DRUG TESTING AND THE FOURTH AMENDMENT: WHAT HAPPENED TO INDIVIDUALIZED SUSPICION?

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For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual.[1]

These invasions can only be characterized as minimal because citizens' sensitivity to their rights have been dulled by the ever-increasing intrusions by the government into all aspects of daily life.[2]

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1. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting).

2. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 587 (1995).

I. INTRODUCTION

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[3]

The Fourth Amendment provides a classic example of the tension found throughout American political thought as reflected in its laws: the desire to protect the individual's liberty while simultaneously meeting the broader needs of a community.[4] Balancing this fundamental dilemma continues to challenge our society, including the judiciary.[5] Fourth Amendment jurisprudence continues to "lurch"[6] between permitting searches only if a warrant is issued upon probable cause,[7] and permitting a warrantless search if the search is deemed "reasonable" after balancing the individual's legitimate privacy expectations with the governmental interests involved.[8] Although the United States Supreme Court has held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,"[9] the Court's allowance of exceptions continues to expand. The warrant requirement was strictly adhered to in the past,[10] but the Supreme Court often employs a

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3. U.S. CONST. amend. IV. The Fourth Amendment is enforceable against the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

4. *See* ROBERT W. HOFFERT, A POLITICS OF TENSION 10-17, 186 (1992) (concluding that our society's belief in equality and communal aspects of living creates tension with our simultaneous belief in liberty and individualism).

5. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. at 2396 (holding that a high school could constitutionally conduct drug testing of athletes absent any suspicion). Justice O'Connor wrote a scathing dissent joined by Justice Souter and Justice Stevens. *Id.* at 2397-407 (O'Connor, J., dissenting).

6. California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

7. *See* Katz v. United States, 389 U.S. 347, 358 (1967) (holding that a physically unintrusive electronic surveillance was illegal without a warrant).

8. *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

9. Katz v. United States, 389 U.S. at 357 (citations omitted).

10. The rationale of the warrant requirement was succinctly stated by Justice Frankfurter:

> When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."

balancing approach to determine whether a search is reasonable in those circumstances not requiring a warrant.[11] In such circumstances, the reasonableness of a search is judged by balancing its intrusion on the individual's privacy expectation, with the promotion of legitimate societal interests.[12] If a search is not intrusive, does not impede legitimate privacy expectations, and the governmental interest is relatively strong, then the search will likely be ruled reasonable.[13] The Court will occasionally blur the Warrant Clause and the Reasonableness Clause by ruling that a search conducted pursuant to a warrant must still be executed reasonably.[14]

As the ills of drug use continue to ravage our society,[15] the governmental interest in halting illicit drug use becomes increasingly important. Within this context, courts have allowed drug urinalysis absent any individualized suspicion for employees in private, pervasively regulated industries,[16] for some governmental employees,[17] and for public school student-athletes.[18] By upholding the drug testing of persons that have not acted in a manner to give rise to any suspicion of wrongdoing, the courts have allowed mass, suspicionless searches without any "principled basis" as to their reasonableness.[19] The courts' departure from the idea that individualized suspicion is a "core component of

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United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (quoting U.S. Const. amend. IV), *overruled in part by* Chimel v. California, 395 U.S. 752 (1969); *see also* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966) (discussing the view that a search is reasonable only if a warrant is obtained).

11. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (holding that warrantless drug tests of railroad personnel after a train accident were reasonable because of the government's special interests in the investigation of such an accident); New Jersey v. TLO, 469 U.S. 325, 343 (1985) (holding that a warrantless search of a student's purse was constitutional after reasonably suspecting the student of smoking cigarettes); Terry v. Ohio, 392 U.S. at 29-30 (holding that a warrantless "pat-down" of a suspect was reasonable because the officer had reasonable suspicion the suspect was carrying a weapon). Those exceptions generally include exigent circumstances including when the safety of a police officer or the public allows a warrantless search. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 3.5-3.10 (2d ed. 1992).

12. Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

13. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

14. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 766-67 (1985) (holding that a court- ordered surgical removal of a bullet from a suspect is too intrusive for a state to deem the search reasonable without the suspect's permission).

15. *See* Michael Janofsky, *Survey Reports More Drug Use By Teen-Agers*, N.Y. TIMES, Dec. 13, 1994, at A1.

16. International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1309 (9th Cir. 1991); Shoemaker v. Handel, 795 F.2d 1136, 1143-44 (3d Cir. 1986).

17. National Treasury Employees Union v. Von Raab, 489 U.S. at 679 (1989); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 898 (D.C. Cir. 1989).

18. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396-97 (1995).

19. Clancy, *supra* note 2, at 634.

reasonableness" also conflicts with the historical purpose of the Fourth Amendment.[20]

This Note briefly explores the historical underpinnings of the Fourth Amendment to understand the framers' intent. This Note then discusses case law upholding suspicionless administrative searches of residential and commercial property based on statutory guidelines. The extension and development of warrantless administrative searches within pervasively regulated industries will then be analyzed. Lastly, this Note explores how suspicionless drug testing of persons in pervasively regulated industries, certain government positions, and public school athletics is upheld. This Note is intended to review the process of how individualized suspicion was slowly removed from Fourth Amendment jurisprudence based on a series of cases that justified searches of residences and businesses without any definitive suspicion for the well-being and safety of the community. The rationale in these cases was extended to justify drug testing of persons without any individualized suspicion.

II. HISTORICAL CONTEXT OF THE FOURTH AMENDMENT AND THE FRAMERS' INTENT OF ITS APPLICATION

A. *England's Rejection of General Warrants*

Although attitudinal antecedents for the purposes behind the Fourth Amendment can be traced to the Magna Carta,[21] and even earlier to Biblical times.[22] This brief historical overview will begin with English and American colonial experiences in the 18th century.

Historically, a general warrant was primarily used to search and seize any printing press or papers critical of the King or Parliament.[23] These warrants failed to specify who or what was to be searched or seized, allowing governmental officials to arrest any persons or search anything desired if it possibly related to criticism of the King.[24] An often cited example of the consequential abuses from a general warrant was witnessed in 1762 when the secretary of state, Lord Halifax, issued a general warrant for the seizure of persons and their papers responsible for the publication of *North Briton*, a pamphlet series the government found particularly offensive.[25] In three days, forty-nine persons were arrested pursuant to a general warrant that eventually led to the arrest of the pamphlet's true author, John Wilkes, as well as the seizure of all his private papers.[26]

Societal outrage in England toward these broad, open-ended warrants led to their abolishment in 1766.[27] The famous English case which contributed to the

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20. *Id.* at 635.

21. LANDYNSKI, *supra* note 10, at 25-26.

22. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-14 n.1 (Da Capo Press 1970) (citing *Joshua* 7:10-26).

23. *See* LANDYNSKI, *supra* note 10, at 21-29.

24. *Id.* at 24.

25. *Id.* at 28-29.

26. *Id.* at 29.

27. *Id.* at 30. Parliament could still authorize a general warrant in specific cases. *Id.*

demise of the general warrant was *Entick v. Carrington*[28] in which Lord Camden wrote:

> [I]f this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel.[29]

The general warrant's failure to narrowly define the state's ability to search persons aroused the fear and anger of Englishmen that were subjected to the possibility of a search despite the absence of a firm basis for any suspicion.[30]

B. *American Colonial Rejection of the Writs of Assistance*

While general warrants were legally enjoined because of their arbitrary nature, writs of assistance continued to flourish in the American colonies.[31] The writs of assistance gave customs officials seeking untaxed goods "unlimited discretion" to search for smuggled goods.[32] Rum smuggling was a notorious and profitable venture for the American Colonies, but the writs of assistance impeded these efforts.[33] Writs of assistance, unlike general warrants, were not limited in time or objective.[34] The writs empowered all officers of the Crown to search at their will "wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye."[35]

Following the death of King George III in 1760, all writs expired.[36] Boston merchants, represented by James Otis, Jr., saw an opportunity to end this practice, which they viewed as illegal, and petitioned the court on the question of granting new writs.[37] Despite an inspirational argument by James Otis, Jr.,[38] the

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28. Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765); *see also* LANDYNSKI, *supra* note 10, at 29.

29. Entick v. Carrington, 19 Howell's State Trials at 1063.

30. LANDYNSKI, *supra* note 10, at 29; *see also* Boyd v. United States, 116 U.S. 616, 626 (1886) ("It [the Entick decision] was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country.").

31. LASSON, *supra* note 22, at 51.

32. LANDYNSKI, *supra* note 10, at 31.

33. LASSON, *supra* note 22, at 51.

34. LANDYNSKI, *supra* note 10, at 31.

35. LASSON, *supra* note 22, at 54.

36. *Id.* at 57 (noting that all writs expired after the death of the granting sovereign).

37. *Id.*

38. John Adams described the argument:

> Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life. . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against the Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.

Massachusetts Superior Court ruled in favor of the customs officers, and new writs of assistance were granted.[39]

The legal validity of the writs of assistance was constantly challenged in the colonies until the Townshend Act of 1767 formally legalized the writs of assistance by authorizing the superior court in each province the power to issue the writs.[40] In 1774, the Continental Congress formally petitioned the King with grievances that included their opposition to the writs of assistance: "The officers of the customs are empowered to break open and enter houses, *without the authority of any civil magistrate, founded upon legal information.*"[41]

The Framers of the Fourth Amendment were profoundly affected by their experiences with wide-sweeping searches pursuant to the writs of assistance.[42] The absence of any firm suspicion of illegal activity and the far-reaching scope of these searches aroused the fear and concern of the Framers resulting in the safeguards found in the Fourth Amendment.[43] Although the Fourth Amendment contains no explicit "irreducible requirement"[44] of individualized suspicion, the history of events surrounding the Fourth Amendment creates a presumption that individualized suspicion is an "inherent quality" of the reasonableness of a search.[45]

The Fourth Amendment protects people, not places.[46] It is argued that the Fourth Amendment is rooted in a deeply moral concept:

> [T]he belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity, and that this privacy must not be disturbed except in overriding social need, and then only under stringent procedural safeguards.[47]

Id. at 59 (quoting CHARLES FRANCIS ADAMS, THE LIFE AND WORKS OF JOHN ADAMS, 276 (1856)) (internal quotations omitted).

39. LASSON, *supra* note 22, at 63.

40. *Id.* at 70.

41. *Id.* at 75 (emphasis added).

42. *See* United States v. Chadwick, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."); *see also* Stanford v. Texas, 379 U.S. 476, 481-85 (1965) ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.").

43. United States v. Chadwick, 433 U.S. at 8.

44. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) ("[S]ome quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.") (citation omitted).

45. Clancy, *supra* note 2, at 489.

46. Katz v. United States, 389 U.S. 347, 351 (1967).

47. LANDYNSKI, *supra* note 10, at 47.

Individualized suspicion assures that the government protects the dignity of the individual, rather than treating its citizens as faceless subjects as permitted by England's general warrants and colonial writs of assistance.[48] Judicial rulings that fail to require individualized suspicion in drug testing stray from the belief that the Fourth Amendment ultimately safeguards personal dignity.[49]

III. THE FIRST ESTABLISHMENT OF INSPECTIONS WITHOUT TRADITIONAL INDIVIDUALIZED SUSPICION PURSUANT TO AN ADMINISTRATIVE SEARCH EXCEPTION

In *Frank v. Maryland*,[50] the United States Supreme Court did not initially require any search warrant for health inspections of residential property conducted by governmental agencies pursuant to municipal regulations.[51] The Supreme Court originally ruled that the Fourth Amendment's search warrant requirement applied only to searches used in criminal prosecutions.[52] The Court also held that the municipal code by which the search was authorized[53] sufficiently limited the inspector's discretion by requiring the inspection to occur during the day, forbidding forcible entries, and requiring valid grounds for a suspicion of a violation.[54] Health inspections were viewed as a necessity to "prevent the spread of disease" and the "pervasive breakdown in the fiber of a people" resulting from slum conditions.[55] The *Frank* decision is an example of the Court ruling that the privacy expectations of the individual were subordinate to the needs of maintaining community health and safety standards. Therefore, the societal interest in upholding community health standards eclipsed a residential property owner's privacy expectations. This legal analysis permitted warrantless inspections to be reasonable.[56]

Camara v. Municipal Court[57] overruled *Frank*, however, emphasizing the "one governing principle, justified by history and current experience" is that a search of private property is unreasonable without a valid search warrant or consent from the owner.[58] This approach focused less on the possible consequences to the community, and shifted the emphasis to the protection of the individual by requiring a search warrant for any housing inspection.[59] Prior to *Camara*, the

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48. *See* Clancy, *supra* note 2, at 489.

49. *Id.* at 589.

50. Frank v. Maryland, 359 U.S. 360 (1959), *overruled by* Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

51. *Id.* at 373.

52. *Id.* at 365.

53. *Id.* at 361.

54. *Id.* at 366-67.

55. *Id.* at 371.

56. *See id.* at 372-73.

57. Camara v. Municipal Court, 387 U.S. 523 (1967).

58. *Id.* at 528-29.

59. *Id.* at 534 (ruling that regulatory inspections are "significant intrusions upon the interests protected by the Fourth Amendment, and that such searches when authorized and conducted

reasonableness of a housing inspection was based only on whether a municipal code provided the authority and guidelines for the inspection, not on whether a search warrant was issued.[60] The *Camara* Court ruled, however, that these "broad statutory safeguards are no substitute for individualized review."[61] This individualized review, however, was not a command for the traditional requirement of probable cause in the criminal context.[62] Rather, probable cause for conducting the search existed if legislative or administrative requirements were met with respect to a particular structure or dwelling.[63] For instance, if a dwelling's age or nature of its construction conforms to a legislative or regulatory decree for permitting an inspection, then probable cause exists for issuing a warrant, even if that structure properly complies with regulations.[64] Therefore, if an ordinance permits inspections of all electrical wiring in twenty-five-year-old houses, then a search warrant could be obtained to inspect the wiring of a twenty-five-year-old house, even if no reasonable suspicion exists as to whether the house's wiring is faulty or not. The decision to find probable cause in this manner rests on the difficulties in enforcing regulations designed to prevent violations that may be hidden and impossible to detect.[65] The dangerous consequences of requiring hazardous conditions to manifest outwardly before "traditional" probable cause exists poses too great a threat to the public.[66]

In a companion case, *See v. City of Seattle*,[67] the Court extended the search warrant requirement to include commercial property inspections.[68] In *See*, a business owner refused to permit the Seattle Fire Department to inspect the premises without a warrant,[69] despite a municipal ordinance authorizing warrantless inspections.[70] The *See* Court ruled that "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."[71]

Although *Camara* and *See* require a search warrant before governmental inspections may occur, these rulings rely on the fact that a search warrant may be

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without a warrant procedure lack traditional safeguards which the Fourth Amendment guarantees to the individual").

60. *See* Frank v. Maryland, 359 U.S. at 366-67.

61. Camara v. Municipal Court, 387 U.S. at 533.

62. *Id.* at 538; *see also* Carroll v. United States, 267 U.S. 132, 162 (1925) (stating that probable cause exists where "the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed.).

63. Camara v. Municipal Court, 387 U.S. at 533.

64. *See id.*

65. *Id.* at 537.

66. *Id.* at 535-36.

67. See v. City of Seattle, 387 U.S. 541 (1967).

68. *Id.* at 543.

69. *Id.* at 541.

70. *Id.*

71. *Id.* at 543.

issued based on objective criteria set forth in regulations and legislation.[72] Therefore, a traditional individualized review is not truly present because an inspection may occur even if the owner's property complies with the regulation's safety standards, affording the residential owner or commercial property owner no forewarning of a pending inspection. *Camara* and *See* provide the basic premise for warrantless inspections based on a "pervasively regulated industry" theory.[73] The parameters of warrantless inspections of pervasively regulated industries are found in statutory or regulatory guidelines, just as the "probable cause" for an inspection of commercial or residential structures is found in statutory or regulatory guidelines. Although the source for issuing a search warrant in administrative searches of residential and commercial property is similarly found in statute or regulations, searches of certain commercial properties in pervasively regulated industries do not require a search warrant.[74] Lower privacy expectations result from participating in a highly regulated industry, therefore warrantless inspections authorized by regulations or statutes are considered reasonable and not violative of the Fourth Amendment.[75] This Note contends that this exception to the warrant requirement is justifiable considering the hazardous consequences of safety violations within highly regulated industries. Similar to the difficulties in enforcing building codes, the government's ability to enforce these safety provisions would be greatly hindered if traditional probable cause was required. Also, the notice and details of the warrant requirement are sufficiently replaced with extensive guidelines set forth in a statute or regulation.

IV. DEVELOPMENT OF WARRANTLESS SEARCHES IN PERVASIVELY REGULATED INDUSTRIES

A. *The Liquor Industry*

The Supreme Court determined that the liquor industry was a pervasively regulated industry, and therefore, not subject to the search warrant requirement when the inspection of the premises followed detailed guidelines.[76] In *Colonnade Catering Corp. v. United States*,[77] the Court ruled the liquor industry

72. Camara v. Municipal Court, 387 U.S. 523, 538 (1967); See v. City of Seattle, 387 U.S. at 544-45.

73. *See* United States v. Biswell, 406 U.S. 311, 316 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

74. *See* United States v. Biswell, 406 U.S. at 317 ("[W]here . . . regulatory inspections further . . . federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.").

75. *See, e.g.*, United States v. V-1 Oil Co., 63 F.3d 909, 912 (9th Cir. 1995) ("The government has a substantial interest in regulating transportation and temporary storage of hazardous materials to protect life and property. [And] unannounced inspections reasonably ensure that the statute is satisfactorily enforced."), *cert. denied*, 116 S. Ct. 1824 (1996).

76. *See* Colonnade Catering Corp. v. United States, 397 U.S. at 77 (holding that a warrantless inspection authorized by federal statute did not permit forcible entry).

77. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

is "long subject to close supervision and inspection" and that "Congress has broad authority to fashion standards of reasonableness for searches and seizures."[78] *Colonnade*, therefore, provided the first clear exception to the search warrant requirement for pervasively regulated commercial premises.

In *Colonnade*, a federal agent of the Alcohol and Tobacco Division of the Internal Revenue Service inspected a catering establishment's cellar without consent.[79] After the owner refused to open the cellar without a showing of a warrant, the federal agent broke the lock and confiscated bottles of liquor suspected of being refilled contrary to 26 U.S.C. § 5301(c)(1).[80] The *Colonnade* Court's reasoning rested on similarities found in *Camara* and *See*—the reasonableness of a search could be judged on procedures found in the statute, not necessarily requiring individualized suspicion.[81] The Court found that the warrantless inspection of a heavily regulated establishment was constitutional, considering the long history of regulation within the liquor industry, as well as the fact that Congress approved warrantless inspections within the liquor industry.[82] Forcible entry, however, was not a procedure approved by Congress.[83] Rather, Congress provided for fines assessed to persons refusing to allow the inspector to enter the premises.[84] The reasonableness of a warrantless search of an establishment

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78. *Id.* at 77.

79. *Id.* at 73.

80. *Id.*; *see also* 26 U.S.C. § 5301(c)(1) (1994).

> No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—
>
> (1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of tax determination under the provisions of this chapter . . . .

Id.

81. Colonnade Catering Corp. v. United States, 397 U.S. at 73-74.

82. *Id.*; *see* 26 U.S.C. § 5146(b).

> The Secretary may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

Id.; *see also Id.* § 7606(a)-(b):

> (a) Entry during day
>
> The Secretary may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects.
>
> (b) Entry during night
>
> When such premises are open at night, the Secretary may enter them while so open, in the performance of his official duties.

Id.

83. Colonnade Catering Corp. v. United States, 397 U.S. at 77.

84. *Id.*; *see* 26 U.S.C. § 7342:

> Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the

serving liquor was justified solely upon the "long history" of statutes allowing legislative bodies to deal with the "evils at hand."[85]

The Court put forth few justifications for allowing a warrantless search. Although the dangers of alcohol to the public may have been a plausible justification, *Colonnade* dealt only with a tax avoidance issue. Unlike *Camara* the necessity of efficient enforcement for safety purposes was not argued. The historical pervasiveness of the legislation concerning inspections of the liquor industry was the only basis for the Court's opinion.[86] This rationale, of course, could lead to "absurd" consequences if new, yet hazardous, industries were created and threatened the public's health or welfare.[87]

B. *Firearms Industry*

In *United States v. Biswell*,[88] however, the Supreme Court justified the warrant requirement exception to pervasively regulated industries on factors other than the customary application of past regulations.[89] The *Biswell* Court looked to the importance of the federal interest in regulating the firearms industry.[90]

The *Biswell* Court held that the firearms industry could be inspected without a warrant, despite the absence of an established history of inspecting the industry.[91] The Court reasoned firearms were a "large" and "urgent" federal interest because of increasing violent crime.[92] This imperative issue provided the impetus for Congressional approval of warrantless inspections[93] that established the reasonableness of the search, so long as the regulatory inspection system was "limited in time, place and scope."[94] In accord with the balancing approach of a reasonable search, the Court noted the privacy expectations of a gun dealer were

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> Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

Id.

85. Colonnade Catering Corp. v. United States, 397 U.S. at 75-76.

86. *Id.* at 76-77.

87. *See* Donovan v. Dewey, 452 U.S. 594, 606 (1981). "[N]ew or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation." *Id.*

88. United States v. Biswell, 406 U.S. 311 (1972).

89. *Id.* at 315.

90. *Id.*

91. *Id.* at 316; *see* The Gun Control Act of 1968, 18 U.S.C. §§ 921-929 (1994).

92. United States v. Biswell, 406 U.S. at 315, 317.

93. 18 U.S.C. § 923(g). The Gun Control Act provides in part that "[t]he Secretary may enter during business hours premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting." *Id.*

94. United States v. Biswell, 406 U.S. at 311; *see also* Donovan v. Dewey, 452 U.S. 594, 600 (1981) (holding that the federal regulatory presence must be "sufficiently comprehensive and defined").

minimal because "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[95] This rationale follows an implied consent theory. By voluntarily conducting business in a highly regulated industry, the owner effectively consents to any ensuing searches. Fourth Amendment jurisprudence consistently recognizes that a person may consent to a search, and thus the search is always reasonable.[96]

Extensive regulation of these industries provides notice of possible searches in the future. If pervasive regulation of an industry reduces the privacy expectation of persons in that industry, what constitutes "pervasive"? The Court in *Marshall v. Barlow's, Inc.*,[97] addressed this issue after an employer refused to allow an inspector into the working area of an electrical and plumbing installation business.[98] The warrantless inspection was pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA).[99] The Court ruled a warrantless inspection was not constitutional under these facts because the OSHA mandates failed to rise to the pervasiveness or specificity found in the statutory exceptions in *Colonnade* and *Biswell*.[100] Certainly, any regulated business could be reached by Congress pursuant to the Commerce Clause.[101] The implications of such broad permissiveness of warrantless inspections would render the Fourth Amendment in any setting nearly toothless; therefore, *Colonnade* and *Biswell* are clear "exceptions" to the rule.[102] Therefore, merely engaging in an industry will not result in implied consent to a warrantless search; the industry must be pervasively regulated as defined by statute and interpreted by case law.

The *Barlow's* Court notably refused to extend this implied consent theory of warrantless inspections beyond the "proprietor," "entrepreneur," or "business [person]" within the liquor and firearms industries or beyond their "stock" (inventory).[103] These cases never permitted physical searches of individuals

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95. United States v. Biswell, 406 U.S. at 316.

96. *See* Zap v. United States, 328 U.S. 624, 628 (1946). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (holding that consent cannot be coerced by explicit or implicit means).

97. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

98. *Id.* at 309-10.

99. Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a) (1994).

100. Marshall v. Barlow's, Inc., 436 U.S. at 314.

101. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that Congress could desegregate public accommodations using the Commerce Clause of the United States Constitution). *But see* United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress exceeded its Commerce Clause authority when it passed the Gun-Free School Zones Act because possessing a gun near a school was not a substantial economic activity affecting interstate commerce).

102. Marshall v. Barlow's, Inc., 436 U.S. at 313.

103. *Id.* (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973)); Robert H. Horn, Comment, Shoemaker v. Handel*: Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement*, 14 HASTINGS CONST. L.Q. 173, 184 (1986).

working in these industries. The cases permitted only searches of premises relating to the hazardous consequences of an industry's activities to protect the public's safety. Searches of a person's body were never an issue in *Colonnade, Biswell*, or *Barlow*. The regulations at issue in the previous cases allowing warrantless searches were limited to commercial premises and objects on those premises.

C. *Mining Industry*

Another area in which the Supreme Court found an important federal interest to justify the absence of any individualized suspicion was the mining industry.[104] The "substantial federal interest"[105] and the statutory provisions authorizing a warrantless search[106] allowed the Court to rule the privacy expectations of mine owners was minimal with respect to their property.[107] The *Dewey* Court enunciated a two-part test to determine if a search is within the pervasive regulation exception.[108] The two-part test states:

> [A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.[109]

The Court also ruled that because the statute's enforcement would be impeded by requiring a warrant, a warrant need not be obtained for inspection.[110] The *Dewey* Court, using language from previous decisions, applied the test specifically to inspections of commercial property, not individuals.[111]

D. *Vehicle-Dismantling Businesses*

All of the prior pervasively regulated industry cases found an implied consent theory[112] or lower expectation of privacy[113] because of the dangerous nature of the industry and the extensive regulation of that industry. *New York v. Burger*,[114] however, is a notable departure from requiring an inherently dangerous

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104. *See* Donovan v. Dewey, 452 U.S. 594, 602 (1981).
105. *Id.*
106. *See* 30 U.S.C. § 813(a) (1994).
107. Donovan v. Dewey, 452 U.S. at 598.
108. *Id.* at 600.
109. *Id.*
110. *Id.* at 603.
111. *Id.* at 600; *see* Horn, *supra* note 103, at 184.
112. United States v. Biswell, 406 U.S. 311, 316 (1972).
113. Donovan v. Dewey, 452 U.S. at 600-01.
114. New York v. Burger, 482 U.S. 691 (1987).

aspect to an industry before permitting a warrantless search.[115] *New York v. Burger* ruled no warrant was required to inspect New York's vehicle-dismantling businesses (junkyards).[116] All of the prior administrative search exceptions were deemed serious hazards requiring governmental regulation.[117] It was argued that the junkyard business in New York was not an inherently life threatening business, nor was the business even pervasively regulated.[118]

The *Burger* decision opened up the possibility of warrantless inspections of businesses that have no grave ramifications to society, despite the Court's previous holdings requiring a significantly hazardous element before a federal interest will exist.[119] The significance of this consequence would be evident in later cases that permitted administrative searches by the State, although the State arguably did not have sufficient interests to overcome legitimate individual privacy expectations.[120] This critique is evident in cases that permitted suspicionless drug testing of high school student-athletes.[121] Although little evidence existed that drug-use was a substantial problem in a particular high school, the Court upheld suspicionless testing because of the possible effects of drugs.[122]

V. EXTENDING THE ADMINISTRATIVE SEARCH RATIONALE TO DRUG TESTING INDIVIDUALS WITHIN PERVASIVELY REGULATED INDUSTRIES, GOVERNMENT EMPLOYMENT, AND PUBLIC SCHOOL ATHLETICS

A. *Persons in Pervasively Regulated Industries*

In *Shoemaker v. Handel*,[123] the Third Circuit used the administrative search rationale to rule that horse racing is a pervasively regulated industry in New Jersey; therefore, jockeys have a diminished expectation of personal privacy, which allows for the use of random drug urinalysis testing without a warrant or individualized suspicion.[124] Drug urinalysis is a search within the Fourth Amendment's reach when the drug test is administered by a State actor.[125]

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115. *Id.* at 719 (Brennan, J., dissenting).

116. *Id.* at 703.

117. *See, e.g.*, Donovan v. Dewey, 452 U.S. at 602 (finding that "the mining industry is among the most hazardous in the country"); United States v. Biswell, 406 U.S. at 315 (holding that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime").

118. New York v. Burger, 482 U.S. at 718-21 (Brennan, J., dissenting).

119. *See supra* notes 112-18 and accompanying text.

120. *See* Robert C. Farley, Jr., Note, *Suspicionless, Random Urinalysis: the Unreasonable Search of the Student Athlete*—Acton v. Vernonia School District 47J, 68 TEMP. L. REV. 439, 456 (1995).

121. *See infra* Part V.C.

122. *See* Farley, *supra* note 120, at 456.

123. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986).

124. *Id.* at 1142.

125. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989); *see also* Schmerber v. California, 384 U.S. 757, 767 (1966) (holding that withdrawing blood to determine blood alcohol content is a search).

According to *Shoemaker*, not only could pervasively regulated businesses be inspected for safe environments, but now physical searches of persons participating in those industries could be searched without a warrant or any reasonable suspicion of individual wrong-doing.[126] The court noted that the state's interest was significant in upholding the integrity of the horse racing business, and that the jockeys were voluntary participants in this highly regulated industry.[127] The *Shoemaker* court arguably ignored the fundamental protections that the Fourth Amendment provides for upholding personal integrity. Inspections of business inventory and premises, although affecting the individual owner, do not impair a person's private life or personal dignity.

In assessing the reasonableness of the search, the *Shoemaker* court found the integrity of a sport, from which large sums of revenue were collected, outweighed the jockey's individual privacy interests.[128] The court's acknowledgment that revenue could be a superior governmental interest that outweighs an individual's privacy opened the plausibility of any societal interest overriding the individual's privacy expectations. Consequently, courts used the horse racing industry as a benchmark to determine whether other industries possessed graver safety ramifications to society; if individualized suspicion was not needed to test jockeys, then employees in more hazardous, highly regulated industries need not possess individualized suspicion either.[129]

The United States Supreme Court eventually addressed the question raised by *Shoemaker* concerning whether warrantless drug testing of persons in a pervasively regulated industry absent individualized suspicion was reasonable.[130] In *Skinner v. Railway Labor Executives Ass'n*,[131] the Supreme Court ruled that the government's "special needs beyond normal law enforcement" following a train accident justified warrantless, suspicionless urinalysis and breathalyzer tests.[132] Because the railroad industry is highly regulated by the Federal Railroad Administration as proscribed by the Secretary of Transportation,[133] the Court ruled that the railroad employees' privacy expectations were diminished because of society's superior need to prevent train accidents.[134] Also, the "chaotic" scenes following a train wreck may prevent officials from identifying which individual

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126. Shoemaker v. Handel, 795 F.2d at 1142.

127. *Id.*; *see also* Dimeo v. Griffin, 943 F.2d 679, 684 (7th Cir. 1991) (ruling that the state interest was the safety of the jockeys, as well as, maintaining the integrity of horse racing, a large revenue source for Illinois).

128. *See* Shoemaker v. Handel, 795 F.2d at 1142.

129. *See, e.g.*, Policemen's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 141 (3d Cir. 1988) (holding that the police industry is highly regulated); Rushton v. Nebraska Public Power Dist., 844 F.2d 562, 566-67 (8th Cir. 1988) (ruling that the nuclear power industry is highly regulated); McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (holding that corrections officers are highly regulated). *But see* Capua v. City of Plainfield, 643 F. Supp. 1507, 1518-19 (D.N.J. 1986) (ruling that firefighters were not employees in a highly regulated industry).

130. *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 626-27 (1989).

131. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

132. *Id.* at 620.

133. *See* 49 U.S.C.A. § 5331 (West 1997); *see also* 49 C.F.R. § 219 (1996).

134. Skinner v. Railway Labor Executives Ass'n, 489 U.S. at 628.

crew members were possibly under the influence of a controlled substance; therefore, drug testing all crew members without any suspicion was deemed reasonable.[135]

The Department of Transportation promulgated further regulations following *Skinner* pursuant to Congressional mandate.[136] The Department of Transportation required random, warrantless drug testing of employees holding safety sensitive positions in transportation industries including trucking,[137] aviation,[138] railroads,[139] mass transits,[140] and marine shipping.[141] Also, any person

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135. *Id.* at 631.

136. *See* 49 U.S.C. 31306(b)(1)(B) (1994).

137. The Department of Transportation instituted a federal pilot program to randomly drug test truckdrivers pursuant to section 5(b)(1) of the Omnibus Transportation Act of 1991, 49 U.S.C. § 31306 (b)(1)(B). New Jersey, Nebraska, Utah, and Minnesota were the states selected to participate in this program. The states were required to follow federal guidelines for testing procedures, which were already applicable to private trucking companies. *See* 49 C.F.R. § 40 (1997). These regulations were found not violative of the Fourth Amendment because the truckdriver's privacy expectations were lower because of the extensive regulation of the industry, and because highway safety was paramount. International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1302 (9th Cir. 1991). Although testing guidelines were uniform, each state instituted its own selection process for randomly testing drivers. *See* Owner-Operator Indep. Drivers Ass'n v. Pena, 862 F. Supp. 470, 471-72 (D.C. Cir. 1993). When the year-long program was completed, over 30,000 random urine samples were collected of which 4.6% tested positive for a controlled substance. 59 Fed. Reg. 62,218, 62,222 (1994). The Department of Transportation adopted the random drug testing program for motor carriers with 50 or more employees on January 1, 1995. 49 C.F.R. § 382.115 (1996). The program was expanded on January 1, 1996, to include employers with 50 or fewer drivers. *Id.* Fifty percent of the industry's personnel are tested, unless the industry's violation rate is .5% to 1% in which cases only 25% of the personnel will be tested. 49 C.F.R. § 382.305(d)(2) (1996). If 25% of the industry personnel is tested, and .5% of the tests return positive for two consecutive years, then only 10% of the industry personnel will be tested. 49 C.F.R. § 382.305(d)(1). These regulations apply to all commercial vehicle drivers, not only long distance tractor-trailer drivers. Kearney v. Town of Brookline, 937 F. Supp. 975, 981 (D. Mass. 1996). Included in the definition of "employer" is a state or political subdivision of a state. *Id.*

138. Section 3 of the Omnibus Transportation Employee Act of 1991, 49 U.S.C. § 45102 requires random drug testing of all airline employees holding safety sensitive positions. These positions include crew members, flight attendants, maintenance personnel, and air traffic controllers. 49 U.S.C. § 45102(a); 14 C.F.R. pt. 121 app. I (1997). The procedures for testing are those found in 49 C.F.R. § 40 (1997). Fifty percent of the industry personnel holding safety sensitive positions are tested unless .5% to 1% of the tests return positive for two consecutive years. 14 C.F.R. pt. 121 app. J § III (c) (1997). In that event, 25% or more of the safety sensitive personnel will be tested. *Id.* In 1993, 182,482 random urinalysis tests were given, which resulted in .53% of the tests returning positive. 59 Fed. Reg. at 62,220. Random urinalysis of airline personnel was held constitutional because the industry was highly regulated, lessening the employees' privacy expectations, as well as the hazardous ramifications of possible safety violations. Bluestein v. Skinner, 908 F.2d 451, 455-58 (9th Cir. 1990).

139. Section 4 of the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 20140 authorized the Secretary of Transportation through the Federal Railroad Administration

that is not within these categories, but who is required to have a commercial driver's license, is subject to random drug testing without individualized suspicion.[142] All of these cases are examples of courts broadening the applicability of warrantless searches. Laws or regulations passed by an imposing majority give permission to drug test an individual—the ultimate minority—without any adequate suspicion of wrongdoing. The individual is left with little constitutional protection for bodily integrity unless the individual finds other employment in a less regulated area. This solution, however, is becoming less viable as more occupations are encompassed in pervasive regulation.

Although Congress possesses the power to pass legislation concerning interstate commerce,[143] the transportation industry is not the only sector affected by these judicial holdings that allow statutes or regulations to replace reasonable suspicion and warrants issued upon probable cause. Other businesses that are considered significantly dangerous are also subject to random drug urinalysis tests.[144] If the government can compel highly regulated private employers to

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(FRA) to promulgate rules establishing random urinalysis testing of railroad carrier employees holding safety sensitive positions. *See* 49 C.F.R. § 219.601 (1996). The FRA conducted 42,199 random urinalysis tests which resulted in .7% of the tests returning positive. 59 Fed. Reg. at 62,221. As with the motor carrier and airline industries, 50% of the industry's safety sensitive positions are tested each year unless the industry as a whole has a random positive rate of less than 1% for two consecutive years. 49 C.F.R. § 219.602(c). In that event, 25% of the personnel will be randomly selected. *Id.* As was previously established, this random testing of railroad personnel without any reasonable suspicion or warrant was ruled constitutional. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. at 624.

140. Section 6 of the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331 authorizes the Secretary of Transportation through the Federal Transit Administration (FTA) to institute random urinalysis testing. *See* 49 C.F.R. § 653.47 (1995). As with other industries, 50% of the personnel will be tested, unless 1% or less of the tests return positive for two years, then only 25% of the personnel will be tested. *Id.* § 653.47(c). Warrantless, suspicionless drug testing of transit employees was ruled constitutional because the government's special needs outweighed the employees' privacy expectations, which was lessened by the pervasive regulation. Transport Workers', Local 234 v. Southeastern Pa. Transp. Auth., 884 F.2d 709, 712 (3d Cir. 1989); *see also* Holloman v. Greater Cleveland Reg'l Transit Auth., 741 F. Supp. 677, 686-87 (N.D. Ohio 1990) (ruling the transit authority could constitutionally require a bus driver to submit to drug testing after a collision and during physical examinations); Moxley v. Regional Transit Serv., 722 F. Supp. 977, 979-80 (W.D.N.Y. 1989) (holding that an employee that is responsible for public transportation has lower privacy expectations by working in a pervasively regulated industry).

141. *See* 46 C.F.R. § 16.230 (1995) and 59 Fed. Reg. at 62,226. ***But see*** Transportation Inst. v. United States Coast Guard, 727 F. Supp. 648, 658 (D.C. Cir. 1989) (ruling that prior regulations allowing random drug testing of every crew member was not reasonable unless a particular position was safety sensitive).

142. *See* 49 C.F.R. § 382.103(a) (1995).

143. *See* U.S. CONST. art. I, § 8, cl. 3.

144. *See* International Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1457-59 (9th Cir. 1990) (upholding suspicionless drug testing of employees in the natural gas pipeline industry); Thomson v. Marsh, 884 F.2d 113, 114-15 (4th Cir. 1989) (upholding random drug testing of civilian employees at Army weapons plant).

randomly drug test employees holding safety sensitive positions, then certainly one could foresee the government testing its own employees.

B. *Government Employees*

In 1986, President Reagan issued an Executive Order declaring that the federal government should be a drug-free employer.[145] Pursuant to this Executive Order, federal agencies instituted orders outlining random drug testing of federal workers. The Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government is the employer.[146]

The Supreme Court upheld the United States Customs Service's drug testing program for employees required to carry firearms, and those employees seeking a promotion to positions involving the interdiction of illegal drugs, or positions with knowledge of classified materials.[147] The Court reasoned that the governmental interests outweighed the individual's privacy concerns because customs agents are "our Nation's first line of defense" against illegal drugs, therefore requiring a warrant or reasonable suspicion would frustrate the deterring effects of random drug testing.[148] These customs agents, the Court ruled, had a diminished expectation of privacy because they volunteered to work in a dangerous profession, which required carrying a gun and working around illegal narcotics.[149] Notably, Justice Scalia dissented in *National Treasury Employees Union v. Von Raab*[150] calling drug urinalysis "destructive of privacy and offensive to personal dignity."[151] Justice Scalia further stated that the Court previously upheld bodily searches without individualized suspicion only with respect to prison inmates.[152] Justice Scalia also objected to the drug testing because the case's record indicated that out of the 3600 employees tested, only five employees tested positive, therefore no compelling need existed.[153]

While random drug testing was upheld for government employees, the scope of these rulings have allowed testing only for those positions that are safety sensitive, which requires the government to show a direct nexus between the position's duties and the nature of the feared violation.[154] Thus, employment in

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145. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C. § 7301 (1994).

146. O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

147. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989).

148. *Id.* at 668.

149. *Id.* at 672.

150. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

151. *Id.* at 680 (Scalia, J., dissenting).

152. *Id.*; *see* Bell v. Wollfish, 441 U.S. 520, 558-60 (1979) (upholding bodily searches of prison inmates without individualized suspicion).

153. National Treasury Employees Union v. Von Raab, 489 U.S. at 683-84 (Scalia, J., dissenting).

154. *See* American Fed'n of Gov't Employees v. Derwinski, 777 F. Supp. 1493, 1497 (N.D. Cal. 1991); American Postal Workers Union v. Frank, 725 F. Supp. 87, 90 (D. Mass. 1989) (holding that postal workers did not engage in a highly regulated industry with grave safety concerns); Harmon v. Thornburgh, 878 F.2d 484, 491 (D.C. Cir. 1989) (holding random drug tests

the federal government will not *per se* require a random drug test. Various legal challenges were brought concerning the Fourth Amendment rights of government employees in several Executive Departments. Many of these suits centered on whether the position could justifiably be labeled safety sensitive and subject to suspicionless tests. These Executive Departments included the Department of Transportation,[155] the Department of Agriculture,[156] the Department of Defense,[157] the Department of Justice,[158] those federal workers with secret security clearances,[159] the Veterans Administration,[160] and the Department of Health and Human Services.[161]

State and local governments have also used the pervasively regulated industry rationale to institute random, suspicionless drug testing of government employees that are perceived as having less legitimate privacy expectations due to their safety-sensitive positions. Cases at the local level involving random drug testing of public employees include police officers,[162] firefighters,[163] corrections

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for Justice Department lawyers with access to grand juries failed to rise to a public safety risk equivalent to carrying a gun or operating a train).

155. *See, e.g.*, American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 889 (D.C. Cir. 1989) (upholding the Department's suspicionless testing of employees whose duties bore a direct and immediate impact on the public's health and safety).

156. *See, e.g.*, National Treasury Employees Union v. Yeutter, 918 F.2d 968, 977 (D.C. Cir. 1990) (upholding the Department's random urinalysis testing of certain motor vehicle operators).

157. *See, e.g.*, National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 615 (D.C. Cir. 1989) (allowing the Army to institute random urinalysis tests on civilian employees holding positions such as drug counselors, police guards, and aviation personnel, but disallowing suspicionless tests of laboratory workers). Soldiers were already subjected to drug urinalysis without constitutional violation. Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).

158. *See, e.g.*, Harmon v. Thornburgh, 878 F.2d at 496 (upholding random testing of workers with top secret clearance, but not of criminal prosecutors or attorneys with access to grand juries).

159. *See, e.g.*, Hartness v. Bush, 919 F.2d 170, 172 (D.C. Cir. 1990) (upholding suspicionless testing of persons holding secret security clearances). *But see* Stigile v. Clinton, 932 F. Supp. 365, 368 (D.D.C. 1996) (holding that economists with clearance to the Old Executive Office Building failed to have sensitive information or special access to the President or Vice President that could justify a required drug urinalysis without any reasonable suspicion), *rev'd*, 110 F.3d 801 (D.C. Cir. 1997).

160. *See, e.g.*, American Fed'n of Gov't Employees v. Derwinski, 777 F. Supp. 1493, 1499 (N.D. Cal. 1991) (upholding suspicionless testing of VA nurses, physicians, pharmacists, technicians, guards, and protection officers, but not every employee within the Veterans Administration).

161. *See, e.g.*, American Fed'n of Gov't Employees v. Sullivan, 744 F. Supp. 294, 299-301 (D.C. Cir. 1990) (allowing random drug testing of persons with top secret security clearances, as well as motor vehicle operators, but not every employee).

162. *See, e.g.*, Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir. 1989) (upholding Boston Police Department's Rule 111 requiring random drug testing of all policemen).

163. *See, e.g.*, Saavedra v. City of Albuquerque, 73 F.3d 1525, 1532 (10th Cir. 1996) (upholding trial court's determination that firefighters and medical technicians are safety-sensitive

officers,[164] public hospital employees,[165] and public school employees.[166] As with federal cases, these state and local cases attempt to restrict suspicionless drug testing only to those positions considered safety-sensitive. One court noted that those employees that may have a "single drug related lapse . . . [that] could have irreversible and calamitous consequences" should be ruled as having safety-sensitive positions.[167] While judicial determination of what constitutes safety-sensitive positions appears to produce inconsistent results,[168] the courts have stressed that drug testing regulations must be specific and narrow, leaving no discretion to the drug test administrator in application or procedure.[169]

Courts uphold suspicionless drug testing of persons in pervasively regulated industries and safety-sensitive government positions by focusing heavily on the public's safety. Cases involving student-athletes in public schools, however, focus less on possible safety consequences for the public at-large and more on

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positions); Penny v. Kennedy, 915 F.2d 1065, 1067 (6th Cir. 1990) (ruling that mandatory urinalysis testing of Chattanooga's firefighters and police officers without reasonable suspicion was constitutional as long as the testing program was specifically defined and narrowly applied); Wilcher v. City of Wilmington, 924 F. Supp. 613, 618 (D. Del. 1996) (holding that firefighters have a lower privacy interest because of the public's interest in their job performance). *But see* Beattie v. City of St. Petersburg Beach, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) (holding that suspicionless testing of firefighters is unreasonable when no evidence of a pervasive drug problem existed).

164. *See, e.g.*, Taylor v. O'Grady, 888 F.2d 1189, 1197 (7th Cir. 1989) (allowing random testing of officers in contact with inmates but not officers with clerical or administrative duties); McDonnell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (upholding "systematic" random testing of officers that have contact with inmates).

165. *See, e.g.*, Kemp v. Clairborne County Hosp., 763 F. Supp. 1362, 1367 (S.D. Miss. 1991) (allowing suspicionless drug testing of hospital personnel with safety sensitive positions including a scrub technician).

166. *See, e.g.*, Aubrey v. School Bd., 92 F.3d 316, 319 (5th Cir. 1996) (holding that a custodian position was safety-sensitive); Jones v. McKenzie, 833 F.2d 335, 336 (D.C. Cir. 1987) (ruling that school bus drivers could be tested randomly), *aff'd on reh'g, sub nom.* Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989); English v. Talladega County Bd. of Educ., 938 F. Supp. 775, 781-82 (N.D. Ala. 1996) (ruling that a school bus mechanic could be randomly drug tested). *But see* Patchogue-Medford Congress of Teachers v. Board of Educ., 510 N.E.2d 325, 331 (N.Y. 1987) (ruling that suspicionless testing of probationary teachers is unconstitutional without reasonable suspicion).

167. National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989).

168. *See* Laura A. Lundquist, Note, *Weighing the Factors of Drug Testing for Fourth Amendment Balancing*, 60 GEO. WASH. L. REV. 1151, 1152 (1992).

169. *See, e.g.*, Rutherford v. City of Albuquerque, 77 F.3d 1258, 1261 (10th Cir. 1996) (holding that the drug test administrators exercised discretion and deviated from the testing policy, thus the urinalysis test was unconstitutional); Kennedy v. City of New York, No. 94 Civ. 2886, 1995 WL 326563 at *5 (S.D.N.Y. June 1, 1995) (ruling that the urinalysis test failed to conform with proper procedures and thus was unconstitutional).

the need to protect the minority-aged student in upholding suspicionless drug testing. [170]

C. *Student-Athletes Attending Public Schools*

The Supreme Court upheld suspicionless drug testing as a requirement for participation in athletics sponsored by a public school district.[171] In *Vernonia School District 47J v. Action*,[172] the Supreme Court noted that minority-aged student-athletes have a diminished expectation of privacy commensurate with communal undress in locker rooms.[173] Justice Scalia opined, "School sports are not for the bashful," and by choosing to participate in athletics the students "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[174] Balanced against this supposed diminished expectation of privacy, the Court ruled that the State's interest in protecting the physical and mental well-being of student-athletes while in the custody of the State was "important—indeed perhaps compelling."[175] Apparently, no solid evidence of a drug problem needs to be found considering the Vernonia School District's policy was founded on disruptive behavior not definitively linked to drug-use and on a few sports injuries witnessed by coaches that hastily concluded that these injuries were drug related.[176] Therefore, Justice Scalia and the majority upheld suspicionless drug testing for students participating in athletics sponsored by a public school.[177]

It must be noted that Justice Scalia found that obtaining a urine sample from students was "relative[ly] unobtrusive[ ]"[178] while his dissent in *Von Raab* (the case involving customs agents) cast the procedure as "particularly destructive of privacy and offensive to personal dignity."[179] Undoubtedly, the distinguishing element for Justice Scalia was the fact that the persons tested in

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170. This Note does not address drug testing college athletes who are 18 years old or older. Courts have generally applied a different standard for college-aged student-athletes. *See generally* University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993) (ruling that random university sponsored drug testing of athletes violated the Fourth Amendment). *But see* Hill v. NCAA, 865 P.2d 633, 669 (Cal. 1994) (ruling NCAA drug testing policy was not violative of a state constitutional right to privacy).

171. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995).

172. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995).

173. *Id.* at 2392-93 (citing Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).

174. *Id.*

175. *Id.* at 2395.

176. *See id.* at 2388-89; *see also* Brief for Respondent, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, *available in* WESTLAW at 1995 WL 89313, at *11-15 (arguing that the school district overreacted to the drug "problem").

177. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. at 2396.

178. *Id.*

179. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

Vernonia were children in the custody of the state while at school.[180] Despite this explanation, one cannot ignore Justice Scalia's observation in *Von Raab* that suspicionless searches were previously upheld only in prisons.[181] The *Vernonia* ruling implicitly equates students' Fourth Amendment rights with the rights of prison inmates. According to the Court, students do not "shed their constitutional rights . . . at the schoolhouse gate,"[182] but the Fourth Amendment protections are applied differently when students choose to participate in school sponsored athletics.

The Court was careful to rule that the scope of the *Vernonia* decision was limited to athletic participants.[183] Cases prior to *Vernonia* held that drug testing an entire school's enrollment was unreasonable because no suspicion existed for individual students, therefore the search was too broad and intrusive upon the students' privacy expectations.[184] In *Odenheim v. Carlstadt-East Rutherford Regional School District*,[185] the court ruled random wide-sweeping searches were "an attempt to control student discipline under the guise of a medical procedure, thereby circumventing strict due process requirements."[186] Although prior to *Vernonia,* a federal court ruled drug testing students in all extracurricular activities without individualized suspicion unconstitutionally infringed on students' privacy expectations,[187] the Supreme Court's reasoning in *Vernonia* could easily expand to incorporate other nonathletic activities.[188] If the fact the students are

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180. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. at 2391.

181. National Treasury Employees Union v. Von Raab, 489 U.S. at 680 (Scalia, J., dissenting).

182. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

183. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. at 2396 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."). When asked why the drug testing was limited to athletes, Wayne Acton's high school principal responded, "because we were afraid we'd be sued to hell if we went to all students." Aaron Epstein, *High Court Upholds School Drug Testing*, THE RECORD (Bergen County, N.J.), June 27, 1995, at A1; *cf.* Haya El Nasser, *More Schools Test Kids for Drugs*, USA TODAY, Sept. 5, 1996, at 1A (noting that one Texas high school is testing every student in extracurricular activities "from the French Club to the National Honor Society").

184. *See* Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist., 510 A.2d 709, 713 (N.J. Super. Ct. Ch. Div. 1985); *see also* Anable v. Ford, 653 F. Supp. 22, 40 (W.D. Ark. 1985) (finding that a particular urine test was improper because it did not reasonably relate to maintenance of order and security in school, and attempted to regulate out of school conduct that would not affect the learning process).

185. Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

186. *Id.* at 713.

187. Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989).

188. *See Drug Tests Upheld for Student Athletes*, VIRGINIAN PILOT-LEDGER STAR, June 27, 1995, at A1 (quoting Gwendolyn Gregory, deputy general counsel for the National School Boards Association as stating overnight trips or other extracurricular activities could be included); *see also* 1997 Fla. S.B. 1564 (a proposed bill requiring random drug testing of all middle school and high school students with the possible consequence of losing the student's driver's license if refusal or

under 18 years of age and under the tutelage of the state while at school creates a significant governmental interest, then anytime a school can find arguably diminished expectations of privacy or possible harmful safety consequences from certain activities, the state could possibly institute suspicionless drug testing. Activities such as driver's education, wood shop class, and even chemistry class all have possible dangerous consequences that could be ruled superior to individual privacy expectations. Also, students participating in drama, band, and gym classes conceivably change clothing around one another. Are these activities "not for the bashful,"[189] and therefore the next avenues for suspicionless testing?

VI. CONCLUSION

The administrative search exception to the Fourth Amendment's probable cause requirement allows inspectors to search houses and businesses for possible safety violations without having any suspicion of violations. Although these inspections are required to have a warrant, the warrant may be issued based on criteria set forth in regulations and legislation, not on an individualized suspicion of suspected or known violations. This Note contends this exception is justified because dangerous conditions that jeopardize the public's safety may manifest without visible signs making detection difficult or impossible. Therefore, the government's special needs outside traditional law enforcement would be hampered, and the public's safety threatened if the government was required to have traditional probable cause before a warrant for inspection could be issued.

This exception was extended to pervasively regulated industries. The government does not need a warrant to inspect premises of pervasively regulated businesses because the extensive regulations create a diminished expectation of privacy. The regulations detailing inspections serve as a sufficient substitute for a warrant as long as the regulations are thorough and narrowly tailored, leaving no discretion for the inspecting official. This Note contends this further exception is also justified because of the difficulties in enforcing safety regulations if probable cause was required.

By extending the exception for pervasively regulated industries to individuals working in these businesses, courts ignored the traditionally accepted requirement of individualized suspicion. It was at this juncture, the Note contends, courts strayed from the fundamental purpose behind the Fourth Amendment—the protection of the individual's autonomy and dignity. Human beings, unlike building structures and inventories, outwardly display behavior resulting in possible suspicions of wrongdoing. Therefore, the government's "special needs" would not be frustrated in requiring individualized suspicion before a searching someone's body. Allowing random drug testing for "safety-

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failure of the test occurred); Kelly D. Patterson, *Alcohol Testing at Prom is Legal, IASD Attorney Says*, ARLINGTON MORNING NEWS, Jan. 25, 1997, at A1 (quoting a school board attorney that claimed a school could constitutionally require students to take alcohol breath tests before attending the prom).

189. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2392 (1995).

sensitive" positions creates an inevitable slippery slope, because courts make this determination based on subjective and unquantifiable parameters. Requiring individualized suspicion before a search occurs protects innocent persons from needless intrusions on their privacy and personal dignity, while still protecting the public's safety through reasonable drug testing. Individualized suspicion must serve as a fundamental measuring device for the reasonableness of a search. Replacing individualized suspicion with wide-sweeping random drug tests of individuals in "safety-sensitive" positions, as determined by courts without sufficient standards, erodes our Fourth Amendment liberties and permits our government to inspect us as inanimate objects. With each exception to the Fourth Amendment, we move further from the intentions of our constitutional founders, and closer to losing one of our most cherished rights—"the right to be let alone."[190]

Darren K. Sharp

190. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).