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SULLIVAN, C. J., with whom VERTEFEUILLE, J., joins, dissenting. The majority concludes that the warrantless search and seizure of the pharmacy records of the defendant, Nicholas Russo, by a drug enforcement agency officer, Marcus Brown, during the course of a criminal investigation did not violate the fourth amendment. I respectfully disagree.

I first note that I am puzzled by the majority's analysis of General Statutes § 21a-265.[1] On the one hand, the majority concludes that "§ 21a-265 affirmatively authorizes federal, state and local law enforcement personnel to review prescription records . . . ." On the other hand, it concludes that the statute "does not require a pharmacist to comply with a request by criminal law enforcement officials to review prescription records in the pharmacist's possession," but that such an inspection may be compelled pursuant to General Statutes § 21a-261. See footnote 27 of the majority opinion. If that is the case, I cannot perceive what affirmative authority § 21a-265 provides, nor can I perceive how the majority's reading of the statute differs from my reading that it is intended to be a shield for pharmacy owners and operators, and other persons with privacy interests in pharmacy records, not a sword for government officials seeking access to those records. Accordingly, I do not see why it is necessary to consider the constitutionality of that statute or of the only statutes that, in my view, do provide government officials with affirmative authority to inspect pharmacy records, namely, § 21a-261[2] and that statute's federal counterpart, 21 U.S.C. § 880.[3] None of those statutes purports to authorize a warrantless search of pharmacy records for criminal law enforcement purposes.[4]

Rather, I would conclude that the question to be answered is whether, under the fourth amendment, the government may compel disclosure of sensitive personal information for a valid regulatory purpose and then use that information for criminal law enforcement purposes. The majority, relying on *Whalen* v. *Roe*, 429 U.S. 589, 591, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), concludes that it may. I disagree.

In *Whalen*, the United States Supreme Court considered the constitutionality, under the fourteenth amendment, of the New York State Controlled Substances Act of 1972; N.Y. Pub. Health Law § 3300 et seq. (McKinney

Sup. 1976–1977). The statute required the recording, in a centralized computer file, of the names and addresses of all persons who had obtained certain drugs pursuant to prescriptions from physicians. *Whalen* v. *Roe*, supra, 429 U.S. 591. The law had been enacted to correct defects in the preexisting law, under which "[t]here was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from over-prescribing . . . ." Id., 592. The law was challenged by a group of patients regularly receiving prescriptions for Schedule II drugs, which include opium and opium derivatives, cocaine, methadone, amphetamines and methaqualone, by doctors who prescribed such drugs and by two associations of physicians. Id., 593 n.8, 595. They claimed that the "the statute threaten[ed] to impair their interest in the nondisclosure of private information" in violation of the fourteenth amendment. Id., 600.

The court noted that "[t]he concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion. . . . The first of [these] facets . . . is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in [this opinion]." (Citation omitted; internal quotation marks omitted.) Id., 599 n.24.

The court also explicitly rejected the appellees' claim, based on language in *Terry* v. *Ohio*, 392 U.S. 1, 9, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Katz* v. *United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), "that a constitutional privacy right emanates from the Fourth Amendment . . . ." (Citations omitted.) *Whalen* v. *Roe*, supra, 429 U.S. 604 n.32. The court concluded that "those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now." Id. In other words, where there is no government surveillance and intru-

sion for criminal law enforcement purposes, the mere disclosure of personal information does not constitute an invasion of privacy under the fourth amendment.

Thus, the court in *Whalen* explicitly distinguished fourth amendment privacy interests from fourteenth amendment privacy interests and made it clear that there was no colorable fourth amendment claim in that case. Id. The court did recognize, however, that the government typically has a duty to avoid unwarranted disclosure of personal information in government files and that that duty ''arguably has its roots in the Constitution . . . .'' Id., 605. The court concluded that, because the New York statute adequately protected the confidentiality of the records; id.; the ''record [did] not establish an invasion of any right or liberty protected by the Fourteenth Amendment.'' Id., 606.

The majority concludes that, under *Whalen*, because state and federal regulatory agents have access to the defendant's pharmacy records under their respective regulatory inspection schemes, he has no privacy interest in those records vis-a-vis criminal law enforcement officials. See footnote 39 of the majority opinion. In my view, however, the majority ignores the language in *Whalen* limiting the holding of that case to fourteenth amendment privacy interests. It also ignores the United States Supreme Court cases decided under the special needs doctrine that have developed and clarified the distinction, merely referred to in *Whalen*, between the privacy interest in nondisclosure of personal information and the privacy interest in being free from government surveillance and intrusion.

In special needs cases, the question is whether a warrantless and suspicionless search is nevertheless reasonable under the fourth amendment because ''special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'' (Internal quotation marks omitted.) *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). In *Skinner*, the court considered the constitutionality of a regulation providing for the suspicionless and warrantless toxicological testing of railway workers. The court concluded that such testing was justified and did not violate the fourth amendment when the purpose was ''not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.' '' Id., 620–21. The court noted, however, that the regulation under review pro-

vided in part that "[e]ach sample provided under [Subpart C] is retained for not less than six months following the date of the accident or incident and may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian . . . ." (Internal quotation marks omitted.) Id., 621 n.5. The court further noted that "[w]hile this provision might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used. Indeed, while respondents aver generally that test results might be made available to law enforcement authorities . . . they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as 'a "pretext" to enable law enforcement authorities to gather evidence of penal law violations.' *New York* v. *Burger*, 482 U.S. 691, [716–17 n.27, 107 S. Ct. 2636, 96 L. Ed. 2d 601] (1987). Absent a persuasive showing that the [Federal Railroad Administration's] testing program is pretextual, we assess the . . . scheme in light of its obvious administrative purpose. We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [Federal Railroad Administration's] program." *Skinner* v. *Railway Labor Executives' Assn.*, supra, 621 n.5. Thus, the court in *Skinner* clearly recognized that the purpose of a search may be constitutionally significant.

In *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 650–51, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), the United States Supreme Court considered the constitutionality of a school policy under which students who wished to play sports were required, under monitored conditions, to provide urine samples that were then tested for drugs. The court recognized that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant . . . ." (Citation omitted.) Id., 653. It also criticized the dissenting opinion in that case for "lump[ing] this search together with 'evidentiary' searches, which generally require probable cause"; id., 658–59 n.2; and emphasized that "the search here is undertaken for prophylactic and distinctly *non*-punitive purposes . . . ." (Citations omitted; emphasis in original.) Id., 658 n.2. Thus the court again clearly suggested that the purpose of the search is constitutionally significant. The court concluded that the govern-

ment interest in protecting high school athletes from adverse effects of drug use and ensuring a drug-free school justified the warrantless drug tests. Id., 664–65.

In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 660, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989), the court considered the constitutionality of a program promulgated by the United States Customs Service that required drug testing of employees who applied for or occupied certain positions within the service. The court noted that "[i]t is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." Id., 666. It concluded that the government's interest in ensuring the physical health and unimpeachable integrity and judgment of customs agents involved in interdiction of drug traffic justified the warrantless searches. Id., 670; see also *Griffin* v. *Wisconsin*, 483 U.S. 868, 875, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (warrantless search of probationer's home is justified by purposes of probation, i.e., rehabilitation of probationer and protection of public); *New Jersey* v. *T. L. O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (need to maintain order in schools justifies warrantless search of student on less than probable cause standard); *Bell* v. *Wolfish*, 441 U.S. 520, 558–60, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (need for prison security justifies warrantless strip search of prisoners).

I note that in *National Treasury Employees Union* the customs service itself, like Connecticut's department of consumer protection and the federal drug enforcement agency, which are charged with administering the inspection schemes at issue in this case, had criminal law enforcement authority. See *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 659–60. Accordingly, the same persons who had authority to view the drug test results had authority to enforce the drug laws. The United States Supreme Court found it constitutionally significant, however, that the test results could not be used for criminal law enforcement purposes without the employee's consent. Id., 666. Thus, even though it is clear that the employees had no protectible fourteenth amendment privacy interest in the test results vis-a-vis the service, the court clearly suggested that the employees retained a fourth amendment privacy interest in that information.

In the United States Supreme Court's recent decision in *Ferguson* v. *Charleston*, U.S. , 121 S. Ct. 1281,

1284, 149 L. Ed. 2d 205 (2001), the court considered ''whether the [state's] interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.'' A task force consisting of representatives of a university hospital, the police, a local substance abuse commission and the state's department of social services had adopted a policy concerning the management of drug abuse during pregnancy. Id., 1285. Under the policy, a pregnant patient was to be tested for cocaine use if she met one of nine specified criteria. Id. The policy also provided that patients who tested positive would be referred to a substance abuse clinic. Id. If the patient tested positive a second time, the police were to be notified, and the patient arrested. Id., 1295.

Ten women who had been arrested after testing positive for cocaine use challenged the policy, claiming that the warrantless and nonconsensual drug tests were unconstitutional searches. Id., 1286. The respondent task force members claimed that the petitioners had consented to the searches and that, as a matter of law, the searches were reasonable because they were justified by special purposes not related to law enforcement. The court did not resolve the respondents' claim that the patients had consented to the searches, because the issue had not been addressed by the Fourth Circuit Court of Appeals. Id. As to the respondents' claim that the searches were justified by ''special non-law-enforcement purposes''; id.; the court recognized that, ''in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification.'' Id., 1286 n.7. It also recognized, however, that ''[i]n . . . special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable cause requirement in part because *there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.*'' (Emphasis added.) Id., 1289 n.15. It concluded that ''the purpose actually served by [these] searches is ultimately indistinguishable from the general interest in crime control.'' (Internal quotation marks omitted.) Id., 1290. ''While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat

of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.'' (Emphasis in original.) Id., 1291–92. The court concluded that the case ''simply does not fit within the closely guarded category of 'special needs.' ''[5] Id., 1292; see also *Indianapolis* v. *Edmond*, 531 U.S. 32, 42–43, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (''severe and intractable nature of the drug problem'' did not justify establishment of vehicle checkpoints when purpose was general crime control). Thus, the court in *Ferguson* recognized that the special needs balancing test is not applicable in cases where the search is undertaken for general law enforcement purposes. See *Ferguson* v. *Charleston*, supra, 121 S. Ct. 1286 n.7 (recognizing that balancing test should be applied only in exceptional cases where special needs make obtaining warrant impracticable).

The majority concludes that, under *Whalen*, because a large number of government officials may look at the defendant's pharmacy records, he has no privacy interest in those records vis-a-vis the government and, therefore, a government official's motive for looking at the records is irrelevant for purposes of determining whether a search has taken place. I simply do not see how that conclusion can be reconciled with the special needs cases. In *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 621 n.5, the court explicitly stated that it was leaving to another day ''the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [Federal Railroad Administration's] program.'' In *Vernonia School District 47J* v. *Acton*, supra, 515 U.S. 658 n.2, the court emphasized that the search under review in that case was reasonable because it was ''undertaken for prophylactic and distinctly *non*punitive purposes . . . .'' (Citations omitted; emphasis in original.) In *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 666, the drug test results were scrutinized by government officials with criminal law enforcement authority and the court found it constitutionally significant that the drug test results ''may not be used in a criminal

prosecution of the employee without the employee's consent.'' Finally, in *Ferguson* v. *Charleston*, supra, 121 S. Ct. 1291–92, the court held that a government program the primary purpose of which was to generate evidence for law enforcement purposes was unconstitutional even when the ultimate purpose of the program was to improve public health.

In my view these cases clearly indicate that the government cannot collect for an administrative purpose sensitive personal information in which an individual would otherwise have a reasonable expectation of privacy and then, claiming that the expectation of privacy has been vitiated because the information has been collected, use the information in a criminal investigation. I do not believe that if the government policies under review in *Skinner* and *Vernonia School District 47J* had provided that the drug test results routinely would be provided to the police, or if the drug testing program in *National Treasury Employees Union* had provided that the customs service could use the test results for general criminal law enforcement purposes without the consent of the employee, those policies would have been found to be constitutional. Nor do I believe that even if the primary purpose of the government program under review in *Ferguson* had been to identify babies needing special medical attention at birth, but the program had provided that the test results routinely would be provided to the police, such a policy would have been found to be constitutional. I cannot perceive any reason that the government's practice of obtaining such information for a criminal law enforcement purpose in the absence of specific regulatory authority should be treated any differently. Accordingly, I do not believe that such a practice is constitutional. In concluding in this case that it is,[6] the majority essentially has adopted the reasoning of the dissenting opinions in *Ferguson* v. *Charleston*, supra, 121 S. Ct. 1300 (Scalia, J., dissenting) (arguing that existence of criminal law enforcement purpose cannot invalidate otherwise lawful search); and *Indianapolis* v. *Edmond*, supra, 531 U.S. 52 (Rehnquist, C. J., dissenting) (arguing that subjective intent of person performing search is irrelevant and that ''[i]t is the objective effect of the State's actions on the privacy of the individual that animates the Fourth Amendment'').

I recognize that the special needs cases, unlike this case, involve intrusions into a person's body or home. In my view, however, that distinction is not significant. As recognized by the United States Supreme Court in

Katz v. *United States*, supra, 389 U.S. 353, "the Fourth Amendment protects people—and not simply 'areas' . . . ." Id. (rejecting view that fourth amendment applies only to intrusion into given enclosure and seizure of tangible items and concluding that it applies to words spoken in public telephone booth). Furthermore, I do not see why the government should be able to do in two or three or four steps what it cannot do in one. If the government cannot collect private materials or information without obtaining a warrant if it intends to use the information for a criminal law enforcement purpose, it cannot compel private entities to collect such information and then obtain it from the private entities and use it for such a purpose.

In short, I believe that an individual's fourth amendment interest in being free from governmental surveillance and intrusion for criminal law enforcement purposes is, as recognized by the court in *Whalen* v. *Roe*, supra, 429 U.S. 599 n.24, distinct from and, in cases where the government has compelled the disclosure for a legitimate regulatory purpose, broader than the fourteenth amendment privacy interest in being free from the disclosure of sensitive personal information. See also *Katz* v. *United States*, supra, 389 U.S. 350 ("[the Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all"). This is especially so in cases, like this one, where the records are not required to be kept in a format that reveals information about specific individuals and, consequently, where there has not necessarily been any prior invasion of an individual's fourteenth amendment privacy interest.[7] Although the government has a legitimate interest in regulating the distribution of Schedule II drugs by pharmacies and physicians that justifies the regulatory inspection scheme, that interest does not require that the government have access to records designed to reveal information about individual consumers, and it would not be undermined by requiring probable cause and a warrant before criminal law enforcement officials are allowed to search such records. Accordingly, I would conclude that the fourth amendment requires probable cause and a search warrant to search an individual's pharmacy records.

Finally, I note that, under the majority's decision in this case, individuals will have even less protection from egregious government conduct than the pervasively regulated pharmacies. The state can now conduct a flagrantly illegal inspection of pharmacy records and use

any materials seized in a criminal prosecution of an individual, even though it could not use the information in proceedings against the pharmacy, because the conduct simply will not constitute a search as to the individual. This point was made very clearly in *United States* v. *Payner*, 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980). In that case, the government engaged in egregious conduct that the United States Supreme Court characterized as ''unconstitutional and possibly criminal,'' in order to obtain evidence against the defendant. Id., 733. Nevertheless, the court held that, because evidence had been in possession of a third party, the defendant had no expectation of privacy in the materials seized and he had no protectible fourth amendment interest. Id., 731–32. Therefore, the court held that the exclusionary rule did not apply. Id., 734. In my view, the special needs cases clearly indicate that this principle does not apply when the government has compelled the disclosure of the object of the search in the first instance.

I would conclude that the defendant's pharmacy records were properly suppressed as having been obtained in the course of a warrantless search unsupported by any recognized exception to the warrant requirement. Accordingly, I dissent.

[1] See footnote 18 of the majority opinion for the text of General Statutes § 21a-265.

[2] See footnote 26 of the majority opinion for the text of General Statutes § 21a-261.

[3] See footnote 13 of the majority opinion for the text of 21 U.S.C. § 880.

[4] The majority states that, while § 21a-265 ''affirmatively authorizes'' inspection of pharmacy records, § 21a-261 and 21 U.S.C. § 880 ''were enacted to protect pharmacists from unreasonable, warrantless intrusions by federal and state regulatory personnel . . . .'' Footnote 20 of the majority opinion. In my opinion, this reading stands the statutes on their heads. Section 21a-261 and 21 U.S.C. § 880 constitute the regulatory scheme that *reduces* the pharmacists' expectation of privacy for fourth amendment purposes. Admittedly, those statutes contain restrictions on the authority to inspect that are dictated by the fourth amendment, but, in the absence of the statutes, the fourth amendment would prohibit *any* intrusion by the government without a warrant or the consent of the pharmacists. On the other hand, in my view, the only purpose of § 21a-265 is to protect pharmacists and other persons with privacy interests in pharmacy records from the unwarranted disclosure of the records to unauthorized persons.

[5] The court also concluded that ''[w]hile state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.'' (Emphasis in original.) *Ferguson* v. *Charleston*, supra, 121 S. Ct. 1292. I assume that a hospital does not ''inadvertently acquire'' evidence of cocaine use when it deliberately administers a test for such use, and, accordingly, I interpret this statement to mean that, if the hospital intends, either under a specific policy or in performance of its perceived civic duty, to inform the police if

the results of the test are positive, it must obtain the prior consent of the patient. See *Vernonia School District 47J* v. *Acton*, supra, 515 U.S. 650–51, 664–65 (warrantless drug testing of athletes by school officials is reasonable under fourth amendment when test results are used only for school purposes and are not provided to law enforcement officials); *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 666 (warrantless drug testing of customs agents by customs agency is reasonable under fourth amendment when testing program is used for internal purposes and is not designed to serve ordinary needs of law enforcement). Furthermore, I interpret the court's statement that a patient has a reasonable privacy expectation that the results of diagnostic tests will not be disclosed to nonmedical personnel without the patient's consent; *Ferguson* v. *Charleston*, supra, 1292; to mean that, under the fourth amendment, the police are not authorized to go on fishing expeditions into patients' records, even though, when a state hospital does "inadvertently acquire" evidence of a crime, e.g., evidence of child abuse acquired during treatment of a child's injuries or evidence of drug abuse acquired while treating a patient for an apparent drug overdose, it must preserve medical records pertaining to the crime and may have a duty to disclose that information to the police.

[6] I recognize that the majority concludes that the searches are specifically authorized by § 21a-265 and focuses its analysis on whether that statute is constitutional. As I have already indicated, I disagree with that analysis. Because the majority believes, however, that the defendant forfeited any expectation of privacy in his pharmacy records vis-a-vis the government when it disclosed the information to the pharmacy, it presumably would conclude that the search of the defendant's records was constitutional even in the absence of § 21a-265.

[7] In particular, I note the intangible and divisible nature of the information contained in prescriptions and the nature of the information storage systems used by the pharmacies. The use of an automated data processing system for the storage and retrieval of prescription information allows the pharmacy to produce the information in a variety of formats, not all of which are required by statute, not all of which are calculated to facilitate enforcement of the regulatory scheme, and not all of which reveal information about particular consumers. For example, the state has pointed to nothing in the governing statutes or regulations that specifically requires the pharmacy to maintain patient profiles, and it has not articulated any regulatory reason for Brown to have obtained the profiles in this case. Rather, it would appear that these profiles are maintained for the convenience of the patient and his physician. Furthermore, I note that an individual's potential privacy interest is implicated only if the information is disclosed in a format that reveals information about him personally, not, for example, when it appears anonymously in a record indicating how much of a particular controlled substance a pharmacy distributed in a particular month. I cannot conclude that, by assuming the risk that his prescription information would be used to further the regulatory scheme, the defendant assumed the risk that the government would inspect his patient profiles without a warrant.