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Fourth Amendment

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FOURTH AMENDMENT

Judge George Pratt:

The next segment of the program focuses a little more intensely on the fourth amendment. I remind you to keep in mind the bifurcation of these section 1983 cases, between those that deal with unauthorized conduct (such as police brutality) and those that deal with authorized conduct (where there are regulations or ordinances, so the government thinks that it is acting properly). The issue in this area is either whether the government has the power to act or whether it can do so in such a manner. This next segment bears largely on the authorized conduct side of section 1983. But, keep the dichotomy in mind; it helps explain some of the apparent inconsistencies.

Our next speaker is Professor William Hellerstein. He is a Brooklyn Law School graduate. He entered practice in 1962, in the District of Columbia, and dealt with the Civil Rights Commission there. He has a distinguished career behind him. He has been a professor at Brooklyn Law School since 1985. He has spent a large block of his career as attorney in charge of the Criminal Appeals Bureau of the Legal Aid Society in New York City, supervising an office of 164 attorneys. But, he is not just a supervisor; he is a litigator, particularly in the appellate field in the Supreme Court. I have here a list of publications he has written. One, in particular, caught my eye—but I should have thought that only a Harvard Law School graduate could write an article on “The Equal Protection Clause and the Rule in *Shelley’s Case*.”

William E. Hellerstein:

Thank you for the kind introduction. In the 1988-89 Term, the Supreme Court decided six fourth amendment cases, five of which are of considerable importance to state and local governments.¹ Of the five that I will discuss, you already have heard

1. The sixth case, *United States v. Sokolow*, 109 S. Ct. 1581 (1989), implicated more routine police concerns involving so-called “drug courier profiles.” *Id.* at 1587.

about two, *Brower v. County of Inyo*² and *Graham v. Connor*,³ from Professor Schwartz,⁴ albeit from a perspective slightly different than mine. Thus, I will not spend as much time on *Brower* or *Graham* as I had intended. Of greater significance, indeed of enormous significance, were the Court's decisions in *Skinner v. Railway Labor Executives' Association*,⁵ and *National Treasury Employees Union v. Von Raab*,⁶ which I will examine at considerable length. It is in these two cases that the Court, for the first time, addressed squarely the constitutionality of employee drug testing. Although not nearly as seminal as these two cases, the Court also decided yet another case involving aerial surveillance, *Florida v. Riley*,⁷ which is of considerable interest to law enforcement and to persons who live in places that can be subjected to aerial surveillance. I did not grow up in such a place, living as I did on the third floor of a tenement. That was not my world. We had other fourth amendment worries in those days.

From the perspective of state and local governmental concerns, I think that, as in prior years, the past Term was one of good news and bad news. As we shall see, however, there was more good news than bad for state and local officials, and it has been that way for a number of years now. The question is whether this is as it should be (and the Court's direction is a principled one) or whether the Court's turn continues a preference for expediency at the expense of core fourth amendment concerns (a preference that wrenches the fourth amendment ever farther from its moorings and sets the stage for additional wrenchings in years to come).

Let me turn first to the employee drug-testing cases and begin with the initial observation that the Supreme Court's decisions may not be as important in New York as elsewhere. I will discuss later, in considerable detail, why that could be the case. But, first let me put the matter in context.

2. 109 S. Ct. 1378 (1989).

3. 109 S. Ct. 1865 (1989).

4. See Schwartz, *Section 1983*, 6 TOURO L. REV. 5, 8-13 (1989).

5. 109 S. Ct. 1402 (1989).

6. 109 S. Ct. 1384 (1989).

7. 109 S. Ct. 693 (1989) (discussed *infra* notes 93-124 and accompanying text).

On September 6, 1989, the New York Times reported that the New York City Police Department had adopted a policy that will subject all New York City police officers, from those on patrol to the Department's chiefs, including Commissioner Ben Ward, to periodic random testing for drug use beginning almost immediately.⁸ It is likely that the announced program will be challenged by the PBA on behalf of the police officers. If it is challenged, the New York Court of Appeals will have to decide whether the tension that exists between its decision in *Patchogue-Medford Congress of Teachers v. Board of Education*,⁹ which held urine testing of probationary teachers unconstitutional under both the federal and state constitutions,¹⁰ and its decision in *Caruso v. Ward*,¹¹ which sustained periodic random urine testing of every member of the Department's Organized Crime Control Bureau (OCCB),¹² will be resolved in favor of or against the broad new plan announced by the Department. There is language in *Caruso* that points both in favor of and against sustenance of the program, and I will highlight that a little later. And, while our New York Court of Appeals thus far has addressed the issue primarily, but not exclusively, from its own jurisprudence under the New York Constitution,¹³ the Supreme Court's decisions in *Skinner* and *Von Raab* may play an important role in forming the court of appeals's approach to the question. Consequently, it is to those decisions that we should now turn.

Briefly stated, the Court held that the government's need to detect and prevent drug use by railroad employees in safety sensitive jobs and by Customs Service employees who are engaged in drug interdiction or who carry firearms (and keep your eye on that ball—"carry firearms") is sufficiently impor-

8. McKinley, *Police Face Drug Testing in New York*, N.Y. Times, Sept. 6, 1989, at B1, col. 5.

9. 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

10. *Id.* at 66, 510 N.E.2d at 329, 517 N.Y.S.2d at 460.

11. 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988).

12. *Id.* at 442, 530 N.E.2d at 855, 534 N.Y.S.2d at 147.

tant to permit testing of their bodily fluids without a search warrant or even individualized suspicion.¹⁴

So, let me first highlight *Skinner v. Railway Labor Executives' Association*.¹⁵ Why? Well, it was the easier case of the two for the Court. The vote was seven-to-two¹⁶ contrasted with five-to-four in *National Treasury Employees Union v. Von Raab*.¹⁷ It also may be an easier case factually.

In *Skinner*, the Court assessed drug testing under Federal Railroad Administration regulations that require, subject to the 1907 Hours of Service Act,¹⁸ private railroads to administer blood and urine tests to employees who are involved in certain train accidents and fatal incidents. In addition, the regulations authorize railroads to administer breath and urine tests following certain accidents and rule violations.¹⁹

What did the Court do? Well, the good news for fourth amendment devotees is that the Court did not dodge the fourth amendment, a path open to it if it had found, as some have argued, that requiring a blood or urine sample does not constitute a search. But, Justice Kennedy, writing for six members of the Court, did not so conclude. Indeed, he said a number of things that fourth amendment aficionados enjoy hearing. First, chemical analysis of urine and blood "can reveal a host of private medical facts about an employee."²⁰ Second, the process of collecting a sample "implicates privacy interests."²¹ Third, and consequently, such tests constitute "searches under the fourth amendment."²²

But, then, for fourth amendment devotees, the not-so-good news began. First, Justice Kennedy announced that testing would be assessed in light of its obvious administrative pur-

14. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1415-17 (1989); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1391-93 (1989).

15. 109 S. Ct. 1402 (1989).

16. *Id.* at 1422.

17. 109 S. Ct. 1384, 1389 (1989).

18. 45 U.S.C. §§ 61-66 (1986).

19. Control of Alcohol and Drug Use, 49 C.F.R. § 219.301 (1988).

20. *Skinner*, 109 S. Ct. at 1413.

21. *Id.*

22. *Id.* (footnote omitted).

poses.²³ Second, Justice Kennedy reminded us that the fourth amendment proscribes only unreasonable searches, and reasonableness “depends on all the circumstances surrounding the search . . . and the nature of the search.”²⁴ Consequently, “the permissibility of a particular practice ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”²⁵ Of course, we have long been told that a search is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause, and that rhetoric, if you will, was acknowledged by the Court. But, as Justice Kennedy also reminded us, exceptions to this rule have been recognized “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”²⁶ Thus, under the balancing approach, the Court previously has dispensed with warrant and probable cause requirements for searches in the contexts of supervision of probationers,²⁷ or regulated industries,²⁸ or the operation of a governmental office,²⁹ school,³⁰ or prison.³¹

This rehearsal by the Court of the numerous instances in which the “balancing approach” and the more recently minted “special needs” offshoot of the balancing approach were used set the stage for the Court’s application of those approaches to the government’s interest in regulating the conduct of railroad employees via urine and blood testing. For here, also, the interests of railroad safety presented “special needs” that “justif[ied] departures from the usual warrant and probable-cause requirements.”³² And, as Justice Kennedy noted, “[i]t [was]

23. *Id.*

24. *Id.* at 1414 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

25. *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

26. *Id.* (citations omitted).

27. *Griffin v. Wisconsin*, 483 U.S. 868, 870-71 (1987).

28. *New York v. Burger*, 482 U.S. 691, 696 (1987).

29. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

30. *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985).

31. *Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979).

32. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989).

undisputed" that the employees covered by the regulations at issue were "engaged in safety-sensitive tasks."³³

Having laid this foundation, the majority concluded that, in this context, a warrant was unnecessary because "the circumstances justifying toxicological testing and the permissible limits of such intrusions [were] defined narrowly and specifically in the regulations."³⁴ Moreover, the delay necessary to procure a warrant might have resulted in the destruction of evidence as alcohol and drugs were eliminated from the bloodstream.³⁵

The majority conceded that even most warrantless searches "must be based . . . on probable cause,"³⁶ and, "[w]hen the balance of interests precludes insistence on [that] showing, . . . [at least] 'some quantum of individualized suspicion' " usually has been required.³⁷ However, Justice Kennedy wrote:

[such a showing] is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where 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.³⁸

Hence, the balancing. First, the intrusions caused by the blood and urine samples were "limited."³⁹ The regulations did not require that urine samples be furnished under the direct supervision of a monitor.⁴⁰ Second, and more important, the employees' expectations of privacy were diminished by their service in a pervasively regulated industry in which "the covered employees have long been a principal focus of regulatory concern."⁴¹ In contrast, the government's interest in testing without a showing of individualized suspicion was compelling because covered employees "can cause great human loss before

33. *Id.*

34. *Id.* at 1415.

35. *Id.* at 1416.

36. *Id.*

37. *Id.* at 1417 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1970)).

38. *Id.*

39. *Id.*

40. *Id.* at 1418.

41. *Id.* at 1419.

any signs of impairment become noticeable to supervisors or others.”⁴² In addition, the regulations will deter employees in safety-sensitive tasks from using drugs or alcohol in the first place. Therefore, Justice Kennedy concluded:

In light of the limited discretion exercised by the railroad employers under regulations, the surpassing safety interests served by the toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, . . . it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired.⁴³

Justice Marshall dissented, joined only by Justice Brennan.⁴⁴ He argued that the majority opinion represented the “special needs” balancing test’s most penetrating incursion yet into core fourth amendment protections.⁴⁵ Marshall pointed out that, until now, “special needs” balancing was limited to searches of places or possessions (rather than persons) in situations where individualized suspicion existed.⁴⁶ But, Marshall continued:

In widening the “special needs” exception to probable cause to authorize searches of the human body unsupported by *any* evidence of wrongdoing, the majority . . . complete[d] the process begun in [*New Jersey v.*] *T.L.O.* of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons “beyond the normal need for law enforcement.”⁴⁷

With perhaps a slight tinge of emotion, Justice Marshall asserted that “[t]here is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest.”⁴⁸

From the perspective of those who favor the interests secured to the individual by the fourth amendment, *Skinner* is a difficult case. While Justice Marshall may be entirely correct about how the Court has used the “special needs” doctrine to

42. *Id.*

43. *Id.* at 1422.

44. *Id.* (Marshall, J., dissenting). Justice Stevens concurred in all of the majority’s opinion except to the extent that it relied on a deterrence rationale. *Id.* (Stevens, J., concurring in part and concurring in the judgment).

45. *Id.* at 1424-25 (Marshall, J., dissenting).

46. *Id.* at 1425.

47. *Id.* (citing majority opinion at 1414).

48. *Id.* at 1426.

limit privacy interests, many who share his overriding concerns have difficulty with the particular, *post hoc* factual context of the case. People are genuinely concerned with public conveyances operated by persons who may be using drugs or alcohol, and, when I have discussed the case with friends or law students, the frequent response is simply that they do not care to board an airplane piloted by a drug or alcohol user.

National Treasury Employees Union v. Von Raab,⁴⁹ however, is quite a different story, as evidenced not only by the closeness of the case but by the very forceful, indeed bitter, dissent authored by Justice Scalia.⁵⁰

Von Raab concerned drug testing of U.S. Customs employees seeking transfer or promotion to positions involving "drug interdiction or enforcement of related laws," carrying of firearms, or the handling of "classified material."⁵¹

Again writing for the Court, Justice Kennedy applied the balancing of interests test that he articulated in *Skinner*.⁵² He again concluded that warrants should not be required because (1) the circumstances in which testing was permitted were "narrowly and specifically" defined and (2) all employees seeking transfer to a covered position would be tested, so that no transfer was "subject 'to the discretion of [an agency] official.'" ⁵³ In addition, he wrote that the agency's "mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions."⁵⁴

Justice Kennedy reasoned that "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person."⁵⁵ In

49. 109 S. Ct. 1384 (1989).

50. *Id.* at 1398 (Scalia, J., dissenting).

51. 109 S. Ct. at 1388.

52. *Id.* at 1390.

53. *Id.* at 1391 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)).

54. *Id.*

55. *Id.* at 1391-92 (citation omitted).

balancing the interests, he concluded that “the Government’s need to conduct the suspicionless searches required by the Customs program outweigh[ed] the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.”⁵⁶ Indeed, the interest was so compelling that no indicia of individualized suspicion should be required.⁵⁷

Justice Kennedy viewed the Customs Service as the “Nation’s first line of defense” in battling the nation’s drug crisis.⁵⁸ He noted that Customs employees involved in drug interdiction may be threatened or tempted by bribes or by their own access to seized illegal drugs.⁵⁹ Thus, he concluded “that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment.”⁶⁰ Moreover, he said that the safety risks involved in carrying firearms require “effective measures to prevent the promotion of drug users to [such] positions” even if they do not involve “interdiction of drugs.”⁶¹ On the other hand, he pointed out that Customs employees in these positions “have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test.”⁶²

The union representing the employees had argued that the drug testing program was unreasonable because there was little or no evidence of a drug problem in the agency—only five out of 3,600 employees had tested positive for drugs.⁶³ Justice Kennedy answered this by stating “that drug abuse is one of the most serious problems confronting our society today” and workers are not immune.⁶⁴ “In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to [the covered] positions . . . the [agency’s] pol-

56. *Id.* at 1392.

57. *Id.* at 1393.

58. *Id.* at 1392.

59. *Id.*

60. *Id.* at 1393.

61. *Id.*

62. *Id.* at 1394.

63. *Id.*

64. *Id.* at 1395.

icy of deterring drug users from seeking such promotions cannot be deemed unreasonable."⁶⁵

Justice Scalia, joined by Justice Stevens,⁶⁶ emphasized that, in *Skinner*, there was evidence of "frequent drug and alcohol use" among railroad employees that resulted in "grave harm."⁶⁷ However, there was no evidence that drug use among Customs employees had resulted in "*even a single instance . . . of bribe-taking, or of poor aim, . . . or of compromise of classified information.*"⁶⁸ To Justice Scalia, it was simply insufficient to rely upon a "pervasive social problem" of drug use, and he maintained that the testing of Customs employees without individualized suspicion must be based on a special need to address a drug use problem among them.⁶⁹

The real heart of Justice Scalia's dissent was his belief that the true reason for the drug testing program appeared to be the Commissioner's desire to set an example in the "war on drugs."⁷⁰ In a statement that would do honor to Justice Brandeis, he wrote: "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."⁷¹

The majority's opinion is vulnerable to considerable exception depending on one's view of the degree to which the language of an amendment framed with the specific intention of inhibiting the government's desire to intrude upon personal privacy should be twisted or, if that is too strong, loosened. As with any constitutional issue, the answer generally is contingent on what question one asks. If one starts with the liturgy that we were taught, still teach, and, indeed, still hear from the Court, that exceptions to the warrant requirement should be

65. *Id.*

66. Justice Marshall, joined by Justice Brennan, dissented for the reasons expressed in his *Skinner* dissent and for the reasons stated in the dissent by Justice Scalia. *Id.* at 1398 (Marshall, J., dissenting).

67. *Id.* (Scalia, J., dissenting).

68. *Id.* at 1400.

69. *Id.*

70. *Id.* at 1401.

few and far between, then that is a valid frame of reference from which to measure a point of departure. But, as Justice Marshall's dissent in *Skinner*, which traces the progression of linguistic and substantive adjustments to the fourth amendment made by the Court, demonstrates, that premise no longer appears to be the frame of reference utilized by the Court.⁷²

I shall not endeavor to improve on Justice Marshall's or Justice Scalia's attacks on Justice Kennedy's opinions for the Court in *Skinner* and *Von Raab*. Instead, I would prefer to return briefly to the issue to which I referred earlier and which is particularly germane to the interests of state and local government in New York: the relationship, if any, between the *Skinner* and *Von Raab* decisions and the development of New York's own jurisprudence on the subject of drug and alcohol testing.

It is a given that, if the New York Court of Appeals, in construing its own state constitution, wishes to be more protective of individual privacy interests, it may do so and has done so on many occasions.⁷³ As noted earlier, in *Patchogue-Medford*,⁷⁴ New York's highest court unanimously held that a urine test required of all probationary school teachers violated the fourth amendment.⁷⁵ Six members of the court also held that it violated article I, section 12 of the New York Constitution.⁷⁶ While concluding that it is not unreasonable for school

72. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1425 (1989) (Marshall, J., dissenting).

73. See, e.g., *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985); *People v. Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985). See generally Kaye, *Dual Constitutionalism in Practice and Principle*, 42 REC. A. B. CITY N.Y. 285 (1987).

74. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (also discussed *supra* notes 9-10 and accompanying text).

75. *Id.* at 68, 510 N.E.2d at 330, 517 N.Y.S.2d at 461.

76. *Id.* at 66, 510 N.E.2d at 329, 517 N.Y.S.2d at 460. Judge Simons expressed the view that, absent a definitive ruling from the Supreme Court, he was "not prepared to join in the majority's assumption that the expectation of privacy held by this State's public employees in the act and product of urination so differs from that expectation held by other citizens of this Nation that an 'independent State ground' should be invoked." *Id.* at 74, 510 N.E.2d at 334, 517 N.Y.S.2d at 465 (citation omitted) (Simons, J., concurring).

authorities to require a teacher to submit to urine analysis for the purpose of detecting potential drug abuse absent a warrant or probable cause, the court of appeals, unlike the Supreme Court in *Skinner* and *Von Raab*, held that school officials must meet a standard of reasonable suspicion before they can demand that a teacher submit to such a test.⁷⁷

On the other hand, in *Caruso v. Ward*,⁷⁸ the court of appeals, in a five-to-two decision, upheld, as not violative of either the state or federal constitution, Interim Order #36 of the New York City Police Commissioner, which provided for periodic random urine testing of every member of the Organized Crime Control Bureau.⁷⁹ The majority emphasized:

OCCB members had a very diminished expectation of privacy due to their pursuit of service in [an] elite unit based on conditions known in advance. All members enter[ed] this service informed, fairly and reasonably, that they [would] be held to the strictest standards of probity and purity, over and above those already imposed on the police force at large.⁸⁰

In addition, reasoned the majority, the Police Department has "a justifiable interest and responsibility in the periodic testing of special officers constituting its main line offense and defense in the war against drug trafficking."⁸¹ Thus, the court, though it did not welcome the absence of a record on how it would work, found the Order, "on its face at least, constitute[d] a *reasonable* search and seizure."⁸² However, there is considerable language in the court's opinion that suggests the decision is a very narrow one, limited by the special nature of the Organized Crime Control Bureau.⁸³ And, there is a certain parallelism in approach between this opinion and that in *Von Raab*.

77. *Id.* at 69, 510 N.E.2d at 330, 517 N.Y.S.2d at 462.

78. 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988).

79. *Id.* at 434-35, 530 N.E.2d at 850, 534 N.Y.S.2d at 143.

80. *Id.* at 440, 530 N.E.2d at 854, 534 N.Y.S.2d at 146.

81. *Id.* at 441, 530 N.E.2d at 854-55, 534 N.Y.S.2d at 147.

82. *Id.*

83. *Id.* at 439-40, 530 N.E.2d at 853-54, 534 N.Y.S.2d at 146.

[T]he special status of police officers does not alone reduce their expectation of privacy to "minimal" level in respect to random drug testing.

But, what now of the Police Department's newly announced policy to subject all of its police officers to random drug testing?⁸⁴ Does *Von Raab* tell us anything? As to the fourth amendment, it tells us a great deal. I asked earlier that you keep your eye on the "carrying firearms" ball. In *Von Raab*, though not essential to its decision because of the special nature of the Customs Service unit at issue, the majority spoke not only of the government's need to conduct suspicionless searches of employees engaged directly in drug interdiction, but also of those who are otherwise required to carry firearms.⁸⁵

Clearly, that language is broad enough to encompass the entire New York City Police Department and all others as well, insofar as all police officers carry firearms. Therefore, as a fourth amendment matter, the newly announced policy of the New York City Police Department, indeed, may be in a safe harbor. But, how the New York Court of Appeals will rule when the issue reaches it is another question. To what extent will *Skinner* and *Von Raab* inform its decision? My prediction is that the court will lean towards the analysis in *Patchogue-Medford* rather than towards *Caruso* and, thus, will not take the gift offered it in the *Von Raab* dictum concerning public employees who are authorized to carry firearms. *Caruso* itself, as noted above, is a grudging decision in that Judge Bellacosa's opinion for the majority felt a degree of discomfort in deciding the issue on an empty record and emphasized the special, elite nature of the OCCB.⁸⁶

My prediction is buoyed in a broader sense by one of the truly remarkable juridical developments of the last fifteen years. As the Burger and Rehnquist Courts have limited the scope of the guarantees of the Bill of Rights, high state courts

Of crucial significance in this case is that OCCB members have a very diminished expectation of privacy due to their pursuit of service in the elite unit

Id.

84. See McKinley, *supra* note 8.

85. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1394-95 (1989).

86. Caruso v. Ward, 72 N.Y.2d 432, 440, 530 N.E.2d 850, 854, 534 N.Y.S.2d 142, 146 (1988).

throughout the country, those bastions of Trotskyite excess, continuously have discovered broader protections of those same rights for their respective citizens under their own state constitutional provisions, the wordings of which are either identical or very close to the provisions of the Bill of Rights.⁸⁷

As noted earlier, the New York Court of Appeals has been in the forefront of this development, and, with the sole exception of Judge Simons in *Patchogue-Medford*,⁸⁸ the court has signaled its willingness to rely on state as well as federal constitutional provisions in assessing the validity of employee drug testing.⁸⁹ Therefore, it will be article I, section 12 of the New York Constitution⁹⁰ that will resolve the validity of the drug-testing program, now in existence, for all police officers.

In sum, *Skinner* and *Von Raab* are just the beginning stages of a constitutional work-through of the dilemmas posed by substance abuse testing in the work place. As the New York Times reported, "[t]he legal briefs will pile up as thickly as autumn leaves as at least 22 different legal challenges to Transportation Department rules move through lower courts."⁹¹ These are rules that go well beyond those approved in *Skinner*. Under them, "employees in safety-related transportation jobs will be tested for the use of illegal drugs before employment, on a periodic schedule, after all accidents, whenever employers believe there is cause to suspect drug abuse and

87. See Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

88. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 71-75, 510 N.E.2d 325, 331-34, 517 N.Y.S.2d 456, 463-65 (1987) (Simons, J., concurring).

89. See *Caruso*, 72 N.Y.2d at 434-35, 510 N.E.2d at 850, 517 N.Y.S.2d at 143.

90. N.Y. CONST. art. I, § 12 provides:

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

Id.

91. Cushman, *Opposition Delays New Programs to Test Transport Workers for Drugs*, N.Y. Times, Aug. 21, 1989, at A15, col. 1.

at random.”⁹² Consequently, while the Supreme Court’s decisions are, indeed, seminal, there is much more to come.

While not nearly as seminal as *Skinner* and *Von Raab*, the Court decided yet another aerial surveillance case in the state’s favor, reducing, once again, the universe of privacy expectation cognizable under the fourth amendment. This time, in *Florida v. Riley*,⁹³ the Court attempted to explain how the fourth amendment bears on police surveillance by helicopter.⁹⁴ What emerged was a mixture of theory, none sufficient to command a majority of the Court.

Five justices agreed that the owner of a partially covered greenhouse situated within the “curtilage” of his home had no reasonable expectation of privacy against warrantless police observation of the structure’s interior from a helicopter hovering at a height of 400 feet.⁹⁵ But, they differed in their reasoning.⁹⁶ A four-justice plurality, speaking through Justice White, emphasized the fact that the helicopter was operating in compliance with Federal Aviation Administration (FAA) regulations.⁹⁷ Justice O’Connor, who provided the crucial vote, argued that it was inappropriate to make the FAA rules the basis for assessing the reasonableness of a privacy expectation.⁹⁸

As in the Court’s airplane surveillance cases of three years ago, *California v. Ciraolo*⁹⁹ and *Dow Chemical Co. v. United States*,¹⁰⁰ *Riley* involved focused surveillance rather than random overflights.¹⁰¹ The police had met with no success in ground-level efforts to check out an anonymous tip that marijuana was being grown on the defendant’s property.¹⁰² An officer then made two circular flights over the greenhouse at a height that allowed him to see marijuana through gaps in the

92. *Id.*

93. 109 S. Ct. 693 (1989).

94. *Id.* at 695-97.

95. *Id.* at 696.

96. *Id.* at 697 (O’Connor, J., concurring).

97. 109 S. Ct. at 696-97.

98. *Id.* at 697 (O’Connor, J., concurring).

99. 476 U.S. 207 (1986).

100. 476 U.S. 227 (1986).

101. *See Florida v. Riley*, 109 S. Ct. 693, 695 (1989).

102. *Id.*

roof and the open sides of the structure.¹⁰³ The Florida Supreme Court, that fount of fourth amendment liberality, held that the overflight was a "search" requiring a warrant.¹⁰⁴

If we recall *Ciraolo*, we remember that there the Court upheld a warrantless, naked-eye surveillance of a fenced backyard conducted from an airplane flying at 1000 feet.¹⁰⁵ The *Ciraolo* Court pointed out that the police do not need a warrant to observe what can be seen from a public vantage point, and it reasoned that a plane flying in a navigable airspace is such a vantage point.¹⁰⁶

Justice White reasoned, in *Riley*, that the same logic applies to the helicopter.¹⁰⁷ Even though Riley put his greenhouse on land that was included within the fourth amendment protections of his home, he could not reasonably expect it to be free from observation by a helicopter flying where a plane legally could fly.¹⁰⁸ Justice White reasoned further that it makes no difference that the helicopter was flying somewhat lower than that: although navigable airspace for fixed-wing aircraft starts at 500 feet, FAA rules set no minimum height for helicopters but require only that they be operated without hazard to persons or property on the ground.¹⁰⁹ "Any member of the public could legally have [flown] over [the defendant's] property in a helicopter at . . . 400 feet and. . . . [t]he police officer did no more."¹¹⁰ Justice White conceded that airborne surveillance of curtilage will not necessarily be constitutional in every case "simply because the plane is within the navigable airspace."¹¹¹ But, he believed:

it [was] of obvious importance that the helicopter in this case was *not* violating the law, and there [was] nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasona-

103. *Id.*

104. *Id.*

105. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

106. *Id.*

107. *Riley*, 109 S. Ct. at 696.

108. *Id.*

109. *Id.*

110. *Id.* at 697.

111. *Id.*

bly anticipated that his greenhouse would not be subject to observation from that altitude.¹¹²

In short, the plurality told us that, even though airplanes may not fly lower than 500 feet, FAA regulations place no height restriction on helicopters and require only that they fly safely.¹¹³ Therefore, because there is no violation of aviation law, the helicopter had a right to be where it was.¹¹⁴ Thus, there was no exploitation of any right of privacy.¹¹⁵

This proved to be a bit too much for Justice O'Connor, who concurred in the result but protested that the plurality relied "too heavily on compliance with FAA regulations," which, she pointed out, are designed to provide safety rather than to protect an individual's right to privacy.¹¹⁶ She noted that people desiring to ensure privacy in their backyards readily can guard "against ground-level observations [but] cannot block off all . . . views . . . [from above] without entirely giving up their enjoyment of those areas."¹¹⁷ To Justice O'Connor, the relevant inquiry was "not whether the helicopter was [in a location in which] it had a right to be, . . . [but] whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity [such] that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as "reasonable."'"¹¹⁸ However, while agreeing with much of Justice Brennan's dissent, Justice O'Connor concurred in the result because she placed on the defendant the burden to demonstrate that no one travels in helicopters at 400 feet, and the defendant had not met that burden.¹¹⁹

Some might conclude that a degree of silliness has entered into the Court's preference for law enforcement needs at the

112. *Id.*

113. *Id.* at 696-97.

114. *Id.* at 697.

115. *Id.*

116. *Id.* (O'Connor, J., concurring).

117. *Id.* at 698.

118. *Id.* (citing *Katz v. United States*, 389 U.S. 347 (1967)).

119. *Id.* at 699.

expense of privacy rights. As Justice Brennan argued quite persuasively:

under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so.¹²⁰

This case is yet another extreme example of how the Court has taken the "reasonable expectation of privacy" standard announced in *Katz*¹²¹ and continued on its relentless course of reducing privacy expectations by announcing, in its purely subjective way, that society is not prepared to recognize a discrete expectation of privacy. Well, who is society? The answer is nothing more mysterious than that it is five members of the Court at any particular time, even though a predominant part of the body politic might, if asked, conclude otherwise as to the extent of privacy expectations.

The irony of this doctrinal evolution is noteworthy. *Katz* was a case which *expanded* privacy protection by announcing a standard that freed analysis from its previous wedded status to property law trespass concepts.¹²² But, rather than march in tandem with the spirit of *Katz*, the Court has used the "expectation of privacy" standard of that case as a means to constantly narrow privacy interests. It seems a fair statement that, with decisions such as *Riley*, having once freed itself from the wooden inflexibility of *Olmstead*¹²³ and its progeny,¹²⁴ the Court has, nonetheless, missed the point of its own history.

120. *Id.* at 700 (Brennan, J., dissenting). Justice Blackmun agreed with Justices Brennan, Marshall, and Stevens that Justice O'Connor, rather than Justice White, posed the right question. The answer, he said, depended on the frequency of nonpolice helicopter flights at an altitude of 400 feet and that, whenever aerial surveillance is conducted from an altitude of less than 1000 feet (the height in *Ciraolo*), the prosecution should bear the burden of proving facts necessary to show that the resident lacked a reasonable expectation against such an intrusion. *Id.* at 705 (Blackmun, J., dissenting).

121. *Katz v. United States*, 389 U.S. 347, 350-53 (1967).

122. *Id.* at 353.

123. *Olmstead v. United States*, 277 U.S. 438 (1928).

124. *Goldman v. United States*, 316 U.S. 129 (1942); *On Lee v. United States*, 343 U.S. 747 (1952).

In sum, therefore, when you combine the Court's *Riley* analysis—there was no search because there was no legitimate expectation of privacy—with the extension of the “special needs” doctrine in *Skinner* and *Von Raab*, what the Court was telling us is that the fourth amendment's meaning will turn very much on the vicissitudes of the times. The question I raise is simply whether that is the true purpose of the amendment. Is it not when the crises that we face are at their severest that the entire Bill of Rights must stand as a bulwark of resistance to the temptation of expediency that such periods of difficulty engender? This is the basic tension which permeates the differing approaches of the current majority and Justices Brennan and Marshall in dissent.

The two fourth amendment cases which Professor Schwartz discussed earlier, *Brower v. County of Inyo*¹²⁵ and *Graham v. Connor*¹²⁶ were, for fourth amendment fans, the good news cases. When the police are engaged, not simply in the investigation of crime, but in rather extreme, and at times, unconscionable behavior in the apprehension of suspects, the current Court can rise to the occasion.

In *Brower*, the Court held that police use of a stationary roadblock to effect a stop of a fleeing suspect can be an unreasonable seizure under the fourth amendment.¹²⁷ The roadblock in this case, as the complaint alleged, was one with a vengeance.¹²⁸ The police placed a tractor-trailer across the unilluminated highway, behind a curve in the road.¹²⁹ Furthermore, the motorist was allegedly “blinded” by lights from a police car.¹³⁰ Instead of coming to a safe stop, the motorist crashed into the truck and died.¹³¹ The officers and the county were sued by the motorist's estate under section 1983.¹³² The

125. 109 S. Ct. 1378 (1989). See Schwartz, *Section 1983*, 6 *TOURO L. REV.* 5, 12-13 (1989).

126. 109 S. Ct. 1865 (1989). See Schwartz, *Section 1983*, 6 *TOURO L. REV.* 5, 8-12 (1989).

127. *Brower*, 109 S. Ct. at 1382.

128. See *id.* at 1380.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

fourth amendment claim was dismissed by the Ninth Circuit on the ground that the alleged facts did not make out a "seizure."¹³³ On appeal, Justice Scalia, writing for the majority, viewed the officers' use of the roadblock as being just as much a "seizure" as was the use of a bullet to bring down a fleeing suspect in the 1985 case of *Tennessee v. Garner*.¹³⁴

Many lay persons and many of my law students have difficulty accepting the proposition that the police may not use any means to bring down a fleeing felon. This puzzlement may be a deep reflection of the times. However, in what is both a positive fourth amendment development as well as a reflection of a substantial degree of humanitarianism, the Court in *Garner*, and now in *Brower*, held that the "reasonableness" clause must speak to that issue.¹³⁵ *Brower* is important in that it continues the *Garner* analysis as to the need to focus on the threshold issue of what constitutes a seizure. This is a normal construct, but, too often, the question of whether there has been a seizure has been merged with the question of reasonableness itself.

Graham v. Connor,¹³⁶ like *Brower*, is another case that involved highly questionable police conduct and reflected the Court's solicitude for the victims. In *Graham*, the Court clarified the substantive standard to be used in excessive force cases. In short, the Court held that claims alleging that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other seizure of a person should be "analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard."¹³⁷

The facts were particularly distressing. The police stopped and detained Dethorne Graham, a diabetic, following what the officers believed to be suspicious behavior in a convenience

133. *Brower v. County of Inyo*, 817 F.2d 540, 546-47 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1378 (1989).

134. *Brower*, 109 S. Ct. at 1380 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

135. *Id.* at 1382-83; *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). In *Brower*, the question of whether the roadblock was reasonable was not before the Court as petitioner's claim had been dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Brower*, 109 S. Ct. at 1383.

136. 109 S. Ct. 1865 (1989).

137. *Id.* at 1867.

store.¹³⁸ Graham, feeling the onset of an insulin reaction, had a friend drive him to a store for orange juice. When Graham saw the crowd at the checkout counter, he hurried out, arousing suspicion in a police officer. The officer followed the car in which Graham was a passenger and decided to make an investigative stop. Though Graham alerted the officer to his acute insulin problem, briefly passed out, and begged the police to get him some sugar, the officer and back-up police refused to help Graham. Instead, Graham was handcuffed, shoved around, and locked up. Needless to say, there had been no incident at the convenience store.¹³⁹ But, when it was all over, Graham had sustained a broken foot and other serious injuries.¹⁴⁰

The problem that Graham faced at trial was that the jury was instructed under a substantive due process standard pursuant to which they had to consider “four factors: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) ‘[w]hether the force was applied . . . in good faith . . . or maliciously and sadistically for the very purpose of causing harm.’ ”¹⁴¹

The Court held that this instruction was wrong, and it reversed.¹⁴² Chief Justice Rehnquist, writing for six members of the Court, held that, where a claim arises in the context of an arrest or an investigatory stop, it is most properly characterized as one invoking the protections of the fourth amendment,¹⁴³ which provides an explicit textual source of constitutional protection against this sort of physically intrusive

138. *Id.* at 1868.

139. *Id.*

140. *Id.*

141. *Id.* (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986)). This standard was developed in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). For further discussion of *Johnson v. Glick* and *Graham v. Connor*, see Schwartz, *Section 1983*, 6 *TOURO L. REV.* 5, 7-12 (1989).

142. *Graham*, 109 S. Ct. at 1872.

143. *Id.* at 1871.

governmental conduct, rendering substantive due process an improper guide for evaluating these claims.¹⁴⁴

Whether the force used in a particular case is reasonable "must be judged from the perspective of a reasonable officer" at that time and place, without the benefit of hindsight.¹⁴⁵ In addition, the determination of whether the force used in a particular case was reasonable "is an objective one"; it must be made without inquiry into underlying motivations.¹⁴⁶

The Court's decision cleared up the confusion that had existed among lower courts in the aftermath of Judge Friendly's opinion in *Johnson v. Glick*¹⁴⁷ fifteen years ago. Moreover, as the *Graham* decision itself demonstrated, the substantive due process standard puts a difficult burden on a civil rights plaintiff when pursuing an excessive force claim against the police.¹⁴⁸ Apart from that additional burden, the *Johnson v. Glick* test¹⁴⁹ gave rise to two disparate standards affecting the same conduct, depending on the context in which the conduct was assessed.¹⁵⁰ The Court wisely recognized that there need be only one standard, that of objective reasonableness, to determine whether a person's fourth amendment rights have been violated.

In sum, the Court's fourth amendment decisions during the Term were, for local government concerns, of considerable importance. While some questions, such as what constitutes a seizure (*Brower*) and what standard should govern police pre-

144. *Id.*

145. *Id.* at 1872.

146. *Id.* Justice Blackmun concurred, in an opinion joined by Justices Brennan and Marshall. He agreed that the use of the fourth amendment's objective reasonableness standard "is the primary tool for analyzing claims . . . in the pre-arrest context," but he found it unnecessary to "reach out" to foreclose the use of a substantive due process standard in all pre-arrest cases. However, he readily conceded that the use of force that was not demonstrably unreasonable under the fourth amendment would only rarely offend substantive due process standards, but he argued in favor of leaving that question for another day. *Id.* at 1873-74. (Blackmun, J., concurring in part and concurring in the judgment).

147. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

148. *See Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989).

149. *Johnson*, 481 F.2d at 1033.

150. *See* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND REMEDIES §3.13 (1986) and §3.13 (1986) Supp. 1989).

arrest conduct (*Graham*), have been clarified, the questions of the constitutionality of employee drug-testing will be with us for some time as they are presented to the Court in a myriad of contexts. But, it is safe to say that the Court has given the practice a substantial endorsement. With respect to privacy expectation analysis, particularly where police surveillance practices are concerned, it seems clear that the Court will continue to be generous towards state and local law enforcement efforts.

Judge George Pratt:

Thank you, Bill. You mentioned how silly the “expectation of privacy” analysis can become. The Second Circuit had a case finding that it was a fourth amendment violation because it was a violation of expectation of privacy for police officers to use a telescope to look across the street through somebody’s open window to see what was going on inside. We have not yet handled the case of field glasses or opera glasses or even ordinary eyeglasses to determine whether even that degree of augmentation of natural abilities becomes a fourth amendment violation. I suppose it is easy to make fun of the analysis, but as Bill points out, we should realize that courts are dealing with a serious problem here, and *Skinner* and *Von Raab* are just the beginning.

Two weeks ago I attended the Second Circuit’s Judicial Conference, and we spent a day on the subject of the future of the right to privacy. We were instructed by people who, I assume, are experts. One, who was from IBM, described the capabilities of computers and their ability to store information about every person in the country and make it almost instantly available. There were other experts who told us about DNA analysis and the potential for taking a blood sample of every infant born in the country, having it on file, knowing to what diseases they are predisposed, and, conceivably, even whether they are psychopathic personalities who, therefore, should not be entrusted with guns.

The potential is mind-boggling, and the only tool we have to deal with these intrusions into privacy is the fourth amendment. It will shape the nature of our society in the future; would that we had the ability to see how.

Now, Professor Kaufman, any comments or questions?

Question from Panelist Eileen Kaufman:

I have one comment and question. As you spoke, I was struck by the contrast between something said by Marty Schwartz earlier today, in connection with *Graham v. Connor*,¹⁵¹ and your reading, and I think it is quite an accurate reading, of the two drug testing cases. Marty said earlier that, in his opinion, one explanation for the Court's choosing the fourth amendment standard over the more amorphous fourteenth amendment standard is that the fourth amendment is clearer, more explicit, and less amorphous than substantive due process.¹⁵² Yet, as you described the two drug testing cases, it seems that the Court has, to some extent at least, read the probable cause requirement out of the text of the fourth amendment. Is it fair to characterize this as an inconsistency?

William E. Hellerstein:

I think Marty Schwartz may have the best of it, and why do I say that? In *Brower*,¹⁵³ in defining seizure, which is a fourth amendment easy-to-work concept, the Court never mentioned its case of last Term called *Michigan v. Chesternut*,¹⁵⁴ which addressed the issue of whether a police car traveling alongside a pedestrian on the street is a seizure. On the facts of the case, the Court said it was not, but recognized that it could be. It was surprising, I thought, in *Brower*, that the Court, in saying that the roadblock was a seizure, did not make any reference at all to the *Chesternut* case. This leads me to believe that what Marty said about his suspicions of that part of the case may be such that the Court is not so fourth amendment delineation-oriented as they are section 1983-oriented.

151. 109 S. Ct. 1865 (1989).

152. Schwartz, *Section 1983*, 6 TOURO L. REV. 5, 11 (1989).

153. *Brower v. County of Inyo*, 109 S. Ct. 1378 (1989).

154. 486 U.S. 567 (1988).