

July 2015

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Recommended Citation

Remis, Robert G. (1989) "Drug-Impaired Police Officers/Fire Fighters and the Reasonable Suspicion Standard: Whose Turn it is to Give Condolences to the Innocent Victim's Family?," *Akron Law Review*: Vol. 22 : Iss. 4 , Article 9.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol22/iss4/9>

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Remis: Drug-Impaired Police Officers/Fire Fighters and the Reasonable Suspicion Standard

DRUG-IMPAIRED POLICE OFFICERS/FIRE FIGHTERS AND THE REASONABLE SUSPICION STANDARD: WHOSE TURN IS IT TO GIVE CONDOLENCES TO THE INNOCENT VICTIM'S FAMILY?

INTRODUCTION

*Scenario:*¹ A woman and child are being held hostage at gunpoint. A police officer has a gun pointed at the armed felon. The officer's hands begin to tremble, and he becomes increasingly paranoid.² The felon decides to surrender and begins to place his gun down. However, the officer misperceives this conduct and shoots - accidentally killing the child.

One court has held that the probability of losing *one* life is not comparable to the probability of losing *thousands* of lives as is the case with impaired nuclear plant employees and air traffic controllers.³ Apparently, courts and commentators advocating this view believe that it is better for one child to die than to invade a police officer's privacy by requiring him to submit to random drug testing.

Ironically, in constitutional analysis, commentators constantly argue for the protection of one person's rights, even though the rights of countless others may be jeopardized. Drug-impaired fire fighters can be a risk to themselves, fellow fire fighters, and the people who depend on them for rescue.⁴ However, many courts and commentators simply take note of these risks, and then conclude that the fire fighter's rights outweigh the potential violation of countless individuals' rights.

Again, ironically, the courts continue to resist the idea of mandatory drug testing even though the public seems to be in favor of it.⁵ President Reagan declared war on drugs, and issued Executive Order No. 12,564 to initiate drug testing programs for employees in "sensitive" positions.⁶ Drugs and their related problems

¹ The number of possible hypothetical situations involving drug-impaired police officers and fire fighters is innumerable.

² Drugs can lead to several adverse results including paranoia, hallucinations, and confusion. R. ASHLEY, COCAINE: ITS HISTORY, USES & EFFECTS 155 (1975).

³ *Lovvorn v. City of Chattanooga, Tenn.*, 846 F.2d 1539, 1547 (6th Cir.), *vacated*, 861 F.2d 1388 (6th Cir. 1988).

⁴ *Id.* at 1544.

⁵ Comment, "Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" *Cries a Lone Voice in a Wilderness of Opposition*, 1987 B.Y.U.L. REV. 1239, 1268.

⁶ Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986); "sensitive positions" refer to people "with access to sensitive information [creating] the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law." *Id.*

constantly appear in newspapers and magazines. Theater ads feature celebrities advising kids not to use drugs - because drugs kill. One television commercial⁷ portrays a frying pan and an egg symbolizing a person's brain on drugs. Still many courts and commentators apparently believe that a public employee should not be required to submit to drug testing - at least until a "reasonable suspicion" arises.⁸

The saying, "Guns do not kill people. People kill people" is true. However, many courts and commentators constantly urge that police officers (who are required to carry guns at all times, both on-duty and off-duty)⁹ should not be subjected to drug testing in the absence of a "reasonable suspicion."¹⁰ Once a child is dead, all courts would probably agree that a "reasonable suspicion" exists. Presently, society merely gives its condolences to the dead child's family because the courts are unwilling to ensure that police officers are drug-free *before* any tragic event occurs.

Part I of this comment will provide a brief overview of the general constitutional concerns of random drug testing. Part II will discuss random drug testing as applied to police officers and fire fighters. Part III will begin by addressing the public/private employer distinction, and the balancing of the conflicting interests. Part III will end by discussing the effects of drugs, the deterrent effect of drug testing programs, and the costs associated with employee drug use.

PART I

CONSTITUTIONALITY OF RANDOM DRUG TESTING OF PUBLIC EMPLOYEES IN GENERAL

The general constitutional concerns regarding random drug testing of public employees have been extensively and exhaustively reviewed by commentators.¹¹ This comment has nothing to add in this area, but will provide a brief overview in order for the reader to better understand the remainder of this comment.

The principal constitutional concern regarding random drug testing is the protection of the rights guaranteed by the fourth amendment.¹² Courts have often concluded that random drug testing¹³ constitutes a "search" under the fourth

⁷ This television commercial is sponsored by the Partnership For A Drug-Free America.

⁸ *Lovvorn*, 846 F.2d at 1547.

⁹ *See, e.g.*, *Policeman's Benevolent Ass'n of N.J., Local 318 v. Wash. Township*, 850 F.2d 133, 139-41 (3d Cir. 1988).

¹⁰ *See, e.g.*, *Lovvorn*, 846 F.2d 1539; *Bostic v. McClendon*, 650 F.Supp. 245 (N.D.Ga. 1986); *Turner v Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *Penny v. Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1563 (6th Cir. 1988).

¹¹ *See, e.g.*, Comment, *supra* note 5; Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337 (1988).

¹² For an overview of other constitutional concerns (specifically due process, right to privacy, and privilege against self-incrimination) *See* Ayers, *supra* note 11, at 356-58.

¹³ For an interesting classification and analysis of the different types of drug testing, *See* Ayers, *supra* note 11, at 356-58.

amendment¹⁴ (the fourteenth amendment applies the fourth amendment to the states).¹⁵ The more controversial question centers around determining whether such a search is “unreasonable” because the fourth amendment only protects against unreasonable searches and seizures.¹⁶ Determining reasonableness requires a balancing of the intrusiveness of the search against the governmental need for the search.¹⁷

Two of the most controversial aspects of urinalysis¹⁸ are: “(1) a urinalysis may reveal physiological secrets beyond whether an employee is an illicit drug user;¹⁹ and (2) a testing administrator must actually watch an employee produce the

11. Ayers categorizes drug testing as follows:

(1) “For cause” testing (individual employees are tested once the employer has a reasonable suspicion as to that employee’s use of illegal drugs); (2) events testing (employees involved in a particular event, such as an accident, injury to another employee, discharge of a gun or high-speed chase are subject to drug testing, as well as employees seeking transfers, promotions and return from leaves of absence); (3) category testing (individuals belonging to the category are tested by virtue of their participation: Critical Incident Response Team (SWAT) members, bomb squad employees, organized crime unit and narcotics bureau members); (4) drug treatment monitoring (employees in this group are tested after having self-reported use, been found using drugs and/or entered treatment); (5) annual medical evaluation testing (drug testing is often included as a component of annual physical fitness examinations); (6) pre-employment testing, (applicants, once given a conditional offer of employment, are subject to drug testing prior to commencing work); and (7) random testing (although capable of other meanings, random testing refers to any employee drug testing where the degree of suspicion concerning drug use is general and not specific to the individual, and the testing does not fall into any of the other groupings; consequently, it may involve testing the entire workforce en masse or selecting out persons to be tested by random methods, with all employees having equal opportunity to ultimately be tested). Although several of these topic areas have generated legal challenges, the most litigated area is random testing.

Id. at 340-41.

¹⁴ See, e.g., *Lovvorn*, 846 F.2d at 1542; *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), cert. granted, 108 S. Ct. 1072 (1988). But cf. the dissenting justice in *Lovvorn* used *Wyman v. James*, 400 U.S. 309 (1971), to argue that when an employee “voluntarily” submits to urinalysis testing, the fourth amendment is not violated according to *Katz v. United States* (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection”). *Lovvorn*, 846 F.2d at 1552 (Guy, Jr., J., dissenting)(quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). The dissenting justice in *Lovvorn* also considered the submission to be “voluntary” because the employee could have refused to undergo the testing; under the *Wyman* rationale, the fact that loss of employment might result would not change the “non-search into a search.” *Lovvorn*, 846 F.2d at 1552-54 (Guy, Jr., J., dissenting).
¹⁵ U.S. CONST. amend XIV. See also *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

¹⁶ U.S. CONST. amend IV. The fourth amendment provides: “The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated...”; see also *Carroll v. United States*, 267 U.S. 132, 147 (1925); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 201 (2d Cir. 1984).

¹⁷ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *O’Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987).

¹⁸ Urinalysis is a technique used to determine whether a person has been using drugs. The most common form of urinalysis is the enzyme immunoassay technique (EMIT test). Miller, *infra* note 19, at 205. For a discussion of how the EMIT test works, see *id.*

¹⁹ Urine testing may disclose treatment for depression or epilepsy, diabetes, pregnancy, and the use of prescribed medications. *Nat’l Treasury Employees Union*, 816 F.2d at 175-76. One commentator has described urine as a “potential gold mine of information.” Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment*, 48 U. Pitt. L. Rev. 201, 208 (1986).

urine sample.”²⁰

Other topics generally discussed include the fourth amendment warrant requirement and its exceptions, particularly the administrative search exception.²¹ The main issue focuses on whether there should be a requirement of some “reasonable suspicion”²² before an employee is required to undergo urinalysis.²³ Another issue which sometimes surfaces is the reliability of the tests.²⁴

PART II

CONSTITUTIONALITY OF RANDOM DRUG TESTING AS APPLIED TO POLICE OFFICERS AND FIRE FIGHTERS

Two recent federal circuit court of appeals decisions are worthy of discussion.²⁵ In *Policeman's Benevolent Ass'n*, the third circuit upheld a township's drug

²⁰ Comment, *supra* note 5, at 1242. For a recital of one woman's account of her humiliating experience of urinating while the test administrator *bent down to watch* the woman give the sample and use toilet paper afterwards, See Comment, *supra* note 5, at 1249 n.55 (citing Siegel, *Toward a New Federal Right to Privacy*, 11 NOVA L. REV. 703, 703-04 (1987)) (emphasis in original); “[F]ew activities in our society [are] more personal or private than the passing of urine.” *Nat'l Treasury Employees Union*, 816 F.2d at 175. However, there are ways to make this requirement less intrusive:

[One program] call[ed] for only indirect monitoring of the employee, the latter being permitted to produce his urine sample behind a partition while the person administering the test listens for the normal sounds of urination. Only if suspicion develops that the employee has tried to tamper with the sample by virtue of the absence of the appropriate sounds from behind the partition, or if the temperature of the sample given to the overseer does not seem appropriate, will direct observation be required.

Comment, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?* 62 TUL. L. REV. 1373, 1385 n.72 (quoting *Am. Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 734 (S.D. Ga. 1986)). However, despite this laxity, the court still found the urinalysis testing to be highly intrusive since the subjected employee's “off-duty conduct” was monitored. *Am Fed'n*, 651 F. Supp. at 732; see also *Nat'l Treasury Employees Union*, in which a similar program was upheld because such programs “minimize the intrusiveness of the search.” Also, the program allowed the employee to list any medications taken and to explain any circumstances under which the employee was legitimately exposed to illegal drugs; the list and explanation are placed in a sealed envelope which “will not be opened unless the urine test is positive.” 816 F.2d at 173-74.

²¹ See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (horse racing industry); *But cf. Lovvorn*, 846 F.2d at 1546 (administrative search exception not applicable to fire fighters). The administrative search exception is usually applied when a warrantless periodic search is “necessary to further a regulatory scheme...” *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). Obtaining a warrant in this situation is held to be unnecessary because the resulting delay would “unduly interfere” with the rationale behind the search. *N.J. v. T.L.O.*, 469 U.S. 325, 340 (1985) (searching children in the school environment).

²² Reasonable suspicion is a lesser standard than probable cause. However, even the following do not even constitute reasonable suspicion: “[r]umors of drug use, unreliable informant information, lack of investigation or information without specific names of employees in the absence of an extremely compelling case for testing, such as in a prison setting...” *Ayers*, *supra* note 11, at 347.

²³ In *Lovvorn*, the court cited numerous upholding and striking down employee drug testing without any reasonable suspicion. 846 F.2d at 1544-45.

²⁴ For a discussion of the reliability of drug tests currently in use, See Comment, *Random Drug Testing*, *supra* note 20, at 1390.

²⁵ *Policeman's Benevolent Ass'n*, 850 F.2d 133; *Lovvorn*, 846 F.2d 1539. These two decisions discuss most of the issues raised in the area of drug testing

testing program for police officers.²⁶ The plan provided for mandatory random drug testing and annual medical examination programs.²⁷ The third circuit, relying on *Shoemaker v. Handel*²⁸ as controlling precedent, held that the drug testing programs fell within the administrative search exception to the fourth amendment warrant requirement.²⁹

In *Shoemaker*, the court held that the administrative search exception applies in heavily regulated industries.³⁰ *Shoemaker* involved the horse racing industry. The court upheld a drug testing plan which required jockeys to submit to daily breathalyzers and random urinalysis.³¹ The court held that the horse racing industry's "pervasive regulation...reduced the justifiable privacy expectations...."³²

In *Policeman's Benevolent Ass'n*, the third circuit then concluded that the police department was much more regulated³³ than the horse racing industry; therefore, the police officers had lower expectations of privacy and the administrative search exception applied to police as well.³⁴ Although this comment urges that the final result of *Policemen's Benevolent Ass'n* is correct (see Part III), the reasoning behind the decision (i.e., the highly regulated industry exception) is fundamentally flawed. The mere fact that an industry is highly regulated bears no rational relationship to mandatory urinalysis. For example, the fact that the public utilities industry is regulated in order to promote economic efficiency should not justify mandatory urinalysis which is "not designed and do[es] not further the purposes pursued by the regulations."³⁵ The mere fact that an industry is regulated does not justify a lower standard of protection regarding an employee's right to privacy.³⁶ "Rather than focus on the amount of regulation in the industry or work force, we believe it is necessary to understand *why* a particular industry is regulated and *why* the drug tests have been initiated."³⁷ In *Lovvorn*, the sixth circuit characterized the highly regulated industry approach as "simplistic and intellectually indefensible."³⁸ The *Lovvorn* court used the *O'Connor v. Ortega*³⁹ balancing

²⁶ 850 F.2d at 141.

²⁷ *Id.* at 135.

²⁸ 795 F.2d 1136.

²⁹ *Policeman's Benevolent Ass'n*, 850 F.2d at 141.

³⁰ *Shoemaker*, 795 F.2d at 1142. Other examples of regulated industry cases include: *Rushtond v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear plant employees); *Nat'l Ass'n of Air Traffic Specialists v. Dole*, No. A87-073 unpublished slip op. (D.C. Alaska 1987) (air traffic controllers) (cited in *Lovvorn*, 846 F.2d at 1545).

³¹ *Shoemaker*, 795 F.2d at 1142.

³² *Id.* See also *Mack v. United States*, 653 F. Supp. 70, 75 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 120 (2d Cir. 1987) (FBI agents have diminished expectations of privacy in light of their positions as FBI agents).

³³ *Policeman's Benevolent Ass'n*, 850 F.2d at 141.

³⁴ *Id.*

³⁵ *Lovvorn*, 846 F.2d at 1546.

³⁶ *Id.*

³⁷ *Id.* (emphasis in original).

³⁸ *Id.* at 1545.

³⁹ *O'Connor*, 107 S. Ct. 1492.

approach instead.⁴⁰

Lovvorn involved a drug testing program for fire fighters. The sixth circuit concluded that “there must be some evidence of significant department-wide drug problem or individualized suspicion” before subjecting employees to urinalysis.⁴¹ The court also felt that it must “inquir[e] into the harm that will result to society if mandatory drug tests are not allowed into that industry. The higher the cost and the more irretrievable the loss, the stronger the argument for finding reasonable the initiation of a drug testing program.”⁴² The *Lovvorn* court then concluded that a drug-impaired fire fighter could impose a significant harm on society - possibly even lost lives - but held that the probability of significant losses was much lower than with “impaired air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day.”⁴³ As Part III of this comment will demonstrate, the *Lovvorn* decision’s reasoning is also flawed.

PART III

ANALYSIS

Public v. Private Employers

The biggest irony stemming from the arguments which oppose drug testing of government employees is that only *government* testing is subject to fourth amendment analysis. Private employers’⁴⁴ actions do not constitute state action; therefore, their actions do not trigger the fourth amendment restrictions. Consequently, the government (this country’s largest employer) has a severe disadvantage. “Private employers who want to institute a drug testing program may do so and need not concern themselves with the fourth amendment,”⁴⁵ but the government *must* consider the employee’s fourth amendment rights.

If the government used the urinalysis results to initiate criminal proceedings⁴⁶ (rather than testing only in its official capacity as an employer) the arguments opposing random drug testing would prevail because the possibility of loss of freedom (resulting from incarceration) is a much more serious deprivation than loss of employment, and therefore is more deserving of constitutional protection. However, proponents of government employee drug testing do not advocate the

⁴⁰ *Lovvorn*, 846 F.2d at 1543.

⁴¹ *Id.* at 1547.

⁴² *Id.* at 1546.

⁴³ *Id.* at 1547.

⁴⁴ For an analysis of drug testing by private employers, see Comment, *Employee Drug Testing -- Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832 (1987).

⁴⁵ *Lovvorn*, 846 F.2d at 1551 (Guy, Jr., J., dissenting).

⁴⁶ *But cf.*, the Supreme Court has stated “it would be 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...” *O’Connor*, 107 S. Ct. at 1497 (quoting *N.J. v. T.L.O.*, 469 U.S. at 335).

initiation of criminal proceedings,⁴⁷ but rather, only such consequences as occur with private employers (e.g., termination of employment). Two decisions are of particular importance. First, in *Katz v. United States*,⁴⁸ the Supreme Court held that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”⁴⁹ Therefore, not all intrusions into privacy expectations are protected by the fourth amendment.⁵⁰ Second, in *Wyman v. James*,⁵¹ a woman refused to allow a caseworker to enter her home; entrance was a condition precedent to receiving financial assistance. The court held that the right of refusal was synonymous with consent, even though refusal would mean forfeiting Aid to Families with Dependent Children (AFDC) relief (her only source of income).⁵² The court held that the caseworker visits did not constitute a fourth amendment search.⁵³

Weighing the Conflicting Interests

The *Lovvorn* court stated: “We do not believe *society* would sanction a grant of power to the government that would have the effect of enabling the government to require a urine test of any individual it had legally stopped, even if it had no reasonable suspicion of drug usage.”⁵⁴ If the *Lovvorn* court is so confident regarding public policy in this area, why not leave it to *society* to decide through the legislature?⁵⁵ “The American people are not opposed to drug testing of employees. [One] survey...indicates that sixty-nine percent of responding employees favored periodic drug testing of employees. Eighty-one percent said that they would be ‘willing to submit to a test even if [allowed] to refuse.’”⁵⁶

The *Lovvorn* court concluded that there must be “some evidence of a significant department-wide drug problem or individualized suspicion”⁵⁷ before random drug-testing could be justified. The problem with this reasoning is that:

[U]rinalysis essentially becomes a tool of confirmation rather than discovery. Therefore, an employer would be forced to resort to other more traditional methods of investigation such as interrogation and surveillance. Not only would such tactics be more intrusive, they would also presumably be subject to constitutional constraints.⁵⁸

⁴⁷ Safeguards could also be enacted -- “The employer simply needs to inform the testing laboratory to disclose only whether an employee is using illicit drugs, not whether she is pregnant.” Comment, *supra* note 5, at 1248.

⁴⁸ 389 U.S. 347.

⁴⁹ *Id.* at 350.

⁵⁰ Comment, *supra* note 5, at 1250-51.

⁵¹ 400 U.S. 309.

⁵² *Id.* at 315-318.

⁵³ *Id.*

⁵⁴ *Lovvorn*, 846 F.2d at 1542 (emphasis added).

⁵⁵ *Accord*, Comment, *supra* note 5, at 1268.

⁵⁶ *Id.* (footnotes omitted).

⁵⁷ *Lovvorn*, 846 F.2d at 1547.

⁵⁸ *Id.* at 1561 (Guy, Jr., J., dissenting).

The *Lovvorn* court concluded that police officers and fire fighters are not comparable to “air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day.”⁵⁹ This argument is unconvincing. Although one mistake by an impaired air traffic controller or nuclear plant employee could ultimately kill a large number of people, this fact does not imply that protecting the lives of a smaller number of people is less important than protecting a police officer’s privacy. The risk of erroneous deprivation of *one* life should outweigh a person’s privacy interest (regarding urinalysis). The inquiry should not be *how many* lives are at stake, but rather, what is the *probability* of *any* lives being taken accidentally. Police officers and fire fighters “are often called upon to rapidly respond to life-threatening emergencies.”⁶⁰ “Fighting fires is perhaps the most dangerous and hazardous of all professions.”⁶¹ Police officers carry guns at all times, both on-duty and off-duty.⁶² Police officers “exercis[e] the most awesome and dangerous power that a democratic state possesses with respect to its residents - the power to use lawful force to arrest and detain them.”⁶³ Police officers are sometimes permitted to use deadly force.⁶⁴ Police officers and fire fighters “are frequently required to operate emergency vehicles at high speeds, thereby creating an even greater risk to themselves and to the public if their performance is impaired by the use of drugs.”⁶⁵

Another issue is public image.⁶⁶ “Police officers are sworn to uphold and enforce the laws...By using illegal drugs, police officers expose themselves to compromise, thereby seriously jeopardizing their effectiveness as law enforcement agents.”⁶⁷ It seems ironic that a police officer who uses illegal drugs (and may even be on drugs at the time) can arrest another person for using illegal drugs. “The need in a democratic society for public confidence, respect and approbation” of police officers is great.⁶⁸

Effects of Drugs

The *Lovvorn* court admitted that controlled substances, such as marijuana, can have an adverse effect on one’s “perception, decision-making time, short-term memory, motor skills, and judgment.”⁶⁹ The court then admitted that “[f]ire fighters so affected become a risk to themselves, their fellow fire fighters, and those depending on them for rescue.”⁷⁰

⁵⁹ *Id.* at 1547.

⁶⁰ *Id.* at 1559 (Guy, Jr., J., dissenting).

⁶¹ *Id.* at 1544.

⁶² See e.g., *Policeman's Benevolent Ass'n* 850 F.2d at 139-41.

⁶³ *Id.* at 141.

⁶⁴ *Lovvorn*, 846 F.2d at 1559 (Guy, Jr., J., dissenting).

⁶⁵ *Id.* at 1558 (Guy, Jr., J., dissenting).

⁶⁶ *Id.* at 1559 (Guy, Jr., J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Policeman's Benev. Ass'n*, 850 F.2d at 141.

⁶⁹ *Lovvorn*, 846 F.2d at 1544.

⁷⁰ *Id.*

The effects of drugs can be grouped into three categories: (1) physiological (effect on the body), (2) psychoactive (effect on feelings, mood, and behavior), and (3) adverse and/or toxic reactions (effects due to an unusual sensitivity to the drug, excessive doses, or chronic long-term use).⁷¹ “Large doses [of cocaine] can cause depression of the CNS [central nervous system] either as a result of cocaine-induced convulsions or as the immediate effect of high concentrations of cocaine reaching the brain.”⁷² “Due to the vasoconstrictive action of [cocaine], blood pressure rises when cocaine is first introduced into the body and returns to normal as the effects wear off. Small doses slow the heart rate, moderate doses increase it. Large doses may result in cardiac failure due to a direct toxic reaction on the heart.”⁷³ Cocaine can cause euphoria, sexual stimulation, and a reduction in fatigue.⁷⁴ “In general, the larger the dose, the more pronounced the effects. But large chronic doses usually lead to adverse results: euphoria may turn into *anxiety*, *paranoia* and *hallucinations*; sexual stimulation to impotency; lucidity to *confusion*; and the lessening of fatigue to insomnia.”⁷⁵ Depending on the dosage taken and the individuals involved, cocaine can cause people to feel a change in their personalities so that the individuals “[react] more sharply to criticism, [feel] more *impatient* when faced with *minor* problems, and in general [feel] slightly *on edge*.”⁷⁶ If an individual exceeds his or her limit, warning signs appear: “cold perspiration, excessive sweating, pallor, feelings of anxiety, exhibitions of aggressive behavior, insomnia, impotency, and feelings of heaviness in the limbs.”⁷⁷

As stated above, these reactions do not always surface because the effects of cocaine vary with the individual and the dosage taken. However, considering the possibility that even one of these symptoms could occur in a fire fighter or an *armed* police officer, these public safety workers themselves should realize that urinalysis is necessary (thereby reducing any reasonable expectation or privacy). “The public wants and rightfully expects the policeman’s finger on the trigger to be as steady as the jockey’s hand on the bridle.”⁷⁸ The scenario in the Introductory paragraph of this comment shows that there are limitless possibilities with respect to a drug-impaired police officer wrongfully taking the life of another. Even though a police officer might only be responsible for a few lives (as opposed to a nuclear plant employee),⁷⁹ when one considers the possible number of drug-impaired police officers nationwide, the number of lives jeopardized could also be staggering.

If the effects of drugs were disputed, then it would be easier to conclude that mandatory urinalysis should be prohibited. However, when the effects of drugs are

⁷¹ R. ASHLEY, *supra* note 2, at 148.

⁷² *Id.* at 151-52.

⁷³ *Id.* at 152.

⁷⁴ *Id.* at 155.

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Id.* at 156. (emphasis added).

⁷⁷ *Id.* at 166.

⁷⁸ *Lowvorn*, 846 F.2d at 1556 (Guy, Jr., J., dissenting).

⁷⁹ See *supra* note 43 and accompanying text.

well-known, it is difficult to conclude that a person's interest in keeping private his use of *illegal* drugs private outweighs the public's interest in ensuring that innocent lives are not jeopardized. Illegal drug use is not a victimless crime. If proper safeguards are taken,⁸⁰ in conjunction with imposing civil and criminal sanctions for non-compliance, then the only disclosure necessary is whether or not the employee is using illegal drugs. Whether the employee is epileptic, diabetic, pregnant, or taking other prescribed medications may properly be protected.⁸¹ As in all constitutional questions, there is no right answer. However, the most important interests must prevail, and the protection of human life is definitely one of the most important interests in our society.

Drug Testing as a Deterrent

Lost lives are not the only consequence of drug use on the job. One can hypothesize countless situations which could result in a deprivation of an individual's liberty. For example, if a drug-impaired police officer becomes "more impatient when faced with a minor problem"⁸² such as starting a fight while merely giving a traffic ticket or investigating a complaint for disturbing the peace. At the trial, it usually comes down to a credibility contest between the defendant and the police officer. A jury might believe the police officer and convict the defendant, even though the police officer initiated the fight. Of course, this is just a hypothetical - but obviously, not far-fetched.

Police officers and fire fighters are given enormous power over the lives of others; such power carries with it enormous responsibilities. Remaining drug-free is one of them. In view of this enormous power over others, it is indeed difficult to sympathize with a police officer's loss of privacy when he submits to mandatory drug testing.

Some courts require a reasonable suspicion of department-wide or an individualized problem of drug abuse.⁸³ However, the problem with this argument is that "[u]rinalysis essentially becomes a tool of confirmation rather than discovery."⁸⁴ One of the most important advantages of drug testing is "deterrence." "The threat of periodic drug testing...is the motivator to keep public safety officers drug free."⁸⁵ The dissenting justice in *Nat'l Treasury*⁸⁶ argues that the drug testing program involved in that decision was not an effective deterrent for two reasons. First, the

⁸⁰ See *supra* note 47.

⁸¹ See *supra* note 20.

⁸² See *supra* text accompanying note 76.

⁸³ *Lovvorn*, 846 F.2d at 1547.

⁸⁴ *Id.* at 1561 (Guy, Jr., J., dissenting). See *supra* text accompanying note 58.

⁸⁵ *Id.* at 1555 (Guy, Jr., J., dissenting). The dissenting justice analogized 'drug testing as a deterrent' to periodic qualification on the firing range. The purpose of firearm qualification "is not primarily to find non-qualifying officers but, rather, to ensure that the officers will practice adequately so that they can pass the test." *Id.*

⁸⁶ 816 F.2d 170.

plan required testing of employees who were seeking “sensitive” positions but did not require testing or retesting of *current* sensitive-position employees. Second, the employees were given five days’ advance notice of the test; therefore, employees could stop using drugs immediately and test negative.⁸⁷ These reasons are faulty because *some* deterrence is better than *no* deterrence. Moreover, it is those employees who cannot stop using drugs for just five days that we should be especially concerned about. Also, if the courts begin to consistently uphold these programs, the deterrent effect will increase because employers will implement more of them - with provisions for retesting employees *currently* in sensitive positions.

Notification is a beneficial requirement; it helps cut down on the unsuspected intrusiveness. In *Capua v. City of Plainfield*,⁸⁸ a surprise urinalysis test was given to fire fighters.⁸⁹ Testing agents locked all of the fire station’s doors and awakened the fire fighters up at 7:00 a.m.⁹⁰ All of the fire fighters were coerced to submit to the testing process.⁹¹ Those fire fighters who tested positive were terminated.⁹² Clearly these tactics are unnecessary. Perhaps the notification period could be shortened (e.g., three days), but a *surprise, forced* test is definitely an intrusion upon an individual’s dignity. At the very least, a five-day notice acts as a deterrent to some people which, as stated above, is better than no deterrent at all.

Cost Associated with Employee Drug Use

A critical concern of proponents of drug testing is ‘cost.’ “[A]t least 20 million Americans use marijuana/hashish. Approximately four million Americans are cocaine users, and two million are using other stimulants.”⁹³ Between 3% and 7% of American employees use illegal drugs regularly; “much of this use is occurring on the job, or at least at a time when such use adversely affects job performance.”⁹⁴ Lost productivity, accident-related costs, health care costs, poor workmanship and employee theft are results of employee drug use which costs the United States \$33 billion per year.⁹⁵ Employees who abuse alcohol or drugs are absent from work sixteen times more often, and are in accidents four times more often, than employees not using drugs.⁹⁶ Accidents resulting from drug-impaired emergency workers can impose liability costs on municipalities under 42 U.S.C. §

⁸⁷ *Id.* at 184 (Hill, J., dissenting).

⁸⁸ 643 F. Supp. 1507 (D.N.J. 1986)

⁸⁹ *Id.* at 1511

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1512.

⁹³ Comment, *supra* note 5, at 1239 (footnotes omitted).

⁹⁴ Miller, *supra* note 19 at 203 (citing Schreier, *A Survey of Drug Abuse in Organizations*, 62 PERSONNEL J. 478, 478-79 (1983)).

⁹⁵ *Id.* (citing Nat’l L.J., Apr. 7, 1986, at 1, col. 2.).

⁹⁶ Quayle, *American Productivity: The Devastating Effect of Alcoholism and Drug Abuse*, 38 AM. PSYCHOLOGIST 454, 455 (1983); See also Imwinkelried, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 NOVA L. REV. 563, 565 (1987).

1983.⁹⁷ Consequently, municipalities nationwide are in financial trouble⁹⁸ and have a “strong financial interest” in reducing accidents and associated costs.⁹⁹ Employers could be liable to fellow employees and third parties injured by drug-impaired employees “as well as to customers injured by defective products produced by impaired employees.”¹⁰⁰

For those skeptical of whether drug testing has any beneficial value, “[a]t least two case studies of particular corporations have concluded that employee assistance programs incorporating urinalysis testing enhanced job efficiency and markedly reduced sickness, disability, and accident rates.”¹⁰¹ As stated above, even some deterrence is better than no deterrence.

CONCLUSION

Drug abuse is a serious problem in our society. Drug-impaired employees are a danger to themselves, fellow employees, and the public at large.¹⁰² Much drug use “occur[s] on the job, or at least at a time when such use adversely affects job performance.”¹⁰³ Drug use costs the United States billions of dollars per year in lost productivity and accident-related costs.¹⁰⁴ Studies have shown that drug testing programs effectively reduce these costs.¹⁰⁵

Police officers and fire fighters are in hazardous professions, and innocent lives could be taken accidentally if these public safety workers are drug-impaired. The problem with requiring a “reasonable suspicion”¹⁰⁶ before testing an employee is that the testing becomes an after-the-fact confirmation rather than a deterrent.

The inquiry should not be *how many* lives are at stake, but rather, what is the *probability* of *any* life being taken accidentally. The probability of lives being taken accidentally by drug-impaired fire fighters and armed police officers appears tremendous.

⁹⁷ *Lovvorn*, 846 F.2d at 1559 (Guy, Jr., J., dissenting).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ This same consequence could be imposed on the government as well as private employers. Employer liability would be based on the doctrine of *respondeat superior*. Note, *Mandatory Drug Testing: Balancing the Interests*, 30 ARIZ. L. REV. 297, 299 (1988) (citing Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L. J. 309, 315-16 (1986)).

¹⁰¹ Miller, *supra* note 19, at 204 (citing *Effect of Alcohol and Drug Abuse on Productivity: Joint Hearing Before the Senate Subcommittee on Alcohol and Drug Abuse and the Senate Subcommittee on Employment and Productivity*, 97th Cong., 2d Sess. 15 (1982) (statement of William Mayer, M.D., Administrator, U.S. Public Health Service)).

¹⁰² *Lovvorn*, 846 F.2d at 1544.

¹⁰³ Miller, *supra* note 19 at 203. See *supra* text accompanying note 94.

¹⁰⁴ *Id.* See *supra* text accompanying note 95.

¹⁰⁵ *Id.* at 204. See *supra* text accompanying note 101.

¹⁰⁶ *Lovvorn*, 846 F.2d at 1543.

The two most controversial aspects of drug testing¹⁰⁷ can be greatly mitigated. First, regarding the disclosure of personal information other than whether the employee is using drugs (e.g., epilepsy, pregnancy, etc.), an independent agency can be employed.¹⁰⁸ This independent agency would be required to disclose only whether or not the employee is using illicit drugs.¹⁰⁹ If the agency violates this requirement, criminal and civil sanctions could be imposed - both against the agency and the employer. Second, regarding the requirement that the testing agent actually watch the employee urinate, a partition could be used.¹¹⁰ The agent would listen for normal sounds of urination and check the temperature of the urine sample.¹¹¹ If it appears that the employee has tampered with the urine sample, then direct observation would be required.¹¹²

In summation, given the enormous potential for loss of innocent lives, police officers and fire fighters should be required to submit to drug testing even in the absence of a "reasonable suspicion." The value of the potential lost lives far outweighs any infringement on the police officers' and fire fighters' right to privacy resulting from mandatory drug testing.

POSTSCRIPT

On March 21, 1989, as this volume was being printed, the Supreme Court decided *National Treasury Employees Union v. Von Raab*.¹¹³ The Court weighed the public interest against the individual's right to privacy and held that "suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions which require the incumbent to carry a firearm, is reasonable."¹¹⁴ In support of its holding, the Court cited the reasons advocated in this comment, namely: the potential loss of citizens' lives due to "impaired perception and judgment" in the use of deadly force,¹¹⁵ the test results would not be used in a criminal prosecution,¹¹⁶ procedures were implemented to safeguard against unwarranted disclosure of personal medical information,¹¹⁷ drug testing programs do deter drug use,¹¹⁸ and the "diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions."¹¹⁹

¹⁰⁷ See *supra* text accompanying nn. 18-20.

¹⁰⁸ See *supra* note 47.

¹⁰⁹ *Id.*

¹¹⁰ See *supra* note 20.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 109 S.Ct. 1384 (1989). See *supra* note 20.

¹¹⁴ *Id.* at 1397.

¹¹⁵ *Id.* at 1393.

¹¹⁶ *Id.* at 1390.

¹¹⁷ *Id.* at 1394 n.2

¹¹⁸ *Id.* at 1396.

¹¹⁹ *Id.* at 1397-98.

The case involved the United States Customs Service, but would be applicable to all police officers because they are required to carry a firearm. The reasoning seems equally applicable to fire fighters who, ‘‘by virtue of the special, and obvious, physical. . .demands’’ of their positions, should have a diminished expectation of privacy. The Supreme Court seems very concerned with the current drug problem in our society, and therefore future drug testing programs are likely to be upheld.

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