RISK: Health, Safety & Environment (1990-2002)

Volume 3
Number 3 *RISK: Issues in Health & Safety*

Article 7

June 1992

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Introduction

In 1983, the Federal Railroad Administration (FRA) reported that, from 1972 to 1983, "at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor" caused "25 fatalities, 61 non-fatal injuries and property damage estimated at... $27 million in 1982 dollars."[1] Ultimately, concerns generated by such data resulted in adoption of a regulation requiring railroads to "take all practicable steps to assure that all covered employees... provide blood and urine samples for toxicological testing by FRA," following an event such as a train accident involving a fatality.[2]

Following a challenge to the regulation instituted by the Railway Executives Association and others, based on Fourth Amendment search and seizure restrictions in the Federal Constitution, a federal district court in California granted summary judgment for the government.[3] A majority of the 9th Circuit Court of Appeals reversed.[4] After granting

* Skinner v. Ry. Labor Exec. Assn., 489 U.S. 602 (1989), hereafter *Skinner*.

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1 48 F.R. 30726 (1983).

2 49 C.F.R. § 219.203(a).

3 Unreported.

4 Ry. Labor Exec. Assn. v. Burnley, 839 F.2d 575 (1988).

the government's petition for a writ of certiori, the U.S. Supreme Court reversed again.[5] While Justice Stevens concurred in part with the majority opinion written by Justice Kennedy and concurred in the judgment,[6] Justice Marshall, joined by Justice Brennan, dissented.[7]

The Court identified the issue to be addressed as determining "whether the Government's need to monitor... justifies the privacy intrusions."[8] In holding that the intrusions are warranted, the majority held that, while collecting blood and urine samples constitute searches and are thus subject to constitutional scrutiny, the risks posed by pervasive alcohol and drug abuse relieved the government of the normal requirement of obtaining a warrant before conducting a search. Indeed, the Court found that not even the normal constitutional minimum of particularized suspicion of the one to be searched was necessary.[9] It seems fair to characterize the Court's approach as that of risk manager.

Risk managers routinely impose "acceptable" costs to reduce "unacceptable" risks. How much testing should be demanded of a pharmaceutical before it is deemed safe and effective? How much money will be diverted away from other worthy research efforts if X amount of dollars is demanded? How much money will it cost to implement a safety measure? How many lives would such a measure save?

Dollars, limbs, and lives are all tangible. Even if the number of dollars or digits affected by implementing various regulations is an educated guess, the decision maker can readily visualize the tradeoffs. The image of unemployed workers left in the wake of bankrupt companies is an image all too real. The same can be said of maimed, poisoned, or dead citizens. When these are the possible outcomes, risk managers can readily imagine the consequences of their decisions. What of rules that do not readily translate into tradeoffs of tangibles? What kind of image is conjured up by the prospect of, e.g., a 2% reduction in

5 *Skinner supra.*

6 *Id.* at 634.

7 *Id.* at 635.

8 *Id.* at 621.

9 *Id.* at 602.

privacy? How does one visualize, quantify or evaluate such factors?

Most commentators have viewed *Skinner* as a portent of a grand erosion of privacy rights in general. It has been widely criticized for leading constitutional jurisprudence down a path in which governmental policies aimed at the pressing needs of the moment trump the enduring principles of inviolability of the person.[10]

Here, however, we would like to explore the role of the Court as risk manager. In the next two sections, we briefly review the evolution of the law of privacy and the "special needs" balancing test as applied in other contexts. Then, we explore the impact of the technology behind substance testing on the resolution of this case. Ultimately, it seems, as has been earlier observed in this journal, that:[11]

> Risk management controversies should not be contests over who can produce the most "experts" with the strongest credentials — ones where non-technical interests are often excluded. ... The object should not be to eliminate controversy but to force everyone to grapple with the tough policy choices that may be concealed in a mass of often irrelevant technical details.

The Changing Face of Privacy

While the Supreme Court and commentators have alluded to privacy rights for years,[12] it was not until 1965 that the constitutional parameters of that right were comprehensively outlined.[13] The Court

[10] *See* Daniel J. Larkosh, *Shrinking Scope of Individual Privacy: Drug Cases Make Bad Law*, 24 SUFFOLK U. L.REV. 1009 (1990), Philip Davidoff & Christopher Martine, *The Drug War in the Workplace: Employee Drug Testing Under Collective Bargaining*, 5 ST. JOHN'S J. LEGAL COMMENTARY 1 (1989); Jeane Flaig, *Preserving Employee Rights During the War on Drugs*, 21 PAC. L.J. 995 (July 1990).

[11] Julie A. Roqué, *Regulating Air Toxics in Rhode Island: Policy vs. Technical Decisions*, 2 RISK 123, 139 (1991).

[12] *See, e.g.*, Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) "[The makers of our Constitution] conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."

[13] Griswold v. Connecticut, 381 U.S. 479 (1965). (Law subjecting contraceptive purchasers to legal sanctions held to violate the "right to privacy.")

found that "penumbras" of privacy could be inferred from the context of various constitutional amendments. From these penumbras, or zones, of privacy, a broader right to privacy could be extrapolated. These were zones into which the government could not enter without a compelling interest.

The Court would later hold that these zones were so strong, that even otherwise constitutionally valid antiobscenity statutes could not stand if enforcement would be sought within the privacy of the home. Thus, in Stanley v. Georgia, the Court struck down a statute that criminalized possession of obscene materials.[14]

The Fourth Amendment was central to the zone of privacy formulation.[15] Under it, the Court has held that privacy interests are defined by society's reasonable expectations of what those interests are.[16] Moreover, what is ultimately protected is "people not places."[17] While the individual's subjective expectation of privacy is protected, as with other subjective judgments, a given expectation can only be evaluated in terms of others' views of its reasonableness.[18]

The rough edges of privacy interests are most strongly defined in search and seizure cases. The Fourth Amendment provisions requiring warrants and reasonableness of searches is most strenuously tested when government actors set out to determine what is concealed in those zones of privacy that society deems protected.[19] The rule here is that such an infringement can lawfully occur only when the government actor possesses a warrant based on probable cause. What have become

14 394 U.S. 557 (1969).

15 *Griswold, supra.*

16 Katz v. U. S., 389 U.S. 347 (1967). (Electronic monitoring of conversations over a public telephone constituted an illegal search without a warrant. The Court found that society affords a reasonable expectation of privacy in such circumstances.)

17 *Id.* at 351.

18 The difficulty in making subjective determinations is that there is rarely any evidence that directly records the subjective state of the individual at the time of an incident in question. Thus, most questions of subjective state are answered indirectly. The fact finder is asked to infer the likely subjective state of an actor from all of the available objective evidence.

19 U.S. v. Jacobsen, 466 U.S. 109 (1984).

widely recognized as the exceptions to this rule have found their rationale in one of two places. When the Court has made such an exception it has found that either what is searched or seized is not within an area reasonably expected to be private or it has found that the search was reasonable in light of all the circumstances.

Thus, the Court has found that diminished privacy expectations justify warrantless searches of automobiles.[20] Warrantless searches of territory within the control of a criminal suspect are valid in the context of a lawful arrest.[21] For example, limited extemporaneous searches based on fear of the use of unlawful weapons are reasonable.[22] Nonetheless, requiring the government actor conducting the search to demonstrate some measure of particularized suspicion of the person searched has been consistently required in Fourth Amendment decisions.[23]

From earlier cases, one would expect resolution of a case such as Skinner to be straight forward. One need only ask if there is a legitimate expectation of privacy in one's body fluids and whether tests are to be conducted pursuant to a warrant. At least a compelling government interest and particularized suspicion of the person tested should be proffered. Failing to find such guarantees in contested regulations would warrant declaring them unconstitutional. And they would have been, but for expansion of a "special needs" test.

Special Needs and Safety

In 1976 the Court announced that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."[24] It noted that where affected privacy interests were not great and an important governmental interest required

[20] Cardwell v. Lewis, 417 U.S. 583 (1974) (Society affords a lessened expectation of privacy in an automobile).

[21] U.S. v. Robinson, 414 U.S. 218 (1973).

[22] Terry v. Ohio, 392 U.S. 1 (1968).

[23] *But see*, U.S. v. Mendenhall, 446 U.S. 544 (1980) (Police may seize an individual who fits a "drug courier profile").

[24] U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).

it, warrantless searches might be legitimate even in the absence of particularized suspicion.[25] Until *Skinner* such circumstances were largely limited to institutional settings. Thus, state hospitals and schools, where governmental policies address a narrow scope of recurring security concerns, required special attention.[26] Oddly, the Court noted that in such circumstances "imposing unwieldly warrant procedures... upon supervisors, who would otherwise have no reason to be familiar with such provisions, is simply unreasonable."[27]

Instances in which such "special needs, beyond the normal need for law enforcement"[28] have been found have given birth to an independent type of constitutional analysis. Where these "special needs" exist a balancing test has been implemented. This test poses the government's interest in effecting its policy against the individual's interest in privacy. If the government can show that its interests are transcendent, the warrant requirement and the probable cause requirement will be cast aside.[29] Herein lies the heart of the Court's risk management approach: A loss in privacy is to be weighed against the objectives of a proposed governmental policy.

In *Skinner,* the Court considered the government's safety objectives in such a context and balanced them against reductions in privacy. The prevention of cataclysmic accidents was found to be an

25 *Id.* at 560.

26 This special needs analysis had been used before in other cases but was largely restricted to institutional situations where a small number of administrators had to deal with large, recurring security problems. Once such instance is in prison administration. *Skinner* expanded this rationale beyond predictability. *See, e.g.,* New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of student property by school officials); O'Conner v. Ortega, 480 U.S. 709 (1987) (state hospital employees subject to work area searches).

27 *Skinner,* 489 U.S. at 625 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)). This is an "odd" justification because it asserts that principle must yield to administrative burden. Constitutional rights are rarely adjudicated in this manner.

28 *T.L.O.,* 469 U.S. at 351.

29 *See, e.g.,* National Treasury Employees Union v. VonRaab, 489 U.S. 656, (1989) ("Special needs" used to justify testing those with access to classified information).

acceptable justification for the intrusion imposed by extracting a small amount of blood in a "procedure involving virtually no risk, trauma, or pain"[30] — not to mention even less intrusive and invasive breath and urine tests "collected in a medical environment."[31] The Court also weighed the diminished expectation of privacy one has as an employee in a heavily regulated industry and the ignorance of railroad supervisors concerning warrant procedures.[32]

While the Court labeled the government interest "compelling,"[33] its calculus appeared to give no special weight to privacy interests.[34] On the one hand, safety objectives can be visualized in terms of miles of wrecked trains, flames, mangled bodies, spilled chemicals, and property damage. On the other hand, intangible privacy interests are difficult to visualize. Urinating in a bottle, breathing into a tube, or, at worst, the prick of a surgically sharp needle are most easily imagined.[35] This

30 *Skinner*, 489 U.S. at 625 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).

31 *Skinner*, 489 U.S. at 626.

32 *Id.* at 628 and 623.

33 *Id.*

34 Labeling the government interest "compelling" confuses the majority's rationale. Under ordinary constitutional adjudication of fundamental rights such a finding is essential to determining that government intrusions are tolerated. The court abandons that method, however, when it states that special needs "may justify departures from the usual warrant and probable cause requirements." *Id.* at 620 (quoting Griffin v. Wisconsin, 483 U.S. 868 (1987)). The entire opinion lines up the pros of testing (benefits) against the cons of cost (effect on privacy). It is submitted that a mere weighing of interests results; the ordinary emphasis given to protection of individual rights is not found here.

35 Neither the majority nor the dissent seemed to be able to get beyond this point. The majority noted that blood tests, breath tests, and urine tests were physically unintrusive. At least one full paragraph is dedicated to proving this for each type of test. *Skinner*, 489 U.S. at 625.

Justice Marshall, in dissenting, argued that "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not." *Id.* at 641. He also indicated a belief that the physical presence of another person (supervisor) while one was

tends to skew the analysis in favor of what can be readily perceived.

Even those who argue most fervently against invasions of privacy almost instinctively use safety to justify what they would otherwise view as reprehensible.[36] In fact, three fourths of a surveyed population favored mandatory drug testing for those involved in safety sensitive jobs.[37]

The Psychology of Technology

The technology behind drug and alcohol testing has had a profound impact on the Court's balancing test and may have an equally profound impact on society's view of the issue as a whole. The *Skinner* majority was certainly comforted by the capabilities of such engineering. They noted, e.g., that the serum and urine tests are commonplace medical procedures[38] that are highly accurate.[39] The majority took extraordinary pains to ensure that the accuracy of such tests was well documented and understood. They noted several times that testing procedures include "[analysis] by a method that is reliable within known tolerances."[40] and that blood tests "unquestionably can identify very

compelled to urinate violate those requirements. *Id.* at 646. However, even he did not seem to give adequate attention to to the intangible importance of privacy.

36 *See, e.g.*, Larkosh, *supra* note 10. Larkosh painstakingly argues for the impropriety of such tests arriving at the extreme position that drugs should be legalized to protect privacy rights. Nevertheless, he concludes that "where an individual's drug use poses a direct risk of physical harm to others because of the sensitivity of their position in relation to public safety, drug impairment testing could proceed without individualized suspicion."

37 Daily Labor Report, July 12, 1990, at A-8.

38 *Skinner*, 489 U.S. at 625, (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).

39 *See Skinner*, 489 U.S. at 610 n.3:

> [W]hile drug screens may be conducted by immunoassays or other techniques, "[p]ositive drug findings are confirmed by gas chromatography/mass spectrometry." ... These tests, if properly conducted, identify the presence of alcohol or drugs in the biological samples with great accuracy.

But see, John M. Gleason & Darold T. Barnum, *Predictive Probabilities in Employee Drug Testing*, 2 RISK 3 (1991).

40 *Skinner*, 489 U.S. at 612. The Court quoted 49 C.F.R. § 219.307(b) and

recent drug use."[41]

Technology must first be found to be "accurate" if its use in privacy intrusions can be justified at all. There is a certain sense of calm in knowing that only the truly guilty are likely to suffer loss of rights. Of course, the guarantee that only malefactors are punished for actual bad deeds could justify skirting any constitutional requirement. If arguably unconstitutional acts are undertaken and the right result is obtained, no one is the worse, the argument goes.

Efficacious technology is but one prerequisite to becoming comfortable with the special needs test. The Court has also noted that the special needs rationale will apply only where "the privacy interests implicated by the search are minimal."[42] This is another hurdle that present technology seems to satisfy. The *Skinner* majority found that where blood tests are used they occur "in a hospital environment according to accepted medical practices."[43] They also found that the test is minimally intrusive, is commonplace, and "involves no risk, trauma, or pain."[44] Moreover, breath tests, they noted, are "even less intrusive."[45] While the *Skinner* majority was not entirely comfortable with the notion of urine collection, they ultimately concluded that since samples "are also collected in a medical environment", there is no major intrusion on privacy interests.[46]

The dissenters in *Skinner* also sought to fight for the hearts and minds of its audience with the tools of technology. First, they noted that

accepted the proposition without debate.

41 *Skinner*, 489 U.S. at 630. This is a point that is in great dispute. It is difficult indeed to determine present impairment with some illegal drugs depending upon whether urine or blood is taken. The majority alluded to this but then generalized that present impairment can indeed be so found. *See* BLACK, TESTING FOR ABUSED DRUGS: A PRIMER FOR EXECUTIVES ON EMPLOYEE TESTING AND THE LAW (1988).

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

43 *Id.* at 625.

44 *Id.*

45 *Id.*

46 *Id.*

procedures such as "compelling a person to submit to the piercing of his skin"[47] is indeed an intrusive procedure as are the other specimen collection techniques. More importantly, however, they set forth their view of the state of diagnostic medicine. They noted that the body fluid collected for these tests can be used to unveil a panoply of personal information that would otherwise be kept confidential.[48]

While both the majority and the dissent made several references to the intrinsic qualities that are affected by such intrusions,[49] the focus was overwhelmingly on physical, extrinsic acts and results.[50] A technology-based argument allows this issue to be framed as a problem of a physical, tangible dimension. Is a momentary prick of a needle an intrusion of constitutional dimension? Is the potential for the revelation of private medical information found in one's urine of constitutional import? Reasonable people can probably differ over the answers to such questions. However, the real questions have not been addressed when such questions take center stage.

Focusing on a physical act and the physiological impact of that act obscures the fundamental interests in privacy. A hypothetical drug test will help clarify this point. Suppose that a completely unintrusive drug

47 *Id.* at 644, 645.

48 "Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression." *Id.* at 647. Given the significant investment in time, effort and money to get such diverse types of information, this characterization of the process could be viewed as another parade of horribles. Nonetheless, it is not completely unfounded. *See, e.g.*, McNulty, *Bush Urges Spot Drug Tests*, Chicago Tribune, April 9, 1989, at 1. (Description of an instance in which applicants to Washington, D.C. Police Department were surreptitiously tested for pregnancy while undergoing drug screening.)

49 The majority referred to the "personal or private" nature of urination and then attacked the issue mechanically. *Skinner*, 489 U.S. at 617. Justice Marshall, in his dissent, stated that "even the deepest dignity and privacy interests become vulnerable." *Id.* at 640.

50 *See, e.g., Skinner*, 489 U.S. at 650 (Marshall, J., dissenting): "I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a persons' blood and urine."

test is available today. Further, suppose it is 100% accurate and precise, yielding no false positives or false negatives. For example, picture a device that bounces a harmless pulse of light off the top of one's head and analyzes the reflected energy. Through this hypothetical device, it is possible to detect, e.g., whether or not someone had ingested cocaine during the last twenty-four hours. Would such a device be useful? Undoubtedly. Would it help deter illicit drug use if it was employed? Arguably, yes again. Would the use of such technology pose a violation of one's privacy interest? Yes, despite the fact that it is physically unintrusive. Even despite the fact that its accuracy and reliability are beyond question. *Skinner* aside, suspicionless use of the device violates one's right to privacy if done under the aegis of government.

The Constitution protects "people, not place...what a person wishes to preserve, even in an area accessible to the public..."[51] It enables each citizen to remain free in their person. In essence, privacy is one's internal sense of security. It is that sense that there is at least one place free from interference of others: the inner self. Even though the futuristic technology outlined above would not pierce any skin, would not compel any urination, and would not result in any inaccurate accusations, it would violate that inner sanctum. It would ask questions that the government is not otherwise entitled to ask without the voluntary participation of the individual.[52] It allows the government into this protected area. Focusing on the physical acts of piercing, urinating, and the results one obtains from them distracts one's attention away from the intrinsic aspects of privacy.

Technology provides information. It may do so painfully or painlessly, accurately or inaccurately. However, information is the end result, irrespective of how it is obtained. It is the act of seeking information that creates the intrusion on one's privacy. The physical consequences of how it is sought are only important factors if the government may dispute the inner sense of security in the first place. Courts could engage in much more trenchant analysis by separating the

51 Katz v. U.S., 389 U.S. 347 (1967).

52 Of course, this right, like most, can be waived. Where a person publishes otherwise private facts, the government can use them.

technological component from the intrinsic component of privacy and first analyzing the impact on the latter. Urinating is something everyone does every day. Few less physically demanding or invasive methods yield biological information about a person. Thus, at the heart of the analysis is features of technology, and when one fixates on the physical, extrinsic aspects of the invasion, the disruption to one's sense of internal security tends to be lost in the technical details.

Some Consequences of the New Jurisprudence

The diminution of concerns for privacy interests has received a great deal of commentary.[53] Generally, critics of the Court have been quick to mark in a new era of Big Brother. The *Skinner* dissent has noted that the Court has ushered in "mass governmental intrusions upon the integrity of the human body that the majority allows to become reality."[54] Regardless of whether or not this characterization comports with reality, the majority position and its technology-based jurisprudence have weaved a new series of threads into American law.

The stated objectives of the contested FRA regulations were to prevent train accidents through deterrence and to enable the FRA to accurately determine the cause of train accidents.[55] The *Skinner* Court acknowledged that drug testing procedures would give results of off-duty ingestion as well as on duty impairment. While the relationship between such off-duty behavior and accident causation was not given

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53 *See, Lewis, Drug Testing: Can Privacy Interests be Protected Under the "Special Needs" Doctrine*, 56 BROOKLYN L.REV. 1013 (1990).

54 *Skinner*, 489 U.S. at 655.

55 49 C.F.R. § 219.201(a)(1) (1987). *See also, Skinner*, at 652–3 (Marshall, J., dissenting).

Deterrence is not addressed here, but it was emphasized by the FRA and the majority. Both found that the prospects of losing one's job as a result of drug screening would translate into lower drug use. Yet, Justice Marshall sharply criticized this view. He analogized to "believing that people who skip school or work to spend a sunny day at the zoo will not taunt lions because their truancy... might be discovered in the event they are mauled." *Skinner*, 489 U.S. at 655. Moreover, he noted the majority's failure to cite any evidence that such a policy would have deterrent effects. *Id.*

much attention, the Court found that the results of such tests would at least provide "the basis for further investigative work"[56] and would:[57]

> furnish invaluable clues for eliminating drug impairment as a potential cause or contributing factor [in railroad accidents]... and would help establish the significance of equipment failure, inadequate training, or other potential causes, and suggest a more thorough examination of these alternatives.

The Court seems to have relied on the accuracy and reliability of the testing methods to support its policy position without fully addressing the effect that test results will have on the subsequent adjudication of criminal matters.[58] Does private drug use a week ago suggest job impairment today? While the argument has not fared well recently, many attorneys find that evidence of past drug use creates a de facto irrebuttable presumption of guilt.[59] Such technologically-based evidence prejudices the accused's character in the minds of fact finders, whether it is relevant or not.[60]

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56 *Id.* at 632.

57 *Id.* at 630.

58 *See,* Howard Markey, *Jurisprudence or Juriscience,* 25 WM. & MARY L.REV. 525 (1984). Judge Markey noted that "No Court, however, should base a decision solely on science if doing so would exclude the transcendental ethical values of the law. If a court accepts technological activity without evaluating fairness and justice to the litigants, juriscience has displaced the jurisprudence."

59 *See, e.g.,* Spence v. Farrier, 807 F.2d 753, 756 (8th Cir. 1986).

60 *See, e.g.,* Nat'l Federation Fed. Employees v. Cheney, 884 F.2d. 603 (DC Cir. 1989), where the U.S. Army was conducting safety-related drug testing and acknowledged that the results merely indicated past use. The Court held that although the Army had not considered other testing alternatives such as neurobehavorial testing, the drug test could be useful in affixing safety failure causation and was thus not prohibited. While the Army may have other justifications for such testing that are not found in the civilian sector, it is interesting to note the ready transference of the accident-causation model as a justification. *See also,* Int'l Brotherhood Electricians v. Skinner, 913 F.2d. 1454 (9th Cir. 1990) in which federal regulations requiring private employers in the pipeline industry to perform random drug testing were upheld. The testing was to be done on workers having maintenance, operating, or emergency response functions in a field where fewer than 4% of the total number

While each case thus far has involved safety-privacy tradeoffs in instances in which *legislative* facts were in dispute,[61] the same justification is apt to be applied in future cases disputing *adjudicative* facts. Guilt or innocence will undoubtedly be determined by data collected in the name of deterrence.[62]

The technological attractions that have led policymakers to adopt intrusive regulations will provide others with the justification to employ them for criminal enforcement. Thus, the psychological impact of technology could not only justify the imposition of intrusive regulations, but it is likely to also have a major effect on criminal trials.

Conclusion

Under the U.S. Supreme Court's increasingly utilitarian approach to privacy jurisprudence, the number of "special needs" is likely to proliferate. As technology becomes more advanced it will be possible to detect many other aspects of a person's life. The mere fact that the government may do so will lead to a lower sense of intrinsic security. As outlined above, this will have a snowballing effect on other aspects of our jurisprudence. Legal presumptions of guilt or innocence, evidentiary principles, and liability judgments all stand to be fundamentally altered. The ultimate cause of this fundamental change to the American legal system can be traced back, in large part, to the over emphasis of risk-management considerations in privacy law.

Over 200 years ago, when the Constitution and its amendments were inked, the cost of protecting intrinsic security was deemed not to be offset by government needs for information. Excluding valuable

of accidents involved human error, none of which were fatal.

61 Questions of legislative fact go well beyond the scope of a particular trial. The extent to which certain classes of employees are likely to use drugs is likely to be an issue of legislative fact. In contrast, whether a particular employee has used drugs is a question of adjudicative fact.

62 The *Skinner* majority minimized the likelihood and significance of the use of test results as a prosecutorial tool. Justice Marshall, however, noted that "This is an unprecedented invitation, leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body." *Skinner*, 489 U.S. at 651.

evidence and testimony that is improperly derived may exact a toll on society's vindication of criminal behavior. Yet, these and similar costs have been accepted for years.[63]

The character of that analysis seems qualitatively different from what has recently evolved into the "special needs" test. That analysis used a calculus in which principle was weighed against short-term goals, and, perhaps because the framers had lived under a system that had denied many rights to them, principle won out. Until recently, that seemed to be the position of the U.S. Supreme Court.

Now, however, the Court seems to have turned from intangible principles to tangible results with dead and wounded bodies juxtaposed against the accuracy of medical procedures and the physiological aspects of sample collection. While science and technology can sometimes be extraordinarily helpful in legal applications,[64] at best they provide data. Data collection, however accurate the technique, does not generate legal conclusions. Resolving issues of data relevance and weight calls for making value judgments. This should not be obscured by technical details — particularly where fundamental legal principles are at stake.

We do not argue that those who are in key positions at the time of a calamity should or should not be drug tested.[65] The basic issue seems not whether the result in *Skinner* was proper but whether the Court used the proper rationale for deciding the issues. The majority seems to have eschewed traditional tools of constitutional analysis in adopting the role of risk manager, and even the dissent seems to have unduly focused on technical issues that do not seem to go to the heart of the matter.

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63 E.g., allowing people to express themselves freely may cost dearly when grossly disruptive ideas are advanced.

64 *Consider, e.g.*, the ability of DNA fingerprinting to help resolve issues of fact.

65 Justice Marshall proposed the possibility of collecting a urine sample after a train accident and storing it until a warrant is procured. This position is interesting but was not seriously perused by either side. Perhaps a more fully developed argument along these lines would have precipitated a discussion of the intrinsic aspects of privacy rights. *See, Skinner*, 489 U.S. at 642–43.