Public Health and the Law

A Nation of Suspects: Drug Testing and the Fourth Amendment

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As concern about illegal drug use in the United States has escalated, increasingly draconian measures have been suggested or implemented. Boats and airplanes have been seized when only very small amounts of illegal drugs have been found under a "zero tolerance policy." New rules are being proposed for the simplified eviction of families from public housing if a member of the family has been charged with drug possession, even outside the public housing grounds. Legislators in Texas and Delaware have introduced bills that would punish drug dealers with amputation of fingers and flogging.[1] The legislators who introduced these bills have made it clear they were not joking.

One of the weapons in the drug war arsenal is drug testing in the workplace. The pretext is often detection of worker impairment, but this is seldom the true motivation. Much of the impetus for the current drug testing rage comes from the 1986 President's Commission on Organized Crime report, *America's Habit: Drug Abuse, Drug Trafficking and Organized Crime*, which recommended that "Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program."[2] In the context of a report on organized crime, workplace drug testing becomes a tool for attacking the drug problem from the demand side. If users can be stopped, then the drug traffickers and dealers will have no one to whom to sell their drugs. President Ronald Reagan underscored this approach in ordering a drug-free federal workplace, declaring that illegal drug use on or off duty by federal employees is not acceptable for a variety of reasons, and directing the head of each executive agency to establish programs to test for the use of illegal drugs by employees in "sensitive positions."[3] One of the goals is to recruit employers, both public and private, into the war on drugs. Former Attorney General Edwin Meese even suggested that employers "undertake surveillance of problem areas, such as locker rooms, parking lots, shipping and mailroom areas, and nearby taverns if necessary."[4]

As a result of this fervor, the pace of workplace drug testing has notably increased. Workers from groups as diverse as firefighters, police officers, nuclear power plant employees, school bus aides, probationary school teachers, and computer programmers have been subjected to mandatory drug testing. There has understandably been a complementary increase in the number of lawsuits brought by workers to halt what they feel is a demeaning and intrusive procedure. The courts have been divided in their determination of the legality of mandatory drug tests. The vast majority of the cases have been brought by governmental employees, since their employers are subject to the restrictions against unreasonable searches and seizures found in the Fourth Amendment of the US Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Not *all* searches are forbidden by the Fourth Amendment—only unreasonable ones. Where a search warrant is secured upon probable cause from a judicial officer, a search becomes reasonable. Over the years, however, the courts have carved out exceptions to both the warrant and probable cause requirements and have, at times, looked at other circumstances to determine if a search is reasonable and, therefore, lawful.

The initial question was, is a urine test a search or seizure at all? In one case, which upheld drug testing of police officers in limited circumstances, a concurring judge argued that requiring a person to urinate on demand could not be a search or seizure since a person could not "retain a privacy interest in a waste product that, once released, is flushed down a drain" and that one could not have a "subjective expectation of privacy in a body waste that must pass from his system."[5] However, no majority of any court has reached this conclusion, and all that have decided the issue have concluded that a mandatory urine, blood or breath test constitutes a search under the Fourth Amendment. The focus of the courts, therefore, has been on the "unreasonableness" of the "search" that is involved in drug testing.

Drug testing can be conducted in a variety of ways. It can be done by examining the urine, blood, or breath of an individual. The urine can be collected by allowing the person to urinate privately, while someone listens for the normal sounds of urination, or under direct observation. People can be tested randomly, as a result of behavior that indicates impairment due to drug use, as part of pre-employment or annual physicals, as a result of known procedures, or through sheer whim and surprise. A positive test can lead to a re-test, a warning to stop drug use, voluntary or mandatory drug treatment programs, termination of employment, or criminal

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prosecution. Given the possible various combinations of these factors, it is not surprising that courts have split on the "unreasonableness" of drug testing in various situations.

The depth of a court's feeling that mandatory drug screening is demeaning, intrusive, or a violation of a person's general right to be free from governmental intrusions, also affects its decision. For example, in one case the Plainfield, New Jersey Fire Department entered a city firehouse at 7:00 am, secured and locked all the station doors, awoke all the firefighters on duty and ordered them to submit a urine sample while under surveillance.[6] There was no notice of any intent to require urinalysis, there was no written directive, policy or procedure, and nothing in the collective bargaining agreement regarding drug tests. All firefighters who tested positive for "controlled substances" were immediately terminated without pay. They were not told of the particular substance found in their urine or its concentration, nor were they provided with copies of the actual laboratory results. The city had no reason to suspect that any of the tested firefighters had used drugs or were impaired in any way. There were no complaints from the public about inadequate fire protection and no increase in the incidence of accidents. In short, there was no reason for this surprise raid.

The court cited several concerns in invalidating this testing process. First, the court noted that while public employees' liberty interests may be somewhat diminished while on the job, that they are not extinguished and are entitled to constitutional protection. It was also found that "mass round-up urinalysis" casually sweeps up the guilty and the innocent and "willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest." As the court pointed out, the city essentially presumed each firefighter was guilty, and the burden was shifted to these individuals to submit to a highly intrusive test to vindicate his or her innocence. Such a presumption of guilt is contrary to the Constitution.

Perhaps even more important than the details of the constitutional analysis was the court's perception of the intrusiveness of mandatory urine screening:

> We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" society come to life.[6]

Some courts have taken the approach that certain public employees, particularly police officers, have a more limited constitutional right to be free from searches and seizures than private citizens because of the dangerous nature of their work and the "paramilitary" nature of the police force. These courts have thus found that a search via urinalysis can be required in the absence of "probable cause" as that term is strictly applied, but that the supervisory personnel ordering the test must have a "reasonable, objective basis to suspect that a urinalysis will produce evidence of illegal drug use."[5] This reasonable basis must be "related to the police officer's fitness for duty."[5] Random or mass testing is not permitted, but if the officer, by his or her actions, shows some job impairment that would be related to drug use, testing would be allowed.

The courts have balanced the Constitutional right to be free from intrusive searches against the need for public safety. The question is always, how far should the balance tip away from the right to be free from governmental intrusion—how weighty must the public interest be to abridge their rights? In 1986, one of the first federal courts of appeal to deal with the issue of drug testing tipped the balance powerfully in favor of governmental testing.[7] Jockeys had asked the court to strike down a rule of the New Jersey Racing Commission that required, among other things, the random drug urine screening of jockeys *after* a race. The state's interest in invading a jockey's Constitutional rights could, of course, in no way be related to public safety. Rather, the court upheld the testing on the basis of the state's interest in "the protection of the state's fisc by virtue of the wagering public's confidence in the integrity of the industry."[7] This is a remarkably thin thread on which to support the abridgement of Constitutional rights. It is hard to know just what the public opinion is regarding the integrity of the horse-racing industry; but it seems unlikely that post-race testing of jockeys would have much of an effect on it.

Even more disturbing was the rest of the court's reasoning. It based its holding on the fact that horse racing was an intensely regulated industry and, therefore, the industry is subject to the "administrative search" exception to the Fourth Amendment. It is certainly true that because some industries are highly regulated, that their *premises* may be searched either without a warrant,[8] or with a much lower requirement for a search warrant than "probable cause."[9] Thus, certain warehouses, or coal mines can be easily inspected for violations of health and safety laws. However, the administrative search exception has been used to search *places* in highly regulated industries, not *persons*. The court was aware of the distinction, it just did not find it important. Not only is the result shocking, the reasoning is frightening. To abridge essential Constitutional rights to be free from governmental searches for the reasons this court gave meant the virtual destruction of the Fourth Amendment as it pertained to drug testing. If government agents can test jockeys for the reasons the court stated, who couldn't the state order tested?

A number of courts have cited this opinion in upholding drug testing, but others have rejected it. The Massachusetts Supreme Judicial Court struck down a more limited jockey testing regulation, holding that the state cannot abridge constitutional rights "to insure the integrity of betting on horses."[10] Another federal Court of Appeals case involved the department-wide testing of all firefighters without reasonable cause to believe that any individual used controlled substances.[11] The court forcefully rejected the idea that because an *industry* was heavily regulated, *individuals* who worked in that industry could have their Constitutional rights easily abridged, stating such an approach is "simplistic and intellectually indefensible."[11] The court noted that the creation of the administrative search exception was founded on the basis that such searches were not personal in nature, and found it "incredible" that it could be used to uphold searches of persons. The balancing test was much more strictly applied.

The court noted that a very different magnitude of harm would occur if a single air traffic controller or nuclear plant employee was impaired from drug use, than if a single firefighter were impaired: ". . . there is a continuum of employment categories that are defined by the degree of suspicion that a drug problem exists and the potential harm to society of an impaired employee operating in that employment sector."[11] The court struck down the testing rule because there was no evidence of a drug problem in the fire

department.

Given the diversity of opinions and approaches used by various courts across the country, it was only a matter of time before the United States Supreme Court would enter the fray. On March 21, 1989, the Court handed down the first two of what is likely to be a series of opinions on drug testing.

The first case, *Skinner v. Railway Labor Executive Association*,[12] involved the constitutionality of a drug testing scheme directed at railway workers. While the tests were to be performed by private railways on their employees, the tests implicated Fourth Amendment concerns because they were either mandated or authorized by the Federal Railroad Administration (FRA). In 1985, the FRA promulgated regulations addressing alcohol and drug use by certain railway employees. The regulations forbid these employees from using or possessing alcohol or any controlled substance while on the job, and prohibit employees from reporting to work while under the influence of, or impaired by, controlled substances or alcohol, or having a blood alcohol level of .04 or higher. These regulations were issued in response to evidence that a significant proportion of railroad workers report to work impaired by alcohol or got drunk while working, that 23 percent of operating personnel were "problem drinkers," and that from 1972 to 1983 at least 21 significant accidents resulting in fatalities, serious injury and multimillion dollar property damage involved alcohol and drug use as a "probable cause or contributing factor."[12]

In addition to the prohibition on drug or alcohol use, the regulations provided for drug testing in two circumstances. First, after any accident which involves a fatality, the release of hazardous material accompanied by an evacuation or reportable injury, or damage to railroad property in excess of $500,000, or a collision that results in a reportable injury or damage to railroad property in excess of $50,000, all crew members and other covered employees are required to be transported to an independent medical facility where both blood and urine samples are to be obtained. The samples are then shipped to an FRA laboratory which is to detect any presence of drugs or alcohol using "state-of-the-art" equipment and techniques. Employees who refuse to provide blood or urine samples may not perform certain services for nine months, and are entitled to a hearing concerning their refusal.[12]

A second part of the regulation provides for permissive testing of employees in instances where supervisors have a "reasonable suspicion" that an employee is under the influence of drugs or alcohol or where an employee appears to be impaired. In these circumstances, the railroad may require breath or urine tests. If the railroad plans to use the results of these breath or urine tests in a disciplinary hearing, it must give the employee an opportunity to provide a blood sample to an independent laboratory. If the employee refuses to do so, the railroad may presume impairment from the results of the urine test.[12] The US Court of Appeals that heard this case struck down all the testing provisions that did not require "individualized suspicion" prior to testing. Such a standard, that court said, would impose no insuperable burden on the government and would ensure that "the tests are confined to the detection of current impairment" rather than discovering the metabolites of various drugs that may remain in the body for days or weeks, and which do not provide evidence of current impairment.[13] The Supreme Court reversed, and upheld FRA's drug testing scheme by a 7 to 2 vote.

In its analysis, the Court recognizes that blood, urine and breath testing are an invasion of employee privacy interests and are a "search" for the purposes of the Fourth Amendment. The Court also recognizes that to perform a search, a warrant or at least probable cause is usually required. But at times, as the Court has held in the past, the government may have "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements. The opinion then discusses the "special needs" in this case. First, the employees to be tested are engaged in "safety-sensitive tasks." Second, the purpose of the tests are not to aid in prosecution of employees, but rather to prevent accidents. Third, those charged with administering the test have minimal discretion and, therefore, there is only a minimal chance of arbitrary or unfair use of the testing procedure. Fourth, railroad investigators are not familiar with the Fourth Amendment or warrant requirements. Fifth, if a warrant was required, the delay in obtaining the warrant might allow the needed evidence to be dissipated. Sixth, although urine tests invade an "excretory function traditionally shielded by great privacy," the regulations do not require the direct observation of a monitor, and it is not unlike similar procedures performed in the context of a "regular physical examination." Seventh, the expectations of privacy of employees is "diminished by reason of their participation in an industry that is pervasively regulated to ensure safety." Eighth, the interests of the government to test are "compelling" because the employees can cause "great human loss before any other signs of impairment become noticeable to supervisors." Ninth, the regulations will be an effective means of deterring employees from using alcohol or drugs. Finally, the testing procedures will help railroads obtain "invaluable information about the causes of major accidents."[12]

This is a remarkably utilitarian approach to the Fourth Amendment, as the dissent notes. Essentially, it holds that the Fourth Amendment safeguards are not applicable to situations where the government has good reasons to want information and the intrusion on the person is not great. It makes no effort to distinguish between the searches of places or things, and searches of persons. As the two dissenters argue, "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."[12] The dissent points out that the Fourth Amendment was designed to make governmental searches of citizens difficult, and that it is all too easy to balance away individual rights for the good of the state. However, that balancing was done by the Founders in favor of the individual. The dissenters agree that if the police were freed from the constraints of the Fourth Amendment, the resulting convictions would probably prevent thousands of fatalities. But "our refusal to tolerate this spectre reflects our shared beliefs that even beneficient governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to a resolute loyalty to constitutional safeguards."[12]

The dissenters were unconvinced that there is any evidence that drug testing is a deterrent or provides useful evidence of the causes of accidents, and were even more concerned with the majority's standardless and shifting balancing of individual rights and state powers to invade those rights, and its "cavalier disregard" for the text of the Constitution: "There is no drug exception to the Constitution, any more than there is a Communism exception or an exception for other real or imagined sources of domestic unrest."[12] In continuing this argument, Justice Thurgood Marshall concluded:

> In upholding the FRAs plan for blood and urine testing, the majority bends time-honored and textually-based principles of the Fourth Amendment—principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy. I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. The immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily.[12]

The second case, *National Treasury Employees Union v. von Raab*,[14] concerned drug testing employees of the US Customs Services who apply for positions that meet one of three criteria: direct involvement in drug interdiction or enforcement of related laws, carrying a firearm, or access to classified material. An employee who applies for one of these positions is instructed that final selection is contingent upon successful completion of a drug screen. Therefore, unlike the railroad case, this is in essence an anti-drug loyalty test—there is no pretense of finding impairment. The goal is to keep drug users out of these positions. Anyone who tests positive for drugs is subject to dismissal although the results are not to be turned over to prosecutors.

In a 5 to 4 opinion, the court upheld this drug testing program. What is particularly remarkable here is that the interests that the Customs Service put forward as justifying the abridgement of its employee's Fourth Amendment rights are all theoretical. For example, the government argued that even off-duty drug use creates the risk of bribery and blackmail. Indeed, the Customs Service proved that several officials have been the target of bribery and others have accepted bribes. There was, however, no indication that *any* of these cases involved Customs officials who used drugs. It was argued that drug users might be unsympathetic to the mission of interdicting narcotics. It was argued that those who carry firearms need to be deterred from drug use which might impair their perception. Even the statistic that only five of the 3,600 employees who had already been tested were found to be positive for drugs had any force, since the Court pointed out that the program is designed to *prevent* drug use. In the absence of *any* proof of any real or substantial drug problem in the Customs Service, the Court upheld this drug testing program in order to ensure the "integrity" of the Customs Service.[14*]

Justice Antonin Scalia, one of the Court's conservatives, wrote a scathing dissent, noting "The Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." Justice Scalia believes that the justification set forth to uphold the testing scheme is not just speculation, but "not very plausible speculation." As he argues, the speculation that a drug user is more likely to be bribed by a drug smuggler, is no more likely than the chance of an employee who wears diamonds being bribed by a diamond smuggler. He asserts that police officers who speed in their private cars do not appear to be less sympathetic to enforcing speeding laws. Justice Scalia is not even impressed with the arguments dealing with gun-carrying agents—as he puts it, if they are not deterred by the knowledge that they "may be shot dead in unequal combat with unimpaired smugglers" it seems unlikely that drug testing would deter their drug use. Ultimately, Justice Scalia notes that since the justification for the Customs Service drug screening is so feeble, that its true rationale must be found elsewhere. He finds it in the Commissioner's memorandum announcing the program. The concluding sentence states, "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." Scalia responds, "I think that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point, that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot invalidate an otherwise unreasonable search."[14]

What do these cases mean for the future right of individuals to be free of government intrusions? In some senses, these cases can be construed very narrowly. In *Skinner*,[12] it could be argued that we were dealing with a group of employees with a history of substance abuse who have caused substantial harm to life and property as a result of that abuse. In that circumstance, a serious accident could provide "reasonable suspicion" of substance use by those who may have caused the accident. Thus, it can be argued, that this case represents only a small expansion of the "reasonable suspicion" standard that has been used by courts in upholding the drug testing of other public safety employees. Even the Customs Service case can be construed narrowly. The Court of Appeals which upheld that the drug testing program did so in large part because of its limited scope—"Only employees seeking transfer to sensitive positions are required to take the test and only as a result of a process they choose to set in motion."[15] Viewed this way, the Customs Service testing program is largely "voluntary," and gives no support to mandatory testing.

Unfortunately, the majority opinions of the Supreme Court made no effort to limit their holdings to the narrow facts of the case before it. Whether or not they do so in the future is impossible to predict. It will take more cases before any definite answer about the constitutionality of any particular drug testing program can be confidently stated. However, particularly in the Customs Service case, five justices showed a strong propensity for upholding drug testing programs for speculative and symbolic reasons, and a willingness to ignore the protections of the Fourth Amendment.

The fear that these opinions have no principled boundaries was expressed by Justice Scalia when he pointed out that automobile drivers, construction equipment operators, and school crossing guards all have safety-sensitive jobs. Could they be drug tested based on the speculative injuries that they might cause if under the influence of drugs? Could states require physicians or nurses to be drug tested as a condition of licensure? There is more evidence of drug use by physicians and medical students than there was evidence of drug use by customs workers.[16] If the court is serious about upholding drug testing to ensure the integrity of a program and prevent the possibility of bribery, then certainly it is judges who should be tested, since they are the ultimate arbiters of imprisonment or freedom for accused drug dealers. One could go on indefinitely making lists of potential job categories that might be eligible for drug screening using the Court's rationale.

*The Court did strike down part of the Customs' testing program. Included in the group of employees who were deemed to have access to "sensitive information" were accountants, animal caretakers, all attorneys, mail clerks and electric equipment repairers. The Court felt that this categorization might be too broad and sent the case back to the lower courts to examine the issue.

This is not idle speculation or liberal hysteria. The drug testing cases have already been used to expand the reach of government into the lives of individuals. For example, a licensed practical nurse was fired when he refused to submit to an HIV (human immunodeficiency virus) test, or to disclose the results of a test he had taken earlier.[17] His employer, a public hospital, had learned that his lover had recently died of AIDS (acquired immunodeficiency syndrome), and wanted to know his HIV status in order to decide what duties he could perform. While the procedures he regularly performed could hardly be deemed invasive, this did not deter the hospital. One of the nurse's claims was that the hospital's demand violated his Fourth Amendment rights. Citing the hospital's desire to provide a "safe and efficient workplace," and pointing out that the nurse was in a "safety-sensitive" position, the court readily upheld the hospital's demand based on the appellate courts' decisions in the railroad workers and Customs Service cases. The result would seem to be supported by the Supreme Court's decisions.

In our well-intended desire to stop the flow of drugs into the country and reduce drug abuse, we are rapidly becoming a nation of suspects. Perfectly law abiding citizens who are under no suspicion of drug use are increasingly being called upon to prove their innocence. This activity extends the scope of those who are victims of the drug war. As Justice Scalia so eloquently put it:

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.[14]

REFERENCES

1. Chambers M: Is mutilation and flogging the answer? National Law J. Feb 27, 1989, p. 13.
2. Alcohol and Drugs in the Workplace: Costs, Controls and Controversies—A BNA Special Report. Washington, DC: Bureau of National Affairs, 1986; 5.
3. Executive Order 12564. 51 Fed Reg 32889 (Sept 17, 1986).
4. Meese suggests drug steps by firms. Boston Globe, Nov 30, 1986, p. 8.
5. *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1011 (D.C. App. 1985) (Nebeker, concurring).
6. *Capua v. City of Plainfield*, 643 F.Supp 1507 (D.N.J. 1986).
7. *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986).
8. *Marshall v. Barlow's*, 436 U.S. 307 (1978).
9. *Camara v. Municipal Court*, 387 U.S. 523 (1967).
10. *Horsemen's Benevolent Association v. State Racing Commission*, 403 Mass. 692 (1989).
11. *Lovvorn v. City of Chattanooga, Tenn.*, 846 F.2d 1539 (6th Cir. 1988).
12. 57 L.W. 4324 (March 21, 1989).
13. 839 F.2d 575, 588-9 (9th Cir. 1988).
14. 57 L.W. 4338 (March 21, 1989).
15. *National Treasury Employees Union v. von Rabb*, 816 F.2d 170,177 (5th Cir. 1987).
16. McAuliffe W, *et al:* Psychoactive drug use among practicing physicians and medical students. N Engl J Med 1986; 315:805.
17. *Leckelt v. Board of Commissioners of Hospital District No. 1*, No. 86-4235, (E.D.La. March 15, 1989).

Workers Switch Health Plans when Out-of-Pocket Costs Rise

Will employees switch plans when the out-of-pocket payment for their health plan increases? Findings from a study sponsored by the National Center for Health Services Research and Health Care Technology Assessment (NCHSR) suggest that they may. The study predicts that a health plan could lose as much as 10 percent of its enrollees in a company or other type of organization by raising the monthly out-of-pocket premium for single-person coverage by as little as $5. A similar loss could result from increasing workers' monthly cost for family coverage by $10.

The study, which was based on data on 5,000 employees in 17 Minneapolis firms in 1984, found that a worker's choice of a health plan is influenced by many factors. Married workers, for example, have a strong preference for health plans that cover preventive services, and older employees favor health plans offering a choice of medical providers. The study found that most employees view fee-for-service (FFS) and independent practice association (IPA) health plans as close substitutes because both offer subscribers a choice of medical providers. As a result, when a worker drops an FFS or IPA health plan, he or she will generally switch to a similar plan rather than to a traditional health maintenance organization (HMO), which does not offer choice of provider.

The researchers also found that HMO enrollees had a 9 percent lower hospital admission rate and spent 27 percent fewer days in the hospital than their counterparts insured under family coverage FFS health plans.

According to Roger Feldman, PhD, who led the University of Minnesota study, the findings suggest that price competition among health plans can be quite vigorous. However, the findings also imply that offering employees a choice of only one FFS or HMO plan may not be sufficient to create competition. Further details about the study, which was funded under NCHSR grant HS05298, are in *Employer-Based Health Insurance* (DHHS Publ. No. (PHS) 89–3434).

A single copy of the study is available without charge from the National Center for Health Services Research and Health Care Technology Assessment (NCHSR), Publications and Information Branch, Parklawn Building, Room 18–12, Rockville, MD 20857; tel: 301/443-4100.