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SEARCHING FOR TERRORISTS: WHY PUBLIC SAFETY IS NOT A SPECIAL NEED

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ABSTRACT

In the wake of the terrorist attacks of September 11, 2001, local police across the country instituted blanket searches without individualized suspicion at various venues—including political protests, sporting events, subway platforms, and public ferries—all in an attempt to prevent further terrorist attacks. When evaluating these searches, courts rely upon the special needs doctrine, which allows the government to conduct a suspicionless search as long as the search serves a special need distinct from the goals of law enforcement. Over the past eight years, courts have struggled to determine whether and how the special needs doctrine applies to these searches, and these struggles have produced inconsistent results.

This Article first reviews the history of antiterrorism searches, which can be roughly divided into three different time periods. In the early 1970s, in response to an epidemic of hijackings and bombings of public buildings, the government instituted a regime of suspicionless

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searches at airports and public buildings—searches which continue to this day. During the second period, the imminent danger of these terrorist actions abated, but courts continued to reject challenges to the searches, and suspicionless searches spread to other contexts far removed from the terrorist threat. Finally, in the third era, which began in 2001 and continues to the present day, the government has aggressively expanded its use of antiterrorism searches, and courts face a new set of challenges in evaluating their constitutionality.

This Article then explains why antiterrorism searches cannot be justified under the special needs doctrine, and indeed why—in their current form—these searches cannot be justified under any Fourth Amendment doctrine. It then proposes a solution: suspicionless searches to prevent terrorism should be permitted, but only if the fruits of the search cannot be used in a subsequent criminal prosecution. Although the solution at first seems controversial, it represents a reasonable balance between the need to protect the country from terrorist attacks and the need to draw a principled distinction between special needs searches and general searches.

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INTRODUCTION

Consider a hypothetical. The United States is the victim of multiple terrorist attacks,[1] and traditional law enforcement techniques have consistently been proven ineffective. In response, federal law enforcement agents institute a regime of blanket searches, conducted without any degree of individualized suspicion. These suspicionless searches work, and in a very short period of time the terrorist attacks abate. Meanwhile, the search regimes are inevitably subjected to a series of challenges in court. The judges, seeing the efficacy of these programs, unanimously approve of the searches by exploiting—and expanding—a relatively obscure loophole in Fourth Amendment jurisprudence. Stability returns to the nation. The question: what happens to the suspicionless searches once the terrorist attacks have been eliminated?

1. Throughout this Article, the word "terrorism" will be used to denote the use or threat of violence with the intent to intimidate, usually for ideological or political purposes. *See* AMERICAN HERITAGE DICTIONARY 1854 (3d ed. 1992).

The answer: they continue indefinitely. And why not? They have proven themselves effective—indeed, indispensable—in preventing widespread acts of violence. They have been sanctioned by the courts. And most importantly, every year that they continue, the citizens who are consistently subjected to these searches become more and more accustomed to them, until they no longer seem to be intrusive. Instead, if the searches are noticed at all, they are thought to be merely a minor annoyance, an inevitable facet of modern life.

This is not a hypothetical from our potential future; it is a lesson from our recent past. In the late 1960s and early 1970s, international hijackers and domestic terrorists caused widespread violence and social unrest in this country. These attacks stopped only after the government ordered searches of every airplane passenger and every visitor to federal courthouses. Courts upheld these suspicionless searches by applying a legal theory called the administrative search doctrine, which had been recently developed to allow health inspectors access to homes without needing to demonstrate individualized suspicion. Now, nearly forty years later, entire generations have grown up assuming the only way to board an airplane or enter a courthouse is to be subjected to a search by law enforcement personnel.

But if we are to learn a lesson from this history, it is not clear what the lesson should be. We have effectively traded liberty for security, but even now it is difficult to measure how much liberty we have lost and how much security we have gained. Are suspicionless searches at airports and public courthouses merely a minor annoyance, or a severe and unjustified privacy intrusion into our privacy made all the more Orwellian by the fact that we only *perceive* them to be a minor annoyance? And how much more secure are we with these searches—or rather, how much security would we lose if we abolished these searches and required police to play by the normal rules to prevent these crimes?

Following the terrorist attacks of 2001, these are no longer academic questions. History is repeating itself. In the wake of the September 11 attacks, local police across the country instituted suspicionless search regimes at political protests, sporting events, subway platforms, and public ferries, all in an attempt to prevent further terrorist attacks. Courts now struggle to determine whether the same doctrine that justified suspicionless searches at airports and public courthouses can be used to support this second generation of

searches. And many academics—usually ready to denounce and criticize new restrictions on Fourth Amendment rights—have scrambled to find ways to justify these searches under existing Fourth Amendment jurisprudence,[2] or have argued that the old Fourth Amendment rules simply do not or should not apply in the face of a terrorist threat.[3]

This Article evaluates the constitutionality of today's antiterrorism suspicionless searches. It argues that one cannot effectively evaluate the validity of these searches without first understanding and critiquing the initial wave of antiterrorism suspicionless searches, all of which were unanimously approved by the courts in the early 1970s. Thus, this Article breaks up the development of antiterrorism searches into three time periods: the early 1970s, when courts first instituted and upheld airport and courthouse searches; the 1980s and 1990s, when terrorist attacks abated and the searches became ingrained in American culture; and the modern era, from 2001 until the present, in which the government seeks to extend the scope of the searches and courts are once again being called upon to evaluate their constitutionality.

Of course, suspicionless searches are not confined to the antiterrorism context. In fact, just before the first antiterrorism searches were being reviewed by the appellate courts in the early 1970s, the Supreme Court created an entirely new doctrine which

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2. *See, e.g.*, Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 722 (2007) (stating that the New York City subway searches are "uncontroversial" and that the case for such searches is "relatively easy to make"); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 131–37 (2007) (arguing that suspicionless searches should be seen as reasonable and thus constitutional if they have been approved by a representative legislative body, because the legislative process will correct any overreaching by law enforcement). *But see* Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 384 (2007) (criticizing the holdings in antiterrorism search cases and noting that "whenever a bright line rule is replaced by a balancing test, civil liberties are likely to lose").

3. *See, e.g.*, Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 777 (2004) (asserting that "traditional Fourth Amendment search-and-seizure doctrine was fine for an age of flintlocks," but that "large-scale searches undertaken to prevent horrific potential harms may be constitutionally sound"). *But see* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 834–35 (2007) (concluding that "the war on terror has generated extraordinary criminal processes applicable to people suspected of terrorism" and that the costs of this change are significant, including that "state power over all of us—over our bodies, our mobility, our words and actions, and of course our lives—continues to increase").

allowed the government to conduct a search or seizure without any showing of individualized suspicion. It is this doctrine, known as the administrative search doctrine, which the early courts ultimately used to justify the antiterrorism searches. Although the Court has described these cases as a "closely guarded category of constitutionally permissible suspicionless searches,"[4] they in fact cover a broad range of situations. They include searches to enforce regulatory violations, mandatory drug testing of schoolchildren and public employees, inventory searches, immigration and drunk driving checkpoints, and searches of probationers and parolees. The doctrine underlying these cases is murky at best, and judges and commentators disagree as to whether these cases all fall into the same category or should be considered doctrinally distinct.[5] For now, I will refer to them all as "permissible suspicionless searches," meaning searches that are permissible even if the government does not have any amount of individualized suspicion of the subject being searched.

The first three Parts of this Article detail the changes to antiterrorism searches and the permissible suspicionless search doctrine for each of these three time periods. Part I covers the first era, approximately 1968–1976, and examines both the government's reaction to the first wave of terrorism, as well as the birth and early application of the permissible suspicionless search doctrine. Part II describes the second era, roughly 1977–2000, which was a time of relative calm between the two waves of terrorism. Despite the relative calm during this period, the permissible suspicionless searches at airports and courthouses became more firmly entrenched in the law, and among the general public they became an unquestioned—and perhaps even comforting—aspect of traveling by air or entering a federal building. Meanwhile, outside the terrorism context, the permissible suspicionless search doctrine was evolving and expanding

4. Chandler v. Miller, 520 U.S. 305, 309 (1997) (declaring unconstitutional a Georgia law that conditioned one's candidacy for state office on passing a drug test).

5. The Ninth Circuit, for example, breaks these cases down into three categories that are "not necessarily mutually-exclusive": searches at "exempted areas" (such as international borders, prisons, airports, and entrances to government buildings), "administrative" searches, and "special needs" searches. United States v. Kincade, 379 F.3d 813, 822–23 (9th Cir. 2004). Professor Schulhofer, meanwhile, distinguishes the "administrative" searches and the "internal governance" searches (such as those that occur in schools and public workplaces) from the mandatory drug testing laws that are actually intended to deter and punish the use of illegal drugs. *See* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 162–63.

to cover a variety of different contexts, acquiring along the way a new name: special needs searches. Finally, Part III discusses the modern era, from 2001 to the present, when terrorism again became a palpable threat to this country, and law enforcement once again responded with suspicionless searches to prevent future attacks. During the present era, however, courts have become more critical of suspicionless searches, both in the antiterrorism context and in other areas, ultimately leading to a confusing legal test and an inconsistent application of that test when it is applied to antiterrorism searches.

After the Article traces the development of both antiterrorism searches and the permissible suspicionless search doctrine, Part IV critically analyzes the special needs doctrine. This Part breaks the special needs cases up into three different categories: searches made outside the criminal context, searches made in the context of criminal activity but whose results are not turned over to law enforcement, and searches made in the context of a criminal case whose results are used by law enforcement. This Part concludes that suspicionless antiterrorism searches fall into the third category—a category that cannot be justified by the special needs doctrine. Part V examines other possible justifications for suspicionless antiterrorism searches, including analyzing these cases under a generalized reasonableness test and relying on implied consent. This Part concludes that no other justifications are valid, given the very real danger of a slippery slope and the need for a principled distinction between searches that require individualized suspicion and those that do not. This creates a significant problem: if suspicionless antiterrorism searches are unconstitutional under the principles of the Fourth Amendment, how can law enforcement protect us from the very real threat of terrorism?

Part VI will propose a solution to this problem: suspicionless antiterrorism searches would be constitutionally justified under the special needs doctrine as long as any contraband that is recovered cannot be used in a criminal prosecution. By giving law enforcement the opportunity to choose between a suspicionless search that is truly aimed only at preventing terrorism and a more traditional search that could result in criminal prosecution, this proposal gives the police more power to search when there is a true terrorist threat, yet encourages them to develop more sophisticated and less intrusive methods of investigation when they are seeking to apprehend and prosecute wrongdoers.

I. THE FIRST ERA: 1968–1976

The government's use of antiterrorism suspicionless searches began in the late 1960s, in response to a series of hijackings and bombings of government buildings across the country. At about the same time, the Supreme Court created the administrative search doctrine, which permitted suspicionless searches as long as they were not "aimed at the discovery of evidence of a crime."[6] When it came time for courts to review the antiterrorism suspicionless searches, many of them turned to the administrative search doctrine to evaluate and ultimately approve of this method of detecting and apprehending terrorists.

A. The First Wave of Terror: Hijackings and Bombings

The late 1960s was a time of severe social unrest in this country. The civil rights movement, opposition to the Vietnam War, protests against the regime of Fidel Castro, and Palestinian claims of sovereignty all motivated radical elements of the population to engage in acts of domestic terrorism. Bombings of public buildings and other high-profile targets increased dramatically. Although the country had experienced forms of domestic terrorism before, the unrest had previously been limited to political fringe groups or specific segments of the population.[7] During the late 1960s, police departments, courthouses, foreign missions, university offices, prisons, the Pentagon, and the United States capitol building were all targets of bomb attacks.[8] According to a report by the Federal Bureau

6. Camara v. Mun. Court, 387 U.S. 523, 537 (1967) (asserting the reasonableness of code-enforcement inspections).

7. For example, in 1857 a group of Mormons in Utah declared themselves to be in open rebellion against the United States and slaughtered 120 settlers on their way to California. *See* Eugene E. Campbell, *Governmental Beginnings*, *in* UTAH'S HISTORY 153, 165–71 (Richard D. Poll et al. eds., 1989). The late-nineteenth century saw a number of violent acts committed during labor disputes or by anarchists attempting to topple the United States government. *See, e.g.*, Nicholas von Hoffman, *To Kill Everyman; A New Chapter in American Terrorism*, WASH. POST, Oct. 15, 1995, at B3 (describing the changing targets of terrorist attacks). And racial violence perpetrated by groups such as the Ku Klux Klan caused many deaths in the early-to-mid-twentieth century. However horrible these terrorists' actions were, in sheer number they did not compare to the widespread bombings of public buildings in the late 1960s. *See infra* notes 8–9 and accompanying text.

8. *See* Thomas R. Brooks, Editorial, *The Radical Underground Surfaces with a Bang*, N.Y. TIMES, Mar. 15, 1970, (Magazine), at 171; *see also* Michael Taylor, *'70s in the Bay Area—Era of Radical Violence*, S.F. CHRON., Jan. 24, 2007, at A1.

of Investigation, there were 3,000 bombings and 50,000 bomb threats in 1970 alone.[9] These attacks, alongside a series of high-profile political assassinations, including Robert Kennedy and Martin Luther King, Jr., heightened the perception of a tidal wave of violent social unrest sweeping the country.[10]

Around the same time, the country experienced an epidemic of airplane hijackings. In the decade preceding 1968, hijackings had averaged only one per year, but in 1968 there were eighteen, and in 1969 there were thirty-three.[11] In one particularly notorious incident in 1970, a radical Palestinian group hijacked four planes bound for New York City and flew them to Jordan and Egypt, where the terrorists ultimately blew up all four planes on the landing field.[12]

The government's response to this rise in both domestic and international terrorism included broad new search procedures at the entrances to public buildings and at airports. In the fall of 1970, the federal General Services Administration issued an order requiring searches of all bags and packages at entrances to every federal building.[13] Meanwhile, on September 11, 1970, President Richard Nixon issued a directive for the Department of Transportation, requiring its agents to work with airlines to institute surveillance programs at all domestic airports.[14] This directive was followed by a series of rules promulgated by the Federal Aviation Administration in 1972 requiring all airline passengers and their luggage to be

9. *See* FBI, History of the FBI: Vietnam War Era: 1960s–1970s, http://www.fbi.gov/libref/historic/history/vietnam.htm (last visited Dec. 22, 2009) (describing violence in opposition to the Vietnam War).

10. *See generally The American Century, 1960–1969*, WASH. TIMES, Aug. 30, 1999, at A10 (detailing the major political and social events of the 1960s).

11. United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc). The high number of hijackings continued into the next decade: twenty-five in 1970, twenty-five in 1971, and twenty-six in 1972. The numbers finally dropped to single digits for most of the rest of the 1970s, and dropped to zero by the 1990s. *See* OFFICE OF CIVIL AVIATION SEC., FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., CRIMINAL ACTS AGAINST CIVIL AVIATION 75 (2000).

12. *See* Eric Pace, *Disclosure Is Made by Amman Radio*, N.Y. TIMES, Sept. 27, 1970, at A1. The four planes were all destroyed on September 12, 1970. *Id.*; *see also* Cynthia R. Fagan, *Iraq's Oil for Terror; $72 Million to Palestinians*, N.Y. POST, Oct. 17, 2004, at 13.

13. Downing v. Kunzig, 454 F.2d 1230, 1231 (6th Cir. 1972). The Government Services Administration (GSA) order stated: "[B]ecause of the recent outburst of bombings and other acts of violence, effective at once, at all entrances to federal property under the charge and control of GSA, where there are guards on duty, all packages shall be inspected for bombs or other potentially harmful devices. Admittance should be denied to anyone who refuses to voluntarily submit packages for examination." *Id.*

14. *Davis*, 482 F.2d at 899–900.

screened prior to boarding an airplane.[15] These requirements have remained in place ever since,[16] and security screenings have become a familiar fixture at every federal building and commercial airport in the country.

The suspicionless searches were challenged almost immediately, and were universally upheld by the courts, which went out of their way to emphasize the grave risk posed by the threat of terrorism. The Sixth Circuit conceded that "[o]rdinarily . . . a person should not have his person or property subjected to a search in the absence of a warrant or probable cause to believe that a crime is being committed,"[17] but also argued that, given the recent wave of violence, "the dangers to federal property and personnel were imminent."[18] The court concluded that "in times of emergency[,] government may take reasonable steps to assure that its property and personnel are protected against damage, injury or destruction."[19] The Ninth Circuit similarly upheld suspicionless searches at a San Francisco courthouse.[20] In reaching its conclusion, the court relied on the fact that there were "specific instances of bomb threats and bomb attacks directed at San Francisco police stations, Oakland police stations, and the Los Angeles federal building."[21] Moreover, the court noted that terrorists had recently kidnapped four individuals and killed a judge in a nearby county.[22] Given this background of violence, the court determined that "a serious threat of violence existed at the Hall of Justice," and therefore courthouse searches were a reasonable

15. *See Davis*, 482 F.2d at 900–02 (noting a February 1 rule requiring air carriers to implement a screening system, an August 1 directive requiring airlines to search the baggage and screen or search the person of passengers meeting a particular profile, and a December 1 order requiring searches of all carry-on items and screening of all passengers).

16. In 2002, federal law enforcement agents replaced private airline employees as screeners. *Federal Screeners Just One Component of Air Safety Net*, USA TODAY, Nov. 19, 2002, at 20A.

17. *Downing*, 454 F.2d at 1232–33.

18. *Id.* at 1232.

19. *Id.* at 1233. The court also held that the searches were not very intrusive, stating that inspection of bags and packages was a "very minimal type of interference with personal freedom," which was reasonable given the government's need to protect itself against the "ruthless forces bent upon its destruction." *Id.*

20. *See* McMorris v. Alioto, 567 F.2d 897, 901 (9th Cir. 1978).

21. *Id.* at 900.

22. *Id.*

precaution to prevent further violence against the courthouse and its personnel.[23]

Judges reacted similarly to suspicionless searches in airports.[24] In approving the new security measures, these courts emphasized the extraordinary harm that was caused by terrorist attacks. The Ninth

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23. *Id.* Legal commentators at the time expressed some concern that the government was overreacting, even given this background of violence. *See, e.g.*, Kenneth L. Jesmore, *The Courthouse Search*, 21 UCLA L. REV. 797, 825 (1974) ("[Courthouse searches] are seldom founded upon an adequate correlation between the scope of the search procedures and the necessity for their implementation. . . . An ongoing emergency—a current, serious threat of violence—may provide the justification necessary . . . . [but t]he threat, of course, can be neither stale nor insignificant, and the intrusion must be limited according to the severity of the emergency.").

The Supreme Court did not rule on any case regarding courthouse bombings or hijackings. However, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Court acknowledged the heightened danger of terrorism in a case in which the government wiretapped a suspected terrorist. The Court noted that "threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them. The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances." *Id.* at 311–12 (footnote omitted). However, the Court ultimately ruled against the prosecutor, concluding that "the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance." *Id.* at 321.

24. *See, e.g.*, United States v. Edwards, 498 F.2d 496, 499–501 (2d Cir. 1974) (holding that the warrantless preboarding search of an airline passenger's beach bag was reasonable when the passenger was given sufficient notice that she was free to avoid the search by leaving the line); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) ("[T]he use of a magnetometer is a reasonable search despite the small number of weapons detected in the course of a large number of searches. The absolutely minimal invasion in all respects of a passenger's privacy weighed against the great threat to hundreds of persons if a hijacker is able to proceed to the plane undetected is determinative of the reasonableness of the search."); United States v. Cyzewski, 484 F.2d 509, 512 (5th Cir. 1973) ("[C]ourts have consistently held airport security measures constitutionally justified as a limited and relatively insignificant intrusion of privacy balanced against the need to protect aircraft and its passengers."); United States v. Davis, 482 F.2d 893, 910–11 (9th Cir. 1973) (holding that preboarding screening of passengers and carry-on items for weapons or explosives is reasonable so long as the passenger can choose to avoid the search by not boarding the aircraft), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc); United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973) ("[R]easonableness does not require that officers search only those passengers who meet a profile or . . . who otherwise appear suspicious."); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972) (concluding that, because of the potential serious dangers of aircraft hijackings, the use of a magnetometer to screen airline passengers is justified by a reasonable governmental interest); United States v. Bell, 464 F.2d 667, 673 (2d Cir. 1972) ("In view of the magnitude of the crime sought to be prevented[and] the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is . . . a reasonable precaution."); United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972) (asserting that magnetometer searches are justified by the minimal invasion of personal privacy and overwhelming governmental interest in preventing air piracy).

Circuit noted that "[t]he need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. The disruption of air traffic is severe. There is serious risk of complications in our foreign relations."[25] Suspicionless searches were seen as the only way to prevent these terrorist acts because "[l]ittle can be done to balk the malefactor after such material is successfully smuggled aboard, and as yet there is no foolproof method of confining the search to the few who are potential hijackers."[26] In upholding suspicionless airport searches, the Fifth Circuit implied that they would be temporary: "Certainly all citizens look forward to the day when skyjackings and their sequels, airport search and security measures, cease. When the threat of air piracy disappears the standards of reasonableness which we here recognize will go with it."[27]

The language of these opinions demonstrates that these suspicionless searches were seen as an extraordinary solution to an extraordinary problem. As one judge noted in 1976: "In the wake of unprecedented airport bombings, aircraft piracy and courtroom violence, the courts have approved precautionary security measures which cannot be reconciled with previously conceived notions of the citizen's protection under the Fourth Amendment against warrantless intrusions without probable cause."[28]

Although courts generally agreed that these searches were necessary, they initially struggled to find a doctrinal justification for their holdings. Some courts simply applied the "unreasonable searches" language of the Fourth Amendment and concluded that the searches were reasonable given the nature of the threat and the relatively low level of intrusion.[29] Others analogized suspicionless searches in airports to searches at the border, and applied a three-part balancing test, including the nature of the threat, the level of the intrusion, and the efficacy of the search in actually preventing the

25. *Davis*, 482 F.2d at 910 (footnote omitted). The Ninth Circuit also held that these searches have an element of implied consent: "[A]irport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft." *Id.* at 910–11. The consent justification for these searches has recently been questioned by some courts. *See infra* notes 316–20 and accompanying text.

26. *Davis*, 482 F.2d at 910.

27. *Skipwith*, 482 F.2d at 1279.

28. Collier v. Miller, 414 F. Supp. 1357, 1362 (S.D. Tex. 1976).

29. *See, e.g.*, Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972).

harm.[30] Still others held that the individual being searched had given a sort of implied consent because he or she could always avoid the search by simply choosing not to board the plane or enter the government building.[31] But most courts placed these searches into a recently developed category of suspicionless searches known as administrative searches—and this category is where they have remained for the subsequent four decades.

B. The Birth of the Administrative Search Doctrine and the End of Individualized Suspicion

The Fourth Amendment prohibits "unreasonable searches and seizures," and states that "no Warrants shall issue, but upon probable cause."[32] This pair of restrictions has led to differing interpretations as to how the Amendment should be applied in practice,[33] which in turn has led to a thoroughly confusing body of jurisprudence. Courts have generally held that a search is unconstitutional unless it is supported by a warrant or probable cause,[34] but they have also used the "reasonableness" language to support exceptions to this general rule. For example, courts allow brief pat-down searches for weapons on a showing of less than probable cause to protect an officer's safety.[35]

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30. *See, e.g.*, *Skipwith*, 482 F.2d at 1275.

31. *See, e.g.*, Singleton v. Comm'r, 606 F.2d 50, 52 (3d Cir. 1979) ("By electing to proceed and board the aircraft, with advance notice of the search requirement, [the passenger] impliedly consented to the search."); *Davis*, 482 F.2d at 910–11. The implied-consent justification was recently rejected by the Ninth Circuit. *See* United States v. Aukai, 497 F.3d 955, 960–61 (9th Cir. 2007) (en banc). For a critique of the implied-consent justification, see *infra* Part V.C.

32. U.S. CONST. amend. IV.

33. *See* Bascuas, *supra* note 2, at 723–25 (explaining that the "warrant preference" interpretation, with certain exceptions, requires that searches and seizures be made under a warrant and with probable cause, whereas the "general reasonableness" interpretation requires only that searches and seizures be reasonable in the context of the particular case). Most scholars today focus on the "unreasonable" language, arguing for a broad balancing test in determining whether or not a given search is constitutional. *See, e.g.*, Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1118, 1120–25 (1998) (discussing different factors that may help to determine whether or not a search is reasonable, including: the scope and intrusiveness of the search, the weight of the governmental interest at issue, and the identity of the subject being searched).

34. *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) ("Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause.").

35. *See* Terry v. Ohio, 392 U.S. 1, 23–24, 28–31 (1968) (holding that a police officer's limited search of three men for weapons was reasonable because the men's unusual conduct gave the officer reasonable ground to believe, in light of his experience, that the search was necessary to prevent harm to himself and others).

And if there is probable cause to make an arrest, the Supreme Court has held that a search of the suspect is reasonable to protect officer safety and preserve evidence for later use at trial.[36]

In each of these cases, however, courts require some form of individualized suspicion (albeit short of probable cause) before the search can take place.[37] In fact, prior to 1967, the only context in which the Supreme Court allowed nonconsensual suspicionless searches[38] was at the international border, pursuant to longstanding and relatively noncontroversial case law.[39] But all that changed in the case of *Camara v. Municipal Court.*[40]

In *Camara*, the Court held that a health inspector was not required to demonstrate probable cause—nor indeed *any* form of individualized suspicion—to obtain a warrant to investigate a home.[41] According to the Court, there was no need to require individualized suspicion because the searches were not "aimed at the discovery of evidence of crime."[42] The Court also stated that a probable cause requirement would be impracticable because the hidden nature of

36. *See* United States v. Robinson, 414 U.S. 218, 234 (1973); Weeks v. United States, 232 U.S. 383, 395–96 (1914) (affirming the principle that evidence found incidental to the execution of a legal search warrant is admissible at trial when material and properly offered in evidence because this evidence was not the product of an unreasonable search and seizure).

37. For searches incident to arrest, no further amount of individualized suspicion is required after the arrest is made—but of course the arrest itself is not legal unless the police have some amount of individualized suspicion against the suspect, and if they do not, the subsequent search incident to the arrest is invalid. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969).

38. Of course, the most common form of search used by law enforcement is the consent search, which does not require any amount of individualized suspicion—but does require the suspect to agree to be searched. *See* United States v. Miller, 20 F.3d 926, 930 (8th Cir. 1994) ("[P]olice officers may search an area, even without probable cause or a warrant, if someone with adequate authority has consented to the search . . . ."); United States v. Morris, 910 F. Supp. 1428, 1446 (N.D. Iowa 1995) (explaining that for a consensual search to be valid, the consent must be voluntary, must not have been "tainted by any other Fourth Amendment violation," and must not exceed the "reasonable scope" of the consent).

39. *See* Carroll v. United States, 267 U.S. 132, 154 (1925) ("Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."); *see also infra* notes 135–38 and accompanying text.

40. Camara v. Mun. Court, 387 U.S. 523 (1967).

41. *Id.* at 528 (overruling *Frank v. Maryland*, 359 U.S. 360 (1959), which held that a health inspector could enter a home even without first obtaining a warrant).

42. *Id.* at 537.

dangerous conditions in homes would prevent an inspector from being able to demonstrate probable cause.[43]

Over the next fifteen years, the Court applied the administrative search doctrine in numerous regulatory contexts, approving warrants issued in the absence of individualized suspicion for Occupational Safety and Health Administration workplace inspections,[44] and permitting warrantless inspections of certain industries that were closely regulated, such as liquor stores,[45] sellers of firearms,[46] and mines.[47] In these cases, the Court added another rationale for abandoning the individualized suspicion requirement: the individuals and businesses engaged in these industries were fully aware of the pervasive regulation in their field and therefore had a reduced expectation of privacy.[48]

Courts also applied the administrative search doctrine to a category of cases known as inventory searches. Police officers frequently take custody of personal property, either pursuant to criminal activity (for example, when they arrest an intoxicated driver and impound the car),[49] or pursuant to other duties (for example, when they tow a car in violation of parking regulations, or find an abandoned bag in a public place).[50] When police officers take custody of such property, they routinely conduct an "inventory search." As the Supreme Court noted in 1976, the goals of such searches are not the discovery or investigation of a crime, but rather to (1) protect the owner's property, (2) avoid false claims of lost or stolen property by the owner, and (3) protect the police from potential danger.[51] Thus, the Court concluded that inventory searches were part of the

43. *Id.* The Court also noted that these types of suspicionless inspections had been traditionally accepted by the courts and by the general public. *Id.*

44. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978).

45. Collonade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

46. United States v. Biswell, 406 U.S. 311, 317 (1972).

47. Donovan v. Dewey, 452 U.S. 594, 606 (1981).

48. *See, e.g.*, *Biswell*, 406 U.S. at 315–16.

49. *See, e.g.*, People v. Trusty, 516 P.2d 423, 424 (Colo. 1973).

50. *See, e.g.*, People v. Sullivan, 272 N.E.2d 464, 466 (N.Y. 1971).

51. South Dakota v. Opperman, 428 U.S. 364, 378 (1976). *Opperman* merely confirmed the overwhelming conclusion of the lower courts; prior to the case, almost every state and circuit court that considered the question had held that inventory searches were permissible. Some lower courts had held that an inventory search was not technically a search under the Fourth Amendment, whereas some had concluded—as the Supreme Court ultimately did—that inventory searches were reasonable under the Fourth Amendment. *See id.* at 369–71 (listing over twenty-five state and circuit court opinions).

"routine, administrative caretaking" functions of the police,[52] rather than part of its law enforcement functions, and approved inventory searches even in the absence of individualized suspicion.[53]

In one sense, it is not surprising that some appellate courts turned to the administrative search doctrine when seeking to justify suspicionless antiterrorism searches in the early 1970s because at the time there was no other doctrine that specifically permitted suspicionless searches.[54] And given the very real and immediate danger posed by the terrorists who were hijacking airplanes and blowing up public buildings in the late 1960s, the government had a reasonable argument that these searches served a purpose other than crime control: to wit, they were designed to secure the safety of airline passengers and government personnel.[55] As the Ninth Circuit explained, the searches were "part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime."[56]

This rationale was not surprising—and perhaps even justifiable, given the quasi emergency the country faced at the time. But even during this early stage, the use of the administrative search doctrine to justify antiterrorism searches was legally suspect. When juxtaposed against inspections for building code safety violations and routine cataloging of the contents of impounded vehicles, widespread suspicionless searches at airports and at courthouses stand out rather dramatically. In the first place, they are much broader in scope, affecting a much larger portion of the population—today, it is fair to say that the vast majority of the country has been subjected to a

52. *Id.* at 370 n.5.

53. *Id.* at 375–76; *accord* Colorado v. Bertine, 479 U.S. 367, 376 (1987).

54. As noted above, some courts did not apply any doctrine at all; they merely conducted a reasonableness balancing test. Some courts analogized these searches to border searches, whereas other courts applied the doctrine of implied consent. *See supra* notes 29–31 and accompanying text.

55. *See, e.g.*, United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) ("In this and other relevant respects, the airport search program is indistinguishable, for Fourth Amendment purposes, from the warrantless screening inspection of air passengers and their luggage for plant pests and disease . . . ."), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc). Although the Supreme Court has never directly reviewed the constitutionality of suspicionless searches at public buildings or in airports, it has cited the circuit court cases with approval in dicta, implying that upholding these suspicionless searches is a proper application of the administrative search doctrine. *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

56. *Davis*, 482 F.2d at 910.

search at an airport or a courthouse (or both). And in the second place, the public safety purpose, although no doubt legitimate, does not seem far removed from general crime control—in fact, if one looks at the searches from a slightly different perspective, the purpose seems to be indistinguishable from crime control.

As it turns out, the problem of distinguishing between public safety and crime control became more severe over the next thirty years, as two changes occurred. First, the administrative search doctrine itself evolved to allow different types of searches, many of which are de facto crime-control searches masquerading as administrative searches. Second, as terrorism once again became a real threat to the country, law enforcement officers sought to expand the use of suspicionless antiterrorism searches to other contexts, and the courts—unlike their predecessors in the early 1970s—began to push back.

II. THE SECOND ERA: 1977–2000

Although the danger from terrorism receded from 1977 to 2000, suspicionless antiterrorism searches continued—if anything, they became more entrenched in the law and in the public consciousness. At the same time, law enforcement began to use—and courts approved of—suspicionless searches in a number of other contexts: in schools, in the workplace, on probationers and parolees, and on the public roads.

A. Order Is Restored

Over the following two-and-a-half decades, the threat of terrorism—perceived and actual—receded from the nation's concerns. The major outbreaks of violence conducted by such groups as the Weathermen, the Black Panthers, and Cuban exile groups faded into history,[57] whereas hijackings were virtually eliminated by the end of the 1970s. But the suspicionless searches at airports and most public buildings remained in place, finding a new practical (if not doctrinal) justification in the minds of the populace and in the courts. Given the relative period of calm, courts could no longer

57. There were some exceptions. The Fuerzas Armadas de Liberación Nacional (FALN), a Puerto Rican Marxist terrorist group, carried out a number of bombings between 1974 and 1985. None of these incidents, however, provoked a national shift in law enforcement tactics. *See* Oscar Avila, *Ex-Puerto Rican Radicals Work to Keep Cause Alive*, L.A. TIMES, Sept. 16, 2009, at A17.

defend these suspicionless searches as extraordinary responses to an "emergency" situation in which public buildings and airplanes faced "imminent" danger from the "ruthless forces" bent on harming the United States. Instead, the Supreme Court offered precisely the opposite argument when it gave suspicionless airport searches its stamp of approval (albeit in dicta) in 1989:

> In the 15 years the [suspicionless search] program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage have been inspected. By far the overwhelming majority of those persons who have been searched . . . have proved entirely innocent—only 42,000 firearms have been detected during the same period. When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.[58]

There is little dispute that the hijacking epidemic ended in large part *because* of the new security procedures at airports; thus, the Court's emphasis on the efficacy of such a program is entirely sensible. No judge, commentator, or (probably) passenger would have considered eliminating the searches even in the year 2000, after a decade without any domestic passenger airplane hijackings.[59] The thought of eliminating them in the wake of the terrorist attacks in 2001 is practically unthinkable. Nevertheless, both the Fifth Circuit's sentiment that Americans all "look forward to the day when skyjackings and their sequels, airport search and security measures, cease"[60] and the promise that the relaxed standards that allow suspicionless airport searches will disappear "when the threat of air piracy disappears"[61] now seem naïve at best. It is now clear that the "threat of air piracy" will never disappear, and thus, the security measures will never disappear either. But if suspicionless searches at airports are now a permanent fixture in American society, it is even more imperative that courts find a principled justification for these

58. *Von Raab*, 489 U.S. at 675 n.3 (citations omitted).

59. *See* OFFICE OF CIVIL AVIATION SEC., *supra* note 11, at 75. There was an attempted hijacking of a nonpassenger airplane in 1994, when a Federal Express employee attempted to hijack one of the company's planes. *See* JEFFREY PRICE, PRACTICAL AVIATION SECURITY: PREDICTING AND PREVENTING FUTURE THREATS 67 (2009).

60. United States v. Skipwith, 482 F.2d 1272, 1279 (5th Cir. 1973).

61. *Id.*

searches—and as we will see,[62] the need to justify these searches has been one of the factors that has turned the permissible suspicionless search doctrine into a confusing tangle of inconsistent jurisprudence.

The policy of suspicionless searches at public buildings has also long outlasted the violent epidemic of bombings and shootings that created it. Like searches at airports, these security procedures have become a familiar and unquestioned part of daily life; one simply accepts that there is no way to enter many public buildings—to meet with a public official, or to attend a session of open court—without submitting to a search by a law enforcement official.[63] But searches at public buildings are different from those at airports in three fundamental ways. First, although almost everyone traces the decrease in hijackings to the suspicionless search policy that was implemented to prevent them, the decrease in bombings and shootings inside public buildings can probably be traced to a number of different factors.[64] Second, courts continue to point out that suspicionless searches in airports are the only effective way to prevent hijacking,[65] whereas there may be other ways of keeping public buildings and courtrooms safe.[66] Finally, as the events of September 11, 2001 have shown, an airplane's unique combination of vulnerability and destructive power means that a hijacking could potentially lead to catastrophic harm in terms of loss of life and property. In short, although the two types of suspicionless searches came into existence at the same time and were justified under similar theories, there is, at least from a policy perspective, a much stronger

62. *See infra* Part III.

63. The unquestioned acceptance of these searches by the general population is perhaps the most troubling aspect of permissible suspicionless searches. Not only does it mean that there is no political will to change—or even critically examine—the policy of suspicionless searches at airports and courthouses, but it could also ultimately mean that *legally* these procedures are no longer even considered to be searches at all. Under the test put forward in *Katz v. United States*, 389 U.S. 347 (1967), a government surveillance or detection procedure is not a search unless it violates the suspect's "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). If suspicionless searches at airports and courthouses are generally accepted by society, it could be argued that they no longer violate a "reasonable expectation of privacy" because it would be unreasonable to believe one had the right to board an airplane without being subjected to a search. *See* Ric Simmons, *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1331–35 (2002).

64. Most importantly, the decades since the Vietnam War have not seen anything like the level of social unrest that was produced by the racial tensions and antiwar protests of that era. *See supra* note 9 and accompanying text.

65. United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005).

66. *See infra* note 355 and accompanying text.

reason for continuing one kind of search than there is for the other. Thus, a doctrine that permits suspicionless searches at airports need not also cover suspicionless searches at public buildings.

B. Broadening the Scope of Permissible Suspicionless Searches

During this second era, the permissible suspicionless search doctrine underwent an important evolution outside the context of antiterrorism searches. Courts expanded the doctrine into a number of different areas, including drug testing in schools,[67] drug testing of public employees,[68] searches of probationers,[69] and drunk-driving checkpoints.[70] But the most dramatic expansion in the law of permissible suspicionless searches was a change in what it meant for a search to have a noncriminal purpose—and this change occurred subtly, perhaps accidentally, without any express acknowledgement from the courts. As Part III demonstrates, this change had dramatic implications for later courts who applied the permissible suspicionless search doctrine in the terrorism context.

One example of this change in the suspicionless search doctrine came in the administrative search context. In the 1987 case of *New York v. Burger*,[71] the Supreme Court upheld the suspicionless search of an automobile junkyard.[72] Under then-existing New York law, every automobile junkyard had to keep records of all the auto parts that came onto the premises, and submit both the records and the junkyard itself to inspections whenever requested by an appropriate state official.[73] Pursuant to this law, police officers from the Auto Crimes Division of the New York Police Department searched Burger's junkyard, copied down the vehicle identification numbers of some auto parts there, and later determined that the parts had come from stolen vehicles.[74] Burger was subsequently charged and convicted for possession of stolen property, and he appealed the

67. *See infra* Part II.B.1.

68. *See infra* Part II.B.2.

69. *See infra* Part II.B.3.

70. *See infra* Part II.B.4.

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

72. *Id.* at 718.

73. *See* N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986). The law allowed inspection by an agent of the Department of Motor Vehicles or by a police officer. *Id.*

74. *Burger*, 482 U.S. at 694–95.

conviction, claiming that the lack of individualized suspicion rendered the search unconstitutional.

The Supreme Court applied the administrative search doctrine and ruled that the search was not "aimed at the discovery of a crime"—even though it was conducted by police officers and resulted in a criminal prosecution.[75] The Court explained that "an administrative scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower;" and that this particular administrative scheme "serves the *regulatory* goals of seeking to ensure that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified."[76]

During this same period, the Supreme Court began to approve of suspicionless searches in other contexts, and in each context the Court moved toward a weakening of the "noncriminal purpose" requirement. Specifically, the Court approved of four new categories of suspicionless searches: drug tests in public schools, drug tests of public employees, searches of probationers and parolees, and vehicular checkpoints. In broadening the scope of suspicionless searches, the Court refined its terminology, moving from "administrative search" to the broader term of "special needs search."

1. *The Birth of Special Needs: Searches and Drug Tests in Schools*. The term special needs was first coined in *New Jersey v. T.L.O.*,[77] in which a high school assistant principal searched the purse of a student whom he suspected of smoking in school.[78] Although the principal had neither a warrant nor probable cause, the Court upheld the search for two reasons: first, the search was conducted for the purpose of "maintaining discipline in the classroom and on school grounds,"[79] not law enforcement purposes; and second, high school students have a "lesser expectation of privacy" than the general

75. In applying the administrative search doctrine, the Supreme Court found that the defendant had a reduced expectation of privacy because he was in a closely regulated industry, *id.* at 703–07, and because suspicionless searches were necessary to further a substantial interest of the state, *id.* at 708–10. The Court also noted that the statute provided notice, which was a valid substitute for a warrant, and that it placed legitimate time, place, and scope restrictions on the searches. *Id.* at 711–12.

76. *Id.* at 713–14 (emphasis added).

77. New Jersey v. T.L.O., 469 U.S. 325 (1985).

78. *Id.* at 336.

79. *Id.* at 339.

population.[80] In his concurrence, Justice Blackmun set out a test that would be used in future cases: a lower standard for searches was permitted "only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[81]

In contrast with the administrative search cases, the special needs test does not involve any explicit finding that the government possessed no other viable means of meeting its objective. Blackmun's test, however, incorporates (and dilutes) this standard by stating that the traditional requirements of the Fourth Amendment can only be loosened if the special needs make adherence to those requirements "impracticable."[82] In the context of a search conducted by school officials, the majority in *T.L.O.* stated that "[t]he warrant requirement . . . is unsuited to the school environment" because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[83]

This first special needs case was not a suspicionless search because the assistant principal had some reason to believe the defendant was carrying contraband in her purse. Thus, the special needs doctrine initially only meant that a court would relax the strict warrant and probable cause requirements if there were special needs beyond the normal needs of law enforcement.[84] In *T.L.O.*, for example, the Court held that the school officials must have "reasonable grounds" to believe the student had broken a law or a school rule.[85]

But this requirement of individualized suspicion for searches of public school students was abandoned ten years later in *Vernonia v. Acton*,[86] in which the Court upheld mandatory, suspicionless drug

80. *Id.* at 348 (Powell, J., concurring).

81. *Id.* at 351 (Blackmun, J., concurring).

82. *See id.* at 340 (majority opinion) ("The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.").

83. *Id.*

84. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

85. *T.L.O.*, 469 U.S. at 341–42.

86. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

testing of school athletes.[87] As in *T.L.O.*, the Court in *Acton* emphasized that schoolchildren had a "lesser expectation of privacy."[88] And the Court found other factors—not present in *T.L.O.*—which would logically lead to a further loosening of the Fourth Amendment standards: athletes in particular have a lower expectation of privacy than other students;[89] a urinalysis is in some ways more limited and less intrusive than the search of a purse;[90] the results of the tests were revealed only to school administrators and parents, not to law enforcement;[91] and alternate methods of deterring drug use were likely to be less effective.[92] Unfortunately, the Court did not explain which of these factors justified the critical doctrinal shift from *T.L.O.*'s requirement of "reasonable grounds" to *Acton*'s abandonment of individualized suspicion.[93]

At first glance, abandoning the requirement of individualized suspicion was the most significant part of the *Acton* opinion. But as this Article demonstrates, suspicionless searches had already been allowed in the context of administrative searches, so this was not an unprecedented step.[94] In truth, the most significant aspect of *Acton* was the specific special need that the Court used to justify deviation from the strict Fourth Amendment requirements in the first place. Unlike the special need in *T.L.O.* (maintaining discipline in the classroom and on school grounds), *Acton*'s special need was barely distinguishable from a standard law enforcement purpose: "[d]eterring drug use by our Nation's schoolchildren."[95]

In the *Acton* case, however, the Court could still legitimately claim that the test was not designed to serve the ordinary needs of law enforcement because the results of the test were not turned over to law enforcement personnel.[96] Since *Acton*, this expansive definition of

87. *Id.* at 663–64.

88. *Id.* at 655–57.

89. *See id.* at 657.

90. *See id.* at 658.

91. *Id.* at 651, 658.

92. *See id.* at 663–64.

93. One can conclude by inference that the "reduced expectation of privacy" of athletes was not one of the dispositive factors, because seven years later the Court approved suspicionless drug testing of all students involved in extracurricular activities. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 825 (2002).

94. Suspicionless searches had also already been permitted in the context of automotive checkpoints. *See infra* notes 139–46 and accompanying text.

95. *Acton*, 515 U.S. at 661.

96. *Id.* at 658.

special needs has broadened to other cases in which the results of the search *are* turned over to law enforcement,[97] thus effectively removing the original justification for departing from the Fourth Amendment's traditional requirement of individualized suspicion.

2. *Searches and Drug Tests of Public Employees*. Only one year after *T.L.O.* was decided, a plurality of the Court applied the special needs test in *O'Connor v. Ortega*,[98] in effect upholding a search of a public hospital employee's desk.[99] As in *T.L.O.*, the reason underlying the intrusion was not the normal need of law enforcement, but rather "the government's need for supervision, control, and the efficient operation of the workplace;"[100] thus, the search was not impermissible even though there was no warrant and no probable cause.

Ortega's analysis was similar to *T.L.O.*'s in many ways. The Court stated that a warrant or probable cause requirement would be impracticable in the context of the public workplace because the supervisors who conduct these searches—like school administrators—"are hardly in the business of investigating the violation of criminal laws," and therefore could not be expected to understand or comply with "unwieldy warrant procedures"[101] or "the subtleties of the probable cause standard."[102] Also, just like the schoolchildren in *T.L.O.* and the heavily regulated businesses in *Camara*, the Court noted that office workers have a diminished expectation of privacy in

97. *See infra* notes 147–50 and accompanying text.

98. O'Connor v. Ortega, 480 U.S. 709 (1987).

99. *Cf. id.* at 722 ("In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.").

100. *Id.* at 720; *see also id.* at 723 ("Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons." (citations omitted)).

101. *Id.* at 722.

102. *Id.* at 724–25.

their workplace.[103] And unsurprisingly, the Court ordered the district court to apply the same standard to evaluate the search: whether the government had "reasonable grounds" to suspect that the search would turn up evidence of wrongdoing.[104]

And like *T.L.O.*, *Ortega* laid the groundwork for future cases in which the Court abandoned the individualized suspicion requirement for public employees. In a pair of cases in 1989, the Court upheld suspicionless mandatory drug tests for railroad employees who had been involved in accidents[105] and customs agents who used firearms or engaged in drug interdiction.[106] In *Skinner v. Railway Labor Executives' Ass'n*,[107] the Court determined that the purpose of drug tests for railroad employees was "ensuring the safety of the traveling public and of the employees themselves,"[108] noting that the tests were administered "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."[109] In *National Treasury Employees Union v. Von Raab*,[110] the Court held that the purpose of drug tests for United States Customs agents was "to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions."[111] Specifically, the Court noted that the Customs Service sought to prevent employees with guns from injuring themselves or others, and to ensure that those protecting the nation's borders maintained good judgment and were not vulnerable to blackmail.[112]

In both *Skinner* and *Von Raab*, the Court cited the familiar justifications for allowing suspicionless searches: a limited intrusion

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103. *Id.* at 717 ("An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office.").

104. *Id.* at 726.

105. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 606 (1989).

106. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 660–61 (1989).

107. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

108. *Id.* at 621.

109. *Id.* at 620–21 (internal quotation marks omitted).

110. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

111. *Id.* at 666.

112. *See id.* at 670–71.

on privacy,[113] reduced expectation of privacy on the part of the subjects,[114] and the fact that imposing a warrant requirement would be impractical and would frustrate the government purpose.[115] But most significantly, *Skinner* and *Von Raab* paralleled the evolution of special needs that would later be seen in *Acton*: in both *Skinner* and *Von Raab*, the purpose of the drug test was essentially to deter illegal activity (drug use), with the dubious argument that deterring illegal activity went beyond the standard goals of law enforcement because of the highly dangerous or sensitive positions that the employees occupied.[116] As with *Acton*, the Court in *Skinner* and *Von Raab* could credibly claim that the test was not meant to serve the ordinary goals of law enforcement because the results of the drug tests were not turned over to the police[117]—but as in *Acton*, the Court did not expressly state that this restraint on the part of the state was a necessary element in determining that the search was conducted for a special need.

3. *Searches of Probationers and Parolees*. In the same year that *Ortega* was decided, the Court in *Griffin v. Wisconsin*[118] found a special need justifying the search of a probationer's home.[119] Again, the search was conducted without a warrant or probable cause, and again, the Court upheld the search for two reasons: first, because of the lower level of Fourth Amendment protection due to

113. *See Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 672 n.2.

114. *See Skinner*, 489 U.S. at 627 (finding a diminished expectation of privacy due to the heavy regulation of the industry); *Von Raab*, 489 U.S. at 672 (ruling that customs agents should expect inquiries into their fitness to perform their job).

115. *See Skinner*, 489 U.S. at 623–24, 628 (noting that drug users sometimes show no outward signs giving rise to probable cause; further noting that private railway employers are not experts in the warrant requirements or the subtleties of the law on probable cause); *Von Raab*, 489 U.S. at 666–67 (holding that a warrant requirement would "divert valuable agency resources from the Service's primary mission").

116. The greater danger posed regarding drug use by schoolchildren, railway operators, and customs agents is an important factor: a few years later, the Court found there was no special need to justify a Georgia law that required drug testing of all candidates for elected office because the officials did not "perform high risk, safety-sensitive tasks." Chandler v. Miller, 520 U.S. 305, 321–22 (1997).

117. *See Skinner*, 489 U.S. at 621 n.5 (noting that although the results of the test *could* be turned over to law enforcement, there was no evidence that the public employer had ever done so, nor that it ever intended to do so); *Von Raab*, 489 U.S. at 666 ("Test results may not be used in a criminal prosecution of the employee without the employee's consent.").

118. Griffin v. Wisconsin, 483 U.S. 868 (1987).

119. *Id.* at 872–74.

probationers;[120] and second, because the goal of the search was not law enforcement, but instead ensuring "that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."[121]

And what of the third factor cited in previous special needs cases—that requiring individualized suspicion was infeasible? In past special needs cases such as *T.L.O.* and *Ortega*, the Court relied on this factor, noting that it was impracticable for teachers, school administrators, or public agency supervisors to learn and understand the complexities of the warrant requirement and probable cause.[122] But in *Griffin*, this factor was whittled down more or less into oblivion because there is no real argument that probation officers cannot understand and apply the warrant or probable cause standards. The best the Court could do was to explain that the government interest might be "unduly disrupted by a requirement of probable cause,"[123] because "so long as [the probationer's] illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected."[124] This statement is equally true in the traditional law enforcement context; thus, it provides no extra ammunition for the argument that a lesser Fourth Amendment standard should apply.[125]

The *Griffin* Court required the government to show "reasonable grounds" before searching a probationer's home, but as with public schoolchildren and public employees, the Court eventually began allowing these searches without any showing of individualized suspicion at all.[126] As this shift occurred, however, searches of

120. *See id.* at 874 (noting that probationers and parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions'" (alterations in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972))).

121. *Id.* at 875.

122. *See* O'Connor v. Ortega, 480 U.S. 709, 720, 722 (1987); New Jersey v. T.L.O., 469 U.S. 325, 352–53 (1985).

123. *Griffin*, 483 U.S. at 878.

124. *Id.*

125. The *Griffin* Court also added another consideration, unique to the probationer context: that the ongoing, supervisory relationship between the probation officer and the probationer would provide extra information to the probation officer in deciding whether to conduct a search. *Id.* at 879.

126. The latest product of this evolution is *Samson v. California*, 547 U.S. 843 (2006), discussed *infra* at note 133.

probationers and parolees slowly left the orbit of the special needs category. A series of circuit court cases in the early 2000s focused on mandatory DNA extraction from prison inmates, parolees, and probationers, and these cases made it clear that the primary consideration in analyzing these searches was the subjects' dramatically reduced expectation of privacy rather than the purpose of the search. Numerous circuits struggled to find a way to characterize the purpose of taking DNA samples as a "special need beyond the normal need for law enforcement,"[127] which turned out to be a logically impossible task because the DNA database being assembled was used for traditional law enforcement purposes. Other circuits abandoned the special needs test altogether and simply applied a "totality of the circumstances" test, allowing the DNA extraction because of the subjects' substantially diminished expectation of privacy.[128]

Finally, in 2001 the Supreme Court itself abandoned the special needs requirement for searches of probationers in *United States v. Knights*.[129] At issue was a probationary condition that allowed the authorities to search the probationer's home at any time.[130] The Court acknowledged that the breadth of the probationary condition meant that a search could be conducted for any purpose, including a law enforcement purpose,[131] and so the special needs doctrine could not justify the condition. The Court cited *Griffin*, however, for the proposition that a probationer's expectation of privacy was very

127. Nicholas v. Goord, 430 F.3d 652, 671 (2d Cir. 2005); *see also id.* at 669 (upholding DNA collection from certain convicted felons because "[a]lthough the DNA samples may eventually help law enforcement identify the perpetrator of a crime," they are not being used for evidence or investigations "at the time of collection"), *overruled in part by Samson*, 547 U.S. 843, *as stated in* United States v. Amerson, 483 F.3d 73, 79 n.5 (2007); Green v. Berge, 354 F.3d 675, 677, 679 (7th Cir. 2004) (upholding DNA collection from prisoners because "the government has a special need in obtaining identity DNA samples").

128. S*ee, e.g.*, United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005) (upholding DNA sample of probationers as a reasonable search under the totality of the circumstances); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005) (same for prisoners); Groceman v. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004) (per curiam) (probationers); United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004) (en banc) (prisoners); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (same).

129. United States v. Knights, 534 U.S. 112 (2001).

130. *Id.* at 114.

131. *Id.* at 116.

low,[132] and thus the search was reasonable, given the strong government interest in monitoring its probationers.[133]

4. *Vehicular Checkpoints*. Suspicionless stops at vehicular checkpoints have a long history. Even before the special needs doctrine was articulated in *T.L.O.*, the Court had extended the administrative search doctrine of *Camara*[134] into the automotive checkpoint context.

The first automotive checkpoint cases involved immigration stops. As noted above, the legal authority to conduct these stops at the border has been well established for nearly one hundred years.[135] Similarly, international mail is subject to suspicionless searches by customs officials,[136] and even files on laptop computers can be opened and read during customs searches without individualized suspicion.[137] As a circuit court explained, border searches are conducted "for the purposes of collecting duties and intercepting contraband destined for the interior of the United States."[138]

After *Camara* in 1967, however, the Court began to use the administrative search doctrine to expand the scope of border searches to include seizures that were nowhere near the border. In 1975, the Court stated that the warrant and probable cause requirement did not apply to roving patrols inside the border.[139] One year later, in *United States v. Martinez-Fuerte*,[140] the Court upheld the constitutionality of a suspicionless immigration checkpoint that took place nearly sixty miles inside the border.[141] The Court relied on *Camara* and its progeny for the principle that, although "individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . . the

132. *Id.* at 119.

133. *Id.* at 120–21. In a case five years later, the Court similarly ignored the special needs test in upholding a California law that allowed parolees to be subject to suspicionless searches. Samson v. California, 547 U.S. 843, 846, 855 n.4 (2006).

134. *See supra* notes 40–43 and accompanying text.

135. *See supra* note 39 and accompanying text.

136. *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 622 (1977); United States v. Seljan, 547 F.3d 993, 1008 (9th Cir. 2008) (en banc).

137. United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008).

138. United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995).

139. United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975) (stating in dictum that law enforcement officers in border areas could pull over cars based on less than probable cause, but stating that there must be some individualized reasonable suspicion).

140. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

141. *Id.* at 566–67.

Fourth Amendment imposes no irreducible requirement of such suspicion."[142]

The Court justified the lower Fourth Amendment standard on numerous grounds. One was the low level of intrusion involved in the stop—a brief detention, a few questions, the production of documents, and a visual inspection of the car.[143] Another justification was the diminished expectation of privacy possessed by individuals in automobiles.[144] But these rationales alone were not sufficient to justify suspicionless stops, so in an attempt to tie the automotive checkpoint cases to the administrative search doctrine, the Court also emphasized two other aspects of the case: the necessity of these techniques to prevent the influx of illegal aliens (a flow that "cannot be controlled effectively at the border");[145] and a non–law enforcement purpose, which it described as the public interest in denying illegal aliens "a quick and safe route into the interior."[146]

The Court later upheld vehicular checkpoints for the purposes of detecting and apprehending drunk drivers. In that case, *Michigan Department of State Police v. Sitz*,[147] the Court rejected the special needs test and instead applied a balancing test from other seizure cases.[148] Because the danger posed to public safety by drunk drivers was so great, and the intrusion on Fourth Amendment rights by the stops was so slight, the Court concluded that the checkpoints were reasonable.[149]

As with the suspicionless searches in *Burger*, *Skinner*, *Von Raab*, and *Acton*, there is a fine line between vehicular checkpoints designed for general crime control and those designed to meet a special need or a distinct public interest. By the year 2000, the suspicionless search doctrine had evolved from covering a narrowly defined group of cases involving truly routine and administrative procedures to covering a wide range of searches that revealed

142. *Id.* at 560–61.

143. *Id.* at 558.

144. *Id.* at 561; *see also* United States v. Chadwick, 433 U.S. 1, 12 (1977) (claiming a "diminished expectation of privacy" with regard to vehicles).

145. *Martinez-Fuente*, 428 U.S. at 556.

146. *Id.* at 557.

147. Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

148. *Id.* at 455. The Court relied most prominently on *Brown v. Texas*, 443 U.S. 47 (1979). *See Sitz*, 496 U.S. at 448–50, 453–54.

149. *Sitz*, 496 U.S. at 449–52.

evidence of criminal activity—though the doctrine's approval rested on whether the *purpose* of the search was something other than detecting criminal activity.[150] As a result, by the end of the second era, antiterrorism suspicionless searches at airports and courthouses no longer seemed out of place as an administrative or special needs search—the doctrine had effectively caught up with the reality of antiterrorism searches.

But in this final period, during the second wave of terrorist attacks, the government began overstepping its bounds, and courts began to resist applying the special needs doctrine to suspicionless antiterrorism searches. At the same time, the Supreme Court began to limit the application of the special needs doctrine in other contexts, further complicating the doctrinal justification for antiterrorist searches.

III. THE THIRD ERA: 2001–2010

The fight against terrorism has been one of the defining characteristics of this decade. In response to the devastating attacks of September 11 and subsequent attacks in Europe, the United States government instituted a number of aggressive law enforcement initiatives to prevent future terrorist attacks. Among these initiatives was a sweeping expansion of antiterrorism suspicionless searches, which were instituted near potential terrorist targets such as reservoirs, political protests, sports arenas, and public transportation. At the same time, however, courts finally began to limit and restrict the use of suspicionless searches, both inside and outside the context of terrorism.

A. The War on Terror

The attacks of September 11, 2001 killed nearly 3,000 Americans in a single day.[151] They were followed by similar attacks on civilians throughout Europe, including the 2004 bombing of four commuter trains in Madrid, which killed 191 people and injured nearly 2,000

150. In fact, the antiterrorism searches provided some authority for this shift because a number of cases that expanded the scope of suspicionless searches cited the earlier courts' unanimous approval of airport and courthouse searches as evidence that public safety was a legitimate special need, distinct from general crime control. *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

151. Sean Alfano, *War Casualties Pass 9/11 Death Toll*, CBS NEWS, Sept. 22, 2006, http://www.cbsnews.com/stories/2006/09/22/terror/main2035427.shtml.

more,[152] and the 2005 bombing of three subway trains in London, which killed 52 people and injured over 700.[153]

The threat of terrorist attacks, and the resulting "war on terror," have been two of the defining characteristics of this decade.[154] Unlike the late 1960s, when the country faced hundreds of small-scale acts of violence as a result of widespread social unrest, the war on terror in the 2000s is primarily defined by the devastating attacks on a single day in 2001.[155] But the popular sentiment and the government reaction has otherwise been similar, and just like in the early 1970s, the government has responded to the terrorist threat with aggressive law enforcement techniques, many of which have restricted civil liberties.[156] The most dramatic responses—the USA PATRIOT Act, indefinite detention at Guantánamo Bay, warrantless wiretapping, and enhanced interrogation techniques—have been subject to significant public criticism,[157] and most have subsequently been repudiated by the Supreme Court or reversed by the Obama administration.[158]

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152. Sean Clarke, *Major Terrorist Attacks Since 9/11*, GUARDIAN, Jul. 7, 2005, http://www.guardian.co.uk/world/2005/jul/07/terrorism.uk1.

153. *Attack on London*, GUARDIAN, July 7, 2005, http://www.guardian.co.uk/flash/0,,1538819,00.html.

154. Terrorism did not even register as an election issue in 2000, but in 2002 it was seen as the second-most important challenge for the government to address. *See Economy Now the Most Important Issue for Americans by a Wide Margin*, HARRIS INTERACTIVE, Sept. 24, 2008, http://www.harrisinteractive.com/harris_poll/index.asp?PID=951 (showing that, of people surveyed in 2002, 17 percent offered unprompted replies of "terrorism" as an election issue, making it the second most common unprompted answer).

155. There have been a series of threats and even fatalities since then, such as an individual who attempted to board a passenger airplane with a bomb in his shoe, *see Shoe Bomb Suspect to Remain in Custody*, CNN.COM, Dec. 25, 2001, http://archives.cnn.com/2001/US/12/24/investigation.plane/index.html, and an unidentified person who sent Anthrax through the mail, *see* FBI, Amerithrax Investigation, http://www.fbi.gov/anthrax/amerithraxlinks.htm (last visited Jan. 3, 2010).

156. For an overview and analysis of many of these responses, see Parry, *supra* note 3, at 770–82.

157. *See, e.g.*, Cate Doty, *Gore Criticizes Expanded Terrorism Law*, N.Y. TIMES, Nov. 10, 2003, at A1 (criticizing expanded security measures).

158. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) (ruling that the Bush administration's tribunals trying enemy combatants held at Guantánamo Bay were unconstitutional); Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. TIMES, Jan. 22, 2009, at A1 ("Mr. Obama signed executive orders closing the detention camp at Guantánamo Bay, Cuba, within a year; ending the Central Intelligence Agency's secret prisons; and requiring all interrogations to follow the noncoercive methods of the Army Field Manual.").

One of the less publicized reactions to this second wave of terrorism has been local law enforcement's increasing use of suspicionless searches in new contexts. Local police have conducted suspicionless searches at subway entrances,[159] on ferries,[160] near the Republican and Democratic conventions,[161] near reservoirs,[162] at protest rallies,[163] at hockey arenas,[164] and at football stadiums.[165] Courts have analogized these cases to the suspicionless antiterrorism searches from the past era, applying the administrative search doctrine to determine whether the search was permissible. But unlike the searches in airports and public buildings that comprised the first wave of antiterrorism suspicionless searches, these searches have not been met with unanimous approval by the courts.

1. *Reservoirs*. The opening act in this second stage of antiterrorism searches occurred one month after the September 11 attacks, in the middle of the night on a small country road near the Cobble Mountain Reservoir in Blandville, Massachusetts.[166] The Cobble Mountain Reservoir supplies water to a number of towns and cities in Massachusetts, and in the wake of the September 11 attacks, the state police were concerned that a terrorist might try to contaminate the water supply or destroy the dam itself.[167] Troopers were stationed on the Cobble Mountain Road, which runs along the length of the reservoir, with orders to stop all vehicles that travelled along the road and speak to the drivers.[168]

The officers stopped David Carkhuff and immediately noticed that he was intoxicated, and then arrested him for driving under the influence.[169] Carkhuff challenged the constitutionality of the stop,

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159. *See infra* Part III.A.4.

160. *See infra* Part III.A.4.

161. *See infra* Part III.A.2.

162. Commonwealth v. Carkhuff, 804 N.E.2d 317, 318 (Mass. 2004); *see also infra* Part III.A.1.

163. Bourgeois v. Peters, 387 F.3d 1303, 1306 (11th Cir. 2004); *see also infra* Part III.A.2.

164. State v. Seglen, 700 N.W.2d 702, 705 (N.D. 2005); *see also infra* Part III.A.3.

165. Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1259–60 (M.D. Fla. 2006), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007), *vacated and superseded on reh'g*, 530 F.3d 1320 (11th Cir. 2008) (per curiam); *see also infra* Part III.A.3.

166. Carkhuff, 804 N.E.2d at 318.

167. *Id.* at 318–19.

168. *Id.* The troopers also had orders to conduct a search of every truck that drove down the road. *Id.*

169. *Id*. at 319.

noting that the troopers had no reason to suspect him of having committed any crime at the time he was ordered to stop.[170] The state urged the court to apply the special needs doctrine, arguing that the troopers' policy of suspicionless stops was analogous to the well-established searches at airports and public buildings.[171] As the state noted, "the search and seizure protocols at those facilities," like the seizure protocol near the reservoir, are not designed for a law enforcement purpose, but rather "to assure that persons entering do not have the means to destroy those facilities or to disrupt their operation."[172]

But the Massachusetts Supreme Court disagreed. The court held that the purpose of the search crossed the line from protecting public safety to straightforward law enforcement, and thus the state troopers' actions did not meet the requirements of an administrative search.[173] The court based this conclusion on the lack of notice given to the defendant, noting that in the case of searches at airports and public buildings, the individual receives prior notice that the search will occur.[174] This allows the individual to avoid the search altogether by "electing not to board the aircraft (or enter the court house)."[175] Giving prior notice reinforces the argument that the purpose of the search is to protect the vulnerable facility rather than to detect and apprehend criminals because "the objective of preventing dangerous persons from gaining access is still accomplished" if a terrorist simply avoids the facility altogether.[176]

2. *Political Protests*. One year after Carkhuff was illegally searched near the Cobble Mountain Resevoir, another antiterrorism suspicionless search took place outside a military base in Columbus, Georgia. A protest group was planning its annual demonstration outside of Fort Benning,[177] and the city of Columbus instituted a new

170. *Id.* at 318.

171. *Id.* at 320.

172. *Id.* The state also used analogies to cases upholding searches at the entrances to military bases. *See, e.g.*, United States v. Miles, 480 F.2d 1217, 1219 (9th Cir. 1973) (per curiam).

173. *Carkhuff*, 804 N.E.2d at 320.

174. *Id.* at 322–23.

175. *Id.* at 322.

176. *Id.* at 323.

177. Bourgeois v. Peters, 387 F.3d 1303, 1306 (11th Cir. 2004). Fort Benning was the host of the Western Hemisphere Institute for Security Cooperation, otherwise known as the "School of the Americas," which trains military leaders from other Western Hemisphere countries in

policy requiring every participant in the protest to submit to a search prior to proceeding to the protest site.[178] The city argued in its brief that the September 11 attacks had—or at least should have—fundamentally changed the rules for antiterrorism suspicionless searches, stating that "[l]ocal governments need an opinion that, without question, allows [suspicionless] non-discriminatory, low-level magnetometer searches at large gatherings."[179]

The Eleventh Circuit refused to give the city such an opinion. In *Bourgeois v. Peters*,[180] the court found the city's argument "troubling" because "the threat of terrorism . . . cannot [be] use[d] . . . as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people."[181] If a generalized threat of terrorism were sufficient to justify mass suspicionless searches, law enforcement could institute these searches for any large event, including "a high school graduation, a church picnic, a public concert in the park, an art festival, a Fourth of July parade, sporting events such as a marathon, and fund-raising events such as the annual breast cancer walk."[182]

Like the state of Massachusetts, the city of Columbus invoked the special needs doctrine, arguing that the purpose of searching the protesters was not to detect crime or enforce the criminal law, but instead to "ensure the safety of participants, spectators, and law enforcement."[183] The *Bourgeois* court rejected this argument, ruling that the goals of public safety and law enforcement were "inextricably intertwined" in this context.[184] The difference is no more than semantic, according to the court; under the city's argument, "a search intended to enforce a given law would be permissible so long as the government officially maintained that its purpose was to secure the

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counterinsurgency tactics. *Id.* The protest group, known as the School of the Americas Watch (SAW), had conducted a peaceful protest of approximately 15,000 people every year for the thirteen years prior to the events in this case. *Id.*

178. The search was essentially identical to an airport screening—every protester was required to walk through a metal detector, and if the detector indicated the presence of metal, the police would conduct a more thorough search of the protestor's person and possessions. *Id.* at 1307.

179. *Id.* at 1311 (quoting Brief of Appellees at 13, *Bourgeois*, 387 F.3d 1303 (No. 02-16886), 2003 WL 23960109).

180. Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004).

181. *Id.* at 1311.

182. *Id.* (quoting Reply Brief of Appellants at 4, *Bourgeois*, 387 F.3d 1303 (No. 02-16886), 2003 WL 23960108).

183. *Id.* at 1312 (quoting Brief of Appellees, *supra* note 179, at 11).

184. *Id.* at 1312–13.

objectives that motivated the law's enactment in the first place (e.g., public safety) rather than simply to enforce the law for its own sake."[185]

But the *Bourgeois* court did not explain why this argument should apply to searches at political protests and not to searches at airports and public buildings, which are also searches intended to detect criminal activity that are justified on the grounds that they protect public safety. Indeed, the *Bourgeois* court—somewhat inexplicably—does not mention the airport and public buildings cases at all. Thus, the court does not provide any principled way to distinguish between antiterrorism suspicionless searches at airports and public buildings (which courts have consistently held to be permissible) and antiterrorism suspicionless searches at political protests (which the court held were impermissible).[186]

Two years later, in preparation for the Republican National Convention of 2004, New York City attempted to institute its own suspicionless search policy for political protesters. To enhance security during the convention, the New York City Police Department (N.Y.P.D.) planned to search the bags of every protestor before allowing them to proceed to the demonstration site.[187] In *Stauber v. City of New York*,[188] the protestors challenged this policy and sought a preliminary injunction to prevent the police from conducting these searches.[189] Once again, the defendant invoked the special needs doctrine, citing the cases upholding suspicionless searches at airports.[190] And once again, the court rejected this argument.[191]

But unlike the *Bourgeois* court, the judge in *Stauber* addressed the airport cases directly, and distinguished them from searches at

185. *Id.* at 1313.

186. The *Bourgeois* court did note in the facts that the demonstrations had been peaceful for thirteen years, with no weapons ever found and no arrests for violence, *id.* at 1306, but it did not refer back to these facts during its legal analysis.

187. Stauber v. City of New York, Nos. 03 Civ. 9162, 03 Civ. 9163, 03 Civ. 9164, 2004 U.S. Dist. LEXIS 13350, at *3 (S.D.N.Y. July 19, 2004). The N.Y.P.D. also announced a number of other security measures, such as requiring demonstrators to assemble within "pens" that were made up of metal barricades and restricting access to the sites of the demonstration. *Id.* at *2–3.

188. Stauber v. City of New York, Nos. 03 Civ. 9162, 03 Civ. 9163, 03 Civ. 9164, 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 19, 2004).

189. *Id.* at *1.

190. *Id.* at *84–87.

191. *Id.* at *84–90.

however, the court in *State v. Seglen*[201] did provide one hint as to why searches at hockey arenas should be treated differently than searches at airports and public buildings—and its reasoning was similar to that of the judge in *Stauber*. The court noted that airport and public building searches were held to be constitutional only after "unprecedented airport bombings, aircraft piracy, and courtroom violence;"[202] in contrast, there was "no history of injury or violence presented" in the *Seglen* case.[203] Whether a history of injury and violence at sports arenas would actually have changed the outcome of the case—and if so, what level of history of injury and violence would be required—was left unexplained.

The next court to hear a suspicionless search case at a sporting event was even more explicit in its reasoning. In *Johnston v. Tampa Sports Authority*,[204] a federal district court judge ruled that suspicionless searches of fans entering a professional football stadium were unconstitutional. The court applied a special needs analysis, and (unlike the Eleventh Circuit in *Bourgeois*), did not dispute the fact that ensuring public safety *could* be a special need distinct from law enforcement purposes.[205] But the court then followed the reasoning of the *Stauber* court, explicitly stating that for an antiterrorism suspicionless search to be constitutional, the danger of a terrorist attack must be a "concrete danger"—that is, a "substantial and real" danger, not merely a generalized risk.[206] In the case of Tampa Bay stadium, the *Johnston* court concluded that "there was no testimony or evidence of a particularized threat to NFL games or to the [Tampa] stadium,"[207] merely a "general threat that terrorists might attack any venue where a large number of Americans gather."[208]

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201. State v. Seglen, 700 N.W.2d 702 (N.D. 2005).

202. *Id.* at 707.

203. *Id.* at 708.

204. Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257 (M.D. Fla. 2006), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007), *vacated and superseded on reh'g*, 530 F.3d 1320 (11th Cir. 2008) (per curiam).

205. *Id.* at 1265–66. The judge in *Johnston* was worried about the slippery slope that would be created if no such principled distinction were drawn. Echoing *Bourgeois*, the court noted that allowing special needs to justify any antiterrorism suspicionless search would lead to searches at "virtually all professional sporting events, high school graduations, indoor and outdoor concerts, and parades." *Id.* at 1269.

206. *Id*. at 1266.

207. *Id.*

208. *Id.* at 1268.

4. *Public Transportation*. The final skirmish in the second wave of suspicionless antiterrorism searches involved public transportation. The first case, *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*,[209] arose from searches that took place on the buses and subway trains of Boston in July of 2004. As part of enhanced security during the Democratic National Convention, the Massachusetts Bay Transportation Authority (MBTA) conducted suspicionless searches of all individuals riding buses or trains that passed near the convention site.[210] When some bus riders sought an injunction against the searches, the MBTA responded with the now-familiar argument: these were merely "administrative" searches "similar to the security inspections of personal belongings conducted at airports and the entryways to certain kinds of property, such as courthouses."[211] But this time the argument won the day. Pointing to the then-recent subway bombings in Madrid and Moscow, the trial judge noted that "it is not without foundation to worry that a terrorist event might be aimed simultaneously at the convention and the transit system."[212] The judge was not bothered by the lack of a specific threat against the Democratic Convention, noting that "there is also no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack,"[213] and that airport searches take place in the "absence of specific threat information about a particular flight or even a particular airport."[214] The court also noted that the visual inspection of bags, though intrusive, is "very similar to the intrusions imposed under other, increasingly common, administrative security search regimes."[215]

During the same month, approximately 230 miles to the northwest, the Lake Champlain Transportation Company (LCT) began conducting suspicionless searches of passengers on the ferry

209. Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859 (D. Mass. July 28, 2004).

210. *Id.* at *1. The searches consisted of a "visual search of the hand-carried items of all passengers." *Id.*

211. *Id.*

212. *Id.* at *2.

213. *Id.*

214. *Id.*

215. *Id.* at *4.

between Grand Isle, Vermont and Plattsburgh, New York.[216] In *Cassidy v. Chertoff*,[217] two of the passengers on the ferry claimed the searches violated their Fourth Amendment rights.[218] Once again, the defendants responded by claiming that the searches served a special need beyond those of ordinary law enforcement,[219] and once again, this argument prevailed.[220] Even though there was no record of ferries being targeted in the United States or anywhere else in the world, the Second Circuit held that "the airline cases make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism;"[221] the search is reasonable as long as the government has determined that the ferries "are at a high risk of being involved in a transportation security incident."[222]

One year later, the N.Y.P.D. began a program of suspicionless searches at various subway stations. Unlike the Boston subway searches in *American-Arab*, which targeted every passenger on a certain train or bus line, the New York searches were based on seemingly random checkpoints set up at different stations at different times,[223] and officers at the checkpoints only searched one out of every series of passengers.[224] The Second Circuit reviewed the constitutionality of these searches in *MacWade v. Kelly*,[225] and the government again invoked the special needs doctrine, leading the court to determine whether the search "serve[d] as [its] immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation."[226] As in the other two public

216. Cassidy v. Chertoff, 471 F.3d 67, 72 (2d Cir. 2006). These searches consisted of visual inspection of carry-on bags and of the trunks and interior of automobiles on the ferry. *Id.* at 73.

217. Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006).

218. *Id.* at 73.

219. *Id.* at 74–75.

220. *Id.* at 86–87.

221. *Id.* at 83.

222. *Id.* at 83–84 (quoting Implementation of National Maritime Security Initiatives, 68 Fed. Reg. 39,246 (July 1, 2003) (codified at 33 C.F.R. pt. 101)).

223. MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006). Although the times and locations of the checkpoints are meant to "appear random, undefined, and unpredictable," they are actually based on a "sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by [the N.Y.P.D.'s] other counter-terrorism initiatives, and available manpower." *Id.*

224. *Id.* at 265.

225. MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).

226. *Id.* at 268 (quoting Nicholas v. Goord, 430 F.3d 652, 663 (2d Cir. 2005)).

transportation cases, the court held that the searches did indeed serve a special need, in this case "preventing a terrorist attack on the subway."[227] As in all the previous cases, there had been no specific, concrete threat to the New York subway system, but the Second Circuit still found the threat to be "sufficiently immediate."[228] Unlike the Eleventh Circuit in *Bourgeois*, which refused to allow searches of protestors that were merely based on a generalized "threat of terrorism,"[229] the Second Circuit held that "[a]ll that is required is that the 'risk to public safety [be] substantial and real' instead of merely 'symbolic.'"[230]

5. *The Current Status of Antiterrorism Searches*. The first wave of terrorism left us with routine suspicionless antiterrorism searches at all airports and most public buildings. These searches have been unanimously upheld by courts under the administrative search doctrine, based on the theory that the searches further an administrative purpose and were not primarily designed to detect or investigate criminal activity. And perhaps just as significantly, these searches have now become accepted by nearly every citizen as a necessary part of modern life.

The second wave of terrorism has left behind the possibility of suspicionless antiterrorism searches at subways and ferries, though such searches are by no means widespread. As of now, these searches have generated very little political opposition. Meanwhile, courts have rejected suspicionless searches at sporting events, protest rallies, and other potential terrorist targets.[231]

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227. *Id.* at 263.

228. *Id.* at 272.

229. Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004).

230. *MacWade*, 460 F.3d at 272 (quoting Chandler v. Miller, 520 U.S. 305, 322–23 (1997)).

231. Throughout this debate, the Supreme Court has never directly reviewed a single antiterrorism suspicionless search case. As noted above, it has implicitly approved of the "first wave" of suspicionless searches in dicta—as well as the application of the special needs doctrine to those searches—in three separate cases. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000) ("Our holding . . . does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."); *Chandler*, 520 U.S. at 323 ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) ("[W]e would not suppose that . . . the government would be precluded from conducting [searches at airports] absent a demonstration of danger as to any particular airport or airline."). And although these cases were all decided before September 11, 2001, the broad language used

Taking a cue from the earlier airport search cases, courts analyze this new wave of cases under the special needs doctrine, but this second wave of suspicionless antiterrorism searches—and the judicial response to it—both continue to evolve. Law enforcement agencies across the country continue to experiment with where to conduct these searches and how extensive they should be, and courts still struggle to determine the point at which these suspicionless searches become unconstitutional—if indeed such a point exists. At one end of the spectrum, the Eleventh Circuit held in *Bourgeois* that antiterrorism searches do not serve a special need, whereas the Second Circuit in *Cassidy* and *MacWade* reached the opposite conclusion. And many of the cases that do accept the *Cassidy* rationale—such as *Seglen* and *Johnston*—require the threat to reach some undefined threshold of specificity before the searches can be justified.

In short, the special needs doctrine does not provide much in the way of principled guidance to courts struggling to evaluate antiterrorism searches. To make matters worse, outside the antiterrorism context, the Supreme Court has been engaged in a similar struggle to find a principled distinction between searches for special needs and searches for a law enforcement purpose.

B. Special Needs in Other Contexts

Two cases in particular show the limits that the Court has tried to create for suspicionless searches over the past decade: *Indianapolis v. Edmond*,[232] a vehicular checkpoint case, and *Ferguson v. City of Charleston*,[233] a suspicionless drug testing case.

In *City of Indianapolis v. Edmond*, the Court considered a suspicionless vehicular checkpoint meant to detect cars carrying drugs.[234] The city of Indianapolis argued that its checkpoint was legally identical to the immigration checkpoint in *Martinez-Fuerte* and

points toward an approval of the second wave of antiterrorism searches: for example, the *Von Raab* Court stated that even if there were no demonstration of risk or danger, "[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." *Von Raab*, 489 U.S. at 675 n.3. The Second Circuit relied upon this broad language in upholding ferry searches in *Cassidy v. Chertoff*, 471 F.3d 67, 83 (2d Cir. 2006), and subway searches in *MacWade*, 460 F.3d at 272.

232. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

233. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

234. *Edmond*, 531 U.S. at 34.

the sobriety checkpoint in *Sitz* because those checkpoints "had the same ultimate purpose of arresting those suspected of committing crimes."[235] But the Court disagreed, stating that the checkpoint in *Martinez-Fuente* was designed to maintain "the integrity of the border"[236] and the checkpoint in *Sitz* was designed to "reduc[e] the immediate hazard posed by the presence of drunk drivers on the highways."[237] In contrast, the primary purpose of the checkpoint in *Edmond* was "to advance 'the general interest in crime control.'"[238] The Court noted that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[239]

The *Edmond* Court realized that the distinction it was making was difficult to draw, conceding that "[s]ecuring the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit of these goals."[240] The Court, however, argued that these valid checkpoints were closely related to the distinct public interests of border security and ensuring safe roadways, whereas the public interest in preventing illegal drug distribution was nothing more than general crime control.[241]

In *Ferguson v. City of Charleston*, a public hospital in Charleston, South Carolina began mandatory drug testing of all pregnant mothers who sought treatment.[242] The government argued that these suspicionless searches served the "special need" of protecting the health of the mother and the unborn child,[243] citing *Skinner*, *Von*

235. *Id.* at 42.

236. *Id.* at 38 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

237. *Id.* at 39.

238. *Id.* at 44 (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)).

239. *Id.* at 41.

240. *Id.* at 42. The dissent also pointed out that the distinction made by the majority was "not at all obvious." *Id.* at 50 n.2 (Rehnquist, C.J., dissenting).

241. *Id.* at 42–44. The definition of "general crime control" was further refined in *Illinois v. Lidster*, 540 U.S. 419 (2004), in which the Court upheld the use of a suspicionless vehicular checkpoint to ask drivers for information about a recent hit and run that had occurred at the same location. *Id.* at 427–28. Although the Court conceded that the *Lidster* checkpoint, like the invalid *Edmond* checkpoint, was designed to meet the "general interest in crime control," the Court held there was a distinction between determining whether the motorist in the car had committed a crime (as in *Edmond*) and asking the motorist for information about a crime that was probably committed by someone else. *Id.* at 423–24.

242. Ferguson v. City of Charleston, 532 U.S. 67, 70–71 (2001).

243. *Id.* at 81.

Raab, and *Acton*.[244] But the Court rejected this argument, holding that the primary purpose of the searches was crime control rather than protecting the fetus's health.[245] The Court distinguished *Ferguson* from the other drug testing cases because the test results in *Ferguson* were turned over to law enforcement and used in criminal prosecutions.[246] Once again the Court reaffirmed that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes."[247]

As in *Edmond*, the Court worked hard to draw a principled distinction between the *Ferguson* holding and other cases in which the Court had upheld suspicionless searches even when the incriminating evidence was used in a criminal prosecution. The Court noted that the drug tests in *Ferguson* served the "immediate" purpose of law enforcement, whereas the broader social goal of protecting the health of the mother and fetus was an "ultimate" goal.[248] In the valid special needs cases, public safety was the "direct and primary" purpose of the search—and using the results in a subsequent prosecution was presumably nothing more than a beneficial side effect of the search—whereas in *Ferguson* the drug test used law enforcement as a "means to an end."[249] "This distinction is critical," said the Court, "[b]ecause law enforcement involvement always serves some broader social purpose or objective."[250] Without this distinction, "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."[251]

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244. *Id.* at 77.

245. *See id.* at 85–86.

246. *Id.* ("The stark and unique fact that characterizes this case is that [this program] was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.").

247. *Id.* at 83 n.20.

248. *Id.* at 82–83.

249. *Id.* at 83–84.

250. *Id.* at 84.

251. *Id.* Most recently, the Court's newfound reluctance to allow suspicionless searches could be implied from *Arizona v. Gant*, 129 S. Ct. 1710 (2009). Although *Gant* is not a suspicionless search case because it covers searches of a suspect's car after he or she has been arrested, it includes language that supports the need for probable cause or a warrant. *See, e.g.*, *id.* at 1721 ("Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are

IV. CAN SUSPICIONLESS ANTITERRORISM SEARCHES BE JUSTIFIED BY THE SPECIAL NEEDS DOCTRINE?

Suspicionless searches can be generally grouped into three different categories: true administrative searches, which do not uncover evidence of criminal activity; searches that uncover evidence of criminal activity, but whose fruits cannot be used in a subsequent criminal prosecution; and searches whose fruits are in fact used in a subsequent criminal prosecution. As this Article demonstrates, the special needs doctrine cannot justify this third category of searches, and it is in this category that antiterrorism searches belong.

A. Categorizing Permissible Suspicionless Searches

The law surrounding permissible suspicionless searches is in a state of disarray,[252] but it is possible to distill some general principles from the various cases. First, there is only one context in which the Supreme Court has openly admitted that a suspicionless search is permissible for criminal law purposes: searches of probationers and parolees.[253] In this category of cases, the Court has held that the defendant has such a diminished expectation of privacy[254] that the state has the ability to conduct a suspicionless search and use the results to criminally incriminate the defendant.[255]

For every other type of suspicionless search, the Court has claimed that the search is invalid unless it serves a purpose other than traditional law enforcement. The Court uses different language in different contexts—the search must not be "aimed at the discovery of

unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.").

252. *See generally* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419 (2007) ("[T]he 'category' of suspicionless searches [has become] a jurisprudential mess, with the only consistent theme being that suspicionless search schemes [have been] regularly upheld as lawful.").

253. *See* United States v. Knights, 534 U.S. 112, 116 (2001).

254. The Supreme Court has held that government surveillance does not constitute a "search" within the meaning of the Fourth Amendment unless the surveillance infringes upon an individual's "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Thus, if an individual does not have a reasonable expectation of privacy in a certain context—for example, if he is conducting an activity in a public place, or if he is in prison—then the government can watch his actions without violating his reasonable expectation of privacy and thus not violate the Fourth Amendment.

255. *Knights*, 534 U.S. at 119.

evidence of crime;"[256] it must serve "special needs[] beyond the normal need for law enforcement;"[257] or it must fulfill a purpose other than "general crime control"[258]—but the requirement itself remains constant. This requirement—assuming it is actually followed in practice—implies that the Fourth Amendment's primary purpose is to prevent the state from invading the rights of citizens during a criminal investigation, and so there is no reason why it should limit the government's actions outside the criminal context.[259] This is a controversial proposition, but it is an inevitable conclusion when examining the special needs doctrine. One benefit of this rule—if it were actually followed—is that it would result in a bright-line rule providing clear guidance to law enforcement and protecting individuals from random, suspicionless searches during criminal investigations.

But as this review of the case law has demonstrated, the non–law enforcement purpose requirement has not been followed in practice. In many of these suspicionless searches, the government conducts searches that—if it detects what it is designed to detect—will produce evidence of criminal activity: possession of firearms or explosives, possession of stolen vehicles, illegal presence in the country, possession or use of illegal substances, or driving while intoxicated. And to state that the purpose of the search is distinct from the "normal need for law enforcement" is merely a semantic game because the special need that justifies the weaker search standard is usually nothing more than the policy justification for the original criminalization of the conduct. Hijacking is illegal because of the dangers it poses to airline passengers; immigration laws exist to secure the country's borders; drugs are illegal because those who use them suffer health effects and an impairment of their abilities; drunk driving is prohibited because those who drink and drive create a danger on the public roadways.

In this sense, the suspicionless search jurisprudence is little more than an exercise in redefining the nature of criminal activity and

256. Camara v. Mun. Court, 387 U.S. 523, 537 (1967).

257. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

258. City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000).

259. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 563 (1985) (Brennan, J., dissenting) ("[The Fourth Amendment safeguards] should govern border searches *when carried out for purposes of criminal investigation*.").

thereby redefining the permissible methods of detecting that activity. A police officer could enforce the law against drunk driving, a law that exists to keep the highways safe, or she could set up a checkpoint to detect drunk drivers to keep the highways safe, and in so doing detect individuals who are breaking the law. In the former case, she would need to have probable cause before pulling over a car, whereas in the latter case, she would not need any level of individualized suspicion because keeping highways safe is a special need.

To be fair, this objection does not fit all of the permissible suspicionless search cases equally. For some of them, the lack of a law enforcement purpose is more than a semantic difference; it is an important distinction that alters the nature and extent of the search in significant ways. To understand this point, it is helpful to divide the special needs cases into three different categories.

The first category consists of the original administrative searches, in which non–law enforcement officials conduct searches to enforce health and safety violations. These include building code inspections, Occupational Safety and Health Administration workplace inspections, mine safety inspections, and the like. Such searches do not seek to enforce criminal laws, and so the searches represent a "less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."[260] This category does not include all administrative search cases because courts have applied the "administrative search" term to a number of cases in which the search has a clear crime-control purpose. For example, the search in *New York v. Burger*—in which the police searched a junkyard for evidence of stolen auto parts and ultimately arrested the junkyard owner on criminal charges—was termed an administrative search even though it was designed to uncover evidence of criminal activity.[261]

The second category is comprised of searches that are designed to uncover evidence of unambiguously criminal activity, but that can legitimately be classified as special needs searches because the results are not used for a law enforcement purpose. In these cases, the search serves a purpose "other than that of traditional law enforcement," not because of the type of information being sought, but rather because

260. *Camara*, 387 U.S. at 530.

261. *See* New York v. Burger, 482 U.S. 691, 708–10 (1987). *Burger* belongs in the third category of suspicionless search cases because the search was upheld based on the defendant's reduced expectation of privacy. *Id.* at 703–07.

of what is done with the information after it is obtained. This category includes the drug tests of school children and public employees, which are designed to find evidence of criminal activity, but whose results are not used in a subsequent criminal prosecution.

The third category involves searches that have a clear law enforcement purpose, and whose results are used by law enforcement in criminal prosecutions. This category includes antiterrorism searches, vehicular checkpoints, and some of the later administrative searches in cases such as *Burger*. For some of these searches, the Supreme Court has stressed that the nature of the intrusion is very slight and that the subject has a reduced expectation of privacy—briefly stopping a vehicle or checking records and inventory for a highly regulated business—though these factors are not present for antiterrorism searches. But assuming individuals in these situations have *some* expectation of privacy (unlike probationers and parolees), courts must still engage in the semantic game of redefining a crime-control search as a special needs search.

B. Placing Antiterrorism Searches into the Proper Category

Once permissible suspicionless search cases are organized in this manner, it becomes easy to see that suspicionless antiterrorism cases fall into the third category of special needs cases. These searches are conducted by law enforcement personnel—police, TSA officers, court officers—and any incriminating search results may be used against the suspect in a criminal trial. And what is more, these searches are even less defensible than the other special needs cases in that category because the other cases involve situations in which the suspect has a reduced expectation of privacy. In contrast, courts have held that subjects of antiterrorism searches—unlike parolees or occupants of cars—"possess[] an undiminished expectation of privacy" for items carried on their bodies or in their bags.[262]

Furthermore, the ultrafine distinction that courts make between special needs and law enforcement needs is especially strained in the antiterrorism context. As the Eleventh Circuit pointed out in *Bourgeois*, the alleged special need of "public safety" is "inextricably intertwined" with the goal of crime control in the antiterrorism

262. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006).

context.[263] Antiterrorism searches are designed to prevent individuals from intentionally committing acts of violence, and to apprehend those who attempt to commit these acts; to claim that this is a public safety purpose rather than a law-enforcement or crime-control purpose is simply disingenuous.[264]

As noted above,[265] the early cases that justified antiterrorism searches as administrative searches were reacting to an extraordinary situation in which there appeared to be no other way to prevent an epidemic of hijackings and bombings of public buildings. The only doctrine available at the time to justify suspicionless searches was the administrative search rationale from *Camara.* These early courts therefore borrowed the terms "administrative" and "regulatory" from *Camara* and used them in a way that had nothing to do with the terms' actual meaning. The Ninth Circuit, for example, noted that searches at airports were "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings."[266] To say that blanket, suspicionless searches of everyone who boards a plane is a "regulatory scheme" is simply an exercise in making a term mean whatever one wants it to mean; likewise, the prevention of violent crimes is an "administrative

263. Bourgeois v. Peters, 387 F.3d 1303, 1312–13 (11th Cir. 2004); *see also supra* notes 180–85 and accompanying text.

264. There is, perhaps, a distinction between trying to *prevent* crime and trying to *detect* crime. If a government activity is only meant to prevent crime, the individualized suspicion requirements of the Fourth Amendment should not apply. For example, installing a window made of bulletproof glass at all post office counters is a method of preventing crimes—there is surely no need to demonstrate individualized suspicion for every customer who approaches the window. It could be argued that suspicionless antiterrorism searches should be analogized to these bulletproof glass windows—if a government agent searched everyone who entered the post office, for example, the search would only be intended to prevent crimes, and so there would be no need to demonstrate any individualized suspicion. The problem with making this distinction is that in practice the suspicionless antiterrorist searches are used both to prevent and detect crime—and ultimately to punish the criminal as well. If the search recovers a weapon, the subject of the search is arrested and the weapon is used as evidence in a subsequent prosecution. The only way to ensure that the suspicionless searches are truly only being used to prevent a crime would be to preclude the government from using any fruits of the search in a subsequent prosecution. *See infra* Part VI.B.

265. *See supra* notes 18–28 and accompanying text.

266. United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc).

purpose" only if one invents a completely new definition for the term "administrative."[267]

This contrivance has been encouraged by the confused way in which the special needs doctrine has evolved over the past few decades, with different justifications becoming significant in different contexts. If the same doctrine is applied to widely different factual situations (from conducting building code inspections to drug testing schoolchildren to detecting terrorists on the subway), it creates confusion when one court interprets the language of another court's precedent. Consider *Von Raab*, the case in which the Supreme Court upheld suspicionless drug testing of United States customs employees. The search in this case falls into the second category of permissible suspicionless searches—because the results of the test are not used for criminal prosecution, the Court can legitimately claim that the search serves a special need unrelated to law enforcement.[268] But the court also attempts to place this search into the first category—claiming that it serves a purely "administrative" or "regulatory" purpose by analogizing the use of cocaine by customs employees to the inventory searches: "[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially when 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."[269] In making this argument, the Court cites a number of legitimate administrative search cases, including an inventory search case,[270] a border search case,[271] and a building code inspection case.[272]

It is already a bit of a stretch to say that cocaine use by customs officials is a "hazardous condition" equivalent to building code

267. Once this terminology had become enshrined in precedent, it was perpetuated by later generations of cases. The Ninth Circuit recently upheld an airport search as an administrative search, quoting this same language from the *Davis* case. United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (en banc).

268. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989). The Court also notes that customs employees have a diminished expectation of privacy, *id.* at 672, but this was not the primary reason that the searches were found constitutional.

269. *Id.* at 668 (emphasis omitted) (citation omitted).

270. Colorado v. Bertine, 479 U.S. 367, 369–71 (1987).

271. United States v. Martinez-Fuerte, 428 U.S. 543, 556–57 (1976).

272. Camara v. Mun. Court, 387 U.S. 523, 534–36 (1967).

violations, and it is difficult to equate suspicionless drug testing with the "routine administrative function" of searching an automobile before it is impounded. But the Court persisted in its analogy, stating that drug use by customs agents was a "latent or hidden condition[]," and "discover[ing] . . . or . . . prevent[ing] the[] development" of such conditions justified a suspicionless search.[273]

The lower courts that applied the special needs doctrine to suspicionless antiterrorism searches merely carried this analogy one step further. For example, this is how the Second Circuit in *MacWade* upheld suspicionless searches on the subway:

> As a legal matter, courts traditionally have considered special the government's need to "prevent" and "discover . . . latent or hidden" hazards, *Von Raab*, 489 U.S. at 668, in order to ensure the safety of mass transportation mediums, such as trains, airplanes, and highways. We have no doubt that concealed explosives are a hidden hazard . . . . Accordingly, preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation. Further, the fact that an officer incidentally may discover a different kind of contraband and arrest its possessor does not alter the [p]rogram's intended purpose.[274]

A terrorist attempting to carry a bomb onto a subway (or an airplane) is not a "latent or hidden hazard." He is an individual attempting to commit an extremely serious crime. Any attempt to deter or detect his actions is purely a law enforcement function, and should be treated as such. And any attempt by courts to claim that a search designed to detect and prevent this crime is an administrative or regulatory search cannot ultimately be sustained.

Thus, even the contorted jurisprudence of the special needs doctrine cannot justify these searches. But this conclusion leads to another question: if suspicionless antiterrorist searches cannot be justified by the special needs doctrine, is there any other way to justify them? We will address this question in Part V.

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273. *Von Raab*, 489 U.S. at 668.

274. MacWade v. Kelly, 460 F.3d 260, 270–71 (2d Cir. 2006) (first alteration in original) (citations omitted).

V. OTHER POSSIBLE JUSTIFICATIONS FOR SUSPICIONLESS ANTITERRORIST SEARCHES

At first, the search for a legitimate justification for suspicionless antiterrorist searches may appear to be a waste of time, or at best a purely academic pursuit. In reality, antiterrorism searches in airports and courthouses are ubiquitous, widely accepted, and seemingly indispensable. But it is important to find a legitimate doctrinal underpinning for these searches for two reasons. First, courts' responses to the second phase of antiterrorism searches have been wildly inconsistent, both in terms of reasoning and results. And second, continued application of the special needs doctrine to these searches will create confusing precedent that could be applied to other areas of the law, leading to even greater damage to the individualized suspicion requirement. Thus, it is worth seeking another justification for suspicionless antiterrorism searches—or, if one cannot be found, to find another way to reconcile these searches with the Fourth Amendment.[275] Other commentators have suggested numerous justifications for suspicionless antiterrorism searches—using a generalized "reasonableness" test, deferring to the legislature, applying the doctrine of implied consent, and creating an entirely new exception to the Fourth Amendment. But as this Article demonstrates, none of these proposals can serve to justify these searches.

A. Evaluation Under a Generalized Reasonableness Test

Even if antiterrorism searches cannot be justified as a special need, most courts and commentators (and indeed lay people) would still find them constitutional under the general test of reasonableness. As the Supreme Court has repeated dozens of times, reasonableness is the "touchstone of the constitutionality of a governmental search,"[276] and whether or not a search is reasonable "depends on all of the circumstances surrounding the search or seizure."[277] When the circuit courts first began approving the suspicionless antiterrorist searches in the early 1970s, many of them relied on a generalized

275. For a discussion of how to reconcile these searches with the Fourth Amendment, see *infra* Part VI.

276. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002).

277. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

reasonableness standard, "balancing the need for a search against the offensiveness of the intrusion."[278] Indeed, all of the current suspicionless antiterrorism cases—after applying the special needs test to bypass the general requirement of a warrant and probable cause—essentially apply a reasonableness analysis. The Second Circuit defines the suspicionless antiterrorism test as follows:

> First, as a threshold matter, the search must "serve as [its] immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." Second, once the government satisfies that threshold requirement, the court determines whether the search is reasonable by balancing several competing considerations. These balancing factors include (1) the weight and immediacy of the government interest; (2) "the nature of the privacy interest allegedly compromised by" the search; (3) "the character of the intrusion imposed by" the search; and (4) the efficacy of the search in advancing the government interest.[279]

So why not abolish the somewhat artificial threshold test of special needs and simply skip to the second step and conduct a reasonableness analysis? The extremely violent and destructive nature of terrorist acts surely affects the appropriateness of a search meant to detect or deter such acts, and this factor would be reflected in a general reasonableness test. For example, if police have twenty-four hours to find an atomic bomb that they know is hidden in one of a hundred houses, it would be reasonable for them to conduct suspicionless searches of each of those houses.[280] If police pull over every car that drives by a reservoir because the dam is a "potential terrorist target," the search would likely be unreasonable.

But these are the extreme cases—and therefore the easy cases. As our review of the second wave of antiterrorism case law shows, it is indeed the hard cases that make bad, confusing, and inconsistent law. Thus, finding a reasonable, principled justification for these searches is critical—and it is more important now than ever. If there is no principled way to evaluate antiterrorism searches, then there is no way of knowing the limits of these searches—if they have limits at all.[281] Under the current law, the only thing resembling a principled limitation to the searches is the factor explicitly stated in *Johnston*

278. *See, e.g.*, United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974).

279. *MacWade*, 460 F.3d at 268–69 (citations omitted).

280. For a discussion of this hypothetical, see Gould & Stern, *supra* note 3, at 779–80.

281. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311–12 (11th Cir. 2004).

and *Stauber* (and hinted at in *Seglen* and *Bourgeois*): that suspicionless antiterrorism searches are unconstitutional unless there is a "concrete danger" that is "substantial and real."[282] In rejecting the suspicionless searches of individuals at sporting arenas, *Johnston* and *Seglen* noted that there had been no history of terrorist attacks or threats against sporting arenas[283]—in contrast, *Johnston* argues that searches of public buildings were allowed after "an outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats, resulting in massive evacuations of federal property and direct financial loss to the Government,"[284] and searches in the New York City subway were allowed because "NYC's mass transit system, including the subway system, had been targeted by terrorists in the past, and within the last year terrorists had bombed commuter trains in Madrid, the subway system in Moscow and had attempted to bomb the London subway system."[285]

Thus, under the current reasonableness analysis, the only limiting factor for suspicionless antiterrorist searches is whether a threat is "substantial and real" or merely the background threat of terrorism that presumably has become part of everyday existence.[286] But this is rather thin protection; there is little doubt that if a terrorist attack occurred at a sporting arena or a political protest, the holdings in *Johnston* and *Seglen* or *Stauber* and *Bourgeois* would be overruled by the next court to consider searches in these contexts. In this sense, it is the terrorists who control the extent of our Fourth Amendment rights: by hijacking planes and blowing up buildings, they persuade courts to allow suspicionless searches at airports and public buildings;

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282. Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1266 (M.D. Fla. 2006), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007), *vacated and superseded on reh'g*, 530 F.3d 1320 (11th Cir. 2008) (per curiam); Stauber v. City of New York, Nos. 03 Civ. 9162, 03 Civ. 9163, 03 Civ. 9164, 2004 U.S. Dist. LEXIS 13350, at *93 (S.D.N.Y. July 19, 2004); *see also Bourgeois*, 387 F.3d at 1311; State v. Seglen, 700 N.W.2d 702, 707–08 (N.D. 2005).

283. *Johnston*, 442 F. Supp. 2d at 1266–69; *Seglen*, 700 N.W.2d at 708.

284. *Johnston*, 442 F. Supp. 2d at 1269 (quoting Downing v. Kunzig, 454 F.2d 1230, 1231–32 (6th Cir. 1972)).

285. *Id.* (citing MacWade v. Kelly, 460 F.3d 260, 272 (2d Cir. 2006)).

286. This rule means that a judge must somehow determine at what point the ever-present "background threat" of terrorism becomes a "substantial and real" threat. If a terrorist group issues a statement that it will attack a sports arena sometime in the next year, does that make the threat to all sports arenas substantial and real? What if it named a city but no date? Would it matter if the terrorist group had been known to have successfully committed terrorist acts in the past? In short, how could a judge intelligently determine the probability of such a threat, and what is the probability threshold for "substantial and real"?

by bombing mass transit in London, Madrid, and Moscow, they convince courts to allow suspicionless searches on ferries and subways; if they successfully target a sports arena or a political protest rally, courts will (under current doctrine) begin to allow suspicionless searches in those contexts as well. And as this Article's discussion of the first wave of suspicionless antiterrorist searches demonstrates, the search procedures (and their acceptance by the courts and by the general population) does not end when the threat subsides. Throughout the 1990s there was not a single domestic passenger airplane hijacking, and the epidemic of shootings and bombings of courthouses disappeared—yet the suspicionless searches continued, and probably will continue forever. As noted above, the Supreme Court cited the infinitesimally low number of airplane hijackers caught through the suspicionless search program as evidence that the programs were "successful."[287] Yet when this "successful" suspicionless search program failed spectacularly—resulting in the death of 3,000 Americans on a single day—the government reaction was to make the suspicionless searches even more rigorous and intrusive, and the reaction of the courts was to reaffirm (in even stronger language) the necessity and constitutionality of those searches.[288]

More generally, antiterrorist searches are particularly ill suited to a generalized balancing test or a reasonableness analysis, for the simple reason that the gravity of the potential harm is so great that it overpowers any other variable that could be placed into the balancing equation. Every first-year criminal law student is presented with some variant of this classic hypothetical, intended to highlight the difference between utilitarianism and retributivism: would the police be justified in torturing an innocent person if it could provide information that would prevent a nuclear bomb from detonating and destroying a city? The threat of terrorism turns the second half of this hypothetical into grim reality: wouldn't it be reasonable to allow nearly any type of surveillance or search program if it could prevent

287. *See supra* note 58 and accompanying text. In *Von Raab*, the Court noted that in fifteen years, 9.5 billion people and ten billion pieces of luggage had undergone a suspicionless search, and only forty-two thousand firearms had been detected. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989). Thus, every suspicionless search that occurred had a .00042 percent chance of detecting a firearm.

288. *See, e.g.*, United States v. Yang, 286 F.3d 940, 944 n.1 (7th Cir. 2002) ("[T]he events of September 11, 2001, only emphasize the heightened need to conduct searches at this nation's international airports.").

catastrophic harm?[289] Should a court somehow give less weight to the government interest in a search seeking to prevent a terrorist attack that may only kill a few hundred people as opposed to many thousands of people? Can a court really evaluate the likelihood of a terrorist attack in any given context, other than by simply accepting the risk assessment the government provides for them?

As the Eleventh Circuit noted in *Bourgeois*, "reasonableness" is a term of art in Fourth Amendment jurisprudence;[290] courts must interpret the term "in the light of established Fourth Amendment principles,"[291] including the warrant requirement, prior judicial scrutiny, probable cause, and individualized suspicion.[292] It is very rare for a search that lacks any of these requirements to be deemed "reasonable." If the term were given its ordinary meaning, the constitutionality of a search would be determined by "the judge's personal opinions about the governmental and privacy interests at stake."[293]

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289. In a recent article, Anthony Coveny described the current balancing test for suspicionless searches as a mathematical formula, in which PC stands for public concern, E is a percentage that represents the efficacy of the searches, and LI stands for the level of intrusion of the search. If PC x E > LI, the search should be allowed, but if PC x E < LI, then the search is unreasonable and hence unconstitutional. Coveny, *supra* note 2, at 379–80. When public concern is preventing terrorism, PC is essentially infinite. Coveny quotes the Second Circuit statement that "the government interest in preventing a terrorist attack on the subway was 'of the very highest order.'" *Id.* at 379 (quoting *MacWade*, 460 F.3d at 267). Other courts use similar language when applying the balancing test. *See, e.g.*, United States v. Hartwell, 436 F.3d 174, 179 (3d Cir. 2006) ("[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance."); United States v. Marquez, 410 F.3d 612, 618 (9th Cir. 2005) ("It is hard to overestimate the need to search air travelers for weapons and explosives . . . ."). Therefore, "as long as the effectiveness measure is anything but zero, the level of intrusiveness is near immaterial." Coveny, *supra* note 2, at 379. And if PC is not set to infinity, how should it be calculated in evaluating the reasonableness of most antiterrorist searches?

290. *See generally* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (discussing why courts have not adopted a test for reasonableness).

291. Bourgeois v. Peters, 387 F.3d 1303, 1313 (11th Cir. 2004) (quoting Chimel v. California, 395 U.S. 752, 765 (1969)).

292. *Id.* at 1313–16.

293. *See id.* at 1314. A number of commentators have also recognized this problem. Professor Ricardo Bascuas notes that using a balancing test to determine what is "reasonable" is not even "a legal inquiry or test" because

> it is not a process of discerning general rules or principles and applying them evenhandedly to specific disputes as they arise. Rather, balancing is for judges, as Justice Scalia put it, "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." The vagueness of the term "reasonable" makes not only the outcome but the very criteria of the "test" unpredictable.

Therefore, reasonableness alone provides neither a principled reason for allowing suspicionless antiterrorist searches, nor a sensible, robust limitation on their use. A search for a more principled basis to justify these searches will not only help to legitimate them, but will also contain them so that they do not swallow up the entire Fourth Amendment.

B. Legislatures Should Decide What Is Reasonable

Political process theory offers a more sophisticated defense of the reasonableness analysis by arguing that the democratic process will provide necessary limits on the government's behavior. The argument runs like this: because the Fourth Amendment's prohibition on unreasonable searches is indeterminate, the task falls to either courts or legislatures to interpret the meaning and scope of the term.[294] According to political process theory, the legislature should conduct this task because the interpretation of democratically elected legislators is more legitimate than the opinions of unelected judges.[295] The courts should thus defer to the legislatures in these situations, and only conduct a rational basis review of any legislative interpretations of ambiguous constitutional terms.

Bascuas, *supra* note 2, at 748 (footnote omitted) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181 (1989)). Professor Thomas Clancy, writing in 1995—well before the second wave of antiterrorism searches began—warned against suspicionless "checkpoints and detectors . . . at stadiums, in schools, and at other public gatherings," all justified by a "totally subjective reasonableness analysis." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 624–25, 627 (1995) (footnotes omitted). Clancy argues that there must be a "return to the central importance given to individualized suspicion by the framers," though he does not explain how this will apply to airport searches. *Id.* at 634. Bascuas proposes his own test for antiterrorism searches, which this Article discusses *infra* at notes 335–38 and accompanying text.

Indeed, the vague nature of the term "reasonableness" was evident in the Supreme Court's most recent school search case, in which a schoolgirl was strip-searched on suspicion that she was carrying illegal prescription drugs. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641–43 (2009). Whether it was reasonable for school officials to conduct such an intrusive search to combat the possession and distribution of drugs in school comes down to little more than the personal opinion of the judge or judges hearing the case. In *Safford United School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), the trial judge found the search to be reasonable, a three-judge appellate panel agreed, an en banc panel split sharply on the question, and the Supreme Court finally ruled that the search was unreasonable. *Id.* at 2637–39.

294. Political process theory focuses on ambiguous terms in the Constitution, such as due process, equal protection, or unreasonable searches and seizures. *See* Richard C. Worf, *supra* note 2, at 100–01.

295. *Id* at 101.

Aside from the increased legitimacy from the democratic process, legislative interpretations of reasonableness are superior to judicial determinations for two reasons. First, the legislature is in a far better position than the courts to determine what is reasonable—it can run a cost-benefit analysis and has better access to the necessary facts in making such a determination.[296] Second, the legislature is more flexible. It can vary from state to state or even city to city, depending on the preferences of the community, and if circumstances change—if terrorists begin a successful campaign of violence, for example—it can adapt much more quickly than the precedent-bound judicial system.[297]

Political process theory recognizes that the democratic process sometimes breaks down, at which point courts must be more aggressive in reviewing a given search. For example, if a search procedure had been instituted by the executive branch, either without legislative approval or pursuant to an overly broad grant of discretion on the part of the legislature, courts would need to conduct a strict scrutiny analysis.[298] Similarly, courts should intervene when searches disadvantage a discrete and insular minority, who may not have adequate representation in the legislature.[299] In other words, the Fourth Amendment is only meant to be a check on majoritarian rule when the political process cannot work effectively.[300]

Permissible suspicionless searches are particularly easy to justify under political process theory—provided they are properly authorized by the legislature—because they are nondiscriminatory by their very nature. They are not directed at a specific class of underprivileged or disenfranchised individuals; they affect everyone more or less equally. Thus, assuming the benefits and costs of the search are spread equally throughout the voting community, the search program cannot be seen as the result of a failure of the democratic process.

Furthermore, deference to legislators seems even more sensible in the context of antiterrorism searches. It is hard enough for judges

296. *Id.* at 120–26.

297. *Id.* at 129–30 ("If mass terror strikes, it might be disastrous to apply old precedents to determine what constitutes a reasonable general search or seizure.").

298. *Id.* at 138–52.

299. *Id.* at 152–58.

300. *Id.* at 189–90.

to make reasoned, informed judgments about the necessity and efficacy of other types of searches, such as roadblocks to prevent drunk driving, or frisks to determine if suspects carry a weapon. But this task becomes even more daunting for antiterrorism searches. The Second Circuit in *MacWade* explained why it deferred to the government's experts who testified that the suspicionless subway searches were an effective method of deterring a terrorist attack:

> We will not peruse, parse, or extrapolate four months' worth of data . . . . Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal their available resources in light of the conditions prevailing on any given day. We will not—and *may not*—second-guess the minutiae of their considered decisions.[301]

But *MacWade* is an outlier in this instance. For the most part, courts have rejected applying political process theory to the Fourth Amendment,[302] and with good reason. Given the central role of the Fourth Amendment in criminal procedure jurisprudence, deferring to the democratically elected legislature to determine what is reasonable is deeply troubling. Some commentators, such as Professor Akhil Amar, have argued persuasively that the Fourth Amendment should not be thought of primarily as a rule of criminal procedure[303]—but there is no denying that, rightly or wrongly, this is what the Fourth Amendment has become. And as a rule of criminal procedure—whose primary purpose is to protect the individual citizen from overreaching by the government during criminal prosecutions—the Fourth Amendment is dangerously unsuitable for political process analysis.

It is no accident that political process analysis has not been applied to the rest of the criminal procedure rules in the Bill of Rights—there is no deference to the legislature to determine when *Miranda* rights apply, for example, or when the right to counsel attaches. Granted, the term "unreasonable" is ambiguous enough to require interpretation, but giving a majority of voters the right to

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301. MacWade v. Kelly, 460 F.3d 260, 274 (2d Cir. 2006).

302. Even the strongest proponents of political process theory concede that the Fourth Amendment has "remained largely invulnerable to political process theory." Worf, *supra* note 2, at 103–04 (noting Akhil Amar's acknowledgment that political process theory has had little influence on Fourth Amendment jurisprudence).

303. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758–59 (1994).

interpret it—and thereby set the parameters for how police interact with ordinary citizens—could lead to extreme results, for two reasons. First, a majority of voters (or their representatives who make the laws) will frequently overreact in times of crisis, trading freedoms in exchange for short-term security. The government responses to this decade's second wave of terrorism are a case in point: in the wake of the September 11 attacks, the federal government took a number of steps to curtail civil liberties to detect and prevent other terrorist activities, including detaining citizens indefinitely without charge and without providing counsel, eavesdropping on conversations between attorneys and clients, and broadening the scope of wiretapping programs.[304] The courts have been very active in reviewing and in some cases rejecting these reactions.[305]

Political process theory would approve of judicial review of some of these rules—for example, rules allowing the government to listen in on conversations between criminal law attorneys and clients only burden accused criminals, who hardly have a proportionate say in the legislature. Others—those that apply broadly to all citizens—would be left untouched by courts if judges agreed to defer to the legislative enactments. But these rules are not the result of a reflective legislative body calmly weighing the costs and benefits—indeed, they are little better than pandering to the political moment.

This short-term pandering might not be so dangerous were it not for the second problem: once civil liberties are restricted, the restrictions are essentially permanent. What the majority of voters think is reasonable will inevitably reflect the rules that they have grown accustomed to in their everyday lives. The reason that searches at airports and public courthouses are now thought to be reasonable by the vast majority of citizens has nothing to do with whether they are in fact a sensible, least intrusive solution to a severe and ongoing problem—though they may in fact be. Rather, they are thought to be reasonable because they have been around for so long that we no longer even notice them or perceive them to be intrusive. And regular searches in some contexts also tend to desensitize individuals to identical searches in other contexts—that is, now that suspicionless

304. *See supra* note 157 and accompanying text.

305. *See supra* note 158 and accompanying text.

searches are ubiquitous at airports, people are less likely to find them unreasonable at schools, rock concerts, sporting events, and so on.[306]

Courts, on the other hand, are far more insulated from the politics of the moment, and far more likely to uphold the principles of the Fourth Amendment—even in times of crisis, which is when such a defense is needed the most. This is not to say that the courts' analyses and holdings are immune to changes in the world, merely that they are more likely to apply constant principles of law to the evolving threats and dangers that arise.[307]

Simply put, it is not very comforting to conclude that the Fourth Amendment—a fundamental protection against government overreaching—says whatever the government wants it to say. If the Fourth Amendment is to have any meaning at all, courts must have the power to review the constitutionality of searches against some principled standard.

C. Consent

Even if there is no principled reason to allow suspicionless antiterrorism searches, law enforcement could conceivably rely on the implied or express consent given by the individual being searched. In other words, if the individual does not wish to be searched, he or she can simply choose not to board an airplane, ride the subway, or attend the political protest. Conversely, if the individual does choose to engage in the activity, he or she is consenting—at least implicitly—to the search that goes along with the activity.

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306. *See, e.g.*, Sara Kornblatt, Note, *Are Emerging Technologies in Airport Passenger Screening Reasonable Under the Fourth Amendment?*, 41 LOY. L.A. L. REV. 385, 404–05 (2007) ("There are metal detectors at courthouses, schools, and stadiums. While some may find magnetometers at these types of locations annoying, society in general has allowed their use without an uproar that Fourth Amendment rights are being violated." (footnote omitted)).

307. There is even an argument that once a threat has receded, courts are more likely than voters to revisit the restrictions on liberty that they put into place. Professor William Stuntz has noted that the twentieth century saw a pattern in the way the Supreme Court interpreted the Fourth Amendment: "Crime fell in the 1940s and 1950s; Fourth Amendment rights expanded in the 1960s. Crime rose sharply in the 1960s; Fourth Amendment protection receded in the 1970s and 1980s. Crime fell again in the 1990s, and by the end of that decade Fourth Amendment rights were once again expanding." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2155 (2002). Thus, it is not that courts are unresponsive to the changing world, but that they are merely slower to respond—both for institutional reasons, and because they are applying fixed principles of law, which legislatures do not do. This deliberateness is probably a virtue when courts are considering alterations to the scope of Fourth Amendment protections.

Consent is a well-established exception to the Fourth Amendment's requirement of individualized suspicion.[308] Law enforcement officers are permitted to search anyone, for any reason, as long as the individual agrees to the search. In the early years, some courts relied—at least in part—on an implied-consent argument to justify suspicionless antiterrorism searches. In *United States v. Davis*,[309] for example, the Ninth Circuit argued that airport screenings are constitutional "only if they recognize the right of a person to avoid search by electing not to board the aircraft."[310] This was in part because a consensual search was thought to be less intrusive than a compulsory search, but also because this helped to ensure that the purpose of the search was the special need of preventing hijackings rather than the law enforcement need of general crime control:

> [A] compelled search . . . would not contribute to barring weapons and explosives from the plane, [and therefore] it could serve only the purpose of apprehending violators of either the criminal prohibition against attempting to board an aircraft while carrying a concealed weapon . . . or some other criminal statute. Such searches would be criminal investigations subject to the warrant and probable cause requirements of the Fourth Amendment.[311]

Even today, implied consent is frequently cited as one of the factors that courts consider in their balancing test, though not a dispositive one. The Third Circuit has argued that searches of airline passengers are "less offensive" because "[a]ir passengers choose to fly," and they are on notice that they will be searched at the airport.[312] Other courts have rejected suspicionless antiterrorism searches in part because of a lack of implied consent. For example, the district court that struck down the searches in the Boston subway noted that proper notice would have "provide[d] an opportunity for persons who do not want to permit inspection to avoid traveling on the MBTA,"[313]

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308. *See, e.g.*, United States v. Miller, 20 F.3d 926, 930 (1994) ("[W]e note that police officers may search an area, even without probable cause or a warrant, if someone with adequate authority has consented to the search . . . .").

309. United States v. Davis, 482 F.2d 893 (9th Cir. 1973), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc).

310. *Id.* at 910–11.

311. *Id.* at 911–12 (citation omitted).

312. United States v. Hartwell, 436 F.3d 174, 180–81 (3d Cir. 2006).

313. Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *3 (D. Mass. July 28, 2004).

whereas the court that struck down the searches at Tampa's stadium noted that the plaintiff was never informed of the search policy before purchasing his tickets and therefore could not have consented to the search at the time of purchase.[314] Conversely, the Second Circuit upheld suspicionless searches in the New York subway in part because the individuals being searched have a choice to either submit to the search or turn away and not ride the subway.[315]

But there is a significant problem associated with relying on implied consent to justify suspicionless antiterrorism searches: the doctrine of unconstitutional conditions. This doctrine holds that it could be unconstitutional if the government conditions participation in a certain activity on the waiver of a constitutional right.[316] The

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314. Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1271–72 (M.D. Fla. 2006), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007), *vacated and superseded on reh'g*, 530 F.3d 1320 (11th Cir. 2008) (per curiam).

315. MacWade v. Kelly, 460 F.3d 260, 273, 275 (2d Cir. 2006). The Second Circuit never used implied consent as a legal justification for the search; instead it applied the fact that individuals could choose to walk away as evidence that the search was "minimally intrusive," *id.* at 273, which is one of the three factors of the reasonableness balancing test for the special needs doctrine, *id.* at 269.

There is a recent Ninth Circuit case that appears to hold that the constitutionality of these searches does not depend on consent, but in reality it only specifies the type of consent that is required. *See* United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (en banc). In *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (en banc), the defendant voluntarily subjected himself to a metal detector and a secondary screening at the airport, but when he was directed to empty his pockets, he refused, telling the TSA officials that he no longer wished to board the plane and asking to leave the airport. *Id.* at 957–58. This request was refused, and a subsequent search of the defendant revealed several baggies of methamphetamine and a glass pipe. *Id.* at 958.

The Ninth Circuit relied on the administrative search doctrine to uphold the search, and went out of its way to note that the constitutionality of the search did not depend on the defendant's consent; thus, the defendant could not revoke his consent and tell the officers that he no longer wished to fly. *Id.* at 960–61. But a few sentences later it noted that "all that is required [for the search to be constitutional] is the passenger's election to attempt entry into the secured area of an airport." *Id.* at 961 (footnote omitted). Thus, for all its strong language about consent not being a necessary element, it appears that the *Aukai* case simply specifies what kind of consent is required, without abolishing a consent requirement altogether. Once individuals choose to undertake an activity (and thus implicitly agree to a search), there comes a point at which they cannot back out of the activity and withdraw their consent. In other words, this holding is not inconsistent with a theory that would justify all suspicionless antiterrorism searches using implied consent. For a recent discussion of these issues, see generally Bethany A. Gulley, Case Note, United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007)*, 31 U. ARK. LITTLE ROCK L. REV. 515 (2009).

316. *See, e.g.*, Adams v. James, 784 F.2d 1077, 1080 (11th Cir. 1986) ("The doctrine of unconstitutional conditions prohibits terminating [prisoner] benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe."); Bertrand v. United States, 467 F.2d 901, 902 (5th Cir. 1972) (per curiam) (ordering

Bourgeois and *Johnston* courts rejected an implied-consent justification on these grounds, noting that an individual's right to attend a protest or even a "property interest in his season tickets and his right to attend [football] games and assemble with other Buccaneers fans" could not be conditioned on a surrender of his Fourth Amendment rights.[317]

The reason the doctrine of unconstitutional conditions presents a problem is that—like a generalized definition of reasonableness—this doctrine also fails to provide a principled, bright-line test. The Seventh Circuit notes that "conditions can lawfully be imposed on the receipt of a benefit—conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures—provided the conditions are reasonable."[318] Thus, attempting to use implied consent as a justification for suspicionless searches leads to the same conclusion, and creates the same problem—in the end it is up to the judge to decide, after balancing all the factors, whether it is reasonable to condition the right to travel by air (or enter a public courthouse or attend a football game) on the individual's waiver of their Fourth Amendment right. And once again, the case law shows the inconsistency that inevitably results from such a broad, discretionary test: courts have said that it is unreasonable to condition entry to a football game or a rock concert on a Fourth Amendment waiver;[319] yet it is not unreasonable to require consent before entering a courthouse or boarding a plane.[320]

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resentencing because "[t]he effect of the trial judge's questioning [of the defendant] was to impose an unconstitutional condition on the petitioner's Fifth Amendment rights: he could go into the details of the other offense . . . that might constitute a confession or he could exercise his right to be silent and receive a long sentence"); Boykins v. Fairfield Bd. of Educ., 399 F.2d 11, 13 (5th Cir. 1968) ("The plaintiffs [were] admitted to the school system, but had been denied the opportunity to transfer from a Negro to a white school. Once the plaintiffs had been admitted to the school system, they had a constitutional right to a desegregated education, and have standing to enforce that right—free of any unconstitutional condition precedent." (quoting Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 851 (5th Cir. 1967))).

317. *Johnston*, 442 F. Supp. 2d at 1271; *accord* Bourgeois v. Peters, 387 F.3d 1303, 1324–25 (11th Cir. 2004).

318. Burgess v. Lowery, 201 F.3d 942, 947 (7th Cir. 2000).

319. *Johnston*, 442 F. Supp. 2d at 1271; Nakamoto v. Fasi, 64 Haw. 17, 22–26 (1981).

320. The Supreme Court has perhaps provided a preview of how they would interpret the doctrine of unconstitutional conditions in its "reasonable expectation of privacy" jurisprudence. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that an individual has no reasonable expectation of privacy in the telephone numbers he calls, because he "voluntarily" communicates these numbers to the telephone company when he dials them. *Id.* at 744. According to *Smith*'s reasoning, the only way to maintain a reasonable expectation of privacy in

D. *Antiterrorism Searches Are* Sui Generis*; Courts Should Create a New Category of Suspicionless Searches*

Another possibility is simply to concede that antiterrorism searches are *sui generis* and create a new, narrowly tailored exception to the individualized suspicion rule. This rule could be designed so that it would apply only to searches designed to prevent terrorist actions, thus responding to contemporary dangers without unnecessarily broadening the scope of special needs searches in other contexts.[321] As one commentator noted: "[T]he exception might expand to cover a variety of different search methods employed in new contexts as the type of weapons and the types of targets changed over time."[322] If the exception stood on its own doctrinal basis, none of these changes would affect other types of suspicionless searches.[323] This is not a trivial benefit. As one commentator points out, this country has conventionally recognized a "traditional criminal process" and an emergency criminal process.[324] The former, defined as "investigation with the goal of proving criminal charges in an ordinary criminal court,"[325] provides substantial rights to defendants, including the right to a speedy and public trial. The latter, which involves the military justice system as well as special military tribunals that are created during times of emergency, is a more flexible and efficient process in which "constitutional and statutory rules apply more leniently, [so] executive officials have discretion to craft strategies for the specific needs of a particular investigation or other activity."[326]

Historically, these two types of criminal processes have remained somewhat separate, but the government's response to the 2001 terrorist attacks has changed that somewhat. Today, many of the

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telephone numbers is to not use the telephone at all. A similar analysis applied to the doctrine of unconstitutional conditions would invariably result in findings of implied consent for almost every activity.

321. *See* Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 FORDHAM L. REV. 3231, 3287–91 (2006) (arguing for a *sui generis* approach to mass transit searches).

322. *Id.* at 3289.

323. *Id.*

324. *See* Parry, *supra* note 3, at 766 ("[T]he 'war on terror' has accelerated the development of a new criminal process and . . . this new process has increasingly displaced traditional methods of investigating, prosecuting, and punishing people who have engaged in conduct that is subject to criminal penalties . . . .").

325. *Id.* at 791–92.

326. *Id.* at 792.

extraordinary actions taken by the government in response to the crisis posed by terrorist threats affect the traditional criminal process, resulting in a hybrid process in which "legally authorized discretion is increasingly valued as a way to respond to a steady stream of perceived crises."[327] In practical terms, the current war on terror has resulted not only in detention without charge and trial by a special tribunal for terrorist suspects in Guantánamo, but also in enhanced search and seizure powers against all citizens, including warrantless wiretapping of overseas telephone calls, data mining of financial information using national security letters, and more frequent detention of material witnesses.[328] Although suspicionless searches are (for the most part) carried out by local law enforcement, they are part of this same trend. If these heightened powers of surveillance can be limited more explicitly to terrorism investigations, the incremental expansion of these powers to everyday investigations can be prevented.

Creating a new exception would also help to shore up the integrity of the special needs doctrine—because preventing terrorism is not really a special need distinct from law enforcement, courts would no longer have to use terms like "administrative," "regulatory," and "law enforcement purpose" in ways that have nothing to do with their actual meaning. This could be a critical first step to bringing logic and doctrinal consistency to what is now a very confused jurisprudence.

The Supreme Court has even hinted that a new exception might be appropriate for antiterrorism searches. *Edmond*, in which the Court struck down a suspicionless roadblock designed to detect illegal drug trafficking, commented in dicta that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack."[329] Although the Supreme Court used the word imminent, the Foreign Intelligence Surveillance Act (FISA) court later relied in part on this dictum to approve wiretap applications that were meant to detect terrorist activity.[330] Noting that the Supreme Court had implicitly approved of applying

327. *Id.* at 835.

328. *Id.* at 770–82.

329. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000); *see also* Gould & Stern, *supra* note 3, at 821–23 (analyzing the implications of this statement).

330. *In re* Sealed Case, 310 F.3d 717, 745–46 (FISA Ct. Rev. 2002).

the special needs doctrine in the case of "an imminent terrorist attack," the FISA court argued that "[t]he nature of the 'emergency,' which is simply another word for threat, takes [antiterrorism cases] out of the realm of ordinary crime control."[331]

In a recent article, Judge Ronald Gould of the Ninth Circuit, writing with his former law clerk Simon Stern, used this language to support a new exception to the individualized suspicion requirement.[332] The authors proposed broadening the special needs doctrine to allow any search as long as (1) the search is meant to "prevent catastrophic harm;" (2) the search "goes beyond routine police functions;" (3) the search is "as effective as is practical . . . [and] minimize[s] harm to the public;" (4) the officers' discretion is constrained and the search is not discriminatory; and (5) under the totality of the circumstances, the balance favors the governmental interest when compared with the infringement on the privacy of those searched.[333]

One problem with creating this new exception is evident both in the FISA court's opinion and in Gould and Stern's proposed test: even with a rule designed specifically for antiterrorism searches, the slippery slope problem still exists. This slippery slope is even apparent in the transition from *Edmond*'s dictum to the FISA court opinion: *Edmond* spoke of a search to meet an imminent threat in an emergency situation, but the FISA court—inexplicably equating "emergency" with "threat"—used this language to justify a wiretap when there was no evidence of an emergency or imminent harm. And the Gould and Stern test contains a final factor that simply asks courts to balance the governmental interest against the privacy infringement—thus providing no principled bright-line test to guide courts and limit the types of search that may be permitted.[334]

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331. *Id.* at 746.

332. Gould & Stern, *supra* note 3, at 823.

333. *Id.*

334. The Gould & Stern test is only one of many proposed tests that ultimately rely on the reasonableness of the search. For example, Professor Edwin Butterfoss proposes a test first developed by Scott Sundby twenty years ago—divide searches into two categories: "initiatory intrusions" and "responsive intrusions." *See* Butterfoss, *supra* note 252, at 488 (quoting Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 418–21 (1988)). Responsive intrusions would be covered by the full range of Fourth Amendment protections whereas initiatory intrusions would be subject to a balancing test based on the subject's reasonable expectation of privacy, the level of intrusion, and the magnitude of the government interest. *Id.* at 488–95.

Recently, Professor Ricardo J. Bascuas proposed his own test that avoids the problematic "totality of the circumstances" language found in many of the proposed antiterrorism exceptions. In an attempt to set out concrete, principled guidelines for suspicionless antiterrorism searches, Bascuas proposes a test that permits such searches if: (1) they are "justified by credible, non-speculative evidence of . . . danger;" (2) the "danger must entail imminent physical injury;" and (3) "anything seized unrelated to the danger . . . [is] suppressed."[335] This test goes a long way toward providing stable guidelines for these searches, as well as preventing pretextual searches in which law enforcement officials conducting ordinary crime control claim to be deterring terrorist activity to bypass ordinary Fourth Amendment rules.

But even a well-crafted, narrowly tailored exception for antiterrorism searches is problematic; depending on how it is interpreted, it is either too narrow or too broad. Bascuas's proposal, for example, requires "credible, non-speculative evidence" and "imminent physical injury."[336] Bascuas uses these terms to distinguish between the vague "alarmist policy arguments" that failed to justify the search of protesters in *Bourgeois* with the concrete "sober evidence" produced by the N.Y.P.D. to justify the subway searches in *MacWade*.[337] But what exactly constitutes credible, non-speculative evidence of an imminent attack? In *MacWade*, the government showed that there had been two plots to bomb the subway over the past eight years, and that terrorists had recently bombed the subway systems of three European cities.[338] Although this surely demonstrates that subway systems are a tempting target for terrorists, does it

335. Bascuas, *supra* note 2, at 781. The concept of precluding any evidence found that is not related to the danger which justifies the search is an intriguing one. Justice Scalia suggested this idea at one point in the context of *Terry* stops, saying that it is supported by "the theory that half a constitutional guarantee is better than none." Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) ("If I were of the view that *Terry* was (insofar as the power to 'frisk' is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered . . . ."). But ultimately this "half a constitutional guarantee" is insufficient in the context of antiterrorism searches because it still allows the government to conduct suspicionless searches and use the weapons that are recovered in a subsequent criminal prosecution, thus bypassing the individualized suspicion requirements of the Fourth Amendment.

336. Bascuas, *supra* note 2, at 781.

337. *Id.* at 786.

338. MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006).

represent credible evidence of an imminent attack? And how would a court apply this test to the original antiterrorism searches at airports and public buildings? Terrorists have targeted airplanes, and airplanes are particularly vulnerable to massively destructive acts of violence, but is there any evidence that an attack on airplanes is imminent? And what evidence exists to support an imminent attack on judges or courthouses?

This critique is not specific to Professor Bascuas's test; it applies to any attempt to create a new antiterrorist exception to the Fourth Amendment. Either it will only apply for a short period of time after a credible threat has been detected in a certain area or venue, in which case the search will no longer be justified once the imminence wears off, or it will remain in place in perpetuity, like the searches at airports and public courthouses, long after the concrete and imminent threat has subsided. The latter, of course, is far more likely.[339] And in any case, it will still be the terrorists who control the scope of the exception; successful attacks against a certain type of target—or even foiled plots that are uncovered by law enforcement—will represent credible evidence that an imminent (yet never-ending) threat exists for that category of target nationwide.

* * *

This Part has considered four possible justifications for suspicionless antiterrorism searches: using a generalized reasonableness standard, relying on the legislature and the democratic process to set the limits of what is reasonable, applying the doctrine of implied consent, and creating an entirely new category of suspicionless searches tailored for antiterrorism cases. Unfortunately, none of these potential justifications are viable, which leads—perhaps reluctantly—to the conclusion that these searches should not be permissible at all.

VI. WHAT IF SUSPICIONLESS ANTITERRORISM SEARCHES ARE UNCONSTITUTIONAL?

We have seen that suspicionless antiterrorism searches do not fit into the administrative or special needs categories to which they have been assigned. Because they are designed to prevent and detect criminal behavior, and because law enforcement uses the results of

339. *See supra* notes 57–66 and accompanying text.

these searches, it is a legal fiction to say that they serve a purpose other than law enforcement. Thus, only three options remain: abolish the special needs threshold and simply analyze these searches under a generalized reasonableness standard;[340] create a new exception to the individualized suspicion requirement and tailor that exception for antiterrorism cases; or conclude that suspicionless antiterrorism searches should be unconstitutional. There are problems with the first two options: an unchecked slippery slope, an ominous but inexorable (and probably irreversible) shift in perceptions of what constitutes a reasonable search by the government, and ultimately allowing the terrorists themselves to determine the scope of Fourth Amendment liberties.[341] In short, the first two options are essentially abandoning principled limitations at a time when those principles are needed the most. Therefore, it is at least worth asking: what if these searches were found to be unconstitutional?

A. Abolishing Antiterrorism Searches

The simplest option would be to abolish antiterrorism searches altogether. At first, this possibility seems unthinkable: surely no court today would forbid the long-standing suspicionless searches at airports and public courthouses. The very fact that this last option seems unthinkable is itself deeply troubling: in only thirty years, the notion of law enforcement agents subjecting individuals and their belongings to suspicionless searches has become not just constitutional and acceptable, but also thought to be indispensable. The searches have become a part of our way of life, a part of our culture, so that we have come to accept that there is no other way to keep us safe on airplanes or in courthouses. In this sense, it may be instructive to consider how "unthinkable" it was to many Americans when the Supreme Court desegregated public schools,[342] or when the Supreme Court required suppression of any confession made without

340. The reasonableness test will apply even if law enforcement tries to rely on implied consent to justify its searches, due to the doctrine of unconstitutional conditions. *See supra* notes 311–17 and accompanying text.

341. *See supra* notes 285–307 and accompanying text.

342. *See* Brown v. Bd. of Educ., 394 U.S. 294, 299 (1955) ("Full implementation of these constitutional principles may require solution of varied local school problems.").

an informed, express waiver of a right to counsel.[343] Indeed, the dissent in *Miranda v. Arizona*[344] predicted that "a good many criminal defendants who would otherwise have been convicted . . . will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted."[345] Of course, nothing of the kind actually occurred—instead, the Court merely forced law enforcement to adhere to certain fundamental requirements of the right against self-incrimination, and law enforcement officers were able to adapt their tactics so that defendants were still convicted at the same rate.[346]

As with *Miranda*, the actual effect of declaring such searches unconstitutional might be far less severe than it first appears. Even without suspicionless searches, the police would be far from powerless to detect and apprehend potential terrorists. As Professor William Stuntz has pointed out, even if suspicionless searches were not allowed, police could use existing authority to great effect.[347] According to Stuntz, the combination of *Atwater v. City of Lago Vista*[348] (which held that the police could make an arrest—and therefore an attendant search—for any crime, regardless of how trivial[349]), and *Whren v. United States*[350] (which held that an officer's motive in conducting a search is irrelevant[351]) already give police broad powers to conduct de facto suspicionless searches in almost any

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343. *See* Miranda v. Arizona, 384 U.S. 436, 492 (1966) (holding a criminal defendant's confession to police inadmissible without a "knowing and intelligent waiver" of Fifth Amendment rights).

344. Miranda v. Arizona, 384 U.S. 436 (1966).

345. *Id.* at 542 (White, J., dissenting). Justice White continued rather dramatically:

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.

Id.

346. *See, e.g.*, RICHARD A. LEO & GEORGE CONNER THOMAS, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 56 (1998).

347. *See* Stuntz, *supra* note 307, at 2141. Professor Stuntz argues that the current system, which allows police to conduct suspicionless antiterrorism searches in some contexts and promises to allow them in many more as time goes on, represents a "healthy bribe" to the police to prevent them from engaging in more intrusive and discriminatory searches. *Id.*

348. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

349. *See id.* at 354.

350. Whren v. United States, 517 U.S. 806 (1996).

351. *See id.* at 813.

context.[352] When further combined with the low standard that justifies a *Terry* search and the ease with which police can elicit consent, police have plenty of options without resorting to suspicionless searches.[353]

In many contexts, particularly commercial air travel, private companies would immediately pick up where law enforcement left off. Allowing airlines to screen their own passengers and luggage would pose no Fourth Amendment problems.[354] Public law enforcement could focus on less intrusive methods of preventing air piracy, such as increased use of sky marshals. New technologies could be deployed that do not implicate the Fourth Amendment, such as trace detection machines that only alert if illegal explosives are detected.[355]

In other contexts, such as suspicionless searches at public buildings, the necessity argument is much weaker: is there really no other way of protecting court personnel than to place a security cordon around every government building and create a miniature "green zone" on the inside? Is the threat posed by terrorists (or ordinary criminals) so much more severe in the context of government buildings that extraordinary search procedures are justified there, as opposed to at a public school, or along a parade route, or at a public sporting event?

At any rate, suspicionless searches at the entryway of public buildings do nothing to prevent the threat of a real terrorist attack—a car bomb or other large explosive being detonated outside, next to, or underneath the building; currently, physical impediments (such as bollards and setbacks from the road) prevent such crimes.

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352. Stuntz, *supra* note 307, at 2158.

353. Given this existing broad authority, Stuntz argues that allowing an even greater range of suspicionless searches and more carefully regulating the manner in which they are carried out would be preferable. *Id.* at 2168–69.

354. Under the state action doctrine, the Fourth Amendment would be implicated as long as these searches were required by the government, as has been the case since the early 1970s. Thus, the government would have to abolish the requirement and allow airlines to take responsibility for their own passengers' safety. Consumers may or may not find this to be a welcome development; private security guards may be more or less abusive—or more or less effective—than government personnel.

355. A surveillance procedure that can only detect the presence or absence of illegal activity is not considered a search under the Fourth Amendment. *See* United States v. Place, 462 U.S. 696, 707 (1983) (concluding that luggage sniffing by narcotics detection dogs is not a search under the Fourth Amendment).

Furthermore, if law enforcement personnel had any reasonable suspicion of a threat, they could still conduct *Terry* searches of that individual. And lastly, the criminal law itself would provide a powerful deterrent to any criminal activity, as it does in every other context—in fact, the deterrence would be even more powerful than usual because it is almost certain that anyone who committed a crime inside a courthouse or other government building would be apprehended, and security cameras would provide solid evidence at any subsequent trial.

But most people would say these safeguards are not nearly enough. At airports, private security guards may not be as well trained as government agents, and the threat that terrorists pose to air traffic is a matter of national security, not to be left to the cost-benefit calculations of the private sector. At courthouses, there may be certain times when higher security is required—during the trial of a particularly high-profile terrorist, or after a credible threat has been received regarding a city or public buildings generally. And as far as the deterrent effect of the criminal sanction, many terrorists have proven themselves to be undeterrable; thus, the prospect of being captured and imprisoned after their crime has been committed will do little to prevent them from carrying out their actions.

The special needs doctrine provides a ready solution to these problems: suspicionless searches could be permitted as long as the government is not permitted to use any fruits of the search in a subsequent prosecution. In other words, such a search would be perfectly legal—because it is justified by the special need of protecting public safety—so citizens could not bring any civil suits against government agents who conducted suspicionless searches for terrorists. If the government agents, however, sought to use the evidence recovered in the search in a subsequent prosecution, a court would conclude that the search was no longer a special need search, but rather was conducted for the purpose of crime control, and so the search would be unconstitutional. Thus, the searches would be allowed to prevent any terrorist attack from occurring, but the exclusionary rule would apply so that any contraband that was recovered would be precluded from use during any subsequent criminal trial.

B. Allowing the Searches, but Precluding the Evidence

Although at first this proposal sounds radical (not to mention politically unpalatable), it finds strong support in criminal procedure

jurisprudence. Most importantly, it comports with the legitimate justification for special needs searches. Originally, suspicionless searches were allowed only if the government agents were conducting the search for a purpose other than generalized crime control. This threshold requirement has been watered down to nonexistence over the decades, culminating in the rather absurd—but consistently repeated—assertion that preventing terrorist actions is not a law enforcement purpose. Not every special needs search suffered from this fatal weakness: some—the original administrative searches—sought information for a legitimate regulatory purpose. Others—for example, the cases involving drug testing of school children or public employees—involved searches for unambiguously criminal activity, but did not use the results for criminal prosecutions.[356] If the government did not use the results of suspicionless antiterrorist searches in a subsequent prosecution, these searches would fall squarely into the second category of special needs searches, alongside the drug tests of *Acton*, *Skinner*, and *Von Raab*.[357] To carry the analogy with the drug testing cases one step further, under the current doctrine, suspicionless antiterrorist searches at airports are really the same as the invalidated drug tests in *Ferguson*, in which the public hospital tested pregnant mothers—supposedly to protect the health of the mother and fetus—and then turned the results over to law enforcement.[358] If the fruits of the search were barred from use in future criminal prosecution, these searches would become more like those of schoolchildren in *Acton* and public train drivers in *Skinner.*

Essentially, barring the government from using the fruits of the search in a subsequent prosecution would accomplish very simply what many courts have been trying to establish throughout the tortured history of antiterrorism searches: ensure that the actual purpose of the search is to prevent terrorist actions, rather than to detect, apprehend, and prosecute criminals. The court in *MacWade*, for example, concluded that the New York subway search program served a need other than law enforcement because the officers "search only those containers capable of carrying explosive devices,

356. *See supra* Part IV.A.

357. *See supra* Part IV.A.

358. *See* Ferguson v. City of Charleston, 532 U.S. 67, 71–73 (2001); *see also supra* notes 242–51 and accompanying text.

and they may not intentionally search for other contraband."[359] Likewise, some of the first courts to review suspicionless airport searches relied on the implied consent of the suspect being searched as evidence that the search was narrowly tailored to prevent terrorism, and therefore did not serve a general crime-control purpose.[360] But these arguments do not really show that the searches serve a need other than law enforcement; they merely perpetuate the fiction that detecting and arresting people who seek to blow up subway cars or airplanes is not a law enforcement purpose.[361] If the results of a search were not used in a future criminal prosecution, there would be no doubt that "the essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all."[362]

Another way of looking at this rule is to say that if law enforcement officials decide to use the fruits of the search in a criminal prosecution, it would create a conclusive presumption that the search was conducted for traditional law enforcement purposes, thus triggering the Fourth Amendment's individualized suspicion requirements. This would create a simple solution to the problem that the Supreme Court created with *Edmond* and *Ferguson*: how to determine when a search was conducted for traditional law enforcement purposes.

Adopting this rule would mean that the focus of suspicionless antiterrorist searches would truly be on prevention, not on apprehension and subsequent punishment. Of course, applying the exclusionary rule would make these searches less effective at

359. MacWade v. Kelly, 460 F.3d 260, 270 (2d Cir. 2006).

360. *See, e.g.*, United States v. Davis, 482 F.2d 893, 910–11 (9th Cir. 1973) ("To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft. It is difficult to see how the need to prevent weapons and explosives from being carried aboard the plane could justify the search of a person who had elected not to board." (footnotes omitted)), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc).

361. Professor Bascuas makes a similar, if more sophisticated argument by proposing to exclude any contraband that is "unrelated to the justification for suspicionless searches." Bascuas, *supra* note 2, at 787–88. This rule would ensure that antiterrorism searches are not used as pretexts for generalized crime-control searches, which is one of Bascuas's chief concerns. *See id.* at 758–69. But it does not go far enough because it does not address the fundamental hypocrisy of categorizing antiterrorism searches as special needs searches.

362. *See Davis*, 482 F.2d at 908.

prevention. Currently the risk of getting caught and ultimately going to prison is a strong deterrent to at least some potential terrorists, and incapacitation through incarceration can help to ensure that any particular criminal who gets caught will no longer be a threat for the time he is in prison. But many potential terrorist suspects are impossible to deter by any means, and so the absence of a threat of prison is unlikely to alter their behavior. And although they cannot be incapacitated through incarceration based on the recovered items, the government is not without options once a suspect is caught. Law enforcement agents could interview the suspect to learn more about his plans. They could begin surveillance on the suspect.[363] In many cases, they would be able to institute deportation proceedings against the suspect. These options would not be as effective as using the results of the search in the criminal prosecution—but again, the focus of the suspicionless searches is by definition not bringing the suspect to justice; rather, it is preventing the terrorist act from occurring.

In dissent, Justice Marshall argued in favor of this sort of rule in the Fifth Amendment context, pointing out that if a police officer wished to protect public safety, he or she was free to ignore the *Miranda* rules—but that this should not somehow render the compelled testimony admissible:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information.[364]

Marshall acknowledged that in certain situations, this would mean the defendant would go free if there were no other way to prosecute him for the crime. But "however frequently or infrequently

363. Although the "fruit of the poisonous tree" doctrine would prevent law enforcement officials from using any evidence that was discovered as a direct result of the suspicionless search (for example, a confession resulting from the subsequent arrest), it would not preclude law enforcement from beginning to monitor the public activities of the suspect and gather evidence of any new crimes against him. *See generally* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963) (describing operation of the "fruit of the poisonous" tree doctrine in the context of illegal police actions).

364. New York v. Quarles, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting).

such cases arise, their regularity is irrelevant. The Fifth Amendment prohibits compelled self-incrimination."[365]

Of course, the Court rejected Justice Marshall's argument in the Fifth Amendment context, creating a public safety exception to the *Miranda* rule.[366] Yet the Supreme Court has confirmed that—outside the public safety context—law enforcement officers are faced with a choice: they are free to ignore *Miranda* as long as they do not use any subsequent statements at a criminal trial.[367] Allowing suspicionless antiterrorism searches but precluding the evidence from trial would give the officers the same choice.

Many would argue that the analogy with Fifth Amendment jurisprudence is fallacious. The Fifth Amendment precludes compelled self-incrimination, which naturally leads courts to conclude that the Amendment does not apply if the statements are not used in a criminal case.[368] The Fourth Amendment's text is much broader; it precludes all "unreasonable searches," regardless of how the government uses these searches. And the Supreme Court has said numerous times that the Fourth Amendment applies with equal force to civil and criminal cases, whether or not the evidence is used in a subsequent trial.[369]

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365. *Id.* at 687.

366. *Id.* at 657–58 (majority opinion). The Court employed reasoning quite similar to what is used to justify suspicionless antiterrorism searches in the Fourth Amendment context, *id.*, noting that "we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety," *id.* at 658 n.7.

367. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 766 (2003) (reasoning that Fifth Amendment rights are not implicated when statements by a subject of a police investigation are not admitted in a criminal proceeding). Just as with suspicionless antiterrorism searches, the courts seem unwilling to apply this doctrine when there is a vague risk to public safety—even though the existence of a danger to public safety has no bearing on whether or not a statement is the result of a coercive interrogation. *See* Parry, *supra* note 3, at 816–18 (noting that "interrogation issues . . . are litigated along two tracks," and using this as an example of how a "new criminal process"—more like war and less like crime control—"restricts the space in which constitutional rights operate to the courtroom alone").

368. The Fifth Amendment is also distinct from the Fourth Amendment in that the former provides a right and a remedy together—effectively stating that compelled testimony is inadmissible in a criminal proceeding. The Fourth Amendment provides a right but no remedy, which has led to courts creating the exclusionary rule.

369. *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 530 (1967) ("But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." (quoting Frank v. Maryland, 359 U.S. 360, 367 (1959), *overruled by Camara*, 387 U.S. 523)).

But the special needs doctrine itself is proof that this is not in fact how the Fourth Amendment has been applied: if evidence that is found as a result of a search is not used for a criminal prosecution, the Court is willing to suspend the individualized suspicion requirement. As it turns out, this is a perfectly sensible distinction. Shifting the focus from the purpose of the search to the use of the results helps to resolve a glaring inconsistency in Fourth Amendment law.

The Supreme Court has made it clear that judges should not delve into the subjective intentions of law enforcement officers who conduct a search[370]—yet the purpose of the search is a critical issue in deciding whether the special needs doctrine applies. If the fruits of the search are never used in a subsequent criminal prosecution, it is easy to determine that the purpose of the search was other than law enforcement. But otherwise it is almost impossible to distinguish between the purpose of the search (the determinative question in special needs cases) and the subjective intentions of those who conduct the search (an improper inquiry under current Fourth Amendment jurisprudence).

One commentator tries to resolve this inconsistency by distinguishing between the "motive" of a search and the "fringe benefits" of the search,[371] or by inquiring whether or not crime control was the "causative or substantive factor" in the decision to conduct the search.[372] The Supreme Court itself in *Ferguson* tried to draw a distinction between the immediate purpose of the search and the ultimate purpose of the search—or whether law enforcement was a means to an end or a happy side effect of the search.[373] But none of this matters to the suspect who is being searched; his reasonable expectation of privacy is being infringed upon to the same degree regardless of the motive of the search.

In other words, one should pay less attention to *why* the search was conducted—which requires courts to delve into the mind of the police officers or police officials, and probably has multiple

370. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (declining to analyze the subjective intent of police officers in the context of the Fourth Amendment).

371. Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agenda*, 111 PENN ST. L. REV. 293, 305 (2006).

372. *Id.* at 309.

373. *See supra* notes 242–51 and accompanying text.

answers[374]—and instead focus on *how* the results of the search are used once they are acquired: are they used as evidence in a criminal prosecution or merely to establish regulatory violations, maintain school discipline, or prevent a bomb from coming on board an airplane? This distinction is logical: an individual who is being searched by a law enforcement officer does not care why the officer is searching him—a checkpoint and visual search of a car pursuant to a drunk-driving checkpoint[375] is just as intrusive as a checkpoint and visual search of a car by officers looking for information on a recent hit and run.[376] But a subject is likely to care quite a bit about whether the results of the search will later be used in a criminal prosecution against him.

In short, one of the primary reasons for limiting the power of the state when it conducts searches is the state's ability to use the fruits of the search to prosecute individuals. What the special needs cases indicate is that these searches become less intrusive—and thus possibly constitutional—if the law enforcement agent does not use the results of the search in a subsequent criminal prosecution.

C. Responding to Potential Criticisms

A rule allowing suspicionless antiterrorism searches would find plenty of opposition on both ends of the political spectrum. To conservatives, the idea that a police officer could apprehend a criminal attempting to blow up an airplane or shoot a judge and then not be allowed to use the recovered evidence against the criminal might seem ludicrous. But of course this is already the law in every other Fourth Amendment context: if law enforcement officers search someone without any individualized suspicion and recover contraband of any kind, the exclusionary rule precludes the contraband from being used in court. There is no reason why certain crimes should be exempt from the exclusionary rule, however serious they may be. Of course, the exclusionary rule itself has been the

374. Of course, it is somewhat easier to determine the purpose of a search if courts look to the *programmatic* purpose of the search, as opposed to the individual motive of the officer conducting the search, but by either definition any given search would probably have multiple purposes.

375. *See supra* notes 234–41 and accompanying text.

376. *See supra* note 241. *Compare* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (holding the Indianapolis drunk driving checkpoint system unconstitutional under the Fourth Amendment), *with* Illinois v. Lidster, 540 U.S. 419, 427–28 (2004) (upholding the constitutionality of police checkpoints used to ask motorists about a hit-and-run incident).

subject of a significant amount of criticism,[377] but for the moment it remains the centerpiece of enforcement for criminal procedure violations, and so in a sense this Article merely proposes that the rule should be applied to every search, regardless of the type of crime being investigated.[378]

Liberals, meanwhile, might worry about abuse on the part of law enforcement: if police no longer need to worry about violating the Fourth Amendment, what will prevent them from conducting overly intrusive searches when searching for terrorists?[379] One response to this concern is to take a realistic look at the state of the suspicionless search doctrine. Many courts have held that antiterrorism searches meet the regulatory purpose of protecting public safety. And most courts that have rejected the special needs test for antiterrorism searches (such as *Johnston* or *Seglen*) are willing to change their minds if there is credible evidence of a terrorist threat—thus opening the door to widespread, indiscriminate suspicionless searches in the name of preventing terrorism. The only other check under current law on the government's ability to conduct such searches is that they must be reasonable—and as this Article demonstrates, this is at best an unpredictable test, with the government more and more likely to win as the terrorist threat (or the perceived terrorist threat) increases. Thus, under current law the government does not face many obstacles in creating suspicionless antiterrorism searches—and if the government agents overstep their bounds and conduct a search that is unreasonable, the usual remedy is simply that the evidence cannot be used in court—which would be no different from the result under the proposed rule.[380]

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377. *See* H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1, 1–2 (surveying criticism of the exclusionary rule). *See generally* Amar, *supra* note 33, at 785–800 (critiquing the exclusionary rule as a remedy for violations of constitutional rights).

378. Even if the exclusionary rule is eventually abolished by the Supreme Court, the rationale for excluding contraband recovered in special needs searches remains because the search can only be honestly termed "special needs" if the results of the search are not used against the suspect in a criminal trial.

379. Judge Friendly, for example, warned against unbridled searches if police were no longer concerned with the Fourth Amendment. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 949 (1965) (analyzing the relationship of the exclusionary rule to the Fourth Amendment).

380. It is true, of course, that individuals whose Fourth Amendment rights are violated have the right to bring a civil rights suit under 42 U.S.C. § 1983. *See, e.g.*, Torbet v. United Airlines, 298 F.3d 1087, 1088 (9th Cir. 2002) (presenting factual background for a statutory claim of a

Another response to those worried about overly intrusive searches is that even if the Fourth Amendment allowed indiscriminate suspicionless antiterrorism searches, the Due Process Clause would still apply to limit the search method used by the police and prevent abuses of this power.[381] There is a long history of case law that defines the due process limits of police activity, leading to a well-established test: police activity that is "so brutal and so offensive to human dignity" that it "shocks the conscience" violates an individual's due process rights.[382] If an antiterrorism search was so extremely abusive that it met this high standard, the subject of the search would be able to recover damages from the law enforcement officer.[383]

For example, a brief pat-down search of every person who enters the subway system at a certain station could be termed a special needs search. As long as the police do not seek to use any contraband

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Fourth Amendment rights violation). These lawsuits are rare, however, and are not the primary mechanism for enforcing the Fourth Amendment.

381. As noted above, Fifth Amendment jurisprudence already has a similar two-tier system: if the government agents want to use an individual's statements against him in a criminal trial, it must comply with *Miranda* and all the other Fifth Amendment requirements. If it has no intention of using the information at trial, it need not comply with *Miranda*—but it is not completely unregulated. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 773 (2003) ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.").

382. Rochin v. California, 342 U.S. 165, 172, 174 (1952); *see also* Breithaupt v. Abram, 352 U.S. 432, 435 (1957) (holding that a blood test taken from a criminal defendant does not "shock the conscience"). It is true that the Supreme Court has said that if police action is covered by the Fourth Amendment, the Due Process Clause will not apply to the search. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 394–95 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). A search that is truly a special needs search (in that the fruits of the search are not used in a subsequent prosecution), however, could be considered to be outside the scope of the Fourth Amendment and therefore covered by the Due Process Clause.

383. If this standard is too low, or if the threat of civil lawsuits is so weak that it is insufficient to deter abusive police behavior, there is nothing preventing cities, states, or the federal government from passing legislation to raise the standards, or make lawsuits easier to file, or to prohibit certain specific egregious practices. *See generally* Parry, *supra* note 3, at 819–20 (discussing potential legislative or judicial responses to illegal police actions). Here is one place in which political process theory would predict intervention by the legislature, especially if the abusive practices were used during widespread, indiscriminate suspicionless searches (and if they were not, the subjects of the search could conceivably file an equal protection claim).

recovered in such a search in a subsequent criminal trial, the search would not violate the Fourth Amendment. And because the pat-down search did not shock the conscience, it would not violate the Due Process Clause, and thus would not subject the police officer to any civil liability.

If the police officers, however, sought to use the recovered evidence in a subsequent criminal trial, the search would no longer be considered a special needs search and would violate the Fourth Amendment (leading to exclusion of the evidence and potential civil liability against the officer). And if the police conducted a blatantly overintrusive search—say, conducting a suspicionless strip search of some of the passengers—a court could find that the search shocked the conscience and violated the Due Process Clause, thus opening up the officer to civil liability.

But of course fear of civil judgments would not be the real check on police behavior. Just as under current law, the exclusionary rule would provide a strong incentive for police officers to find some other way to conduct the search that would allow them to use the evidence in court.

Essentially, this proposal would give law enforcement officers a choice: if their true goal was to prevent an armed criminal from boarding a plane—or boarding a subway, or entering a public courthouse, or entering a sports arena, or attending a protest, or driving near a dam—they could set up a suspicionless search program to detect any explosives or other weapons, ensuring that such contraband is confiscated and the terrorist act is prevented. If their goal is to apprehend the armed criminal and bring him to trial—in other words, if they have a criminal law purpose—they would need to design a search regime that comported with the usual Fourth Amendment requirements, which would include some form of individualized suspicion.

Thus, the rule would have several benefits. First, it would give law enforcement the flexibility to decide which priority is more important for the given context. If there is a credible threat that must be responded to regarding, say, a specific trial or protest, law enforcement officers could develop a suspicionless search regime, emphasizing prevention at all costs and abandoning their crime detection function. But in the absence of a credible threat, law enforcement officers would decide to revert to legitimate surveillance procedures, the results of which could be used in court. The decision

of which type of search to use would be made by the individuals in the best position to make such a decision: law enforcement officers themselves. And unlike the searches at airports and courthouses—which became legally and thus culturally entrenched, and are now permanently part of American life—intrusive security procedures that are put into place because of the increased threat would only be temporary, until the specific, credible threat receded and the police decided to shift priorities to attempt to apprehend and prosecute perpetrators.

Second, the rule would give law enforcement *more* powers to search if it were truly intending only to prevent a terrorist attack. They would no longer have to worry about whether their actions complied with the inconsistent and ever-changing case law in this area, and they would no longer have to prove that they had a specific and concrete threat (and they would no longer need to guess about what a judge might think that term means). But the ban on using the fruits of these searches would be an automatic check against police frequently resorting to overly intrusive techniques: the fact that the contraband that is recovered cannot be used in subsequent criminal proceedings would provide a strong incentive for law enforcement to conduct this type of search sparingly. And, as discussed above, the Equal Protection Clause and Due Process Clause would still apply, precluding any discriminatory or extraordinarily intrusive searches.

Finally, this rule would provide police with a strong incentive to develop more effective but less intrusive methods of antiterrorism surveillance, such as machines that could detect the presence of explosives or firearms without revealing any other information about the suspect and without subjecting him to a physical search.[384] As noted above, banning suspicionless searches entirely would provide an even stronger incentive, but would also compromise security in those situations in which there is a real threat of a terrorist attack.

384. These types of searches are known as binary searches because they are designed to only tell a law enforcement officer whether or not illegal conduct is occurring, without other information about the suspect—essentially producing an output of either "yes" or "no." Examples of binary searches currently in widespread use by law enforcement are drug-sniffing dogs and narcotics field tests. These searches do not implicate the Fourth Amendment under the *Katz* standard because they do not violate a reasonable expectation of privacy. *See* United States v. Place, 462 U.S. 696, 707 (1983) (holding that an inspection by a narcotics dog trained to sniff contraband without opening passengers' luggage does not violate the passengers' Fourth Amendment rights). For a further discussion of the legality of binary searches, see Ric Simmons, *Technology-Enhanced Surveillance by Law Enforcement Officials*, 60 N.Y.U. ANN. SURVEY AM. L. 711, 718–19 (2005).

This rule still encourages creativity and innovation in developing less intrusive surveillance tools and procedures, but would ensure that law enforcement could still provide protection when necessary.

CONCLUSION

When antiterrorism searches first began, they no doubt seemed reasonable to the public and to the courts. In the late 1960s, air piracy and domestic terrorism were seen as real threats to the United States' security, and law enforcement seemed powerless to combat these threats through ordinary means. Instituting a regime of blanket suspicionless searches was the only effective solution—and the searches were indeed effective. Once the problem was solved, why would anyone want to dismantle the search regimes and revive the old dangers and risks?

Likewise, the administrative search doctrine began innocently enough. Health inspectors had an important job to do, and they could not do it effectively if they needed to generate individualized suspicion before conducting their inspections. And because their inspections were far removed from the harm the Fourth Amendment was meant to prevent, allowing suspicionless searches for purely regulatory purposes seemed harmless—a thoughtful compromise based on the reasonableness language in the Fourth Amendment.

But in both instances, this Article demonstrates that these reasonable compromises have grown into an inconsistent tangle of case law, justified by a broad Fourth Amendment loophole whose premise—that detecting and preventing violent crime is not a law enforcement purpose—borders on the absurd. It is long past time to restore logic and principle to this area of the law, and the new wave of suspicionless antiterrorism searches presents courts with the perfect opportunity to do so. Precedent already exists in the special needs doctrine—numerous drug testing cases such as *Acton* and *Von Raab* look to how the fruits of the search are utilized as part of the test to determine whether the search was conducted for a law enforcement purpose. The obstacles are the thirty-five-year-old precedents, which—against all logic—held that searching airline passengers and courthouse visitors for weapons was a regulatory function.

These obstacles are all the more daunting because the searches that they affirm are now a generally accepted—and even welcome—part of everyday life. But if they are left undisturbed, the government

will continue using them to justify antiterrorism suspicionless searches in dozens of other contexts, and courts will be forced to approve of them all or to manufacture artificial distinctions between cases, creating an inconsistency and unpredictability that will inevitably leach into other special needs cases. By excluding the fruits of these searches from future criminal prosecutions, the courts will provide a simple, principled distinction between legitimate and illegitimate suspicionless searches—and their claims that these searches fulfill a special need other than law enforcement will actually be true.