ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4695 HJUD HB 261 - HB 283 (FILE 1)
267

* The voice/breath analyzer is similar to a preliminary breath tester used by police officers or the car breath analyzed ignition interlock.

* Voice prints are very accurate and similar to finger prints in that each persons voice is unique.

* The alcohol voice analyzer can be used as a stand alone or in conjunction with the Home Escort system.

* The voice breath analyzer will send the supervising agency the actual readout (ie, .053). This readout is sent by phone line to the main computer. If positive it registers a violation. The unit in the offenders home can be made to show the offender the actual breath test results, pass/fail, or no reading at all.

* Voice/breath analyzer in the offenders home has a pressure sensitive unit that is placed on the persons mouth when the offender is called to give a test. Pressure is kept on that mouth piece throughout the entire process. If that pressure sensitive device is removed from the lips the test aborts.

HB

266

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

1-15-88

(9)

HOUSE COMMITTEE REPORT

5/H

Date referred: 4/10/87

FURTHER REFERRALS: Judiciary

DATE: 5/9/87

The Resources Committee has considered HB 266

"An Act relating to the recording of documents."

RECOMMENDS:

[✓] replace with CS HB 266 (Res) [✓] the same title

[ ] attached amendment(s) [ ] a new title

- [✓] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [✓] zero fiscal note
- [X] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

Sam Cotten
Mike Navarre
Lyman Hoffman
Al Adams
Cliff Davidson
Dick Shultz
Hamilton Springer
Adelheid Herrmann

SIGNING OTHER RECOMMENDATIONS:

Irene Pearce - No Rec

Sam Cotten
Chairman's signature

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 266 (Resources)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: January 8, 1988
Title: An Act relating to the recording of documents
Sponsor: Ulmer
Requestor: House Judiciary

Agency Affected: Natural Resources
BRU: Management & Administration

Components: Information Resource Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Clarifies certain procedures for recording of documents by the State Recording Offices. Requires that regulations be no more restrictive than the statutes unless they further a "legitimate administrative need".

Prepared by: Sharon Barton Phone: 465-2406
Division: Management Date: 1/8/88

Approved by Commissioner: Judith M. Brady Date: 1/8/88
Agency: Department of Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

HUGHES THORSNESS GANTZ POWELL & BRUNDIN

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JOHN G. FRANK**
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TIMOTHY R. REDFORD
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VALDEZ, ALASKA 99686-0787
TELEPHONE (907) 835-2988

REPLY TO ANCHORAGE

March 10, 1987

Honorable Fran Ulmer
State Representative
P. O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

I received the enclosed memorandum from the Alaska Bar Association, as I am a member of the Natural Resources Section Executive Committee of the Bar Association.

I support the language of the attached (proposed) House Bill, "An Act relating to the recording of documents", in its entirety. I wholeheartedly support the bill and the reasoning behind it. I urge you to introduce it, and not by request.

If for no other reason, I object to the current recording regulations and support the proposed bill on the grounds that the Department of Natural Resources has no business placing unreasonable and cumbersome limitations on the public's right to record documents. If it is to be done at all, it should be done by the legislature through elected representatives and not subject the right to record documents to the discretionary, often petty and whimsical "legal" interpretations of clerks. I have personally had the experience of the Fairbanks Recording Office (initially) refusing to record documents that are <u>required</u> by federal mining claim regulations to be recorded with the recording district; only after strenuous argument (the clerks adjourned to a private conference on the matter while I waited an hour) was the document accepted. If the documents had not been recorded, my clients' mining claims could have been declared invalid by the United States Bureau of Land Management.

Most of my practice consists of representing small miners. As a group, these people are bright, but have little formal education; they are literally overwhelmed by the legal and regulatory climate in which they are struggling to survive. As a user group, I would wager that miners use Alaska's recording

offices more than any other single group of people. They do so for a very good reason: they must annually file documents with recording offices to preserve their possessory rights, upon pain of losing the claims to rival claimants or the government.

Unlike persons wishing to record documents who are seeking to place themselves prior in time to the interest of another party, the failure to timely record a document for a miner does not simply place that miner's interest in a position subordinate to someone who has filed ahead of him. Instead, the failure to timely file various mining documents can, and usually does, result in a total loss of the miner's rights--e.g., by an administrative declaration from BLM to the fictional effect that their claims have been "abandoned". This abandonment penalty has been sustained as lawful by the United States Supreme Court recently and BLM may take such action, despite abundant evidence that the miner did not intend to abandon the claim.

As a group, miners stand to lose more than any other group under these current recording regulations, because miners typically wait until near the annual deadlines to file their documents. At that time, should a clerk narrowly or adversely interpret any one of the host of regulatory obstacles to recording with which DNR is now armed, it will be too late for the miner to correct the situation; in many instances, the miner will simply lose his rights. Often, the failure to record cannot be cured by filing another mining claim location certificate, because the ground upon which the claim was located is now in one of Alaska's many national parks or other areas now closed to mineral entry.

Long before there were recorder's offices, there were mining districts. Each mining district (many of which were established shortly after acquisition of Alaska from Russia) had a district recorder, whose job was almost exclusively to accept mining claim recordations. It is sad and ironic that State of Alaska recorders offices, which succeeded to the duties of mining district recorders, now seek to limit the public's right to record.

Finally, I will conclude by suggesting that some teeth be placed in the bill proposed; otherwise, even though the intention of the legislation is clear, it could still be frustrated, without penalty, by State employees. You are probably aware of the fact that some Alaska statutes provide for penalties to be assessed against an employee who violates the statute. For example, I believe there is a statutory prohibition against Department of Revenue employees divulging confidential information about taxpayers; penalties are provided for releasing the information. I can say from personal experience that this penalty provision is

terribly effective, because I have sought to obtain seemingly unrelated and harmless information and the Attorney General's Office has always advised the employee to err on the side of caution by refusing to release it. The fear of this penalty is so great that I have even had cases wherein the Attorney General gave this same advice, even though the information was requested pursuant to a lawfully issued subpoena (I was able to obtain the information, but only after persuading the taxpayer to authorize its release).

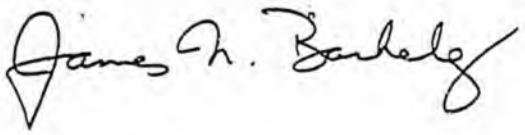
Thus, assuming a reasonable definition of "wrongful refusal to record" could be arrived at, I respectfully submit that penalties should be provided for under those circumstances--which penalties should include all losses proximately caused by the wrongful refusal--e.g., the loss of mining claims or other valuable property rights.

This is not a matter involving a particularly crusty, obstructionist clerk in one recording district; this is a matter of paramount importance and is of state-wide concern.

One last note: my opinions in this letter are conveyed to you from me as an individual, and they do not necessarily constitute the opinions of the Alaska Bar Association nor of Hughes, Thorsness, Gantz, Powell & Brundin.

Very truly yours,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN



By:
James N. Barkeley

JNB/mt
2793i
cc: Linda Nordstrand, Alaska Bar Association
CLE Director

(907) 586-3539

DOUGLAS L. GREGG, Esq.
A Professional Corporation
ATTORNEY-AT-LAW
130 SEWARD STREET, SUITE 417
JUNEAU, ALASKA 99801

March 4, 1987

Honorable Fran Ulmer
Representative District 4B
State House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to Recording Statute AS 34.15
My File G-1579
Dear Representative Ulmer:

Thank you for having our bill drafted. It seems to cover all the bases. I am not certain my schedule will allow me to attend Friday's bar luncheon. As a committee member I certainly hope that you will get a bill in as quickly as possible. I keep hearing horror stories. Fred Baxter is currently having a problem getting a certified copy of a court order from Anchorage recorded down here. The reason for refusal: "It is not an original." Can you believe this?

Very truly yours,

DOUGLAS L. GREGG

DLG

cc: Fred J. Baxter, Esq.
Larry Weeks, Esq.
James E. Fisher, Esq.

(907) 586-3539

DOUGLAS L. GREGG, Esq.
A Professional Corporation
ATTORNEY-AT-LAW
130 SEWARD STREET, SUITE 417
JUNEAU, ALASKA 99801

January 28, 1987

Honorable Fran Ulmer
State Representative
State Capitol
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to AS 44.37.025 (Recording Documents);

Dear Fran:

I learned today that you may not have received a copy of the Juneau Bar letter and enclosures of January 7th. Here is a copy. The issue at hand may well relate to the budget in that the host of regulations which have been implemented in the last year or two cannot help but have added substantially to the work load of the recorder's offices around the state. In any event, we appreciate your assistance. We'd like to see a bill drafted to add a few amendments to the existing statute. Thank you.

Very sincerely yours,

Douglas L. Gregg

ENCLS:
cc:James E. Fisher, President
Juneau Bar Association

J U N E A U B A R A S S O C I A T I O N

6645 N. Douglas Highway
Juneau, Alaska

January 7, 1987

Honorable Jim Duncan
State Senator
State Capitol
P.O. Box V
Juneau, Alaska 99811

Honorable Fran Ulmer
State Representative
State Capitol
P.O. Box V
Juneau, Alaska 99811

Honorable Bill Hudson
State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to AS 44.37.025 (Recording Documents);

Dear Juneau Legislative Delegation:

There is a need for new legislation to correct a serious problem with recording documents in Alaska. In recognition of that difficulty, the Juneau Bar Association, at its regular meeting on December 5, 1986, adopted the recommendation of its Committee on the Office of the Recorder, copy enclosed. The committee was formed as the result of numerous complaints about the many new restrictions on the right to record documents that were imposed through the rule-making power of the Department of Natural Resources, which has jurisdiction over the Office of the Recorder.

In addition to amending existing legislation, we are requesting that new regulations be adopted by DNR. However, we request that a bill be drafted to provide guidelines restricting future rule-making power to those matters of legitimate concern to the Office of the Recorder. Such an amendment to the statute should make it clear that the public has a <u>right</u> to record legal documents and that the Office of the Recorder is not to judge the internal legal integrity of documents but simply to record them

if they meet certain minimum requirements.

As to the rule-making power of the department, six recommendations are contained within the committee's report. However, the department might well consider several other changes in its current regulations. The committee restricted itself to the most obvious areas of needed change. The regulations could be further amended to provide that the Recorder may not refuse to record or file a document because:

- it lacks a title reflecting its overall content;
- it does not contain a "return to" address;
- the individual who incurred an assessment is not named (even though the property against which the assessment is placed is described and the party claiming the assessment is identified).

The Juneau Bar Association is not opposed to all regulation of the right to record. The new regulations are, however, onerous. More importantly, they are constituting a substantial restriction on the right to place a document on the record as public notice. Many times a document serves that purpose even though the document could admittedly be improved in its context and could be more complete than it is. But the right to record and create the public notice for the protection of parties is of paramount importance. Perfection in legal documents is desirable but many people making use of the Recorder's Office are not lawyers or skilled title examiners. Failure to successfully record can have dire results when intervening filings place a party in a secondary position.

We will appreciate your assistance in correcting the problem through the amendment of AS 44.37.025 to insure that future regulations will not contravene public policy. Thank you for your cooperation in this matter.

Very sincerely yours,

/S/

James E. Fisher, President
Juneau Bar Association

ENCL

REPORT OF COMMITTEE ON OFFICE OF THE RECORDER

The Committee met on August 22nd. The work of the Committee was assigned to its members, Larry Weeks, Fred J. Baxter, and Douglas Gregg. Bruce Hansen of Title Insurance Agency was invited to attend that meeting as an ex-officio member. He was requested to make inquiries of other title companies in an effort to obtain their viewpoints on the current difficulties in recording documents in Alaska. Fred Baxter spent some time outlining the essentials of a hypothetical complaint for damages. Larry Weeks explored the question whether the Office of the Recorder can, under the language of the statute requiring him to record instruments, refuse to record in reliance on the new regulations. Fred concluded that a person suffering damages by reason of the recorder's refusal to record an instrument could frame a good cause of action in many instances. Larry concluded that there would be a good chance, in a declaratory judgment action, to secure a judgment invalidating many of the regulations in question.

Your chairman met with Mr. Hansen on November 7th, at which time Mr. Hansen had received and compiled the results of an informal poll conducted among title insurance offices throughout the state. There were over 35 written responses (some did not answer every question.) Mr. Hansen had posed 15 questions in the poll. A simple "yes" or "no" was solicited to these questions.

The top of the poll asked whether the recipient felt that the Recorder should refuse to record or file a document when the document had certain attributes. These attributes were described in the 15 questions he selected. (Poll and results annexed.) There was near unanimity on several of the 15 items, with a more or less equal division of other items. Comments of respondents are omitted from this report. Several respondents sent letters praising Mr. Hansen for taking a personal hand in the difficulty.

A summary of the poll results shows general dissatisfaction with the system currently being employed by the Recorder in rejecting documents offered for recording.

Your committee's proposed amendments to the statute would help ensure that when new rules and regulations are adopted they will be circumscribed in such manner as to prevent unreasonable or unnecessary restrictions.

The Committee agrees that there is a need for modification in the existing regulations entirely apart from our proposed amendment to AS 44.37.025 which grants rule making power to the Department of Natural Resources. It may adopt regulations ". . . prescribing the records to be maintained and the instruments to be recorded." The statute currently lacks any restrictions or guidelines as to the scope of that power. An amendment would

help ensure that over-zealous rule-making will not in the future impair the ability of the public to make reasonable use of the Recorders' Offices.

Such an amendment to the statute could articulate a public policy. For example, it might state something along these lines:

PREAMBLE. The Legislature recognizes and therefore finds as follows:

1. The recording of legal documents of the kind customarily recorded throughout the United States is an essential State function.

2. The time and place that a document was placed of record may well be more important than the underlying sufficiency of that document from a strictly legal standpoint.

3. The Recorder's Office exists primarily for the benefit and convenience of the general public.

4. Commercial institutions, the business community, banks, and private individuals cannot safely function without the protections afforded by the right to give public notice through the ability to record their legal documents.

> BE IT ENACTED etc. etc. . . . that public policy of this State is declared as follows: to maintain a convenient means of regularly recording legal documents and to obtain information concerning existing recorded documents. In the making of rules and regulations to facilitate the legitimate administrative needs of the various recording offices, reasonable doubts shall be resolved in favor of recording rather than of rejection. The Recorder shall not make judgments as to the legality of the contents of any document offered for recording. Nevertheless, the Department of Natural Resources shall adopt such rules and regulations as it requires to control indiscriminate filings of documents that do not meet certain minimum requirements. These regulations may include but shall not be limited to the requirement for a legal description, if needed, names of parties, capacity of parties, legibility and other such reasonably required information to assure that the Recorder's Office functions in a manner consistent with the needs of the citizens of this state.

The foregoing suggestions for a statutory change to control the rule-making authority of DNR is one suggestion. The second is that a request be made to DNR for proposed new amendments to the existing provisions contained in the Alaska Administrative Code relative to recording. Your Committee recommends that at least the following amendments be specifically requested of DNR:

1. All documents valid at the time they were made shall be recorded, notwithstanding that they may not meet the requirements contained in later-adopted rules and regulations.

2. A document shall not be rejected on the ground that it serves more than a single purpose nor shall it be required that a document be recorded separately for each of the

various purposes for which it may appear to stand. (This shall not preclude the multiple recording by the offering party of a document which has several purposes.)

3. A document which makes reference to an attached exhibit shall not be rejected on the ground that the exhibit does not contain a label.

4. A document shall not be rejected on the ground that it lacks the recording information contained in another document that is being amended by the one being offered.

5. An official certified document from any governmental office in this state or a sister state shall not be rejected on the ground that it is not the original provided it is legible.

6. A document shall not be rejected on the ground that it does not specify the name of the recording district provided that that information is given to the Recorder by the person offering the document, or such information is contained in a cover letter accompanying the document. (The information so received by the Recorder may be noted by the Recorder elsewhere on the document for future reference.)

CONCLUSION

It is recognized that many of the existing regulations may be desirable in the abstract. However, uncompromising loyalty to multiple details, often of questionable importance, result in the rejection of instruments and consequent delays in giving notice. Such delays can have disastrous results. All persons who are drawing legal instruments and submitting them for recording are not attorneys or title companies. The public's right to record ought to be paramount.

DATED: December 5, 1986.

Respectfully submitted,

Douglas L. Gregg

Larry Weeks

Fred J. Baxter

Do you feel that the recorder should refuse to record o file a document because:

YES	NO	
17	15	Contains no "return to" address.
30	4	Lacks trustee name on deed of trust.
29	8	Lacks real property description.
15	17	Lacks a title reflecting its overall content.
26	10	Document not executed entirely in English.
26	9	Lacks the recording information of the original document being amended, corrected, extended, modified, or released.
16	13	Document is larger than 8 1/2 by 14 inches.
29	9	Document must state in what capacity the signatory executed the document; individually, as attorney-in-fact, partner, corporate office, executor, administrator, guardian or trustee.
22	11	Lacks the name of the recording district in which it is to be recorded.
16	14	Lacks reference to attached exhibit/Exhibit not clearly labeled.
26	5	Lacks attached exhibit when reference is made to such.
5	27	An original, recordable document may not be accepted as an attachment to another document.
3	32	The document serves more than one purpose. Recording fee is charged separately for each purpose.
19	14	Does not name person against whom assessment is placed.
3	29	Document is valid instrument executed prior to effective date of regulations but does not conform to current regulations.

282 217

COMMENTS:

499 RESPONSES

APPROX 35 INDIVIDUAL RESPONSES

BILL: HB 266 01:59 PM 01/13/88
NAME:
TITLE: "AN ACT RELATING TO THE RECORDING OF DOCUMENTS."

PRIME SPONSOR: ULMER

CURRENT STATUS: (H) JUD STATUS DATE: 05/11/87

04/10/87	(H)	810	READ THE FIRST TIME - REFERRAL(S)
04/10/87	(H)	810	RESOURCES, JUDICIARY
05/11/87	(H)	1304	RES RPT CS(RES) 8DP 1NR
05/11/87	(H)	1304	ZERO FISCAL NOTE/ANALYSIS 5/11/87
05/11/87	(H)	1304	REFERRED TO JUDICIARY

BILL: HB 266 05:00 PM 01/13/88
NAME:
TITLE: "AN ACT RELATING TO THE RECORDING OF DOCUMENTS."

PRIME SPONSOR: ULMER

CURRENT STATUS: (H) JUD STATUS DATE: 05/11/87

04/10/87	(H)	810	READ THE FIRST TIME - REFERRAL(S)
04/10/87	(H)	810	RESOURCES, JUDICIARY
05/11/87	(H)	1304	RES RPT CS(RES) 8DP 1NR
05/11/87	(H)	1304	ZERO FISCAL NOTE/ANALYSIS 5/11/87
05/11/87	(H)	1304	REFERRED TO JUDICIARY

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/11/87

FURTHER REFERRALS:

DATE: 1-15-88

The Judiciary Committee has considered HB 266

"An Act relating to the recording of documents."

RECOMMENDS:

[ ] replace with _____ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[✓] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

M E M O R A N D U M

January 15, 1988

TO: All Representatives

FROM: Representative Fran Ulmer

SUBJECT: House Bill 266

I introduced House Bill 266, "An Act relating to the recording of documents", to bring consistency to the policies governing what documents should be recorded by the Recording Offices throughout the State of Alaska. House Bill 266 has received widespread support from the Alaska Miners Association, title companies and attorneys.

Section 1 is a statement of facts explaining the underlying purpose of the bill.

Section 2 adds a new section to AS 34.15 outlining recording criteria. When determining whether a document may be recorded, the recorder could not consider whether the contents of the document are legally sufficient to achieve the purposes of the document. Reasonable doubts would be resolved in favor of recording.

The bill also sets forth several instances when a document may not be rejected.

The recorder could not require that a document which serves more than one purpose be recorded separately for each of the purposes. This would not prevent the multiple recording of a document if the person requests that it be recorded for more than one purpose.

Finally, in Section 3, the bill amends AS 44.37.025 so that a regulation of the department could not impose a restriction on document recording unless the restriction is required by statute, or furthers a legitimate administrative need of the recorder.

Thank you for your support of HB 266.

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

MEMORANDUMM

May 2, 1987

TO: House Resources Committee

FROM: Representative Fran Ulmer

SUBJECT: HB 266, An Act relating to the recording of documents

---

House Bill 266 was introduced at the request of the Juneau Bar Association. The bill adds a new section to AS 34.15 and amends AS 44.37.025.

After the Department of Natural Resources adopted regulations during the past year, the requirements for recording documents have become increasingly more onerous for Alaskans who need these services. These regulations have not been uniformly interpreted or applied by the staff in the various recording offices throughout the state.

My aide and I have had several meetings with staff from the Division of Management, Department of Natural Resources to discuss this bill. In addition to numerous communications favorable to the bill, these meetings have confirmed the need for legislative policy to address the recording of documents.

As you know from public response to the proposed budget cuts that would have closed some of the recording offices, Alaskans need and want the services provided by these recording offices. HB 266 proposes to clarify the requirements for recording documents and to make these services more equitable throughout the state.

I am hopeful that we can work together to pass a bill that will address the problems associated with the recording of documents and will improve these public services.

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, AK 99503 (907) 276-0347

April 17, 1987

RECEIVED [illegible] 1987

Honorable Fran Ulmer
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: House Bill No. 266

Dear Rep. Ulmer:

The Alaska Miners Association supports House Bill No. 266 and its passage this session of the legislature.

Since the majority of mining operations in Alaska are conducted by "small miners", in remote and unsurveyed areas of the state, and since the penalty for failure to timely file or record documents relating to mining claims can be loss of the claims, it is imperative that procedural or technical niceties do not preclude their recordation, as long as the intent of the documents is fairly stated.

We believe that House Bill No. 266 goes a long way toward accomplishing those objectives, and congratulate you for introducing that bill.

Sincerely,

ALASKA MINERS ASSOCIATION

Curt McVee

Curtis V. McVee
Executive Director

TIA TITLE INSURANCE AGENCY

[X] Main Office
201 N. Franklin St.
Juneau, AK 99801
(907) 586-6445

☐ Valley Branch
9110 Glacier Hwy.
Juneau, AK 99801
(907) 789-1671

April 17, 1987

Representative Fran Ulmer
Pouch V
Juneau, AK 99811

Dear Fran:

Your introduction of House Bill 266 is commendable. This type of legislation is long overdue.

The recording system has been kind of a step child for as long as I can remember, being administered according to the whims of various departments it has been in. It's encouraging to see an attempt to stabilize the system.

Sincerely,

Glen A. Prince
Executive Vice President

GAP:bjk

RECEIVED APR 21 1987

DORIS LOENNIG
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

SUITE 120, 515 SEVENTH AVENUE - FAIRBANKS, ALASKA 99701
907 452-2005

April 1, 1987
(Dictated 3-31-87)

Representative Fran Ulmer
P.O. Box V
Juneau, Alaska 99811

Dear Mrs. Ulmer:

I received a memorandum March 9, 1987 from members of the Natural Resources and Real Estate Sections of the Alaska Bar Association asking me to review a proposed amendment to the Recording Act. I apologize for not responding more promptly, but I do want to advise you that I am strongly in favor of the amendment.

As is so often the case as governmental bodies develop, there is a tendency to draft laws and regulations that benefit the bureaucrats while not particularly serving the public. The Recorder's Office has become extremely stringent in what they will accept for recording with the result that vital documents are being denied recording. For instance, I am involved in a situation where a Deed necessary to the chain of title was damaged by flood water. It is readable, but the Recorder's Office will not record it because the microfilm record would not be readable. The solution would be to type an exact copy of the deed, certify it as a copy of the original and then record both the original and the certified copy. By the Recorder's Office refusal to record the document, there is a break in the chain of title which will require an expensive suit to quiet title.

Also, recently I had a very difficult time getting a certified copy of an Alaska State Patent recorded. The original Patent had not been

recorded when issued, and had been lost. The present owner of the property was required to convey a marketable, insurable title, which he could not do without completing the chain of title by the recordation of the Alaska State Patent. There should never have been raised any objection to the recording of the certified copy.

Very truly yours,

DORIS LOENNIG, P.C.

By: _____
DORIS LOENNIG

DL:dcm

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

MEMORANDUMM

May 2, 1987

TO: House Resources Committee

FROM: Representative Fran Ulmer

SUBJECT: HB 266, An Act relating to the recording of documents

---

House Bill 266 was introduced at the request of the Juneau Bar Association. The bill adds a new section to AS 34.15 and amends AS 44.37.025.

After the Department of Natural Resources adopted regulations during the past year, the requirements for recording documents have become increasingly more onerous for Alaskans who need these services. These regulations have not been uniformly interpreted or applied by the staff in the various recording offices throughout the state.

My aide and I have had several meetings with staff from the Division of Management, Department of Natural Resources to discuss this bill. In addition to numerous communications favorable to the bill, these meetings have confirmed the need for legislative policy to address the recording of documents.

As you know from public response to the proposed budget cuts that would have closed some of the recording offices, Alaskans need and want the services provided by these recording offices. HB 266 proposes to clarify the requirements for recording documents and to make these services more equitable throughout the state.

I am hopeful that we can work together to pass a bill that will address the problems associated with the recording of documents and will improve these public services.

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

ULMER

ANALYSIS - COMMITTEE SUBSTITUTE FOR HOUSE BILL 266 (RES)

"An Act relating to the recording of documents"

Section 1 is a statement of facts explaining the underlying purpose of the bill.

Section 2 adds a new section to AS 34.15 outlining recording criteria. When determining whether a document may be recorded, the recorder could not consider whether the contents of the document are legally sufficient to achieve the purposes of the document. The recorder would have to resolve reasonable doubts about whether the document is eligible for recording in favor of recording the document.

The recorder could not reject a document because: it does not satisfy the current requirements for recording if it satisfied requirements for recording that existed at the time it was executed; serves more than one purpose; does not state the name of the recording district if the name is given to the recorder at the time the document is recorded, or if the name is contained in a cover letter; references an attached exhibit that is not labelled; is a certified copy of an official document from a governmental office in this or another state.

The recorder could not require that a document that serves more than one purpose be recorded separately for each of the purposes. This would not prevent the multiple recording of a document, if the person offering the document requests that it be recorded for more than one of its purposes.

Finally, in Section 3, the bill amends AS 44.37.025 so that a regulation of the department could not impose a restriction on document recording unless the restriction is required by statute, or furthers a legitimate administrative need of the recorder.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

ULMER

ANALYSIS - COMMITTEE SUBSTITUTE FOR HOUSE BILL 266 (RES)

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DORIS LOENNIG
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

SUITE 120, 515 SEVENTH AVENUE - FAIRBANKS, ALASKA 99701
907 452-2005

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P.O. Box V
Juneau, Alaska 99811

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Very truly yours,

DORIS LOENNIG, P.C.

By: _____
DORIS LOENNIG

DL:dcm

HUGHES THORSNESS GANTZ POWELL & BRUNDIN

ATTORNEYS AT LAW

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JAMES M. POWELL
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GARY W. GANTZ
JERRY E. MELCHER
JOE H. HUDDLESTON
SIGURD E. MURPHY
CARL J. O. BAUMAN
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MARY K. HUGHES
FRANK A. PFIFFNER
RALPH R. BEISTLINE*
GORDON J. TANS
R. CRAIG MESSER
ROBERT L. MANLEY
JAMES M. GORSKI
TIMOTHY R. BYRNES
JAMES M. SEEDORF
RONALD E. NOEL*
FREDERICK J. OSSEN
MICHAEL L. LESSMEIER**
STEVEN S. TERVOOREN
MATTHEW K. PETERSON
JOSEPH R. O. LOESCHER
KENNETH D. LOUGEE*
EARL M. SUTHERLAND
JOHN B. THORSNESS
GREGORY W. LESSMEIER**
JOHN V. ACOSTA*
DONNA P. WALKER**
WILLIAM M. WALKER***
DANIEL M. WOLD
DAVID S. CARTER
MARILYN MAY
JOHN G. FRANK**
ANN S. BROWN*
BRIAN O. BJORKQUIST
JAMES N. BARKELEY
THOMAS R. LUCAS
TIMOTHY R. REDFORD
SHELDON E. WINTERS**
JOHN J. NOVAK
JOHN H. TINDALL
DAVID H. KNAPP
MICKALE C. CARTER
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BRYAN M. EMMAL*
ROBERT A. SPARKS*
JOSEPH S. SLUSSER*
JAMES F. KLASEN

OF COUNSEL
JOHN C. HUGHES
RICHARD O. GANTZ

500 WEST THIRD AVENUE
ANCHORAGE, ALASKA 99501-2273
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TELECOPIER (907) 274-7525
TELEX 090-25378 (DENALI)

**ONE SEALASKA PLAZA
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JUNEAU, ALASKA 99801-1249
TELEPHONE (907) 586-5912
TELECOPIER (907) 463-3020

*590 UNIVERSITY AVENUE
SUITE 200
FAIRBANKS, ALASKA 99709-3652
TELEPHONE (907) 479-3161

***200 CHENEGA STREET
P.O. BOX 787
VALDEZ, ALASKA 99686-0787
TELEPHONE (907) 835-2978

REPLY TO ANCHORAGE

March 10, 1987

Honorable Fran Ulmer
State Representative
P. O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

I received the enclosed memorandum from the Alaska Bar Association, as I am a member of the Natural Resources Section Executive Committee of the Bar Association.

I support the language of the attached (proposed) House Bill, "An Act relating to the recording of documents", in its entirety. I wholeheartedly support the bill and the reasoning behind it. I urge you to introduce it, and not by request.

If for no other reason, I object to the current recording regulations and support the proposed bill on the grounds that the Department of Natural Resources has no business placing unreasonable and cumbersome limitations on the public's right to record documents. If it is to be done at all, it should be done by the legislature through elected representatives and not subject the right to record documents to the discretionary, often petty and whimsical "legal" interpretations of clerks. I have personally had the experience of the Fairbanks Recording Office (initially) refusing to record documents that are <u>required</u> by federal mining claim regulations to be recorded with the recording district; only after strenuous argument (the clerks adjourned to a private conference on the matter while I waited an hour) was the document accepted. If the documents had not been recorded, my clients' mining claims could have been declared invalid by the United States Bureau of Land Management.

Most of my practice consists of representing small miners. As a group, these people are bright, but have little formal education; they are literally overwhelmed by the legal and regulatory climate in which they are struggling to survive. As a user group, I would wager that miners use Alaska's recording

offices more than any other single group of people. They do so for a very good reason: they must annually file documents with recording offices to preserve their possessory rights, upon pain of losing the claims to rival claimants or the government.

Unlike persons wishing to record documents who are seeking to place themselves prior in time to the interest of another party, the failure to timely record a document for a miner does not simply place that miner's interest in a position subordinate to someone who has filed ahead of him. Instead, the failure to timely file various mining documents can, and usually does, result in a total loss of the miner's rights--e.g., by an administrative declaration from BLM to the fictional effect that their claims have been "abandoned". This abandonment penalty has been sustained as lawful by the United States Supreme Court recently and BLM may take such action, despite abundant evidence that the miner did not intend to abandon the claim.

As a group, miners stand to lose more than any other group under these current recording regulations, because miners typically wait until near the annual deadlines to file their documents. At that time, should a clerk narrowly or adversely interpret any one of the host of regulatory obstacles to recording with which DNR is now armed, it will be too late for the miner to correct the situation; in many instances, the miner will simply lose his rights. Often, the failure to record cannot be cured by filing another mining claim location certificate, because the ground upon which the claim was located is now in one of Alaska's many national parks or other areas now closed to mineral entry.

Long before there were recorder's offices, there were mining districts. Each mining district (many of which were established shortly after acquisition of Alaska from Russia) had a district recorder, whose job was almost exclusively to accept mining claim recordations. It is sad and ironic that State of Alaska recorders offices, which succeeded to the duties of mining district recorders, now seek to limit the public's right to record.

Finally, I will conclude by suggesting that some teeth be placed in the bill proposed; otherwise, even though the intention of the legislation is clear, it could still be frustrated, without penalty, by State employees. You are probably aware of the fact that some Alaska statutes provide for penalties to be assessed against an employee who violates the statute. For example, I believe there is a statutory prohibition against Department of Revenue employees divulging confidential information about taxpayers; penalties are provided for releasing the information. I can say from personal experience that this penalty provision is

terribly effective, because I have sought to obtain seemingly unrelated and harmless information and the Attorney General's Office has always advised the employee to err on the side of caution by refusing to release it. The fear of this penalty is so great that I have even had cases wherein the Attorney General gave this same advice, even though the information was requested pursuant to a lawfully issued subpoena (I was able to obtain the information, but only after persuading the taxpayer to authorize its release).

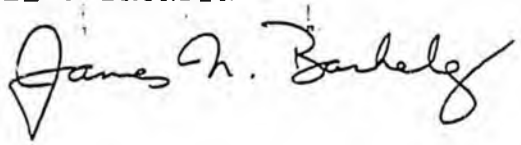
Thus, assuming a reasonable definition of "wrongful refusal to record" could be arrived at, I respectfully submit that penalties should be provided for under those circumstances--which penalties should include all losses proximately caused by the wrongful refusal--e.g., the loss of mining claims or other valuable property rights.

This is not a matter involving a particularly crusty, obstructionist clerk in one recording district; this is a matter of paramount importance and is of state-wide concern.

One last note: my opinions in this letter are conveyed to you from me as an individual, and they do not necessarily constitute the opinions of the Alaska Bar Association nor of Hughes, Thorsness, Gantz, Powell & Brundin.

Very truly yours,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN



By:
James N. Barkeley

JNB/mt
2793i
cc: Linda Nordstrand, Alaska Bar Association
CLE Director

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, AK 99503 (907) 276-0347

April 17, 1987

RECEIVED [illegible] 1987

Honorable Fran Ulmer
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: House Bill No. 266

Dear Rep. Ulmer:

The Alaska Miners Association supports House Bill No. 266 and its passage this session of the legislature.

Since the majority of mining operations in Alaska are conducted by "small miners", in remote and unsurveyed areas of the state, and since the penalty for failure to timely file or record documents relating to mining claims can be loss of the claims, it is imperative that procedural or technical niceties do not preclude their recordation, as long as the intent of the documents is fairly stated.

We believe that House Bill No. 266 goes a long way toward accomplishing those objectives, and congratulate you for introducing that bill.

Sincerely,

ALASKA MINERS ASSOCIATION

Curt McVee

Curtis V. McVee
Executive Director

TIA TITLE INSURANCE AGENCY

[X] Main Office
201 N. Franklin St.
Juneau, AK 99801
(907) 586-6445

[ ] Valley Branch
9110 Glacier Hwy.
Juneau, AK 99801
(907) 789-1671

April 17, 1987

Representative Fran Ulmer
Pouch V
Juneau, AK 99811

Dear Fran:

Your introduction of House Bill 266 is commendable. This type of legislation is long overdue.

The recording system has been kind of a step child for as long as I can remember, being administered according to the whims of various departments it has been in. It's encouraging to see an attempt to stabilize the system.

Sincerely,

Glen A. Prince
Executive Vice President

GAP:bjk

RECEIVED APR 2 1 1987

(907) 586-3539

DOUGLAS L. GREGG, Esq.
A PROFESSIONAL CORPORATION
ATTORNEY-AT-LAW
130 SEWARD STREET, SUITE 417
JUNEAU, ALASKA 99801

March 4, 1987

Honorable Fran Ulmer
Representative District 4B
State House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to Recording Statute AS 34.15
My File G-1579

Dear Representative Ulmer:

Thank you for having our bill drafted. It seems to cover all the bases. I am not certain my schedule will allow me to attend Friday's bar luncheon. As a committee member I certainly hope that you will get a bill in as quickly as possible. I keep hearing horror stories. Fred Baxter is currently having a problem getting a certified copy of a court order from Anchorage recorded down here. The reason for refusal: "It is not an original." Can you believe this?

Very truly yours,

DOUGLAS L. GREGG

DLG

cc: Fred J. Baxter, Esq.
Larry Weeks, Esq.
James E. Fisher, Esq.

(907) 586-3539

DOUGLAS L. GREGG, Esq.
A Professional Corporation
ATTORNEY-AT-LAW
130 SEWARD STREET, SUITE 417,
JUNEAU, ALASKA 99801

January 28, 1987

Honorable Fran Ulmer
State Representative
State Capitol
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to AS 44.37.025 (Recording Documents);

Dear Fran:

I learned today that you may not have received a copy of the Juneau Bar letter and enclosures of January 7th. Here is a copy. The issue at hand may well relate to the budget in that the host of regulations which have been implemented in the last year or two cannot help but have added substantially to the work load of the recorder's offices around the state. In any event, we appreciate your assistance. We'd like to see a bill drafted to add a few amendments to the existing statute. Thank you.

Very sincerely yours,

Douglas L. Gregg

ENCLS:
cc:James E. Fisher, President
Juneau Bar Association

J U N E A U B A R A S S O C I A T I O N

6645 N. Douglas Highway
Juneau, Alaska

January 7, 1987

Honorable Jim Duncan
State Senator
State Capitol
P.O. Box V
Juneau, Alaska 99811

Honorable Fran Ulmer
State Representative
State Capitol
P.O. Box V
Juneau, Alaska 99811

Honorable Bill Hudson
State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to AS 44.37.025 (Recording Documents);

Dear Juneau Legislative Delegation:

There is a need for new legislation to correct a serious problem with recording documents in Alaska. In recognition of that difficulty, the Juneau Bar Association, at its regular meeting on December 5, 1986, adopted the recommendation of its Committee on the Office of the Recorder, copy enclosed. The committee was formed as the result of numerous complaints about the many new restrictions on the right to record documents that were imposed through the rule-making power of the Department of Natural Resources, which has jurisdiction over the Office of the Recorder.

In addition to amending existing legislation, we are requesting that new regulations be adopted by DNR. However, we request that a bill be drafted to provide guidelines restricting future rule-making power to those matters of legitimate concern to the Office of the Recorder. Such an amendment to the statute should make it clear that the public has a <u>right</u> to record legal documents and that the Office of the Recorder is not to judge the internal legal integrity of documents but simply to record them

if they meet certain minimum requirements.

As to the rule-making power of the department, six recommendations are contained within the committee's report. However, the department might well consider several other changes in its current regulations. The committee restricted itself to the most obvious areas of needed change. The regulations could be further amended to provide that the Recorder may not refuse to record or file a document because:

- it lacks a title reflecting its overall content;
- it does not contain a "return to" address;
- the individual who incurred an assessment is not named (even though the property against which the assessment is placed is described and the party claiming the assessment is identified).

The Juneau Bar Association is not opposed to all regulation of the right to record. The new regulations are, however, onerous. More importantly, they are constituting a substantial restriction on the right to place a document on the record as public notice. Many times a document serves that purpose even though the document could admittedly be improved in its context and could be more complete than it is. But the right to record and create the public notice for the protection of parties is of paramount importance. Perfection in legal documents is desirable but many people making use of the Recorder's Office are not lawyers or skilled title examiners. Failure to successfully record can have dire results when intervening filings place a party in a secondary position.

We will appreciate your assistance in correcting the problem through the amendment of AS 44.37.025 to insure that future regulations will not contravene public policy. Thank you for your cooperation in this matter.

Very sincerely yours,

JES

James E. Fisher, President
Juneau Bar Association

ENCL

REPORT OF COMMITTEE ON OFFICE OF THE RECORDER

The Committee met on August 22nd. The work of the Committee was assigned to its members, Larry Weeks, Fred J. Baxter, and Douglas Gregg. Bruce Hansen of Title Insurance Agency was invited to attend that meeting as an ex-officio member. He was requested to make inquiries of other title companies in an effort to obtain their viewpoints on the current difficulties in recording documents in Alaska. Fred Baxter spent some time outlining the essentials of a hypothetical complaint for damages. Larry Weeks explored the question whether the Office of the Recorder can, under the language of the statute requiring him to record instruments, refuse to record in reliance on the new regulations. Fred concluded that a person suffering damages by reason of the recorder's refusal to record an instrument could frame a good cause of action in many instances. Larry concluded that there would be a good chance, in a declaratory judgment action, to secure a judgment invalidating many of the regulations in question.

Your chairman met with Mr. Hansen on November 7th, at which time Mr. Hansen had received and compiled the results of an informal poll conducted among title insurance offices throughout the state. There were over 35 written responses (some did not answer every question.) Mr. Hansen had posed 15 questions in the poll. A simple "yes" or "no" was solicited to these questions.

The top of the poll asked whether the recipient felt that the Recorder should refuse to record or file a document when the document had certain attributes. These attributes were described in the 15 questions he selected. (Poll and results annexed.) There was near unanimity on several of the 15 items, with a more or less equal division of other items. Comments of respondents are omitted from this report. Several respondents sent letters praising Mr. Hansen for taking a personal hand in the difficulty.

A summary of the poll results shows general dissatisfaction with the system currently being employed by the Recorder in rejecting documents offered for recording.

Your committee's proposed amendments to the statute would help ensure that when new rules and regulations are adopted they will be circumscribed in such manner as to prevent unreasonable or unnecessary restrictions.

The Committee agrees that there is a need for modification in the existing regulations entirely apart from our proposed amendment to AS 44.37.025 which grants rule making power to the Department of Natural Resources. It may adopt regulations ". . . prescribing the records to be maintained and the instruments to be recorded." The statute currently lacks any restrictions or guidelines as to the scope of that power. An amendment would

help ensure that over-zealous rule-making will not in the future impair the ability of the public to make reasonable use of the Recorders' Offices.

Such an amendment to the statute could articulate a public policy. For example, it might state something along these lines:

PREAMBLE. The Legislature recognizes and therefore finds as follows:

1. The recording of legal documents of the kind customarily recorded throughout the United States is an essential State function.

2. The time and place that a document was placed of record may well be more important than the underlying sufficiency of that document from a strictly legal standpoint.

3. The Recorder's Office exists primarily for the benefit and convenience of the general public.

4. Commercial institutions, the business community, banks, and private individuals cannot safely function without the protections afforded by the right to give public notice through the ability to record their legal documents.

BE IT ENACTED etc. etc. . . . that public policy of this State is declared as follows: to maintain a convenient means of regularly recording legal documents and to obtain information concerning existing recorded documents. In the making of rules and regulations to facilitate the legitimate administrative needs of the various recording offices, reasonable doubts shall be resolved in favor of recording rather than of rejection. The Recorder shall not make judgments as to the legality of the contents of any document offered for recording. Nevertheless, the Department of Natural Resources shall adopt such rules and regulations as it requires to control indiscriminate filings of documents that do not meet certain minimum requirements. These regulations may include but shall not be limited to the requirement for a legal description, if needed, names of parties, capacity of parties, legibility and other such reasonably required information to assure that the Recorder's Office functions in a manner consistent with the needs of the citizens of this state.

The foregoing suggestions for a statutory change to control the rule-making authority of DNR is one suggestion. The second is that a request be made to DNR for proposed new amendments to the existing provisions contained in the Alaska Administrative Code relative to recording. Your Committee recommends that at least the following amendments be specifically requested of DNR:

1. All documents valid at the time they were made shall be recorded, notwithstanding that they may not meet the requirements contained in later-adopted rules and regulations.

2. A document shall not be rejected on the ground that it serves more than a single purpose nor shall it be required that a document be recorded separately for each of the

various purposes for which it may appear to stand. (This shall not preclude the multiple recording by the offering party of a document which has several purposes.)

3. A document which makes reference to an attached exhibit shall not be rejected on the ground that the exhibit does not contain a label.

4. A document shall not be rejected on the ground that it lacks the recording information contained in another document that is being amended by the one being offered.

5. An official certified document from any governmental office in this state or a sister state shall not be rejected on the ground that it is not the original provided it is legible.

6. A document shall not be rejected on the ground that it does not specify the name of the recording district provided that that information is given to the Recorder by the person offering the document, or such information is contained in a cover letter accompanying the document. (The information so received by the Recorder may be noted by the Recorder elsewhere on the document for future reference.)

CONCLUSION

It is recognized that many of the existing regulations may be desirable in the abstract. However, uncompromising loyalty to multiple details, often of questionable importance, result in the rejection of instruments and consequent delays in giving notice. Such delays can have disastrous results. All persons who are drawing legal instruments and submitting them for recording are not attorneys or title companies. The public's right to record ought to be paramount.

DATED: December 5, 1986.

Respectfully submitted,

_____

Douglas L. Gregg

_____

Larry Weeks

_____

Fred J. Baxter

Do you feel that the recorder should refuse to record or file a document because:

YES	NO	
17	15	Contains no "return to" address.
30	4	Lacks trustee name on deed of trust.
29	8	Lacks real property description.
15	17	Lacks a title reflecting its overall content.
26	10	Document not executed entirely in English.
26	9	Lacks the recording information of the original document being amended, corrected, extended, modified, or released.
16	13	Document is larger than 8 1/2 by 14 inches.
29	9	Document must state in what capacity the signatory executed the document; individually, as attorney-in-fact, partner, corporate office, executor, administrator, guardian or trustee.
22	11	Lacks the name of the recording district in which it is to be recorded.
16	14	Lacks reference to attached exhibit/Exhibit not clearly labeled.
26	5	Lacks attached exhibit when reference is made to such.
5	27	An original, recordable document may not be accepted as an attachment to another document.
3	32	The document serves more than one purpose. Recording fee is charged separately for each purpose.
19	14	Does not name person against whom assessment is placed.
3	29	Document is valid instrument executed prior to effective date of regulations but does not conform to current regulations.

282 217

COMMENTS:

499 RESPONSES

APPROX 35 INDIVIDUAL RESPONSES

HB

273

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

4-22-88

7)

HOUSE COMMITTEE REPORT

Date referred: 4/22/87

FURTHER REFERRALS:

L&C referral waived 4/22)

DATE: 4-27-87

The Judiciary Committee has considered HB 273

"An Act relating to financial institutions; and providing for an effective date."

RECOMMENDS:

[ ] replace with (S HB 273 ad) [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published 4-15-87

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

wo1537hB
Bannister
4/23/87

Original sponsor: Rules/Governor

Adopted

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 273 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to financial institutions; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 06.05.470(t) is amended to read:

(t) The following claims have priority in liquidation proceedings, in the order listed:

(1) obligations incurred by the department;

(2) wages and salaries of officers and employees earned during the three-month period preceding the department's possession in an amount not exceeding $3,000 for each person;

(3) fees and assessments due to the department;

(4) deposits [TO THE EXTENT OF $1,000 FOR EACH DEPOSITOR].

* Sec. 2. AS 06.30.065 is amended to read:

Sec. 06.30.065. CORPORATE NAME. The name of every association shall include either the words "Savings Association," "Savings Bank," or "Savings and Loan Association." These words shall be preceded by an appropriate descriptive word or words approved by the commissioner. An ordinal number may not be used as a single descriptive word preceding the words "Savings Association," "Savings Bank," or "Savings and Loan Association," unless the words are followed by the words "of .....," the blank being filled by the name of the city in which or near which the association has its home office. An ordinal number may be used together with another descriptive word, preceding the words "Savings Association," "Savings Bank," or "Savings and Loan

Association," provided the other descriptive word has not been used in the corporate name of any other association in the state, in which case the suffix mentioned above is not required to be used. An ordinal number may be used, together with another descriptive word, preceding the words "Savings Association" or "Savings and Loan Association," even when the other descriptive word has been used in the corporate name of an association in the state, provided the suffix "of ....," as provided above, is also used. The suffix provided above may be used in any corporate name. The use of the words "National," "Federal," "United States," "Insured," "Guaranteed," or any form of these words, separately or in combination with other words or syllables, is prohibited as part of the corporate name of an association. A [NO] certificate of incorporation of a proposed association having the same name as a corporation authorized to do business under the laws of this state or a name so nearly resembling it as to be calculated to deceive may not [SHALL] be issued by the commissioner, except to an association formed by the reincorporation, reorganization, or consolidation of other associations, or upon the sale of the property or franchise of an association.

* Sec. 3. AS 06.30.070 is amended to read:

Sec. 06.30.070. PROHIBITED USE OF NAMES AND TITLE. Unless authorized to do business in the state under this chapter and actually engaged in carrying on a savings association, a [NO] person may not [SHALL] do business under a name or title that [WHICH] contains the terms "savings association," "savings bank," "savings and loan association," "building and loan association," "building association," or any combination employing either or both of the words "building" or "loan" with one or more of the words "saving," "savings," "thrift" or words of similar import, or any combination employing one or more of

the words "saving," "savings," "thrift" or words of similar import with one or more of the words "association," "bank," "institution," "society," "company," "corporation" or words of similar import, or use a name or sign or circulate or use a letterhead, billhead, circular or paper whatever, or advertise or represent in any manner that [WHICH] indicates or reasonably implies that the [HIS] business is the character or kind of business carried on or transacted by an association or that [WHICH] is calculated to lead a person to believe that the [HIS] business is that of an association. Upon application by the commissioner or an association, a court of competent jurisdiction may issue an injunction to restrain a person from violating or continuing to violate this section.

* Sec. 4. AS 06.05.470(e) is repealed.

* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF BANKING, SECURITIES & CORPORATIONS

P.O. BOX D
JUNEAU, ALASKA 99811-0800

Banking & Securities (907) 465-2521
Corporation Section (907) 465-2530

April 28, 1987

Honorable John Sund
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Sund:

The Federal Deposit Insurance Corporation (FDIC) must follow state law when appointed receivor of state chartered financial institutions. The FDIC, in reviewing these provisions of law, found two areas that would have an adverse effect on depositors and consumers of banks in control of the FDIC.

First, under present law, uninsured depositors would have only limited preference up to $1,000 over the insured $100,000. It is the depositors' base that established the liability side of the bank's financial structure and must be given preference.

Second, a prior notification of an impending action to close a bank would create chaos and destroy orderly transfer to new investors or purchasers of banks.

Sincerely,

Willis F. Kirkpatrick

Willis F. Kirkpatrick
Director

WFK/LPC/ss0595Z
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08-H14LH

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 14, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to include the title "savings bank" as an appropriate designation for a financial institution organized under AS 06.30 (Alaska Savings Association Act). This bill provides a cure for an inequality placed upon state-chartered savings and loan associations as a result of deregulation.

Federally chartered savings and loan associations may apply under federal law to receive the designation "savings bank" in their name after being granted certain additional banking powers. A state-chartered savings and loan association has recently been granted authority to exercise similar powers, but current Alaska law does not allow a name to reflect this new authority and resulting increased banking services.

This bill simply provides that those financial institutions organized under AS 06.30 which have expanded authority in banking may apply for the use of the name "savings bank" in their title, not only to better reflect their authorized service charter, but also to maintain parity with federally chartered financial institutions.

Sincerely,

Steve Cowper
Governor

(6) the bank holding corporation which controls the bank refuses to permit an examination as provided in AS 06.05.235;

(7) the bank has lost, or received notice of the termination or suspension of, its membership in the Federal Deposit Insurance Corporation or has relinquished its membership in the Federal Deposit Insurance Corporation without the consent of the department.

(b) The department shall take possession under (a) of this section by posting upon the bank premises a notice stating that it is assuming possession under this chapter. Its possession is considered to commence at the time of posting of the notice. The notice shall also be filed in the superior court of the judicial district in which the bank is located. The department shall notify the Federal Reserve Bank if the bank in the possesion of the department is a member of the Federal Reserve System. When the department has taken possession, it is vested with the full and exclusive power of management and control, including the power to assess outstanding capital stock under AS 06.05.310, to continue or discontinue the business, to stop or limit the payment of its obligations, to employ necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate its possession by restoring the bank to its board of directors, and to reorganize or liquidate the bank in accordance with this chapter. As soon as practicable after taking possession, the department shall make an inventory of the assets and file a copy of it with the superior court.

(c) When the department has taken possession, there shall be a postponement, until six months after the commencement of that possession, of the date upon which any period of limitation fixed by a statute or agreement would otherwise expire on a claim or right of action of the bank, or upon which an appeal must be taken or a pleading or other document must be filed by the bank in any pending action or proceeding.

(d) If, in the opinion of the department, an emergency exists which will result in serious losses to the depositors, it may take possession of a bank without prior hearing. Within 10 days after the department has taken possession, any interested party may file with it an application for an order vacating the possession. The department shall grant the application if it finds that its action was unauthorized under this chapter.

(e) If the department decides to liquidate a bank, it shall give notice to the directors, stockholders, depositors, and creditors as it may prescribe. Any objection to the liquidation shall be filed with the department within 15 days after that notice has been mailed. The department may proceed to liquidate the bank within 15 days after notice has been mailed.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 273
Publish Date : HOUSE 4/15/87

REQUEST:

Revision Date:
Title : Relating to reorganization of Financial Institutions
Sponsor : RULES
Requestor : Governor

Agency Affected : Comm. & Econ. Dev.
BRU : Banking
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Willis F. Kirpatrick, Director
Division : Banking, Securities and Corporations
Phone : 465-2541
Date : April 14, 1987

Approved by Commissioner : J. Anthony Smith, Commissioner
Agency : Department of Commerce and Economic Development
Date : April 14, 1987

Distribution (by preparer):
Legislative Finance
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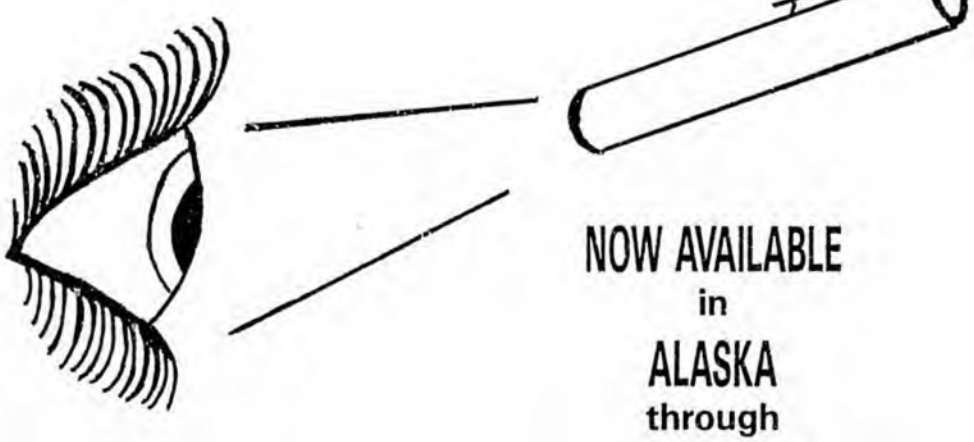

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Phone 225-5144
Phone 225-5145

November 5, 1987

Representative John Sund
2504 Second Avenue
Ketchikan, Alaska 99901

Dear John:

Enclosed please find a copy of an article on drug testing from the October 16th issue of the Journal of the American Medical Association. The article is a report from the council on scientific affairs of the AMA that was adopted as policy at the annual meeting in Chicago last June.

The nub of the article is in the third recommendation on the last page, namely that the AMA adopts the position that urine drug and alcohol testing of employees should be limited to a) pre-employment examinations of those persons whose jobs affect the health and safety of others, b) situations in which there is reasonable suspicion that an employees job performance is impaired by drug and alcohol use and c) monitoring as part of a comprehensive program of treatment in rehabilitation in alcohol and drug abuse or dependents.

Further, in recommendation four the AMA urges employers to continue to establish drug testing programs to use confirmed positive test results in employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs.

I hope that the considerable list of references and the article may be useful to you. If you have any questions regarding the article, or wish any more information, I would, of course, be glad to respond as best I can.

Thank you for being willing to take on this difficult issue.

Yours truly,

David E Johnson, MD

DEJ:ts

Enclosures

Issues in Employee Drug Testing

Council on Scientific Affairs

RESOLUTION 84 (A-86) asks the American Medical Association to develop criteria for mandatory drug screening that address scientific and administrative standards as well as constitutional safeguards. Resolution 106 (A-86) calls for the AMA to study the problem of testing specific groups of individuals to determine the most effective methods for defining and attacking the problem. Both resolutions were referred to the Board of Trustees.

In partial response to these resolutions, the House of Delegates adopted Council on Scientific Affairs Report J (I-86), which dealt with the scientific issues in drug testing but did not address the legal and constitutional issues.

At the 1986 Interim Meeting, Resolutions 16 and 60 were referred to the Board. Resolution 16 (I-86) asks that the AMA urge all physicians in the United States to agree to undergo voluntary drug testing. Resolution 60 (I-86) asks that the AMA urge employers and unions to agree to random on-the-job testing for the use of drugs by employees engaged in occupations in which such use may affect the safety of other persons.

This report responds to the issues raised by the four resolutions that were not addressed in Report J.

Drug and alcohol abuse is a national problem of immense proportions. One of the most controversial methods of identifying individuals who use drugs is urine testing. This report analyzes many of the legal issues raised by testing for drugs in the workplace.

It is important to note the limited scope of the report. It does not address the use of urine testing beyond the civilian workplace, such as in schools, prisons, the military, and other sectors. It does not address the legality of employer discipline for off-work drug use detected by arrest, observation, or other means. It does not discuss issues of criminal law arising from the sale, possession, or use of drugs at work. It also does not focus on the potential liability of employers for harm caused by impaired employees.

Even excluding these areas, this report addresses many constitutional, statutory, regulatory, and common law principles. In a number of respects, however, the law is still evolving; it is difficult to predict and is likely to change over time.

CONSTITUTIONAL LAW

"Nearly all of the Constitution's self-executing, and thus judicially enforceable, guarantees of individual rights shield individuals only from government action."[1] In the context of occupational drug testing, this means that federal constitutional protections are limited to public employees and private employees where drug testing is mandated by federal, state, or local governments. Specifically because of these constitutional protections, the first wave of legal challenges to workplace drug testing has consisted largely of claims by public employees.

Search and Seizure

The Fourth Amendment to the Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The first question to address is whether employee drug testing amounts to an unreasonable search and seizure.

In *Schmerber v California*,[2] the Supreme Court held that taking a blood sample from a criminal defendant to determine

From the Council on Scientific Affairs, American Medical Association, Chicago.

Report A of the Council on Scientific Affairs, adopted by the House of Delegates of the American Medical Association at the 1987 Annual Meeting.

This report is not intended to be construed or to serve as a standard of medical care. Standards of medical care are determined on the basis of all the facts and circumstances involved in an individual case and are subject to change as scientific knowledge and technology advance and patterns of practice evolve. This report reflects the views of the scientific literature as of February 1987.

Reprint requests to Council on Scientific Affairs, American Medical Association, 535 N Dearborn St, Chicago, IL 60610 (William R. Hendee, PhD)

whether he was intoxicated was a search within the meaning of the Fourth Amendment. Lower court decisions after *Schmerber* have recognized that requiring a urine sample is far less intrusive than extracting blood but have nonetheless concluded that these also are searches according to the Fourth Amendment.[3] The limited nature of the intrusion, however, may be important in determining the validity of the search.

The Fourth Amendment does not bar all searches, only unreasonable ones. Therefore, it must be determined whether the drug test is unreasonable. This in turn often depends on the nature of the search: Who is searched? Why and when is the search made? How is it made? What is done with the results? Courts balance the degree of intrusion of the search on the person's Fourth Amendment right of privacy against the need for the search to promote some legitimate government interest.[4]

One essential factor is whether the individual has a reasonable expectation of privacy relative to the circumstances of the search. Government employees have a reasonable expectation of privacy at work and "do not surrender their Fourth Amendment rights merely because they go to work for the government."[5] However, government employers maintain rights in conducting warrantless searches "for the proprietary purpose of preventing further damage to the agency's ability to discharge effectively its statutory responsibilities."[5]

Three distinct privacy interests have been identified in urinalysis. First is the expectation of privacy as to the urine itself. According to one court, "an individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain."[6] Another court, however, has observed that "[t]he urine excreted for a drug test . . . is not expected to be a waste product, flushed down the toilet. Indeed, precautions are taken in the test procedure to prevent the sample from being disposed of."[7] Second is the expectation of privacy regarding the information contained in the urine.

> Obviously, one does not expect that he will be made to discharge urine so that it can be analyzed in order to discover the personal physiological secrets it may hold. Thus, as with blood, there is an expectation of privacy concerning the 'information' body fluids may hold.[8]

Third is the expectation of privacy in the process of urination. "[T]he act of urination is a private one and, if interfered with, protected by the Fourth Amendment."[6] Therefore, policies requiring observation of an individual urinating are difficult to sustain.

Invasion of Privacy

A related but distinct constitutional protection has been established for the "right of privacy." Although this right is not explicit in the Constitution, the Supreme Court has found that it includes the individual's interest in avoiding disclosure of personal matters and protects independence in making certain kinds of important decisions, such as those concerning marriage, procreation, and family relationships.[9] This privacy interest, however, is not absolute and must be balanced against legitimate governmental interests in disclosure. For example, in *Shoemaker v Handel*,[10] the Court upheld a New Jersey regulation requiring licensed jockeys to list all illnesses requiring treatment by a prescription drug because of concerns for safety and integrity.

Due Process

The Fifth and Fourteenth amendments prohibit the federal government and state governments from denying any person "due process of law." In the context of drug testing, due process may be used to challenge testing procedures or employee termination procedures. It has been held that termination of employment on the basis of an unconfirmed, enzyme-multiplied immunoassay test violated due process[11] and that the destruction of voluntarily submitted urine samples before they could be sent out for independent testing also violated due process.[12] Even the addition of confirmatory testing may not satisfy due process concerns about the proper handling of the specimen and cleaning and calibration of test equipment. The termination of an individual's employment may be preceded by notice and opportunity for a hearing appropriate to the nature of the case, although a full hearing before discharge may not necessarily be required.[13]

A number of other federal constitutional protections have been invoked to challenge workplace drug testing. These protections include substantive due process, equal protection, and avoidance of self-incrimination. To date, to our knowledge, none of these theories have been the basis of a successful challenge.

State Constitutional Law

Unlike the US Constitution, certain state constitutions are not limited in their applicability to governmental action. Thus, it is possible for state constitutional law to extend coverage to employees in the private sector and to proscribe practices not currently prohibited by federal constitutional law. These principles have not been widely applied in drug testing cases, although the theory already has been used to challenge drug testing in California.[14]

STATUTES

Handicap Discrimination

The Rehabilitation Act of 1973[15] is the primary federal law prohibiting employment discrimination against handicapped individuals. This law applies to the federal government, government contractors, and recipients of federal financial assistance. The 1978 amendment to the act explicitly recognizes that the denial of employment opportunities on the basis of alcohol or drug use is justified only under limited circumstances. As the act states, "[The term handicapped individual] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drug abuse would constitute a direct threat to property or the safety of others."[16] The purpose of the amendment is to prohibit discrimination against individuals who are able to perform a job.[17] Therefore, drug addicts and alcoholics currently under control are certainly subject to the act's protection.[18]

The 1978 amendment applies only to federal contractors (Section 503) and recipients of federal financial assistance (Section 504). It does not apply to federal agency employers (Section 501). Because the amendment sought to correct a perceived "flaw" in the law, whereby affirmative action plans would seemingly mandate the employment of "active" alcoholics and drug abusers, the fact that Section 501 was not included in the amendment should not be interpreted to mean that alcoholics and drug abusers are not protected under Section 501.[19] Although there have been no reported Section

501 drug cases, discrimination against alcoholics under Section 501 has been held to violate the Rehabilitation Act.[20]

All 50 states and the District of Columbia have laws prohibiting discrimination in employment on the basis of handicap. Some of the laws specifically include alcoholics and drug abusers; others specifically exclude them from coverage. Some other states have resolved the issue through case law.

Abuse vs Use

Coverage under the Rehabilitation Act is extended to individuals who are "drug abusers." The question thus arises whether drug abusers includes "drug users" or is limited to drug addicts. The legislative history is silent on this point, but it is possible that the word *abuse* will be construed broadly to mean improper use, in which case anyone who used a controlled substance for a nonmedical purpose would be a substance abuser.

Individuals are excluded from coverage if their current use of alcohol or drugs "would constitute a direct threat to property or the safety of others."[21] It is not clear how broadly "direct threat" will be interpreted. Executive Order 12 564, issued by President Reagan on Sept 15, 1986, authorized drug testing of federal employees in "sensitive positions," defined as those handling classified information; those serving as presidential appointees; those in positions related to national security; law enforcement officers; those charged with the protection of life, property, and public health and safety; and those in jobs requiring a high degree of trust and confidence.

In *National Treasury Employees Union v Von Raab*,[22] a divided panel of the Fifth Circuit held that the drug testing program of the Customs Service was constitutional. The program requires urinalysis of all employees seeking promotions. Because the case involved the testing of customs officers, who are law enforcement officers specifically charged with intercepting illegal drugs, it is not clear that this case endorses broad drug testing. The constitutionality of the governmentwide testing program is being challenged in a separate lawsuit.

With such a broad directive, it is apparent that President Reagan is requiring testing of some individuals who are *not* in direct threat positions and therefore are not excluded from coverage under the Rehabilitation Act. Is this legal?

Regulations implementing Section 501 of the Rehabilitation Act (applicable to federal agencies) prohibit the use of any employment test or selection criterion that screens out or tends to screen out handicapped persons unless the test or criterion is shown to be job related.[23] Similar regulations apply to recipients of federal financial assistance[24] and federal contractors.[25] Although individuals who test positively may or may not be "screened out," they are certainly subject to different treatment. Therefore at least for some federal employees, it is arguable that drug testing is not job related. The Civil Service Reform Act also prohibits the consideration of an individual's off-work activities in employment matters. Because most tests only measure prior exposure and not impairment or intoxication, drug testing arguably invades the off-work lives of employees.

Some state handicap discrimination laws also could be used to prohibit drug testing. For example, regulations implementing California's Fair Employment Practice Law[26] specifically limit preemployment inquiries, medical examinations, and selection practices to job-related criteria.

Reasonable Accommodation

After a positive drug test, the Rehabilitation Act and other handicap discrimination laws may prohibit summary discharge or other adverse treatment. The federal law and many state laws require "reasonable accommodation." It is not settled what accommodations may be required in the case of a drug abuser. There are, however, several cases involving alcoholics in which reasonable accommodation was required when the employee was willing to undergo treatment.[27] The Alcoholism Rehabilitation Act requires federal agencies to have alcoholism treatment programs for employees.[28]

Title VII of the Civil Rights Act of 1964

Title VII[29] prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. If an employer were to adopt a drug screening program that had a disparate impact along lines proscribed by Title VII, the employer would have to prove that the screening program was compelled by business necessity and was the least onerous means of achieving those ends.

In *New York City Transit Authority v Beazer*,[30] the New York City Transit Authority (TA) had a policy of not hiring drug users, including individuals receiving methadone maintenance treatment for heroin addiction. The plaintiffs attempted to prove this rule's discriminatory effect by showing that 81% of employees referred to the TA's medical consultant for suspected drug violations were black or Hispanic and that between 62% and 65% of all persons receiving methadone treatment in New York City are black or Hispanic. The US Supreme Court rejected the plaintiffs' Title VII claim and held that, even if the statistics established a prima facie case of discrimination, "it is assuredly rebutted by TA's demonstration that its narcotics rule . . . is 'job related'."[31] The Court also rejected a challenge to the rule based on the equal protection clause of the Fourteenth Amendment. The Court said,

> No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision.[32]

In *Toledo v Nobel-Sysco Inc*,[33] a restaurant supply company refused to hire as a truck driver a member of the Native American Church because he used peyote during religious ceremonies. The employer was held to have violated Title VII. According to the court, the company could have accommodated the applicant's religious beliefs simply by ensuring that he not drive while under the influence of peyote.

National Labor Relations Act

Sections 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act[34] require that the employer and the union bargain in good faith with respect to wages, hours, and other terms and conditions of employment. A drug screening program would be considered a "working condition" and therefore a mandatory subject of bargaining. Hence, employers may not implement drug screening unilaterally without giving the union an opportunity to bargain.[35] An increasing number of collective bargaining agreements contain specific provisions relating to drug possession, use, detection, discipline, and rehabilitation. In some instances the provisions are vaguely worded, and arbitrators have to interpret terms such

as *intoxicated* or *under the influence*.[36] The arbitrator may even see fit to add conditions to a drug screening rule. For example, in *Griffin Pipe Products Co*,[37] the company adopted a rule requiring a drug screening urine test of all employees reporting for medical treatment. The purpose of the rule was to reduce accidents. The arbitrator upheld the rule but added two conditions. First, employees suspended under the rule because of a test later found to be negative were to be reimbursed for lost wages. Second, employees taking prescription medication were not subject to discipline. Arbitrators also have upheld discharges based on the failure to submit to a drug test.[38] In one case, an arbitrator found discharge appropriate only if the employees were on duty at the time.[39]

Many arbitrators require a higher standard of proof in cases involving drugs than in other discharge cases. This standard is often "clear and convincing evidence" rather than simply a "preponderance" of evidence.[40] The main reasons for this higher standard are that possession of a controlled substance is a crime and that discharge for a drug offense makes it very difficult for the employee to obtain another job.[41]

In meeting this burden of proof, the employer often has to prove the test's accuracy, the chain of custody of the specimen, corroboration of impairment, and other matters specifically applicable to drugs. As a general rule, arbitrators often consider the following to be prerequisites for valid employer discipline: (1) The employee must have had notice of the rules. (2) The rules must have been applied fairly. (3) Management must have investigated the charges and given the employee a reasonable chance to answer them. (4) The punishment must fit the crime.[42] In drug cases, arbitrators also frequently look at whether the use of drugs affected job performance, safety, or customer relations.[43] As a result of these limitations, employers have a difficult time sustaining drug-based discharges in subsequent arbitration proceedings.[44]

The Supreme Court is currently considering the legality of an arbitrator's award directing the reinstatement of an employee who was found in a car on company premises with marijuana and marijuana smoke in the car.[45]

Specific Drug Testing Legislation

With federal constitutional protections inapplicable to private sector employees and uncertain even for public sector employees, opponents of drug testing have turned to the legislatures. Bills to limit or prohibit drug testing have been introduced at the local, state, and national levels, and several laws have been enacted. Proponents of drug testing have countered with bills to require or permit drug testing, although such efforts have been less successful.

The most important municipal drug testing law yet enacted is San Francisco's ordinance,[46] which applies to any person working in San Francisco except uniformed police, firefighters, police dispatchers, and emergency vehicle operators. The ordinance prohibits employee drug testing unless

> the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and . . . the employee is in a position where such an impairment represents a clear and present danger to the physical safety of the employee, another employee or to a member of the public.

The ordinance, which took effect on Dec 29, 1985, became law without the signature of Mayor Feinstein. She refused to sign the ordinance because she considered the measure too stringent. In her view, "clear and present danger" is too difficult to satisfy and gives protected status to being under the influence of drugs.[47]

The ordinance also may be questioned because the key provisions are written in the conjunctive. This means that, to be tested, an individual must be in a job related to safety *and* the employer must have a reasonable belief that the employee is impaired. For an employee who works alone, such as a truck driver, this latter requirement would be very difficult to establish.

At least seven states have enacted drug testing laws, and many new laws are likely to be enacted in the next few years.[48] The laws passed in Connecticut,[49] Iowa,[50] Minnesota,[51] Montana,[52] Rhode Island,[53] and Vermont[54] are similar in the following respects: (1) All of the laws seek to limit drug testing but do not prohibit testing completely. (2) All of the laws permit the preemployment testing of applicants, and some permit the periodic testing of employees if advance notice is given. (3) Exceptions are often made for public safety officers and employees in safety-sensitive jobs. (4) "For cause" testing is generally allowed if there is "probable cause," "reasonable cause," or "reasonable suspicion" that an employee is impaired. (5) Most of the laws require that the sample collection be performed in private. (6) All of the laws require confirmatory testing. (7) Most of the laws specifically require that drug testing records be kept confidential.

Utah's Drug and Alcohol Testing Act[55] differs significantly from the other laws. The Utah law permits drug testing as a condition of hiring or continued employment so long as employers and managers also submit to testing periodically. In encouraging drug testing, the statute requires that employers performing drug testing have a written testing policy and that confirmatory tests be used. If an employer satisfies these requirements, the law protects the employer from liability for defamation or other torts based on drug testing. It also prohibits any action based on the failure to conduct a drug test.

Not surprisingly, bills introduced into Congress have reflected a wide range of opinion on the efficacy of drug testing for federal employees. Some bills would require testing, others would restrict or prohibit it. The only measure actually enacted dealing with drug testing so far has been a supplemental appropriations bill that permitted the testing contemplated by Executive Order 12564.[56] The Anti–Drug Abuse Act of 1986[57] makes it a crime to operate a common carrier, such as a train or bus, while under the influence of alcohol or drugs, but the law does not mandate the use of drug tests.

The most important piece of legislation considered by Congress, the Transportation Employee Safety and Rehabilitation Act of 1987,[58] would establish drug testing (before employment, periodic, random, for reasonable suspicion, and after an accident) for persons in safety-sensitive positions in the aviation, rail, and motor carrier industries. The legislation would cover 2.5 million truck and bus drivers, 300 000 railroad workers, and 200 000 aviation workers.[59]

REGULATIONS

Some employee drug testing programs have been imposed by federal and state regulations. At the federal level, one of the most important sets of regulations, that of the Federal Railroad Administration,[60] took effect in 1986. Preemployment drug tests are used to test for alcohol, opiates, cocaine,

barbiturates, amphetamines, cannabinoids, hallucinogens, and other drugs in frequent use in the locality. Drug tests also are required after serious accidents and on "reasonable cause." Governmentwide drug testing guidelines also were issued in February 1987.[61]

In December 1986, the Federal Aviation Administration (FAA) announced its intention to propose rules that would require pilots and flight instructors, flight engineers and navigators, other noncrew airmen (air traffic controllers, aircraft dispatchers, mechanics and repairmen, parachute riggers, and ground instructors), and flight attendants to undergo mandatory drug and alcohol testing using both random and scheduled tests, preemployment tests, and tests for "reasonable suspicion."[62] The Federal Highway Administration promulgated rules that prohibit use of Schedule 1 drugs (defined by the Drug Enforcement Administration) by foreign and interstate commercial motor carrier drivers.[63] At the same time the Federal Highway Administration asked for comments on whether drug screening should be mandated as well.[64]

COMMON LAW

Under common law, employees working without an express contract, either written or oral, are "at will" employees. This means that they may be fired at will for almost any reason by the employer at any time. In recent years, three main exceptions to the at-will doctrine have emerged to lessen the often harsh effects of this rule: (1) Contractual limitations on employer prerogatives may be inferred from provisions in employee handbooks or personnel manuals.[65] (2) Discharges in violation of public policy, such as for serving on jury duty, are prohibited.[66] (3) Arbitrary and bad-faith discharges may violate an employer's duty of good faith and fair dealing.[67]

The exceptions to the at-will doctrine are a newly emerging area of law that vary greatly by jurisdiction. Where one or more exceptions are recognized, they operate only after a discharge has taken place to provide a remedy in tort or contract. Therefore, in the context of drug testing, at best, employees who were discharged because of a refusal to undergo a test or because of a positive test may have a legal action. Regarding the public policy exception, the most widely recognized of the three exceptions, an action is most plausible when the employer requires that the act of urination be observed. Arguably, this invasion of privacy contravenes public policy.[68] No cases have been decided, however.

Records of drug testing results are extremely sensitive, and the wrongful disclosure of this information could lead to common law tort liability. Although employers are protected against liability for defamation by a limited privilege to disclose employee personnel records,[69] the privilege is lost if the disclosure is made with reckless disregard for the truthfulness of the disclosure or if there is excessive publication of the defamatory information. In *O'Brien v Papa Gino's of America Inc*,[70] a former employee was awarded damages for defamation after the employer falsely stated that the individual was discharged for using cocaine.

In *Houston Belt & Terminal Railway v Wherry*,[71] a railroad employee was tested for drugs after fainting following an accident on the job. The initial test result showed a "trace" of methadone, but a follow-up test showed the presence of a normal compound whose characteristics resemble methadone. The employee was later discharged for failure to report his accident in a timely manner. The railroad wrote a letter to the Department of Labor stating that the employee "passed out and fell" and that "traces of methadone" were present in his system. The Texas Court of Civil Appeals affirmed an award of $150 000 in compensatory damages and $50 000 in punitive damages based on this and other statements. The court stated, "We think the jury was entitled to conclude from the evidence that they made false statements in writing that he was a narcotics user when they knew better."[72]

Determining the Reasonableness of Drug Testing

Although the specific legal criteria vary with the source of the legal protection, essentially the courts seek to determine whether the challenged drug testing program is reasonable. This determination often centers on the following four questions: Who is being tested? When are they being tested? How is the test performed? What action is taken on the basis of test results?

The starting point for determining whether any particular drug testing is reasonable is to look at the individual being tested. In other words, the job description and responsibilities of the person tested are very important.

The courts have been more willing to sanction the use of drug testing when employees and coworkers may be endangered by drug impairment. Thus, drug testing has been upheld for employees of a municipal utility working around high-voltage power lines[73] and jockeys.[74] Employees with public safety and health responsibility, such as police and firefighters[75] and bus drivers,[76] also may be subjected to drug testing.

Drug testing in other job classifications is less likely to be upheld. For example, a discharge based on a positive drug test of a school bus attendant, whose only responsibility was to assist students on the bus, was struck down.[77] Similarly, in *Patchogue-Medford Congress of Teachers v Patchogue-Medford Union Free School District*,[78] the Appellate Division of the New York Supreme Court struck down a rule that all probationary teachers, as a condition of receiving tenure, must submit to a drug test:

> [T]he need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, firefighter, bus driver, or train engineer, where, given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.[79]

Drug testing may be conducted at a variety of stages during the employment relationship, ie, before employment, on a periodic basis, on return to work following a leave of absence, after an accident, on suspicion of drug use, and randomly. The timing or circumstances of the testing often affect its legality.

To our knowledge, there are no reported cases dealing with preemployment testing. Periodic testing, especially when used as part of an overall medical evaluation of fitness, is likely to be upheld.[80] For other types of testing without a particularized or individualized need for testing, the courts are inclined to find that testing is unnecessary and therefore unreasonable. Thus, random testing of correctional officers[81] and police officers in an organized crime control unit[82] has been held to be illegal. Similarly, the "surprise, roundup" testing of 126 police officers and civilians and 99 firefighters of Plainfield, NJ, was held to be unconstitutional.[83]

If there is specific evidence of the need to test, the courts are inclined to uphold the testing. Drug testing of certain employees who were identified in reports as drug users has been upheld.[73,84] In *Division 241, Amalgamated Transit Union v Suscy*,[76] the Seventh Circuit upheld the Chicago Transit Authority's rule mandating drug testing for bus drivers involved in a serious accident or suspected of being intoxicated.

The courts have not required "probable cause" before upholding an individual drug test. "Reasonable suspicion," a lesser standard, has been widely adopted[85]:

> The 'reasonable suspicion' test requires that to justify this intrusion, officials must point to specific, objective facts and rational inferences that they are entitled to draw from these facts in the light of their experience.[86]

Reasonable suspicion pertains to individual drug testing. An unresolved issue is whether evidence of widespread drug abuse in a community or a problem within a group of workers is needed to justify wider testing:

> Thus, without any direct or even circumstantial proof that any problem exists in OCCB [Organized Crime Control Branch], it is difficult to justify random testing as a deterrent when there is little indication that there is any significant drug use to deter.[87]

In *Lovvorn v City of Chattanooga*,[88] the city was enjoined from conducting mass urine testing of all firefighters and police. According to the court, the city failed to establish that there was a drug abuse problem generally or with respect to specific personnel.

The testing procedures used may affect the legality of the testing. In *Jones v McKenzie*,[77] the court held that the use of an unconfirmed enzyme-multiplied immunoassay test, which violated a specific regulation mandating confirmation, was arbitrary and capricious.[89] Confirmatory testing, such as the use of gas chromatography/mass spectrometry to confirm an initial immunoassay, increases the accuracy of the test and, thus, the likelihood of legality.

It is also important to safeguard the chain of custody of the specimen to eliminate the possibility of confusion, mishandling, or sabotage. In addition, it may be necessary to retain the sample to allow for independent confirmation of the results. In *Banks v FAA*,[90] the discharges of air traffic controllers were set aside because the urine samples had been destroyed before they could be retested by an independent laboratory.

A final issue relates to sample collection. In *Caruso v Ward*,[82] police officers were required to urinate in the presence of a superior officer of the same sex to ensure the regularity of the sample. The court found this process especially troublesome:

> [T]he subject officer would be required to perform before another person what is an otherwise very private bodily function which necessarily includes exposing one's private parts, an experience which even if courteously supervised can be humiliating and degrading.[91]

Having the observer stand behind a shoulder-level screen, however, has been deemed not to be an invasion of privacy by one court.[92]

Occupational drug testing programs are more likely to be upheld if individuals who test positively are rehabilitated rather than discharged.[93] This often relates closely with the duty to make reasonable accommodation to handicapped workers. For example, in *Hazlett v Martin Chevrolet Inc*,[94] an employer was found to have violated Ohio's handicapped discrimination law by discharging an employee suffering from drug and alcohol addiction and refusing to grant a one-month disability or sick leave so the employee could obtain treatment. Other employees with other illnesses previously had been given leaves.

SUMMARY

To establish what legal principles pertain to any case of drug testing, it is necessary to make the following inquiries: (1) Is the individual tested a public employee or is the test mandated by the government (thus raising constitutional issues)? (2) Is the individual covered under the terms of a collective bargaining agreement? (3) Is the individual working under an express written or oral contract or subject to provisions in an employee handbook or personnel manual? (4) Does the individual work for an employer that is a government contractor or a recipient of federal financial assistance (and therefore covered under the federal Rehabilitation Act)? (5) Does the individual work in a state that includes drug abuse within the definition of handicap? (6) Is the purpose or effect of the drug testing to discriminate on the basis or race, color, religion, sex, or national origin (this violates Title VII of the Civil Rights Act)? (7) Did the employer act in a manner that violated public policy or that constituted a breach of good faith and fair dealing? (8) Is there any other legal basis for challenging the drug testing?

PRIOR AMA ACTION

In August 1984, the AMA submitted comments to the Federal Railroad Administration in response to a proposed rule, "Control of Alcohol and Drug Abuse in Railroad Operations." The final rule, which affects railroad employees who perform services covered by the Hours of Service Act (such as train crew members), was promulgated on July 29, 1985. The rule contains the following provisions: (1) It prohibits on-the-job use and possession of or impairment by alcohol or any controlled substance. (2) It mandates toxicologic testing after an accident. (3) It authorizes railroads to require breath and urine tests for reasonable cause. (4) It requires railroads to adopt policies to aid in the identification of troubled employees. (5) It provides for preemployment drug screening. (6) It requires more complete reporting of alcohol and drug involvement in train accidents. The AMA supported the requirements for drug testing after accidents, before employment, and for reasonable cause. In addition, the AMA supported the establishment of employee assistance programs to treat employees who have a drug or alcohol problem. The Federal Railroad Administration did not propose, and therefore the AMA did not comment on, random drug testing of presently employed persons, even though some of these employees hold positions that affect the public safety.

In March 1986, the AMA submitted a study of the medical standards and the medical certification process for civilian airmen to the FAA.[95] A committee comprising eight psychiatrists and one neuropsychologist reviewed mental and behavioral issues and recommended that the FAA incorporate into its routine medical examination a mini-mental-status examination that would detect diminished cognitive function. The committee also provided guidance to the aviation medical examiners on the detection of clinical signs of alcohol and drug

8. *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789, 792 (Sup Ct 1986).
9. *Whalen v Roe*, 429 US 589, 599 (1977).
10. 619 F Supp 1089 (DNJ 1985), *aff'd*, 795 F2d 1136 (3d Cir 1986).
11. *Jones v McKenzie*, 628 F Supp 1500, 1507 (DDC 1986).
12. *Banks v FAA*, 687 F2d 92 (5th Cir 1982).
13. *Cleveland Board of Education v Loudermill*, 470 US 532 (1985).
14. *Price v Pacific Refining Co*, No. 292000 (Contra Costa, Cal Super Ct, Feb 10, 1987); *see generally note, Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* 19 Loy LAL Rev 1461 (1986).
15. 29 USC §§ 701-796 (1984).
16. 29 USC § 706(7)(B).
17. *See* 124 Cong Rec S 19.002 (daily ed Oct 14, 1978) (remarks of Sen Williams).
18. *See Davis v Bucher*, 451 F Supp 791 (ED Pa 1978).
19. *See* 124 Cong Rec 14.507 (daily ed May 18, 1978) (remarks of Rep Hyde).
20. *See, eg, Whitlock v Donovan*, 598 F Supp 126 (DDC 1984), *aff'd*, 790 F2d 964 (DC Cir 1986); *Walker v Weinberger*, 600 F Supp 757 (DDC 1985).
21. *See Heron v McGuire*, 803 F2d 67 (92d Cir 1986).
22. 816 F2d 170 (5th Cir 1987).
23. 29 CFR §§ 1613.705-1613.706 (1986).
24. 45 CFR § 84.13(a) (1986).
25. 41 CFR § 60.741.6 (1986).
26. Cal Admin Code §§ 729.5-7294.2 (1985).
27. *See Whitlock v Donovan*, 598 F Supp 126 (DDC 1984), *aff'd*, 790 F2d 964 (DC Cir 1986); *Walker v Weinberger*, 600 F Supp 757 (DDC 1985).
28. 42 USC § 290dd(a) (1984).
29. 42 USC § 2000e (1984).
30. 440 US 568 (1978).
31. *Id* at 587.
32. *Id* at 594.
33. 41 FEP Cas 282 (DNM 1986).
34. 29 USC §§ 158(a)(5), 158(b)(3), 158(d) (1984).
35. *See, eg, IBEW Local 1900 v Potomac Electric Power Co*, 634 F Supp 642 (DDC 1986); *Brotherhood of Locomotive Engineers v Burlington Northern Railroad*, 117 LRRM 2739 (D Mont 1984).
36. Denenberg TS, Denenberg RD: *Alcohol and Drugs: Issues in the Workplace*, Washington, DC, BNA Books, 1983.
37. 8202 Arb ¶ 8616 (1982) (Daly, Arb).
38. Wabco Division of American Standard, 77 LA 1085 (1981) (Katz, Arb).
39. Texas Utility Generating Co, 84-1 Arb ¶ 1025 (1984) (Edes, Arb).
40. *See, eg*, Bell Helicopter Co, 69-2 Arb ¶ 8608 (1969) (Abernethy, Arb).
41. Levin E, Denenberg TS, *How Arbitrators View Drug Abuse*, 31 Arb J 97 (1976).
42. Wollett DH, *What an Arbitrator Looks for from Management in Discharge Cases*, 9 Employee Rel LJ 525 (1983-1984).
43. *See* Wynns P, *Arbitration Standards in Drug Discharge Cases*, 34 Arb J 19 (1979).
44. *See* Dufek RA. Underhill DM, *Arbitration Can Thwart Employer No-Drug Policy*, Legal Times, March 18, 1985, p 21; Geidt T, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 Employee Rel LJ 181 (1985).
45. *Misco Inc v United Paperworkers International Union*, 768 F2d 739 (5th Cir 1985), *cert granted*, 107 S Ct 871 (1987).
46. San Francisco Police Code, art 33a, §§ 3300A.1-3300A.11 (1985).
47. Daily Lab Rptr, Dec 4, 1985, at A-2.
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49. Conn Pub Act 87-551 (1987).
50. Iowa HF 469 (1987).
51. Minn Stat Ann §§ 181.93-181.995 (1987).
52. Mont Code Ann § 39-2-304 (1987).
53. RI Gen Laws §§ 28-6.5-1 to 28 6.5-1-2 (1987).
54. Vt Stat Ann tit 21, ch 5, §§ 511-520 (1987).
55. Utah Code Ann §§ 34-38-1 to 34-38-15 (1987).
56. HR 1[illegible]7, 100th Cong, 1st Sess, 1987.
57. Pub L 99-570 (to be codified at 21 USC § 801).
58. S 1041, 100th Cong, 1st Sess (1987).
59. McGinley L, *Senate Panel Approves Bill Requiring Drug Tests on Transportation Workers*, Wall St J, March 11, 1987, at 8, col 1.
60. 49 CFR, pts 212, 217-219, 225 (1986); 50 Fed Reg 31 508-31 579 (1985).
61. Alcohol, Drug Abuse, and Mental Health Administration, Department of Health and Human Services, Scientific and Technical Guidelines for Drug Testing Programs, 52 Fed Reg 30 638 (1987).
62. 51 Fed Reg 44 432-44 436 (1986).
63. 49 CFR § 391.41(b)(12) (1987).
64. 51 Fed Reg 17 572 (1986).
65. *See, eg, Wagner v City of Globe*, 722 P2d 250 (Ariz 1986); *Pine River State Bank v Mettille*, 333 NW2d 622 (Minn 1983).
66. *See, eg, Nees v Hocks*, 272 Or 210, 536 P2d 512 (1975).
67. *See, eg, Fortune v National Cash Register Co*, 373 Mass 96, 364 NE2d 1251 (1977).
68. *Cf Wagenseller v Scottsdale Memorial Hospital*, 147 Ariz 370, 710 P2d 1025 (1985) (nurse discharged for refusing to perform in a skit that called for "mooning" the audience).
69. *See Sindorf v Jacron Sales Co*, 27 Md App 53, 341 A2d 856 (1975), *aff'd*, 276 Md 580, 350 A2d 688 (1976); *Harrison v Arrow Metal Products Corp*, 20 Mich App 570, 174 NW2d 875 (1969); *see generally comment, Qualified Privilege to Defame Employees and Credit Applicants*, 12 Harv CR-CL L Rev 143 (1977).
70. 780 F2d 1067 (1st Cir 1986).
71. 548 SW2d 743 (Tex Civ App 1977), *appeal dismissed*, 434 US 962 (1978).
72. 548 SW2d at 752.
73. *Allen v City of Marietta*, 601 F Supp 482 (ND Ga 1985).
74. *Shoemaker v Handel*, 619 F Supp 1089 (DNJ 1985), *aff'd*, 795 F2d 1136 (3d Cir 1986).
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77. *Jones v McKenzie*, 628 F Supp 1500 (DDC 1986).
78. 119 AD2d 35, 505 NYS2d 888 (App Div 1986), *aff'd*, 70 NY2d 57, 510 NE2d 25, 517 NYS2d 456 (1987).
79. 505 NYS2d at 891 (1986).
80. *See Curry v New York Transit Authority*, 86 AD2d 857, 450 NYS2d 399 (App Div), *aff'd*, 56 NY2d 798, 437 NE2d 1158, 452 NYS2d 401 (1982).
81. *McDonnell v Hunter*, 612 F Supp 1122 (SD Iowa 1985), *modified*, 809 F2d 1302 (8th Cir 1987) ("systematic" random selection permissible).
82. *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789 (Sup Ct 1986).
83. *Capua v City of Plainfield*, 643 F Supp 1507 (DNJ 1986).
84. *Turner v Fraternal Order of Police*, 500 A2d 1005 (DC 1985); *King v McMickens*, 120 AD2d 351, 501 NYS2d 679 (1986).
85. *See eg, McDonnell v Hunter*, 809 F2d 1302 (8th Cir 1987); *City of Palm Bay v Bauman*, 475 So 2d 1322 (Fla App 1985); *Patchogue-Medford Congress of Teachers v Patchogue-Medford Union Free School District*, 70 NY2d 57, 510 NE2d 325, 517 NYS2d 456 (1987). *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789, 799 (Sup Ct 1986).
86. *City of Palm Bay v Bauman*, 475 So 2d 1322, 1326 (Fla App 1985).
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89. *But see Turner v Fraternal Order of Police*, 500 A2d 1005 (DC 1985).
90. 687 F2d 92 (5th Cir 1982).
91. 506 NYS2d at 793.
92. *National Treasury Employees Union v Von Raab*, 816 F2d 170 (5th Cir 1987).
93. *See* Exec Order 12 574, 51 Fed Reg 32.889 (1986).
94. 25 Ohio St 3d 279, 497 NE2d 478 (1986).
95. Engelberg AL, Gibbons HL, Doege TC: A review of the medical standards for civilian airmen: Results of a two-year study. *JAMA* 1986;255:1589-1599.
96. Council on Scientific Affairs: Scientific issues in drug testing. *JAMA* 1987;257:3110-3114.

use. The issue of urine testing for drug use was considered at great length, but such testing was not recommended. Instead, the AMA recommended to the FAA a method of detecting mental and physical impairments that may result from alcohol and drug abuse or dependence rather than a chemical method of detecting alcohol or drug use.

At the 1986 Annual Meeting, the House of Delegates adopted Report K of the Council of Medical Service, "Employers' Violation of Patient Privacy With Group Medical Insurance Claim Forms." This report opposed employment discrimination due to any health condition not related to the requirements of a job and suggested that the AMA develop model federal and state legislation that would prohibit such discrimination.

At the 1986 Interim Meeting, the House of Delegates adopted Council on Scientific Affairs Report J, "Scientific Issues in Drug Testing." The report discussed the strengths and limitations of screening and confirmatory testing techniques and the importance of forensic testing procedures and quality controls. It concluded that drug testing does not provide any information about mental or physical impairments that may be due to drug use or about patterns of use. A high-quality drug testing program can provide accurate evidence of previous exposure to drugs. The report urges that physicians be aware of the objectives of any drug testing program in which they participate.

URINE SCREENING OF PHYSICIANS

At the 1972 Clinical Convention, the AMA adopted Board of Trustees Report T, "Physicians With Psychiatric Disorders, Including Alcoholism and Drug Dependence." This landmark report not only addressed the problems of alcoholism, drug dependence, and psychiatric illness among physicians and medical students but also outlined a series of concrete steps that various members of the medical profession could use to get help for an impaired colleague. The report further proclaimed that it is an unimpaired physician's ethical responsibility to take affirmative action to assist an impaired physician who is unable to seek treatment or rehabilitation by himself or herself.

Since that time, programs to help impaired physicians have been developed by every state medical society. Similarly, most medical licensing bodies now are governed by legislation that addresses the many aspects of this complex problem; much of this legislation allows a physician to seek help and specifies the conditions under which the physician may return to practice after treatment. The AMA model state legislation, "The Impaired Physicians Treatment Act," encourages collaboration between the state medical society and the licensing board and suggests a variety of model provisions by which effective relationships can be developed. These programs recognize the value of constructive intervention to assist an impaired medical colleague. Intervention that is based on realistic and documented concern and referral for diagnosis and treatment is a positive step and an appropriate response.

Urine screening for drug and alcohol use has been recognized by state medical societies and licensing boards as *one* component of a comprehensive treatment plan for chemical dependence. In recent years, as more state societies have devoted increasing resources to impairment programs and have continued to hire full-time medical staff to assure implementation of a comprehensive program, they have been better able to act as a physician's advocate by monitoring his or her recovery as the physician returns to practice. Written agreements between the physician and the program often specify the use of urine screening as an accepted method of assuring recovery when it is used in conjunction with other methods of assurance.

CONCLUSION

The case law concerning drug testing of employees is developing very rapidly, and for the most part, no discernible trends have evolved. Previous action by the AMA has tended to support cautious application of drug testing: (1) The AMA supported drug testing of railroad crews under limited circumstances, such as after accidents and for reasonable cause, and urged that the railroads establish employee assistance programs to treat employees with drug or alcohol use problems. (2) The AMA did not recommend urine drug testing of civilian airmen as part of the FAA's medical standards and medical certification process. (3) The AMA opposed employment discrimination based on health status. (4) The AMA delineated the strengths and limitations of drug testing based on scientific concerns, including that high-quality drug testing procedures can provide accurate information about previous exposure to a drug but cannot establish patterns of use or mental or physical impairments resulting from that use. (5) The AMA recognized the appropriate use of urine drug screening in monitoring physician recovery from an impairing problem of alcohol or drug use.

The Council on Scientific Affairs recommends:

1. That the AMA reaffirm its commitment to educate physicians and the public about the scientific issues of drug testing as presented in Report J (I-86).[56]

2. That the AMA monitor the evolving legal issues in drug testing of employee groups, especially the issues of positive drug tests as a measure of health status and potential employment discrimination resulting therefrom.

3. That the AMA take the position that urine drug and alcohol testing of employees should be limited to: (a) preemployment examinations of those persons whose jobs affect the health and safety of others, (b) situations in which there is reasonable suspicion that an employee's job performance is impaired by drug and alcohol use, and (c) monitoring as part of a comprehensive program of treatment and rehabilitation of alcohol and drug abuse or dependence.

4. That the AMA urge employers who choose to establish drug testing programs to use confirmed positive test results in employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs.

5. That this report be adopted in lieu of Resolutions 84 (A-86), 106 (A-86), 16 (I-86), and 60 (I-86).

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ducted out of the public eye. The search becomes unreasonable because it is contradictory.

Third, sex acts are inherently private. They work to exclude the world from their participants' perceptions and conversely, in order to work, require such exclusion. They create sanctuary and require sanctuary. Any right to substantive privacy that protects repose and sanctuary will protect the inherent privacy of sex.

Fourth, even if the perimeter of what counts as a self-affecting action is fuzzy, the role of sexual behavior in a person's life clearly gives sex *a* central place among self-affecting activities. As the fulfillment of need, as an access to ecstasy and as a necessary substrate for matrimonial love, sexual pleasure is set apart from casual pleasure and assumes a role more central in the configuration of human emotions than even friendships have. Any right that protects central self-affecting values, then, will also protect the right to consensual sex.

Finally, because a person's body is a necessary source for all free actions and for any action that instills value in his world, if there are any areas of life in which an individual's plans and projects take precedence over those of society, then the individual must be able to act reflexively on his own body to make it as he wills it and to instill value in it. Moreover, because of the moral priority of the body to an agent's actions in the world, the state's prohibition of and interference in a person's reflexive actions on his own body is an offense on a moral par with a direct violation of a person's body by the state. To be raped by a policeman and to be prevented by the police from having consensual sex are moral equivalents. Therefore, if there are any substantive rights to act in the world, the right to do *to* one's body as one will is necessarily protected. Only when one's control of one's body is protected, does one have a right to bodily integrity, and only when one has bodily integrity is one a person at all. Any moral systems in which persons are a locus of value—systems of humans, not systems of angels or animals—will be obligated to protect from government those persons' acts of consensual sex.

Compulsory Urinalysis of Public School Students: An Unconstitutional Search and Seizure*

by
Paul L. Gillow**

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."•••

I. Introduction

Urinalysis to detect drug and/or alcohol use, made relatively inexpensive by recent technological developments, has spread rapidly to many areas of American life. Its use has been approved in prisons,[1] the military,[2] public[3] and private[4] employment, and sports.[5] Recently, a school district in Bergen County, New Jersey sought to add public schools to the list.

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* The fourth amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

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••• Shelton v. Tucker, 364 U.S. 479, 487 (1960).

1. Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Tucker v. Dickey, 613 F Supp. 1124 (W.D. Wis. 1985).

2. *See infra* note 51.

3. *See infra* notes 84-85 and accompanying text.

4. Approximately one quarter of Fortune 500 companies currently require drug screening of applicants. Hanley, *The Validity of Student Drug Testing*, N.Y. Times, Dec. 10, 1985, at B2, col. 1. The President's Commission on Organized Crime has recommended routine testing of all American workers for drug use. Lindsey, *Worker Drug Test Provoking Debate*, N.Y. Times, May 3, 1986, at 1, col. 3.

Private employers are not bound by the fourth amendment because there is no state action. *See infra* note 15. Drug testing by private employers could be limited, however, by state constitutions, legislation, or collective bargaining agreements. *See* Schwanenberg, *Inconsistencies plague laws, rules on drug testing in workplace*, Newark Star-Ledger, July 27, 1986, § 1 at 1, col. 1.

5. Sports organizations are usually private employers who are not bound by the fourth amendment. *See supra* note 4. *But see* Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986) (compulsory urinalysis of licensed jockeys upheld under the administrative search standard for closely regulated industries).

In June 1985, the Carlstadt-East Rutherford Regional Board of Education approved compulsory urinalysis of all students at the Henry P. Becton Regional High School to screen for drug and/or alcohol use as part of comprehensive medical examinations. A group of five students and their parents filed suit, and a temporary restraining order against the drug screening aspect of the examinations was issued by the New Jersey Superior Court in August 1985. In *Odenheim v. Carlstadt-East Rutherford Regional School District*,[6] which was decided in December 1985, the Superior Court ruled the urinalysis proposal an unconstitutional violation of the plaintiffs' rights to be free from unreasonable searches and seizures, the plaintiffs' due process rights, and the plaintiffs' legitimate expectations of privacy. In May 1986, the defendant school district decided to drop its appeal.

While the New Jersey case has been resolved, the issue of compulsory urinalysis of public school students cannot be regarded as settled by the courts,[7] and the increasing drug problem in American schools makes it quite likely that the issue will be raised again.[8] The object of this Note is to show that, although the fourth amendment affords public high school students limited protection, compulsory urinalysis is unprecedented and should be considered unconstitutional because of the highly intrusive nature of the test and the failure to comply with a standard of individualized suspicion. The Becton High School drug screening proposal and litigation provide the basis for discussion, but the analysis in this Note is equally applicable to any compulsory urinalysis program. First, the Note describes the Becton High School drug screening proposal and addresses the school district's claim that the proposal was a medical procedure. Then, fourth amendment analysis is applied to the proposal, in order to show that the procedure was a search and seizure, and

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Attempts to impose compulsory urinalysis programs in professional baseball and football have been opposed by players' unions, which argue that unilateral imposition of such programs by the commissioner and insertion of drug test clauses in players' contracts violate collective bargaining agreements. *See* Molotsky, *N.F.L. Postpones Its New Drug Plan*, N.Y. Times, July 12, 1986, at 45, col. 1; Goodwin, *Ueberroth Changes Tactics, Gets His Way on Drug Issue*, N.Y. Times, March 3, 1986, at C2, col. 4.

6. 211 N.J. Super. 54, 510 A.2d 709 (Ch. Div. 1985).

7. *Odenheim* is a trial court opinion, and therefore of low value as precedent. One federal district court has reached the issue of compulsory urinalysis of students, but that case did not involve blanket testing of a student population. Anable v. Ford, No. 84-6033, slip op. (July 15, 1985), *modified*, slip op. (W.D. Ark. Sept. 5, 1985). *See infra* text accompanying notes 99-105.

8. Recently, Secretary of Education William J. Bennett suggested to Congress that federal funds be withheld from schools that do not demonstrate a serious commitment to combatting drug use, N.Y. Times, May 21, 1986, at A20, col. 6, and one school board adopted a policy that permitted strip searches of elementary school students for drugs. *See* Friendly, *Schools Ease Curbs on Drug and Weapon Checks*, N.Y. Times, June 17, 1986, at B2, col. 1. Both public and private schools are struggling with the question of how far they can go to fight drug use. *See* Friendly, *Board Studies Strip Search for Students*, N.Y. Times, June 8, 1986, § 23, at 1, col. 4; *Boarding Schools' Hard Line Angering on Drug Tests*, N.Y. Times, June 8, 1986, § 1, at 54, col. 3.

therefore subject to the standard for school searches recently set forth by the United States Supreme Court in *New Jersey v. T.L.O.*[9] The focus of this Note is on the failure of the proposal to satisfy that standard, since it was neither justified at its inception nor reasonable in its scope. Finally, the Note considers the due process issues raised by the proposal.[10]

II. The Drug Screening Proposal

The Becton High School drug screening proposal was set forth in a board of education policy[11] that required physical examinations of all students enrolled or to be enrolled in the high school.[12] The examinations were to be conducted annually at the beginning of the school year and to consist generally of on-premises examinations by the school medical examiner.[13] The purpose of the

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9. 469 U.S. 325 (1985).

10. There appears to be no claim under the fifth amendment privilege against self-incrimination because of the rule that the privilege applies only to evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757 (1966). *But see* National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 388 (E.D. La. 1986) (holding that a urinalysis plan violated the fifth amendment privilege against self-incrimination because urine testing is more intrusive than the procedure involved in *Schmerber* and because the plan required a subject to fill out a written form stating medications taken and any circumstances in which the subject may have been in contact with illegal substances).

Urinalysis may implicate a right of privacy to the nondisclosure of personal medical information. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1515 (D.N.J. 1986) (holding that a urinalysis program violated the plaintiffs' right of privacy in medical information because of inadequate safeguards to insure confidentiality). *See also Von Raab*, 649 F. Supp. at 389 ("[t]he Court finds that the [urinalysis plan] unconstitutionally interferes with the penumbral rights of privacy held by Customs workers"). This Note accepts the provisions of the Becton High School proposal at face value and assumes the adequacy of its confidentiality guarantees. *See infra* text accompanying notes 25-26. The privacy concerns raised by the proposal are addressed directly by the fourth amendment. On students' legitimate claim of privacy, *see infra* notes 49-52 and accompanying text, and on the intrusion of urinalysis into students' activities outside of school, *see infra* text accompanying notes 99-104.

Reliance on the right of privacy is more problematic. The United States Supreme Court has not established a right of privacy to the nondisclosure of personal medical information. *See* Whalen v. Roe, 429 U.S. 589 (1977) (upholding a statute that required physicians to report the names and addresses of all patients who obtained prescriptions for "dangerous" drugs; the Court largely relied on the confidentiality provisions in the statute). Moreover, the current Court seems less than eager to expand the "fundamental rights" that are protected by the right of privacy. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (the Constitution does not confer a fundamental right to engage in homosexual sodomy). However, the right of privacy has been extended to school children. *See* Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) (struck down on privacy grounds a school questionnaire designed to identify "potential drug users" among eighth grade students).

11. Carlstadt-E. Rutherford Regional Bd. of Educ., Policy No. 5141.3, "Comprehensive Medical Examination" (1985), *reprinted in* Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54 app., 510 A.2d 709 app. (Ch. Div. 1985) [hereinafter Policy].

12. Policy at 62-63, 510 A.2d at 714.

13. *Id.* at 63, 510 A.2d at 714.

examinations was "to identify the existence of any physical defects, illnesses or communicable diseases, as well as, but not limited to, the pupil's fitness to participate in any school sponsored health, safety, sport, and/or physical education courses as required by law."[14] To that end, the examinations included a drug screening test.[15] The proposal asserted that identification of drug use was not for a punitive,[16] but a rehabilitative, purpose.[17]

According to the procedural guidelines issued by the school district, a urine sample would be taken during the medical examination for the performance of various tests, including the drug screening test.[18] Failure of a student to complete any portion of the medical examination would result in the student's exclusion from school.[19] If a student tested positive for drug and/or alcohol use, the school physician was to notify immediately the school superintendent and the parents or legal guardian of the student or the student himself, if over age 18.[20] The school physician would also decide whether to exclude the student from school.[21] The school superintendent, the school physician, the parents or legal guardian of the student, and the student would meet "to discuss the results of the test, the nature of the problem and the course of action to be taken."[22] The superintendent, with the advice of the

14. *Id.*

15. "The Board of Education has concern for the health of the entire school population and hereby resolves to identify and isolate any and all health problems which presently exist. These complete physical examinations will help to identify any drug and alcohol use by the pupils. The detection of drug and/or alcohol use will enable the Board of Education to enter the pupil into an appropriate rehabilitation program designed to help the student recognize the danger and to remedy any problem that exists." *Id.*

16. *Id.*

17. "If any illness or health problem is identified through this testing, then the Board will take the necessary steps to correct any such problem. Included in these corrective measures would be counseling and other rehabilitative procedures to treat the illness caused by drug and alcohol abuse." *Id.* at 64, 510 A.2d at 717.

18. Carlstadt-E. Rutherford Regional Bd. of Educ., Policy No. 5141.3, "Administrative Procedures for Policy 5141.3," § 2, ¶ C (1985), *reprinted in Odenheim*, 211 N.J. Super. at app., 510 A.2d at app. [hereinafter Administrative Procedures], provides:

> In the same manner and environment as above indicated, the medical examiner shall ask each pupil for a urine sample, to be obtained in a medically appropriate method. The sample shall be obtained for the purpose of discerning the level of protein, sugar, specific gravity, blood and the existence or non-existence of controlled dangerous substances, non-authorized prescription drugs as defined in the introductory statement and alcohol.

A "controlled dangerous substance" is defined as "a narcotic or non-narcotic substance as listed under N.J.S.A. 24:21-4, N.J.A.C. 8:65-10.1, and any prescription drug not prescribed or authorized by a medical physician." Policy, *supra* note 11, at 63, 510 A.2d at 717.

19. Administrative Procedures, *supra* note 18, § 4.

20. *Id.* § 5, ¶ B.

21. "The school physician will ... determine if, in his opinion, the pupil is able to continue classroom study. Except as hereinafter provided, the decision of the school physician shall be final." *Id.*

22. *Id.* § 5, ¶ C(2).

school physician, would then "make any recommendations necessary to facilitate the effective rehabilitation of the pupil."[23] Possible recommendations included periodic conferences with the parents or legal guardian concerning the problem, referral to the school district's alcohol or drug supervision program, and referral of the case to the county office of the State Division of Youth and Family Services.[24] A separate confidential medical file would be kept for test results[25] and all information concerning any action taken under the policy.[26]

III. The Position of the School District

At trial, the position of the school district was that alcoholism and drug abuse are diseases. Accordingly, screening for alcohol and drug use is an appropriate part of a comprehensive medical examination required of all students pursuant to the board of education's statutory obligation to examine all students for physical defects.[27] The trial judge wrote in his opinion, "[t]he linchpin of defendants' argument is that drug use and/or abuse is an illness and/or a departure from normal health and therefore beyond the parameters of the law of search and seizure."[28]

The school district emphasized that a urine sample would not be taken solely to screen for drugs but would also be tested for other signs of physical defects. A urine sample was, in fact, part of the annual physical in previous years.[29] The school district claimed that its purpose was rehabilitative, noting that no civil or criminal sanctions were to be imposed under the proposal in the event of a positive test. In light of these considerations, the school district contended that no intrusive deprivation of privacy would occur when a urine sample was examined for the presence of drugs or alcohol.[30]

As stipulated by the parties at trial, during the 1984-85 school year, 28 students out of a student population of 520[31] (or about 5%) "either made inquiry or were referred to the student assistant counselor"[32] concerning drug or alcohol use. The number for the 1985-86 school year, as of the November 12 trial date, was 11 out of a student population of 516.[33] These statistics included "students who denied any involvement in either alcohol or drugs

23. *Id.* § 5, ¶ C(4).

24. *Id.* § 5, ¶ C(4)(a)-(c).

25. *Id.* § 5, ¶ C(1).

26. *Id.* § 5, ¶ C(4)(e).

27. *See* N.J. Stat. Ann. § 18A:40-4 (West Supp. 1986).

28. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 58, 510 A.2d 709, 711 (Ch. Div. 1985).

29. Hanley, *supra* note 4.

30. *Odenheim*, 211 N.J. Super. at 57, 510 A.2d at 710-11.

31. *Id.*

32. *Id.*

33. *Id.*

and others who received follow-up referral service."[34] Counsel for the defendants contended at trial that these statistics were only the "tip of the iceberg,"[35] but did not argue that the school district had anything but a "normal" drug problem.

IV. Drug Screening Is Not a Medical Procedure

The school district attempted to avoid the issue of intrusion on students' privacy by classifying drug screening as a medical procedure. While the medical profession may consider alcoholism and drug abuse to be diseases,[36] it is by no means clear that use of alcohol or drugs is a medical problem.[37] A positive test result on a urine sample does not distinguish between use and abuse.

Unlike other diseases for which students may be excluded from school,[38] drug use and abuse are not contagious, at least not literally. Drug users will not infect the "healthy" student population. There may be concern for the health of the drug user, but that does not make clear the need for urinalysis. New Jersey state law already provides procedures to identify and, if necessary, exclude students who are under the influence of alcohol or drugs.[39]

While use of drugs is clearly illegal[40] and in violation of school rules, the school district supported its assertion that the proposal would not cause an

34. *Id.*

35. Hanley, *supra* note 4.

36. American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 164-176 (3d ed. 1980).

37. A study by the Stanford Center for Research in Disease Prevention reports a lower incidence of heart disease among moderate drinkers of alcoholic beverages than non-drinkers. Camargo, Williams, Vranizan, Albers & Wood, *The Effect of Moderate Alcohol Intake on Serum Apolipoproteins A-I and A-II: A Controlled Study*, 253 J. A.M.A. 2854 (1985).

38. N.J. Stat. Ann. § 18A:40-10 (West 1981) provides:

> No teacher or pupil who is a member of a household in which a person is ill with smallpox, diphtheria, scarlet fever, whooping cough, yellow fever, typhus fever, cholera, measles, or such other contagious or infectious disease as may be designated by the board of education, or of a household exposed to contagions as aforesaid, shall attend any public school during such illness, nor until the board of education has been furnished with a certificate from the board of health, or from the physician attending such person, or from a medical inspector, certifying that all danger of communicating the disease by the teacher or pupil has passed.

See also N.J. Stat. Ann. § 18A:40-11 (West Supp. 1986) (providing for the exclusion of any student with communicable tuberculosis).

39. *See infra* notes 97-98 and accompanying text.

40. The New Jersey Controlled Dangerous Substances Act, N.J. Stat. Ann. §§ 24:21-1 *et seq.* (West Supp. 1986), defines a disorderly person as anyone who uses or is under the influence of any controlled dangerous substance. *Id.* § 24:21-20 (b). The term "controlled dangerous substance" does not include alcohol. *Id.* § 24:21-2.

The New Jersey Act is a variation of the Uniform Controlled Substances Act, 9 U.L.A. 187 (1970), which has been adopted in some form by most states.

intrusive deprivation of privacy by claiming that no civil or criminal[41] sanctions would be imposed in the event of a positive test result for drug use and that the school district's purpose was not punitive or disciplinarian but rehabilitative. The school district adopted this rather awkward position in order to defeat the fourth amendment protection afforded students. As the trial judge wrote: "Defendants' policy is an attempt to control student discipline under the guise of a medical procedure."[42]

The school district's position is further undermined by a provision in the proposal itself that allowed the school physician to certify the "health" of a student who has the "disease" of drug or alcohol use.[43] It is either irresponsible or dishonest to classify as healthy a person who has an illness. Obviously, the provision was designed to give school officials more flexibility in dealing with students who are identified as drug users, but the discretion granted school officials under the proposal is worrisome. It is not hard to envision the drug use of an above average, well-behaved student being glossed over with a few parent conferences, and the equal drug use of a "problem" student resulting in exclusion from school. Both students in this hypothetical have the same "medical" problem, but the prescriptions are quite different. Such discriminatory treatment is abhorrent to the medical profession, but a foreseeable outcome of the proposal.

School districts have an undeniable interest in combatting drug and alcohol use by students. They should not, however, be permitted to avoid compliance with the Constitution by describing urinalysis as a medical procedure. As the trial judge wrote, "the spectrum of items that could be approached simply by defining them as medical is limitless. To accept defendants' position suggests that medical testing is without limits."[44] Rejection of the "medical procedure" argument did not defeat the proposal, however; it simply meant that the proposal was not exempt from the requirements of the fourth amendment.[45]

41. At trial, the judge pointed out that this may not be entirely true. The State Division of Youth and Family Services could be given test results under the proposal. This agency is required to give evidence of criminal acts to county law enforcement agencies. Rozanski, *Judge hears precedent-setting case of testing students for drug abuse*, Newark Star-Ledger, Nov. 13, 1985, § 1 at 1, col. 1.

A positive test result might constitute evidence of criminal acts, but an attempt to impose criminal sanctions on the basis of a positive test result alone would run afoul of Robinson v. California, 370 U.S. 660 (1962), which struck down a state law that made it a crime to "be addicted to the use of narcotics."

42. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 62, 510 A.2d 709, 713 (Ch. Div. 1985).

43. "Even with the existence of a drug or alcohol problem, the physician may certify to the pupil's health or condition, so long as the aforementioned Superintendent's recommendations are complied [sic] with." Administrative Procedures, *supra* note 18, § 5, ¶ (2)-3.

44. *Odenheim*, 211 N.J. Super. at 62, 510 A.2d at 713.

45. The fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Action by a state board of

V. Urinalysis Constitutes a Search and Seizure

The threshold question in fourth amendment analysis is whether the action at issue constitutes a search and seizure. Courts have unanimously held that the taking of a urine specimen for urinalysis testing is a search and seizure within the meaning of the fourth amendment.[46] These courts based their conclusions on precedent holding that compulsory extractions of "bodily fluids" is a search and seizure within the meaning of the fourth amendment.[47] Courts have also considered the taking of a urine specimen to be a highly intrusive search.[48]

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education is state action subject to the fourteenth amendment. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

46. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 386 (E.D. La. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 37-38, 505 N.Y.S.2d 888, 890 (1986); Caruso v. Ward, 133 Misc. 2d 544, 546-47, 506 N.Y.S.2d 789, 792 (Sup. Ct. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985). *See also* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879 (E.D. Tenn. 1986) (the proposition "seems clear" and the parties did not disagree); Tucker v. Dickey, 613 F. Supp. 1124, 1127 (W.D. Wis. 1985) (defendants "seem to concede" the proposition) Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984) (the parties agreed on the proposition). Two courts of appeals cases, by analyzing the constitutionality of urinalysis under the fourth amendment, implicitly lend support to the proposition. *See* Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

47. Schmerber v. California, 384 U.S. 757 (1966) (blood); United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984) (bowel movement).

48. *See Capua*, 643 F. Supp. at 1514 (footnote omitted):

> [D]efendants' mass urine testing program subjected plaintiffs to a relatively high degree of bodily intrusion. As stated earlier, while urine is routinely discharged from the body, it is generally discharged and disposed of under circumstances that warrant a legitimate expectation of privacy. The act itself, totally apart from what it may reveal, is traditionally private. Facilities both at home and in places of public accommodation recognize this privacy tradition. In addition, society has generally condemned and prohibited the act in public . . . . The requirement of surveillance during urine collection forces those tested to expose parts of their anatomy to the testing official in a manner akin to strip search exposure. Body surveillance is considered essential and standard operating procedure in the administration of urine drug tests, . . . thus heightening the intrusiveness of these searches. A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarassing and humiliating experience.

See also Storms, 600 F. Supp. at 1220 (quoting *Schmerber*, 384 U.S. at 771):

> Urinalyses are entitled to the same level of scrutiny accorded body cavity searches. It may, perhaps, be debated whether one type of search offends "human dignity and privacy" more than the other, but the difference is a matter of degree, not kind. Both are degrading. It is this basic offense to human dignity, rather than any particular style of causing offense, which sets this type of search apart from traditional types.

See also id. at 1218. In *McDonell*, 612 F. Supp. at 1127, the court wrote:

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as a part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

See also Von Raab, 649 F. Supp. at 386 (urinalysis is a "full-scale search" and "even more intrusive than a search of a home"); *Tucker*, 613 F. Supp. at 1129-30 (following *Storms*).

But in Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), the district court wrote:

> [W]hile the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalyses are considered less intrusive than body cavity and strip searches and those searches which have been identified as intruding upon the "integrity of the body" . . . . While breathalyzer and urine tests require the individual involved to "give up" something, the intrusion is less than the involuntary securing of a blood sample or other searches into which an intrusion into the body is required.

608 F. Supp. at 1158 (citation omitted). This distinction seems somewhat unconvincing in light of Yanez v. Romero, 619 F.2d 851 (10th Cir.), *cert. denied*, 449 U.S. 876 (1980) (petitioner gave urine sample after being threatened with forced catheterization). In *Capua*, 643 F. Supp. at 1514 n.2, the court declined to follow *Shoemaker* on the ground that, in *Shoemaker*, the urine samples were collected privately, without surveillance. In any event, *Shoemaker* differs with other decisions only as to the degree of intrusiveness of urinalysis. *See also* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985) (urinalysis is "not an extreme body invasion"); *Lovvorn*, 647 F. Supp. at 880 ("the degree of intrusion engendered by a urine test will vary greatly depending upon the individual"). For the purpose of this Note, it is not necessary to establish the precise location of urinalysis on the spectrum of intrusiveness. *See infra* note 74.

49. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

50. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (footnote omitted).

51. *Id.* at 338-39. In certain contexts, courts have ruled that the subjective expectation of privacy is unreasonable or not legitimate. *See* Hudson v. Palmer, 468 U.S. 517, 525-26 (1984) (prisoner retains no legitimate expectation of privacy in a cell). Cases upholding compulsory urinalysis programs in the military have emphasized the overriding state interest in a ready, effective military and the reduced expectation of privacy in military as opposed to civilian life. Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983); Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476-7 (D.C. Cir. 1975). Two cases upholding compulsory urinalysis of public

The fourth amendment protects the individual's "legitimate expectation of privacy."[49] The United States Supreme Court recognized students' expectations of privacy in *New Jersey v. T.L.O.*: "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."[50] *T.L.O.* went on to establish the legitimacy of students' expectation of privacy in personal property brought into school.[51]

Because it is well-established that the fourth amendment applies with its greatest force to searches of persons,[52] *a fortiori* students also have a legitimate expectation of privacy in their persons. Thus, the legitimate privacy interest that was implicated in the Becton High School proposal is indistinguishable from the interest which courts have held to be infringed in other urinalysis cases.

Finally, it is insignificant that the school district required a urine sample as part of the annual physical in previous years. Once part of the school district's purpose for taking the sample is to screen for drugs, the character of the action has changed. It would be absurd if one or more legitimate tests of a urine sample exposed a subject to other tests which, standing alone, could not legitimately be performed.[53] To decide otherwise would be to invite attempts to circumvent constitutional protections.

VI. The *New Jersey v. T.L.O.* Reasonableness Standard for School Searches

The next question in fourth amendment analysis is whether the search and seizure is constitutional. The Supreme Court has ruled that, at a minimum,

employees have in part relied on the reduced expectation of privacy rationale. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (bus drivers' subjective expectation of privacy in regard to urinalysis unreasonable in light of public safety interest); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985) (following *Suscy* analysis in context of police, which court described as "para-military"). *See also* King v. McMickens, 120 A.D.2d 351, 353, 501 N.Y.S.2d 679, 681 (1986) (dismissal of correction officers for failure to submit to urinalysis upheld; the court wrote of the reduced expectation of privacy in a "para-military discipline"). It would be difficult for the school district to follow *Suscy* and *Turner* in this respect in light of the *T.L.O.* holding that students do have a legitimate expectation of privacy in the schools, and the fact that the safety interests in *Suscy* and *Turner* were more compelling. *See infra* note 85 and accompanying text. Any analogy between the schools and the military seems quite remote.

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

53. An analogy can be made to the "plain view" doctrine, which holds generally that a search for certain objects otherwise valid does not become invalid merely because a police officer seizes other objects which the officer is in a position to see during the course of the search. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) ("the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges"); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest unreasonable in scope when it extends beyond arrestee's person and area within arrestee's control); Harris v. United States, 390 U.S. 234 (1968) (officer, taking measures to protect a car in police custody, observed and permissibly seized a registration slip which lay face up on the metal stripping over which the car door closes).

By analogy, if the taking of a urine sample for valid purposes incidentally revealed signs of drug use, the discovery of those signs would not require a separate justification under the fourth amendment. But where the purpose is to search for signs of drug use, and to administer a drug screening test to the urine sample, the search for signs of drug use does require a separate justification.

the fourth amendment requires that a search be reasonable.[54] Normally, a search may not be conducted without issuance of a warrant upon probable cause;[55] warrantless searches are per se unreasonable "subject only to a few specifically established and well-delineated exceptions."[56] In *T.L.O.*, the Supreme Court held that searches of students conducted by school officials must meet a reasonableness standard.[57]

T.L.O. involved the search of a public high school student's personal property by a school official.[58] The Supreme Court rejected the state's argument

54. *See generally* Terry v. Ohio, 392 U.S. 1 (1967); Elkins v. United States, 364 U.S. 206 (1959).

55. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970); *see generally Coolidge*, 403 U.S. 443; *Terry*, 392 U.S. 1; Schmerber v. California, 384 U.S. 757 (1966).

56. *Katz*, 389 U.S. at 357. In *Coolidge*, 403 U.S. at 445, after quoting this language from *Katz*, the Court wrote:

> The exceptions are "jealously and carefully drawn," [Jones v. United States, 357 U.S. 493, 499 (1958),] and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." [McDonald v. United States, 335 U.S. 451, 456 (1948).] "[T]he burden is on those seeking the exemption to show the need for it." [United States v. Jeffers, 342 U.S. 48, 51 (1951).]

The major categories of exceptions are:

1) searches with probable cause conducted under exigent circumstances such that taking the time to obtain a warrant would frustrate the purpose of the search, *Schmerber*, 384 U.S. 757.

2) searches conducted with the valid consent of the person being searched, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see* N.Y. Educ. Law § 912-a (McKinney Supp. 1987) (permits school authorities of each school district to subject all students in the district in grades seven through twelve at public and private schools to urinalysis for the detection of "dangerous drugs," with the consent of each student's parent or guardian);

3) searches conducted incident to a lawful arrest or for the safety of an arresting officer, *Chimel*, 395 U.S. 752; *Terry*, 392 U.S. 1; and

4) searches conducted in a unique setting which warrants relaxing typical fourth amendment protections, such as border, United States v. Villamonte-Marquez, 462 U.S. 579 (1983), and administrative searches, Camara v. Municipal Court, 387 U.S. 523 (1967); *see also* text accompanying notes 73-80, *infra*. *See generally* 68 Am. Jur. 2d, *Searches and Seizures* §§ 37-59 (1973).

57. Before *T.L.O.*, the courts were split on the applicability of the fourth amendment in public schools, holdings ranged from inapplicability of the fourth amendment to applicability with a full probable cause standard. *See T.L.O.*, 469 U.S. at 332 n.2.

58. The respondent T.L.O. was a 14-year-old student in a public high school who was caught smoking cigarettes with a companion in the lavatory in violation of a school rule. T.L.O. and her companion were taken to the principal's office, where Assistant Vice Principal Theodore Choplick met with them. T.L.O.'s companion admitted she had violated the school rule, but T.L.O. denied smoking in the lavatory and claimed she did not smoke at all. Mr. Choplick asked T.L.O. to come into his office and demanded to see her purse. He opened the purse and found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of lying. When he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers, which in his experience were closely associated with the use of marijuana. Mr. Choplick proceeded to search the purse thoroughly, suspecting there might be further evidence of drug use. He discovered a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters implicating T.L.O.

that the fourth amendment applies only to searches conducted by law enforcement officials. Citing *Camara v. Municipal Court*,[59] the Court noted the fourth amendment has been held applicable to civil as well as criminal authorities. The Court also rejected the *in loco parentis* doctrine, which views school officials not as representatives of the state but as parental surrogates who may claim parental immunity from the fourth amendment.

Noting that what constitutes a reasonable search depends upon the context of the search, the Court wrote that the standard of reasonableness requires a balancing of the individual's legitimate expectations of privacy and the government's need for effective methods to deal with breaches of public order. The Court rejected the state's argument that students have no legitimate expectation of privacy in personal property "unnecessarily" carried into school:

> Although this court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the school may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells . . . . We are not yet ready to hold that the school and the prisons need be equated for purposes of the Fourth Amendment.[60]

On the state's side, the Court wrote of the strong interest in "maintaining discipline in the classroom and on school grounds."[61] The Court noted that drug use and violent crime in the schools threaten the maintenance of order in the classroom.

In balancing these legitimate interests, the Court dismissed a requirement that school authorities obtain a warrant before searching a student. The Court also held that the requisite level of suspicion of illicit activity to justify a search in a school setting does not rise to the level of probable cause. The Court wrote, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[62] To determine the reasonableness of a school search, the Court adopted a twofold test based on that set forth in *Terry v. Ohio*.[63] First, the search must be "justified at its inception."[64] "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student had violated or is violating either the law or the rules of the school."[65] Second, the search, as actually conducted, must be "reasonably related in scope to the circumstances which justified the interference in the first place."[66] In the Court's words: "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[67] Under this standard, the Court held the search at issue was reasonable.

in dealing marijuana. This evidence was turned over to the police, and T.L.O. was brought to police headquarters, where she confessed to dealing marijuana. Delinquency charges were brought against T.L.O. by the state in the Juvenile and Domestic Relations Court of Middlesex County. T.L.O. contended that Mr. Choplick's search of her purse violated the fourth amendment and moved to suppress the evidence found in her purse and the confession, which she argued was tainted by the search.

59. 387 U.S. 523 (1967).
60. *T.L.O.*, 469 U.S. at 338-39.
61. *Id.* at 339.
62. *Id.* at 341.
63. 392 U.S. 1, 20 (1967).

VII. Compulsory Urinalysis of Public School Students Violates the *New Jersey v. T.L.O.* Reasonableness Standard

A. Compulsory Urinalysis Is Not Justified at Its Inception

The Becton High School proposal was not based on individualized suspicion of particular students but on a generalized suspicion that some students were using drugs and/or alcohol. Although some of the language in *T.L.O.* seems to contemplate that individualized suspicion is part of the reasonableness standard,[68] the Court did not decide the question since there was individualized suspicion of the student involved. In a footnote, the Court wrote:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[69]

In *Odenheim*, the school district argued that no individualized suspicion was required because all students would be tested under the proposal without

64. *T.L.O.*, 469 U.S. at 341.
65. *Id.* at 341-42 (footnote omitted).
66. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)).
67. 469 U.S. at 342.
68. *See supra* text accompanying note 65.
69. 469 U.S. at 342 n.8 (citation omitted).

discretion vested in any school official.[70] The proposal avoided the problem of discretionary testing, however, not by instituting safeguards, but by subjecting all students to the test. A blanket search, which presents serious constitutional problems,[71] can hardly be characterized as a safeguard against potential abuse of discretion.

The Fourth Amendment in Unique Settings

Since the proposal did not follow a standard of individualized suspicion, the highly intrusive nature of urinalysis[72] proved constitutionally fatal. In fourth amendment cases where a reasonableness standard has been applied because of the unique setting of the search,[73] courts have frequently upheld searches despite the lack of individualized suspicion where there was *both* a strong state interest and a low degree of intrusiveness.[74] In *United States v. Villamonte-Marquez*,[75] for instance, the Supreme Court held that customs officers could board offshore boats without reasonable suspicion, given the government's interest in deterring and apprehending smugglers and provided that the intrusion is limited to a "brief detention where officials come on board, visit public areas of the vessel, and inspect documents,"[76] and where neither the vessel nor its occupants are searched. In *United States v. Martinez-Fuerte*,[77]

70. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 59, 510 A.2d 709, 711 (1985).

71. *See* Ybarra v. Illinois, 444 U.S. 85 (1979); Davis v. Mississippi, 394 U.S. 721 (1969).

72. *See supra* note 48 and accompanying text.

73. *See supra* note 56. The other major exceptions to the warrant requirement provide no guidance because of the factual differences. The Boston High School drug screening proposal was not to be conducted under exigent circumstances with probable cause, nor conducted with the valid consent of the students, nor conducted incident to a lawful arrest.

74. United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974).

Even if the dicta in *Shoemaker*, *see supra* note 48, were accepted as to the lower degree of intrusiveness of urinalysis compared to body cavity and strip searches and searches where an actual intrusion beyond the body's surface occurs, these cases would not provide support for the constitutionality of compulsory urinalysis. The degree of intrusiveness in these cases was lower than urinalysis even under the *Shoemaker* view. In *Villamonte-Marquez* and *Martinez-Fuerte*, there was no search of the person. *Albarado* did involve a search of the person, but the degree of intrusiveness was lower than that of urinalysis.

> While the magnetometer may be "inefficient" in that it searches every passenger, balanced against this is the absolutely minimal invasion of privacy involved. There is no detention at all; there is no "probing into an individual's private life and thoughts . . . ." The passing through a magnetometer has none of the indignities involved in finger printing, paring of a person's fingernails or a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it. Not even the activation of the alarm is cause for concern because such a large number of persons may activate it in so many ways. No stigma or suspicion is cast on one merely through the possession of some small metallic object.

Albarado, 495 F.2d at 806 (citations omitted) (quoting Davis v. Mississippi, 394 U.S. 721 (1969)).

75. 462 U.S. 579 (1983).

76. *Id.* at 592.

77. 428 U.S. 543 (1976).

the Supreme Court held that fixed border control checkpoints need not be based on reasonable suspicion nor on any individualized suspicion that a vehicle contains illegal aliens, since visual inspection is not very intrusive and the need to make routine checkpoints is great. In *United States v. Albarado*,[78] the Second Circuit held reasonable the use of magnetometers at airports without any individualized suspicion, given the absolutely minimal intrusion and the great threat of hijacking.

Where there is no individualized suspicion and a high degree of intrusiveness, however, courts have held searches unreasonable despite the existence of a government interest. In *United States v. Brignoni-Ponce*,[79] the Supreme Court held random stops of vehicles in border areas unreasonable, on the grounds that they are more intrusive and discretionary than fixed checkpoint stops. In *Hunter v. Auger*,[80] the Eighth Circuit held unconstitutional strip searches of prison visitors based on unsubstantiated, anonymous tips.

The Fourth Amendment in Prisons

The only precedent that may be found for a search that is highly intrusive and without individualized suspicion is in the case of prisoners.[81] In *T.L.O.*, the Supreme Court expressly stated that it would not equate students and prisoners for constitutional purposes.[82] There is a legitimate state interest in maintaining order in both schools and prisons, but the analogy stops there. In a prison, security is a paramount concern, and little or no effort is directed toward creating a learning environment. Prisoners are stripped of many constitutional protections after being accorded due process of law. Surely, even the most pessimistic observer of the state of American schools would not advocate that school authorities regularly subject students to body cavity searches, as prison authorities may prisoners.[83]

78. 495 F.2d 799 (2d Cir. 1974).

79. 422 U.S. 873 (1975).

80. 672 F.2d 668 (8th Cir. 1982).

81. Bell v. Wolfish, 441 U.S. 520 (1979), held reasonable body cavity searches of prisoners conducted after every contact visit with a person from outside the institution. Justice Rehnquist wrote for the Court that "wide ranging deference" should be accorded policies that prison authorities deem necessary for security purposes. While he acknowledged that prisoners do retain some constitutional rights, he noted that security considerations may require "limitation or retraction" of those rights. Balancing the security interests of the prison against the diminished privacy interests of the prisoners, the Court held the body cavity searches could be conducted on a standard below probable cause. The Court did not determine what standard of suspicion the body cavity searches did meet, but it is at least arguable that, if not individualized suspicion, there were reasonable grounds to suspicion. Given the well-known problem of contraband smuggled into prisons, the mere fact that a prisoner has had contact with an outsider could be viewed as a security risk. Further, the body cavity searches were not compulsory. A prisoner could avoid the searches by not receiving visitors. Realistically, few prisoners could be expected to make such a choice, but with compulsory urinalysis even the possibility of avoiding the search without official sanctions is not present.

82. *See supra* text accompanying note 60.

83. *Bell*, 441 U.S. 520.