitimate expectations that they will not be subject to unreasonable and arbitrary searches of their person because the public interest lies in the rehabilitation of prisoners.<sup>281</sup> As the Supreme Court has noted with respect to parolees, fair treatment of prisoners will encourage rehabilitation by avoiding reactions to arbitrariness.<sup>282</sup> Thus, while the arbitrary exercise of power may serve short-term security interests, over the long run it may serve to compromise the ability of the prison system to further rehabilitative goals.<sup>283</sup>

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is always the reasonable demands of the public interest that are used to justify incursions on civil liberties." As another commentator has noted, "[a]t the mere mention of security from the lips of a correctional administrator, a majority of the Court begins to man the barricades." Cohen, *Search and Seizure of Prison Cells — The Constitution Takes a Holiday*, 21 CRIM. L. BULL. 171, 175 (1985).

<sup>280</sup> *Camara*, 387 U.S. at 538 (to conduct an area inspection there must be reasonable legislative or administrative standards which are satisfied with respect to a particular building). For a good discussion of why regulations enhance the reasonableness of searches generally, see Amsterdam, *supra* note 19, at 416–29. For discussions of the benefits of "rulemaking" in the prison context, see Gianelli and Gilligan, *supra* note 60, at 1075–76; Note, *Body Searches*, *supra* note 67, at 1055. See also *Matz v. Satran*, 313 N.W.2d 740, 742 (N.D. 1981). The *Matz* court noted, "[i]n the prison context, the requirement of reasonably precise rules is not an empty formality; notice of behavioral standards enhances the inmate's sense of fair play and reduces the risk of arbitrary administration. Moreover, equal treatment of similar conduct is more certain within fixed rules."

<sup>281</sup> Gianelli & Gilligan, *supra* note 60, at 1069 (citing *Procunier v. Martinez*, 416 U.S. 396, 412 (1974)). The Court in *Procunier* stated that an important objective of a penal system is the "rehabilitation of prisoners." *Procunier*, 416 U.S. at 412. See also Singer, *supra* note 60, at 699 ("the purpose of the prison should be protection, security and rehabilitation; whatever its present practice it should not be an instrument of degradation and a perpetrator of dehumanization").

<sup>282</sup> *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

<sup>283</sup> Gianelli and Gilligan, *supra* note 60, at 1069 ("Without the privacy and dignity provided by the fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished"); Singer, *supra* note 60, at 699–700 ("by restoring the dignity of the inmate,

In addition, society has an interest in avoiding radical shifts in a prisoner's own beliefs in himself or herself and those important to the prisoner that will have an obvious impact on the prisoner's relationship to the community once the prisoner is released.<sup>284</sup> As former Chief Justice Burger has noted, when society incarcerates individuals, it becomes obligated "to help the offender to help himself begin again."<sup>285</sup> Yet excessive surveillance, of varying levels of intrusiveness, degrades and ultimately dehumanizes prisoners.<sup>286</sup> Rehabilitative goals are not served by repeatedly impressing upon a prisoner that he or she has no humanity.<sup>287</sup> Indeed, a prisoner who undergoes continued self-abasement may become increasingly violent.<sup>288</sup> To divorce the "routine-procedure" intrusiveness of the urinalysis search from its contribution to the total "message" which prisoners receive is to underestimate its ultimately dehumanizing and degrading impact.<sup>289</sup>

Finally, society should recognize that prisoners have legitimate and reasonable privacy interests in their persons because society has a basic interest in assuring that the government does not violate fundamental rights on an ongoing basis.<sup>290</sup> A conclusion that prisoners do not retain legitimate rights of privacy in their persons precludes any fourth amendment inquiry into the reasonableness of searches of the person.<sup>291</sup> Coupled

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we are likely to decrease the potential security problem, while a decision in favor of security can only decrease the humanity of the resident"); Note, *Body Searches*, *supra* note 67, at 1050 ("excessive surveillance may indirectly create greater security risks than it cures").

<sup>284</sup> Singer, *supra* note 60, at 669 (quoting E. GOFFMAN, *ASYLUMS*, 14, 18-19 (1961) (a prisoner experiences "radical shifts in his moral career" as a result of "a series of abasements, degradations, humiliations, and profanations of self")). See also Edwards, *Foreword to Symposium on Prisoners' Rights — Penitentiaries Produce No Penitents*, 63 J. CRIM. L., CRIMINOLOGY AND POLICE SCIENCE 154, 157 (1972) ("The victim of the vengeance omnipresent in both sentencing and prison treatment frequently returns to society inclined to seek vengeance himself." (citing K. MENNINGER, *THE CRIME OF PUNISHMENT* 214-18 (1968))).

<sup>285</sup> Cohen, *supra* note 279, at 174 n.8 (citing Burger, *Foreword to COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS* (2d ed. 1972)).

<sup>286</sup> See also Singer, *supra* note 60, at 694 (acts of intrusion are wrongful not because they cause distress and embarrassment; "[t]hey are wrongful because they are demeaning of individuality and they are such whether or not they cause emotional trauma") (quoting Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973-74 (1964)).

<sup>287</sup> *Id.* at 715.

<sup>288</sup> See *Hudson*, 468 U.S. at 552 (Stevens, J., concurring in part and dissenting in part). Justice Stevens writes: "Depriving inmates of any residuum of privacy or possessory rights is in fact plainly contrary to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence toward themselves or others." *Id.* (Stevens, J., concurring in part and dissenting in part) (emphasis in original) (citing Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J. CRIM. L. C. & P.S. 229 (1972)). Justice Stevens goes on to cite Professors Gianelli and Gilligan: "It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures." *Id.* (Stevens, J., concurring in part and dissenting in part) (citing Gianelli and Gilligan, *supra* note 60, at 1069). See also Note, *Body Searches*, *supra* note 67, at 1050 ("Social scientists have found that a reduced sense of self-identity can be associated with an increase in violent and irrational behavior.").

<sup>289</sup> See Singer, *supra* note 60, at 715 ("Perhaps the small harassments and hassles, such as hourly bed checks, with flashlights in the face, . . . can be every bit as demeaning, and dehumanizing, as the larger ones.").

<sup>290</sup> *Higgs*, 616 F. Supp. at 232.

<sup>291</sup> As Professor Amsterdam notes:

The question of what constitutes a covered "search" or "seizure" would and should be viewed with an appreciation that to exclude any particular police activity from coverage

with the Supreme Court's holding that prison searches of cells and belongings are not covered by the fourth amendment,<sup>292</sup> such a conclusion essentially would isolate from judicial and constitutional scrutiny an extremely wide range of prison search practices<sup>293</sup> and would appear inconsistent with the Court's rejection of the hands-off approach to prison administration.<sup>294</sup> Former Chief Justice Burger has noted that concern with the treatment of prisoners arises in part from a fundamental belief that the way a society treats those persons who transgress it is indicative of the essential character of that society.<sup>295</sup> Accordingly, society should be reluctant to sanction the absolute retraction of fundamental fourth amendment rights in the prison setting as a solution to short-term security interests. Such acceptance may lend support to the belief that constitutional protections are too dangerous to enforce<sup>296</sup> in other settings where the governmental interest is strong and individuals retain only limited fourth amendment protection.<sup>297</sup>

### B. Prison Searches: Quasi-Criminal and Potentially Open to Abuse

In addition to the strong societal interest in keeping the control and discipline of prisoners through body searches within the ambit of the fourth amendment, courts

is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than to say that it must be conducted in a reasonable manner.

Amsterdam, *supra* note 19, at 393. As Justice Stevens noted in *Hudson*, a prison cell concededly may have a trivial residuum of privacy associated with it. *Hudson*, 468 U.S. at 542 (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated, however, that that trivial residuum "may mark the difference between slavery and humanity." *Id.*

<sup>292</sup> *Hudson*, 468 U.S. at 525-26.

<sup>293</sup> See Gianelli and Gilligan, *supra* note 60, at 1068. Professors Gianelli and Gilligan noted, "[t]he Supreme Court has been extremely reluctant to 'isolate from constitutional scrutiny' actions of government agents that impinge upon fourth amendment interests." (quoting *Terry*, 392 U.S. at 17).

<sup>294</sup> See *supra* notes 71-72 and accompanying text for a discussion of the hands-off approach to prison administration. See also *Camara*, 387 U.S. at 532: "discretion of the official in the field . . . is precisely the discretion to invade private property which we have consistently circumscribed."

<sup>295</sup> *Hudson*, 468 U.S. at 523-24.

<sup>296</sup> See Rudovsky, *The Criminal Justice System and the Role of the Police*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 242, 247 (D. Kairys ed. 1982). Professor Rudovsky argues along similar lines that the attack on the exclusionary rule, which excludes evidence gathered in violation of an individual's fourth amendment rights,

is an example of the way the public's perception of the criminal process has been consciously manipulated. The distortion of the actual impact of this rule on conviction rates . . . diverts the focus from the illegal police conduct and leads the public to believe that constitutional principles are too dangerous to enforce.

*Id.*

<sup>297</sup> For example, other individuals whose fourth amendment protections are limited include school children, military personnel, and government employees. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (school children); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975) (military personnel); *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985) (government employees). See also Rudovsky, *supra* note 296, at 245. Professor Rudovsky argues that "[p]ersonal fear and pressure to protect by any means society's short-run interest in order inevitably leads to state-sanctioned brutality and violation of individual rights." Professor Kitch similarly argues that "[i]t is always the reasonable demands of the public interest that are used to justify incursions on civil liberties." Kitch, *supra* note 279, at 168. For a partial listing of drug-testing decisions requiring varying degrees of constitutional protection in non-prison settings — for example, schools, police departments, bus companies — see Banzhaf, *How to Make Drug Tests Pass Muster*, NAT'L L.J., Jan. 12, 1987, at 13, 24.

should recognize that substitutes for warrants are particularly apt given the quasi-criminal nature of prison urinalysis testing. Urinalysis programs are designed to uncover evidence admissible in a subsequent disciplinary proceeding;<sup>298</sup> indeed, a program's effectiveness in deterring drug use depends upon the prison administration's threat that prisoners whose urine samples test positive may be punished.<sup>299</sup> Moreover, a positive test potentially will result in significant forms of punishment.<sup>300</sup> Furthermore, those who conduct "inspections" are often those who search for evidence of criminal conduct.<sup>301</sup> Thus the distinction between prison searches as law enforcement or as administrative is blurred.<sup>302</sup>

The substantial nexus between such procedures and punitive sanctions<sup>303</sup> suggests in addition that courts should be particularly sensitive to the possibility of ulterior motives behind individual searches even if conducted under an established administrative search program.<sup>304</sup> Prison employees have at times participated in or permitted drug trafficking. As one court notes, official corruption pervades the prison system, and yet prison officers who have participated in or permitted violations are empowered to search prisoners.<sup>305</sup> Indeed, one prison system's justification for strip searching prisoners within a maximum security unit rested on the prison's repeated problems with its own guards smuggling in

<sup>298</sup> See, e.g., Gianelli and Gilligan, *supra* note 60, at 1082-83 ("items uncovered during an inspection may be admissible in subsequent criminal or disciplinary proceedings . . . prison inspections are designed to uncover . . . contraband").

<sup>299</sup> *Storms*, 600 F. Supp. at 1224-25. The *Storms* court stated, "[t]he threat which is intended to make this testing program an effective deterrent is that prisoners who are found to have urine samples indicating that they are using drugs may be punished."

<sup>300</sup> See *supra* notes 12-15 and accompanying text.

<sup>301</sup> The Supreme Court expressed concern for administrative inspectors acting as a front for the police in *Abel v. United States*, 362 U.S. 217, 226 (1960). The Court stated that the government's use of an administrative warrant to gather evidence for a criminal investigation "must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." *Id.*

<sup>302</sup> Gianelli and Gilligan, *supra* note 60, at 1083.

<sup>303</sup> *Id.*

<sup>304</sup> Note, *Body Searches*, *supra* note 67, at 1052.

<sup>305</sup> *Sec. & Law Enforcement Emp., Dist. C. 82 v. Carey*, 737 F.2d 187, 212 (2d Cir. 1984). As the Court noted in *Johnson v. United States*, the "competitive enterprise of ferreting out crime" can color the judgment of searchers. 333 U.S. 10, 14 (1948). The Second Circuit in *Carey* noted that prisons often empower prison employees to arrest offenders when the prison employees have permitted and participated in the crimes themselves. *Carey*, 737 F.2d at 212. The *Carey* court, in upholding urine tests for prison guards, quoted from the PRISONERS' RIGHTS SOURCEBOOK:

There is . . . one determinant of the prison condition that is not usually considered in these discussions. It is the corrupt acts of prison officials. Official corruption pervades the prison system, and necessarily compromises the integrity of and safety within the prison. It inequitably distributes privilege to those who can afford to pay for it.

[O]fficers have had sex with inmates; brought them contraband, including food, liquor, narcotics, and money used in at least one case to pay for an inmate's execution; . . . Prison employees have permitted and participated in crimes for which they are empowered to arrest the offenders.

*Id.* (quoting from Flannery, *Prison Corruption: A Mockery of Justice*, 2 PRISONERS' RTS. SOURCEBOOK, 271, 273-74 (1980)). See also *Arruda v. Fair*, 710 F.2d 886, 888 (1st Cir.) (in at least eight instances, guards found to have been involved in smuggling contraband, including drugs, to prisoners in a maximum security prison with a lengthy history of prison drug problems), *cert. denied*, 464 U.S. 999 (1983).

contraband.<sup>306</sup> The searcher's desire to intimidate, humiliate, or degrade the prisoner may be the predominant motive for searching a particular prisoner.<sup>307</sup> As the Court has noted, a civilized society should not tolerate the intentional harassment of even society's most hardened offenders.<sup>308</sup> Thus, courts should be sensitive that law enforcement searches potentially can pass under the guise of preventative security searches.<sup>309</sup>

### C. Regulations: Objectives and Necessary Components

Given the basic societal and institutional goals in the prison setting, courts should require that prison administrators set forth and comply with informed guidelines, in the form of regulations, as to how they will carry out their preventative, nonpersonalized urinalysis search programs.<sup>310</sup> Regulations provide four fundamental protections envisioned by the Court in *Camara* in evaluating administrative searches. First, the drafting process ensures that some semblance of a neutral decisionmaker is interposed between prison officials and the guards, in particular, and the prisoners.<sup>311</sup> In addition, regulations provide notice to prisoners of what they can expect.<sup>312</sup> Thus, regulations would assure prisoners that lawful authority exists to search and enable prisoners to verify the appropriate limits of the inspection.<sup>313</sup> As the Court in *Camara* noted, warrantless searches can be unreasonable in part because they fail to verify either the need for or the appropriate limits of the search.<sup>314</sup> Just as authority to search in the form of a warrant would lessen the intrusiveness of a dwelling search, so would authority to search in the form of detailed regulations mitigate the intrusiveness of unpredictable and potentially arbitrary urinalysis searches.<sup>315</sup> Furthermore, regulations that set forth neutral criteria for initiating and conducting searches impose controls on the discretionary power of lower-

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<sup>306</sup> *Arruda*, 710 F.2d at 887-88. The Senior Judge, in dissent in *Arruda*, found the prison's problem with its own "incurable" guards "seems no rationale at all here." *Id.* at 889 (Maletz, Senior Judge, concurring in part and dissenting in part).

<sup>307</sup> See Singer, *supra* note 60, at 699-701 ("the entire process of prison is designed to destroy the last remnants of the dignity of the individual"); *id.* at 700 ("the usual 'search' is neither for purposes of discovering weapons, or for preventing bloodshed; it is a 'functional' search — it 'keeps the inmates uncertain' and 'on their toes'"); *id.* at 703 (hair and clothing regulations in prison begun with "only one purpose in mind — the degradation and humiliation of the inmate").

<sup>308</sup> *Hudson*, 468 U.S. at 528.

<sup>309</sup> See Gianelli and Gilligan, *supra* note 60, at 1083. Professors Gianelli and Gilligan noted that "[t]he danger is that inspectors will be used as a subterfuge for law enforcement searches." *Id.* See also *supra* note 307.

<sup>310</sup> Commentators calling for prison search regulations include Gianelli and Gilligan, *supra* note 60, at 1075-77; Note *Body Searches*, *supra* note 67, at 1055. Professor Singer cites a 1961 Maryland case in which the court, in response to the prisoners' allegations of brutality, ordered adoption of rules concerning cell and person searches. Singer, *supra* note 60, at 676 n.21.

Professor Amsterdam calls for rulemaking in search situations generally. See Amsterdam, *supra* note 19, at 415-29. Professors Gianelli and Gilligan cite commentators arguing for police search rulemaking. See Gianelli and Gilligan, *supra* note 60, at 1075 n.199.

<sup>311</sup> See Gianelli and Gilligan, *supra* note 60, at 1076 (rule promulgation would lie with high level officials, thereby removing policymaking from guards).

<sup>312</sup> Note, *Body Searches*, *supra* note 67, at 1055.

<sup>313</sup> See *Camara*, 387 U.S. at 540.

<sup>314</sup> *Id.*

<sup>315</sup> See Note, *Body Searches*, *supra* note 67, at 1055.

echelon prison officials to search.<sup>316</sup> Finally, regulations provide an objective standard against which to measure individual searches.<sup>317</sup>

As a basic requirement, regulations should affirmatively set forth the noncriminal, security objectives of the prison's urinalysis program.<sup>318</sup> In addition, regulations should particularize the nature of the searches and the conditions and manner under which they should be conducted. In their totality, regulations should provide an objective and informed standard for review.

Because random searches are not based on any particularized suspicion that the prisoner should be searched, courts should place the burden on the state to establish a generalized antecedent justification for searching.<sup>319</sup> The courts should require more than conclusory assertions that prisons are dangerous and drugs create opportunities for violence. The burden should be on the state to justify a urinalysis program by demonstrating the extent of the drug problem and the effectiveness of the urinalysis program in dealing with the problem.<sup>320</sup>

In this vein, courts should bear in mind that the Court in *Schmerber* evaluated the reasonableness of an intrusive bodily search based in part on the likelihood that the search would produce the evidence of guilt sought.<sup>321</sup> In the prison context, as one commentator suggests, the likelihood of finding evidence of drug possession is perhaps greatest and consequently the governmental security interest is perhaps strongest at the point where drugs are first introduced into the prison, through prisoners' contact with outsiders.<sup>322</sup> Presumably, searches of prisoners who have already been searched after all contacts with visitors are less likely to yield drugs than are the post-contact searches themselves.<sup>323</sup> In addition, internal searches are even less likely to yield drugs given the freedom with which prison administrators may search cells and belongings after *Hudson v. Palmer*.<sup>324</sup> Furthermore, one might argue that the traffic in drugs creates more serious risks of conflict than does the ingestion of some drugs, such as marijuana.<sup>325</sup> Thus, even given the judicially noticed drug problems in American prison systems,<sup>326</sup> courts should consider the actual effectiveness of internal drug detection searches. To date, courts

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<sup>316</sup> See Gianelli and Gilligan, *supra* note 60, at 1084; Note, *Body Searches*, *supra* note 67, at 1055.

<sup>317</sup> The *Camara* court required standards against which to measure searches. See *supra* note 141.

<sup>318</sup> See, e.g., *Denike*, No. 83-2737, slip op. at 4 (D.N.J. April 6, 1984).

<sup>319</sup> Gianelli and Gilligan, *supra* note 60, at 1074.

<sup>320</sup> See Cohen, *supra* note 279, at 175. Professor Cohen termed the prisons' usual burden of proof "feather-light" and "virtually unbeatable." *Id.* Professor Cohen asserted that "[a]t the mere mention of security from the lips of a correctional administrator, a majority of the Court begins to man the barricades." *Id.*

<sup>321</sup> See *supra* note 157 and accompanying text.

<sup>322</sup> See Note, *Body Searches*, *supra* note 67, at 1054 n.144 and accompanying text.

<sup>323</sup> *Id.*

<sup>324</sup> For a discussion of *Hudson*, see *supra* notes 91-94 and accompanying text.

<sup>325</sup> Professors Gianelli and Gilligan note that the acquisition of drugs is power. Gianelli and Gilligan, *supra* note 60, at 1071 n.171 (quoting National Advisory Committee on Criminal Justice Standards and Goals, Corrections 39 (1973)).

<sup>326</sup> For United States Supreme Court's judicial notice of prison drug problems see *Block v. Rutherford*, 468 U.S. 576, 588-89 (1984) ("we can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country"). See also *Hudson*, 468 U.S. at 527 ("attempts to introduce drugs and other contraband into the premises . . . we can judicially notice, is one of the most perplexing problems of prisons today"). The New York Federal District Court in *Storms* took "judicial notice that drug use among prisoners is a serious, disruptive problem within American prisons." *Storms*, 600 F. Supp. at 1220.

have briefly referred to the Supreme Court's comments on drug use and its attendant problems in the prisons<sup>327</sup> to conclude that cause exists to conduct searches based on no individualized suspicion. One writer has termed the burden of proof on corrections officials to justify prison searches as "reasonable speculation."<sup>328</sup> Unfortunately, this scant attempt to include in the case law the exact showing of the specific prison necessity and the effectiveness of the programs employed does not aid in laying the groundwork for a valid program or in evaluating the foundation necessary to justify an existing program.

In addition, this antecedent justification component of the required regulations should be tailored to the institution involved and even to the particular security status of those prisoners to be searched.<sup>329</sup> The probable cause in *Camara* needed to justify issuance of a warrant for inspection did not depend upon specific knowledge of the condition of the building in question, but it did depend upon the condition of the area to be searched, the nature of the building, and the passage of time.<sup>330</sup> If, for example, in a maximum security facility, the prison never has found contraband in such a search or has shown no evidence of a drug problem, then frequent urine searches may indicate that the prison has a hidden agenda, in addition to its professed security interests, which may potentially include the punishment, intimidation, humiliation, and degradation of prisoners.<sup>331</sup> However effective these tactics may be in ensuring the prison's short-term security needs,<sup>332</sup> they should be recognized as counter to the long-term rehabilitative purposes of the prison system.<sup>333</sup>

In affirmatively setting forth the objectives of the search program, the regulations should set forth neutral, nonindividualized criteria for initiating a search, such as guide-

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<sup>327</sup> See *Block*, 468 U.S. at 588-89.

<sup>328</sup> Cohen, *supra* note 279, at 175. Professor Cohen continues, "[a] witness for corrections need only provide testimony as to his or her employment — this creates instant expertise — and then offer the opinion that X will create a security problem. The combination of a feather-light burden of proof and conferred expertise gives the corrections officials a virtually unbeatable position . . . ." *Id.*

<sup>329</sup> See Singer, *supra* note 60, at 682 n.42. Professor Singer comments, "we must cease talking about 'the' prison and 'the' prisoners, and begin a more careful analysis. For prisons and other correctional institutions are divided into several classes of 'security,' . . . we should at least consider whether different regulations indeed, different constitutional standards, might not apply . . . in these allegedly different grades of institutions." *Id.* See also Gianelli and Gilligan, *supra* note 60, at 1084, 1086 (security requirements may differ from a maximum to minimum security facility). For example, in *Frazier v. Ward*, a New York Federal District Court held that strip searches, complete with rectal and testicle examinations, violated the fourth amendment where the prison had never found contraband. 426 F. Supp. 1354, 1366 (N.D.N.Y. 1977). The prison conducted the searches at issue when it transferred the prisoner out of a special disciplinary unit. *Id.* at 1362. The court found that "the removals were from sterile cells, with the inmate in handcuffs and belt, and kept under continuous observation of correction officers." *Id.* at 1365. See also *Hurley v. Ward*, 584 F.2d 609, 611 (2d Cir. 1978) (anal and genital searches of inmate unnecessary and unjustified where prisoner was heavily shackled and under close and constant guard during his few restricted excursions from his segregated cell).

<sup>330</sup> *Camara*, 387 U.S. at 538.

<sup>331</sup> Gianelli and Gilligan, *supra* note 60, at 1083. See also *supra* note 307 and accompanying text for a discussion of improper search purposes.

<sup>332</sup> For a discussion of how these tactics undermine prison security, see *supra* notes 106-12 and accompanying text.

<sup>333</sup> See *supra* notes 106 and 112. Courts also should question whether such programs violate the eighth amendment to the Constitution's prohibition against cruel and unusual punishment. See U.S. CONST. amend. VIII. For a discussion of the use of the eighth amendment in prison search cases, see Note, *Body Searches*, *supra* note 67, at 1039-40.

lines as to how frequently the searches will be conducted, who can authorize a search, and who can execute the search. The mere existence of the rules should encourage uniform treatment<sup>334</sup> and assure the regularity of the routine.<sup>335</sup> Controls on the discretionary power to search are particularly important in an environment where those who serve as inspectors for administrative purposes may also serve as searchers for evidence of criminal conduct.<sup>336</sup>

In addition, specified search guidelines would circumscribe the searching officer's discretion in executing the search. Regulations should specify where prison officials must conduct searches with an eye towards maximum privacy and safety.<sup>337</sup> Nonconsensual intrusions into the human body outside of a hygienic, medical environment are particularly offensive to the values embodied within the fourth amendment.<sup>338</sup> That urine samples are taken by nonmedically trained personnel outside of a hospital environment is a factor which weighs against the reasonableness of these procedures.<sup>339</sup> Conducting searches in the view of unnecessary watchers, such as other prisoners or superfluous staff members,<sup>340</sup> subjects prisoners to unnecessary embarrassment and potentially invites the sexual harassment that is endemic in the penal environment.<sup>341</sup> In addition, prisons should conduct searches during normal waking hours.<sup>342</sup> Because individuals are incarcerated for twenty-four hours a day, a prison should be hard pressed to justify a urinalysis search conducted during sleeping hours.

Furthermore, by requiring that the prisons establish rules that protect fourth amendment interests in privacy and bodily integrity and safety, courts can use the rules as an objective standard against which to measure the constitutionality of specific searches of individuals and avoid judicial mandates of how prisons should be operated. The Court in *Camara* requires a magistrate to look to whether the inspection for which authorization is sought is consistent with the established "reasonable legislative or administrative standards."<sup>343</sup> Once a prison has an established policy that satisfies basic fourth amendment requirements, the court's role is to evaluate whether prison officials have complied with their own rules in an individual case. Such a case-by-case approach would be consistent with the Court's rejection of the hands-off approach to evaluating prison practices,<sup>344</sup> yet it would enable courts to continue to defer to prisons' administrative judgments as to how prisons are to be operated.<sup>345</sup>

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<sup>334</sup> Gianelli and Gilligan, *supra* note 60, at 1076. See also Matz, 313 N.W.2d at 742 (equal treatment is more certain within fixed rules).

<sup>335</sup> Amsterdam, *supra* note 19, at 418.

<sup>336</sup> See *supra* note 159.

<sup>337</sup> *Id.*

<sup>338</sup> *Schmerber*, 384 U.S. at 771-72.

<sup>339</sup> See *id.*

<sup>340</sup> See, e.g., *Storms*, 600 F. Supp. at 1222 (if no legitimate security need to do so, searches in front of onlookers are unreasonable).

<sup>341</sup> See *Bell*, 441 U.S. at 577 (evidence existed in the record that body cavity searches conducted in front of other prisoners "engendered among detainees fears of sexual assault" and "were the occasion for actual threats of physical abuse by guards") (Marshall, J., dissenting).

<sup>342</sup> See, e.g., *Tucker*, 613 F. Supp. at 1130-31 (prison's motion to dismiss denied where prison gave no reason why, among other defects, it had to conduct a search at five a.m. when it can assume prisoners are sleeping).

<sup>343</sup> *Camara*, 387 U.S. at 538.

<sup>344</sup> See *supra* note 71 and accompanying text.

<sup>345</sup> In *Bell*, the Court noted that prison administrators "should be accorded wide-ranging de-

In addition to requiring detailed regulations, courts seriously should question the controversial reliability of the most widely used testing device, the EMIT, and recognize the heightened potential for abuse in the prison setting. Given the defects inherent in the technology and the on-site testing, courts should require that prisons affirmatively establish the reliability of the tests and the reliability of their own programs. In addition, courts should, at a minimum, require that prisons confirm EMIT test results, preferably by an alternative method of drug screening. Given the tests' questionable reliability and the special potential for abuse in the prison environment, courts should place great emphasis on the justification to search. Optimally, courts should require more than confirmation testing and should look for additional corroboration of drug use by some evidence other than testing.

#### CONCLUSION

Courts currently are in agreement that prisons can conduct urinalysis testing of prisoners without violating the fourth amendment prohibition against unreasonable search and seizure. As a starting point, courts have recognized that the Supreme Court has accorded wide-ranging deference to prison administrators to manage in their best judgment. In addition, courts have recognized that individuals have reduced expectations of privacy upon incarceration. Yet despite these substantial bulwarks against striking a prison practice as an unreasonable search, courts for the most part have examined prison urinalysis programs with an eye towards maintaining for prisoners a degree of privacy and humanity that comports with the fundamental purposes of the fourth amendment.

Concluding that urinalysis testing of prisoners is a search and consequently evaluating the reasonableness of those searches under the fourth amendment are important steps towards assuring that constitutional protections of prisoners are not unrealized promises. Courts should not delegate unreviewable power to prisons by denying to prisoners fourth amendment protections from unreasonable body searches or by deferring summarily to the prisons' claims of "security needs." Courts should proscribe standardless searches in the prison setting as unreasonable by requiring prisons to supply concrete justification for implementing urinalysis programs. Rehabilitative goals will best be served in the long run if prisons and courts work towards viable guidelines for searches that recognize and enhance the prisoner's basic human interests in privacy and dignity.

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ference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.