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EMPLOYMENT DRUG TESTING, PREVENTIVE SEARCHES, AND THE FUTURE OF PRIVACY

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In 1988, employers tested an estimated eight million Americans for the use of illegal drugs.¹ By 1992, this figure may swell to twenty-two million.² This Article focuses upon some of the long-term effects that institutionalizing mass drug-use testing³ might have on our society. By examining the role employment drug testing is playing in our society as a surveillance and control model, we can begin to see how mass drug testing is likely to transform certain aspects of our culture. The public has debated and considered only a few of these potential ramifications.

Widespread drug testing in the American workplace began with President Ronald Reagan's enactment of Executive Order 12,564, which required executive branch agencies to adopt regulations creating a drug-free workplace, including drug testing of applicants and employees.⁴ In 1988, the Department of Transportation enacted regulations *requiring* various private transportation industries regulated by the Department to conduct drug tests including random testing of its employees under certain circumstances.⁵

In addition to federally mandated workplace drug testing, the private sector was encouraged to implement drug testing because economic studies showed that substance abuse among American workers cost \$34 billion annually in lost productivity.⁶ Private,

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1. See Milt Freudenheim, *Booming Business: Drug Use Tests*, N.Y. TIMES, Jan. 3, 1990, at D1, col. 3 (statement of Michael B. McNulty, Vice president for corporate testing programs at the Clinical Laboratories unit at SmithKline).

2. KEVIN B. ZEESE, *DRUG TESTING LEGAL MANUAL: GUIDELINES AND ALTERNATIVES* § 1.01, at 1-4 (1990).

3. For the purposes of this Article, the term "drug testing" refers to "drug-use testing" rather than the testing of the quality of drugs. This Article is not concerned with the mechanics of employment drug testing, nor even its pros and cons.

4. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 41 U.S.C. § 702(a)(2) (1988).

5. See Procedures for Transportation Workplace Drug-Testing Programs, 53 Fed. Reg. 47,002 (1988) (codified as amended by 49 C.F.R. § 40.1 (1990)).

6. John P. Morgan, *The "Scientific" Justification for Urine Drug Testing*, 36 KAN. L. REV. 683, 685 (1988).

state, and local governments have embarked upon systematic testing—often random—of applicants and employees for a variety of reasons, ranging from reducing industrial accidents, absenteeism, health care costs, inefficient employees, dishonest employees, sick leave, and illegal drug abuse to promoting employee health, greater productivity, and public confidence in the integrity of a business.⁷

Mass drug testing has exposed or spawned the following models or effects of mass surveillance and control: (1) Fourth Amendment tolerance of systematic preventive searches; (2) increased use of biochemical surveillance as a means of monitoring and deterring undesired behavior; (3) increased use of the workplace and economic sanctions as a tool of regulating undesirable behavior; (4) privatization of traditional law enforcement functions; (5) shrinkage of our expectations of personal privacy; (6) increased use of "profiles"; (7) erosion of the presumption of innocence; and (8) erosion of dignity and autonomy. A discussion of each of these issues follows.

I. A RUPTURE IN THE FOURTH AMENDMENT: PREVENTIVE BODY SEARCHES

The Fourth Amendment was adopted to end the government's preventive search program conducted under the guise of general warrants and writs of assistance.⁸ As a result of the development of drug-testing technology, the Court, in two landmark drug-testing cases—*Skinner v. Railway Labor Executives' Association*⁹

7. For a discussion of the history of employment drug testing and the laws relating to it, see CRAIG M. CORNISH, *DRUGS AND ALCOHOL IN THE WORKPLACE: TESTING AND PRIVACY* (1988); KEVIN B. ZEESE, *supra* note 2.

8. Writs of assistance were "general warrants authorizing the bearer to enter any house or other place to search for and seize prohibited and uncustomed goods and [the writs] commanded all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter." LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION* 1156 (1987). "The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method." *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991) (Marshall, J., dissenting). See generally JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

9. 489 U.S. 602 (1989).

and *National Treasury Employees Union v. Von Raab*¹⁰—permitted mass preventive body searches for the first time. Fourth Amendment jurisprudence came full-circle from prohibiting preventive searches to permitting them. The decisions evolved in part from the “surgical” nature inherent in the technology of drug testing—drug testing detects only the presence or absence of a single or particular group of drugs. This technology seduced the Supreme Court into characterizing such searches as “minimal intrusions,”¹¹ thus permitting this new drug-testing technology to circumvent the Fourth Amendment. The first obvious impact, therefore, of mass drug testing has been the fundamental shift in Fourth Amendment jurisprudence, which, because of the Supreme Court’s drug-testing cases, now permits mass biochemical testing of innocent citizens without a warrant, a neutral magistrate’s ruling, probable cause, or any other basis for believing that the body to be searched contains evidence of wrongdoing.

A. *The Preventive Search Doctrine*

Traditionally, law enforcement searches consisted of attempts to find evidence linking a particular individual to a particular crime. The Fourth Amendment limits the scope of law enforcement searches by requiring a probability that the search will yield evidence of a crime.¹² The traditional Fourth Amendment principle requiring a predictive nexus between the place searched and evidence of a crime protected the vast majority of innocent people from being subjected to governmental searches of their persons, homes, or property. In light of the Framers’ Fourth Amendment design to reduce the scope of governmental searches and to eliminate general warrants and writs of assistance,¹³ this nexus requirement reasonably served this objective.

Preventive searches are qualitatively different than traditional searches. First, unlike the traditional law enforcement search, which is intended primarily to identify or gather evidence of

10. 489 U.S. 656 (1989).

11. See *infra* notes 53-60 and accompanying text.

12. See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure in such a [criminal] case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”).

13. See *supra* note 8 and accompanying text.

wrongdoing, the preventive search is aimed at deterrence of wrongdoing through fear of detection. The preventive search is not expected to yield any evidence of wrongdoing. Probable cause and individualized suspicion are therefore not relevant to preventive searches. Their effectiveness is measured by the fact that such searches do not yield evidence of a crime because the systematic program of preventive searches has successfully deterred wrongdoing. Second, preventive searches systematically target large areas or groups, rather than individual locations. Third, a program of preventive searches is open and announced to its target subjects in order to achieve its deterrent purpose. Fourth, objective events or criteria, such as fixed locations on a highway or random selection of social security numbers of employees, tend to trigger preventive searches. Fifth, the discretion to search is shifted away from the particular individual searchers to "neutral" observers, such as legislatures, administrative agencies, committees, or personnel directors, who determine the criteria for selecting the persons to be searched. Sixth, the scope of the search is usually "surgical"; it collects only a limited amount of information.

B. Evolution of the Preventive Search Doctrine

The history of the application of the Fourth Amendment to searches represents a struggle between the government's attempt to gather information and the need to preserve some privacy for the people. Before the Fourth Amendment, early Americans were subjected to mass preventive searches in the form of general warrants and writs of assistance.¹⁴ The government used these devices to stifle speech and subject many innocent people to invasions of privacy.

Following the adoption of the Fourth Amendment, the scope of the government's power to search narrowed. The Amendment contains two separate clauses that limit the government's power to search "persons, houses, papers, and effects."¹⁵ The Warrant Clause provides 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."¹⁶ The Reasonableness Clause provides that the "right of

14. See *supra* note 8 and accompanying text.

15. U.S. CONST. amend. IV.

16. *Id.*

the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."¹⁷

Although ambivalently, the Supreme Court frequently construed the Reasonableness Clause in light of the Warrant Clause.¹⁸ As Justice Brennan wrote: "[T]he provisions of the Warrant Clause—a warrant and probable cause—provide the yardstick against which official searches and seizures are to be measured."¹⁹ As the Court held in *Dunaway v. New York*,²⁰ in reference to seizures:

The "long-prevailing standards" of probable cause embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.²¹

As long as the Fourth Amendment requires the government to possess a certain quantum of evidence from which some probability exists that the search will yield evidence of wrongdoing, preventive searches are not possible.

In 1967, the Supreme Court faced squarely the issue of whether the Fourth Amendment condemns all preventive searches. In *Camara v. Municipal Court*,²² the Court upheld, against a Fourth Amendment challenge, a city's routine, periodic, area-wide inspections of buildings and dwellings. However, if the occupant refused entry, the Court conditioned such searches upon obtaining

17. *Id.*

18. For a discussion of the history of the Court's ambivalence in this area, see *California v. Acevedo*, 111 S. Ct. 1982, 1992-94 (1991) (Scalia, J., concurring).

19. *New Jersey v. T.L.O.*, 469 U.S. 325, 359-60 (1985) (Brennan, J., concurring in part and dissenting in part).

20. 442 U.S. 200 (1979).

21. *Id.* at 208 (citations omitted). Although *Dunaway* involved Fourth Amendment restrictions on arrests, the same principles apply to searches. See also *Chimel v. California*, 395 U.S. 752, 763 (1969) ("[Routine] searches . . . may be made only under the authority of a search warrant.").

22. 387 U.S. 523 (1967).

an administrative search warrant.²³ The search warrant required by the Fourth Amendment in *Camara* did not demand individualized probable cause, but could be based upon "the nature of the building . . . or the condition of the entire area."²⁴ Such an administrative warrant requires, in effect, group- or area-based probable cause.

The Court began its analysis in *Camara* by noting that the "primary governmental interest at stake [was] to *prevent* . . . the unintentional development of conditions which are hazardous to public health and safety."²⁵ The Court additionally observed that "unanimous agreement [existed] among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes [was] through routine periodic inspections of all structures."²⁶ Recognizing that strict adherence to the traditional individualized nexus requirement would deal "a crushing blow"²⁷ to municipal building code enforcement, the Court held that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."²⁸ The Court listed four factors that justified deviation from the traditional individualized nexus requirement:

First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be *prevented* or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself. Finally, *because the inspections are neither personal in nature nor aimed at the discovery of crime, they involve a relatively limited invasion of the urban citizen's privacy.*²⁹

However, the Court refused to eliminate the need for any kind of search warrant because the searches would have predictably adverse consequences to the individual's interest in "self-protec-

23. *Id.* at 540.

24. *Id.* at 538.

25. *Id.* at 535 (emphasis added).

26. *Id.* at 535-36.

27. *Id.* at 536.

28. *Id.* at 536-37.

29. *Id.* at 537 (emphasis added and citations omitted).

tion": a municipal criminal charge could be brought against an individual for refusing entry to a city inspector.³⁰ The adverse consequence of a positive drug test—loss of employment—is surely a more severe consequence to one's interest in self-protection than that commonly associated with a violation of a housing code.

Nevertheless, *Camara* began a categorical shift away from interpreting the Reasonableness Clause in light of the Warrant Clause to an ad hoc balancing test for searches of buildings by administrative agencies. In such cases "reasonableness is . . . the ultimate standard."³¹

Camara gave birth to a Fourth Amendment exception to the warrant requirement known as the "administrative search doctrine."³² Prior to the drug-testing cases in 1989, the Court permitted warrantless preventive searches only of commercial premises.³³

Eleven years after *Camara*, the Court, in *United States v. Martinez-Fuerte*,³⁴ upheld preventive stops of automobiles at permanent checkpoints near the United States-Mexico border that involved only brief detention and questioning of occupants.³⁵ The purpose of such stops was to check for illegal immigrants. The Court upheld these fixed checkpoint stops because they did not include searches of the occupants or the stopped vehicles.³⁶ If an intrusion was "minimal," the Fourth Amendment would not require an individualized nexus between the occupants and illegal immigration, if "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations."³⁷

Prior to *Skinner* and *Von Raab*, lower courts had upheld several types of preventive searches, such as the inspection of luggage at airports³⁸ and the use of metal detectors to search people entering courthouses.³⁹ The Supreme Court, however, had never

30. *Id.* at 531.

31. *Id.* at 539.

32. For the latest administrative search case, see *New York v. Burger*, 482 U.S. 691 (1987).

33. See *Camara*, 387 U.S. at 539.

34. 428 U.S. 543 (1976).

35. *Id.* at 546-47.

36. *Id.* at 558.

37. *Id.* at 557.

38. See WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.6 (2d ed. 1987).

39. See *id.* § 10.7(a); see also Jay Zitier, Annotation, *Searches and Seizures: Validity of Searches Conducted as Condition of Entering Public Premises—State Cases*, 28 A.L.R.4th 1250 (1984).

permitted body searches of a person without probable cause to believe the search would produce evidence of a crime.⁴⁰

C. The Supreme Court's Drug-Testing Cases

In 1989, the Supreme Court issued two landmark opinions upholding systematic preventive searches.⁴¹ In *Skinner*, the Court upheld regulations promulgated by the Federal Railroad Administration requiring railroad companies to conduct blood and urine tests of railroad employees involved in accidents resulting in death, injuries, or property damage.⁴² The Court further authorized railroads to conduct breath or urine tests if an employee violated certain rules, or if a supervisor reasonably suspected that an employee's acts or omissions contributed to a reportable accident or incident.⁴³ The regulations also permitted railroad companies to require breath tests if a supervisor reasonably suspected that an employee was under the influence of alcohol at work.⁴⁴

In *Von Raab*, the Court upheld United States Customs Service regulations that required drug tests of any Customs Service employee seeking a transfer or promotion into a position that directly involved the interdiction of illegal drugs, required the carrying of a firearm, or gave the employee access to classified material.⁴⁵

Because the regulations permitted systematic searches of large groups of employees without regard to whether the individuals tested had engaged in wrongdoing, the Court was once again confronted with the problem of how to interpret the Fourth Amendment in a way that remained true to its purpose, text, and history without dealing a crushing blow to the federal government's regulatory scheme.

In both cases, the Court began its Fourth Amendment analysis by separating analytically governmental searches based upon "special governmental needs, beyond the normal need for law

40. See, e.g., *Winston v. Lee*, 470 U.S. 753, 762-63 (1985) (discussing factors used to determine constitutionality of a body search).

41. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

42. *Skinner*, 489 U.S. at 633.

43. *Id.* at 630-34.

44. *Id.* at 611. In both *Skinner* and *Von Raab*, the blood or urine was tested for illegal and prescription drugs. *Id.* at 609; *Von Raab*, 489 U.S. at 662.

45. *Von Raab*, 489 U.S. at 679.

enforcement" from law enforcement searches in criminal cases.⁴⁶ In such cases, the government's interests must be balanced against the privacy interest affected by the search.⁴⁷ "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."⁴⁸ Because an individualized nexus requirement will almost always jeopardize the efficiency of a preventive search program,⁴⁹ or any search for that matter, the only real obstacle in *Skinner* and *Von Raab* to permitting systematic drug testing was whether blood and urine testing would meet the "minimal" intrusion standard that the Court previously said was a prerequisite to cutting loose the individualized nexus requirement.

The Court had never before announced any principle or standard by which to measure the degree of intrusiveness of a search. It had only held searches of buildings⁵⁰ and various types of stops⁵¹ to be minimally intrusive. In *Skinner*, the Court looked at four factors to determine the intrusiveness of the drug-testing procedures: the scope of information collected, the manner of the intrusion, and the cultural and governmental environments in which the search was conducted.⁵²

The unique fact of these cases is that the drug-testing technology can hone in on a microscopic amount of information, thus providing an extremely tight fit between the goal of the search and the information collected. If the government's preventive search program had utilized searches of employees' homes, cars, purses, or briefcases—which would inescapably compel the searcher to observe information having nothing to do with the

46. *Id.* at 665; *Skinner*, 489 U.S. at 619. Both cases quote *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

47. *Von Raab*, 489 U.S. at 665-66.

48. *Skinner*, 489 U.S. at 624.

49. According to the Court in *Skinner*, a search warrant was not necessary because "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate," and because imposing a search warrant requirement would frustrate the governmental purpose behind the search. Furthermore, the Court determined that both the probable cause and individualized suspicion requirements would be inconsistent with the preventive nature of the search program. *Id.* at 622-24.

50. *New York v. Burger*, 482 U.S. 691 (1987).

51. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Terry v. Ohio*, 392 U.S. 1 (1968).

52. *See Skinner*, 489 U.S. at 624-28.

objectives of the search—the Court would probably not have characterized such searches as “minimally intrusive.”⁵³

This surgical search characteristic had been appealing to the Supreme Court for some time.⁵⁴ In *United States v. Place*,⁵⁵ the Court held that subjecting an airline passenger’s luggage to a “canine sniff” for the presence of drugs was not a search.⁵⁶ In *United States v. Jacobsen*,⁵⁷ the Court held that a Drug Enforcement Agent’s chemical field testing of a plastic bag containing white powder for the presence of cocaine was also not a search.⁵⁸ The Court in *Skinner*, however, held drug testing to be a search because blood and breath testing require an infringement upon bodily integrity.⁵⁹ Urine testing “can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant or diabetic,” and the process of collecting urine “implicates privacy interests.”⁶⁰

The fact that the Court upheld drug testing is not what is so frightening. More distressing are the Fourth Amendment holes that have been left in the wake of *Skinner* and *Von Raab* that are likely to widen even further. One could make a superficially plausible argument that *Skinner* and *Von Raab* are *sui generis* and narrowly limited to their facts. One could argue that *Skinner* applied only to employees in positions in which drug impairment could lead directly to physical harm to themselves or to others. The Court destroyed that distinction in *Von Raab* by permitting preventive drug tests of employees to promote “probity,” or public confidence in the integrity of employees in certain positions.⁶¹

53. See *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (plurality opinion) (“The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer’s business address.”).

54. See, e.g., *United States v. Karo*, 468 U.S. 705 (1984) (holding that a transfer of a can of chemicals that contained an electronic homing device was not a search or seizure because the device conveyed no information that the defendant wished to keep private).

55. 462 U.S. 696 (1983).

56. *Id.* at 707.

57. 466 U.S. 109 (1984).

58. *Id.* at 123 (“governmental conduct that can reveal whether a substance is cocaine, and no other arguably private fact, compromises no legitimate privacy interest.”).

59. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616-17 (1989).

60. *Id.* at 617.

61. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670-71 (1989). Lower courts have used this rationale to uphold testing of Department of Justice employees holding top secret national security clearance in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990), and of United States Army drug

One could argue that preventive biochemical searches are limited to groups of individuals for whom some type of group suspicion of illegal drug use exists. This idea was also rejected in *Von Raab* as a limiting principle.⁶² The Court was undaunted by the fact that no evidence proved that Customs Service employees and applicants subject to testing used illegal drugs.⁶³

It is difficult to gauge the precedential impact of any given case, but one can safely predict that future Supreme Court cases will narrow only the scope of protections under the Fourth Amendment. *Skinner* and *Von Raab* emphasized the fact that suspicionless preventive searches were permissible under the Fourth Amendment in part because each case involved interests other than normal law enforcement needs. Within one year, however, the Court permitted suspicionless law enforcement sobriety checkpoints to deter drunk driving.⁶⁴ In 1991, the Court upheld another form of suspicionless preventive stop: police may now randomly approach passengers inside buses to request permission to search their luggage and personal belongings for drugs.⁶⁵ It is difficult to predict when the Court will simply reverse its past precedents to make room for easier law enforcement searches, as the Court did this year in *California v. Acevedo*.⁶⁶

Von Raab and *Skinner* indicate that the Court has accepted deterrence as a valid purpose for searches of persons under the Fourth Amendment. Formerly, social institutions would search only the few people whom the institutions had cause to believe were engaged in wrongdoing. Now, we have found a Court willing

counselors in *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Compare *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (holding that Department of Agriculture policy of mandatory drug testing of employees who do not hold safety- or security-sensitive jobs violates the Fourth Amendment) with *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (holding that the only employees of a county department of corrections that may permissibly be tested are those who come into contact with prisoners or have opportunities to smuggle drugs to prisoners, not those employees whose tasks are merely administrative) and *American Fed'n of Gov't Employees v. Sullivan*, 744 F. Supp. 294 (D.D.C. 1990) (preliminarily enjoining mandatory post-accident drug testing of employees with respect to workers not employed in safety-sensitive positions).

62. *Von Raab*, 489 U.S. at 674.

63. *Id.*

64. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

65. *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

66. 111 S. Ct. 1982 (1991) (overruling *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), which held, respectively, that to open a footlocker or a closed container located in a properly stopped automobile was a Fourth Amendment violation). The Court's precedents are becoming increasingly tenuous: "[T]his Court has never felt constrained to follow precedent. . . . Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 (1991) (citations omitted).

to allow us to search everyone else in hopes of deterring the guilty few. This acceptance threatens to subject millions of innocent people to government searches and represents a major shift in Fourth Amendment jurisprudence. Our nation's fascination with employee drug testing has produced this Fourth Amendment revolution.

II. THE NEW USE OF BIOCHEMICAL SURVEILLANCE TO MONITOR AND CONTROL BEHAVIOR

Every society identifies forbidden behavior. Every society also establishes the means to enforce behavioral norms through various techniques of surveillance and punishment. Traditionally, surveillance of forbidden behavior was conducted through visual observation and written documentation. As technology progressed, society developed increasingly sophisticated means of monitoring illegal behavior: binoculars, transponders, computer monitoring, electronic eavesdropping, and high-tech aerial photography.⁶⁷ Each of these forms of surveillance monitors the outward behavior of an individual. Drug testing, however, represents a new kind of surveillance: surveillance of the inside of a person, surveillance of one's biochemistry.

We are entering a new era in which biochemical surveillance is used to regulate behavior in addition to its potential health-promotion purposes. To be sure, medical and psychological examinations that gather similar "internal" information are not new, but powerful institutions use such diagnostic technology sparingly to monitor and shape behavior, or to condition employment.⁶⁸ Not only is the biological search a relatively recent development, but the vast scope of its application is also unprecedented.

Criminal justice agencies have employed drug testing to monitor and promote law-abiding behavior in persons charged with

67. The government has increased its use of these sophisticated monitoring devices: Without notice . . . the Bush Administration has escalated the use of wiretapping to a level nearly twice that of the Reagan Administration. During the Reagan years, the amount of wiretapping exceeded that in previous administrations by 20 percent.

In 1990, the Department of Justice asked for and received from federal judges authorization to install electronic surveillance 324 times, exceeding the all-time record

Wiretaps Under Bush: Upward and Onward, 17 PRIVACY J. 1, 3 (Aug. 1991).

68. For a discussion of the history and analysis of medical examinations in the workplace, see MARK A. ROTHSTEIN, *MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS* (1989).

or found guilty of crimes.⁶⁹ For example, police use breathalyzers for this purpose if evidence indicates that a person committed the crime of driving while impaired. Indirectly, polygraph tests purport to measure or detect past wrongful behavior through surveillance of the internal process of emotional guilt created by lying to deny wrongful behavior.⁷⁰ In contrast to present-day drug testing, however, these forms of testing target only individuals reasonably believed to have violated the law, a limitation that narrows dramatically the scope of persons subjected to such testing. Within a few years, we have come to accept mass drug testing even though the overwhelming majority of those tested test negative.⁷¹ Recent public opinion polls reflect widespread support for mandatory employee drug testing.⁷²

This social experiment will have serious transforming consequences in the future. If drug testing is cost-effective and reduces illegal drug use, society will find new uses for similar testing. Surveillance of any kind is not conducted for its own sake. The information collected is used to make decisions about people that affect important aspects of their lives.

Drug testing at the worksite has been proposed as a health measure to detect drug users and persuade or compel them to accept rehabilitation. This rationale assumes that those detected through surveillance need rehabilitation or treatment. In the absence of a need for treatment for the majority of users detected and in the absence of established effective treatment, employment drug-use testing as a health benefits paradigm cannot be sustained. Rather, it is intended primarily to cause those who would use certain drugs to forego such use. In other words, the drug tests are used to shape applicant and employee behavior. Because drug testing can detect marijuana use within seven to twenty-eight days after the use,⁷³ drug testing at the worksite obviously detects use away from the worksite, often in one's home or the homes of others.

69. See Eliot Marshall, *Testing Urine for Drugs*, 241 SCI. 150, 151 (1988).

70. Of course, the reliability and the theory of polygraphy—that lying leads to conscious conflict which in turn produces a measurable physiological response—is subject to differing scientific views. For a discussion of the theory and application of polygraphy, see OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION (1983) and DAVID LYKKEN, A TREMOR IN THE BLOOD: USE AND ABUSES OF THE LIE DETECTOR (1980).

71. See, e.g., Craig Zwerling et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639, 2641 (1990).

72. See Tom Shoop, *Urnalysis Update—Random Drug Testing of Federal Workers is Marking Headway*, GOV'T EXECUTIVE, Feb. 1990, available in LEXIS, Nexis Library, Omni File.

73. Zwerling, *supra* note 71, at 2640.

Another rationale for worksite testing is the desirability of having employees obey the laws that pertain to drug use, but drug testing in the workplace has little to do with obeying the law. Urine tests have quantitative cutoffs, designed in various programs to focus on heavier or more recent users, or to reduce false positive rates.⁷⁴ If smaller amounts of illicit drugs are detected on quantitative analysis, the test is recorded as negative.⁷⁵ Thus, the test results are not focused on the law because only heavier users are identified for possible action. Moreover, most employers do not conduct breathalyzer tests of employees operating motor vehicles, ignoring those persons who are driving illegally.

Furthermore, the underlying supposition that recreational users of marijuana or cocaine are a danger to themselves or others at the worksite, or that they are less productive than nonusers is surprisingly unpersuasive. In a recently published study, the authors observed that the extent of drug-related absenteeism, termination, and disciplinary action was far less than they had anticipated.⁷⁶ In addition, their positive results showed interdrug inconsistencies and their analysis did not take into account the possible effects of alcohol.⁷⁷ Another of the very few peer-reviewed articles in the medical literature found no effect from drug use on worksite performance.⁷⁸ Other critics of drug testing highlight the misleading nature of the data used to justify drug testing.⁷⁹ Regardless of motivations concerning employee health, productivity, or safety, the major effect of drug testing at the worksite is to compel behavioral conformity, both at the workplace and in individuals' private lives away from the worksite.

Technology for carrying out urine tests has improved remarkably over the last twenty years and the technology will only get better in the future. The widespread acceptance of mass systematic drug testing will pave the way for other forms of biochemical surveillance that will be used to regulate behavior and to affect important opportunities in life. The next wave of new tests will enhance the government's and employers' abilities to predict

74. ROBERT P. DECRESCE ET AL., *DRUG TESTING IN THE WORKPLACE* 59 (1989).

75. John P. Morgan & Pamela S. Puder, *Urinary Testing for Drugs of Abuse in the Military*, 7 *BEHAVIORAL SCI. & L.* 374, 383 (1989).

76. Zwerling, *supra* note 71, at 2643.

77. *Id.*

78. David C. Parish, *Relation of the Pre-Employment Drug Testing Result to Employment Status: A One-Year Follow-Up*, *J. GEN. INTERNAL MED.* § 4:44-47 (1989).

79. Morgan, *supra* note 6, at 692.

individual susceptibility to various diseases.⁸⁰ This information could be used to require diet, medication, medical treatment, lifestyle, or employment changes to reduce these risks. Some employers have already tried to exclude fertile women from working in certain chemical environments out of fear of genetic damage to their potential offspring.⁸¹

One of the techniques now being rapidly explored is the isolation and identification of single genes that either promote or suppress disease. These technological advances could also be used for surveillance purposes. For example, an employer could advise a person who has a gene that promotes lung cancer not to augment that gene's activity by smoking or by exposing the gene to common lung carcinogens in the workplace. The employer could urge such individuals to get plenty of carotenes in their diets or in dietary supplements to attempt to reduce their increased risk of lung cancer.

In the near future, blood tests may characterize the genetic makeup of an individual. An employer might be able to predict a potential employee's propensity to develop heart disease, cancer, arthritis, or major mental disease, any of which could cause loss of productivity and substantial medical expense. Having a group of employees with substantial health risks will increase health insurance premiums and reduce the profits of the employer. As genetic technology improves and gene therapy becomes available, individuals who have been subjected to a genetic test could be required to undergo treatment to modify those genes that create extraordinary risks to illness or disease. Having workers with healthy genomes could even result in insurance premium discounts.⁸²

The capacity for complete genetic analysis should be achieved by the end of the next two decades.⁸³ During that twenty-year period, many interim technological advances will provide an extraordinary amount of genetic information; possibly most of the expressions of human genes will be deciphered within a few

80. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, GENETIC MONITORING AND SCREENING IN THE WORKPLACE 140-41 (1990).

81. See *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (holding that sex-specific fetal protection policies violate title VII as amended by the Pregnancy Discrimination Act).

82. For a discussion of biochemical testing by employers, see *infra* notes 85-96 and accompanying text.

83. See NATIONAL INSTITUTES OF HEALTH, REPORT OF THE AD HOC PROGRAM ADVISORY COMMITTEE ON COMPLEX GENOMES (D. Baltimore ed., 1988).

years.⁸⁴ Consequently, by the end of this two-decade era, and perhaps within this decade, apprehensions about the invasion of privacy incurred by having body fluid observed for information about drug use will be dwarfed by anxieties about privacy created by our stunning technological advances.

If the genome analysis enters a networked computer system, the consequences for the employee could be catastrophic. Such disclosures could affect employment opportunities, life insurance or health insurance premiums, or bank loans. In a sense, having one's genome in another's computer is a form of bio-psycho-social rape, and the potential misuse of information about that genome is a perpetual Sword of Damocles. If biochemical surveillance is used this way in the future, it will be significantly caused by society's unrestrained embrace of mass drug testing today.

III. USING THE WORKPLACE AND ECONOMIC SANCTIONS TO REGULATE BEHAVIOR

Intuition suggests that employment drug testing today will effectively reduce illegal drug use among those who might be tested. Coupling economic sanctions with biochemical surveillance can be a very potent tool in regulating behavior. If all employers required employees to wear crew cuts as a condition of employment, a majority of adults would be sporting crew cuts.

Our legal system uses both economic credits and criminal sanctions to encourage and discourage behavior. Only recently, however, have we begun to withhold very important economic benefits, which many would consider entitlements or basic necessities, if an employee engages in undesired behavior. For example, we now deny federal grants to individuals who use illegal drugs.⁸⁵ The federal government now mandates that recipients of federal grants or financial assistance require employees to report all convictions for drug offenses occurring in the workplace to their employers who, in turn, must report them to the federal funding agency.⁸⁶ The Drug-Free Workplace Act requires employers either to punish an employee convicted of a workplace

84. Mark D. Adams et al., *Complementary DNA Sequencing: Expressed Sequence Tags and Human Genome Project*, 252 Sci. 1651 (1991).

85. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 41 U.S.C. § 702(a)(2) (1988).

86. Drug-Free Workplace Act of 1988, § 5153, 41 U.S.C. § 702.

drug offense or to require the employee to enter a drug awareness or rehabilitation program.⁸⁷ The City of Miami passed an ordinance requiring the police to report drug-related arrests to the arrestee's employer.⁸⁸ Blue Cross and Blue Shield of Maryland has denied medical benefits to repeat drunk drivers who are injured in accidents they themselves caused.⁸⁹ Congress withholds student financial aid from persons convicted of drug crimes.⁹⁰ G.I. Bill benefits are denied to veterans who fail to apply timely as a result of alcoholism or drug abuse.⁹¹ Public housing is denied to tenants and their families when tenants engage in illegal drug dealing.⁹² Driver's licenses are withheld from young persons who drop out of school.⁹³

These examples show an increase in the emphasis on the use of economic sanctions to control behavior that was formerly regulated primarily by criminal sanctions. Economic sanctions may be a more effective tool than the criminal sanction for individuals who care about employment, education, housing, licenses, or health care. This approach may be promoted in part because such programs might avoid many of the constitutional protections that inhibit effective enforcement in the criminal justice system.⁹⁴

Although these ideas may be effective in the war against drug abuse, once we realize the effectiveness of biochemical surveillance and economic sanctions in regulating a person's life, we are likely to use those tools together to regulate other behavior. For example, employers who want to reduce health care costs of employees and dependents may prevent certain behaviors such as cigarette smoking, and monitor compliance through biochemical testing.⁹⁵ Many employers now monitor the amount of time

87. *Id.* § 703.

88. *Miami Beach to Report Drug Arrests to Employers*, N.Y. TIMES, Jan. 25, 1991, at A15.

89. Keith Schneider, *Stopping Drunken Drivers Before the Next Wreck*, N.Y. TIMES, Jan. 30, 1991, at A16.

90. See 45 C.F.R. § 1170.3(j) (1981) (excepting drug and alcohol abusers from federal financial assistance programs under nondiscrimination regulations for the handicapped).

91. *Traynor v. Turnage*, 485 U.S. 535 (1988).

92. Dirk Johnson, *Target: Gangs that Plague Housing*, N.Y. TIMES, May 20, 1989, § 1, at 9; see, e.g., Deborah Marquardt, *Running the Drug Dealers out of Public Housing*, N.Y. TIMES, Oct. 2, 1989, § 8, at 1.

93. *No School, No License*, N.Y. TIMES, July 14, 1989, at A28.

94. In New York City and Portland, Oregon, authorities have been using public nuisance laws that do not even require a criminal conviction to evict suspected drug dealers. Mere arrests can support a finding of a public nuisance. See Now, *Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, Jan. 25, 1991, at B16.

95. See, e.g., *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987).

their employees exercise.⁹⁶ To the extent that we can monitor a person's diet, employers may also require certain diets and monitor adherence to them through biochemical tests.

All of the new forms of biological surveillance and control of individuals raise questions about the relationship between the individual and society as a whole. Should any aspect of the individual be immune from societal surveillance and regulation even if it will not advance the common good? Should an individual be denied employment, housing, or education just because he chose to take certain drugs, forego certain prescription medications, or refuse compliance with the employer's diet? Should individuals' lives be shaped by biochemical profiles?

Because using economic sanctions to control behavior circumvents procedural due process afforded to the criminally accused under state and federal constitutions, we are likely to see new areas of rights developing similar to what we now see in the common law of employment.

IV. PRIVATIZATION OF TRADITIONAL LAW ENFORCEMENT EFFORTS

Budget crunches are forcing federal, state, and local governments to cut back, rather than expand, governmental services. In recent years, federal, state, and local governments have been contracting out services such as food services, street maintenance and repair, medical services in jails, and solid waste collection.⁹⁷

One area in which this delegation has occurred is in the field of regulating illegal drug use. By legislation and regulation, the federal government has encouraged and required private industry to conduct drug-use surveillance and to punish drug-using American citizens.⁹⁸ Numerous regulations promulgated by the United States Department of Transportation require the *private* transportation industry to conduct mass testing—including random

(forbidding firefighters to smoke during first year on the job is not a violation of their constitutional right to privacy or due process of law); see also KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE* § 7.7 (1987 & Supp. 1991).

96. See Claudia H. Deutsch, *Rewarding Employees for "Wellness"*, N.Y. TIMES, Sept. 15, 1991, at F21 (listing examples of employers giving bonus pay and incentives to employees who exercise, quit smoking, or even have healthy blood test results).

97. Michael D. Hinds, *Cash-Strapped Cities Turn to Companies to Do What Government Once Did*, N.Y. TIMES, May 14, 1991, at A8.

98. See, e.g., Drug-Free Workplace Act of 1988, §§ 5152-5158, 41 U.S.C. §§ 701-707.

testing—of millions of employees.⁹⁹ The Drug-Free Workplace Act of 1988¹⁰⁰ and the regulations promulgated pursuant to it¹⁰¹ require private employers receiving federal grants or contracts to establish a drug-free workplace, even though these grants and contracts do not, on their face, require drug testing.¹⁰² The idea behind each of the measures is that the threat of loss of employment will deter illegal drug use when the threat of criminal sanctions has failed.

Privatizing the government's search functions has several effects. First, if the government's encouragement and participation do not rise to the level of state action, these surveillance functions are immune from Fourth Amendment constraints and can, therefore, be more intrusive and pervasive than traditional governmental searches.¹⁰³ Second, regardless of whether the Fourth Amendment restrictions apply to private sector surveillance, such surveillance does not utilize governmental resources. This approach, therefore, expands the scope of government-desired surveillance of individuals. Third, to the extent that private sector surveillance is coupled with punitive sanctions, such as withholding employment opportunities from individuals, the government also succeeds in regulating behavior without expending any of its own resources.

How far the government will go toward delegating or privatizing its surveillance and control of individual functions is unclear, but its drug-testing policies have certainly created a model that we can expect to find arising in other areas of traditional governmental surveillance and control.

V. THE SHRINKING OF EXPECTATIONS OF PRIVACY: A SLIPPERY SLOPE OF EXPECTATIONS

Regardless of how one defines privacy, the American public believes strongly that individual privacy is being eroded. In a

99. See regulation contained in Individual Empl. Rts. Man. (BNA) § 595:147-750 (1991).

100. 41 U.S.C. §§ 701-707.

101. For Department of Defense regulations, see 48 C.F.R. §§ 223.7500-223.7504, 252.223-7500 (1990). For rules pertinent to the Department of Defense, General Services Administration, and National Aeronautics and Space Administration, see 55 Fed. Reg. 21,679 (1990). For drug-free workplace regulations adopted by the Office of Management and Budget, see 55 Fed. Reg. 3465 (1990). See also O&B Questions and Answers on Drug-Free Workplace Act of 1988, 54 Fed. Reg. 4947 (1989).

102. See *supra* note 101.

103. For a discussion of the state action doctrine, see *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989).

1990 Harris survey, nearly three out of four Americans agreed that they have "lost all control over how personal information about them is circulated and used by companies."¹⁰⁴ Seventy-nine percent of Americans are concerned about threats to their personal privacy.¹⁰⁵ The increasing use of technology, such as electronic surveillance and biochemical testing, and the increased use of computers to store and disseminate large amounts of personal information, such as financial, medical, educational, and criminal information, reflect a trend toward a total surveillance society—one in which we are gradually losing control over our data profile and decisions that are made about us. The current debate over whether the United States Constitution affords the people *any* privacy, outside of the Fourth Amendment, is indicative of the peril in which privacy finds itself today.

Part of the reason privacy is being lost is that we, as a society, do not have a clear definition of what privacy is, and consequently there is no political consensus regarding a definitive value that "social progress" must follow. This lack of a social rudder causes each privacy debate to be fought on the merits of that particular case rather than by balancing the asserted social interest against the comprehensive social interest in preserving individual privacy. To the extent that any privacy debate considers privacy issues outside the context of the particular case, all prior intrusions into privacy, which society has accepted, form a baseline for comparison to the type of intrusion. Each new intrusion appears to represent only an incremental diminution of privacy overall.

This phenomenon is visible in Supreme Court cases. In *United States v. Lee*,¹⁰⁶ the Court held that shining a search light onto a boat to illuminate the deck did not infringe upon a reasonable expectation of privacy of the owner or occupants of the boat. The rule gleaned by the Court in this case was that technology that merely enhances the visual senses of the government agents is not a search under the Fourth Amendment. This same principle was used by the Supreme Court to justify monitoring a person in possession of a package that contained an electronic tracking device,¹⁰⁷ and watching people and places through enhanced aerial

104. *Privacy: Survey Finds Public Concern Rising Over Protection of Personal Privacy*, DAILY REP. FOR EXECUTIVES, June 12, 1990, at A8.

105. *Id.*

106. 274 U.S. 559 (1927).

107. *United States v. Knotts*, 460 U.S. 276, 282 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.").

photography.¹⁰⁸ If privacy can be eroded incrementally, then it can eventually vanish.

Employment drug testing poses a serious threat to privacy precisely because of this practice of incrementalism. Because drug testing involves biochemical surveillance and regulation of the individual, societal acceptance of this use of toxicology will form the baseline and gateway for future forms of biochemical surveillance—including genetic testing. These forms of testing will appear only incrementally more intrusive than employment drug testing.

Typically, society's response to the introduction of intrusive technology has not been to ban its use, but, rather, only to *regulate* its use. By regulating it, society approves the use of the new technology that creates a narrower scope of privacy as a baseline of acceptable intrusions. The few laws that confront the intrusiveness of computer technology only regulate its use.¹⁰⁹ Ironically, most regulations are designed to enhance the accuracy, and thus, the efficiency of the technology. This phenomenon is apparent in drug-testing legislation. Most of the federal statutes, state statutes, and regulations pertaining to drug testing in the workplace describe the circumstances in which tests may be required. They often regulate the process of testing in order to reduce false positives and/or to minimize (but not eliminate) the embarrassment of providing a urine specimen.¹¹⁰ No laws flatly prohibit drug testing.¹¹¹

The Supreme Court has contributed to this transparent protection of privacy by the toothless analytical model it uses to implement the values of the Fourth Amendment. To warrant *any* Fourth Amendment protection, the government's surveillance technique must infringe upon "an expectation of privacy that society is prepared to recognize as reasonable."¹¹² Supreme Court precedents have not revealed how to identify a "society" or which values or spokespersons of that society are to be counted

108. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) ("The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares").

109. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552(a)-(q). The Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (1990), may be an exception. However, the degree of inaccuracy of such tests rather than the degree of their intrusiveness was probably the real catalyst for enacting this legislation.

110. A SUBSTANCE ABUSE TESTING ACT § 3(b) (Task Force on the Drug-Free Workplace, Institute of Bill of Rights Law, Proposed Official Draft 1991).

111. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (noting that drug testing must conform to Fourth Amendment standards for reasonable searches).

112. *Id.*

in determining which expectations of privacy are reasonable. By definition, the scope of privacy protected under the Fourth Amendment is culturally dependent—and lately, we are told, context based.¹¹³ Thus, the threshold test for Fourth Amendment protection is subject to control by those forces that have the power to manipulate society's expectations and not by any independent privacy value. The more the government and private employers intrude on individual privacy, the less the Fourth Amendment protects privacy. It should be easy to see that such a test fails to provide a meaningful check on the government, which is the very entity the Fourth Amendment was designed to control. Most students of the Fourth Amendment believe, as Justice Marshall has written, that the Fourth Amendment must *create* entitlements to expectations of privacy that neither the government nor society can manipulate away.¹¹⁴

In the last twenty years, the Court has refused to find that numerous government surveillance techniques, many of which involve the use of technology, infringe upon a reasonable expectation of privacy; these techniques are thus not even worthy of the Fourth Amendment's procedural protections.¹¹⁵

113. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace context.").

114. *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting) (arguing that the Fourth Amendment "assigns to the judiciary some prescriptive responsibility.").

115. *See, e.g., Michigan Dep't. of State Police v. Sitz*, 110 S. Ct. 2481, 2487 (1990) (upholding police sobriety checkpoints without warrant, probable cause, or individualized suspicion of wrongdoing); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (allowing drug testing of railroad employees without warrant, probable cause, or individualized suspicion of wrongdoing); *Skinner*, 489 U.S. at 618 (same holding as *Von Raab*); *Florida v. Riley*, 488 U.S. 445, 452 (1989) (upholding helicopter surveillance of backyard greenhouse from 400 feet); *California v. Greenwood*, 486 U.S. 35, 44 (1988) (allowing rummaging through and reading information contained in an individual's trash once it has been left outside for pickup); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (allowing aerial surveillance of a 2000 acre manufacturing facility using a sophisticated aerial mapping camera which is capable of enlargement on a scale of 1" equalling 20' or greater without significant loss of detail or resolution); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (allowing aerial surveillance from a fixed-wing aircraft of a backyard from 1000 feet); *United States v. Karo*, 468 U.S. 705, 721 (1984) (validating the secret use of specially trained dogs to sniff packages and luggage in airports for drugs); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (allowing the secret tracking of persons by way of electronic devices concealed in packages in the possession of the individual); *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (allowing the recording of telephone numbers dialed from one's home without the consent of the telephone subscriber or caller); *Whalen v. Roe*, 429 U.S. 589, 606 (1977) (upholding state maintenance of a computerized databank with the names and addresses of patients for whom Schedule II

Even if the Court finds that a surveillance technique infringes upon a reasonable expectation of privacy, the Fourth Amendment may provide only limited, if not ephemeral, protection for individual privacy. This limited concern is due to the Court's interpretation of how the Fourth Amendment restricts governmental action. In most cases involving police searches, the Court requires a warrant and probable cause, but, of course, allows numerous exceptions. In cases that do not involve searches by police officers, however, the Court engages in a free-wheeling ad hoc balancing test which pits *society's* interest in the search against the *individual's* interest in freedom from the intrusion. Several members of the Court have strongly condemned this test. As Justice Brennan wrote in his dissenting opinion in *New Jersey v. T.L.O.*,¹¹⁶

In the past several Terms, this Court has produced a succession of Fourth Amendment opinions in which "balancing tests" have been applied to resolve various questions concerning the proper scope of official searches. The Court has begun to apply a "balancing test" to determine whether a particular category of searches intrudes upon expectations of privacy that merit Fourth Amendment protection. It applies a "balancing test" to determine whether a warrant is necessary to conduct a search. In today's opinion, it employs a "balancing test" to determine what standard should govern the constitutionality of a given category of searches. Should a search turn out to be unreasonable after application of all of these "balancing tests," the Court then applies an additional "balancing test" to decide whether the evidence resulting from the search must be excluded.

All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while

drugs have been prescribed); *United States v. Miller*, 425 U.S. 435, 446 (1976) (allowing the inspection of personal bank records without the consent of the bank customer); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (allowing the distribution of flyers based upon an undisclosed arrest record falsely stating that an individual was a known active shoplifter); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) (allowing bank reporting to the federal government of customers' financial transactions); *United States v. White*, 401 U.S. 745 (1970) (involving secret electronic surveillance of conversations with only one party consenting to the electronic surveillance); *see also* *United States v. New York Tel. Co.*, 434 U.S. 159 (1977) (allowing the FBI to order telephone company to record telephone numbers dialed by an individual); *Laird v. Tatum*, 401 U.S. 1 (1972) (holding that the photographing of political protesters and maintaining dossiers on them does not infringe upon their First Amendment rights to associational privacy).

116. 469 U.S. 325 (1985).

the Court in fact engages in an unanalyzed exercise of judicial will.¹¹⁷

This weak interpretation of the Fourth Amendment allowed the Court to permit suspicionless biochemical testing of workers.¹¹⁸ Who would have ever thought that the analytic test employed in *Camara*,¹¹⁹ which involved searches of buildings, and *Terry v. Ohio*,¹²⁰ which involved temporary stops and pat downs, would eventually yield cases upholding the systematic blood testing of workers? Under the Court's test, each new form of surveillance that is given a Fourth Amendment imprimatur becomes a springboard for tolerance of further incursions into individual privacy.

The recent drug-testing cases illustrate how one decision permitting government surveillance forms the basis for permitting a more intrusive search in the future and how powerful institutions through fiat set the standards for determining how intrusive the Court views each surveillance technique.

Important to its holding in the drug-testing cases was the fact that blood and urine testing of the workers represented to the Court only a limited or minimal intrusion into their privacy. The Court offered four justifications for this view: the limited informational scope of the search, the manner of the search, and the cultural and governmental environments in which the search took place. Regarding the cultural environment in which the search took place, the Court determined that blood tests were not "an unduly extensive imposition on an individual's privacy and bodily integrity,"¹²¹ because such tests "are commonplace in these days of periodic physical examinations."¹²² *Schmerber* had held that a blood alcohol test could be involuntarily administered to a motorist if there was probable cause to believe the blood contained evidence of intoxication.¹²³ As the Court in *Schmerber* wrote:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence

117. *Id.* at 369 (Brennan, J., dissenting in part) (citations omitted).

118. See *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting).

119. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

120. 392 U.S. 1 (1968).

121. *Skinner*, 489 U.S. at 625 (quoting *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

122. *Id.* (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)).

123. *Schmerber*, 384 U.S. at 769-70.

of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.¹²⁴

The Court in *Skinner*, however, failed to cite any evidence showing the pervasiveness of blood tests today. The blood tests referred to in *Schmerber* were mostly voluntary diagnostic tests. Twenty years later, the Court in *Skinner* cited one reference in *Schmerber* indicating that many people experience a blood test in one form or another during their lifetime to support the blood testing of workers in a totally different context for a totally different purpose. Moreover, in *Schmerber*, a situation that an individual may encounter no more than once a year (and for most people far less frequently) became characterized as a "common-place" event for the purpose of determining the intrusiveness of drug tests in a different context.¹²⁵

In *Skinner*, the Court said the most important reason why drug testing of railroad workers did not infringe upon a significant interest in privacy was that the railroad industry has long been regulated heavily to ensure safety, and that such regulations have focused in part on the health and fitness of employees who may have operational duties.¹²⁶ So long as the federal or state government and industry institute *some* regulations on the fitness of workers, their right to privacy vis-à-vis *other* invasions of privacy is diminished. Such reasoning effectively permits government and industry to determine the Fourth Amendment's limits on their destruction of individual privacy. Perhaps if the government and telephone companies began conducting warrantless bugging of residential telephones, and the practice was not struck down for twenty years, it too would be considered commonplace; one's expectations of telephone privacy would be diminished by virtue of such regulations and surveillance. In *Von Raab*, the Court did not even try to tie a reduced expectation of privacy to a history of employee regulation, stating simply that the class of employees who were subject to testing *should* expect to be tested.¹²⁷ Because they should expect to be tested, such testing represents a constitutionally minimal invasion of such employees' privacy.

124. *Id.*

125. *Id.* at 771.

126. *Skinner*, 489 U.S. at 620.

127. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989).

Although the holdings in *Skinner* and *Von Raab* appear to be based on rather limited factual circumstances, courts have cited these decisions many times over the past two years as authority for upholding the *random* testing of numerous classes of workers.¹²⁸ As Judge Harry Edwards has aptly written, "Constitutional principles, once abandoned, are not easily reclaimed."¹²⁹

Although the purpose of this Article is not to propose a new analytic model for the Fourth Amendment, the Court clearly must develop some type of prescriptive test that prevents the government and powerful institutions in society from manipulating the scope of privacy protected by the Fourth Amendment.

We cannot turn back the clock of privacy once it is removed. Even worse, invasions of privacy are contagious; each intrusion will lead to greater intrusions unless we insist upon the protection of moral values—such as privacy—and are willing to accept the price of a less efficient society to preserve these values. In light of the means that we are using to fight illegal drug abuse and the consequences those means will have on the future of privacy, we must ask ourselves whether we are purchasing a drug-free society at the price of a privacy-free one.

VI. INCREASING USE OF PREDICTIVE JUDGMENTS AND PROFILES

Whenever technology enables us to acquire sufficient data about groups of people to make predictions about members of the group (for instance, that applicants testing positive have a higher rate of absenteeism or failure than those testing negative), profiles emerge. Our society is increasingly making decisions about individuals based upon "risk factors." Drug testing represents another model for making judgments about each *member* of a group based on statistical characteristics that apply only to the group as a whole. Such judgments can often be very inaccurate and unfair to many individuals within the group.¹³⁰

128. See Craig M. Cornish, *Drug-Use Testing in the American Workplace: Recent Cases* (1991) (unpublished manuscript, on file with the *William and Mary Law Review*).

129. *Hartness v. Bush*, 919 F.2d 170, 175 (D.C. Cir. 1990) (Edwards, J., dissenting).

130. One of the major problems inherent in drug-testing technology is the consequences of the false-positive test. False-positives can arise from mislabeling of specimens or from laboratory error. Laboratory dependability or reliability is determined by submitting quality control specimens and demanding reasonable proficiency, but the evidence suggests that laboratories perform substantially better when they know a submitted specimen is for quality control than when such specimens are submitted blindly. False-positive results may occur in one to two percent of cases; that is of great concern with mass testing of a low prevalence phenomenon. For those mislabeled as positive, the consequences can be catastrophic. For a discussion of the predictive value of drug testing, see MARK A. ROTHSTEIN, *MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS* 65-66 (1989).

The absence of data correlating a positive preemployment drug test with subsequent on-the-job performance has not deterred thousands of employers from assuming that everyone who tests positive on a preemployment or employment drug test will prove less productive or more detrimental than individuals who test negative. This result is due in part to the unwillingness of some employers to accept any risk, which is a social hazard produced by predictive judgments.

Some employers justify denying employment to illegal drug users based upon the deterrent value of that act. In such cases, it makes no difference how low the predictive value of the test may be. Test criteria becomes acceptable for reasons unrelated to what the test says or predicts about the person who is denied employment. The simplicity of a numerical score also seduces the decisionmaker into giving the "score" more weight than it is due merely because of its simplicity compared to the complexity of making individualized predictions about future performance.

On a broader scale, the increased use of predictive judgments can collide with the principles of meritorious advancement and autonomy. By acquiring large amounts of information and making predictive judgments about groups, individuals who grow up with certain genetic, biochemical, or behavioral profiles may find it difficult to overcome the odds of these predictive judgments. The net effect of using such information may be to reduce decisions based on merit and to discourage individuals from working hard to achieve beyond their predicted levels of achievement. This problem has existed in the Soviet Union and in feudal societies in which individuals grew up with their life plans already mapped out; deviation from the plan was usually an impossible dream. Under the concept of freedom in the United States, however, opportunity should be open to everyone so that individuals can believe realistically that they have a chance of achieving their dreams.

VII. EROSION OF PRESUMPTION OF INNOCENCE

Drug testing also erodes the presumption of innocence. For many employers with drug-testing policies, those persons who refuse to be searched are treated exactly as persons who violate the employer's policies or test positive.¹³¹ If a majority of people

131. *See Von Raab*, 489 U.S. at 660 (upholding Customs Service decision not to hire applicants refusing to take the drug test—the same penalty as for individuals who test positive).

volunteer to be tested, suspicion necessarily focuses upon those individuals who refuse to be tested.¹³² The common—but false—adage that if you have nothing to hide, you have nothing to lose by being searched, operates heavily in our social environment to point the finger of suspicion of wrongdoing at individuals who refuse to be searched. Thus, society punishes people not for wrongdoing, but for merely refusing to be searched.

As it operates in the United States today, systematic drug testing can result in a greater punishment to the person who does nothing more than attempt to assert his right of privacy and bodily integrity than to a person convicted of a drug-related offense that results in only probation or work release. Not only do individuals who are terminated for refusing to be searched lose employment, but the stigma attached to a drug-testing-related firing may make it very difficult to find future employment. Employers in any field are likely to believe that a person who was fired for refusing to take a drug test attempted to avoid detection of illegal drug use. In such a situation, second employers may not want to take a chance with the applicant.

The presumption of innocence not only guards against punishing innocent people, it also makes a social statement about the dignity of the individual. The presumption of innocence maintains that individuals will be trusted unless proof exists not to trust them. By searching groups without cause, society thus shows its inherent distrust of the individual.

VIII. THE EROSION OF DIGNITY AND AUTONOMY

The notion that the government and large organizations can functionally invade the body and spy on our biochemical systems without cause represents a qualitative leap from traditional methods of search. This notion allows the government and large organizations to acquire qualitatively new types of information—biochemical information—which, until recently, has never been in the public domain and over which the individual has always assumed that he or she has control. By breaking this element of control, society weakens the individual's self-control and feelings of self-worth.

The ideas of individual control and self-worth are not simply intrinsically moral notions. Depression may result from feelings of hopelessness and lack of control over one's life. As the gov-

132. *Id.*

ernment increasingly gathers information about us and monitors our behavior and biochemistry, each added form of monitoring weakens the degree to which individuals have control over their actions. The ability to stake out an informational sphere of privacy is an essential element of dignity and self-control.

If individual rights are valuable, then we must be willing to protect those rights even if the protection of those rights may conflict with obvious societal interests. The concepts of autonomy and dignity engender the notion that every individual is intrinsically valuable as a person regardless of whether that person benefits society. The fact that society becomes better off as we take away more privacy is not in and of itself a valid reason to override individual privacy if we do, in fact, value it. Something more than a societal gain should be required as a condition for infringing upon a fundamental right such as dignity. In other words, an individual is not merely an instrument by which society betters itself; dignity affords the individual this respect.

Dignity may be a somewhat amorphous concept, but it is one that we should preserve in our society. With advances in our technological ability to study the macroscopic effects of individual behavior and social policy, to assign numerical values to the causes and effects and costs and benefits, and to measure these quantitative benefits, moral principles have suffered. Moral values are compromised in part because they are not easily measurable in a quantitative cost-benefit analysis, whereas other factors, like the economic effects of social policy, are more easily measurable by our computer brains. Other explanations may exist, but certainly our ability to perform massive and complex quantitative evaluations has driven us to value increasingly those decisions that appear to improve society through manipulation of quantitative aspects of life. Cast to the side, however, are unquantifiable moral values such as privacy, dignity, and autonomy.

The loss of individual values in constitutional law stands as proof that we are gradually losing interest in those values; individual dignity faces extinction. We increasingly see the individual not as a value in itself, but rather, as only an instrument through which we can shape a more perfect society. In the past twenty years, the Court has reduced the protection of many individual rights in the Constitution.¹³³ The Court has allowed

133. See Edwin Chemerinsky, *Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Robin West, *Foreward: Taking Freedom Seriously*, 104 HARV. L. REV. 40 (1990).

the government to kill people consciously and deliberately in order to either satisfy our thirst for vengeance or to deter homicide.¹³⁴ It has denied adults the right to choose their sex partners if the sex partner is of the same gender;¹³⁵ denied women the opportunity of military service;¹³⁶ and denied religious liberty to all religious groups if state or local governmental entities have criminalized their conduct for purposes unrelated to intentionally suppressing religious practices.¹³⁷ The Court has also dropped judicial integrity as a basis for employing the exclusionary rule;¹³⁸ dropped, or at least only paid lip service to, the fairness interest in the due process clause;¹³⁹ and has certainly taken a dim view of privacy.¹⁴⁰

To the extent that a society is measured by the means it uses to enforce its laws, one cannot help asking whether our society sees any limits to the infringement of individual privacy and dignity in order to eliminate drug abuse. Perhaps authorities may decide as the next step to conduct house-to-house preventive searches in neighborhoods in which drug dealing is prevalent.

Regardless of the next step, however, it is clear that neither the public nor the courts are standing up for individual dignity. Even the goals of tort law are shifting away from compensating the victim to maximizing the utility of the law to reduce net injuries. As one scholar recently observed, "Landes and Posner have played a major role in replacing the traditional legal justification of the tort system based on notions of fairness and compensation with a concern for efficiency and deterrence."¹⁴¹

134. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

135. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding state sodomy statutes).

136. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

137. *Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

138. *United States v. Leon*, 468 U.S. 897 (1984).

139. In determining the scope of procedural due process, the Court recently employed: the now familiar threefold inquiry requiring consideration of "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and lastly "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Connecticut v. Doe, 111 S. Ct. 2105, 2112 (1991) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). No mention is made of fairness to the individual.

140. See *Bowers v. Hardwick* 478 U.S. 186 (1986).

141. John J. Donohue III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047, 1056 (1989) (commenting on WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)). Professor Steven Shavell rec-

By examining the biochemistry of an individual and allowing this type of information to become a part of important decisions made about an individual, we begin to shift from looking at the individual as a soul with emotions to seeing the individual solely as a sum of various biological and molecular parts. This shift tends to depersonalize and dehumanize relationships between society and the individual and among individuals. As we become capable of reading the genetic codes of a fetus early in the gestation cycle, society, the government, and large institutions will place increasing pressure on women to abort fetuses predicted to produce lives that are less than full and would prove costly to society.¹⁴²

If nothing about the individual is sacrosanct, untouchable from without, and controllable by the individual, what does autonomy mean? The more institutions conduct surveillance, the less control the individual has over his or her own life. Institutions conduct surveillance to make decisions about people, and those decisions are frequently decisions that limit, rather than expand, an individual's choices. If, in the next fifty years, biochemical surveillance becomes a widespread means of monitoring behavior, what questions will we be asking about the relationship between society and the individual? Will we urge that one's genetic code should be sacrosanct and cannot be spied on or manipulated, or will we argue that only certain genes within the entire genetic code are off limits to the government and to our employers?

The institutionalization of employee drug testing raises many moral questions. It is hastening the use of technology in new ways that are transforming the relationship between the individual and society. It may be too late for society to hold down the efficient effect of technological "progress." Unless we are willing to become the slaves of technology, we must erect some moral values intended to preserve the dignity of human beings as a barrier to technological change. To do this, we must first be able to *see* the social effects of each new use of technology.

ommends that victims of tort injuries should not receive compensation for nonpecuniary losses, but that tortfeasors should be required to pay to the state a sum equal to such losses. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 234 (1987). As Professor John Donohue observes, "This recommendation is consistent with the basic deterrence principle that it is more important for the defendant to pay than for the victim to receive." Donohue, *supra*, at 1065.

142. In Los Angeles, persons calling into a radio talk show chastised a television personality for bringing her pregnancy to term because, as a result of a defective gene she possesses, her offspring has a 50-50 chance of developing a malformity of the hands and feet. Steven Holmes, *Radio Talk About TV Anchor's Disability Stirs Ire in Los Angeles*, N.Y. TIMES, Aug. 23, 1991, at B18.