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Pretrial Drug Testing—An Essential Component of the National Drug Control Strategy

*Reggie B. Walton**
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When President George Bush unveiled the first National Drug Control Strategy in September 1989, he emphasized that combatting drug abuse and drug trafficking was the number one priority on his domestic affairs agenda.¹ The President's emphasis on this tragic and terribly destructive problem was consistent with its importance in the public's mind, as reflected in numerous polls and surveys. The President has continually reiterated the importance he attaches to the Nation's counter-drug efforts, and while opinion polls may now show other problems to be paramount in the public's mind, the drug problem remains a vital concern.²

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1. In his Inaugural Address (January 20, 1989), President Bush said, "There are few clear areas in which we as a society must rise up united and express our intolerance. The most obvious now is drugs. And when that first cocaine was smuggled in on a ship, it may as well have been a deadly bacteria, so much has it hurt the body, the soul of our country. And there is much to be done and to be said, but take my word for it: This scourge will stop!" 1 PUB. PAPERS 3 (1989).

2. See, e.g., *The New York Times/CBS News Poll*, N.Y. TIMES, Sept. 6, 1990, at A22.

This article addresses only one of the many weapons the United States has and needs in its arsenal to effectively combat the scourge of drugs: the expanded use of drug testing in the criminal justice system, and in particular, testing during the pretrial stage of the process. Such drug testing through urinalysis has been encouraged in each of the National Drug Control Strategies issued to date. This position is consistent with other themes incorporated in those Strategies and with the Constitutional protections provided by the Fourth, Fifth, and Sixth Amendments.³ As such, the use of drug testing as a part of the criminal justice system should be further expanded at the Federal, State and local levels. While this article confines itself primarily to the limited arena of pretrial drug testing, it should be noted that the Bush Administration has also encouraged the use of drug testing throughout the criminal justice process and also in the workplace, in both the public and private sectors.⁴

I. THE NATIONAL DRUG CONTROL STRATEGY'S EMPHASIS ON DRUG TESTING IN THE CRIMINAL JUSTICE SYSTEM

The third edition of the National Drug Control Strategy, prepared by the Office of National Drug Control Policy (ONDCP) was issued by President Bush on January 31, 1991. Like its predecessors, the Strategy presents a comprehensive approach to controlling both the supply of illicit drugs and the demand for them. The Strategy sets policies and encourages measures designed to implement those policies in each of seven priority subject areas: (1) the Criminal Justice System; (2) Drug Treatment; (3) Education, Community Action, and the Workplace; (4) International Initiatives; (5) Interdiction Efforts; (6) Research; and (7) Intelligence.

Certain themes are consistently emphasized throughout these different priority subject areas, including that of accountability. For too long in this country, both drug offenders and many of the programs designed to apprehend, prosecute, punish or treat them have been able to avoid accountability. To

3. See discussion *infra* part III.

4. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 70-73, 149 (1991) [hereinafter NATIONAL DRUG CONTROL STRATEGY III]; OFFICE OF NATIONAL DRUG CONTROL POLICY, STATE DRUG CONTROL STATUS REPORT (WHITE PAPER) 17-18 (1990) [hereinafter STATUS REPORT]; OFFICE OF NATIONAL DRUG CONTROL POLICY, BUILDING A DRUG-FREE WORKPLACE (GUIDE FOR STATE LEGISLATION) (1990).

address this deficiency, the Strategy has encouraged, among other measures: new and different kinds of accountability, so that all drug offenders, casual and occasional users as well as dealers, can be held responsible for their aberrant behavior; evaluations of the effectiveness of anti-drug programs (whether oriented towards law enforcement, prevention, treatment, or corrections) receiving Federal grant dollars; and the expanded use of quantified and scheduled objectives to better assess longitudinal program effectiveness.

There are a number of specific policies and programs encouraged in the National Drug Control Strategy that reflect this principle of accountability. One such policy that the Bush Administration has promoted from its inception has been the expanded use of drug testing in the criminal justice system. The initial Strategy, issued by President Bush on September 5, 1989, called for drug testing at every stage of the criminal justice process.⁵ A few months later, on January 25, 1990, President Bush's Second National Drug Control Strategy was issued. It, too, called for drug testing through urinalysis within the criminal justice system for those on pretrial and post-conviction release.⁶ Like its predecessors, the Third Strategy calls for the use of drug testing through urinalysis at all stages of the criminal justice process, from the time of arrest through parole.⁷

Following publication of the initial Strategy, the Administration proposed legislation that would have conditioned receipt of Federal criminal justice funds upon States adopting drug testing programs for targeted classes of individuals throughout their criminal justice systems.⁸ While Congress has not yet enacted the legislation, the Administration continues to support this requirement and will pursue its enactment.⁹

5. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 26, 100 (1989) [hereinafter NATIONAL DRUG CONTROL STRATEGY I].

6. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 25-26 (1990) [hereinafter NATIONAL DRUG CONTROL STRATEGY II]. The President submits a new National Drug Control Strategy to Congress by February 1 of each year, as required by Section 1005 of the Anti-Drug Abuse Act of 1988, Public L. No. 100-690, 102 Stat. 4181 (codified at 21 U.S.C. §§ 1502, 1504 (1988)). To date, each volume of the Strategy has reaffirmed—and then built upon—the policies set forth in the initial Strategy. See NATIONAL DRUG CONTROL STRATEGY II, *supra*, at 6; NATIONAL DRUG CONTROL STRATEGY III, *supra* note 4, at 2-3.

7. NATIONAL DRUG CONTROL STRATEGY III, *supra* note 4, at 34.

8. S. 1711, 101st Cong., 1st Sess. (1989).

9. NATIONAL DRUG CONTROL STRATEGY III, *supra* note 4, at 34. On March 11,

Drug testing programs can improve counter-drug efforts, and the accountability of those efforts, in a number of overlapping areas. For example, they serve as an "early warning system" that provides another method of monitoring pretrial and post-conviction releasees. Those who violate the conditions of their release by continued drug use can be detected quickly and sanctioned. Test results can also help judges allocate scarce treatment slots to those who need them most. Moreover, such testing programs, accompanied by swift and certain penalties for continued drug use in violation of a condition of community release, can provide an incentive for criminal defendants to get off, and stay off, illegal drugs.

II. DRUG USE AND ITS RELATIONSHIP TO CRIME AND FAILURE TO APPEAR FOR FUTURE COURT PROCEEDINGS

A. *Drug Use and Crime*

The government has a legitimate interest both in preventing crime and in securing the appearance of charged offenders at future court proceedings.¹⁰ In turn, the legitimacy of required urinalysis programs, at least at the pretrial stage, depends on whether the procedure is reasonably related to furthering those interests.¹¹ There is substantial evidence of such a relationship.

In 1986, a panel of criminal justice professionals convened by the National Research Council of the National Academy of Sciences concluded that while the connection may be a complex one, "[t]he relationship between substance abuse and criminal activity is widely thought to be firmly established, supported by empirical research as well as informal observations of criminal justice operations."¹² A 1986 United States Department of Justice survey of State prison inmates showed that one in three offenders was under the influence of some drug when they committed the offense for which they had been charged. For

1991, the Administration's drug testing proposal for criminal justice systems was submitted as part of the Comprehensive Violent Crime Control Act of 1991, S. 635, 102d Cong., 1st Sess. §§ 901-902.

10. Richard B. Abell, *Pretrial Drug Testing: Expanding Rights and Protecting Public Safety*, 57 GEO. WASH. L. REV. 943, 945, 950 (1989).

11. *Id.*

12. PANEL ON RESEARCH ON CRIMINAL CAREERS, NATIONAL ACADEMY OF SCIENCES 50 (A. Blumstein et al. eds., 1986). While serving as an Associate Judge on the District of Columbia's Superior Court, one of the co-authors of this article, Reggie B. Walton, was a member of this Panel.

certain offenses, the rates were even higher.¹³ Numerous other studies conducted over the last decade have shown that drug involved offenders commit crimes with much greater frequency than offenders who are not drug users.¹⁴ These crimes include not only continued drug violations and property-related offenses, but violent crimes as well. This is illustrated by the toxicology data of the victims and the urinalysis test results of the assailants involved in the 435 homicides which occurred in the District of Columbia from January 1 to November 30, 1990, which indicated that most of the victims and the assailants had drugs in their systems at the time of their deaths or arrests.¹⁵

The Drug Use Forecasting (DUF) System, established by the National Institute of Justice, reveals that drug use is far more prevalent among arrestees, as compared to the non-arrestee population. Since 1986, the DUF program has used random and voluntary urinalyses to test a sample of arrestees in selected major cities to determine recent drug use. By 1990, twenty-three cities had entered the DUF program, in which arrestees' urine samples are tested for the presence of ten different drugs (including cocaine, marijuana, phencyclidine-PCP, methamphetamine, heroin, and opium), and a report of the findings is released each quarter.¹⁶ Admittedly, the DUF data does not reveal whether the user's need for drugs was a motive for the commission of the offense charged, or whether the arrestee was a chronic or an occasional user.¹⁷ Nevertheless, it is significant that the DUF program determines drug use pri-

13. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, STATE PRISON INMATE SURVEY, 1986: DRUG USE AND CRIME 3-4 (1988).

14. See Christy A. Visher, *Using Drug Testing to Identify High-Risk Defendants on Release: A Study in the District of Columbia*, 18 J. CRIM. JUST. 321 (1990); see also MARY G. GRAHAM, U.S. DEPT OF JUSTICE, CONTROLLING DRUG ABUSE AND CRIME: A RESEARCH UPDATE (1987); BERNARD A. GROPPER, U.S. DEPT OF JUSTICE, PROBING THE LINKS BETWEEN DRUGS AND CRIME (1985); James Q. Wilson, *Drugs and Crime*, in 13 DRUGS AND CRIME 521, 522 (Michael Tonry & Norval Morris eds., 1990) James K. Stewart, *Quid Pro Quo: Stay Drug-Free and Stay on Release*, 57 GEO. WASH. L. REV. 68, 69 (1988).

15. STATISTICAL ANALYSIS CENTER, OFFICE OF CRIMINAL JUSTICE PLANS AND ANALYSIS, DISTRICT OF COLUMBIA, DRUG ABUSE INDICATORS TREND REPORT FOR THE DISTRICT OF COLUMBIA (1991); see also Jan M. Chaiken & Marcia R. Chaiken, *Drugs and Predatory Crime*, in 13 DRUGS AND CRIME 203, 205, 212-13 (Michael Tonry & Norval Morris eds., 1990); Stewart, *supra* note 14, at 69.

16. See, e.g., NATIONAL INST. OF JUSTICE, U.S. DEPT OF JUSTICE, ARRESTEE DRUG USE, JANUARY TO MARCH 1990 (1990).

17. Eric D. Wish & Bernard A. Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, in 13 DRUGS AND CRIME 321, 369 (Michael Tonry & Norval Morris eds., 1990).

marily through urinalysis, which has proven to be a far more reliable method than self-reporting.¹⁸ Moreover, the DUF program focuses on drug use among those charged with crimes, a population that is underrepresented in other drug use surveys, such as the National Institute on Drug Abuse's National Household Survey. By using urinalysis to test a sample of those arrested in major cities, the DUF program provides concrete information about a subsection of the population where drug use is heavily concentrated. Indeed, the results of the DUF program to date reveal that the rate of drug use is as much as ten times greater among those arrested for serious crimes, as compared to those in the general population.¹⁹

B. Drug Use and Failure to Appear

At least one judge who has previously written about pretrial drug testing has noted that assuring defendants' appearances at future court proceedings is a compelling governmental concern.²⁰ Clearly, this position is correct. When defendants fail to reappear for court proceedings, the criminal justice process, under most circumstances, cannot go forward. This causes substantial inconvenience to not only the court and the attorneys, but perhaps more importantly, to the victims of crime. In addition, public funds are lost every time a case has to be extended to apprehend defendants who fail to come to court.

It has been shown that drug use also has a negative effect on the reappearance rate of arrestees. In the District of Columbia, for example, researchers found, after screening for other factors that might affect pretrial release risk such as background characteristics and prior record, that defendants identified through urine tests as recent drug users pose higher pretrial release risks than nonusers, both for failure to appear

18. During an eight-month (June 1984—Jan. 1985) study of arrestees in the District of Columbia, less than one-half of the drug users identified by urine tests told researchers they were drug users. MARY A. TOBORG ET AL., U.S. DEPT' OF JUSTICE, ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA 5 (1989). Similar results were obtained from a comparative study of urinalysis and self-reporting involving arrestees in New York City. Eric D. Wish & Bruce D. Johnson, *The Impact of Substance Abuse on Criminal Careers*, in 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 70 (Alfred Blumstien et al. eds., 1986).

19. OFFICE OF NATIONAL DRUG CONTROL POLICY, LEADING DRUG INDICATORS (WHITE PAPER) 16-19 (1990).

20. JUDGE ROBERT L. EVANS, RECORDER'S COURT FOR THE CITY OF DETROIT, DRUG TESTING WITHIN THE CRIMINAL JUSTICE SYSTEM: IS IT CONSTITUTIONAL? (MONOGRAPH) 12 (1988).

and pretrial rearrest.²¹ A study of 2,606 New York City arrestees reached similar conclusions regarding the utility of urine test results in improving pretrial risk classification.²² It found that positive drug results were "significantly associated" with both failure to appear and the probability of rearrest.²³

The New York City study also corroborated findings from the District of Columbia program that the use of specific drugs and the use of a combination of drugs relate in different ways to the risks of pretrial arrest, failure to appear, or overall pretrial misconduct (a composite measure used by the researchers, consisting of failure to appear, pretrial rearrest, or both). Those who tested positive for cocaine and/or heroin were found to be more likely to fail to appear, while those testing positive for PCP or a combination of three or more drugs were more likely to be arrested during the pretrial period.²⁴ A third study conducted by the National Institute of Justice, using data from New York and Washington, also concluded that defendants with positive drug tests at the time of their arrest, especially for several drugs, are more likely to be rearrested before trial and more likely to fail to appear than arrestees with similar profiles whose urine tests were negative.²⁵

Moreover, defendants who "participated" in Washington's pretrial urine-testing program—arrestees tested on four or more occasions following their arrests (the lockup test plus at least three subsequent tests)—performed significantly better on pretrial release than other released defendants, while those

21. TOBORG ET AL., *supra* note 18, at 18.

22. Douglas A. Smith et al., *Drug Use and Pretrial Misconduct in New York City*, 5 J. QUANTITATIVE CRIMINOLOGY 101 (1989).

23. *Id.* at 122-23; see also Cathryn Jo Rosen & John S. Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. CRIM. L. & CRIMINOLOGY 114, 165 (1989). ("Preliminary research provides empirical evidence tending to show a connection between positive results in bail stage urine testing and performance on pretrial release.") (footnote omitted). However, in Smith et al., *supra* note 22, at 121-22, the same authors question the empirical support of the general relationship between drug use and crimes committed by individuals on pretrial release.

24. Smith et al., *supra* note 22, at 124; TOBORG ET AL., *supra* note 18, at 10.

25. Christy A. Visher & Richard L. Linster, *A Survival Model of Pretrial Failure*, 6 J. QUANTITATIVE CRIMINOLOGY 153 (1990); Christy A. Visher, *Incorporating Drug Treatment in Criminal Sanctions*, N.I.J. REP., Summer 1990, at 2 n.2. However, the author notes that in two other jurisdictions (Miami and Tucson), drug test results did not appear strongly related to rearrest or failure-to-appear rates, an inconsistency which she suggests may be explained by differences in study design and analysis and also by different patterns of drug use. *Id.* at 2-3, 7 n.3.

who did not comply with pretrial testing orders did notably worse.²⁶ Indeed, both the rates of pretrial rearrest and failure to appear for defendants who participated in the program—about two-thirds of all persons ordered into the programs—were about one-half the rates of the defendants who did not participate.²⁷ Thus, not only can initial lockup urine tests help classify defendants for pretrial release risks, but the nature of defendants' participation in the pretrial urine testing program after release can also help to assess pretrial release risks after enrollment in the program.²⁸

Judges in the District of Columbia recognize and appreciate the utility of this potential "signaling" effect of drug testing for pretrial monitoring purposes. When asked about the effects of the testing program on rates of failure to appear and pretrial rearrest, most judges thought both rates were lower than they would be without the program and that a defendant's performance in the program (both in terms of test results and test participation) served as a good "signal" or indicator with respect to both risks, particularly with respect to failures to appear.²⁹

III. PRETRIAL DRUG TESTING AND THE CONSTITUTION³⁰

Despite the obvious benefits that can be derived from pretrial drug testing, legal opposition to the procedure still exists.

26. TOBORG ET AL., *supra* note 18, at 18.

27. TOBERG ET AL., *supra* note 18, at 18.

28. TOBORG ET AL., *supra* note 18, at 18.

29. TOBORG ET AL., *supra* note 18, at 13; *see also* MARY A. TOBORG & JOHN P. BELLASSAI, U.S. DEPT OF JUSTICE, PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA: THE PERSPECTIVES OF JUDICIAL OFFICERS IN 1989 28-29 (1989) (available from the National Criminal Justice Reference Service, Rockville, Maryland); MARY A. TOBORG ET AL., ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA: PERIODIC URINE TESTING AS A SIGNALING DEVICE FOR PRETRIAL RELEASE (MONOGRAPH 5) (1989) [hereinafter PRETRIAL RELEASE].

30. In part V, *infra*, we also recognize the utility of post-conviction drug testing—where fewer constitutional protections exist—including a diminished expectation of privacy, than in the pretrial setting. *See, e.g.*, United States v. Williams, 787 F.2d 1182, 1185 (7th Cir. 1986); Storms v. Coughlin, 600 F. Supp. 1214, 1221 (S.D.N.Y. 1984); *see also* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987); Bell v. Wolfish, 441 U.S. 520 (1979); Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT §§10.9-10.10 (2d ed. 1987). *But see* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1182 n.97, 1213-15, 1226-28, 1239 (1990). The weight of authority supports the Administration's view that post-conviction drug testing is both a legally accepted and an effective component of the criminal justice system.

The legal arguments advanced in opposition to pretrial testing are numerous.³¹ They include: (1) that pretrial drug testing amounts to a substantive due process violation because it places an unreasonable condition of release on arrestees; (2) that the testing procedures are not sufficiently reliable to meet the constitutional requirements of procedural due process; (3) that pretrial drug testing constitutes a violation of the Fourth Amendment proscription against unreasonable searches and seizures; (4) that pretrial drug testing violates the constitutional privilege against self incrimination guaranteed by the Fifth Amendment; and (5) that the procedure deprives arrestees of their Sixth Amendment right to counsel.³² However, none of these arguments is sufficiently compelling to render pretrial testing unconstitutional.³³

A. *The Substantive Due Process Argument*

In *Bell v. Wolfish*,³⁴ the Supreme Court held that the Fifth Amendment's Due Process Clause (made applicable to the States by the Fourteenth Amendment) protects arrestees from being punished prior to an adjudication of guilt.³⁵ Thus, in viewing the constitutionality of conditions of pretrial release, the appropriate inquiry centers on whether the conditions of release amount to punishment of the arrestee.³⁶ Specifically, the Supreme Court held "that in determining whether a governmental action is considered punishment in the constitutional sense of the word a court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."³⁷ Previously, the Supreme Court had held that the substantive

31. See generally Rosen & Goldkamp, *supra* note 23, at 114.

32. A District of Columbia study in which twenty-five judges and commissioners were interviewed showed that pretrial drug testing actually enhanced Eighth Amendment bail rights. This salutary result occurs because drug testing affords arrestees who are drug users the option of being placed on pretrial release without posting a monetary bond, provided that they submit to continued urine test monitoring following their release. See Abell, *supra* note 10, at 956 (citing TOBORG & BELLASSAI, *supra* note 29, at 17).

33. See EVANS, *supra* note 20, at 17; Abell, *supra* note 10, at 945-946; Charles J. Cooper, *The Constitutionality of Drug Testing*, 35 FED. BAR NEWS J. 359 (1988); Stewart, *supra* note 14, at 74-75.

34. 441 U.S. 520 (1979).

35. *Id.* at 535.

36. *Id.*

37. *Id.* at 538.

due process analysis requires courts to assess "whether there is an alternative purpose to which [the condition of release] may rationally be connected, and whether the procedure under review appears excessive in relation to the alternative purpose."³⁸ So long as a particular "condition or restriction" is reasonably related to a legitimate government objective, the Supreme Court has held that it does not, without more, amount to "punishment."³⁹ On the other hand, if the restriction or condition is not "reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment."⁴⁰

Consistent with the holding in *Bell*, the Federal Bail Reform Act of 1984 (Act)⁴¹ has been held to authorize courts to detain arrestees charged with certain serious felonies if the government demonstrates by "clear and convincing evidence" after an adversary hearing, that no release conditions "will reasonably assure the safety of any other person and the community."⁴² While the Act grants courts the authority to detain arrestees prior to trial, it also gives them the authority to place conditions and restrictions on arrestees who are released.⁴³ Accordingly, the Supreme Court has held that "pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty."⁴⁴

As discussed in Part II, *supra*, there is a direct correlation between drug use and the increased likelihood that defendants will fail to appear for future court proceedings, be rearrested, or both. The substantive due process test articulated in *Bell* is satisfied by this nexus.⁴⁵

38. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

39. *Bell*, 441 U.S. at 539.

40. *Id.*

41. 18 U.S.C. §§ 3141 -3156 (Supp. III 1982). The Act states that: "The judicial officers shall hold a hearing to determine whether any conditions or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." *Id.* § 3142 (f).

42. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

43. *Id.* at 742. The Supreme Court in *United States v. Salerno* held that when determining bail and pretrial release conditions courts must consider the following statutorily enumerated factors: (1) a defendant's criminal charge, (2) a defendant's prior record of conviction, (3) a defendant's community ties, and (4) a defendant's history of drug abuse. *Id.* at 742-43.

44. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

45. 441 U.S. at 539.

While alternatives to systematic urine testing to detect drug use could theoretically be employed, whether at the time of the initial appearance or during periods of pretrial or post-conviction release, the likelihood of discovering such use by self-reporting or other measures is not as reliable as with urine testing.⁴⁶ Arrestees are less likely to report their drug use, knowing that their initial release may be adversely affected by such an admission, or that future testing or participation in a treatment program may be imposed as a condition of release.⁴⁷ Against this reality, mandatory urine testing cannot be considered excessive and is, therefore, not violative of the substantive due process test as articulated in *Kennedy v. Mendoza-Martinez*.⁴⁸

B. *The Procedural Due Process Argument*

To satisfy the requirements of procedural due process, the process used to detect drug use must be sufficiently reliable so as to ensure the accuracy of the results.⁴⁹ In most jurisdictions which have initiated mandatory pretrial drug testing, the Enzyme Multiplied Immunoassay Technique (EMIT) system is used to test the urine samples. Various courts have concluded that the EMIT test is presumptively reliable and that the results are, therefore, admissible evidence.⁵⁰ Thus, once this threshold assessment of the reliability of the test is made, procedural due process is not offended so long as the proce-

46. See discussion *supra* part II.

47. See, e.g., *supra*, studies cited in note 18 and the report and report findings, *infra*, notes 100 & 102.

48. 372 U.S. 144, 168-69 (1963). Even if other methods of detecting drug use were just as reliable and could be accomplished by less intrusive measures, systematic pretrial urine testing could, nevertheless, be deemed reasonable. Although the use of available alternative sources of information or evidence must be considered when determining the reasonableness of a particular search, courts need not rule that a restriction or condition is excessive merely because a less intrusive alternative exists. *Accord* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987), *aff'd*, 489 U.S. 656 (1989) (citing *Colorado v. Bertine*, 479 U.S. 367 (1987)).

49. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987).

50. See, e.g., *Spense v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986); *Wykoff v. Resig*, 613 F. Supp. 1504, 1512 (N.D. Ind. 1985); *Jensen v. Lick*, 589 F. Supp. 35, 39 (D.N.D. 1984); *Jones v. United States*, 548 A.2d 35, 46 (D.C. 1988); *Smith v. State*, 298 S.E.2d 482, 484 (Ga. 1983); see also *Abell, supra* note 10, at 947 n.19; *Mike Lawrence & Maria Hewitt, Accuracy and Reliability of Urine Drug Tests*, 36 KAN. L. REV. 641 (1988); *Rosen & Goldkamp, supra* note 23, at 122 n.42.

dures employed to protect the integrity of the urine samples are adequate to insure the accuracy and reliability of the results which are presented to the court.⁵¹

C. *The Fourth Amendment Search and Seizure Argument*

The Fourth Amendment of the United States Constitution guarantees, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."⁵² This amendment protects persons, "against certain arbitrary and invasive acts by officers of the government or those acting at their direction."⁵³ The Supreme Court has ruled that the collection and testing of urine samples is a "search" under the Fourth Amendment.⁵⁴ In reaching this conclusion, the Court has stated that "[t]here are few activities in our society more personal or private than the passing of urine."⁵⁵ In addition, the Supreme Court noted that the testing of urine samples can reveal other medical information which may implicate privacy interests.⁵⁶

However, pretrial urine testing only transgresses the Fourth Amendment if the taking of the samples for testing purposes is unreasonable.⁵⁷ When determining reasonableness, the Supreme Court has stated that in each case it requires a balancing of "the intrusion [of a particular practice] on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁵⁸ Courts must consider various factors when conducting this balancing test, including: (1) the scope of the particular intrusion; (2) the man-

51. *Von Raab*, 816 F.2d at 182.

52. U.S. CONST. amend. IV.

53. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989), (citing *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

54. *Skinner*, 489 U.S. at 617 ("Taking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the [individual's] possessory interest in his bodily fluids."). *Id.* at 617-18 n.4. However, once an act is characterized as a "search," it becomes unnecessary for Fourth Amendment purposes to also determine whether a seizure occurred. *Id.*; see also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

55. *Skinner*, 489 U.S. at 617 (quoting *Von Raab*, 816 F.2d at 175).

56. *Id.*

57. *Id.* at 619 ("[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); see *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757, 768 (1966).

58. *Skinner*, 489 U.S. at 619 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

ner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted.⁵⁹

In criminal cases, searches or seizures will generally be held reasonable only when "accomplished pursuant to a judicial warrant issued upon [a showing of] probable cause."⁶⁰ There are many exceptions to the warrant requirement, however.⁶¹ Pretrial drug testing has all of the ingredients of the non-criminal or administrative exception. The Supreme Court has determined that such searches are reasonable in the absence of probable cause or some quantum of individualized suspicion "where a Fourth Amendment intrusion serves special governmental needs beyond the normal need for law enforcement,"⁶² and when balanced against the individual's privacy expectations it would be "impractical to require a warrant or some level of individualized suspicion in the particular context."⁶³

The results of pretrial urine tests are only used for administrative and regulatory purposes, although admittedly within the criminal justice setting.⁶⁴ Moreover, pretrial urine tests are only conducted on those arrestees who consent to them. While as a practical matter the refusal to provide an initial sample may adversely impact an arrestee's pretrial release status, the arrestee nevertheless retains the right of refusal.⁶⁵ Similarly, arrestees who are released subject to a condition of

59. *Bell v. Wolfish*, 441 U.S. 520, 559 (1978).

60. *Skinner*, 489 U.S. at 619 (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

61. *National Treasury Employees Union v. Von Raab*, 489 U.S. 665 (1989) ("While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.") (citations omitted).

62. *Id.*

63. *Id.* at 665-66; see also *Skinner*, 489 U.S. at 619 ("When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context.") (citations omitted); *Willner v. Thornburgh*, 928 F.2d 1185, 1187 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991).

64. *Rosen*, *supra* note 30, at 1191 ("[A]dministrative searches may be conducted with the primary purpose of discovering criminal misconduct in order to impose non-criminal sanctions involving loss of important rights and privileges or interests, such as continued employment, the right to attend school, or imposition of civil fines and penalties."); see also *Griffin*, 483 U.S. at 873-74.

65. JOHN A. CARVER, U.S. DEPT OF JUSTICE, DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING (1986).

regular pretrial drug testing expressly consent to abide by this condition, along with any other conditions imposed by the court.⁶⁶

Furthermore, the results of pretrial urine testing cannot be used in determining guilt on the underlying offense.⁶⁷ For example, in the District of Columbia, urine-test results are not admissible on the issue of guilt on the underlying charge, although they can be used for other specified collateral purposes, including use at perjury trials and contempt proceedings brought against arrestees for violating conditions of release, and for purposes of impeachment in any subsequent proceeding.⁶⁸

The government's legitimate interests in ensuring that arrestees who are placed on pretrial release return to court as instructed and do not commit new offenses while on release is significantly advanced by pretrial drug testing.⁶⁹ The nexus between the furtherance of these legitimate interests and mandatory drug testing is founded in the growing body of empirical evidence showing a positive correlation between drug use and crime and between drug use and failure to appear for subsequent court appearances.⁷⁰

On the other hand, whatever additional intrusion on the privacy interests of arrestees is occasioned by pretrial drug testing is minimal.⁷¹ The persons being tested are already in

66. *Id.*

67. *Id.*

68. D.C. CODE ANN. § 23-1303(d) (1981 & Supp. 1988); *see also infra* notes 88-89; TOBORG ET AL., *supra* note 18, at 2.

69. *See, e.g.,* discussion *supra* part II.

70. *See supra* part II. In addition, drug use is itself a crime, and procedures like pretrial drug testing, which detect illegal drug use and discourage further illegal use, help reduce the incidence of this crime. Thus, "[e]ven if no empirical data existed that correlated drug testing and decreased criminal activity, drug testing at least has the demonstrable result of lowering future drug use, a goal which the government has a legitimate interest in advancing." Abell, *supra* note 10, at 951 (footnote omitted).

71. Abell, *supra*, note 10, at 954; *see also* Stewart, *supra* note 14, at 75 ("What is reasonable also requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' Use of urine is considered far less intrusive than the drawing of blood, which requires an invasive technique.") (citation omitted). *But see* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 613, 626-28 (1989) (recognizing a privacy interest of constitutional dimensions in urine testing, even though it does not involve an invasive act, but one which was nevertheless diminished and outweighed by the government's public safety interests); *see also* Willner v. Thornburgh, 928 F.2d 1185, 1187 (D.C. Cir.), *cert. denied*, 112 S.

custody, and this alone constitutes a substantial restriction on the liberty rights of the arrestees.⁷² Furthermore, a person detained pursuant to a lawful arrest has already been seized and can thereafter be compelled to give handwriting and blood samples, voice exemplars, and to stand in line-ups.⁷³

Requiring the government either to obtain a warrant or to develop individualized suspicion as predicates for pretrial urine testing would severely hinder the government's ability to further the dual objectives derived from such testing. In order to have test results available for arrestees' initial court appearances, when the issue of bail must be addressed—which occurs within hours after an arrest—the tests must be conducted expeditiously. The Supreme Court has recognized that the government's interest in dispensing with the requirement of a search warrant is at its strongest when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”⁷⁴ If the test results are not completed by the time of required bail hearings, the government's legitimate purposes are not only frustrated, but are totally defeated. Similarly, the systematic and expeditious processing of urine samples, and the mass screening of arrestees required if the government is not to be confined to relying on inaccurate measures of recent drug use (such as self-reporting) in order to further the purposes of drug testing, would be compromised if individualized suspicion were to be required before an arrestee could be tested.⁷⁵

Ct. 669 (1991).

72. *Bell v. Wolfish*, 441 U.S. 520, 537 (1978).

73. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987), *aff'd*, 489 U.S. 656 (1989) (quoting *United States v. Wade*, 388 U.S. 218, 222 (1967)).

74. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 613, 623 (1989) (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 533 (1967)).

75. One commentator has observed:

[P]retrial urinalysis specifically avoids “individualized suspicion” analysis by requesting all persons in lock-up to participate. Further, the liberty and property interests—employment versus the recognized government interest in setting bail—are so unrelated that the “individualized suspicion” need not be formed. The results of pretrial urinalysis testing are not used to deny or terminate employment. Nor are they used to effect an arrest and thus seize a person, thereby limiting liberty. On the contrary, arrestees submit to testing voluntarily to provide information related to bail. No individual is singled out as a suspect of unlawful behavior or as a danger to the community; thus individualized suspicion is never formed. Therefore, the intrusion into liberty or property interests need not be balanced against individualized “reason to believe” because this analysis

In sum, the government's legitimate interests in ensuring that arrestees who are released pending trial return to court as instructed and refrain from committing new offenses while on conditional release are significantly advanced by pretrial urine testing. On the other hand, the intrusion on the Fourth Amendment rights of arrestees which occurs from the taking of the urine samples, prior to an initial appearance or as a condition of pretrial release, is minimal. Balancing the competing interests of the government and arrestees in the context of pretrial urine testing tilts the scales heavily in favor of the government and justifies the testing of all arrestees without first requiring that the government acquire a warrant or make a showing of individualized suspicion.⁷⁶

D. *The Privilege Against Self-Incrimination Argument*

The Fifth Amendment privilege against self-incrimination "only protects an accused from being compelled to testify against himself, or otherwise provide the government with evidence of a testimonial or communicative nature."⁷⁷ The information discovered from a drug test does not reveal any knowledge that the person tested was required to communicate.⁷⁸ Moreover, pretrial drug test results are used simply to aid the court in selecting appropriate release conditions.⁷⁹ Therefore,

simply does not apply.

Abell, *supra* note 10, at 955 (citations omitted). *But see* Rosen & Goldkamp, *supra* note 23, at 171 (Absent consent, implementation of mass urine testing programs may be impossible if pre-bail drug testing is limited by requiring reasonable, individualized suspicion.).

76. *Skinner*, 489 U.S. at 626-28; *see also* Willner v. Thornburgh, 928 F.2d 1185, 1191 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991).

77. *See* United States v. Dionisio, 410 U.S. 1, 7 (1973) (producing voice exemplars does not violate the privilege against self-incrimination); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (requiring handwriting samples does not violate the privilege against self-incrimination); *United States v. Wade*, 388 U.S. 218, 221-23 (1967) (requiring arrestees to stand in a lineup does not violate the privilege against self-incrimination); *Schmerber v. California*, 384 U.S. 758, 760 (1966) (requiring an arrestee to furnish blood samples does not violate the privilege against self-incrimination). In the case of pretrial urine testing, as in these cases, an arrestee's testimonial capacities are in no way implicated. Indeed, "[an arrestee's] participation, except as a donor, [is] irrelevant to the results of the test, which depend on chemical analysis and on that alone." *Id.* at 765 (footnote omitted).

78. *Schmerber*, 384 U.S. at 765.

79. The District of Columbia pretrial drug test results are also routinely used by judges when imposing sentences. Since guilt has already been established, there is nothing legally impermissible about this practice. *See id.* at 761 (holding that

the Fifth Amendment privilege against self-incrimination cannot be considered a bar to mandatory pretrial urine testing.

E. The Sixth Amendment Right to Counsel Argument

The Sixth Amendment guarantees all criminal defendants the right to the assistance of counsel.⁸⁰ The right attaches at the "time adversary judicial proceedings have been initiated against [the accused]."⁸¹ Such proceedings have been characterized by the Supreme Court as "critical stage[s] of the prosecution."⁸² While the Supreme Court has not yet ruled on the specific issue of whether the right to counsel attaches when urine samples are collected or when pretrial drug testing is conducted, the Court's precedents clearly suggest that neither of these events occurs during a "critical stage in the prosecution." Like the post-arrest taking or testing of blood, fingerprints, clothing, hair, and the like, the denial of the right to have counsel present when the urine samples are taken or when the pretrial drug tests are performed does not violate a defendant's Sixth Amendment rights, "since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial."⁸³ However, even if arrestees had the right to have their attorneys present, the Sixth Amendment would not preclude the government from conducting pretrial urine tests.⁸⁴

even when the non-testimonial evidence is used to discover evidence that can be used to prosecute the individual, there is no violation of the privilege against self-incrimination). The test results merely provide additional information for the sentencing judge to consider when assessing whether convicted individuals will comply with conditions of probation or pose a danger to the public if a probationary sentence is imposed. *See* EVANS, *supra* note 20, at 18.

80. U.S. CONST. amend. VI.

81. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

82. *Simmons v. United States*, 390 U.S. 377, 382-83 (1967).

83. *United States v. Wade*, 388 U.S. 218, 227-28 (1967); *see, e.g., Gilbert v. California*, 388 U.S. 263 (1967) ("The taking of the [handwriting] exemplars was not a 'critical' stage of the criminal proceedings . . ."); *Schmerber v. California*, 384 U.S. 758, 766 (1966) (no right to counsel at the post-arrest drawing of a blood sample because "[n]o issue of counsel's ability to assist [the defendant] in respect of any rights he did possess is presented."); *see also* 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 7:3 (2d ed. 1986 & Supp. 1989).

84. *See, e.g., Wade*, 388 U.S. at 237-38.

IV. EXISTING PROGRAMS FOR DRUG TESTING OF ARRESTEES

A. *The Washington, D.C., Program*⁸⁵

Beginning in 1984, a comprehensive pretrial drug testing program for adult defendants was implemented in the District of Columbia, funded by the National Institute of Justice (NIJ). When Federal funding for the program expired in 1986, the program was maintained through local funding. The testing program is operated by the District of Columbia Pretrial Services Agency (PSA), an independent agency of the District of Columbia Government. The PSA is charged by law with the responsibility for (1) interviewing all adult arrestees to determine their eligibility for pretrial release; (2) making recommendations as to appropriate terms and conditions for release in all criminal cases; and (3) monitoring compliance with release conditions for all defendants, except those released on surety bonds.⁸⁶

PSA attempts to test all adult arrestees coming through the District of Columbia's Superior Court lockup for the presence of selected drugs in their urine, prior to their initial court appearances. The tests will detect the presence of opiates (primarily heroin), cocaine, PCP, amphetamines, and methadone.⁸⁷ The urine samples are collected in the presence of a PSA worker.⁸⁸ The samples are then taken by PSA staff

85. D.C. CODE ANN. § 23-1303 (1981 & Supp. 1988). While not specifically authorizing drug testing, the statutory basis for the District of Columbia's testing program rests in this section and the other sections (23-1301 to 23-1332) of Chapter 13 of Title 23 of the D.C. Code [Pretrial Services Agency and Pretrial Detention]. A more complete description of the District of Columbia drug testing program can be found in articles by John A. Carver, Esq., Director of the District of Columbia Pretrial Services Agency. See John A. Carver, *Pretrial Drug Testing: An Essential Step in Bail Reform*, 5 B.Y.U. J. PUB. L. ??? (1991); CARVER, *supra* note 65. For other evaluations of the District of Columbia program see TOBORG & BELLASSAI, *supra* note 29 and PRETRIAL RELEASE, *supra* note 29.

86. TOBORG & BELLASSAI, *supra* note 29, at 1.

87. Beginning in 1986, the District of Columbia Pretrial Services Agency (PSA) also began testing all juvenile arrestees for the same selected drugs except methadone. TOBORG AND BELLASSAI, *supra* note 29, at 5.

88. The Supreme Court considered whether urine samples are taken under the direct supervision of a monitor as a relevant factor when assessing the degree of the intrusion on the individual's privacy rights. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 613, 626 (1989). While the Court stated that the lack of such monitoring lessened the extent of the intrusion, it nevertheless recognized "the desirability of such a procedure to ensure the integrity of the sample." *Id.* Moreover, the *Skinner* Court, in the context of employee testing, concluded that the

from the court lockup directly to PSA's laboratory—located in the same building—for analysis, using the EMIT system.⁸⁹ Test results are made available that same day—usually within 1-2 hours—to PSA's in-court representatives, who are present at the arrestee's initial court appearance to make the test results available to the sitting judge or commissioner and to make pretrial release recommendations to the court.

Before this program began, the only release option specifically tailored to the needs of drug users had been referrals for treatment. With the advent of the drug testing program, however, a new release alternative became available for drug-using defendants, namely, placement in PSA's periodic urine-testing program.⁹⁰ If an individual repeatedly tests positive while on pretrial release and the positive results are confirmed by a second EMIT test, the defendant may be considered in violation of a condition of his release or held in contempt of court for failure to comply with a court-ordered condition of release. A series of graduated sanctions can then be imposed, ranging from more frequent drug testing to additional release conditions—including the posting of a money bond—and the imposition of a contempt of court citation resulting in a fine or a prison sentence.

nature of the industry was the most important factor to consider when calculating the reasonableness of employees' expectations of privacy. *Id.* at 627. Since the industry in *Skinner* (the railroad industry) "is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees," the Court held that the justifiable expectations of privacy for such employees is minimal. *Id.* at 627-28.

In the context of pretrial testing, arrestees have been charged with violating a criminal statute and are already in custody when the urine samples are taken. Furthermore, the arrestees do not have access to a private bathroom when the samples are collected during their detention. Under these circumstances, arrestees' reasonable expectations of privacy—at least as to their urine—cannot be considered substantial. And when weighed against the compelling government interest to determine whether arrestees are drug users for the purpose of setting bail, the government's interests are clearly superior. Accordingly, the presence of the PSA monitor is not so intrusive as to make the collection of the urine samples an unreasonable search or seizure.

89. The District of Columbia Court of Appeals has held "that [the Enzyme Multiplied Immunoassay Technique] EMIT test results are presumptively reliable and generally admissible into evidence in every case." *Jones v. United States*, 548 A.2d 35, 46 (D.C. 1988) (citation omitted). In *Jones*, the government was allowed to introduce evidence of a positive pre-arraignment urine test to impeach the defendant's testimony that he did not know the substance he was charged with possessing was cocaine.

90. Judges also use the information in fashioning appropriate sentences. TOBORG & BELLASSAI, *supra* note 29, at 2; see also *supra* notes 68 & 79.

Though it began as a research program, the PSA drug testing program now comprises an integral part of the pretrial (as well as the post-conviction) decision-making process in the District of Columbia's Superior Court. During the period from the program's implementation on March 5, 1984, until January 1, 1988, some 57,000 criminal defendants in the District of Columbia program were tested.⁹¹ In 1988 alone, the agency conducted 35,000 prisoner interviews, sent out 60,000 court appointment letters, and performed more than 50,000 drug tests.⁹²

B. Other Local Programs

The Washington, D.C., drug testing program has served as a model for a number of other programs around the country.⁹³ Beginning in 1987, the United States Department of Justice's Bureau of Justice Assistance (BJA), seeking to replicate and test the "D.C. model" in other jurisdictions, contracted with the Pretrial Services Resource Center in Washington, D.C., to assist BJA in selecting from among applicant jurisdictions a limited number of sites to implement pretrial drug testing programs, and to provide technical assistance to those sites during the period when discretionary Federal funding was provided.⁹⁴ Since then, seven such programs have been initiated: Pima County, Arizona (Tucson, beginning in 1987); Multnomah County, Oregon (Portland, beginning in 1987); New Castle

91. Stewart, *supra* note 14, at 73.

92. David S. Broder, *D.C. Pretrial Agency Is a Small but Vital Cog in Wheels of Justice*, WASH. POST, May 28, 1989, at C1.

93. The Office of National Drug Control Policy has emphasized the importance, at both the State and Federal levels, of devising workable measures of accountability to ensure that limited funds go to those programs that have achieved demonstrable results. See, e.g., OFFICE OF NATIONAL DRUG CONTROL POLICY, UNDERSTANDING DRUG TREATMENT (WHITE PAPER) 2-3 (1990); STATUS REPORT, *supra* note 4, at 1.

94. PRETRIAL SERVICES RESOURCE CENTER, U.S. DEPT OF JUSTICE, ESTIMATING THE COSTS OF DRUG TESTING FOR A PRETRIAL SERVICES PROGRAM 1 (1989). The Resource Center also provides technical assistance to local jurisdictions using Federal funds from the Bureau of Justice Assistance's (BJA) block grant program to implement pretrial drug testing. The Resource Center has also prepared two other monographs, still in draft form and under review by BJA: "Integrating Drug Testing into a Pretrial Services System," an implementation guide for program administrators, and "Interim Guidelines for Pretrial Drug Testing," which provides a framework for initiating and operating a pretrial drug testing program. The American Probation and Parole Association is also working with BJA to develop guidelines for post-conviction drug testing.

County, Delaware (Wilmington, beginning in 1987 and terminated shortly thereafter); Prince George's County, Maryland (beginning in 1988); Maricopa County, Arizona (Phoenix, beginning in 1988); Milwaukee County, Wisconsin (beginning in 1989); and Los Angeles County, California (beginning in 1990 but involving only pretrial supervision testing). Because of funding problems, several jurisdictions have subsequently limited or discontinued their pre-initial appearance testing programs.⁹⁵

While these are the only federally-funded programs that have employed—at least initially—pre-arraignment drug testing on a widespread basis, a number of other state and local programs use drug testing on a limited basis at different stages of their criminal justice process. A nationwide survey of state and local pretrial services programs conducted by the Pretrial Services Resource Center in 1990 revealed that 72 of the 180 programs responding indicated that pretrial drug testing is conducted in some capacity. Of these 72 programs, 58 indicated that testing is available only as a condition of release and on a selective basis.⁹⁶

Another survey has recently been conducted by the National Criminal Justice Association (NCJA), as part of their study to determine the fiscal impact on States of the drug testing requirement called for in the National Drug Control Strategy.⁹⁷ As of January 31, 1991, twenty-four States and the Dis-

95. While not as exhaustive as the studies of the Washington, D.C. program, evaluations have been prepared for some of the other demonstration sites. See STEFAN KAPSCH & LOUIS SWEENEY, U.S. DEP'T OF JUSTICE, MULTNOMAH COUNTY DETECTION AND MONITORING OF DRUG-USING ARRESTEES, EVALUATION FINAL REPORT (REVISED) (1990); JOHN S. GOLDKAMP ET AL., U.S. DEP'T OF JUSTICE, THE UTILITY OF DRUG TESTING IN THE ASSESSMENT OF DEFENDANT RISK AT THE PRETRIAL RELEASE DECISION, FINAL REPORT (1989); JOHN S. GOLDKAMP ET AL., U.S. DEP'T OF JUSTICE, MEASURING THE IMPACT OF DRUG TESTING AT THE PRETRIAL RELEASE STAGE: PRETRIAL DRUG TESTING IN MILWAUKEE COUNTY, NEW CASTLE COUNTY AND PRINCE GEORGE'S COUNTY: PRELIMINARY REPORT WITH EVALUATION UPDATE FROM THE PIMA COUNTY PROGRAM (1989).

96. Conversation with the Pretrial Services Resource Center, Washington, D.C., February 1991.

97. The National Criminal Justice Association (NCJA) is a special interest group based in Washington, D.C., that represents States on crime control and public safety matters and provides staff support to the National Governors Association's Committee on Justice and Public Safety. The impact study provision was incorporated into the State-Justice appropriations bill, H.R. 2991, 101st Cong., 1st Sess. (1989), which was signed into law by President Bush on November 21, 1989. The study is expected to be completed by the end of 1991. The study is being funded by the National Institute of Justice.

trict of Columbia had responded to the survey. Preliminary results suggest that drug testing programs for probationers and parolees are most common, with at least some testing of those populations in twenty-three of the twenty-five jurisdictions; in addition, seventeen states reported testing individuals who were under some other form of conditional release (either pre-trial or post-conviction, or both). Nineteen states also reported testing individuals who were incarcerated, and fifteen reported testing inmates in other correctional facilities, such as "boot camps." Thirteen states reported testing arrestees, and ten states reported testing arrestees who had been detained following their initial court appearance; however, early analyses suggest that much of the reported testing of these populations occurs as part of the nationwide Drug Use Forecasting (DUF) program and not as a sanction or as a monitoring measure. A number of states reported having existing testing authority but no testing programs; most often this authority covers probation and parole populations, followed by the testing of individuals on other forms of conditional release (either pretrial or post-conviction), prison inmates, and persons in other types of correctional facilities.⁹⁸

C. *Drug Testing Programs in the Federal Courts*

Section 7304 of the Anti-Drug Abuse Act of 1988,⁹⁹ required the Director of the Administrative Office of the United States Courts ("Administrative Office") to establish a demonstration program of mandatory drug testing of criminal defendants in eight Federal judicial districts. The program began January 1, 1989, and concluded two years later, in the following districts: the Middle District of Florida; the Southern District of New York; the Eastern District of Michigan; the Western District of Texas; the District of Nevada; the District of Minnesota; the District of North Dakota; and the Eastern District of Arkansas. As of March 1991, all of the demonstration sites were continuing the pretrial testing programs with funding from the Administrative Office, but only Arkansas was continuing to test post-conviction releasees on a comprehensive basis.¹⁰⁰ To the extent feasible, testing was to be completed

98. NATIONAL CRIMINAL JUSTICE ASSOCIATION, STATUS OF NCJA RESEARCH ON ISSUES AFFECTING DRUG TESTING OF CRIMINAL JUSTICE POPULATIONS IN THE STATES (DRAFT REPORT) 3-5 (1991).

99. Pub. L. No. 100-690, 102 Stat. 4181 (codified at 21 U.S.C. § 1501 (1988)).

100. Conversation with the Administrative Office of the United States Courts,

prior to the defendant's initial appearance before a judge or magistrate, and the results of the test were to be included in the bail report presented to the judicial officer. If the court ordered the release of the defendant before trial, under title 18, Section 3142(c) of the United States Code, it was to order further periodic testing as a condition of release.¹⁰¹

The legislation which established the demonstration program further provided that for felony offenses occurring or completed on or after January 1, 1989, it was to be an additional, mandatory condition of probation or unsupervised release that defendants refrain from the illegal use of any controlled substances and submit to periodic urinalysis to detect drug use at least once every sixty days. However, the testing requirement could be suspended if all of a defendant's drug tests were negative after at least one year of testing.¹⁰²

The findings of the demonstration program support other studies showing that urine testing is substantially more reliable than self-reporting in identifying recent drug users.¹⁰³ Moreover, during the length of the program, there were no formal legal challenges to the constitutionality of pretrial drug testing in the federal system.¹⁰⁴ In its final report to Congress on the demonstration project, the Administrative Office recommended the expansion of pretrial urine testing, both to enhance the ability of judicial officers to assess the dangerousness of defendants for bail-setting purposes and to enhance the current methods of post-conviction drug testing administered in the federal court system.¹⁰⁵

V. USING DRUG TEST RESULTS TO INCREASE THE EFFECTIVENESS AND FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM

The results of urine-testing programs can be used at vari-

Washington, D.C., March 1991.

101. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FINAL REPORT ON THE DEMONSTRATION PROGRAM OF MANDATORY DRUG TESTING OF CRIMINAL DEFENDANTS (1991) [hereinafter MANDATORY DRUG TESTING].

102. *Id.*

103. *Id.* at iii. "Pretrial testing prior to the initial appearance identifies 31% of all tested defendants in the eight pilot districts as drug users. This compares with 24% of defendants nationally who admit to a substance abuse problem or a recent history of substance abuse during the pretrial services interview." *Id.*; see also *supra* notes 18 & 47.

104. MANDATORY DRUG TESTING, *supra* note 101, at iii, 18.

105. MANDATORY DRUG TESTING, *supra* note 101, at iii-iv, 78.

ous stages of the criminal justice process to promote both fairness and effectiveness.

A. *Pretrial Monitoring*

One recent study concluded there are at least four reasons to drug test in the criminal justice system: (1) to detect those who have recently used drugs; (2) to identify chronic users; (3) to monitor and deter drug use among those under the authority of the criminal justice system; and (4) to estimate national and local drug-use trends among criminal justice system populations.¹⁰⁶ Testing immediately after arrest, coupled with regular drug testing of those who test positive and are then conditionally released, can further each of these purposes. For example, the District of Columbia's program, and those patterned after it, use arrestees' initial urinalysis results to aid judges in determining conditions of pretrial release, and the results of those defendants who are periodically tested as a condition of pretrial release are used to monitor compliance with release conditions imposed by the court.¹⁰⁷

For pre-trial testing programs to have a meaningful deterrent value, however, it is essential that they be able to respond quickly when conditions of release are violated.¹⁰⁸ This responsiveness has been part of the program design in the District of Columbia since its inception.¹⁰⁹ However, many judges who reported in 1985 that they often held bail revocation and contempt hearings for condition of release violations told the District of Columbia study team in 1989 that they no longer did so as frequently, because of the pressure of growing court

106. Wish & Gropper, *supra* note 17, at 324. See also Rosen, *supra* note 30, at 1245-46 (identifying three ways to utilize urinalysis in probation—as an assessment tool, as a surveillance and monitoring mechanism, and as a deterrent device).

107. The District of Columbia has also used its drug-test information to assess drug-use trends and to develop therefrom appropriate planning and prevention strategies. For example, the juvenile urine-testing program resulted from the ongoing adult lockup test results, which disclosed high rates of drug use among young adults. These findings created an incentive for earlier interventions, particularly before juveniles entered the adult criminal justice system. In addition, because the results of the lockup testing of adult arrestees showed surprisingly high rates of cocaine and PCP use, a greater percentage of treatment and prevention resources were directed to abusers of those drugs. TOBORG ET AL., *supra* note 18, at 5.

108. BUREAU OF JUSTICE ASSISTANCE, URINALYSIS AS PART OF A TREATMENT ALTERNATIVES TO STREET CRIME (TASC) PROGRAM (MONOGRAPH) 4 (1988).

109. CARVER, *supra* note 65 ("If the program is to have the intended deterrent effect, defendants must know that violations will be detected and punishment will follow.").

dockets. Judges in the Portland program have shown a similar reluctance to hold show cause hearings.¹¹⁰ Notwithstanding the demands such oversight places on judges, it is important that some type of sanction be applied at the earliest indication of noncompliance. Such a policy is consistent with research findings that even failing to appear for the first post-release urine test is a significant indicator of subsequent pretrial misconduct, for either rearrest or failure to appear.¹¹¹ These sanctions, at least initially, need not result in the revocation of defendants' release status. There should, however, be a graduated system of sanctions available, and the sanctions which are imposed should be measured to fit the circumstances of the violation and the offender.¹¹²

The benefits of pretrial urinalysis programs extend beyond the criminal justice arena to the general community and to the drug-abusing offenders themselves.¹¹³ Such programs provide the government and the public with a fast and reliable tool for detecting and deterring recurring drug use—and the criminal activity that often accompanies such use—for those on pretrial release. They help judges by giving them information about defendants that is of great value in making reasoned and objective decisions. And, they also help the defendants required to participate in the testing programs. For example, such programs allow for more flexible bail-setting at the pretrial stage. Moreover, they help identify those defendants who need drug treatment, can coerce them into treatment, and thereafter give them a continuing incentive to stay in treatment.¹¹⁴ At the same time, pretrial testing programs enhance the public safety by reducing the number of drug-using defendants on pretrial

110. TOBORG & BELLASSAI, *supra* note 29, at 19; KAPSCH, & SWEENEY, *supra* note 95, at 6.16.

111. Visher, *supra* note 14, at 325, 330.

112. *Id.* Compare NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 8 (1990), wherein the authors argue persuasively for "an enriched range of punishments better suited to the diversity of crime and criminals to be sentenced, and with intermediate punishments being more extensively imposed and more determinedly enforced for the better protection of the community and the larger achievement of justice."

113. While this article confines itself to urine testing, a recent comparison of different drug testing methods (including different methods of urine testing and hair testing) and their applications in criminal justice systems, as well as a discussion of some of the legal and ethical issues raised by the tests, can be found in Wish & Gropper, *supra* note 17.

114. See Abell, *supra* note 10, at 956.

release.

B. *Monitoring for Treatment Purposes*

The majority of drug users do not need drug treatment, but they often do need the threat of social, legal or employer sanctions to motivate them to stop on their own.¹¹⁵ For these persons, pretrial urine-testing alone, without referral to treatment, is often sufficient to prompt them to stop using drugs.¹¹⁶ Similarly, for drug users who need treatment, it is frequently trouble with the law that forces them into treatment. In fact, according to the 1989 Treatment Outcome Prospective Study (TOPS) done at the Research Triangle Institute, as many as one out of two people who enter public drug treatment programs were under either direct or indirect legal pressure to do so.¹¹⁷

At present, there remains a shortage of public drug treatment slots in this country. Urine test results can help make the criminal justice system more effective by allocating those slots to the individuals who need them most. Urine-testing programs at the bail-fixing stage can also lead to earlier and more extended interventions. Moreover, different forms of drug abuse require different treatment modalities, and urine-testing programs can help match those individuals who need treatment with the most appropriate program. Continued drug-testing as a condition of release can help to keep a drug abuser in treatment for a longer time, and virtually all studies agree that the longer an addict receives treatment, the better his or her chances are for long-term success.¹¹⁸ Nor are the prospects for success diminished by the threat of legal sanctions. Indeed, research has determined that those under legal pressure to undergo treatment do as well as, or better, than those who seek treatment on their own.¹¹⁹

115. See UNDERSTANDING DRUG TREATMENT, *supra* note 93, at 4.

116. In the District of Columbia's urine-testing program, PSA

studies show that while 43 percent of the tests ordered for those on pre-trial release in 1988 came up positive for at least one of the five drugs, more than 700 people who were drug users when first arrested went through the entire series of court-ordered post-arrest tests without another positive drug finding.

Broder, *supra* note 92, at C4.

117. See UNDERSTANDING DRUG TREATMENT, *supra* note 93, at 10.

118. UNDERSTANDING DRUG TREATMENT, *supra* note 93, at 11, 25.

119. UNDERSTANDING DRUG TREATMENT, *supra* note 93, at 11, 25; see also HARRY

C. *Post-Conviction Monitoring*

While drug testing is of vital importance at the pretrial stage to assess risks associated with release pending final adjudication of criminal cases, it is of equal importance to the effective functioning of probation and parole programs. In fact, if post-conviction release immediately follows a period of pretrial testing during which the arrestee abstained from drug use, or the post-conviction release occurs within a relatively short time thereafter, the likelihood of successful post-conviction release is enhanced. As stated in the initial National Drug Control Strategy:

Probation, like parole, court-supervised treatment, and some release programs, should be tied to a regular and rigorous program of drug testing in order to coerce offenders to abstain from drugs while integrating them back into the community. Such programs make prison space available for those drug offenders we cannot safely return to the streets. But unless they rigidly enforce drug abstinence under the threat of incarceration, these efforts lose their teeth. Drug tests should be a part of every stage of the criminal justice process—at the time of arrest and throughout the period of probation or incarceration, and parole—because they are the most effective way of keeping offenders off drugs both in and out of detention.¹²⁰

For those defendants who initially test positive for drug use, but thereafter cease their use and are then sentenced to probation, it is important that they continue on a urine testing program as a condition of their probation (or parole). A 1986 study for the Administrative Office of the United States Courts indicated that in the absence of such testing, even probation officers in intensive supervision programs cannot identify which of their probationers are currently abusing drugs.¹²¹

There is some evidence that post-conviction urine testing

K. WEXLER ET AL., U.S. DEPT OF JUSTICE, A CRIMINAL JUSTICE SYSTEM STRATEGY FOR TREATING COCAINE—HEROIN ABUSING OFFENDERS IN CUSTODY 5-6 (1988); James Q. Wilson, *supra* note 14, at 537; Dean R. Gerstein, & Henrick J. Harwood, *Treating Drug Problems*, 1 INST. OF MED. 9-11 (1990).

120. NATIONAL DRUG CONTROL STRATEGY I, *supra* note 5, at 26.

121. ERIC D. WISH ET AL., U.S. DEPT OF JUSTICE, IDENTIFYING DRUG USERS AND MONITORING THEM DURING CONDITIONAL RELEASE 6 (1988) (citing ERIC D. WISH ET AL., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ESTIMATES OF DRUG USE IN INTENSIVE SUPERVISION OF PROBATIONERS: RESULTS OF A PILOT STUDY, FEDERAL PROBATION (1986)).

programs, along with increasing the effectiveness of probation and parole, can also reduce recidivism rates. For example, an analysis of the California Civil Addict Program found that heroin-using parolees who were urine-tested as part of their supervision had lower rates of criminality than otherwise similar parolees who received no supervision or supervision without testing.¹²² On the other hand, a National Institute of Justice study shows that among serious drug users who were also involved in criminal activity, those under post-conviction supervision without urine testing and those under no legal supervision at all commit crimes and use drugs at about the same rate.¹²³ Thus, empirical research supports the notion that urine testing is an essential component of post-conviction supervision for individuals at high-risk for continued drug use.

VI. CONCLUSION

The magnitude of the problems created by drug use is staggering. Many of our nation's children are being born physically and mentally impaired because their mothers used drugs during pregnancy. Intolerable numbers of children are being abandoned, and in other ways abused and neglected, by their drug abusing parents. The streets of many of our cities and even our smaller towns are flowing with blood, at least in part because of drug involvement by the American citizenry. As a result, many of our fellow citizens live in a constant state of fear in their neighborhoods.

Our criminal justice system and our society as a whole need as many weapons as can reasonably be deployed if, as a Nation, we are to prevail in the war against drugs. Each of the National Drug Control Strategies has addressed the many challenges we face and has identified the necessary steps we must take to meet those challenges. One step that has been encouraged in each Strategy has been the use of drug testing through urinalysis at all stages of the criminal justice process, including the pretrial stage. Such testing is constitutionally sound and satisfies traditional notions of bail and pretrial re-

122. *Id.* at 16.

123. Christy A. Visher, *Incorporating Drug Treatment in Criminal Sanctions*, N.I.J. REP., Summer 1990, at 3 (citing M.D. ANGLIN ET AL., U.S. DEPT OF JUSTICE, REEXAMINING THE EFFECTS OF PROBATION AND PAROLE ON NARCOTICS ADDICTION AND PROPERTY CRIME (FINAL REPORT) (1989)). NIJ is now considering field experiments to evaluate the effect of urine testing of those on probation and parole. *Id.*

lease. At the pretrial stage, testing serves the interest of the public by quickly detecting drug use, which is often related both to criminal activity and failure to appear for scheduled court appearances. It serves the interest of the judiciary by giving judges more objective data on which to base their bail and pretrial supervision decisions. And, it benefits arrestees by providing an additional bail option and pretrial monitoring mechanism, and also by coercing many of them to get drug treatment and to stay in treatment for an extended period, thus improving their chances for long-term success.

As we continue the battle against illegal drugs, pretrial drug testing (and indeed drug testing throughout the entire criminal justice system), constitutes an important weapon. It will, therefore, continue to be an essential component of the Bush Administration's National Drug Control Strategy.