COMMENT

Shoemaker v. Handel: Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement

Introduction

Alcohol and drug abuse is a problem of enormous proportions. Drug abuse alone costs American society nearly sixty billion dollars annually.[1] In a rare joint address to the nation, President Reagan and his wife, Nancy Reagan, warned of a "drug and alcohol abuse epidemic in this country."[2]

Drug testing has emerged as an important tool to combat drug misuse in the workplace. On September 15, 1986, the President ordered the heads of executive agencies to establish mandatory programs to test federal employees in "sensitive positions" for drug use.[3] The military has tested its active duty personnel for several years.[4] In the private sector, employee drug abuse has prompted such companies as IBM, Greyhound, and American Airlines to screen all job applicants with a urinalysis test to detect drug consumption;[5] in fact, approximately one-third of For-

1. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 6 n.3 (1986) [hereinafter PRESIDENT'S COMMISSION] (citing a 1984 government-commissioned study which used 1983 data). *See also id.* app. G, at 5-6 ("costs" may include lost productivity, medical expenses for treatment or rehabilitation, and expenses incurred for crime prevention, police, courts, and prisons).

2. Joint address by President Reagan and Nancy Reagan (Sept. 14, 1986), *reprinted in* N.Y. Times, Sept. 15, 1986, at 11, col. 4. An estimated 25 million Americans have tried cocaine, and five to six million use the drug at least once per month. PRESIDENT'S COMMISSION, *supra* note 1, at 16 (citing *Cocaine Abuse and the Federal Response: Hearing Before the House Select Committee on Narcotics Abuse and Control*, 99th Cong., 1st Sess. 87 (1985) (statement of Dr. Arnold Washton, research director, National Cocaine Hotline)). Approximately 50 to 60 million Americans have tried marijuana, of which 20 million use the drug at least once per month. *Id.* at 47.

3. Exec. Order No. 12,564, 51 Fed. Reg. 32889 (1986).

4. Department of Defense Drug Abuse Testing Program, 32 C.F.R. 60 (1985).

5. Brecker, *Taking Drugs on the Job*, NEWSWEEK, Aug. 22, 1983, at 2.

tune 500 companies[6] require applicants or employees to undergo such tests.[7] A presidential commission studying America's drug abuse problem recommended that all government and private employers require their applicants and employees to take drug tests.[8]

The question arises whether mandatory warrantless alcohol and drug testing of employees violate the Fourth Amendment's proscription against unreasonable search.[9] Tests required by private sector employers absent government involvement do not implicate the Fourth Amendment and therefore never constitute an unreasonable search.[10] However, the

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6. The "Fortune 500" is a list compiled annually by FORTUNE magazine of the 500 largest United States industrial corporations.

7. NEWSWEEK, Sept. 29, 1986, at 18. *See also* O'Boyle, *More Firms Require Employee Drug Tests*, Wall St. J., Aug. 8, 1985, at 6, col. 1; PRESIDENT'S COMMISSION, *supra* note 1, at 461 (two-thirds of 180 "Fortune 500" companies do not employ applicants who fail a drug test, 25% fire employees who fail such a test, and 41% help employees seek treatment).

8. PRESIDENT'S COMMISSION, *supra* note 1, at 485.

9. *See infra* note 35 and accompanying text.

10. The Supreme Court has stated:

> This Court has also consistently construed [the fourth amendment] protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."

United States v. Jacobsen, 466 U.S. 109, 113 (1984), *quoting* Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting). Therefore, legal protection for private sector employees must come from an exercise of the state's police power that limits drug testing by private sector employers. For example, the City of San Francisco has adopted an ordinance that provides, in pertinent part, as follows:

> Sec. 3300A.5 EMPLOYER PROHIBITED FROM TESTING EMPLOYEES. No employer may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to blood or urine testing if:
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> (a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and
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> (b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and
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> (c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by [a] State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.
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> In conducting those tests designed to identify the presence of chemical substances in the body, and not prohibited by this section, the employer shall ensure to the extent feasible that the test only measures and that its records only show or make use of information regarding chemical substances in the body which are likely to affect the ability of the employee to perform safely his or her duties while on the job.
>
> Under no circumstances may employers request, require or conduct random or company-wide blood, urine or encephalographic testing.
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> In any action brought under this Article alleging that the employer had violated this section, the employer shall have the burden of proving that the requirements of Subsections (a), (b), and (c) as stated above have been satisfied.

SAN FRANCISCO, CA., POLICE CODE art. 33A, § 3300A.5 (1985).

Fourth Amendment does apply to searches conducted with government involvement, and several courts have held unconstitutional the random drug testing of government employees.[11]

In *Shoemaker v. Handel*,[12] a federal court confronted the situation of state-mandated warrantless alcohol and drug testing of private sector employees in the closely regulated horse racing industry. The *Shoemaker* court deemed the testing program constitutional notwithstanding government involvement, finding that pervasive regulation of the industry brought the state alcohol and drug testing scheme within a recognized exception to the Fourth Amendment's search warrant requirement.[13]

This Comment briefly describes the facts and decision in *Shoemaker*, then discusses the Fourth Amendment's search warrant requirement—its purpose, its applicability to regulatory inspections, and the establishment and scope of its pervasive regulation exception. The rules defining the exception are then applied de novo to the facts in *Shoemaker*. This Comment concludes that the court impermissibly expanded the pervasive regulation exception, and thereby jeopardized the protection afforded under the search warrant requirement of the Fourth Amendment.

I. *Shoemaker v. Handel*: Race Horse Jockeys Challenge a Mandatory Warrantless Alcohol and Drug Testing Program

The plaintiffs in *Shoemaker*, all professional thoroughbred race horse jockeys,[14] brought a suit challenging the constitutionality of regulations that require every official, jockey, trainer, and groom to submit to mandatory warrantless breath[15] and urine[16] tests.[17] A state agency, the

11. American Fed'n of Gov't Employees, AFL-CIO v. Weinberger, No. CV486-353 (S.D. Ga. Dec. 2, 1986) (drug testing of civilian Department of Defense employees in "critical" positions); National Treasury Employees Union v. Von Rabb, No. 86-3522 (E.D. La. Nov. 14, 1986) (United States Customs Service Workers); Lovvorn v. City of Chattanooga, No. Civ-1-86-389 (E.D. Tenn. Nov. 13, 1986) (fire fighters); Penny v. City of Chattanooga, No. Civ-1-86-417 (E.D. Tenn. Nov. 13, 1986) (police department personnel); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. Sept. 18, 1986) (fire fighters).

12. 795 F.2d 1136 (3d Cir.), *cert. denied*, 55 U.S.L.W. 3389 (U.S. Dec. 2, 1986) (No. 86-576) (opinion by Judge Gibbons) [hereinafter *Shoemaker III*]; 619 F. Supp. 1089 (D.N.J. 1985) (opinion by Judge Brotman) [hereinafter *Shoemaker II*]; 608 F. Supp. 1151 (D.N.J. 1985) (opinion by Judge Brotman) [hereinafter *Shoemaker I*].

13. *Shoemaker III*, 795 F.2d at 1142; *Shoemaker II*, 619 F. Supp. at 1099-1100. *See infra* notes 58-90 and accompanying text.

14. William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Braccioli.

15. N.J. ADMIN. CODE tit. 13 § 70-14A.10 (1985). This regulation reads in full:

> Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than

New Jersey Racing Commission (the "Commission"), promulgated the regulations and administers the tests.[18] Under the Commission's program, jockeys must take a breathalyzer test daily. Officials, trainers, and grooms undergo such testing less frequently. The breathalyzer regulation does not provide for the preservation of confidentiality of test results.[19] The urine tests are administered under a lottery system. The names of all jockeys participating in a particular race are placed in an envelope, from which three to five names are selected at random. The chosen jockeys must provide a urine sample upon completion of their last race of the day.[20] The urinalysis regulation requires that all information acquired during the process of obtaining a urine sample, including test results, be kept confidential, "except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling."[21] The alcohol and drug tests constitute

.05 percent of alcohol in the blood, such person shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

16. N.J. ADMIN. CODE tit. 13 § 70-14A.11 (1985). This regulation provides in part:

(a) No licensee or official shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the official, jockey, trainer and groom to give notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner when requested.

(b) Every official, jockey, trainer and groom for any race at any licensed racetrack may be subjected to a urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersy Racing Commission. Any official, jockey, trainer or groom who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

17. The plaintiffs employed four theories in their challenge to the regulations: unreasonable search and seizure (*Shoemaker II*, 619 F. Supp. at 1097-1104; *see also infra* notes 35-39 and acccompanying text); denial of due process (*Shoemaker II*, 619 F. Supp. at 1104-05; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976)); denial of equal protection of the laws (*Shoemaker II*, 619 F. Supp. at 1105; *see also* U.S. CONST. amend XIV, § 1); and invasion of privacy (*Shoemaker II*, 619 F. Supp. at 1105-07; *see also* Whalen v. Roe, 429 U.S. 589 (1977)). The district court focused on the fourth amendment claim. *Shoemaker II*, 619 F. Supp. at 1097-1104.

18. The New Jersey State Legislature has enacted statutes to regulate horse racing. *See* N.J. STAT. ANN. §§ 5:5-22 to 5:5-121 (West 1973 & Supp. 1986). The Legislature established the Commission and vested it with broad supervisory power over the industry, including the "full power to prescribe rules, regulations and conditions under which all horse racing shall be conducted . . . ." *Id.* at § 5:5-30.

19. *Shoemaker II*, 619 F. Supp. at 1094.

20. *Id.* at 1094-95.

21. N.J. ADMIN. CODE tit. 13 § 70-14A.11(e) (1985).

searches within the meaning of the Fourth Amendment.[22]

Initially, the jockeys sought but failed to obtain a preliminary injunction to enjoin enforcement of the regulations.[23] Several months later, after a full bench hearing, the district court upheld the constitutionality of the regulations, and again denied injunctive relief.[24]

The primary issue before the district court was whether state-mandated alcohol and drug tests, administered without individualized suspicion[25] to individuals in a heavily regulated industry, violate the Fourth Amendment.[26] Under the Fourth Amendment, the Supreme Court has established an administrative search warrant requirement which mandates that a regulatory official obtain a warrant issued upon probable cause before conducting a search.[27] The Supreme Court, however, has recognized a narrow exception to the administrative search warrant requirement: regulatory inspections of pervasively regulated industries.[28] The exception applies when the state's interest in enforcing the regulatory scheme through warrantless search outweighs legitimate privacy ex-

22. For those cases finding that a urinalysis test constitutes a search under the Fourth Amendment, see McDonnell v. Hunter, 746 F.2d 785 (8th Cir. 1984); Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976); Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984). For those cases holding that breathalyzer tests are searches under the Fourth Amendment, see Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska 1986); *Shoemaker II*, 619 F. Supp. 1089 (D.N.J. 1985); Leslie v. State, 711 P.2d 575 (Alaska Ct. App. 1986); State v. Locke, 418 A.2d 843 (R.I. 1980).

23. *Shoemaker I*, 608 F. Supp. 1151 (D.N.J. 1985).

24. *Shoemaker II*, 619 F. Supp. 1089 (D.N.J. 1985).

25. A degree of individualized suspicion is usually required for a search or seizure to be considered constitutional. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976). However, a particularly strong government interest may preclude insistence on this requirement if safeguards limit the discretion of the official conducting the search. Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968).

26. *Shoemaker II*, 619 F. Supp. at 1097.

27. Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967). *See also infra* notes 35-57 and accompanying text. A search warrant is:

> An order in writing, issued by a justice or other magistrate, in the name of the state, directed to a sheriff, constable, or other officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of a crime, or things otherwise criminally possessed . . . .

BLACK'S LAW DICTIONARY 1211 (5th ed. 1979).

To determine whether probable cause exists in the administrative search setting, *Camara* fashioned a test that balances the state's need for the search against the intrusiveness of the search to the individual. *Camara*, 387 U.S. at 537. Thus, probable cause is not an inflexible concept. A greater or lesser showing of probable cause may be required, depending on the circumstances of the search. Hence, intrusions into the human body require a higher quantum of probable cause. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 111-12 & n.26 (1985) (citing Schmerber v. California, 384 U.S. 757 (1966)). *See infra* note 117 and accompanying text.

28. *See infra* notes 58-90 and accompanying text.

pectations that have been diminished by close government regulation.[29]

The district court in *Shoemaker* held the New Jersey alcohol and drug testing program constitutional under the pervasive regulation exception to the administrative search warrant requirement.[30] It reasoned that the pervasive regulation of the horse racing industry put jockeys on notice that they would be required to comply with regulations that furthered the state's interests in ensuring the safety and integrity of the sport.[31]

The Third Circuit Court of Appeals affirmed the district court's decision.[32] The appellate court's analysis of the fourth amendment issue in *Shoemaker*, however, differed from the trial court's in one significant respect: the court of appeals rested its approval of the drug testing program on the state's interest in preventing corruption in racing. The opinion did not mention enhanced safety, in regard to either the state's interest in the regulations,[33] or the jockeys' legitimate expectations of privacy.[34]

II. The Fourth Amendment's Administrative Search Warrant Requirement and the Pervasive Regulation Exception

A. The Administrative Search Warrant Requirement

The Fourth Amendment provides in part:

> The right of the people to be secure in their persons . . . 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,

29. *See infra* note 84 and accompanying text. For an in-depth discussion of the administrative search warrant requirement and the pervasive regulation exception, see generally Note, *Constitutional Law—Warrantless Administrative Searches and the Two-Step Test of* Donovan v. Dewey, 56 TUL. L. REV. 1467 (1982) [hereinafter Note, *Warrantless Searches*].

30. *Shoemaker II*, 619 F. Supp. at 1099-1100.

31. *Id.* at 1098-1100. On another fourth amendment issue—the absence of individualized suspicion—the district court ruled that the regulations sufficiently circumscribed the discretion of the state stewards in selecting the jockeys for the tests. Because all jockeys must take the breath test daily, and under a daily lottery system each jockey has an equal chance of being selected to give a urine specimen, "[t]he fair characterization of these tests is that they are administered neutrally, with procedural safeguards substituting for lack of any individualized suspicion." *Shoemaker II*, 619 F. Supp. at 1103. *See supra* note 25.

32. *Shoemaker III*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 55 U.S.L.W. 3389 (U.S. Dec. 2, 1986) (No. 86-576).

33. "Frequent alcohol and drug testing is an effective means of demonstrating that persons engaged in the horse racing industry are not subject to certain outside influences." *Id.* at 1142.

34. "When jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry." *Id.*

and the persons or things to be seized.[35]

The Fourth Amendment protects individuals from "unreasonable government intrusions into their legitimate expectations of privacy."[36] Courts determine the reasonableness of government intrusion by balancing the public interest in the intrusion against the individual's right to freedom from arbitrary interference by government officials.[37] A search is unreasonable under the Fourth Amendment unless accompanied by a valid search warrant,[38] except in situations where requiring officials to get a warrant would be impossible or would impede an important governmental interest.[39]

The Supreme Court initially refused to extend the search warrant requirement to inspections conducted by government regulatory entities. In *Frank v. Maryland*,[40] the Court held that a warrant was not necessary before a city health inspector could enter a citizen's home to conduct a search authorized by statute.[41] The Court's justification was twofold: first, it believed that the Fourth Amendment's search warrant requirement applied only to "searches for evidence to be used in criminal prosecutions;"[42] and second, the ordinance "strictly limited" the health inspectors' discretion by requiring that they have valid grounds for suspicion of a violation, that the health inspection be made during the daytime, and that no forced entry occur.[43] The Court noted in *Frank* that the "inspection touch[ed] at most upon the periphery of the important

35. U.S. CONST. amend. IV. The Fourth Amendment is enforceable against the States through the Due Process Clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30 (1963); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

36. United States v. Chadwick, 433 U.S. 1, 7 (1977).

37. *See* Winston v. Lee, 470 U.S. 753, 760 (1985); Delaware v. Prouse, 440 U.S. 648, 654 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307, 315-16 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

38. Payton v. New York, 445 U.S. 573, 586 (1980). *See supra* note 27.

39. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984) (search of a prison inmate's cell); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (search on the high seas); United States v. Ramsey, 431 U.S. 606 (1977) (border search); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (search at a fixed checkpoint); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (search by consent); United States v. Biswell, 406 U.S. 311 (1972) (search of a pervasively regulated business); Chambers v. Maroney, 399 U.S. 42 (1970) (automobile search); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit).

40. 359 U.S. 360 (1959).

41. BALTIMORE, MD., CITY CODE art. 12 § 120 (1950). This ordinance provides:

> Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

42. *Frank*, 359 U.S. at 365.

43. *Id.* at 366-67.

interests safeguarded by the Fourteenth Amendment's protection against official intrusion [and was] hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy."[44] The Court also noted that Maryland had a long history of such inspections,[45] and that the public had an interest in maintaining community health in growing cities.[46] Thus the *Frank* Court concluded that the search warrant requirement did not apply to administrative inspections.

In *Camara v. Municipal Court*,[47] the Supreme Court again considered whether regulatory inspections should be exempt from the search warrant requirement of the Fourth Amendment. *Camara* involved a property owner charged with violating the San Francisco Housing Code[48] by refusing to permit a warrantless inspection of his residence. The lower court, relying on *Frank*, held that the ordinance authorizing the search did not violate the Fourth Amendment. The Supreme Court, however, overruled *Frank*, and rejected the city's contention that the fourth amendment interests at stake in inspection cases are "peripheral."[49] Instead, the Court stated that regulatory inspections are "significant intrusions upon the interests protected by the Fourth Amendment, and that such searches when authorized and conducted without a warrant procedure lack traditional safeguards which the Fourth Amendment guarantees to the individual."[50] The Court noted that fourth amendment protection is not restricted to instances when an individual is suspected of criminal behavior.[51] Additionally, the Court believed that statutory safeguards "are no substitute for individualized review."[52] Regarding the public interest in maintaining community health, the Court stated that the question is not whether this interest justifies a warrantless search, but whether the burden of obtaining a warrant would frustrate the purpose of the search.[53] The Court found that the warrant requirement did not frustrate enforcement of the housing code.[54]

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44. *Id.* at 367.

45. *Id.*

46. *Id.* at 372.

47. 387 U.S. 523 (1967).

48. SAN FRANCISCO, CA., HOUSING CODE § 503 (1958). The ordinance provides:

> Sec. 503 Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code. . . .

49. *Camara*, 387 U.S. at 530.

50. *Id.* at 534.

51. *Id.* at 530.

52. *Id.* at 533.

53. *Id.*

54. *Id.*

In *See v. City of Seattle*,[55] a companion case to *Camara*, the Court extended the search warrant requirement to include the inspection of commercial property by regulatory officials. Mr. See was a commercial property owner who appealed his conviction for refusing to permit a representative of the Seattle Fire Department to enter and inspect his commercial warehouse without a warrant.[56] The Court stated that "[t]he 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."[57]

Thus, the administrative search warrant requirement extends fourth amendment protection to regulatory inspections of a residence or a place of business. Government agents who perform administrative inspections must first establish probable cause and obtain a warrant if the individual in possession of the property does not consent to their entry.

B. The Pervasive Regulation Exception to the Administrative Search Warrant Requirement

1. Establishment of the Pervasive Regulation Exception

Three years after *Camara*, the Supreme Court created an exception to the administrative search warrant requirement that applies to the inspection of *commercial* property. In *Colonnade Catering Corp. v. United States*,[58] the corporation challenged a warrantless search by Treasury Department officials of a locked liquor storeroom. The officials conducted the search pursuant to a statute authorizing warrantless entries and inspections of the commercial premises of retail dealers in liquors.[59]

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55. 387 U.S. 541 (1967).

56. Such inspections were authorized by a Seattle ordinance that reads as follows:

> Inspection of Building and Premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Seattle, Wa., Ordinance 87870 § 8.01.050 (Jan. 19, 1959).

57. 387 U.S. at 543.

58. 397 U.S. 72 (1970).

59. 26 U.S.C. § 5146(b) (1970) (amended 1976) provides:

> The Secretary or his delegate 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.

26 U.S.C. § 7606 (1970) (amended 1976) in part provides:

> (a) Entry during day—The Secretary or his delegate 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 purpose of examining said articles or objects.
>
> (b) Entry at night—When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

The Court held the search constitutional. It stated that where Congress has authorized inspections but has made no rules governing the procedure inspectors must follow, the restrictions of the Fourth Amendment apply.[60] Where, however, an industry, such as the manufacture and distribution of liquor, has "long [been] subject to close supervision and inspection," Congress has broad power to design inspection procedures, and thereby exclude that industry from the protection otherwise afforded to commercial premises in the absence of Congressional guidelines.[61]

In *United States v. Biswell*,[62] the Supreme Court expanded the pervasive regulation exception to include governmental inspections of the firearms industry. In *Biswell*, federal agents enforcing the Gun Control Act of 1968[63] conducted a warrantless search of the storeroom of a licensed weapons dealer. The Court balanced the federal interest in the regulation of interstate firearms traffic against the individual's right to privacy, and upheld the constitutionality of the search. The Court declared that "large"[64] and "urgent"[65] federal interests in preventing violent crime and assisting state regulation of firearms traffic require close federal scrutiny of the firearms industry.[66] Moreover, a warrant requirement could easily frustrate effective inspection.[67] In regard to the individual's privacy interests, the Court conceded that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry . . . ."[68] Nevertheless, the Court concluded that recently imposed pervasive regulation of the firearms industry provided sufficient notice of prospective warrantless inspection to firearms dealers to justify dispensing with the administrative search warrant requirement:

> Inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When 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

60. *Colonnade*, 397 U.S. at 77.

61. *Id.* at 76-77.

62. 406 U.S. 311 (1972).

63. The Gun Control Act, 18 U.S.C. §§ 921-929 (1982 & Supp. II 1984). The Act authorizes official entry during business hours as follows:

> [Into] the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises.

Id. at § 923(g).

64. *Biswell*, 406 U.S. at 315.

65. *Id.* at 317.

66. *Id.* at 315-16.

67. *Id.* at 316.

68. *Id.* at 315.

to effective inspection.[69]

Thus the Supreme Court established the pervasive regulation exception to the administrative search warrant requirement. While *Colonnade* required that an industry have a long tradition of extensive government control before the exception would apply, the Court in *Biswell* broadened the pervasive regulation exception to include an industry only recently subject to heavy regulation.[70]

2. *Scope of the Pervasive Regulation Exception*

Initially, the Supreme Court foresaw limited application of the pervasive regulation exception.[71] Although some lower courts narrowly construed the exception, others, anticipating a broadening of the exception's scope after *Biswell*, applied the exception merely because a certain industry was subject to pervasive regulation.[72]

In *Marshall v. Barlow's, Inc.*,[73] the Supreme Court sought to clarify the scope of the pervasive regulation exception. In *Barlow's*, the owner of an electrical and plumbing installation business engaged in interstate commerce sought an injunction against the warrantless inspection of his business premises. Such inspections were authorized under the Occupational Safety and Health Act of 1970 ("OSHA").[74] The government argued that because all businesses engaged in interstate commerce have

69. *Id.* at 316. The *Biswell* rationale for warrantless searches has been termed the "implied consent" doctrine, because the firearms dealer knows before he enters the firearms industry that his business will be subject to heavy regulation and constant inspection. *See* Lacek, Camara, See *and Their Progeny: Another Look at Administrative Inspections Under the Fourth Amendment*, 15 COLUM. J.L. & SOC. PROBS. 61, 65-66, 71-72 (1979).

70. The initial rationale for the pervasive regulation exception was implied consent, *see supra* note 69, yet elimination of the history of regulation requirement of *Colonnade* subjects owners in newly regulated industries to warrantless searches even though the owners might not have been aware at the time they formed their businesses that such searches would take place. This result has been criticized. *See* Donovan v. Dewey, 452 U.S. 594, 609-14 (1980) (Stewart, J., dissenting); Note, *Warrantless Searches*, *supra* note 29, at 1479.

71. *Dewey*, 452 U.S. at 611 (Stewart, J., dissenting). *See* Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 867 (1979) [hereinafter Note, *Administrative Searches*].

72. Note, *Administrative Searches*, *supra*, note 71, at 867. *See also* Lacek, *supra* note 69, at 72-73; McManis & McManis, *Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant?*, 26 AM. U.L. REV. 942, 953 (1977).

73. 436 U.S. 307 (1978).

74. Section 8(a) of the Act reads:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices,

long been subject to close regulation, the warrantless OSHA inspections fell within the pervasive regulation exception.[75] In rejecting this argument, the *Barlow's* Court reasoned that regulation of interstate commerce did not provide notice to the owner such that he or she could be considered to have voluntarily consented to later warrantless searches.[76] The Court explained as follows:

> Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.
>
> . . . The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. . . . "[T]he businessman in a regulated industry in effect consents to the restrictions placed upon him."
>
> . . . The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception.[77]

Thus the Court resurrected the *Colonnade* requirement that there be a long history of close governmental supervision and inspection of the industry.[78] Although the *Barlow's* Court spoke of privacy expectations,[79] the decision rested on an implied consent theory.[80] Notably, the Supreme Court applied its implied consent rationale only to the "proprietor," "entrepreneur," "business[person]," and his or her "stock."[81]

The Supreme Court further clarified the scope of the pervasive regulation exception in *Donovan v. Dewey*.[82] The *Dewey* Court considered whether warrantless inspections of underground and surface mines, as

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equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

29 U.S.C. § 657(a) (1982).

75. *Barlow's*, 436 U.S. at 313-14.

76. *Id.* at 314.

77. *Id.* at 313 (citations omitted) (quoting in part Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973)).

78. *See Colonnade*, 397 U.S. at 77; *see also supra* text accompanying note 61.

79. The Fourth Amendment protects an individual's legitimate expectations of privacy, "that in certain places and certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' " Winston v. Lee, 470 U.S. 753, 758 (1985) (citing Katz v. United States, 389 U.S. 347 (1967) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

80. *Dewey*, 452 U.S. at 611 (Stewart, J., dissenting); Note, *Warrantless Searches*, *supra* note 29, at 1473. *See also supra* notes 69-70.

81. *See supra* text accompanying note 77.

82. 452 U.S. 594 (1980).

provided for in the Federal Mine Safety and Health Act of 1977,[83] violate the Fourth Amendment. The Court, concluding that the mine searches were reasonable, established the prevailing two-part test to determine whether a particular search falls within the pervasive regulation exception:

> [1] [A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and [2] 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.[84]

In *Dewey*, the Court again discarded the requirement that there be a long history of regulation in the subject industry[85] and abandoned the related "implied consent" doctrine.[86] Instead, the Court employed "expectation of privacy" language.[87]

Under the two-part *Dewey* test, a court must first deem reasonable a legislative or administrative determination that a warrantless inspection is necessary to enforce a governmental regulatory program,[88] and secondly, a court must determine whether the regulation of the trade or business is sufficiently pervasive to notify a commercial property owner that warrantless inspections of his or her property might take place.[89] Significantly, the *Dewey* Court's privacy expectation language specifically refers to *owners* and inspection of commercial *property*, and thereby parallels the Supreme Court's prior pervasive regulation cases.[90]

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83. Section 103(a), 30 U.S.C. § 813(a) (1982), authorizes mine inspectors to investigate and inspect coal or other mines annually, and in performing these duties "no advance notice of an inspection shall be provided to any person."

84. *Dewey*, 452 U.S. at 600.

85. *See supra* notes 68-70 and accompanying text.

86. *See supra* notes 69-70.

87. *Dewey*, 452 U.S. at 600. *See also supra* note 79.

88. *See* Note, *Warrantless Searches*, *supra* note 29, at 1476.

89. *Id.*

90. *Dewey*, 452 U.S. at 600 (mine owners); 30 U.S.C. § 813(a) (1982) (authorizes inspection of mines) (*supra* note 83); *Barlow's*, 436 U.S. at 313 (proprietors, entrepreneurs and businesspersons, and inspection of the "stock" of their enterprise) (*supra* note 77 and accompanying text); *Biswell*, 406 U.S. at 316 (firearms dealers); 18 U.S.C. § 923(g) (1982) (authorizes the warrantless search of records, documents, firearms, and ammunition) (*supra* note 63); *Colonnade*, 397 U.S. at 77 (retail liquor dealers); 26 U.S.C. § 146(b) (1970) (amended 1976) (permits the warrantless search of premises for records or other documents, distilled spirits, beer, or wine) (*supra* note 59).

III. Application of the Two-Part *Dewey* Test to Mandatory Warrantless Alcohol and Drug Testing in the Horse Racing Industry

A. Part One of the *Dewey* Test: The State's Interest in Mandatory Warrantless Alcohol and Drug Testing

The first part of the *Dewey* test measures the strength of the governmental interest in conducting warrantless inspections.[91] Although in *Shoemaker* the district court believed that the horse racing regulatory scheme was based on the state interests in both the safety of jockeys and the integrity of the industry, it approved the alcohol and drug testing program primarily because of safety considerations:

> [T]he state has a vital interest in ensuring that horse races are safely and honestly run and that the public perceives them as so. Safe racing promotes the "integrity" of the industry. . . . It is clear that horse racing is a highly dangerous sport where injury to participants is commonplace. A jockey must be in full possession of his mental faculties and physical capabilities—his coordination, skill, and reflex ability are critical to good performance. . . . In this context, even a single jockey impaired by alcohol and drug use, and participating in several races that evening, will ride proximate to dozens of jockeys and increase the probability that all may be injured.[92]

The court of appeals' fourth amendment analysis, however, justified the tests based on the state's desire to prevent corruption, omitting any reference to safety considerations.[93]

To warrant application of the pervasive regulation exception the search must be necessary to further the *regulatory scheme*.[94] The scheme behind pervasive regulation of horse racing was not meant to ensure the safety of the sport. To the contrary, courts have recognized that the *sole* objective behind pervasive regulation of the horse racing industry is to prevent corruption. The district court was aware that "[t]he public has a special interest in the strict regulation of horse racing [which] has always been pervasively regulated, in order to minimize the criminal influence to which it is so prone."[95] A New Jersey state court wrote:

> The danger of clandestine and dishonest activity inherent in the business of horse racing has been well recognized. The business itself and the legalized gambling which accompanies its activities are strongly affected by a public interest. Corruption in horse

91. *Dewey*, 452 U.S. at 600; *Shoemaker III*, 795 F.2d at 1142. *See supra* text accompanying note 84.

92. *Shoemaker II*, 619 F. Supp. at 1102.

93. *Shoemaker III*, 795 F.2d at 1142. *See supra* notes 33-34 and accompanying text.

94. *See supra* text accompanying note 84.

95. *Shoemaker II*, 619 F. Supp. at 1099.

> racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. Strict and close regulation is therefore regarded as highly appropriate.[96]

The New Jersey Supreme Court in quoting the above language stated: "It was doubtless with these important considerations in mind that the legislature gave the Racing Commission full regulatory power over horse racing in this state."[97] Thus, only those regulations necessary to prevent corruption further the purpose behind the pervasive regulation of horse racing and comply with the first part of the *Dewey* test. To justify alcohol and drug testing on safety grounds places the search outside of the pervasive regulation exception.

This interpretation is necessary to prevent bootstrapping by legislators or bureaucrats. Otherwise, a regulatory scheme authorizing warrantless searches for a limited purpose could become the basis for further warrantless searches based on state interests that alone would not support an exception to the warrant requirement. To preserve the integrity of the Fourth Amendment's administrative search warrant requirement, warrantless searches used to enforce a regulatory scheme must serve particular well-established purposes. The *Shoemaker* district court's analysis of the state's interest supporting the warrant exception fails to limit the scope of the regulatory scheme. Instead, the court's construction allows a regulatory scheme to expand with the passage of every new regulation or every new state interest found by a court, both of which may be unrelated to the rationale behind pervasive regulation of the subject industry. The permissible scope of warrantless searches based on a regulatory scheme could expand to the point where the first part of the *Dewey* test provides little fourth amendment protection to participants in a pervasively regulated business.[98]

The court of appeals perhaps recognized this flaw in the district court's analysis, and therefore rested its affirmance soley on the state's interest in preventing corruption.[99] However, the appellate opinion is itself questionable. *Dewey* requires that the state make a *reasonable* determination that the warrantless searches are *necessary* to the regulatory scheme:[100] the warrantless searches must help prevent corruption in the horse racing industry. Hypothetically, the consumption of alcohol or drugs could diminish the jockeys' performance or subject them to blackmail, but the state presented no evidence establishing a nexus between alcohol or drug use and corruption, and failed to demonstrate that test-

96. Dare v. State, 159 N.J. Super. 533, 536-37, 388 A.2d 984, 985 (App. Div. 1978) (citation omitted).

97. Delguidice v. New Jersey Racing Comm'n, 100 N.J. 79, 90, 494 A.2d 1007, 1012 (1985) (citations omitted).

98. *See Dewey*, 452 U.S. at 611-12 (Stewart, J., dissenting).

99. *See supra* notes 33-34, 93 and accompanying text.

100. *See supra* text accompanying note 84.

ing would reduce accidents.[101] Without strong evidence that corruption in horse racing follows from alcohol and drug use by jockeys, the court should not have concluded that warrantless breath and urine tests are necessary to prevent corruption. Moreover, the paucity of evidence indicates that the Commission neglected to make a reasonable determination that warrantless searches are necessary.

B. Part Two of the *Dewey* Test: The Alcohol and Drug Testing Program and Legitimate Privacy Expectations

Even if horse racing were pervasively regulated for safety, or if there were a nexus between alcohol or drug use and corruption, it does not automatically follow that the alcohol and drug tests in *Shoemaker* were constitutional. The second part of the *Dewey* test requires a court to weigh the legitimate privacy expectations of the individual against the state's interest in the searches: regulation must be "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*."[102] In weighing privacy expectations, the *Shoemaker* court faced two questions: first, whether the court could extend a rule that specifically refers to owners and the inspection of commercial property to include alcohol and drug testing of employees;[103] and second, whether pervasive regulation had provided such notice that the jockeys should have known they would be subject to warrantless alcohol and drug testing for the specific purpose of preventing corruption.[104]

1. Extending Diminished Privacy Expectations and the Areas Subject to Search

The Supreme Court, in developing the pervasive regulation exception to the administrative search warrant requirement, found diminished privacy expectations only among retail liquor dealers, firearms dealers,

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101. The district court stated:

> While the state has introduced little evidence linking accidents with jockeys impaired by alcohol or drugs—only one accident at a race track in Pennsylvania—the court does not believe that this should be the critical and only factor in the analysis. The state has shown that jockeys have been found in impaired states at the race track in sufficient numbers to indicate a high probability that the testing program will either uncover such use or deter it and thereby prevent accidents.

619 F. Supp. at 1102-03.

102. *Dewey*, 452 U.S. at 600 (emphasis added). *See supra* text accompanying note 84.

103. *Shoemaker III*, 795 F.2d at 1142; *Shoemaker II*, 619 F. Supp. at 1100. The court of appeals' holding is broad in terms of those employees it subjects to warrantless searches: "We . . . hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry." *Shoemaker III*, 795 F.2d at 1142 (footnote omitted). The district court limited its holding to licensed race track employees. *See Shoemaker II*, 619 F. Supp. at 1100. Jockeys are licensed employees of the horse racing industry. *See Shoemaker III*, 795 F.2d at 1142.

104. *See Shoemaker III*, 795 F.2d at 1142; *Shoemaker II*, 619 F. Supp. at 1099-1100.

proprietors, entrepreneurs or businesspersons, and owners.[105] By applying the exception to jockeys, the *Shoemaker* court included employees within the classes of persons judicially recognized as having diminished privacy expectations. Admittedly, pervasive regulation of a business may reduce the privacy expectations of employees as well as owners. Nevertheless, the privacy expectations of these two classes of persons are not necessarily equivalent. Regarding searches of premises, for example, owners have a lesser expectation of privacy than employees because it is the owners' commercial property and business effects that will be subject to warrantless search. Pervasive regulation of a business would not diminish the legitimate privacy expectations of employees unless the regulatory scheme had informed them that they would be subject to warrantless search. No language in the statutes that govern horse racing provides such notice.[106] In the horse racing industry, therefore, extending the concept of diminished privacy expectations to employees is questionable.

Additionally, the cases defining the scope of the pervasive regulation exception have dealt exclusively with statutes authorizing searches of commercial property, not persons.[107] *Shoemaker*, however, involved "warrantless searches of persons on regulated property, not merely the regulated property itself."[108] The district court argued that the same considerations behind the exception to the warrant requirement for property searches are applicable to searches of licensed persons on regulated premises.[109] For authority the court cited *In re Martin*,[110] where the New Jersey Supreme Court upheld warrantless searches of licensed casino employees. The *Martin* court reasoned that a casino employee's expectation of privacy is limited, particularly where applicants are notified

105. *See supra* note 90 and accompanying text.

106. The statutes governing horse racing enacted by the New Jersey State Legislature, N.J. STAT. ANN. §§ 5:5-22 to 5:5-121 (West 1973 & Supp. 1986), indicate only that warrantless searches of property might take place:

> The commission shall appoint a steward . . . to serve at any horse race meeting held under a permit issued under this act. . . . These officials . . . shall have full and free access to any portion of the space or enclosure where such horse race meeting is held and shall have such powers and duties as the commission may from time to time delegate to them under the provisions of this act.

Id. at § 5:5-37. Furthermore, the regulations promulgated by the Commission prior to enactment of the alcohol and drug testing program only provide notice of warrantless property search, as indicated by the court of appeals in *Shoemaker*: "Even before the regulations challenged here were adopted, the jockeys were aware that the Commission had promulgated regulations providing for warrantless searches of stables." *Shoemaker III*, 795 F.2d at 1142. *See infra* notes 123-130 and accompanying text.

107. *See generally supra* notes 58-90 and accompanying text.

108. *Shoemaker II*, 619 F. Supp. at 1100.

109. *Id.* The court of appeals apparently deemed the pervasive regulation exception applicable to unlicensed as well as licensed employees. *See supra* note 103.

110. 90 N.J. 295, 447 A.2d 1290 (1982).

prior to licensing that they will be subject to warrantless searches.[111] And the court of appeals in *Shoemaker* stated:

> [W]hile there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principle regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable.[112]

Both analyses obscure important differences between inspection of property and searches of persons. Under the Fourth Amendment, courts must balance the public interest behind a warrantless search against an individual's legitimate privacy expectations.[113] Logic dictates that the greater the invasion of privacy, the more compelling must be the public interest. Thus, a court must determine the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[114] The Supreme Court has recognized that an individual deserves more protection in his or her home than on commercial premises,[115] and that the privacy interest in one's body exceeds that in property.[116] Not all searches of persons equally impinge on privacy. Searches that invade bodily integrity, for example, affect greater fourth amendment interests than do frisk searches.[117] In this context, courts have correctly concluded that urinalysis constitutes a highly intrusive search.[118] Further-

111. *Id.* at 314, 447 A.2d at 1299.

112. *Shoemaker III*, 795 F.2d at 1142.

113. *See supra* note 37 and accompanying text.

114. Winston v. Lee, 470 U.S. at 761.

115. *Dewey*, 452 U.S. at 598-99.

116. Winston v. Lee, 470 U.S. at 760. Thus, in National Treasury Employees Union v. Von Rabb, No. 86-3522 (E.D. La. Nov. 14, 1986), the court stated: "Drug testing of . . . workers' bodily wastes is even more intrusive than a search of a home."

117. *See* Winston v. Lee, 470 U.S. 753 (1985) (bullet removal); Hayes v. Florida, 470 U.S. 811 (1985) (seizure of person for fingerprints); Davis v. Passman, 442 U.S. 228 (1979) (fingerprints); Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scrapings); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplar); Schmerber v. California, 384 U.S. 757 (1966) (blood sample); Rochin v. California, 342 U.S. 165 (1952) (forced stomach pump); *see also supra* note 27.

118. In determining the intrusiveness of the alcohol and drug tests, the *Shoemaker* district court believed that "breathalyzer tests and urinalysis are considered less intrusive than body cavity and strip searches." *Shoemaker II*, 619 F. Supp. at 1101. Furthermore, both the district court and the court of appeals believed that the procedures specified in the regulations assured that the tests would not be administered in an arbitrary or unreasonable manner. *Shoemaker III*, 795 F.2d at 1143; *Shoemaker II*, 619 F. Supp. at 1103. *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979) (random searches that do not limit the discretion of officials in the field violate the Fourth Amendment). Other courts, however, have equated urinalysis with a body cavity search. Tucker v. Dickey, 613 F. Supp. 1124, 1129-30 (D. Wis. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1218-20 (S.D.N.Y. 1984). Although procedural safeguards, such as privacy while providing a sample and confidentiality of test results, might render a particular testing program more reasonable than would be the case absent such protection, the fact remains that the taking of a urine specimen is a substantial intrusion into personal privacy. In American Federation of Government Employees, AFL-CIO v. Weinberger, No. CV486-353 (S.D. Ga.

more, drug tests are highly invasive because they can reveal to officials an individual's activities outside the regulated facility.[119] Therefore, alcohol and drug testing in horse racing require demonstration of a more compelling public interest than was needed for the casino search in *Martin* (which also concerns the state interest in preventing corruption but involved an inspection of the exterior of a person's body and personal effects present in the casino[120]) or the inspections in industries examined in Supreme Court decisions that upheld use of the pervasive regulation exception.[121] Actual rather than potential corruption could constitute a more compelling state interest that might have justified alcohol and drug testing. New Jersey, however, failed to demonstrate that alcohol or drug use by jockeys actually corrupted the horse racing industry.[122]

2. *Legitimate Privacy Expectations as a Limit on the Type of Searches that May Be Performed*

Assuming that the *Shoemaker* court legitimately expanded the pervasive regulation exception from inspections of property to include searches of persons, the second part of the *Dewey* test still required the court to determine whether pervasive regulation of horse racing so diminished privacy expectations that the jockeys could not help but be aware they would be subject to warrantless testing for alcohol and drug

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Dec. 2, 1986), the court described urinalysis as a "highly intrusive" search. Importantly, the *Weinberger* court noted that administering a urine test in a reasonable manner does not negate the fact that the search is a significant intrusion on the individual searched. *Id.* (citing Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir. 1986). Lastly, confidentiality under the Commission's testing program is not absolute. If an employee tests positive, results may be divulged in a ruling issued by the Commission, or in any administrative or judicial proceeding concerning the ruling. *See supra* note 21 and accompanying text.

119. Detectable traces of marijuana remain in the body for up to four weeks after consumption. All other drugs remain in the body for as long as three days. THE ECONOMIST, Dec. 6, 1986, at 34. Thus, drug tests may monitor activities unrelated to job performance, far removed from the job site by both time and location. *See* American Fed'n of Gov't Employees, AFL-CIO v. Weinberger, No. CV486-353 (S.D. Ga. Dec. 2, 1986). Additionally, drug testing potentially affects privacy more than other searches because results are often unreliable. False indications of drug use, which are not uncommon, could cost innocent persons their jobs and reputations. *See* Altman, *Expensive Drug Tests Often Inaccurate*, N.Y. Times, Sept. 16, 1986, at 11, col. 1.

120. *Martin*, 90 N.J. at 312, 447 A.2d at 1298. *See* N.J. STAT. ANN. § 5:12-79(a)(6) (West 1973 & Supp. 1986).

121. *See Dewey*, 452 U.S. at 602 (safety of underground and surface mines); *Biswell*, 406 U.S. at 315 (regulation of interstate firearms traffic); *Colonnade*, 397 U.S. at 75-76 (protection of liquor tax revenue).

122. *See supra* text accompanying note 101. Compare this analysis with that of the court of appeals in *Shoemaker*, which reasoned that the state's interest in preventing the mere appearance of corruption rendered the warrantless alcohol and drug tests reasonable: "It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing." *Shoemaker III*, 795 F.2d at 1142.

use to deter corruption.[123] The district court reasoned that licensed participants in a heavily regulated industry have limited expections of privacy, and because the jockeys are licensed and had received notice of the testing regulations, the testing program did not infringe upon the jockeys' reasonable privacy expectations.[124] Although the court acknowledged that licensure and notice do not constitute a *per se* waiver of fourth amendment rights, "licensed participants in an industry subject to strict oversight have a diminished expectation of privacy."[125] The court of appeals also linked the jockeys' diminished privacy expectations to notification that testing would take place.[126]

The flaw in this analysis is that it links the privacy expectations of jockeys to notice of an *impending* regulatory program. The *Dewey* test, however, expressly states that the "regulatory presence," not newly adopted regulations, must provide the notice which reduces privacy expectations.[127] If, within a pervasively regulated industry, notice of a new regulatory program alone could diminish legitimate privacy expectations, the state could gradually shrink the circle of privacy surrounding employees in a pervasively regulated industry by continually adopting new regulatory agendas and announcing new searches; the fourth amendment protection ostensibly provided by the second part of the *Dewey* test would thereby disappear.[128]

The extent that *pervasive regulation* of horse racing reduces jockeys' legitimate privacy expectations must be determined. An industry pervasively regulated to prevent corruption does not sufficiently diminish privacy expectations to justify warrantless body searches in the interest of safety. Furthermore, even if a jockey must expect to be scrutinized for the specific purpose of deterring corruption, pervasive regulation does not extend such scrutiny to include alcohol and drug testing. Without a perceptible nexus between alcohol or drug use and corruption,[129] no

123. *See supra* text accompanying note 84.

124. *Shoemaker II*, 619 F. Supp. at 1102.

125. *Id.*

126. The court of appeals argued that, in the context of pervasive regulation, an announcement that alcohol and drug testing would begin after a specified date provided sufficient notice to the jockeys. *Shoemaker III*, 795 F.2d at 1142.

127. *See supra* text accompanying note 84.

128. For example, in *Dewey* Congress had specifically authorized the inspection of mines. *See supra* note 83. The *Dewey* Court reasonably concluded, therefore, that pervasive regulation had placed the mine owners on notice that their mines would be subject to warrantless searches. 452 U.S. at 603-05. Pervasive regulation could not be viewed as having notified mine owners that they themselves would be searched without a warrant. In the horse racing industry, as with mining, the regulatory scheme only provided notice that inspection of property might take place. *See supra* note 106. In both industries, an administrative agency's newly adopted regulations that authorize searches of persons cannot be permitted to accomplish what a legislative body through pervasive regulation did not.

129. *See supra* text accompanying note 101.

jockey could have foreseen the implementation of an alcohol and drug testing program.

Thus, the pervasive regulation of horse racing could not have diminished the privacy expectations of jockeys to the extent that they could not help but be aware that they would be tested for alcohol and drugs, as required by the second part of the *Dewey* test.[130] Both the district and appellate courts impermissibly relied on newly promulgated regulations to provide the requisite notice.

In sum, the facts in *Shoemaker* fail both parts of the *Dewey* test. The district court's focus on safety placed the Commission's alcohol and drug testing program beyond the regulatory scheme. Even if one accepts the court of appeals' analysis, which justified the testing program on corruption grounds and thereby placed it squarely within the regulatory scheme, the state did not demonstrate that the tests were necessary to further that scheme. Additionally, the state did not demonstrate a sufficient public interest to warrant expansion of the traditional application of the pervasive regulation exception to include highly intrusive warrantless searches of employees, nor does pervasive regulation of the horse racing industry diminish the legitimate privacy expectations of employees sufficiently to justify such searches. The testing program, therefore, should not have been upheld.

IV. The Potential Impact of *Shoemaker*

The impact of *Shoemaker* extends well beyond the horse racing industry. Indeed, widespread alcohol and drug abuse[131] and the increasing reliance in our society on drug testing of government and private employees[132] underscores the potential applicability of the *Shoemaker* analysis. Under the court's expansive interpretation of the *Dewey* test, those employed in heavily regulated private industries could face mandatory warrantless alcohol and drug testing where such testing is not reasonable. *Shoemaker* is problematic because it would allow government regulators to impose a mandatory alcohol and drug testing program without properly considering both the purpose behind pervasive regulation of the subject industry and an individual's legitimate expectations of privacy.

Even under a correct *Dewey* analysis, it is questionable whether government-sponsored warrantless alcohol and drug testing programs could be upheld. For example, in the nuclear power[133] or

130. *See supra* text accompanying note 84.

131. *See supra* notes 1-2 and accompanying text.

132. *See supra* notes 3-8 and accompanying text.

133. The Nuclear Regulatory Commission (NRC) has not yet promulgated rules aimed at preventing drug use by employees at licensed nuclear utility sites. The NRC has, however, issued a Policy Statement to guide utilities in the design of "fitness for duty programs." *See* NUCLEAR REGULATORY COMMISSION, POLICY STATEMENT ON FITNESS FOR DUTY OF NU-

airline[134] industries, government-mandated warrantless tests to ensure public safety might appear reasonable. The public interest in safety is strong, involving the protection of several million people, and the legitimate privacy expectations of industry participants are diminished in the realm of safety. However, it would be difficult for the state to demonstrate that off-site alcohol and drug use in such industries has in fact affected safety sufficiently to justify expansion of the pervasive regulation exception to include highly intrusive body searches of employees.

Conclusion

The Fourth Amendment generally requires issuance of a warrant prior to a search conducted by law enforcement agents, including regulatory inspections conducted by administrative officials. Administrative inspections in pervasively regulated industries constitute one exception to the search warrant requirement. The Supreme Court defined the parameters of this exception in *Donovan v. Dewey*. *Dewey*'s safeguards promise that warrantless searches will occur only when necessary to further the specific purposes of the pervasive regulatory scheme, and only when tolerated by legitimate privacy expectations. The issue in *Shoemaker v. Handel* was whether mandatory warrantless alcohol and drug testing of race horse jockeys fell within the pervasive regulation exception to the administrative search warrant requirement. The *Shoemaker* court, in its laudible effort to cope with the growing alcohol and drug abuse problem, weakened *Dewey*'s fourth amendment safeguards by failing to require the state to demonstrate that the testing is necessary to deter corruption in

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CLEAR POWER PLANT PERSONNEL (effective Aug. 4, 1986). The guidelines in part provide as follows:

> An acceptable fitness for duty program should at a minimum include the following essential elements: . . . (1) A provision that the sale, use, or possession of illegal drugs within the protected area will result in immediate revocation of access to vital areas and discharge from nuclear power plant activities. The use of alcohol or abuse of legal drugs within the protected area will result in immediate revocation of access to vital areas and possible discharge from nuclear power plant activities[;] (2) A provision that any other sale, possession, or use of illegal drugs will result in immediate revocation of access to vital areas, mandatory rehabilitation prior to reinstatement of access, and possible discharge from nuclear power plant activities[; and] (3) Effective monitoring and *testing procedures* to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty.

Id. at 6-7 (emphasis added).

Although this Policy Statement is merely a recommendation, it went on to emphasize that "[n]othing in this Policy Statement shall limit the authority of the NRC to conduct inspections as deemed necessary or to take appropriate enforcement action when regulatory requirements are not met." *Id.* at 8. If the NRC would some day *require* alcohol or drug testing of nuclear power industry employees, such state involvement would implicate the Fourth Amendment, and the *Shoemaker* analysis would apply.

134. The Federal Aviation Administration has considered adopting rules that would require airline pilots and certain other airline employees to undergo alcohol and drug testing. *See* N.Y. Times, Dec. 5, 1986, at 1, col. 4.

horse racing, by unjustifiably expanding the exception's scope to include employees and intrusive body searches, and by allowing newly promulgated regulations—instead of pervasive regulation—to define legitimate privacy expectations. The pervasive regulation exception to the administrative search warrant requirement thus risks becoming the rule, threatening the fourth amendment rights of employees in pervasively regulated industries.

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