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Constitutionality of Drug Testing the Homeless in the Mather Program: Are Privacy Rights Outweighed by Governmental Interests?, The

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The Constitutionality of Drug Testing the Homeless in the Mather Program: Are Privacy Rights Outweighed by Governmental Interests?

Michelle M. Sheidenberger*

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I. INTRODUCTION

"Anybody who has the desire to get their life together shouldn’t have any problem getting drug tested."

—Mather Resident

After the closure of the Mather Air Force Base in Sacramento County, California, local officials had to determine how to utilize the facilities. Sacramento County officials decided to use a portion of the Mather Air Force Base for the Mather Transitional Housing Program (Mather Program) for the homeless. Thus, the Mather Program, which opened in September 1995, was established to provide transitional housing and job training for 200 single people and sixty families.

However, the opening of the Mather Program was clouded by controversy. In September of 1995, against recommendations to the contrary, Sacramento County supervisors narrowly approved a strict drug testing policy for the Mather Program. The drug testing policy, which was drafted by the Sacramento County Department of Human Assistance (Department), was adopted to assure potential

2. See Bob Burns, New Plan Offered for Mather Site, SACRAMENTO BEE, Sept. 18, 1993, at B1 (listing the various plans Sacramento County officials considered for the reuse of the Mather Air Force Base as including the creation of a civilian airport, the preservation of an existing residential neighborhood that would be rehabilitated for first-time buyers, the construction of an artificial lake and wetlands, and the creation of a regional park).
3. See Robert D. Davila, Mather Homeless Project Beset by Problems, SACRAMENTO BEE, June 17, 1996, at B1 (noting that Sacramento County received a $12.8 million grant from the United States Department of Housing and Urban Development to fund the transitional housing program for five years). See generally Melanie B. Abbott, Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?, 22 FORDHAM URB. L.J. 1, 5-6 (1994) (commenting that an analysis conducted by Dr. Fischer reveals that the number of homeless persons vary from study to study because of the widely divergent definitions of homelessness used); Steven R. Paisner, Comment, Compassion, Politics, and the Problems Lying on Our Sidewalks: A Legislative Approach for Cities to Address Homelessness, 67 TEMP. L. REV. 1259, 1263-64 (1994) (suggesting that nobody knows exactly how many Americans are homeless as illustrated by various surveys); Deborah L. Parker, Note, Right to Shelter for the Homeless: The Use of Decision Analysis in Fashioning a Remedy, 81 GEO. L.J. 829, 831 n.20 (1993) (noting that estimates of the number of homeless range between 500,000 to 3 million).
4. See Robert D. Davila, Homeless Program Drug Tests OK'D, SACRAMENTO BEE, Sept. 13, 1995, at B1 (discussing the characteristics of the Mather Program); see also Davila, supra note 3 (reporting the numerous problems that have plagued the Mather program since its opening; for example, the problems have included substandard military housing facilities, red tape, and bureaucratic conflicts).
5. SACRAMENTO COUNTY DEPARTMENT OF HUMAN ASSISTANCE, ALCOHOL AND DRUG TESTING POLICY (1995) [hereinafter MOTHER DRUG TESTING POLICY] (copy on file with the Pacific Law Journal); see Davila, supra note 4 (discussing the controversy surrounding the Sacramento County supervisors' decision to approve the drug testing policy for the Mather Program); Drug-Testing Funds Approved, SACRAMENTO BEE, Oct. 12, 1995, at B2 (noting that Sacramento County supervisors agreed to spend $103,625 on drug and alcohol testing for the homeless applicants to the Mather Program). The alcohol and drug testing policy adopted by the County Board of Supervisors for use in the Mather Program is a pilot program which was evaluated after 10 months for effectiveness, accuracy, and fairness. MOTHER DRUG TESTING POLICY, supra, § 5. Recommendations concerning the policy were to be brought before the County Board of Supervisors. Id.
employers that clients of the Mather Program are alcohol and drug free. The Mather drug testing policy requires drug and alcohol testing for all applicants to the Mather Program. Applicants who fail the test are denied admission to the Mather Program. Furthermore, the policy requires program participants to be subject to both random and suspicion-based testing for the first six months. Thereafter, participants are subject only to suspicion-based testing.

This drug and alcohol policy gives rise to significant constitutional concerns. In fact, the Sacramento County counsel advised the Sacramento County supervisors that requiring blanket drug testing would probably be subject to a legal challenge.

This Comment analyzes whether the Mather Program’s drug testing policy can withstand constitutional scrutiny. Part II describes the details of the drug testing policy adopted for the Mather Program. Part III sets forth the requirements of the Fourth Amendment with regard to drug testing, and discusses United States Supreme Court cases which have dealt with such testing. Finally, Part IV analyzes the constitutionality of the Mather Program’s drug testing policy, and concludes that the policy is probably unconstitutional.

II. MATHER PROGRAM’S DRUG TESTING POLICY

A. Applicant Testing

As a condition to entering the Mather Program, all applicants must submit to an alcohol and/or drug test. The Mather Program is a “zero tolerance” program, and thus any level of a positive result is deemed unacceptable. Applicants who

6. MATHER DRUG TESTING POLICY, supra note 5, § 1.
7. Id. § 2.
8. Id.
9. Id. § 3; see infra notes 24-46 and accompanying text (setting forth the procedures for the random and suspicion-based testing).
10. MATHER DRUG TESTING POLICY, supra note 5, § 3.
11. See infra notes 163-208 and accompanying text (discussing the constitutional concerns with the Mather Program’s drug testing policy).
13. See infra notes 16-70 and accompanying text.
14. See infra notes 71-162 and accompanying text.
15. See infra notes 163-208 and accompanying text.
16. See MATHER DRUG TESTING POLICY, supra note 5, § 2 (estimating that there will be five applications for every client selected); see also Ross Farrow, County Mulls Expanding Mather Homeless Plans, SACRAMENTO BEE, Jan. 11, 1996, at N1 (noting that since the opening of the Mather Program, applicants have been drawn exclusively from the Sacramento County homeless shelter system; however, Sacramento County Supervisors voted unanimously in January 1996 to expand the Mather enrollment policy to include families who are not residents at County homeless shelters).
17. MATHER DRUG TESTING POLICY, supra note 5, § 2.
fail the drug test are forbidden to enter the Mather Program.\textsuperscript{18} Thereafter, applicants who fail the drug test and hence are prevented from entering the Mather Program, are assisted with their substance problems through services available within the Sacramento homeless shelter program.\textsuperscript{19} Applicants who fail the drug test are not allowed to reapply to the Mather Program until they can demonstrate a minimum of thirty days participation in a substance abuse program.\textsuperscript{20} However, an applicant who reappears to the Mather Program is still not guaranteed admission into the program.\textsuperscript{21}

B. Participant Testing

In developing the alcohol and drug testing policy for the participants in the Mather Program, the Department decided to combine random and suspicion-based testing.\textsuperscript{22} As with the policy covering applicants to the Mather Program, the policy for participants is also "zero tolerance," providing for the expulsion of any participant who tests positive twice.\textsuperscript{23}

1. Random Testing

Once an applicant is admitted into the Mather Program, he or she is deemed to be a program participant and is subject to a different alcohol and drug testing policy than are applicants.\textsuperscript{24} During the first six months of participation, Mather Program participants are subject to random testing.\textsuperscript{25} The random selection of those subject to testing is based upon a scientifically valid method.\textsuperscript{26} If the participant has not tested positive at the conclusion of the first six months, the participant is no longer subject to random testing.\textsuperscript{27} However, the participant is still subject to testing when there is a reasonable suspicion that the participant is using drugs or alcohol.\textsuperscript{28} Furthermore, a participant who is subject to random testing

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\textsuperscript{18} Id.

\textsuperscript{19} Id.; see id. (allowing a social worker in certain circumstances to recommend an extension of the applicant's shelter stay for an additional 30 days).

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id. § 3.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id. § 3(a).

\textsuperscript{26} Id.; see id. (recommending the use of a system called the Health Evaluation and Information System for Drug Abuse in Industry (HEIDI), that is already used by the Departments of Probation, Public Works, and Airports, as well as the Sheriff, to maintain random pool groups, to perform random selection for drug testing, and to schedule tests).

\textsuperscript{27} Id.

\textsuperscript{28} Id.; see infra notes 39-46 and accompanying text (setting forth the Mather Program's suspicion-based drug testing policy).
testing during the first six months of participation is also subject to suspicion-based testing.\textsuperscript{29}

If a participant fails a random test, the participant is required to recommit to the Mather Program, to agree to remain sober, and to attend counseling sessions for two weeks.\textsuperscript{30} A second failure results in a participant’s dismissal from the Mather Program.\textsuperscript{31} However, an individual dismissed from the Mather Program may reapply for admission after the individual can demonstrate a minimum of sixty days participation in a rehabilitation, treatment, or support services program designed to address substance abuse problems.\textsuperscript{32} Nevertheless, reapplication after treatment only allows for, but does not guarantee, readmission into the Mather Program.\textsuperscript{33} Of course, upon reapplication to the Mather Program, the applicant will once again have to pass an alcohol and/or drug test.\textsuperscript{34}

Once a participant is disqualified from the Mather Program, several options exist. First, the individual can be referred back to the Sacramento homeless shelter system for assistance with housing and supportive services.\textsuperscript{35} Second, the individual can also be referred back to residential recovery programs if the individual’s substance abuse problem is severe enough.\textsuperscript{36} As a third option, the individual can be referred back to the General Assistance program’s substance abuse program.\textsuperscript{37}

2. \textit{Suspicion-Based Testing}

All participants in the Mather Program are required to undergo testing if there is a reasonable suspicion of alcohol or drug use.\textsuperscript{38} Reasonable suspicion can exist if the participant exhibits symptoms and/or behaviors associated with substance abuse as set forth in the Diagnostic Statistical Manual IV (DSM IV).\textsuperscript{39} Reasonable
suspicion can also exist if the participant fails to comply with the program’s requirements. In determining reasonable suspicion, a social worker must assess whether the symptoms and/or behaviors or the failure to comply with program requirements are the result of substance abuse rather than some other cause.

If a participant tests positive to a suspicion-based test, the participant is required to recommit to the Mather Program and to attend counseling sessions for a two-week period. A subsequent positive test, at the conclusion of the two weeks, results in dismissal from the Mather Program. Again, dismissed participants will be eligible to reapply for readmission to the Mather Program after sixty days of minimum treatment and a clean drug and/or alcohol test. Readmission into the program, however, is not guaranteed.

C. Testing Procedures

The Mather Program tests for the presence of alcohol, as well as specified controlled substances. The testing procedure is designed to be as unintrusive as possible. The testing procedure includes the following: (1) Notice to all applicants and participants that they will be required to submit to testing by providing breath and/or urine samples by indirect observation during application to and participation in the Mather Program, (2) adequate procedures for ensuring the chain of custody for the storage of samples, (3) accuracy of identification of alcohol or controlled substances in the retrieved sample, (4) a reliable quality assurance program, (5) maintenance of confidentiality of all medical information obtained through the testing process, and (6) protection of the applicant or participant from undue invasion of privacy.

In drafting this policy, the Department reviewed the alcohol and drug testing procedures currently used within Sacramento County by the Department of Human Resources and the Sheriff’s Department. In addition, the Department

problems caused by the effects of the substance). These symptoms have never met the criteria for Substance Dependence for this class of substance. Id. at 183.

41. MATHER DRUG TESTING POLICY, supra note 5, § 3(b).
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.

47. See id. § 4 (listing the following non-prescription controlled substances the Mather Program tests for: marijuana, cocaine, opiates, amphetamines, phencyclidine, barbiturates, benzodiazepine, and other controlled substances that may become prevalent).
48. Id.
49. Id.
50. Id.
researched industry guidelines and practices relating to substance testing in order to draft an adequate testing policy.51

The Department, considering several factors, such as timeliness for testing program implementation, cost effectiveness, and timeliness of results, recommended a combination of various procedures.52 The procedures utilized by the Sheriff's Department Work Release Program are replicated in the Mather Program.53 The Sheriff's Department Work Release Program uses on-site drug testing equipment and routinely conducts a confirmation screening of all specimens that test positive.54 If a specimen tests positive a second time, the individual is notified of the results.55 If the individual denies drug use, the specimen is then sent to an outside laboratory for confirmation.56 The Mather Program uses this same approach for confirmation, that is, conducting two tests on-site, notification to the applicant or participant, and if necessary, sending the specimen to an outside laboratory for confirmation.57

However, for the outside confirmation test, the Department recommended that the County Board of Supervisors adopt a drug testing procedure similar to the one approved for county personnel.58 If a specimen tests negative, test results will usually be received within one day.59 However, if a specimen tests positive, a second confirmation test must be performed.60 This confirmation test usually can be completed within two days.61

An applicant or participant in the Mather Program may challenge the results of the alcohol and/or drug test through the general appeal procedures applicable to the Mather Program.62

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51. Id.
52. Id.
53. Id.
54. Id.
55. Id.; see id. (indicating that the Sheriff's Department claims that 98% of those testing positive admit to drug use).
56. Id.
57. Id.
58. Id.; see id. (noting that the drug testing procedure approved for county personnel is outlined in the County Personnel Policies and Procedures B-7, Pre-Employment Drug Testing Program). The policy also requires the drug testing vendor or laboratory to provide the following follow-up and support services: (1) Administering initial screening tests, (2) administering second confirmation tests, (3) communicating test results to the appropriate department representative, (4) providing statistical data on the program, (5) providing experts to testify at appeal hearings and/or litigation, and (6) ensuring the confidentiality of the drug testing process and results. Id.
59. Id.
60. Id.
61. Id.
62. Id.
D. Governmental Interests

In support of the Mather Program’s alcohol and drug testing policy, the Department emphasized that alcohol and drug problems are rampant among the homeless population. Thus, according to the Department, homeless individuals with such problems are not able to fully participate in the Mather Program.

The Mather Program is intended as an employment program, not a drug and alcohol treatment program. The objective of the Mather Program is for the County to recruit employers who are willing to hire these homeless individuals. However, because of the productivity and other problems associated with employees who suffer from alcoholism or drug addiction, local employers are often reluctant to hire homeless individuals with these problems. Thus, the ability to represent to prospective employers that the Mather Program’s clients are alcohol and drug free is a factor critical to the ultimate success of the Mather Program. Therefore, the ultimate rationale behind the alcohol and drug testing policy is to be able to assure employers that the homeless clients in the Mather Program are alcohol and drug free.

The rationale delineated above is the sole governmental interest given for the alcohol and drug testing policy in the Mather Program. No other governmental interests are set forth in the drug testing policy. Nothing is mentioned about protecting program participants from other participants who may be drunk or under the influence of drugs. Furthermore, no mention is made about protecting the surrounding neighborhoods from such individuals. In other words, the testing policy is designed solely to enable the Mather Program to appear credible to potential employers in order to ensure the Program’s ultimate success.

63. Id. § 1; see Palsner, supra note 3, at 1265 (stating that many of the homeless are addicted to drugs or alcohol); Parker, supra note 3, at 840 (indicating that 35% of the homeless suffer from alcoholism or substance abuse).
64. MATHER DRUG TESTING POLICY, supra note 5, § 1.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. See Parker, supra note 3, at 842-43 (noting that homeless individuals who are alcoholics or drug abusers may display tendencies towards violence and arson and thus, are a threat to themselves and to others in homeless shelters, and may even be a threat to the physical structure of the shelter as well).
The Fourth Amendment to the United States Constitution prohibits the federal government from conducting "unreasonable searches and seizures."\(^7\) Although the guarantees of the Fourth Amendment apply to the federal government and government employers,\(^7\) the guarantees do not apply to a private party who initiates a search or seizure.\(^7\) However, the Supreme Court has held that the Fourteenth Amendment\(^7\) extends the constitutional guarantees to searches and seizures by state officers\(^7\) and public school officials.\(^7\)

71. U.S. CONST. amend. IV; see id. (providing that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"); see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining a "search" as occurring "when an expectation of privacy that society is prepared to consider reasonable is infringed" upon); id. (defining a "seizure" of property as occurring "when there is some meaningful interference with an individual's possessory interests in that property").

72. See O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (holding that searches and seizures by government employers or supervisors of the private property of their employees are subject to the Fourth Amendment). Nevertheless, this Court, using the "special needs" exception, found that it was permissible for government employers and supervisors to conduct warrantless, work-related searches of employees' desks and offices without probable cause. Id. at 725-26. The Court found that the standard should be one of reasonableness. Id. Furthermore, the Court noted that "requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome." Id. at 722; see infra note 81 and accompanying text (delineating the "special needs" exception to the probable cause requirement).

73. See Jacobsen, 466 U.S. at 113-14 (noting that although the Fourth Amendment does not apply to a search or seizure, even if unreasonable, conducted by a private party, the Fourth Amendment protects against such intrusions if the private party acted as an instrument or agent of the government). The Jacobsen case involved Federal Express employees who opened a torn package to inspect it for damage and found cocaine inside. Id. at 111-12. The Court held that because Federal Express is a private carrier, the opening of the package by its employees did not constitute a violation of the Fourth Amendment. Id. at 115; see Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1051, 264 Cal. Rptr. 194, 205-06 (1989) (holding that Matthew Bender, a private employer, did not violate article I, section 1 of the California Constitution, which declares that privacy is among the people's "inalienable rights," by requiring pre-employment drug testing because the applicants had notice of the drug testing policy, the samples were collected during a regular pre-employment physical examination under conditions designed to minimize intrusiveness, and access to the test results were restricted). However, the California Court of Appeal for the First District warned that this decision did not hold that all pre-employment drug and alcohol testing by private employers is constitutional under the California Constitution, just the particular policy adopted by Matthew Bender. Id.

74. See U.S. Const. amend. XIV, § 1 (providing in part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

75. See Elkins v. United States, 364 U.S. 206, 223-24 (1960) (extending the Fourth Amendment's guarantees against unreasonable searches and seizures to searches conducted by state law enforcement officers). The Court further emphasized that the test is the same as under federal law. Id. at 224.

76. See New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985) (holding that the Fourth Amendment applies to school officials because they act as representatives of the State, and not merely as surrogates for the parents).
The Fourth Amendment requires that in order for a search to be constitutional, the search must be "reasonable." Whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." In the criminal context, the Supreme Court has held that a reasonable search generally requires a judicial warrant. However, the issuance of warrants is conditioned upon the showing of probable cause as required by the Warrant Clause. Nevertheless, the Supreme Court has recognized exceptions to this rule and has upheld searches unsupported by probable cause "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."

77. See Carroll v. United States, 267 U.S. 132, 147 (1925) (emphasizing that the Fourth Amendment prohibits only unreasonable searches or seizures, not reasonable ones); id. at 149 (stating that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure [at the time the amendment was adopted]").


79. See Payton v. New York, 445 U.S. 573, 586 (1980) (stating that under the Fourth Amendment, searches and seizures inside a home without a warrant are presumptively unreasonable). However, the police are allowed to seize weapons or contraband found in a public place without a warrant. Id. at 587. As long as "there is probable cause to associate the property with criminal activity," these seizures are allowed because the seizure of property in plain view involves no invasion of privacy and is therefore presumptively reasonable.

80. See U.S. CONST. amend. IV (stating that "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"). However, there are exceptions to the warrant requirement when supported by probable cause. See, e.g., California v. Acevedo, 500 U.S. 565, 579-80 (1991) (adopting a "car exigency" to the warrant requirement; thus, the police may search an automobile and any containers within it without a warrant where they have probable cause to believe contraband or evidence will be found inside the automobile); Vale v. Louisiana, 399 U.S. 30, 34 (1970) (suggesting that there is a "destruction of evidence exigency" to the warrant requirement; thus, the police may be able to conduct a search without a warrant where they believe that the destruction of evidence is imminent); Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (authorizing a "hot pursuit exigency" to the warrant requirement in this particular case; thus, the Court held that under the "exigencies of the situation," where police officers were in hot pursuit of a suspected armed felon in the house that he had entered only minutes before they arrived, no warrant was needed).

81. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring in judgment). The Supreme Court in this case found "special needs" to exist in the public school context. In this context, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Id. at 340; see Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (holding that the government's interest in regulating the conduct of railroad employees to ensure safety presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements"); Griffin v. Wisconsin, 483 U.S. 868, 872-76 (1987) (upholding a Wisconsin regulation that permitted any probation officer to search a probationer's home without a warrant, because the supervision of probationers was a "special need" of the State that justified departing from the usual warrant and probable cause requirements); Ortega, 480 U.S. at 722-26 (finding that to "[require] an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinet for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome"); thus, "special needs, beyond the normal need for law enforcement make the probable cause requirement impracticable"); cf. Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978) (considering the burdens a warrant requirement would impose on the Occupational Safety and Health Act (OSHA) regulatory scheme, and holding that the warrant requirement was appropriate after concluding that warrants would not impose serious burdens on the inspection
The Supreme Court in *Camara v. Municipal Court*, held that in certain circumstances government officials could conduct administrative searches pursuant to a regulatory scheme without adhering to the usual warrant or probable cause requirements. The Court adopted a balancing test to determine the reasonableness of a search conducted without probable cause or individualized suspicion. After determining there is a reasonable search, the probable cause required to issue a warrant exists if there are "reasonable legislative or administrative standards." Subsequently, in *Delaware v. Prouse*, the Supreme Court held that administrative searches of automobiles were reasonable if the searches were based upon an articulable and reasonable suspicion that a motorist is unlicensed, an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law. The Court articulated a balancing test, similar to the test used in *Camara*, for determining the reasonableness of a random and suspicionless search and seizure. Thus, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate
governmental interests." Using this test, the Court found that the random, suspicionless stop of the automobile in this case was unconstitutional. The Court found that the State's interest in discretionary spot checks as a means of ensuring roadway safety did not outweigh the physical and psychological intrusion visited upon the occupants of a stopped vehicle.

The Supreme Court went even further in New Jersey v. T.L.O., and held that school officials may conduct warrantless searches of some student property without probable cause. The Court, using the balancing test first articulated in Camara and followed in Prouse, held that a student's privacy interest was outweighed by the interest of school officials in maintaining school discipline.

Thus, school officials are constitutionally allowed to search a student's property if there are reasonable grounds for suspecting that the student is violating the law or school rules.

The Supreme Court has on several other occasions also upheld suspicionless seizures. For example, the Supreme Court has upheld automobile checkpoints for illegal immigrants and drunk drivers. Despite the number of occasions where

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91. Id. at 654.
92. Id. at 663.
93. Id. at 655-61.
95. T.L.O., 469 U.S. at 340-42. However, although there was no probable cause and no warrant here, the search was supported by individualized suspicion of wrongdoing. Id. at 327-29. In this case, a principal of a high school searched a student's purse only after she was caught smoking in the bathroom, and after she denied violating the rule prohibiting smoking in the bathroom. Id.
96. Id. at 339-40.
97. Id. at 341-42. See generally Alexander C. Black, Annotation, Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision, 31 A.L.R. 5TH 229 (1995) (discussing cases in which the courts have considered whether a search by school officials violates the Fourth Amendment or equivalent provisions of state constitutions).
98. See United States v. Martinez-Fuerte, 428 U.S. 543, 556-62 (1976) (holding that the Border Patrol's routine stops of automobiles located on a major highway away near the Mexican border for brief questioning without any individualized suspicion was constitutional under the Fourth Amendment). The Court concluded that requiring stops on major routes inland to always be based upon a reasonable suspicion would be impractical because of the heavy flow of traffic. Id. at 557. Using the Fourth Amendment balancing test, the Court held that while the government interest to make routine checkpoint stops was high in order to deter illegal immigration, the intrusion of the private citizen's Fourth Amendment interests was relatively low. Id. The Court, justifying its claim that the checkpoints' intrusion was minimal, stated that routine checkpoints did not interfere greatly with traffic. Id. at 559. Furthermore, checkpoint operations involve less discretionary enforcement activity than roving-patrol stops. Id. at 559-60. In sum, routine stops for brief questioning conducted at permanent checkpoints were constitutional under the Fourth Amendment and therefore, did not require a warrant. Id. at 566.
99. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding as consistent with the Fourth Amendment a highway sobriety checkpoint program). The Court noted that the intrusion resulting from the brief stops here were indistinguishable, for constitutional purposes, from the checkpoint stops that were upheld in Martinez-Fuerte. Id. at 453. Moreover, the magnitude of the problem associated with drunk drivers, namely alcohol-related accidents, causing injuries and deaths, was great. Id. at 451. Lastly, the Court found the checkpoint to be an "effective" method of advancing the governmental interest in preventing drunken driving. Id. at 453-55.
the Supreme Court has approved suspicionless searches and seizures, in the drug testing context, the Supreme Court has approved the constitutionality of drug tests in only three contexts.

A. Ensuring the Safety of the Public and Fellow Employees

In *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court upheld the constitutionality of drug testing railroad personnel involved in train accidents. The Supreme Court held that the Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the Federal Railroad Administration (FRA) because the collection and testing of urine samples intrudes upon expectations of privacy, and therefore must be deemed a search. The Court held that the government's interest in regulating the conduct of railroad employees in order to ensure the safety of both the public and the employees themselves presents a "special need" beyond normal law enforcement so as to justify departing from the warrant and probable cause requirements. In other words, the government's interest in testing without a showing of individualized suspicion was high. Furthermore, the Court was concerned that the delay caused by having to procure a warrant would result in the destruction of valuable evidence, since alcohol and drugs might be eliminated from the bloodstream before a warrant could be obtained.

On the other hand, the Court held that an individual's privacy interest was not as "compelling" as the governmental interest in conducting the testing. The privacy expectations of the tested employees were diminished by the fact that they worked in an industry that is highly regulated by the federal and state governments to ensure safety. The regulations governing the collection of the

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100. 489 U.S. 602 (1989).
102. *Id.* at 617-18. In addition, the collection and testing of urine samples is also a Fourth Amendment seizure, since it is a meaningful interference with an individual's possessory interest in his or her bodily fluids. *Id.* at 617.
103. *Id.* at 620-21.
104. *Id.* at 628.
105. *Id.* at 623-24.
106. *Id.* at 627-33.
107. *Id.* at 627-28. For examples of some of these regulations, see, e.g., ALA. CODE § 37-2-85(a) (1992) (requiring that persons employed as train dispatchers, engineers, conductors, flagmen, brakemen, trackmen, and switchmen be subjected to a thorough examination of his or her character, sobriety, knowledge, eyesight and hearing); N.Y. R.R. LAW § 63 (McKinney 1991) (requiring that all applicants for positions as motormen or gripmen "be subjected to a thorough examination by the officers of the [railroad] corporation as to their habits, physical ability and intelligence"); OHIO REV. CODE ANN. § 4999.16 (Anderson 1991) (providing that no railroad company shall employ a person in a position which requires such person to distinguish form or color signals without administering a color blindness test); and OR. REV. STAT. § 824.028(1) (1995) (requiring that persons employed by the Oregon Department of Transportation as railroad inspectors must pass an examination concerning physical and mental fitness).
urine necessary for the drug tests further reduced the intrusiveness of the collection process by requiring that the samples be furnished in a medical environment, without direct observation.\textsuperscript{108} For these reasons, the Supreme Court upheld the suspicionless alcohol and drug testing programs as reasonable within the meaning of the Fourth Amendment.\textsuperscript{109}

B. Ensuring Fitness, Integrity, and Judgement of Employees Authorized to Use Deadly Force

In \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{110} the Supreme Court upheld the constitutionality of the random drug testing of federal custom officers who carry firearms or who are involved in drug interdiction.\textsuperscript{111} The Court concluded that when the federal government requires its employees to take a urinalysis test to look for drug use, the collection and testing of such samples are searches which must meet the reasonableness requirement of the Fourth Amendment.\textsuperscript{112} Nevertheless, the Custom Service's testing program was not designed to serve the ordinary needs of law enforcement.\textsuperscript{113} The Court held that under the Fourth Amendment's balancing test, the government's need to conduct the suspicionless searches outweighed the privacy interests of those employees engaged directly in drug interdiction and/or those employees required to carry firearms.\textsuperscript{114}

The Court stressed the important role the Customs Service provides in fighting the national drug problem.\textsuperscript{115} Thus, the government had a "compelling interest" to ensure that these employees are "physically fit, and have unimpeachable integrity and judgment."\textsuperscript{116} Furthermore, the public should not be put

\textsuperscript{108.} \textit{Skinner}, 489 U.S. at 626-27. However, Justice Marshall, in his dissent, suggested that compelling a person to produce a urine sample on demand intrudes deeply on both privacy and bodily integrity. \textit{Id.} at 645-47.

\textsuperscript{109.} \textit{Id.} at 634. However, the alcohol and drug testing programs cannot accurately be described as totally suspicionless. The FRA provided for mandatory blood, urine, and breath tests for railroad employees only after employees were involved in a serious train accident, an incident involving a fatality of an employee, or only after other specifically defined incidents. \textit{Id.} at 609.

\textsuperscript{110.} 489 U.S. 656 (1989).

\textsuperscript{111.} \textit{Von Raab}, 489 U.S. at 679. \textit{See generally} Kathleen M. Dorr, Annotation, \textit{Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Requiring Random or Mass Drug Testing of Public Employees or Persons Whose Employment is Regulated by State, Local, or Federal Government}, 96 A.L.R. Fed. 420 (1988) (analyzing federal and state cases which have discussed the constitutionality of mass or random drug testing of public employees).

\textsuperscript{112.} \textit{Von Raab}, 489 U.S. at 665.

\textsuperscript{113.} \textit{Id.} at 666. In concluding that the Custom Service's drug testing program was not designed to serve the ordinary needs of law enforcement, the Court stressed the fact that test results may not be used in a criminal prosecution of an employee without the employee's consent, and the purposes of the program were to deter drug use among a certain class of employees. \textit{Id.}

\textsuperscript{114.} \textit{Id.} at 668.

\textsuperscript{115.} \textit{Id.}

\textsuperscript{116.} \textit{Id.} at 670.
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at risk by employees impaired by drug use who are in positions where deadly force is sometimes utilized.\textsuperscript{117}

Moreover, the character of the intrusion involved was slight. The employees were given advance notice of the urinalysis test.\textsuperscript{118} Upon reporting for the urinalysis test; which was conducted by an independent contractor, the employees were only asked to remove outer garments and personal belongings.\textsuperscript{119} Furthermore, the employees had the choice of producing the sample behind a partition or in a bathroom stall.\textsuperscript{120} A monitor of the same sex of the employees remained within listening range to listen for the normal sounds of urination.\textsuperscript{121}

On the privacy interest side, the Court noted that Customs employees in this line of work should have a diminished expectation of privacy interests because they should expect inquiries into their fitness and probity.\textsuperscript{122} Moreover, by only testing certain groups of employees and giving those employees advance notice of the drug test, the intrusion upon an individual’s privacy was minimized.\textsuperscript{123} In addition, the urine samples could only be examined for specified drugs, and not for other substances.\textsuperscript{124} Lastly, the employees were not required to disclose personal medical information to the government unless his or her test result came back positive.\textsuperscript{125} Overall, a warrant was not required under the Fourth Amendment’s balancing test in the context of this situation.\textsuperscript{126} The Court stated that a warrant would have provided little or no additional protection of an employee’s privacy because the program was narrowly defined and well known to the covered employees.\textsuperscript{127}

In \textit{Skinner} and \textit{Von Raab}, the Court developed the “compelling need” test which was a part of the balancing test of privacy interests versus governmental interests. If the government had a “compelling need” to conduct drug tests, and that need outweighed a person’s privacy interests, then the drug test would be constitutional under the Fourth Amendment. However, after these two decisions, critics felt that the Court’s tolerance for suspicionless drug testing was quite

\begin{itemize}
  \item \textsuperscript{117} \textit{Id.} at 670-71.
  \item \textsuperscript{118} \textit{Id.} at 661.
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.} In addition, dye was added to the toilet water to prevent the employees from using the water to adulterate the sample. \textit{Id.}
  \item \textsuperscript{122} \textit{Id.} at 672.
  \item \textsuperscript{123} \textit{Id.} at 672 n.2.
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.} at 673 n.2.
  \item \textsuperscript{126} \textit{Id.} at 666. However, the Supreme Court was not able to determine the reasonableness of the government’s drug testing program as it related to employees who were required “to handle classified material.” \textit{Id.} at 677.
  \item \textsuperscript{127} \textit{Id.} at 667.
\end{itemize}
Thus, it seemed that the government could only satisfy the "compelling need" for a suspicionless drug testing policy where public safety or national security were somehow in danger. Nevertheless, the Court appeared to move away from the "compelling need" test in its next case dealing with random drug testing, and thus seemed to invite more suspicionless drug testing programs.

C. Drug Testing Student Athletes and the Important Interest Test

In *Vernonia School District 47J v. Acton*, the Supreme Court upheld the constitutionality of the district's policy of randomly drug testing student athletes. Again, the Court, in determining the "reasonableness" of a search under the Fourth Amendment, balanced the intrusion on the student's Fourth Amendment interests with the promotion of legitimate governmental interests.

The Court began by looking at the nature of the privacy interest involved. The Court emphasized the fact that the drug testing policy was aimed at children who had been committed to the temporary custody of the state as "schoolmaster." The Court concluded that schoolchildren have a diminished ex
pectation of privacy because they are subject to the guardianship of the school.\textsuperscript{135} In addition, schoolchildren are routinely required to submit to various physical examinations and vaccinations.\textsuperscript{136} Moreover, the Court went on to conclude that student athletes have even lower expectations of privacy than students who are not athletes because student athletes change and shower in public school locker rooms that are not notable for privacy.\textsuperscript{137} For example, in these public school locker rooms, many bathroom stalls do not even have doors.\textsuperscript{138}

The Court went on to note that there are additional reasons why school athletes have reduced expectations of privacy. For one, student athletes must submit to a physical examination prior to their participation in sports.\textsuperscript{139} Additionally, student athletes "choose" to "go out for the team."\textsuperscript{140} The Court analogized student athletes who "choose" to "go out for the team" with adults who "choose" to work in a "closely regulated industry."\textsuperscript{141} By voluntarily becoming student athletes, the Court suggested that these athletes, "have reason to expect intrusions upon normal rights and privileges, including privacy."\textsuperscript{142}

The Court next examined the character of the intrusion involved.\textsuperscript{143} The degree of intrusion is dependent upon the manner in which production of the urine sample is monitored for a urinalysis test.\textsuperscript{144} In this case, male students produced urine samples from urinals which were located along a wall.\textsuperscript{145} The students remained fully clothed and were only observed from behind.\textsuperscript{146} Female
students, on the other hand, were allowed to produce urine samples in enclosed stalls, with a female monitor standing outside to listen for sounds of tampering. The Court concluded that since these conditions mirrored those typically found in public restrooms, the intrusion upon the privacy interests involved in obtaining the urine samples was "negligible." Furthermore, the Court also noted that the drug tests involved here only looked for drugs and not for other conditions, such as epilepsy, pregnancy, or diabetes. In addition, positive test results were only disclosed to a limited number of school personnel, and not to other school personnel or law enforcement officials. Lastly, the Court followed its decision in Skinner, finding that the advance disclosure of medications was not "a significant invasion of privacy.

The Court balanced these privacy interests with the governmental interests behind the testing policy. However, in response to the "compelling need" test used in Skinner and Von Raab, the Court stated that this phrase did not describe "a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand...." Thus, it appeared that the Court moved away from the rather stringent "compelling need" test and replaced it with a more liberal "important interest" test.

Using this new standard, the Court went on to hold that the governmental concern here was "important," if not "compelling." On the governmental interest side, the Court emphasized the need to deter schoolchildren from using drugs. The Court recognized that if drugs were not eliminated in the school

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147. Id.
148. Id.
149. Id.
150. Id.
151. Id. at 2394. The Court noted that it has never indicated that requiring advance disclosure of medications is per se unreasonable. Id. Furthermore, under the Vernonia policy, students could provide the requested information in a confidential manner. Id.
152. Id.
153. Id. at 2394-95 (emphasis added).
154. See Memorandum from Robert A. Ryan, Jr., County Counsel, to Board of Supervisors, County of Sacramento, supra note 12 (concluding that "in [Vernonia] the United States Supreme Court appeared to back away from a compelling interest test, at least within the school/child context presented by that case. ... The Court imposed its own balancing test of 'important' interests against the level of intrusion and the expectation of privacy").
155. Vernonia Sch. Dist. 47J, 115 S. Ct. at 2395. In both Skinner and Von Raab, the Court characterized the governmental interest as "compelling." Id. at 2394. In Skinner, the "compelling" interest was in preventing railroad accidents. See id. In Von Raab, the "compelling" interest was ensuring the fitness of customs officials who interdict the drug trade and/or carry firearms. See id.
156. Id. at 2395.
system, they had the potential of disrupting the entire educational process.\(^\text{157}\) Finally, the Court noted that drugs pose substantial psychological and physical risks to athletes.\(^\text{158}\)

However, despite the Court’s decision that drug testing student athletes was constitutional, the Court was eager to warn that “suspicionless drug testing will [not] readily pass constitutional muster in other contexts.”\(^\text{159}\) The Court stressed that the most significant element in this case was “that the [p]olicy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”\(^\text{160}\) The relevant question, the Court stated, is whether the search is one that a reasonable guardian and tutor might undertake.\(^\text{161}\) The Court found that in this context the searches were what a reasonable guardian and tutor might undertake.\(^\text{162}\)

With these cases in mind, it is now necessary to turn to the issue presented in this Comment: Is the Mather Program’s drug testing policy constitutional?

IV. CONSTITUTIONALITY OF THE MATHER PROGRAM’S DRUG TESTING POLICY

The collection and testing of urine for evidence of drug use is deemed to be a search and seizure within the meaning of the Fourth Amendment.\(^\text{163}\) Thus, whether the drug testing policy for the Mather Program will withstand constitutional scrutiny depends upon whether the policy will meet the “reasonableness” requirement of the Fourth Amendment.\(^\text{164}\) In other words, the privacy interests of the Mather Program’s applicants and participants must be balanced against the governmental interests involved in requiring the drug tests. However, in determining whether the Mather Program’s drug testing policy is con-

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\(^{157}\) Id. At the time of this case, the Vernonia School District was experiencing many problems. Id. For example, students were in a state of rebellion and disciplinary actions had increased significantly. Id. These problems were attributed to alcohol and drug abuse. Id.

\(^{158}\) Id. The Court listed the psychological effects to include impairment of judgment, slow reaction time, and the lessening of the perception of pain. Id. The Court listed the physical effects to include, among others, artificially induced heart rate increases, blood pressure increases, irregular blood pressure responses during changes in body position, and the inhibition of the normal sweating responses. Id.

\(^{159}\) Id. at 2396.

\(^{160}\) Id.

\(^{161}\) Id. at 2397.

\(^{162}\) Id.

\(^{163}\) See supra note 102 and accompanying text; see also Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding that the taking of blood to be analyzed for the presence of alcohol is a Fourth Amendment search).

\(^{164}\) See supra notes 77-81 and accompanying text (discussing the “reasonableness” standard of the Fourth Amendment).
institutional, the issue arises whether the Court would use the "compelling need" or the "important interests" test.165

A. "Compelling Need" Test

Prior to Vernonia School District, the Court utilized the "compelling need" test in determining whether drug tests were constitutional under the Fourth Amendment.166 Under the "compelling need" test, the Mather Program's drug testing policy would most likely be held to be unconstitutional.167 The governmental interest involved in the Mather Program, the ability to recruit employers by representing that Mather Program participants are drug free, is not a "compelling" governmental interest. The Court has recognized that only those governmental interests in protecting public safety or national security may be deemed "compelling."168 Neither of those interests are implicated here.169

Moreover, the collection of urine samples for a drug test has been recognized as intruding upon "an excretory function traditionally shielded by great privacy."170 Thus, under the "compelling need" test articulated by the Skinner and Von Raab Courts, the Mather Program's drug testing policy would most likely fail if subject to a constitutional challenge because the privacy interests of the Mather Program's applicants and participants would outweigh the non-compelling governmental interests.

165. See infra notes 166-98 and accompanying text (analyzing the Mather Program's drug testing policy under both the "compelling need" and the "important interests" tests).
166. See supra notes 128-29 and accompanying text (discussing how the Skinner and Von Raab Courts developed the "compelling need" test).
167. Cf. Abbott, supra note 3, at 60-62 (suggesting in an article written prior to the Vernonia School District decision, that under the "compelling need" test, drug tests administered as a condition of admission to a Housing/Treatment Program (H/TP) model, would be held to be constitutional). The author, working by analogy with Skinner and Von Raab, noted that the only uses positive drug tests would serve in the H/TP case were first to enroll a substance-abuser in the program, and second to dismiss a recalcitrant drug user from the program. Id. at 61. These uses for the drug tests did not carry the stigma associated with being fired from a job. Id. Furthermore, the program officials had no discretion in determining who was to be tested because all potential residents were tested, along with participants in the program being monitored. Id. Balanced against these privacy intrusions was the governmental interest in protecting those residents who were drug free. Id. Active drug users could pose a danger to those who were trying to stay drug free. Id. at 62. Thus, the author concluded that in view of this danger, and in light of the governmental interest in helping substance abusers solve their homelessness problem by solving their substance abuse problem, the Supreme Court would find the governmental interest involved to be rational. Id.
168. See supra text accompanying note 129 (suggesting that under the "compelling need" test, a suspicionless drug testing policy would only be upheld where public safety or national security were somehow in danger).
169. See supra notes 65-70 and accompanying text (noting that the Mather Program's drug testing policy is not designed to address the safety of the participants or the surrounding neighborhoods but rather is designed to attract potential employers).
B. "Important Interests" Test

In *Vernonia School District*, the Court appeared to move away from the "compelling need" test and replaced it with the more liberal balancing test of "important interests." Using this new test, the Court in *Vernonia School District* upheld the constitutionality of random drug tests of student athletes for rather weak governmental interests. Thus, the likelihood that the Court would uphold the constitutionality of suspicionless drug testing policies after the *Vernonia School District* decision seems to have increased.

However, the *Vernonia School District* decision can be viewed in a narrower context also. As noted before, the Court heavily emphasized the fact that the individuals being drug tested in *Vernonia School District* were schoolchildren. Arguably, the *Vernonia School District* Court was moving away from the "compelling need" test only in the context of schoolchildren. The *Vernonia School District* Court warned:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.

Thus, the Court possibly meant to keep the "compelling need" test in all contexts except those involving schoolchildren. Therefore, since a "compelling need" test would most likely be applied, the Mather Program's drug testing policy would probably be held unconstitutional.

The Court could nevertheless choose to apply the "important interests" test to the Mather Program, analogizing that homeless persons are "entrusted" to the government's care similar to schoolchildren. If the Court were to use the

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171. *See supra* notes 153-54 and accompanying text (discussing the *Vernonia School District* Court's move away from the "compelling need" test to the "important interests" test).
172. *See supra* notes 155-58 and accompanying text (delineating the governmental interests involved in *Vernonia*); *see also* Cole, *supra* note 132, at 525 (criticizing the *Vernonia School District* Court's use of an open-ended "reasonableness" test).
173. *See supra* notes 134-36 and accompanying text (setting forth the Court's emphasis on schoolchildren).
175. *See supra* notes 166-70 and accompanying text (discussing how the Mather Program's drug testing policy would probably be unconstitutional under the "compelling need" test).
176. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 314-19 (1982) (holding that a retarded man committed to a state school and hospital, i.e. “entrusted to the government’s care,” had a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably
“important interests” test in analyzing the constitutionality of the Mather Program’s drug testing policy, the Program’s policy would have a better chance of surviving scrutiny.\(^{177}\)

1. **Privacy Interests**

Unlike *Vernonia School District*, the subjects of the Mather Program’s drug testing policy are not student athletes, but rather, homeless individuals. Like schoolchildren, however, homeless individuals seeking help at a homeless shelter may have diminished expectations of privacy because they are subject to the care of the government. There are many similarities between locker rooms and homeless shelters. In homeless shelters, the sleeping areas and bathing areas are often communal. Moreover, like student athletes who “choose” to “go out for the team,” homeless individuals “choose” to seek help at a homeless shelter, and thus should expect intrusions upon their privacy rights because of the communal nature of homeless shelters.\(^{178}\) In addition, if homeless individuals “choose” to go to a homeless shelter which is operated by the government, this might be another reason why they should reasonably expect intrusions upon their privacy.

However feasible these privacy arguments might be concerning homeless shelters, these arguments are inapplicable to the Mather Program. The Mather Program is a transitional housing program which is different from a homeless shelter. The units in the Mather Program are individual apartments with their own living rooms, bedrooms, kitchens, and bathrooms.\(^{179}\) Thus, it is hard to imagine that individuals entering the Mather Program would have diminished expectations of privacy given the particular living arrangements.\(^{180}\) Although the individuals might have some diminished expectations of privacy given the fact that the

\(^{177}\) See discussion infra Parts IV.B.1-3 (discussing why the Mather Program’s drug testing policy could be constitutional or unconstitutional under the “important interests” test).

\(^{178}\) On the other hand, it should be noted that most homeless individuals do not “choose” to become homeless.

\(^{179}\) See Farrow, *supra* note 1, at N1 (reporting that a single mother and her three children received an apartment at the Mather Program with a living room, three bedrooms, two small kitchens and four bathrooms).

\(^{180}\) *Cf.* Pottinger v. City of Miami, 810 F. Supp. 1551, 1570-73 (S.D. Fla. 1992) (finding that the homeless plaintiffs had a legitimate expectation of privacy in their personal property; thus, the court found the City of Miami liable for unlawful seizures of plaintiffs’ property in violation of the Fourth Amendment); Community for Creative Non-Violence v. Unknown Agents of the United States Marshals Service, 797 F. Supp. 7, 9, 13-20 (D.C. 1992) (stating that “[h]omeless citizens are entitled to no less and no more protection under the Fourth Amendment than those in our country who have housing;” thus, the court held that United States Marshals violated the homeless plaintiffs’ Fourth Amendment rights when they conducted a pre-dawn ‘raid’ of a homeless shelter armed only with an arrest warrant for one particular individual); State v. Mooney, 588 A.2d 145, 150 (Conn. 1991) (holding that a homeless individual had a reasonable expectation of privacy in the contents of his duffel bag and cardboard box, which he kept under a bridge abutment where he was living; thus, the warrantless search of these items by the police violated his Fourth Amendment rights and the evidence found should have been suppressed).
apartments are furnished by the government, it seems that these individuals would have more expectations of privacy than the student athletes who undress and shower in public school locker rooms. The Court has consistently recognized that individuals have more expectations of privacy in their own homes. For the individuals at the Mather Program, these apartments are their homes.

2. Character of the Intrusion

In Vernonia School District, the Court examined the character of the intrusion involved in collecting and analyzing the urine samples for drugs. The Court found no significant invasion of privacy in the school district’s methods of collecting and analyzing the urine samples.

The Mather Program’s drug testing policy states that the testing procedure is designed to be minimally intrusive. As in the Vernonia School District case, the testing procedure in the Mather Program contains a notice to all applicants and participants, procedures for ensuring the chain of custody and storage, procedures for the accuracy of identification of drugs in the samples, a reliable quality assurance program, methods to ensure confidentiality of all medical information, and the protection of the applicant or participant from undue invasion of privacy. Moreover, the Mather Program is using a combination of procedures that is currently being used by the Department of Human Resources and the Sacramento County Sheriff’s Department. Although there is a pos-

181. See, e.g., Frisby v. Schultz, 487 U.S. 474, 477, 484-88 (1988) (holding that an ordinance making it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual” is not facially invalid under the First Amendment because, in part, the ordinance served the significant government interest of protecting unwilling listeners within their homes from the intrusion of unwanted speech); Payton v. New York, 445 U.S. 573, 574, 586-90 (1980) (requiring that the police obtain a warrant before entering a suspect’s home in order to make a routine felony arrest); Federal Communications Comm’n v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (noting that of all forms of communication, broadcasting has the most limited First Amendment protection because, in part, it extends into the privacy of the home and it is impossible completely to avoid those that are patently offensive); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First Amendment prohibits making the mere private possession of obscene material in one’s own home a crime); id. at 564-65 (emphasizing repeatedly that individuals have the right to privacy in their own homes); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion”).

182. See supra notes 143-51 and accompanying text (discussing the Vernonia School District Court’s analysis of the character of the intrusion involved in the school district’s drug testing policy).

183. Id.

184. MATHER DRUG TESTING POLICY, supra note 5, § 4.

185. Cf. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (holding that routine checkpoint stops do not intrude on the privacy of the motoring public because motorists “are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere”); Wyman v. James, 400 U.S. 309, 319-21 (1971) (providing a welfare recipient with written notice several days in advance of an intended home visitation minimized the intrusion on privacy that the visit brought).

186. MATHER DRUG TESTING POLICY, supra note 5, § 4.

187. Id.
sibility that these procedures might later be determined to be unconstitutional, it seems safe for the Mather Program to adopt these procedures that have yet to lose a constitutional challenge.

However, although the Mather Program's procedures are probably not intrusive, there are less intrusive means that the government could utilize in lieu of the drug testing policy and still maintain the Mather Program as drug free. Although the Court has declined to hold that only the "least intrusive" search practicable can be deemed reasonable under the Fourth Amendment, an examination of the alternatives available to meet the Mather Program's objectives is necessary in order to determine if a drug testing policy is overly intrusive.

Sacramento County supervisors rejected two less stringent proposals to ensure that the Mather Program was drug free. The two less stringent proposals included the following: (1) Requiring testing for all applicants but limiting the random testing for those "at risk" participants during the first six months of participation; and (2) requiring testing for applicants in the same manner as for the participants. Despite these suggested alternatives, the County supervisors adopted the tougher drug testing policy in order to help ensure the success of the Mather Program.

In addition, there are other alternatives that would be less intrusive than the drug testing policy. For example, the Mather Program could screen applicants via written and oral tests, and then use a suspicion-based drug testing policy for program participants. Alternatively, the Mather Program could eliminate drug

188. See Vernonia Sch. Dist. 47I, 115 S. Ct. at 2395-96 (rejecting the argument that less intrusive means, namely suspicion-based testing, is superior to random testing to achieve the same results because suspicion-based testing is accusatory in nature); Colorado v. Bertine, 479 U.S. 367, 373-74 (1987) (holding that reasonable police regulations relating to inventory procedures administered in good faith satisfied the Fourth Amendment although 'less intrusive' procedures could have been devised); Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (noting that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means"); Cadry v. Dombrowski, 413 U.S. 433, 447-48 (1973) (upholding the search of the trunk of a car to find a revolver suspected of being there, while rejecting the contention that the public could equally well have been protected by posting a guard over the car); see also United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (suggesting that "[a] creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished").

189. Davila, supra note 4, at B1.

190. Id.

191. Id. (quoting Supervisor Dave Cox as saying in regards to the drug testing proposal that "[t]his board just needs to assume the risk of being sued").

192. See Caitlin Rother, Drug Tests Soon to Accompany Relief Benefits Screening, SAN DIEGO UNION-TRIB., May 22, 1995, at B2 (reporting that in San Diego County, applicants for General Relief benefits have to undergo a drug and alcohol test by taking a 10-minute written or oral test). This article also noted that General Relief recipients in Oceanside and Logan Heights have been tested in this manner since February of 1995. Id. The tests in April 1995 found nearly half the 1768 screened recipients to be chemically dependent in those counties. Id.

testing altogether and merely have a “drug free” policy that participants would be required to adhere to. If a participant was caught violating the “drug free” policy, he or she would then be discharged from the program. Clearly, these alternatives are not as effective in maintaining a drug free environment as the blanket testing of applicants and the random and suspicion-based testing of participants because these alternatives would not identify as many drug users as the urinalysis tests.

Overall, since the Mather Program’s procedures are similar to those upheld in *Vernonia School District* and are based on existing drug testing procedures in other County Departments, the Court should not have any hesitation in finding that the invasion of privacy occasioned by the drug testing procedures is minimal. However, the existence of alternatives capable of fulfilling the governmental interest indicates that the drug testing policy might be more intrusive than necessary.

3. Governmental Interests

If the Court utilizes the “important interests” test in analyzing the Mather Program’s random drug testing policy, the Court will have to determine if the government’s interest is important enough to justify the invasiveness of the drug testing policy. On the one hand, the government’s interest in eliminating drug use in the Mather Program is an important enough interest to justify the implementation of the drug testing policy. Eliminating drug use in the Mather Program by adopting a drug testing policy helps maintain the credibility of the program as well as ensure the program’s success. In addition, the drug testing policy helps justify the financial expenditures involved in setting up the Mather Program by helping to ensure that more employers use the program. Since the drug testing policy only has to achieve “important goals” under the “important interests” test in order to survive constitutional scrutiny, the government’s interests here appear to meet that test.

On the other hand, the governmental interest here can be characterized as “generic.” The Mather Program’s drug testing policy is designed solely to maintain a drug free program in order to attract potential employers to hire the

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194. See supra note 153 and accompanying text (articulating the “important interests” test).
195. See Abbott, supra note 3, at 3 (suggesting that a successful solution to the homeless problem must address substance abuse); id. at 7 (stating that advocates for the homeless admit that viable solutions to the homeless problem require an acknowledgement that substance abuse problems exist among the homeless); Paisner, supra note 3, at 1261 (stating that a solution to the homeless problem has to involve housing, job training, drug and alcohol treatment, and mental health care).
196. See Davila, supra note 3, at B1 (noting that Sacramento County received a $12.8 million grant from the United States Department of Housing and Urban Development for the Mather Program).
program's participants. Nowhere in the drug testing policy is there any indication that the policy is based on other governmental interests. There are no interests expressed that seek to protect the safety of the participants or the surrounding neighborhoods from those who are addicted to drugs. Although the drug testing policy is designed to achieve the goal of eliminating drug use in the program, this objective might not be important or specific enough to justify the privacy intrusion. A review of Supreme Court cases demonstrates that the Court will not accept any interest as "important," since the Court in the drug testing context has only upheld drug testing under the "important interests" test in one specialized, student athlete context.

Overall, if the Court were to use the "important interests" test in analyzing the constitutionality of the Mather Program's drug testing policy, it is debatable whether the Court would find the policy constitutional or not. However, this point is moot until the next question is answered: Which test would the Court use in analyzing the Mather Program's drug testing policy, the "compelling need" or "important interests?"

C. Proper Test for the Mather Program's Drug Testing Policy

In order for the Mather Program's drug testing policy to have a chance to survive constitutional scrutiny, the Court must be willing to use the "important interests" test, because the policy most likely would be deemed unconstitutional under the "compelling need" test. Since the Court has only utilized the "important interests" test in the student athlete context presented in Vernonia School District, the question becomes whether the Court would be willing to expand the use of that test to include the homeless in the Mather Program.

In Vernonia School District, the Court warned that "suspicionless drug testing will [not] readily pass constitutional muster in other contexts." The Court further emphasized that the most significant factor in the case was "that the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." A look at the literal language of the Vernonia School District opinion indicates that the Court's use of the "important interests" test was driven by the fact that schoolchildren were involved. Apparently, the Court is not eager to expand the use of the "important interests" test into other contexts.

197. See supra notes 63-70 and accompanying text (discussing the governmental interests involved in the Mather Program's drug testing policy).
198. See supra notes 153-58 and accompanying text (discussing how the Vernonia School District Court upheld the constitutionality of random drug testing of student athletes under the "important interests" test).
199. See supra notes 167-70 and accompanying text (concluding that the Mather Program's drug testing policy is probably unconstitutional under the "compelling need" test).
201. Id.
However, the Vernonia School District Court did not absolutely foreclose the possibility of using the "important interests" test in other contexts. The Vernonia School District Court merely stated that "suspicionless drug testing will [not] readily pass constitutional muster in other contexts." This statement does not mean that suspicionless drug testing will never survive constitutional scrutiny. Thus, conceivably the Court might utilize the "important interests" test in a context analogous to student athletes.

As mentioned above, there are some similarities between homeless individuals and student athletes. Since both are "entrusted" to the government's care, both may have lower expectations of privacy. In addition, a lot of homeless shelters are similar in nature to the locker rooms emphasized by the Vernonia School District Court. Lastly, both can be analogized to adults who "choose" to work in a "closely regulated industry." 

However, as was also mentioned above, these similarities are weak as applied to the Mather Program. Since the Mather Program is a transitional housing program and not a homeless shelter, the analogy between the homeless individuals in the Mather Program and the student athletes in Vernonia School District is a stretch. Thus, the Court would probably not use the "important interests" test in analyzing the constitutionality of the Mather Program's drug testing policy. Since the "compelling need" test is the proper test for analyzing the Mather Program's drug testing policy, the policy is probably unconstitutional.

202. Id. (emphasis added).
203. See discussion supra Part IV.B.1 (discussing the similarities between homeless individuals and student athletes).
204. See id. (explaining why homeless individuals "entrusted" to the government's care might have lower expectations of privacy).
205. See id. (demonstrating the similarities between homeless shelters and locker rooms).
206. See id. (discussing how student athletes and the homeless at shelters "choose" their respective positions).
207. See id. (explaining why the similarities between student athletes and the homeless in homeless shelters are inapplicable to the Mather Program).
208. See supra notes 167-70 and accompanying text (concluding that the Mather Program's drug testing policy is probably unconstitutional under the "compelling need" test). The analysis and the conclusion are the same for both the random testing and the suspicion-based testing. Both testing polices require balancing privacy interests with governmental interests. Courts have usually held that even with suspicion-based searches, the governmental interest must be great. The generalized governmental interest in eliminating drug use in the Mather Program does not seem to be a compelling enough interest to uphold even the suspicion-based part of the drug testing policy. Cf. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620-21 (1989) (upholding a drug testing policy that was in part suspicion-based because of the great governmental interest in regulating safety in the railroad industry); New Jersey v. T.L.O., 469 U.S. 325, 338-43 (1985) (holding that school officials may conduct suspicion-based searches of students' property because of the strong interest school officials having in maintaining discipline in the schools).
Overall, the Mather Program’s drug testing policy probably would not survive constitutional scrutiny. Although the policy might be considered constitutional under the “important interests” test articulated in *Vernonia School District*, the Court would probably not expand the use of that test into the homeless context presented here. No one will argue that Sacramento County has only philanthropic motives in implementing the drug testing policy at the Mather Program. Indeed, the Department is correct in stating that a homeless person’s alcohol or drug abuse problem prevents the individual from solving his or her homelessness problem. However, the government must have a “compelling” interest in requiring drug tests. Unfortunately, the Mather Program’s desire for a drug free environment would not be considered “compelling” enough to justify a privacy intrusion occasioned by drug tests.

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209. *Cf.* Memorandum from Robert A. Ryan, Jr., County Counsel, to Board of Supervisors, County of Sacramento, *supra* note 12 (concluding in regards to the Mather Program’s drug testing policy that “it is unlikely that either [the] government’s generalized concern to eliminate drug use or its expressed desire to have a drug free environment would constitute, under the law, either a compelling or important interest sufficient to justify imposition of a drug testing policy”).


211. *Cf.* Memorandum from Robert A. Ryan, Jr., County Counsel, to Board of Supervisors, County of Sacramento, *supra* note 12 (suggesting that the Department articulate important or even compelling governmental interests to be furthered by the drug testing policy at the Mather Program).