When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism

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Abstract

In 2001, the airborne attack on the World Trade Center, unlike any other in U.S. History, shook America to her core. In the process, the hand of government was strengthened at the expense of the constitutional liberties afforded by the Fourth Amendment.\(^1\) *MacWade v. Kelly* is just one more example of the increasing governmental interest in securing this nation from another terrorist attack, and in so doing, subjecting Americans to more “big brother” government. In *MacWade*, the New York Police Department faced down a 42 U.S.C 1983 challenge to its Container Inspection Program (CIP) in the name of security.\(^2\) The Court used the traditional balancing test, under the “special needs” doctrine, to ratify the CIP and abrogate traditional Fourth Amendment protection against unreasonable search and seizure.

Terrorism is a new reality, and as such the world in which Americans live is fundamentally different today than it was a hundred, fifty, or even ten years ago. This author concedes this point, and stresses that the choices to be made in this new reality are, ultimately, political in nature. This article does not argue that the clock should be turned back—nor does it imply that such a thing is possible. This article simply looks at the

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\(^1\) See Walle Engedayehu, Andrew I.E. Ewoh, Anthony C. Covery and Lee A. McGriggs, *American Government with Readings*, Boston, MA: Pearson Custom Publishing, (2004) (explaining that the growth of the federal government in U.S. history has been a crisis-driven process, including the Great Depression, the Civil War, 9-11, and even the most recent crisis following the Katrina Hurricane).

\(^2\) *MacWade* v. *Kelly*, 460 F.3d 260, 263 (2d. Cir. (N.Y.)) (seeking “declaratory judgment, preliminary and permanent injunctive relief, and attorney’s fees”).
nature of the balancing test for Fourth Amendment jurisprudence in light of the governmental interest in combating terrorism. It may be that the pendulum must swing in the direction it is for a time, only to swing back later. But as such, it is prudent to watch the course of Fourth Amendment jurisprudence as it dilutes the protection it affords in the name of national security. Perhaps the liberties Americans have known are forever gone—it is my hope that they are only being borrowed for a time.

This article evaluates Fourth Amendment jurisprudence as applied in MacWade v. Kelly. After a review of the case and the history of the Fourth Amendment, with special emphasis on the “special needs” doctrine, this article looks at the application of the balancing test to MacWade. In MacWade the Court engages in a balancing test where one of the weights, governmental interest, is the threat of terrorist attack. This threat is so weighty that it eclipses all other aspects of the balancing test—including the invasion of privacy and the issue of efficacy. It may be that the government has found its “unstoppable force” in justifying nearly any intrusion on the Fourth Amendment’s territory—and in the words of Justice Blackmun, entitle the Court “to substitute its balancing of interest for that of the Framers.”iii The Bill of Rights, the historical “immovable object” protecting American civil liberties, may have met its match.

This article ends with a brief analysis of how this new “governmental interest” may go beyond the Fourth Amendment to erode other safeguards found in the Bill of Rights.

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iii New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)(concurring in the judgment of the court, and noting that the Court must, under the rubric embraced here, often replace the Framer’s intent with its own.)
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I. Introduction:

On July 29th, 2005, Brendan MacWade got up to go to work. He lived in Queens, but worked in Manhattan, only a few miles as a crow flies, but as anyone who lives in New York City, an arduous voyage on any given work-day. The trip can be made by car, but the traffic may cost the drive an hour or so, and then there is the forty dollar price tag for parking. Another alternative is to use a taxi—for about fifty dollars. Then there is the obvious choice, used by 1.4 billion passengers each year, the New York subway system. For about two dollars and in about 20 minutes, Brendan MacWade would be at work—but not today. Upon entering the subway system, he was met with uniformed police officers who insisted on searching his satchel. Startled, offended, and frightened, he refused. On July 29th, 2005 Brendan MacWade was obliged to find another route into the city.¹

The liberties that make America the envy of world are under attack, not from outside forces, but from a desire to make her safer. The Fourth Amendment is one of the most vulnerable of those liberties, having been eroded for years even before terrorism took on a whole new life in the aftermath of 9-11.² Now, in New York City, people trying to board a subway can be subjected to a warrantless search in the absence of any indication or suspicion of wrong-doing. Though many find this extra security assuring, one of the many lessons of history is that “it stands as a constant caution that in times of

¹ This description is drawn from the experiences of all of the plaintiffs, not just those of Brendan MacWade, and augmented for narrative purposes.

² Infra, note 290.
war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees.”³ National security is not a “get out of jail free” card for the government to do as it wishes, and the Courts are but one of the watchdogs of American liberties.⁴

How is the Fourth Amendment to survive the onslaught of terrorism? Fourth Amendment jurisprudence has already been compared to a “tarbaby,” in the words of one commentator, “a mass of contradictions and obscurities that has ensnared the ‘Brethren’ in such a way that every effort to extricate themselves only finds them more profoundly stuck.”⁵ This has become even more true in light of MacWade v. Kelly,⁶ where the

³ See Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984)(ruling that reparations for Japanese interred at the LLLLLL where entitled to remuneration for violations of their civil liberties).

⁴ Id.


⁶ MacWade v. Kelly, 460 F.3d 260, 263-64 (2d. Cir. (N.Y.))(addressing, for the first time, the random search of would-be passengers’ bags and personal belongings before allowing them to board the subway); but see American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-111652-GAO, 2004 WL 1682859 (D. Mass. July 28, 2004)(addressing this issue in very limited terms for a temporary policy put in place during the Democratic National Convention in Boston. The searches were limited in scope to a single bus line and a single subway line, and only during the convention).
dangers of a Fourth Amendment balancing test are revealed. It is one thing to use a
delicate balancing test in the courts, as they are no strangers to this process as indicated in
the depiction of Lady Liberty holding the scales of justice in her right hand. But in the
case of terrorism, it may be that the scales of justice have fallen victim to the ultimate
weight for which there is no counter.

This article first looks at the container inspection program implemented in New
York’s subway system in the aftermath of the London bombings. It then looks at the
history of Fourth Amendment jurisprudence with emphasis on the conception and
evolution of the “special needs doctrine”—the doctrine upon which the Second Circuit
Court was called to make its decision. This article then analyzes the balancing test used
by the courts and how it was applied in *MacWade v. Kelly*. It finishes with a discussion
of the implications of a threat of terrorism on civil liberties both within, and without, a
balancing test.

II. MacWade v. Kelly

A. The Inception of the Container Inspection Program

New York City is the quintessential American city—not because it is
representative of every other city, but precisely because it is like no other. This has been
both its crowning star and its Achilles Heel. It is emblematic of American strength, but
as such lies the target of the heart of a nation. No area of the nation was impacted more

7 *MacWade*, 460 F.3d at 263.
by the events of 9-11 than was the city of New York.\textsuperscript{8} This is true even though, as far as American cities go, New York has perhaps the most experience with terrorism.\textsuperscript{9} The New York subway system had been the target of terrorism before, with thwarted attempts in 1997 and 2004 to plant explosives deep in its network of tunnels.\textsuperscript{10} In fact, the World Trade Center itself had been attacked less than a decade before the 9-11 attack, and had since undergone a renovation in security measures to make it less vulnerable to attack.\textsuperscript{11}

\textsuperscript{8} Of the thousands who dies on 9-11, the vast majority were in the World Trade Center. Likewise, in terms of economic damage and the costs of rehabilitating the site of the attack, New York City accounted for over 90% of the cost. But the impact went much further than even those numbers can tell. Some authors have even argued that the very nature of New York City’s people has changed, with the events of 9-11 forever etched upon the character of those who work and live there. Lists of victims available at: www.cn.com SPECIALS/2001trade.center/victims/main.html (last visited October 23, 2006); See also Sara Kugler, \textit{New WTC Death Till is 2752}, CBSNews.com, Oct 30, 2003, www.cbsnews.com/stories/2003/10/29/attack/main 580620.html.

\textsuperscript{9} Oklahoma and Columbine are two other cities which have known terrorism, though in each of these the source was homegrown.

\textsuperscript{10} \textit{MacWade}, 460 F.3d at 263-64.

\textsuperscript{11} See Deborah Sontag, \textit{Explosion at the Twin Towers: Disruptions; Manhattan Is Held in the Grip Of Traffic Snarls and Anxiety}, NEW YORK TIMES, February 27, 1993 (discussing bombing); see also \textit{Ramzi Yousef}, Wikipedia (serving a prison term for that first World Trade Center bombings, who on February 26, 1993 detonated a car bomb in the parking garage beneath the North Tower.
It would have been difficult indeed for those who had overseen the new security measures to envision such a deadly attack from the air only eight years later.

Since 9-11, however, New York has been vigilant in upgrading its security.\textsuperscript{12} It is now deemed the most secure big city in America.\textsuperscript{13} But the rest of the world has not fared so well, as countenanced by the attacks taking place in both Spain and Russia in 2004.\textsuperscript{14} In both instances, Islamic fundamentalist terrorists attacked subways systems with deadly force.\textsuperscript{15} Likewise, London has seen two coordinated attacks on its subway system, successfully on July 7\textsuperscript{th} and unsuccessfully only two weeks later on July 21, 2005.\textsuperscript{16} Finally, in India’s financial city of Mumbai, Muslim terrorists attacked the trains killing 174 and wounding nearly 300 more.\textsuperscript{17}

\textsuperscript{12} New York City has, for example, worked to create a no-fly zone over Manhattan (difficult, at best, in light of the fact that there are three major airports in the immediate area). In a similar vein, the city has worked to integrate First Responders’ communication equipment and increase training for eventualities that have not yet occurred on American soil.

\textsuperscript{13} According to the NEW YORK TIMES, dated September 19, 2006, the F.B.I. has indicated that NYC remained the safest big city in America.

\textsuperscript{14} See American-Arab Anti-Discrimination Comm. V. Mass. Bay Trans. Auth., Civil Action No. 04-11652, 2004 U.S. Dist Lexis 14345, at *4 (D. Mass. July 28, 2004)(describing, in detail, the March 11\textsuperscript{th} explosions in Madrid that killed over 200 and the one in Moscow on February 6\textsuperscript{th} that killed about 40 persons.)

\textsuperscript{15} MacWade, 460 F.3d at 263-64.

\textsuperscript{16} MacWade, 460 F.3d at 263-64.
In response to these attacks, New York City implemented a new program, begun on July 22, 2005, to help curtail the possibility of an attack on its subway system.\textsuperscript{18} The New York Police Department (NYPD) began assigning officers to some of the 468 subway stations in New York which carry approximately four and one-half million passengers every weekday.\textsuperscript{19} The “Container Inspection Program” (CIP) was established to be a random, non-racial profiling, inspection of containers capable of carrying an explosive device.\textsuperscript{20} The officers, in uniform and at well-marked tables set close to the subway entrances, were to conduct random searches (on a designated, numeric basis) in

\begin{itemize}
  \item \textsuperscript{17} See At Least 174 Killed in Indian Train Blasts, CNN, July 11, 2006.
  \item \textsuperscript{18} See infra, at 46 (discussing the testimony of Commissioner Sheehan noting that the Container Inspection Program (CIP) was announced and implemented immediately following the London bombings on July 21, 2005; see also MacWade, 460 F.3d at 263-64.
  \item \textsuperscript{19} See Washington Legal Foundation, \textit{WLF Urges Court to Uphold New York Subway Bag Inspection Program to Deter Terrorist Attacks}, October 26, 2005. Available at http://www.wlf.org; see also Decision and Order, 05 Civ. 6921 (RMB)(FM) at 7 (noting that the subway system in New York operates 24 hours a day, and that the 26 interconnected lines have 468 stations with multiple entrances and exits each. As such, the NYS is the most highly used subway system in the U.S.).
  \item \textsuperscript{20} MacWade, 460 F.3d at 263-64.
\end{itemize}
the effort to both screen and deter persons from carrying explosives onto the subway system.\textsuperscript{21}

New York City, under Mayor Bloomberg and in light of the devastating attacks overseas, was not going to wait for a “second strike” like it did with the World Trade center. Instead, it planned to work proactively to prevent a terrorist attack that would decimate travel, and the economy, of a city whose hub is an island. As part of this proactive anti-terrorism effort, some passengers would be required to submit to a brief inspection of the personal belongings at randomly assigned subway entrance points—a small price to pay for lowering the chance of a devastating attack. The only problem? The Fourth Amendment prohibition against unreasonable search an seizure without probable cause or a warrant. In the City’s opinion, such a search is inherently reasonable. Others disagree.

\textbf{B. The Challenge to New York City’s Container Inspection Program}

On August 4, 2005, only two weeks into the CIP, Partha Banerjee, Joseph Gehring, Jr., Brendan MacWade, Norman Murphy, and Andrew Schonebaum brought an action for permanent injunctive relief against New York City and its Police Commissioner Raymond Kelly.\textsuperscript{22} While some of them submitted to the search and felt “violated,” the others were compelled to leave the station because they would not submit

\textsuperscript{21} \textit{Id.} An important distinction needs to be made here. The program is set up to appear random, but the authorities have an elaborate scheme that actually addresses flows of traffic and threat risks.

\textsuperscript{22} \textit{Id.} at 1.
to the search.\textsuperscript{23} They, it appears, were forced to either be searched or find alternative transportation. With the assistance of the New York Civil Liberties Union (NYCLU), these plaintiffs alleged that the defendants’ “policy and practice of searching those seeking to use New York subway system without an individualized suspicion of wrongdoing violates the Fourth and Fourteenth Amendments of the United States Constitution and 42 U.S.C § 1983.”\textsuperscript{24} The plaintiffs argued that the program constituted a search, that passengers have a full expectation of privacy; that there is no special need inviting abrogation of that right; that where the right to privacy is complete even a special need does not suffice to overcome the Fourth Amendment protection; and that an immediate and permanent injunction should issue against the CIP.\textsuperscript{25}

The defendants in this case conceded that the CIP constituted a search, but argued that the special need created by precedent and recent events justified a deviation from the Fourth Amendment requirement of individualized suspicion. This special need, they contend, is the threat of a terrorist attack. They further argued that even a full expectation of privacy is not a bar to its waiver under the special needs doctrine. They argue that the CIP is constitutional as interpreted under Supreme Court precedent.

\section*{III. The History of the Fourth Amendment Protection against Unreasonable Search and Seizure}

\textsuperscript{23} Appellate Brief, Brief of American Civil Liberties Union, 1967 WL 113689, 2.

\textsuperscript{24} Appellate Brief, Brief of American Civil Liberties Union, 1967 WL 113689, 2; \textit{see also} MacWade, 460 F.3d at 263-64.

\textsuperscript{25} \textit{Id.} at 1.
The protections encompassed in the Bill of Rights are reflective of the concerns of the founding fathers.26 One such concern was that protected by the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.27

This Amendment was penned by individuals who knew, first hand, the difficulties of living in its absence.28 They feared general warrants that had been used to cover large scale searches.29 The British had required little in the way of justification for searching homes or persons—their power was complete as colonial master. This was especially true in the aftermath of the French and Indian war, where the Crown’s debt had skyrocketed and the colonies were loath to be targeted for reimbursement.30 As a result of those tumultuous times, it is not surprising that the founding fathers penned such a protection into the Bill of Rights.

26 See supra, note iii.

27 U.S. Const. amend. IV.


29 Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 556-57 (1999)(detailing the historical underpinnings of the Fourth Amendment, interpreting the Framers’ intention to make warrantless searches rare and warrants difficult to attain.)

30 Engedayehu, supra note 2.
The Supreme Court itself noted that “no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”31 This right, having been extended by the Fourteenth Amendment to state governments,32 protects an individual “whenever [that] individual may harbor a reasonable ‘expectation of privacy.’”33 This protection, however, does not negate all governmental searches and seizures, but only those that are unreasonable.34 It has been a discussion of what is, and what is not, reasonable that has driven the lion’s share of Fourth Amendment jurisprudence in the United States.35 This following section discusses first the necessity of a warrant and/or probable cause to make a search “reasonable.” What follows is a discussion of the “special needs doctrine.” It is this doctrine that underpins the CIP and that was challenged in MacWade v. Kelly.

35 See generally, Charles J. Keeley III, Subway Searches: Which Exception to the Warrant and Probable Cause Requirement Applies to Suspicionless Searches of Mass Transit Passengers To Prevent Terrorism? 74 FORDHAM L. REV. 3231 (discussing the arguments that have been determinative of Fourth Amendment rulings, and finding that changing interpretations of reasonableness have played a prominent role).
A. The legal Foundation of Fourth Amendment Jurisprudence: The Warrant and Probable Cause

The foundational principle of the Fourth Amendment is that individualized suspicion of wrongdoing is usually necessary prior to any intrusion into the private life of a citizen.36 In most cases a warrant is necessary, supported by probable cause, or the search is presumptively unreasonable.37 This is because, to the Framers, the idea of a single officer of the government acting as both assessor and executioner is anathema.38 This is especially true in criminal cases, where police officers must go to a “neutral” judge to present what she finds to be probable cause.39 Only the neutral judge may issue


38 See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547, 578 (1999)( stating: “The common-law tradition viewed any form of discretionary authority with unease--but delegation of discretionary authority to ordinary, "petty," or "subordinate" officers was anathema to framing-era lawyers.”).

39 See Id. at 547, 576-77 (1999)(stating: “The preference for warrants is premised on the expectation that magistrates will be more likely than officers to perceive when justification for a proposed search is inadequate”).
the warrant—an idea well depicted in the imagery of Lady Justice, the blindfolded judge holding the sword and scales.\textsuperscript{40} In this way, the overzealous action of law enforcement agents is tempered by the courts. This concept, both in criminal law and in government more generally, is embodied in the concept of separation of powers.\textsuperscript{41} The idea that power is diffuse makes the guarantee of civil liberties more secure.\textsuperscript{42}

1. The Warrant

The principle that a warrant is necessary prior to governmental intrusion has held in both civil and criminal cases.\textsuperscript{43} In \textit{Camara v. Municipal Court of City and County of San Francisco}, a regulatory case, the government sought to conduct warrantless searches of homes to assure compliance with housing regulations.\textsuperscript{44} The idea was simple—

\textsuperscript{40} Id. at 578-83.

\textsuperscript{41} See United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 317 (1972) (stating emphatically that: “The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.”)

\textsuperscript{42} ENGEDAYEHU, \textit{supra} note 2.

\textsuperscript{43} See O’Connor v. Ortega, 480 U.S. 709, 714-15 (noting that the Fourth Amendment, applicable to the states through the Fourteenth Amendment, does not distinguish between a criminal investigation or other governmental action in derogation of the rights of individuals to be secure in their person and homes).

\textsuperscript{44} 387 U.S. 523, 533 (1967).
housing codes had been enacted, and yet the only way to ensure compliance required that agents of the government be allowed to enter homes to so verify. In *Camara*, an occupant of a ground-floor apartment refused to allow San Francisco Municipal Health and Safety officials to inspect his dwelling, and as such was brought up on charges.\(^45\) He challenged these charges on the grounds that the city officials needed a valid warrant prior to forcing him to allow them access to his private home. The Court, conceding the need cities often have of trying to eliminate “urban blight,” nonetheless refused to waive the warrant requirement because requiring a warrant did not frustrate the ends of the search program.\(^46\) The court deemed a warrant a valid hoop through which city officials would have to jump in the name of restraining the possibility of legal persecution.\(^47\) It also required *specific probable cause* be met with regard to each specific dwelling—there could be no blanket warrant issued for a neighborhood or street.\(^48\) The Court noted:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."\(^49\)

The Court was clear that a warrant was the protection Americans expect and are provided for in the Fourth Amendment—at least in most situations. Governmental agencies, be

\(^{45}\) *Id.* at 525.

\(^{46}\) *Id.* at 525-26.

\(^{47}\) *Id.* at 529 (citing Johnson v, United States, 333 U.S. 10 (1948).

\(^{48}\) *Id* at 525-26.

\(^{49}\) *Id.* at 529 (citing Johnson v, United States, 333 U.S. 10 (1948).
they federal, state, or local in nature, are required to observe the proper procedures before demanding entrance into an American home.\textsuperscript{50}

In even stronger terms, this principle has been enshrined in criminal law. In what is perhaps one of the most famous Fourth Amendment criminal cases, the Court also refused to lower the protection against warrantless searches and seizures in the gathering of evidence for trial.\textsuperscript{51} In \textit{Mapp v. Ohio}, the police searched a family’s home without a search warrant because of rumors that one of the residents had been involved in a recent bombing.\textsuperscript{52} Although no bomb making materials were discovered, the police did find a small cache of pornographic materials in the basement.\textsuperscript{53} The owner was then charged with possession of pornographic materials, which at that time in Georgia was illegal.\textsuperscript{54} The \textit{Mapp} Court, finding the search to be unreasonable because it was conducted without a warrant, proffered a prophylactic rule in criminal cases to prevent warrantless searches by extending the exclusionary rule, baring evidence acquired in violation of an

\textsuperscript{50} \textit{Id.} at 528 (citing to Ker v. State of California, 374 U.S. 23, 30 (1963); but see infra, note 80.

\textsuperscript{51} Mapp v. Ohio, 367 U.S. 643 (1961)(extending to state proceedings a controversial prophylactic rule barring all evidence from use in court if garnered without a warrant and without clear justification for waiver of the warrant requirement); see Weeks v. U.S., 232 U.S. 383 (1914)(propounding the prophylactic rule for the first time in United States jurisprudence, though applicable only to federal proceedings).

\textsuperscript{52} \textit{Id.} at 644.

\textsuperscript{53} \textit{Id.} at 645.

\textsuperscript{54} \textit{Id.} at 645-46.
individual’s Fourth Amendment right to be secure in his person and personal belongings, to state proceedings.\textsuperscript{55} This extreme measure was construed to combat an extreme problem, best articulated in \textit{Johnson v United States}:

\begin{quote}
The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.\textsuperscript{56}
\end{quote}

Interestingly enough, the \textit{Johnson} ruling came fifteen years prior to the \textit{Mapp} ruling. \textit{Mapp} remains a highly controversial case and demonstrates the constant tension between the Fourth Amendment protections on one hand and the need for the government to do its job on the other (a concept to be discussed below).\textsuperscript{57} The exclusionary rule demonstrates the court’s commitment to the principle of requiring a warrant in most situations.\textsuperscript{58}

\textsuperscript{55} \textit{Mapp}, 367 at 655 (banning the introduction of evidence, in this case pornographic materials, gained in a warrantless search).


\textsuperscript{57} See OYEZ U.S. Supreme Court Multimedia, available at http://www.oyez.org/oyez/resource/case/223/. (noting the controversial nature of this decision and referring to it as “historic.”)

\textsuperscript{58} The exclusionary rule, as articulated in \textit{Weeks} (supra, note 48) also applies to any subsequent evidence acquired based upon the initial evidence, often called the "fruit of the poisonous tree." See Nardone v. United States, 308 U.S. 338, 341, (1939).
2. Probable Cause

As Mapp v. Ohio and Camara v. Municipal Court of City and County of San Francisco demonstrate, a warrant should be based upon an individualized suspicion of wrongdoing—or probable cause. It is the judge’s job to determine if sufficient probable cause exists to issue the warrant. But the presumption of unreasonableness in the absence of a warrant is not without exception, as probable cause itself (under certain circumstances) may be sufficient to allow the state to engage in a search or seizure. In criminal law, a governmental actor may conduct a search or a seizure, under certain conditions, without a warrant in the presence of “individualized suspicion of wrongdoing.” There is good reason for this exception. Imagine a car has been pulled over for speeding and, as such, there is yet no reason to believe any criminal act has been performed. The officer, under Fourth Amendment jurisprudence, is prohibited from searching the car without the driver’s permission. But assume for a moment that the officer hears crying coming from the trunk of the car. Should he try and obtain a warrant? What if it is a child in distress? Under certain circumstances, the courts have recognized that “probable cause” serves as the basis of reasonableness.

59 Mapp, 367 U.S. 650, (noting that it is the nature of an arbitrary search that implicates the Fourth Amendment, and one such situation is a warrantless search when a warrant is called for).

60 New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); See also California v. Acevedo, 500 U.S. 565 (1991) (allowing a warrantless search of an automobile and all containers within it where there was probable cause that contraband was contained inside).
In *Skinner v. Railway* the Court noted that at the minimum, in the absence of a warrant, there usually must be “‘some quantum of individualized suspicion’ before concluding that a search is reasonable.”61 This includes searches materially incident to an arrest.62 When there is probable cause that a crime has been committed, and there is a subsequent risk of flight or the destruction of evidence, the requirement of a warrant can be suspended.63 It is also required that such probable cause “exists where the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”64 However, there are even limits to this exception, such as an investigation of a crime scene being carried on for an exorbitantly long period of time in the absence of a warrant. This was the case in *Mincey v. Arizona*, where officers conducted a four-day search without a warrant of an apartment in which a fellow officer was shot.65 The court refused to allow an argument for thoroughness and efficiency to trump the defendant’s Fourth Amendment right to a

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63 *U.S. v. Banks*, 540 U.S. 31 (2003) (allowing police to enter a apartment against the resident’s will to prevent the disposal of marijuana); *Ker v. State of Cal.*, 374 U.S. 23, 34-35 (1963) (Noting that: “The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant.”).

64 *Id.* at 35 (quoting *Brinegar v. United States*, 338 U.S. 160 (1949)).

warrant, noting that such abrogation requires some sort of emergency, like a threat to life or limb.  

There has been a great deal of debate, however, as to what “quantum of individualized suspicion” the governmental entity must demonstrate. A child crying may be suspicious, especially if coming from the trunk of an automobile, but what of a myriad other possibilities? One such situation involves the daily confrontation of individuals by police officers who are regularly in danger of possible violence. Police often observe conduct that is suspicious at a level that could be classified as minimal. As a case-in-point, *Terry v. Ohio* brought to the fore the “difficult and troublesome issues regarding a sensitive area of police activity.” In *Terry*, a police officer with more than 35 years of experience was patrolling a neighborhood and noted some “suspicious behavior.” He observed three individuals engaging in what appeared to be “casing” of a local store, and approached them to ask some questions (this behavior could be deemed a “suspicion of wrong-doing”). In so doing, and to protect himself, he patted each one

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66 Id. at 393-94.

67 See *Ornelas v United States*, 517 U.S. 690 (1996)(determining that the *de novo* standard of review will be applied to the legal sufficiency of the probable cause, but that the facts underpinning the probable cause will be reviewed with deference to the Judge’s interpretation).

68 392 U.S. 1, 9 (1968) (noting this was a case of first impression for the Supreme Court with regard to this issue).

69 Id. at 5.

70 Id. at 5-6.
down to see if they were carrying weapons—two of them were.\textsuperscript{71} The officer then corralled the three into a local store and called for a police wagon.\textsuperscript{72} The two were charged with carrying concealed weapons and sentenced to between one and three years.\textsuperscript{73}

The defendants attempted to defeat the charges on First Amendment grounds, but the Supreme Court in an ironic twist (the defendants had relied almost exclusively on 1\textsuperscript{st} Amendment grounds, but the ACLU had submitted an amicus brief defending the convicted men on 4\textsuperscript{th} Amendment grounds) chose to rule upon the reasonableness of the search instead.\textsuperscript{74} In this case, the court upheld “stop and frisk” searches as constitutional in the absence of a warrant, and in so doing demonstrated the fine line between what is sufficient probable cause and what is not in these situations.\textsuperscript{75} It noted that individualized suspicion is often a tenuous and difficult thing for a police officer to define.\textsuperscript{76} The Court noted that police must have the ability to ask questions, and to insure the persons to

\textsuperscript{71} \textit{Id.} at 4.

\textsuperscript{72} \textit{Id.} at 4-5.

\textsuperscript{73} \textit{Id.} at 4-5; \textit{see also} Brown v. Texas, 443 U.S. 47 (1979)(rejecting the state’s claim that probable cause existed where the officer saw a man leaving an alley in a neighborhood where drug offenses are common. The Court found this was clearly insufficient “individualize suspicion of wrongdoing”).

\textsuperscript{74} Appellate Brief, Brief of American Civil Liberties Union, 1967 WL 113689, 2; \textit{see also} Religion and the Constitution, 2006 CATOSCTR 7, 20.

\textsuperscript{75} \textit{Id.} at 20.

\textsuperscript{76} \textit{Id.} at 21.
whom they are talking are unarmed.\textsuperscript{77} The Court was quick to note that the frisk was of
the outer clothing, and only upon encountering something that could possibly be a gun,
did the officer’s hands go beneath the clothing.\textsuperscript{78} The Court, to a large degree, accepted a
“stop and frisk” policy “as a practical matter” that could not be “subjected to a warrant
and probable-cause requirement” effectively.\textsuperscript{79}

\textbf{B. The “Special Needs” Exception}

The warrant and probable cause standards are well established in American
jurisprudence, but so too is an exception to either one called the “special needs”
doctrine.\textsuperscript{80} The Court, in establishing this doctrine, has now deviated from a warrant
requirement, the necessity of showing an individualized suspicion of wrongdoing, and
from requiring even the “quantum” of probable cause standard set down in \textit{Skinner}.\textsuperscript{81} In

\textsuperscript{77} \textit{Id.} at 21.

\textsuperscript{78} \textit{Id.} at 20-21.

\textsuperscript{79} Terry v. Ohio, 392 U.S. 1, 20-21 (1968); see also New Jersey v. T.L.O., 469 U.S. 325,

\textsuperscript{80} Although not discussed here, there are also a line of cases where warrantless
administrative searches of certain types of establishments have been held to be
constitutional. These include mining facilities, establishments that sell guns, and liquor
administrative exception principle in detail, including citation to prominent cases
involved in its establishment).

\textsuperscript{81} \textit{Supra} note 37.
National Treasury Employees Union v. Von Raab, the Court noted that neither “a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.” The Court in Von Raab reasoned that if it is to find a Fourth Amendment intrusion valid, there would have to be a clear governmental purpose that differed from a normal law enforcement purpose, and that even in these cases a balancing of the privacy interest against the governmental interests would be necessary to help “determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”

This broad exception to Fourth Amendment protection came to be called the “special needs” doctrine after New Jersey v. T.L.O.. The plaintiff in this case was a

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83 Id. at 665-66.
84 469 U.S. 325, 351 (1985); see Charles J. Keeley III, Subway Searches: Which Exception to the Warrant and Probable Cause Requirement Applies to Suspicionless Searches of Mass Transit Passengers To Prevent Terrorism? 74 Fordham L. Rev. 3231 (explaining that T.L.O. was the origin of the “special needs” terminology that has become the Court’s staple). It should also be noted that there are other broad-based exceptions to the Fourth Amendment warrant requirement, including administrative searches (cf. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (holding that the IRS may inspect establishments holding a liquor license without a warrant); United States v. Biswell, 406 U.S. 311 (1972) (allowing government officials to inspect a pawn shop selling guns). Also see New York v. Burger, 482 U.S. 691, 701 (1987) (reasoning that
young woman, known by her initials T.L.O., who was adjudicated a delinquent after a
school official discovered drug paraphernalia and a small amount of marijuana in her
purse following a progressively more intrusive, and warrantless, search.85 In this case, in
his concurring opinion, Justice Blackmun noted: “Only in those exceptional
circumstances in which special needs, beyond the need for normal law enforcement,
make the warrant and probable-cause requirement impracticable, is a court entitled to
substitute its balancing of interest for that of the Framers.”86 The Court then went on to
conduct a balancing test in T.L.O., making careful note that students have a right to
privacy, albeit perhaps to a lesser degree in schools.87 Likewise, the court noted the
incompatibility of a warrant system within the workings of a school environment.88
Finally, the majority embraced the governmental interest of protecting school children as
the foundation for its acceptance of “reasonableness” notwithstanding the absence of a
warrant or probable cause.89

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the Colonnade-Biswell rule was based upon the lowered expectation of privacy in
establishments that sold guns or liquor.)

85 Id. at 328 (summarizing the facts of the case is Justice White, author of the majority
opinion).

86 Id. at 351 (emphasis added).

87 T.L.O., 469 U.S. 337-338.

88 T.L.O., 469 U.S. 342, n 7.

89 T.L.O., 469 U.S. 350 (stating “it would be unreasonable and at odds with history to
argue that the full panoply of constitutional rules applies with the same force and effect in
the schoolhouses as it does in the enforcement of criminal laws.)
T.L.O. was clearly not the first case to embrace the “special needs” doctrine.90 But like its predecessors, it lacked a clear and well defined structure through which to measure Fourth Amendment reasonableness.91 In fact, many of the principles that seemed to underpin the ruling in T.L.O have come under scrutiny, and a great deal of case law has been necessary to provide the actual test for what is, and is not, the beneficiary of the special needs doctrine.92 This next section discusses the qualifying test for the special needs doctrine.

The “Special Needs” Test

The “special needs” doctrine has, since T.L.O., been developed through case-law. In Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, the Court described the “special needs” doctrine as “a fact-specific balancing test, with intrusion into the private life of a citizen at one end and the promotion of a legitimate governmental interest at the other.”93 These two poles have represented the basis of the test since before the term “special needs” was articulated, but there is also a third and

90 469 U.S. 325, 351 (1985)(noting many other cases that preceded its decision).


92 Cf infra, page 52-56, discussing the misinterpretation of the relevance of a full (verses a partial) expectation of privacy.

fourth prong. In *Illinois v. Lidster* the Supreme Court, in one of the clearest articulations yet of the special needs doctrine, clarified the four primary criteria that should be considered:94

a. the gravity of the public concern served by the program or policy
b. the degree to which that program or policy ameliorates that public concern
c. the severity of the interference with individual liberty
d. the purpose of the search as distinct from traditional law enforcement

*Lidster* concerned a checkpoint that the Illinois state police set up the evening following a fatal hit-and-run.95 The idea was to stop individuals, passing by the place where the bicyclist had been struck, and inquiring if anyone had knowledge about the incident. In deciding this case, the Court found the public concern (alternatively called the governmental interest) was valid and that the program had a likelihood of gathering information because this was a pathway that many workers took everyday. In addition, the intrusion was minimally invasive because the officers were not looking to arrest the occupants of the vehicle (removing some of the fear associated with a police stop), but rather merely eliciting information.96 In short, all four elements were satisfied and hence the Court upheld the Illinois scheme. Each of these elements is discussed in further detail below.

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95 *Id.* at 424.
96 *Id.*
1. The Gravity of the Public Concern

The first has an interesting legacy, with some of the most important cases predating the term “special needs,” but relying on a similar framework for constitutionality. Among the earliest, like Lidster, were the “checkpoint” cases.97 The Court in United States v. Martinez-Fuerte, a seminal check-point case that predated Lidster by nearly a quarter century, was one of the first to apply something akin to the special needs doctrine. While the Fifth Circuit was allowing evidence of transporting illegal aliens to the United States, gathered at a border check-point, to be used at trial, the Ninth Circuit disagreed, ruling that the exclusionary rule was to be applied to such evidence. In the absence of clearly articulated precedent, dealing with conflicting Circuit Court holdings on whether roadblocks a few miles inside the border between the United States and Mexico were legal, it applied the two-pole Earl’s test. The Supreme Court reversed the Ninth Circuit, noting: “The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”98 The court then, instead of a bright line rule, introduced a balancing test—weighing the public

97 United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (allowing roadblocks near the Mexican border for the purpose of controlling illegal immigration, and after weighing the individual privacy right against the governmental interest served, abrogating the need for individualized suspicion of wrong-doing); see also Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

interest in the search and seizure against the privacy right. The Court then pointed to the fact that the roadblocks served an important governmental interest while only causing a modest privacy invasion. As such, the concern for securing the border outweighed the privacy rights of individuals protected under the Fourth Amendment.

A few years later, in Brown v. Texas, the Supreme Court explained its decision-making paradigm in terms that would eventually become the test for all special needs cases: “a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” In Brown, the court looked at the interest of the state in compelling individuals to identify themselves and provide addresses to police officials upon request (with no individualized suspicion of wrongdoing and no other probable cause). The law was being enforced against a young man who walked out of an alley after conferring

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99 But see Almeida-Sanchez v. United States, 413 U.S. 266 (1973)(finding that the significant law enforcement purpose behind a searching cars for illegal aliens by a roving patrol was not enough to abrogate the Fourth Amendment protection against warrantless search and seizure).

100 Martinez-Fuerte, 428 U.S. 555-56.

101 Brown v. Texas, 443 U.S. 47, 51 (1979) (holding unconstitutional a Texas law requiring an individual, in the absence of any suspicion of wrongdoing, from having to identify self and address to any inquiring police official upon request); see also United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

102 Brown, 443 U.S. at 49 (noting that the balance tilt toward the individual given the week nature
with another young man. 103 Given that the area was known for drugs and the fact that the young man was unknown to the officers driving by, one of them demanded he identify himself. When the young man refused to give the information, he was arrested under the Texas statute for failing to provide the requested information. 104 The court found that this sort of law went too far, allowing police to demand personal information from individuals in the absence of any individualized suspicion of wrong-doing. 105 The court noted: “The record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees.” 106 Although neither Martinez-Fuerte nor Brown clearly articulate what is and is not a compelling state interest, in these cases the Court indicated it lies somewhere between securing the borders and securing the identification and living quarters of a citizen.

Since these early cases and until the recent “terrorism” cases, most “special needs” cases have revolved around the governmental interest in controlled substance abuse. 107 In nearly every case, exceptions noted below, the courts have been persuaded by

103 Id. at 50-51.
104 Id.
105 Id. at 52-53.
106 Id. at 52.
107 Charles J. Keeley III, Subway Searches: Which Exception to the Warrant and Probable Cause Requirement Applies to Suspicionless Searches of Mass Transit Passengers To Prevent Terrorism? 74 FORDHAM L. REV. 3231, 3252; see also Tracey Maclin, Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth
the governmental interest in controlling the drug problem in the United States, albeit in confined settings.\textsuperscript{108} In *Treasury Employees Union v. Von Raab*, the Court deemed random drug testing of federal custom’s employees constitutional when these employees sought a promotion or a transfer to a position involving drug interdiction or the carrying of a firearm.\textsuperscript{109} In a similar case, in *Skinner v. Railway Labor Executives' Assn.*, the Court was willing to allow for drug and alcohol tests when railway employees were

\textit{Amendment? What Should (and Will) the Supreme Court Do?}, 33 J.L. MED. & ETHICS 102, 108-09 (2005).

\textsuperscript{108} The “special needs” cases should not be confused with drug-sniffing dog cases, where the courts have rules on several occasions that such action does not constitute a search, and where a warrant was procured after a dog indicated drugs were on the premises, no violation occurs. See Hope Walker Hall, *Sniffing Out the Fourth Amendment: United States v. Place-Dog Sniffs-Ten Years Later*, 46 Me. L. Rev. 151 (1994)(citing to United States v. Place, 462 U.S. 696 (1983) where six justices ruled that the canine sniff search in an airport was not a search); see also Eugene D. Bryant, *Snoop Dogs: An Analysis of Narcotics Canine Sniffs of Storage Units Under the Fourth Amendment*, 40 GA. L. REV. 1209, 1211-1212 (2006)(discussing the rule that a canine sniffing the units at a storage facility did not constitute a search in an of itself); but see Minnesota v. Carter, 697 N.W.2d 199, 211 (Minn. 2005)(holding that, under the Minnesota constitution, canine sniffing is a search).

involved in accidents or other safety violations. The Court cited safety of commuters and the large value of the assets at the disposal of employee action.

The case for drug control has been especially persuasive with regard to school campuses. In *Board Of Education Of Independent School District No. 92 v. Earls*, the Court once again took up a 42 U.S.C. 1983 challenge to the constitutionality of a government search and seizure. The Court conceded that individualized suspicion can be waived as a prerequisite under certain circumstances—in this case the school’s analysis of urine samples from its students. In quoting from *Griffin v. Wisconsin*, using the term “special needs,” the *Earls* Court noted that some situations exist where individualized indication of wrongdoing is no longer required. Justice Thomas delivered the opinion of the Court, noting: “Because this Policy reasonably serves the School District’s important interest in detecting and preventing drug use among its students, we hold that it is constitutional.”

Though the public concern over drug use has been persuasive, it has not always been sufficient. In *Chandler v. Miller*, the Court was unimpressed with Georgia’s interest in making each candidate for designated state offices certify that a urine analysis, in the

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111 *Id.* at 602-605.


114 Earls, 536 U.S. 825,
30 days preceding the election, came back negative for drug use.\textsuperscript{115} Justice Ginsberg, writing the majority opinion, stated “we confront in this case the question whether that requirement ranks among the limited circumstances in which suspicionless searches are warranted.”\textsuperscript{116} While the lower court had “acknowledged the absence of any record of drug abuse by elected officials in Georgia,” it upheld the constitutionality of the drug screening policy because “the people of Georgia place in the trust of their elected officials ... their liberty, their safety, their economic well-being, [and] ultimate responsibility for law enforcement.”\textsuperscript{117} The Supreme Court did not agree, and quoted with approval the lower court’s lone dissenter: "There is nothing so special or immediate about the generalized governmental interests involved here, as to warrant suspension of the Fourth Amendment's requirement of individualized suspicion for searches and seizures."\textsuperscript{118}

A similar departure from finding controlled substances a valid basis for abrogating Fourth Amendment protections can be found in Ferguson v. City of Charleston.\textsuperscript{119} In Ferguson, in order to reduce the frequency of babies born to cocaine using mothers, the city began to require drug testing of pregnant mothers. Plaintiffs here

\textsuperscript{115} Chandler v. Miller, 520 U.S. 305, 308-10 (1997).

\textsuperscript{116} \textit{Id.} at 308.

\textsuperscript{117} \textit{Id.} at 311, quoting from the lower court’s opinion (Chandler v. Miller , 73 F.3d. 1543, at 1546).

\textsuperscript{118} \textit{Id.} at 312, quoting from the lower court’s opinion (Chandler v. Miller , 73 F.3d. 1543, at 1551).

were ten mothers-to-be who were arrested for testing positive for drug use.\textsuperscript{120} Justice Stevens explained the crux of the case in these words: “the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.”\textsuperscript{121} In this case, the Court refused to extend the abrogation of the Fourth Amendment’s requirement of individualized wrong doing because of the nature of the governmental interest.\textsuperscript{122} Instead, it found the interest in this program was primarily one of traditional law enforcement, and not an interest having a higher design.\textsuperscript{123}

In the aftermath of the drug cases, there are new cases that look at the threat of national terrorism. These newest cases will be discussed below as part of the analysis of \textit{MacWade v. Kelly}.

2. The Degree to which the Public Policy Ameliorates the Problem

\begin{itemize}
\item \textsuperscript{120} \textit{Id.} at 73-74.
\item \textsuperscript{121} \textit{Id.} at 70.
\item \textsuperscript{122} \textit{Id.} at 79-81.
\item \textsuperscript{123} \textit{Id.} It is interesting to note that had the state government proceeded with the program in a way that highlighted helping the women and their babies, rather than relying on criminal punishment as the deterrence, it may have withstood the Court’s review. It is also interesting to note that, in comparing this case to four previous cases, the court here notes the highly intrusive nature of this program in part because of its clandestine nature. \textit{Id.} at 78.
\end{itemize}
The second *Illinois v. Lidster* factor is more problematic because, as much as it is referred to, it is discussed less than the other factors in case law. In the words of the *Earls* Court, “this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them.” But while the *Earls* Court spent a great deal of time discussing the general immediacy of the concern, it barely paid lip service to the efficacy of the drug testing policy in ameliorating the problem. In fact, it merely assumed efficacy even as it noted that the plaintiffs had not demonstrated any real drug problem specific to the schools involved in the drug screening program, adding that “we express no opinion as to [the] wisdom” of the policy.

The paying of lip-service while accounting no noticeable weight to this element seems more the norm than the aberration. In *Veronia Sch. Dist. 47J v. Acton*, a controlled substance case, the Court again took up the balance between the need of the government to do its job and the Fourth Amendment rights of citizens to be secure in their persons and personal belongings. In addition to spending a great deal of time talking about the

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124 Earls, 536 U.S. at 834.

125 See David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 Hastings Const. L.Q. 47, 55, (2005)(linking both the Chandler case discussed above and the Earls case by the common fact that advocates of the policies failed in either case to show a substantial problem prior to institution drug screening).

126 *Earls*, 536 U.S. at 838.

127 515 U.S. 646, 652-3 (1995)(reconfirming that the “ultimate measure of the constitutionality of a governmental search is ‘reasonableness’” and noting that “to be
prevalence of the problem and the compelling nature of the governmental interest (as discussed above, illicit drugs weigh heavily in the Court’s estimation of a compelling public problem), the *Acton* Court noted that the policy under review must also be arguably effective at solving the problem.128 The Court noted: “As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.”129

Once again the Court noted efficacy as a primary goal, but once again this consideration was enveloped by other matters. In *Brown v. Texas*, however, there seems to be something akin to attention being paid to this prong.130 There the Court noted: “The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”).

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128 *Id.* at 662-663.

129 *Id.* at 663 (adding that the requirement that the “least intrusive” search possible be the only constitutional avenue has been rejected out-of-hand) (citing to *Skinner v. Railway Labor Esec. Ass’n*, 489 U.S. 602, 629 n. 9 (1989)).

130 443 U.S. 47.
it.\footnote{Id. at 52.} In these words, the Court seems to advance a skepticism about the efficacy of this law, but then purports to assert that even if that efficacy was evident under the facts of this case, the special needs exception to an individualized suspicion of wrongdoing would not avail. Hence, though once again they discuss efficacy, the decision hinged upon other matters.

Airport security inspection cases, the first of which preceded a clear articulation of the “special needs” doctrine, offer perhaps the best review of why efficacy plays such a limited role in most special needs cases. In United States v. Skipwith, the Court articulated the “reasonableness” of a warrantless search in these words: “Necessity alone, however, whether produced by danger or otherwise, does not itself make all non-probable-cause searches reasonable. Reasonableness requires that the courts must weigh more than the necessity of the search in terms of possible harm to the public. The equation must also take into account the likelihood that the search procedure will be effective in averting the potential harm.”\footnote{U.S. v. Skipwith 482 F.2d 1272, 1275 (5th Cir. 1973).} Hence, even though Skipwith well precedes Lidster and T.L.O, it is evident that efficacy has been central to a balancing test—formerly in the debate over reasonableness, and later as part of the well-articulated special needs doctrine put forward in Lidster. Unfortunately, the courts today are left with little guidance because even in the seminal airport security cases it engendered little discussion. That said, the silence of the courts is understandable for reasons that follow.
In *United States v. Marquez*, the court noted the difficulty of trying to search only those who were likely hijackers.\(^{133}\) In citing to *Davis*, the court noted that “Little can be done to balk the malefactor after [weapons or explosives are] successfully smuggled aboard, and as yet there is no foolproof method of confining the search to the few who are potential hijackers.”\(^{134}\) The *Marquez* case, a 2005 ruling, summed up the two purposes of allowing the government to search would-be passengers without probable cause or a warrant.\(^{135}\) First, the policy ACTUALLY prevents the carrying of weapons on board. Second, the policy DETERS terrorists from trying.\(^{136}\) Though this point is subtle in both the older cases (like *Skipwith*) and the more recent cases (like *Marquez*) its importance cannot be overlooked. The governmental interest in preventing terrorism is supplemented by a system that actually prevents the trafficking of weapons on planes.

\(^{133}\) 410 F.3d 612 (9th Cir. 2005)(finding that the choices for would-be passengers ought to be either to submit to a search or forgo flying and that a search that discovers contraband, incident to a valid search for weapons, is reasonable.). *See also* U.S. v Skipwith, 482 F.2d 1272, 1273-74 (5th Cir. 1972) (discussing the use of profiling to detain those who fit a terrorism profile, a practice that is oft frowned upon today due to the dangers of racial profiling); *see also* Jonathan Finer, *Boston to Begin Random Baggage Checks on Trains*, WASH. POST, June 9, 2004, at A02 (making the case that the policy is ineffective at preventing terror and, quoting the Executive Director of the Massachusetts ACLU, only a ruse to allow racial profiling).

\(^{134}\) United States v. Davis, 482 F.2d 893, 910 (9th Cir.1973).

\(^{135}\) *Marquez*, 410 U.S. at 617; *see also* *Davis*, 482 F.2d at 908.

\(^{136}\) *Marquez*, 410 U.S. at 617.
because every person is subjected to a search, employing the best technology known, that is effective.\textsuperscript{137} In these airport search cases, the blanket searching of all would-be travelers creates a situation where efficacy is assumed because weapons cannot make it onto the plane.\textsuperscript{138}

Airport security also fares better in a discussion of efficacy because of the universal, and inescapable, nature of the search. Every person is searched at an airport, leaving little doubt that contraband will be intercepted prior to take-off. As a case-in-point, in \textit{United States v. Skipwith}, the Court decided that a passenger choosing to board a place may not, after seeing that a more intrusive search will be conducted upon her person or her belongings, leave the premises to avoid such a search.\textsuperscript{139} The court was

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\textsuperscript{137} \textit{See also} United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (stopping every vehicle at designated roadblocks near the border with Mexico to briefly question, and possible search, vehicles, and noting that “many smuggler and illegal aliens” have been have been apprehended at such); \textit{cf} U.S. v. McDaniel, 463 F.2d 129 (5\textsuperscript{th} Cir. 1972)(applying the blanket application of a border checkpoint, where \textit{every} car was stopped and its driver briefly questioned.).
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\textsuperscript{138} \textit{See also} Sitz, 496 U.S. 444, 453 (1990)(allowing intoxication checkpoints and noting that every car is stopped, not to prove efficacy, but as a argument that such universal application of the stop decreases the fear and surprise to individuals by such an intrusion).
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\textsuperscript{139} United States v. Skipwith, 482 F.2d 1272 (5\textsuperscript{th} Cir. 1973)(preventing a passenger from leaving in the event that they are not satisfied with how a search is progressing, noting that this would create a situation where terrorists could leave and re-enter later).
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clear that such a program would not be effective because terrorists could leave each time
they failed the initial screening test and simply wait until they had passed such a test
before proceeding to the gate of the plane. This type of policy is a “heads I win, tails you
lose guarantee to criminals wishing to board aircraft.”\textsuperscript{140} In \textit{Herzbrun}, a case citing to
\textit{Skipwith} often, the court emphatically notes that it has rejected, out of hand, the right to
leave after being selected for search.\textsuperscript{141}

These two principles, the ACTUAL efficacy of preventing weapons onboard
aircraft, and the blanket searching of every individual (who do not have the right to
depart once selected), abrogates the need to discuss efficacy. So what about cases where
random selection of individuals has been upheld? In \textit{United States v. Green},
suspicionless, \textit{random} checkpoints, near military bases, were held to be constitutional.\textsuperscript{142}
The court found that “[s]topping vehicles at regular intervals, rather than every one, first
husbands the resources of law enforcement. It also reasonably advances the purposes of
the checkpoint because it deters individuals from driving while unlicensed and or
transporting weapons and thereby endangering base personnel. It provides a gauntlet,
random as it is, that persons bent on mischief must traverse.”\textsuperscript{143} The Court then noted

\textsuperscript{140} See \textit{U.S. v. Herzbrun}, 723 F.2d 773, 776 (11\textsuperscript{th} Cir. 1984) (citing \textit{Skipwith}, 482 F.2d
1281).
\textsuperscript{141} \textit{Herzbrun}, 723 F.2d 777.
\textsuperscript{142} 293 F.3d 855 (5\textsuperscript{th} Cir. 2002)(this case also makes clear that vehicle stop cases differ
from other special needs cases, an that there is no clear indication that the basis or
reasoning behind the two types of cases is necessarily the same).
\textsuperscript{143} \textit{Id.} at 862.
that the same principle of randomly searching luggage at airports (every person is searched, but until very recently, bags that were checked were searched on a random basis) supports the randomness of stopping cars.\textsuperscript{144} The Court in \textit{Green}, however, avoided any discussion of efficacy as to the five articulated goals, ranging from the extreme (as part of the fight against terrorism) to the more mundane (maintaining readiness and protecting federal property).\textsuperscript{145} Instead, they simply allowed that the deterrence factor was sufficient.

3. The Severity of the Interference with the Privacy Interest

The third is the degree to which the program or policy invades a liberty interest to be free of search and seizure. This includes the actual nature of the search, including the “expectation of privacy,” and who is conducting the search. The expectation of privacy serves as the basis for whether a search is reasonable, but who conducts that search also implicates when and under what circumstances a warrantless search is deemed reasonable. These two prongs of the \textit{interference with the privacy interest} are discussed in this section.

a. The Nature of the Search: The “Expectation of Privacy”

\textsuperscript{144} \textit{Id.} at 862, n. 40.

\textsuperscript{145} See generally \textit{Delaware v. Prouse}, 440 U.S. 648 (1979)(holding that an interest in licensing and registration is inadequate to validate a stop and search without some probable cause or individualized suspicion of wrongdoing).
The Fourth Amendment serves to protect the "right of the people to be secure in their persons, houses, papers, and effects...."146 Although there is no evidence that an ordering of “privacy interests” was being implemented, there are stark differences in how the various subjects of searches are dealt with by the courts—and, intentionally or no, they closely follow the Fourth Amendment’s ordering. This is true because the Court has come up with a two-part test for ranking privacy interests, articulated by Justice Harlan in *Katz v. United States*.\(^{147}\) The first is that the individual must have a subjective privacy expectation, such that she acted in a way to maintain the privacy of her belongings.\(^{148}\) The second is that the expectation must be objectively reasonable.\(^{149}\) This test was established to put to rest the concept that property ownership was the basis of the right to privacy.\(^{150}\) For example, owning a diary but placing it on reserve in the library would

\(^{146}\) U.S. Const. Amend. IV.

\(^{147}\) 389 U.S. 347 (1967)(Harlan, J., concurring)

\(^{148}\) *Id.* at 361; *see Overview of the Fourth Amendment*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, n. 14 (2006)(detailing case history of this first element of the Harlan test for expectation of privacy); *see also* Bond v. U.S., 529 U.S. 334, 338-39 (2000)(discussing the privacy expectation of a person’s belongings, in an opaque bag, on a transit bus).

\(^{149}\) *See Overview of the Fourth Amendment*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, n. 15 (2006)(detailing case history of this second element of the Harlan test for the objective and reasonable expectation of privacy).

\(^{150}\) 389 U.S. 347, 361 (1967) (Harlan, J., concurring)(explaining that property ownership is not the basis of the right to privacy, but rather it is an expectation of privacy that so qualifies).
clearly abrogate a right to privacy, as would abandoning an automobile on a back road, or giving others consent to search one’s parcels.\textsuperscript{151} Ownership is not enough—a person must expect, and that expectation must be objectively reasonable, prior to creating a Fourth Amendment protection.

The most protected area is clearly an individual’s body, where a person has a full expectation of privacy. In \textit{Rochin v. California}, the police forced their way into the defendant’s home, having probable cause to believe he was in possession of narcotics.\textsuperscript{152} Upon entry, however, they saw him put something into his mouth and swallow it.\textsuperscript{153} They proceeded to take him to a hospital and have his stomach pumped—finding the narcotics they suspected he had attempted to conceal.\textsuperscript{154} In striking down the availability of this evidence, the Court employed Fourteenth Amendment Due Process grounds, referring to the act of having a person’s stomach forcibly pumped as “shocking the conscience.”\textsuperscript{155} The court went on to say: “Illegally breaking into the privacy of the

\textsuperscript{151} \textit{See Overview of the Fourth Amendment}, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, n. 16-18 (2006)(detailing case history of these exceptions to the reasonable expectation of privacy)

\textsuperscript{152} 342 U.S. 165 (1952).

\textsuperscript{153} \textit{Id.} at 166-67.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} This case, as with others that deal with bodily integrity, are not always articulated as violations of warrantless search and seizure (though reference is made to this type of violation). This is because there are other, more potent, grounds for defeating these intrusions.
petitioner, the struggle to open his mouth and remove what was there, the forcible
extraction of his stomach's contents—this course of proceeding by agents of government
to obtain evidence is bound to offend even hardened sensibilities." The Court seemed
to think that this sort of intrusion into the body would be hard to justify for any purpose.

In contrast, in Breithaupt v. Abram, the court allowed evidence of intoxication to
be introduced as evidence even though it was taken via a needle and his blood from the
defendant while he was unconscious following a traffic accident. The court noted:
“There is argument on behalf of petitioner that the evidence used here, the result of the
blood test, was obtained in violation of the Due Process Clause of the Fourteenth
Amendment in that the taking was the result of an unreasonable search and seizure
violative of the Fourth Amendment.” The Court upheld the defendant’s conviction of
vehicular homicide, however, noting that the intrusion was a reasonable one and only a
minor invasion of his privacy because it was done by a physician while the man was
being hospitalized. The Court distinguished this case from Rochin in these words:
“Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the
taking of a sample of blood when done, in this case, under the protective eye of a
physician.”

156 Id. at 172.
158 Id. at 434.
159 Id. at 435.
160 Id.
Also under the protective eye of a physician, and perhaps less intrusive than even *Rochin*, in *Ferguson v. Charleston* the Court struck down a warrantless search on the grounds that the testing of the patient’s blood was pursuant to a traditional law enforcement purpose. The blood sample of expecting mothers was tested for drugs and then turned over to the police. The Court was clear to articulate that the patient’s have a full privacy interest in their bodies and medical records, but this was merely a single weight in the balancing of privacy interests versus governmental interests. Ultimately, it was the purpose of the governmental interest (and not the privacy interest) that served as the grounds for denying the constitutionality of this policy. What is interesting to note is that while in *Breithaupt* and *Rochin* individualized suspicion was present, in *Ferguson* there was none. Hence, theoretically, in *Rochin* and *Ferguson* a warrant could have validated the searches—though whether they would have passed other due process challenges is suspect.

Bodily violations of Fourth Amendment search and seizure can also involve over-aggressive strip searches. In *N.G. v. Connecticut*, two young girls in juvenile detention brought a 42 U.S.C. 1983 action after being repeatedly subjected to strip searches to discover weapons or contraband. Connecticut’s *Operational Policy 311* mandates strip searches of all juveniles following any lapse of detention in the juvenile justice system,

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162 *Id.* at 78.

163 382 F.3d 225, 231 (2d Cir. 2004)(seeking, under 42 U.S.C. 1983, both injunctive and monetary relief against the state actors).
including hospital visits, furloughs, etc.\textsuperscript{164} This Policy, requiring no individualize suspicion of wrongdoing, could only be validated on the grounds that it is a special needs case. But the Court was unwilling to so certify. While the court was willing to speculate that some individuals, with histories of violence and escape attempts might engender this sort of treatment, it found that the state was going much too far in engaging in such a strong intrusion of privacy with little showing of individualized threat. Unfortunately for the two plaintiffs, in this case their histories fit that pattern, and hence their own causes of action were dismissed even as the law itself was found to fail constitutional muster.

Again, the Court places a high burden on the state to engage in suspicionless searches—especially where the individual’s body is at issue.

Clearly an invasion of a person’s body is ascribed the highest degree of protection—and some level of probable cause or individual suspicion of wrongdoing is mandated in every case. Close to this is the sanctity of the home.\textsuperscript{165} This fact is evidenced in Johnson, where the Court noted: America is “a society which chooses to dwell in reasonable security and freedom from surveillance.”\textsuperscript{166} In Camara, the Court

\textsuperscript{164} \textit{Id.}.

\textsuperscript{165} \textit{See} Payton v. New York, 445 U.S. 573 (1980)( discussing the “zone of privacy” and noting that a person has every expectation of being able to withdraw to her home and there expect the privacy from governmental intrusion that might be less apropos in the outside environs); \textit{see also} U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 313 (1972)(noting "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

made clear “even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.” The Supreme Court has emphatically stated: “one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.” This principle has been echoed time and again, with the Court noting the fundamental difference between searching a person’s home and searching a person’s belongings outside the home.

167 Camara, 387 U.S. at 530-31.

168 Id. at 528-29; but see City of Vincennes v. Emmons 841 N.E. 2d 155 (failing to extend this protection to landlords who do not live on the premises and hence cannot call it their home).

169 See Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) (holding the distinction between a search on a man’s property is per se unreasonable except in the existence of “exigent circumstances”); see also Jones v. United States, 357 U.S. 493, 497-98 (1958)(holding that it the police were able to search a home because they believed a certain item was there, without a warrant, then the Fourth Amendment would be virtually eviscerated): see also Payton v. New York, 445 U.S. 573, at 589 (1980)(“The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical
The inspection of personal belongings, outside the home, has always been seen as less invasive.\textsuperscript{170} The courts have been cognizant of this fact in distinctions between, for example, the work place and the home. In \textit{Oliver v. United States}, the court noted that sometimes the expectation of privacy one has at work is entitled to the same protection as one enjoys in the home.\textsuperscript{171} But this is not always the case, as a person’s expectation of privacy can never really reach the level it does in the home. In \textit{O’Connor v Ortega} the Court noted that the “operational realities of the workplace, however, may make some employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official” is possible.\textsuperscript{172} This is because such a location bears with it a reduced expectation of privacy.

The expectation of privacy is also contingent upon the degree to which the individual seeks to keep something private. This concept embraces the level of effort an individual undertakes to assure privacy.\textsuperscript{173} In \textit{U.S. v Chadwick}, the Chief Justice Burger

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\textsuperscript{170} See Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971)(drawing the distinction between privacy on one’s property and without one’s property); see also Payton 445 U.S. at 573 (juxtaposing searches in the home and those outside the home).
\textsuperscript{171} 466 U.S. 170, 178 (1984)(enforcing the Fourth Amendment protection of privacy in the workplace).
\textsuperscript{172} 480 U.S. 709, 716-17, (1987).
\textsuperscript{173} See also Arizona v. Hicks, 480 U.S. 321 (1987)(holding that the action of the officers is also of import, and finding that an officer, having legally entered an apartment, could
noted that a double-locked footlocker evinced a desire to maintain privacy much as if a person had locked their home.\footnote{433 U.S. 1, 11 (1977)(overturned by California v. Acevedo, 500 U.S. 565 (1991).} This case, however, was partially overturned by \textit{California v. Acevedo}, in which Justice Blackmun, speaking for the majority, held that a container in an automobile may be searched without a warrant so long as the police have probable cause that it contains the product of the criminal offense.\footnote{California v. Acevedo, 500 U.S. 565, 566-567 (1991).} While \textit{Chadwick} had required the police to await a warrant, \textit{Acevedo} dispensed with this requirement, noting that the officers had seen the defendant leave an apartment they knew contained marijuana and had seen him then place a brown paper bag into the car’s trunk.\footnote{Id. at 566.} It ruled that since the police had sufficient probable cause to suspect the paper bag of containing marijuana, they could validly open the locked trunk without a warrant. This is only an apparent overturning, or partial overturning, of \textit{Chadwick}, because it is articulated as the “automobile exception.”\footnote{Id. at 566-567.} Automobiles seem to fall under an increasingly different paradigm. “As we have noted earlier, one’s expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.”\footnote{United States v. Ortiz, 422 U.S. 891, 896, n.2.} Hence, the law seems to combine effort to keep something private with the location that privacy seeks to reach.

\textsuperscript{174} 433 U.S. 1, 11 (1977)(overturned by California v. Acevedo, 500 U.S. 565 (1991)).
\textsuperscript{176} Id. at 566.
\textsuperscript{177} Id. at 566-567.
\textsuperscript{178} United States v. Ortiz, 422 U.S. 891, 896, n.2.
b. Who Conducts the Search and Why

In the seminal *T.L.O.* ruling, albeit the concurring opinion, the famous Blackmun quote set as a standard a differentiation between a traditional police function conducted by police and a nontraditional police function served by those not trained in police work.\(^{179}\) One of the fundament elements of intrusiveness has been who is doing the intruding and why. Blackmun’s special needs required that the search be a non-police activity, and that impliedly the one conducting the search be a non-police official.\(^{180}\) In *T.L.O.*, one of the reasons given to support the program was that the individuals conducting the searches were school officials, neither trained in assessing individualized suspicions of wrongdoing, nor were they conducting traditional police business.\(^{181}\)

Later cases have proven that this principle is not just dicta.\(^{182}\) In *Ferguson*, the basis of the court’s rejection of the policy was that a traditional police function was being served.\(^{183}\) While the city officials had articulated other rationale, such as the protection of babies from cocaine addiction acquired from addicted mothers, the primary end-result

\(^{179}\) 469 U.S. 325, 350 n.1 (1985)(It is interesting to note this distinction was also noted by the Court’s opinion: “Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws. Of course, as illustrated by this case, school authorities have a layman's familiarity with the types of crimes that occur frequently in our schools”).

\(^{180}\) *Id.* at 352.

\(^{181}\) *T.L.O.*, 469 U.S. 325, at

\(^{182}\) See N.G. v. Connecticut, 382 F.3d 225, 230.

was the trying of those who had broken the law by using cocaine.\footnote{\textit{Id.} at 74-75.} While the actors in the program were not law enforcement agents, similar to the school officials in \textit{T.L.O.}, nonetheless the \textit{purpose} of the program was deemed to be one of law enforcement. Interestingly enough, this rejection came at a time when drug-testing (noting a string of cases recently handed down) had been greeted by the courts with favor.\footnote{See \textit{Skinner v. Railway Labor Executives' Assn.}, 489 U.S. 602 (1989) (upholding testing of railroad workers drug test for safety issues); \textit{see also} \textit{Treasury Employees v. Von Raab}, 489 U.S. 656 (1989) (upholding promotion and appointment to drug-sensitive positions bases upon drug use test); \textit{see also} \textit{Vernonia School Dist. 47J v. Acton}, 515 U.S. 646 (1995) (upholding program testing high school athletes for drug use); but see \textit{Chandler v. Miller}, 520 U.S. 305 (1997) (overturning a lower court case upholding drug testing for certain state-wide candidates).} \textit{Ferguson} is one of the few aberrations.

\textit{National Treasury Employees Union v. Von Raab} is more in a case-in-point, where fighting the drug problem was deemed a valid governmental interest divorced of its traditional police function. The court reiterated that the governmental interest had to outweigh the invasion of privacy \textit{and} that a special needs case must serve a purpose “beyond the normal need for law enforcement.”\footnote{489 U.S. 656, 665 (1989)} In this case, the United States Custom Service implemented a program to conduct drug testing on all employees who sought a promotion to a position where they would be in close contact with drugs and weapons. Conceding the gravity of the government’s interest, the fact that this interest outweighed
the personal liberty interest, and that this function was not one aimed at a traditional
police function (it was not arrests that were sought but public safety), the Court upheld
the drug testing.

In contravention of these cases, though not uniformly so, are the line of
checkpoint cases which seem to alternately embrace and drop the “non-traditional police
function” requirement.187 In *Michigan Department of State Police v. Sitz*, the use of
sobriety checkpoints was held to be constitutional given the grave threat of driving while
intoxicated on society.188 Rehnquist, writing the majority opinion, notes that drunk
driving is a valid governmental interest and that the intrusion to the motorist is limited
(the Court seems to assume efficacy—and given that every vehicle was stopped, this is a
safe assumption).189 The Court, in upholding the constitutionality of the checkpoints did
not seem to mind that the primary tool was one of law enforcement and that it was

187 In nearly every assessment of checkpoint cases, the courts treat them under the same
rubric of “special needs” cases, including the *MacWade* court. See *MacWade*, 460 F.3d
at 268. For a discussion of the automobile exception within checkpoint cases, see David
E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*,


189 *Id.* at 448-51 (adding that the average stop of only 25 seconds was a “slight”
intrusion).
conducted by police. As long as the “primary purpose” was to make the streets safer from drunk drivers, then the role of law enforcement did not negate the constitutionality on its own.

This sits in stark contrast *City of Indianapolis v. Edmond*. In *Edmond*, as discussed above, a random stop checkpoint was used to search for drugs. The cars were stopped while an officer spoke to the driver and a drug sniffing canine was walked around the parameter of the automobile. This, interestingly enough, was found unconstitutional because it served a clear law enforcement purpose. The purpose of the search was to actually apprehend the occupants of the car upon a finding of wrongdoing—anyone found to have drugs would be apprehended. This was the reason, given in *Brown v. Texas*, that the Court upheld the checkpoints in *Brown* while rejecting those in *Earls*. The Brown decision was much like the decision in *Illinois v. Lidster*, where the Court noted that, though the checkpoints were set up to help the police,

190 The Court seemed to ignore this fact entirely, whether intentionally because the weight of the public interest in preventing drunk driving is so great, or inadvertently for some other reason.

191 See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)(distinguishing the present case from *Sitz* on the grounds that the “primary purpose” of the Edmonds checkpoint was to make the streets safer while the primary purpose of the Edmond checkpoint was to catch drug users/traffickers).


193 *Id.* at 34-35.

194 *Id.* at 41-42.
information gathering was not a “traditional police function” in that the occupants were not being targeted for arrest.\textsuperscript{195}

The casual reader, however, would have a hard time distinguishing \textit{Sitz} from \textit{Edmonds}. Clearly \textit{Brown} and \textit{Lidster} are uniquely different from \textit{Sitz}, but the only difference between \textit{Sitz} and \textit{Edmond} is that the former was a search for alcohol violations while the later was a search for illegal drugs. A more thorough reading, however, does posit an escape route.\textsuperscript{196} A violator in \textit{Sitz} is committing both a crime and a dangerous act, while a violator in \textit{Edmond} might be only committing the first of these two. The person with illicit drugs may not be impaired at all, as they may simply be in possession of the drugs for transfer or use at a later time.

In short, the level of privacy accorded individuals is contingent, at least in part, on the expectation of privacy the individual has. This is balanced by the purpose of the search and, to some regard, who conducts the search.

\textbf{IV. The Lidster Balancing Test as Applied in MacWade v. Kelly}

The Second Circuit in \textit{MacWade} applies the “special needs” test as articulated in \textit{Earls}, citing to this case for each of the following elements:\textsuperscript{197}

(1) the weight and immediacy of the government interest

(2) "the nature of the privacy interest allegedly compromised by" the search,

\textsuperscript{195} \textit{Lidster}, 40 U.S. at 424.

\textsuperscript{196} \textit{Cf Edmonds}, 531 U.S. at 38 (implying that the primary purpose of the program is to identify those who have drugs, not necessarily those who are using them).

\textsuperscript{197} \textit{MacWade}, 460 F.3d at 269.
(3) "the character of the intrusion imposed" by the search, and
(4) the efficacy of the search in advancing the government interest.198

However, in application, the Court applies the more streamlined test as put forward in
Lidster, combining (2) and (3) into an assessment of the level of intrusion caused by the
search. In the end, the Second Circuit finds the public concern to be unrivaled, the
efficacy to be assumed in light of this fact, and the intrusiveness minimal. The Second
Circuit then cites to Nicholas v. Goord, a case from the Second Circuit which addressed
the import of the search being a non-traditional police function, and finds the CIP to have
a valid “non-traditional” police function.199

A. Terrorism: the Unrivaled Public Concern

“The gravity of the threat alone cannot be dispositive of questions concerning
what means law enforcement may employ to pursue a given purpose.”200 Nonetheless, it
is both the first element of the balancing test in Lidster and often the most salient.201 In a
post 9-11 world, terrorism is arguably the most important public concern,202 and there is a

198 Id.

199 430 F.3d 652, 663 (2d Cir.2005).

200 Edmonds, 531 U.S. at 38.

201 See supra, page 19.

202 See Illinois v. Caballes, 543 U.S. 405, 417 n. 7 (2005)(Souter, J.,
dissenting)(disagreeing with the Court’s majority position while emphasizing that canine
units conducting searches for bomb-materials would be a more compelling interest than
searching for drugs).
great deal of concern both in the public and among lawmakers that the government be allowed to do its job in fighting terrorism.\textsuperscript{203} Terrorism is also amazingly difficult to quantify.\textsuperscript{204} This is true because terrorism, unlike other public concerns, cannot be measured solely in terms of loss of life.\textsuperscript{205} In fact, many more Americans will die of obesity related heart-failure and of smoking related lung cancer each year than died in the World Trade Center bombings.\textsuperscript{206} It is unlikely, however, that the Fourth Amendment will be waived to reduce obesity or smoking anytime soon—as it most certainly would have to be if “governmental interest” (or public concern) was measured in the number of

\textsuperscript{203} See RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL, 334 (2005) (noting: “In an age of terrorism…the courts must also take caution not to unduly restrict the ability of citizens, acting through their government, to protect themselves against catastrophic attack.”

\textsuperscript{204} See Testimony of Commissioner Sheehan, Decision and Order, 05 Civ. 6921 (RMB)(FM) at 22. Terrorism is not the only difficult problem to quantify. In Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 648 (1995) (upholding the suspicionless drug testing of school athletes, and rejecting plaintiff’s claim that the policy was unconstitutional), the school district conceded that drugs had not always been a major problem. But teachers (since the mid-1980s) had noted a rise in their usage.


\textsuperscript{206} In fact, of the ten most likely means of death in the United States, Terrorism is not even mentioned. See the \textit{NATIONAL VITAL STATISTICS REPORT}, Vol. 50, No. 15, September 16, 2002, also available at http://www.the-eggman.com/writings/death_stats.html.
citizens lost. Instead, terrorism must be measured in intangibles, like the level of fear it engenders, the economic loss it precedes, and the insecurity and unease it causes millions. Since 9-11, these “terrorism consequences” have been on the minds of American citizens and politicians alike. The attack of 9-11 was the first of its kind in many respects. It was arguably the first attack on the continental United States by a foreign entity since the War of 1812. It was the largest single orchestration of terrorism in American history, also taking a global award for loss of life in a single terrorist attack. As such, the events of 9-11 heralded a new era in America. The nation, long a veteran of international war, was faced with a new struggle that was much more difficult to either conceptualize or prepare for. During the Cold War, SALT treaties could be signed to

207 See generally Susan N. Herman, The USA Patriot Act and the Submajoritarian Fourth Amendment, 41 HARV. C.R.-C.L. L. REV. 67, 2006 (discussing the general approval of both Congressional leaders and the public, in the aftermath of 9-11, to the provisions of the Patriot Act.)

208 Most commentators appraise the death toll on September 11, 2001 to be the worst in human history. See generally Infoplease, Terrorist Attacks, available at www.infoplease.com/ipa/A0001454.html; but see Praful Bidwai, The World’s Worst Terrorist Attack, August 6, 2005, available at www.wagingpeace.org/articles/2005/08/06_bidwai_worlds-worst-terrorist-act.htm (placing the bombing of Hiroshima at the top of the world’s most devastating events).

209 One very unique and insightful look at the difficulties of fighting terrorism can be seen in Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, January 2, 2005, available at www.jewishvirtuallibrary.org/jsource/Politics/terror.html
give people a sense that peace was attainable. Missile defense systems could be built to protect the nation—perhaps not against the onslaught of Soviet missiles, but against the more attenuated threat of rogue nations like North Korea or Iran. The Cuban missile crisis, perhaps the pinnacle of the Cold War era, showed that the American navy could be called upon to defend, and with a little brinksmanship (and perhaps a bit of luck) the fear of nuclear terror subsided.

Not so anymore. Since 9-11 a new threat has shown that American military might and technical sophistication are not equipped to protect Americans from the willingness of a few radical Muslims to die for their faith. Benjamin Netanyahu, former Prime Minister of Israel, has recently put it in these words:

We have the means to destroy our enemies, but not the will. Our enemies have the will to destroy us, but not the means. Soon, one or the other will get the second half of the equation. The only question is which one it will be.210

These words, to a great extent, sum up the difficulty of the public concern facing lawmakers. The stakes are high—in fact they may even be the very existence of one of the two parties to this conflict. The Bush Administration has repeatedly said that the war against terror is one in which we must be right 100 percent of the time, while the enemy only has to be right once.211 Since 9-11, there have been no terrorism attacks on U.S. soil—something George W. Bush claims is a testament to his successful policy of taking


Regardless of whether the president is correct or not with regard to the latter, he is correct with his assessment that it is the single success of the enemy that frightens both politician and citizen alike. As such, the threat of terrorism has become the new trump card in balancing tests weighing the propriety of governmental action that threatens traditionally protected civil liberties.

The New York Subway system is one of myriad possible transportation systems in the United States, and yet it is in the only city to have been hit twice by Al Qaeda. Add to this the testimony of Commissioner Sheehan at the original trial that 40 to 50 percent of terrorist attacks are aimed at transportation systems throughout the world and the case for greater scrutiny of anti-terrorism efforts in the New York subway system

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212 See George W. Bush, *State of the Union Address*, January 2003 (adding, with ever present optimism, that: “We have the terrorists on the run. We're keeping them on the run. One by one, the terrorists are learning the meaning of American justice.” To which he added: “We are winning.”) available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

213 According to WLF Senior Executive, Paul Kamenar, the subway inspection program under review in *MacWade* is highly popular amongst subway riders (though he cites to no study to substantiate this point).

214 See Richard Esposito, *No Icons, No Monuments Worth Protecting*, ABC News, June 1, 2006 (noting New York City is the only city in American to have been hit twice by Islamic terrorists, and arguing that proposed cuts to its anti-terror funding is not appropriate.) Available at http://blogs.abcnews.com/theblotter/2006/06/no_icons_no_mon.html.
Commissioner Sheehan also testified that, after the London subway bombings, New York felt obligated to concentrate on the subway system because of the confirmation that terrorists were targeting transportation systems, the facts that similar groups to those in London were operating in the NY area, and that the attacks were carried out in spite of the heavy security in London’s subway system.216

The facts discussed above provide ample justification for a compelling public concern. Interestingly enough, however, the Second Circuit spent a great deal less time discussing the grander threat of terrorism than it did the specifics of the threat to the New York subway system and why it needed special protection:

The New York City subway is a singular component of America’s urban infrastructure. The subway is an icon of the City’s culture and history, and engine of its colossal economy, a subterranean repository of its art and music, and, most often, the place where millions of diverse New Yorkers and visitors stand elbow to elbow as they traverse the metropolis.217

The Court went on to discuss the subway as both an “unsurprising” and “undisputed” prime target.218 It presented, as evidence of this, the former attempts to attack it as noted above,219 and the propensity of terrorism groups for targeting such systems.220 Although

215 Decision and order, 05 Civ. 6921 (RMB)(FM) page 8; see also MacWade, 460 F.3d at 264

216 Decision and Order, 05 Civ. 6921 (RMB)(FM) page 9; see also MacWade, 460 F.3d at 264 (noting that the July 21st attacks in London were the event that led to the immediate inception of the CIP in New York City).

217 MacWade, 460 F.3d at 264.

218 Id.

219 See supra, n 16.
it is unclear the weight the court actually gave to the “subterranean repository” of art and music, or the fact that the ridership is diverse, what is clear is that the court accepted that two alleged (and thwarted) attacks in the past and similar types of attacks overseas as sufficient for categorizing the New York subway as a clear public concern. 221

Though the reasons given in this Court’s opinion differ from previous cases in that they speak of the uniqueness of the subway system, there is some overlap with previous cases concerning airport security. 222 In United States v. Davis, where the defendant was convicted for trying to smuggle a gun on-board a plane, the court noted that airport searches were administrative in nature, with a clear purpose of “prevent[ing] the carrying of weapons or explosives aboard the aircraft.” 223 Likewise, in U.S. v. Pulido-Baquerizo, the court noted: “The determination of reasonableness requires a balancing of an individual’s right to be free of intrusive searches with society’s interest in safe air travel.” 224

220 See supra, n 14.

221 MacWade, 460 F.3d at 264

222 See generally United States v. Davis 482 F.2d 893, 897-98 (9th Cir. 1973) (approving the applicability of the Fourth Amendment to searches at airports because such searches, even when conducted by private personnel, are founded upon a “nationwide anti-hijacking program conceive, directed, and implemented by federal officials”).

223 482 F.2d 893, 908 (9th Cir. 1973) (approving the warrantless search of would-be airline passengers).

224 800 F.2d 899, 901-02 (9th Cir. 1986) (adding that implied consent is given to a visual search when a bag is placed upon the conveyor belt, and that a subsequent physical
In *United States v. Edwards* the purpose of allowing metal detectors to be installed in airports was couched in different terms, similar to those in the New York Subway system as articulated by the city in *MacWade*. The interest was in protecting hundreds of human lives and millions in property damage. The most interesting line in this case was simple a assessment that “the danger alone meets the test of reasonableness.” This line, a quarter of a century before 9-11, seems to sum it all up. The danger alone, because it is so great, makes the search “reasonable” under a Fourth Amendment balancing test.

**B. Terrorism: Proof of Effectiveness Unimportant in MacWade**

In *MacWade v, Kelly*, the Court comes to the conclusion that the “City’s counter-terrorism programs incrementally increases security and that taken together, the

search is reasonable if it follows an inconclusive x-ray search); The petitioner in this case had argued that he should be allowed to leave the airport without being subjected to the more thorough inspection, and that the more intrusive inspection lacked consent and was therefore unreasonable. The Court disagreed, holding that notice of a more intrusive search (and not actual knowledge) had been given and that petitioner was no longer free to take his luggage and exit the airport. Interestingly enough, in the present case, the passenger is free to leave if they do not want to subject their luggage to inspection but can be arrested if they try to re-enter at another station with the bag they denied authorities an opportunity to search).

225 498 F.2d 496, 500-501 (2d Cir. 1974).

programs address the broad range of concerns related to terrorist activity; and have created an environment in New York City that has made it more difficult for terrorists to operate.” (emphasis added) 227 This quote, however, is almost as difficult to comprehend as it is meaningless, as there is no discussion in any of the case materials of a wider war against terrorism that could be “taken together” with the CIP.228 Instead, the court was quick, or almost eager, to accept that no empirical proof of effectiveness was necessary for this balancing test.229 Efficacy, with regard to terrorism, is assumed with very little augmentation.

To the Court’s credit, it ignored one claim that the “special needs doctrine” does not require an inquiry into efficacy,230 and did conduct an investigation into the efficacy of the CIP. 231 In the present case it found the testimony of three “experts” was sufficient, including the testimony of David Cohen, the NYPD’s Deputy Commissioner for

227 MacWade, 460 F.3d at 267-68.

228 The court does make a passing reference to “overlapping coverage provided by its other counter-terrorism initiatives,” but does not elucidate what these are. In part this is because the District Court Judge performed an in camera review of the confidential plans of the City and deemed them adequate to justify the CIP. The Circuit Court gave deference to that finding of fact. MacWade, 460 F.3d at 264, 267.

229 See also Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 453-54 (1990) (counseling against a “searching examination of ‘effectiveness’” by arguing that it is up to political officers to decide which method is most likely to produce the desired impact).

230 Brief of Amici Curiae, Washington Legal Foundation, October 26, 2005

231 See MacWade, 460 F.3d at 273-74.
Intelligence, Michael Sheehan, the NYPD’s Deputy Commissioner for Counter-Terrorism, and Richard C. Clarke, former Chair of the Counter-Terrorism Security Group of the National Security Council.\textsuperscript{232} The Court noted that each of the individuals had a long resume reflecting work within law enforcement and/or counterintelligence, and that their individual testimony was so similar in nature that a single summary would suffice.\textsuperscript{233} The three experts noted that terrorists prefer coordinated attacks, that they like to plan using “dry runs,” that the terrorists place a high premium on “success,” and that the CIP is therefore effective.\textsuperscript{234} The City argued that an inspection program was set up to introduce uncertainty into the terrorist’s planning and staging of attacks.\textsuperscript{235} It noted that terrorists like to plan these attacks for long periods of time, conducting surveillance beforehand to ascertain that nothing will interrupt their efforts.\textsuperscript{236} It added that terrorists often look to see how responsive officials are to terrorist threats and how likely they are to conduct effective preventative measures.\textsuperscript{237} The proponents of the CIP, the defendants, alleged that as long as the inspection program is unpredictable, the program

\textsuperscript{232} MacWade, 460 F.3d at 265.

\textsuperscript{233} Id. at 265-66.

\textsuperscript{234} Id. at 266.

\textsuperscript{235} See Testimony of Commissioner Cohen, Decision and Order, 05 Civ. 6921 (RMB)(FM) at 21.

\textsuperscript{236} Id. at 24

\textsuperscript{237} Id. at 24
“dramatically improves the security posture” of New York’s subway system\textsuperscript{238} and provides the “a desirable level of deterrence.”\textsuperscript{239} According to the defendants’ key witness, “the presence of the program itself is the most important thing.”\textsuperscript{240}

But will the program actually stop terrorist attacks? According to the Earls Court, efficacy is an important component in measuring governmental action.\textsuperscript{241} Terrorism, however, appears to have carved out its own unique exception. One of the key witnesses for the plaintiffs, an expert of the design and operation of the NYSS, noted that the CIP would be easy to circumvent because perpetrators would be able to see the advanced warning the system and avail themselves of the “walk away “ provision for anyone not willing to subject their belongings to the search.\textsuperscript{242} Other testimony indicated that the deterrent effect of the CIP was “close to zero” and provided “no meaningful deterrent value.”\textsuperscript{243} Among the arguments of the plaintiffs was the fact that a terrorist could easily go to another entrance, could simply come back another day, or simply find another

\textsuperscript{238} See Testimony of Commissioner Sheehan, Decision and Order, 05 Civ. 6921 (RMB)(FM) at 22.

\textsuperscript{239} See Testimony of Richard Clarke, Decision and Order, 05 Civ. 6921 (RMB)(FM) at 23.

\textsuperscript{240} Id at 26.

\textsuperscript{241} Supra, page 20.

\textsuperscript{242} See Testimony of Gene Russianoff. Decision and Order, 05 Civ. 6921 (RMB)(FM) at 18.

\textsuperscript{243} See Testimony of Charles Pena, Decision and Order, 05 Civ. 6921 (RMB)(FM) at 19.
target outside of the subway system. To this, the proponents of the CIP simply asserted: “The fact that a terrorist could decline a search and leave the subway system makes little difference in assessing the Program’s effectiveness.” The word “assessing,” however, is ill applied here because no assessment is called for—a better choice of words would have included “presuming” in place of “assessing.”

The opponents of the CIP procured solid arguments, but in this case they backfired. The plaintiffs’ arguments that the ineffectiveness of the system was the fact that it did not go far enough in curtailing terrorism brought it little sympathy with the court, and in fact the court seemed to find irony in the idea that the opponents were arguing that the program was not as invasive as it ought to be.

244 See Religion and the Constitution, 2006 CATOSCTR 7, n 60 (citing Alan Feur, Appeals Court Upholds Random Police Searches of Passengers' Bags on Subways, N.Y. Times, August 12, 2006, at B5 (quoting from the article that "the ACLU argued that the searches were too infrequent and haphazard to be effective and violated the Fourth Amendment's provision against unreasonable searches and seizures without a specific cause")).

245 MacWade, 460 F.3d at 267.

246 Id. at 274-75 (noting the defendants could not quantify the program’s effectiveness, and accepting that such is not a necessary component of a valid program).

247 See Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 n.4 (1989)(citing Nat’l Treasury Employees Union v. Von Raab, 816 F.2d 170, 180 (5th Cir. 1987)(“The dissent, inconsistently is seems to us, argues that the testing program would
related case that unfolded in Boston during the Democratic National Convention, noted a similar belief.\textsuperscript{248} He noted that, undoubtedly, the best way to protect the city was to allow mass, warrantless, suspicionless searches at will by the police.\textsuperscript{249} The unanswered question remains, however, as to how ineffective a program can be and still qualify for “special needs” status.

In the end, the \textit{MacWade} Curt conceded that efficacy was an element in the “special needs doctrine.”\textsuperscript{250} It created, however, a new “deference to political and administrative officials” exemption, noting that because “counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task…we will not—and \textit{may not}\textsuperscript{251}—second guess [them].” Unfortunately, this deference can be dangerous because politicians often act for demonstrative purposes, in order to make a show of better security or to create a false-sense of security where actual security is be more likely to be constitutional if it were more pervasive and more invasive of privacy”\textsuperscript{251}).


\textsuperscript{249} \textit{Id.} at 1001.

\textsuperscript{250} \textit{See MacWade}, 460 F.3d at 273-74.

\textsuperscript{251} \textit{MacWade}, 460 F.3d at 273-74.
elusive. In short, they address the “fear factor” without addressing the real threat because the former is entirely easier than the later.

The Fourth Amendment was established to protect citizens from their government, hence deference to it is tantamount to capitulation. The Court concluded, however, that “as set forth above, the deterrent effect in this case is clear.” \(^{252}\) What the Court should have said is that the political benefit of the CIP, to city politicians, is clear.

**C. Terrorism: the Level of Intrusion**

1. **The Nature of the Search: The “Expectation of Privacy”**

   “the absence of a formal study of the Program’s deterrent effect does not concern us.”\(^{253}\)

   The court is not dealing, in this scenario, with a bodily search or the search of a person’s home. Nonetheless, it is dealing with a search that will invade the personal belongings of an individual—which the person has evinced an interest in keeping private by enclosing them in a sealed, covered container. The Plaintiffs argued that the “special needs doctrine” could not apply when a person has a full expectation of privacy.\(^{254}\) They opined that the lower expectation of privacy was the basis of *T.L.O*, where a child’s lower expectation of privacy at school provided the basis for warrantless searches. Likewise, the Plaintiffs argued that the reason searches of personal belongings were valid in airports

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\(^{252}\) *Id.* at 275.

\(^{253}\) *Id.* at 275.

\(^{254}\) See *MacWade*, 460 F.3d at 263.
was because people had come to expect them. They posited that since a person riding a subway has a full expectation of privacy in their personal belongings, carried with them, that no special needs doctrine could be applied.

The Court rejected this argument out-of-hand, and insightfully so. Even in the most private sphere of all, the body, exceptions have been granted. One such case was in *Breithaupt v. Abram*, discussed above, where the court allowed evidence of intoxication to be introduced as evidence even though it was taken from the defendant while he was unconscious. The expectation of privacy is clearly relevant, but not the only consideration. In *Ferguson*, the court noted the full expectation of privacy a person has in her medical records is a valid concern, albeit among others, for consideration. The *MacWade* court first conceded that the right to privacy implicated here was, in fact, complete. It went on, however, to note that: “the relevant privacy interest must not be treated in isolation or accorded dispositive weight, but rather must be balanced against

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255 This argument is porous at best, and the Court rightfully notes such defect. By this reasoning, as long as the government announced that all telephones would be tapped from here on out, the public would not have a diminished privacy interest because they would come to expect that sort of intrusion. *See MacWade*, 460 F.3d 262.

256 *MacWade*, 460 F.3d at 263-64.

257 *See supra*, pages 32-34.

258 *Supra* note 156 and accompanying text; 352 U.S. 432 (1957).

259 *Ferguson*, 532 U.S. at 78.

260 *MacWade*, 460 F.3d. at 270-271.
other fact-specific considerations.” In so ruling, it explicitly held that there is no threshold barrier for the “special needs” doctrine where the level of privacy interest is concerned.

With that pronouncement, the MacWade court proceeded to take into account the relevant elements of the privacy intrusion. Among these other considerations, compiled from previous cases with relevant facts, were the level of fear likely to arise from the search, the stigma that such a search would cause, the level of intrusion (amount of time and how “deep” the search was), and the possibility for police abuse. The Court addresses each in turn.

In *Michigan Dept. of Police v. Sitz*, the Supreme Court was cognizant that “fear and surprise” were to be seen as elements of a “level of intrusion” balancing test. The Court noted, citing to *Martinez-Fuerte*, that many drivers might be fearful because “the record failed to demonstrate that approaching motorists would be aware of their option to make U-turns or turnoffs to avoid the checkpoints.” This fact, in *Martinez-Fuerte*, was sufficient to categorize the check-points as impermissibly intrusive. The *MacWade* court noted that it is for this reason that the locations for the CIP are to be clearly marked

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261 *MacWade*, 460 F.3d at 269.

262 *Id.*

263 496 U.S. 444, 452-53.

264 *Id.* at 452 (citing to United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

265 *Martinez-Fuerte*, 428 U.S. at 443-44.
and refusal to submit to the searches made readily available without consequence. In fact, in addition to an officer on a speaker-phone announcing the program, large posters are placed to warn would-be passengers of the presence of the inspection stations. The Court notes that this very process works inversely with the efficacy of the CIP, but notes that in its jurisprudential history such notice has been deemed a positive with regard to intrusion in an individual’s right to privacy.

With regard to social stigma, the Court in United States v. Pulido-Baquerizo noted that airport searches produce “negligible social stigma” and that such searches constitute only a “slight privacy intrusion” because their intent is to uncover weapons and not other illegal contraband. Subways are not airports, and have no history of searches in America, so the Court in MacWade had to come up with its own reasoning for finding “negligible social stigma.” It did so by noting that the officers would be in uniform and the searches would be in public—citing to both United States v. Martinez-Fuerte and U.S. v. Hartwell for support. But these cases noted that uniforms help reduce the fear of a stop at a roadblock by legitimating it, and that the public nature of a search at an airport is preferable to a search on a dark road where only the officer is witness. Neither of the

266 MacWade, 460 F.3d at 265 (noting that refusal is not itself a crime, but anyone who refuses and subsequently attempts to board the subway with the package yet un-inspected, risks arrest).

267 Decision and Order, 05 Civ. 6921 (RMB)(FM) at 12.

268 800 F.2d 899, 901-02 (9th Cir.1986).


270 Martinez-Fuerte, 428 U.S. at 558; Hartwell, 436 F.3d at 180.
cases cited purport that a public search, in a public place, by a uniformed officer, reduces public stigma! Many intelligent individuals could reasonably come to the opposite conclusion.

The Pulido-Baquerizo Court also noted that a search constitutes only a “slight privacy intrusion” if their intent is to uncover weapons and not other illegal contraband.\(^\text{271}\) The MacWade court points out that the two-week old program had yet to arrest anyone for contraband,\(^\text{272}\) though it concedes that if an officer does come across any, he may initiate an arrest.\(^\text{273}\) The court added that this constitutes a limited search because the officers only engage in a minimal intrusion, going only so far as to satisfy themselves that no explosive materials are present in the bag.\(^\text{274}\) They do not search small bags nor do they read any materials that they see.\(^\text{275}\) Likewise, in compliance with Brown v. Texas, they do not require identification nor request any other personal information.\(^\text{276}\)

In United States v. Davis, the Court stated that in its opinion, a free society is willing to tolerate brief inspections given that the threat of terrorism is great.\(^\text{277}\) This sentiment, however, is highly sensitive to the type of search, where and when it is done,

\(^{271}\) 800 F.2d 899, 901-02 (9th Cir.1986).

\(^{272}\) MacWade, 460 F.3d at n.1.

\(^{273}\) Id. at 265.

\(^{274}\) Id. at 273.

\(^{275}\) Id.

\(^{276}\) Id. at 265.

\(^{277}\) United States v. Davis, 482 F.2d 893, 901-02 (9th Cir.1973).
and how invasive it is. What must be conceded is that the CIP involves a much more invasive procedure than the traditional random checkpoint cases.\textsuperscript{278} Nonetheless, the Court in \textit{MacWade} found the search to be “minimally invasive” even where it conceded that the privacy interest was complete.\textsuperscript{279} By erasing the concept that certain areas of privacy are not subject to the “special needs” exception, the \textit{MacWade} court has taken down any barrier to its reach into American lives.

2. Who Conducts the Search and Why

In \textit{United States v. Lifshitz}, the court notes that the “means employed must bear ‘a close and substantial relationship’ to the government’s interest in pursuing the search.”\textsuperscript{280} Likewise, that governmental interest cannot be for a “traditional police purpose.”\textsuperscript{281} The Second Circuit, going further than even the \textit{Lidster} test detailed above, and citing to its own precedent in \textit{Nichols}, elevates this element to a threshold test.\textsuperscript{282} It is only if the governmental interest is not a traditional police interest that the Second Circuit progresses to the other elements of the \textit{Lidster} test.\textsuperscript{283} The Court finds that the CIP easily passes this test, however, closely mirroring its reasoning in \textit{Edwards}.\textsuperscript{284} In \textit{Edwards}, the Court had noted that terrorism was a threat of special interest, though even ordinary criminals and

\textsuperscript{278} See \textit{Religion and the Constitution}, 2006 CATOSCTR 7, n 60.

\textsuperscript{279} See supra, note 259.

\textsuperscript{280} 369 F.3d 173, 192 (2d Cir. 2004)(citing \textit{Earls}, 536 U.S. at 837).

\textsuperscript{281} See supra, pages 39-41.

\textsuperscript{282} \textit{MacWade}, 460 F.3d. at 268.

\textsuperscript{283} \textit{Id.} at 269.

\textsuperscript{284} \textit{Edwards}, 498 F.2d at 500-501.
those who are “demented” also might try to bring weapons onto a plane. To the Edwards Court, and similarly in MacWade, the transference from “traditional” to “non-traditional” seems one of the possible scope of the damage. Little else seems to differentiate the two.

As for the second element, the Court all but ignores the seminal T.L.O. mantra, albeit in the concurring opinion, of Justice Blackmun that a search conducted by a uniformed officer voids the special needs doctrine. One of the fundament arguments of intrusiveness has been who is doing the intruding. Blackmun’s special needs required that the search be a non-police activity, an important part of the justification of warrantless searches in T.L.O.—where the court made clear that should trained police officers be the ones to conduct the searches, perhaps individualized suspicion of wrongdoing would be required.285 In U.S. v. Marquez the Court quotes, with regard, a treatise on Fourth Amendment search and seizure: “Generally, such a search is brief, is less intrusive than the typical search warrant execution, does not have a stigma attached to it, is not made by armed police, and is often made only with advanced notice.” (internal quotation marks removed, emphasis added)286

The Second Circuit, in following its own jurisprudential history in Nichols, has reduced the T.L.O. rule to reflect the “primary purpose” of the search while removing the concern for “who” conducts the search.287 On one hand, this leaves its ruling open to challenge. On the other hand, the Nichols rule seems to bring together the traditional

285 See supra, notes 179-181 and accompanying text.

286 U.S. v. Marquez, 410 F.3d at 616 (quoting WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.6(C) (4th ed. 2005).

287 MacWade, 460 F.3d at 268-69.
“special needs” cases and the check-point cases. By differentiating between the primary purpose of the search and who is conducting the searches the Court might have provided more continuity. The final arbiter, however, has yet to rule on this formulation.

V. Why a Balancing Test is No Longer Possible

Philosophy has had an old mind-twister—what happens when an unstoppable force meets an impenetrable obstacle. The answer, of course, is one of semantics and definitions. Unstopvable and impenetrable are two ideas that, when they collide, require creativity to solve the balancing problem that ensues. Just as true, what happens when a constitutionally protected right meets a grave public concern. In most situations, the courts look to the evidence the gravity of the public concern, the efficacy of the program that would invade the protected right, and the level of intrusion (keeping in mind that the interest does not serve a traditional police purpose). This could be shown algebraically as $PC \times E > LI$, where $PC$ is the degree of public concern, $E$ is the efficacy of the program at curtailing the concern, and where their product must be greater than $LI$, or the level of intrusion.\(^{288}\) The mathematical reality is that $E$ is a percentage, and hence any perceived $PC$ will be algebraically reduced by $E$ unless $E$ is 100%, whereby $PC$ remains unchanged.

This is neither a unique nor a novel way of formulating the approach—in fact, once Justice Blackmun “authorized” the court to replace the intent of the Framers with its own balancing test, this is exactly what the court has been doing in special needs

\(^{288}\) Cf Edwards, 498 F.2d at 500-01 (2d Cir. 1974)(allowing metal detectors to be installed in airports, and subjecting passengers to warrantless searches.)
cases. In the analogy noted above, the unstoppable force will overcome any obstacle because it is defined in an equation as infinity, or \( \delta \). Only when the object becomes immovable (also \( \delta \)) does it become problematic—as \( \delta = \delta \). In the case of terrorism and the balancing test, as long as \( PC = \delta \), and as long as the effectiveness measure is anything but zero, the level of intrusiveness is near immaterial. As the court put it, the government interest “in preventing a terrorist attack on the subway was of the very highest order.”

In the words of the Court in 1974, when the opinion of the Court was reflected as one of “reasonableness” and not “special needs,” “the danger alone meets the test.”

In *MacWade*, the Court found the *PC* of vital importance—as just noted, of the “highest order.” In short, the Court is conceding that the fear or perception of an imminent terrorist attack is the ultimate governmental interest (or public concern). This may not have been problematic if, as it did, it then found the expectation of privacy, by riders on a subway, to be complete. This later observation, however, was attenuated by other factors, such as the brevity, notice, limited nature, and non-discretionary nature of the search. The Court, by dispensing of a “bright line rule” and embracing a balancing test even where the privacy interest is complete, has created an algebraic anomaly. Now, the *PC* is near infinity and the *LI* is limited by a number of particular assessments.

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289 *See supra*, note iii and accompanying text.

290 *MacWade*, 460 F.3d at 268-69

291 *See MacWade*, 460 F.3d at 269-70.

292 *See supra*, note 259.

293 *See supra* pages 61-64.
This leaves only the level of effectiveness to complete the equations. The court found the program to be effective—perhaps nominally so, but effective. In this case, the incredibly low efficacy score should have reduced the product on the left considerably. Any number, multiplied by a percentage less than zero, is reduced. Although the Court in MacWade accepts the efficacy of the CIP, any casual observer can note that there are problems with it. While the city witnesses give such high marks to terrorists in the level of planning and preparation, they give almost no credit to these same individuals for flexibility, for making minor alterations to their plans, or adaptability. Also, they fail to note the largest defect of all. On 9-11, one of the four failed, but the terrorist engaged in redundancy, an element that would certainly preclude the CIP effectiveness if such a coordinated attack took place. For these reasons, though possible having some deterrent effect, the efficacy of the program should be a very small score. But this is now immaterial, as any fraction of \( \delta \) remains \( \delta \). Under this new rubric any amount of efficacy above zero justifies the governmental interest in the search as long as there is any finding of a reduction in \( LI \).

VI. The Implications towards Post-9-11 Civil Liberties Cases

In the immediate aftermath of the 9-11 bombing of the World Trade Center, Congress passed the USA Patriot Act.\(^{294}\) It contained, among other powers, the authority to engage in wiretaps, the authority to monitor library reading habits, to hold suspects on

secret charges, and to keep “no fly lists” of individuals without notifying them of this condition.295 This has created an interesting dilemma for Fourth Amendment jurisprudence, because though the level of threat is not mentioned in the Fourth Amendment, it has played a monumental role in how strictly the Fourth Amendment protections are applied.296 The Fourth Amendment challenges to the Patriot Act have proved “stubbornly resistant” to legal challenge, and in “the four years since the enactment of the Patriot Act, very few challengers have even attempted to litigate the constitutionality of any of the provisions discussed here.”297

That said, there have been significant challenges—some with more success than others. The dividing line may become the type of test used to determine the flexibility accorded governmental interests vis-à-vis civil liberties. While bright line tests are likely to prevent Constitutional erosion, terrorism poses a new threat when balancing tests are employed.

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A. Challenges outside the Scope of a Balancing Test Remain Promising

Challenges to governmental programs are not all in the same sphere. There are those that fall within the “bright line” rules, such as traditional illegal searches and seizures under Mapp and Weeks in criminal law (where the exclusionary rule is applied with force). There are also challenges to other Constitutional protections that are not amenable to a balancing test. In these areas even the weight of the governmental interest in preventing terrorism has not been a win-win situation for the federal government. This principle can be seen in one clear area of contention between the civil liberties Americans have come to rely on and the post-9-11 world as seen through Hamdi et al. v. Rumsfeld.

In Hamdi, Justice O'Connor wrote an opinion that debunked the President’s position that separation of powers should preclude the court from interfering in the area of detention and trying of “enemy combatants.” “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the

298 See supra, pages 12-14 and accompanying notes.


300 See Hamdi v. Rumsfeld, 126 S.Ct. 2749 (noting with concern the failure of the military commission to abide by the Uniform Military Code, be clearly authorized by Congress, and be in compliance with the Geneva Convention).
Nation's citizens.”

This point conceded, the court still allowed the president a great deal of latitude in creating a legal structure through which to prosecute “enemy combatants.” The tenuous 6-3 decision, with a mix-and-match opinion that seems alternately to stand up to the presidency and cave in to the presidency, does not bode well for enemy combatants. It does, however, bode well for proponents of civil rights who, at least symbolically, won a victory. Over the President’s efforts, the Court upheld the civil liberties provided in Constitution.

Many decision that are contingent upon a bright line, as in the case of due process and the rights of enemy combatants to some sort of legal challenge to their detention, may deal a defeat to governmental programs aimed at eroding civil liberties provided in the Bill of Rights. This is less likely, however, where a delicate “balancing test” is employed.

B. Challenges inside the Scope of a Balancing Test are Likely to Lose

Challenges that are amenable to balancing tests, most notable the Fourth Amendment challenges, are much more likely to be decided in favor of governmental

\[\text{\textsuperscript{301}}\text{ See }\text{Norman J. Finkel, }\textit{supra} \text{ note 286 (quoting from Hamdi v. Rumsfeld, 542 U.S. 507, 535-36 (2004)).}\]

\[\text{\textsuperscript{302}}\text{ See Senators Leahy and Spector, }\textit{Habeas Corpus Restoration Act of 2006} \text{(noting that the Bush administration had been embarrassed by the Hamdi ruling).}\]
programs to fight terrorism.\textsuperscript{303} In Justice Marshall’s dissent in \textit{Skinner}, he pointed out just such a danger in using a balancing test for Fourth Amendment analysis:

In reaching this result, the majority ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges. But the majority errs even under its own utilitarian standards, trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA’s testing program.\textsuperscript{304}

First he points out that using a balancing test is, in itself, a break from the traditional uses of a bright line rule—in the case of a search it is the necessity of probable cause. Second, he points out that the use of a balancing test can often (as is seen as fit to the judges administering the test) diminish an important ingredient of that test and it can come to ignore the weaknesses in the governmental program under review. Both of these occur in \textit{MacWade}, where the individual privacy interest is downplayed and the ineffectiveness of the program, vis-à-vis the intent of the program, is made immaterial. The “inherent weakness” of a balancing test becomes more pronounced when a governmental interest like fighting terrorism comes to the fore.

\textsuperscript{303} See Susan N. Herman, \textit{supra} note 284 at n 32 (noting that “In the four years since September 11, for example, the Court has ruled against Fourth Amendment claims in thirteen of the fourteen cases it reviewed.”). While her assessment is probably correct, of the fourteen cases she cites to, none deal with elements of the Patriot Act (these will likely be a year or two in the making), and probable reflect more an overall attitude on the high court that State interests will receive greater deference—especially regarding the war on drugs.

This is evident in one of the recent challenges to The Patriot Act, where it has been the practice of the FBI to conduct electronic surveillance with a warrant that is premised upon a secret informant’s declaration.305 While the court has long exempted foreign wiretapping as an expedient means of addressing the pressing need for national security, the Court has not extended that power to domestic surveillance until now.306 In In re Sealed Case, information obtained through surveillance under the Foreign Intelligence Surveillance Act no longer must be shown to be solely for the purpose of foreign intelligence.307 In a break from the Fourth Amendment requirement that this information serve a foreign intelligence purpose and not be linked to domestic criminal prosecution, the Court held that in light of The Patriot Act a new “significant purpose” test was more fitting.308 This new test allows surveillance of an agent of a foreign power if a significant purpose is “foreign intelligence,” even if one of the purposes is also to “criminally prosecute” the agent domestically.309


306 See Elizabeth Gillingham Daily, supra note 282 at 644-53 (discussing, in depth, case law and principles of allowing foreign wiretapping for national security purposes while traditionally forbidding warrantless domestic wiretapping).


308 In re Sealed Case, 310 F.3d at 735.

309 Id.
This is a troubling development, much like in MacWade, because whenever a bright line rule is replaced by a balancing test, civil liberties are likely to lose.\textsuperscript{310} One author rightfully notes: “The most fundamental legal framework for protecting the public from abusive surveillance of any form is, of course, the Fourth Amendment’s protection against unreasonable searches and seizures.”\textsuperscript{311} But the threat of terrorism has left the government with the eight hundred pound guerilla. Not only are plaintiffs who challenge the government on eroded Fourth Amendment causes likely to lose, but other challenges are simply not being brought.\textsuperscript{312} In Doe v. Gonzales several internet providers brought suit to challenge the FBI’s demand to see its subscribers lists.\textsuperscript{313} The FBI had begun sending out National Security Letters (NSL) to internet providers in order to track suspicious usage. These subscribers initially challenged the government, and having won lower court rulings,\textsuperscript{314} including a preliminary injunction, the government changed some portions of the NSL to allow these companies to discuss the matter with lawyers and to

\textsuperscript{310} Interestingly enough, as indicated above, the Fourth Amendment has already been under attack from the War On Drugs. See, e.g., David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U. CHI. LEGAL F. 237 (1994). The War on Terror, however, poses an even greater threat in this author’s opinion.


\textsuperscript{312} See Susan N. Herman, supra note 284 at 71.

\textsuperscript{313} 449 F.3d 415 (2\textsuperscript{nd} Cir. 2006).

challenge individual NSLs.315 This was enough to render the issues moot on appeal, so the policy remains intact.

In other cases, institutions want to appear cooperative in the war on terror, and hence these “custodians” of information are often forthcoming when information is requested—with little hesitancy, much less a legal challenge.316 AT&T, and other large companies, is only one of many that has been accused of complicity with government requests for sensitive information.317 Such is also the case where airlines are refusing many Americans the right to fly because of government distributed “No Fly Lists”—Senator Edward Kennedy and Congressman Donald Young of Alaska are two of the lucky winners who have been refused boarding on numerous occasions.318 With such prominent individuals being denied boarding, one would expect a legal challenge to the

315 Gonzalez, 449 F.3d. at 19.


317 See Leslie Cauley, NASA has Large Data Base of Americans’ Phone Calls, USA TODAY, May 11, 2006; but see Anne Broache, Judge: Google Must Give Feds Limited Access to Records, C/NET NEWS, March 17, 2006 (discussing Google’s fight to retain records subpoenaed by the government and the judge’s finding of a sufficient governmental interest in access to those files).

denial of Due Process under the Fourth Amendment.\textsuperscript{319} But to date, there has been no successful challenge (and not even an unsuccessful challenge where the court has reached the merits of the case).\textsuperscript{320}

\textbf{VII. Conclusion}

The ascendancy of terrorism to the forefront of the American political landscape could hardly be expected to leave that terrain unaltered. But the changes to the political landscape are appreciably more profound than might be seen at first blush. Terrorism has

\textsuperscript{319} \textit{See} Justice Florence, \textit{Making the No Fly List Fly: A Due Process Model for Terrorist Watch Lists}, 115 \textit{Yale L.J.} 2148 (2006)(detailing the need for due process provisions, such as notice, a hearing, and the appointment of counsel for those on the list prior to any attempt to board a place).

\textsuperscript{320} \textit{See} Ibrahim v. Department of Homeland Security, Slip Copy, 2006 WL 2374645, (N.D.Cal.,2006)(dismissing challenge to constitutionality of “no fly list” due to want of jurisdiction); Gilmore v. Gonzales, 435 F.3d 1125, (C.A.9 2006)(refusing to rule on constitutionality of the no fly list because the injury in fact was due to would-be passenger’s refusal to provide proper identification); Gordon v. F.B.I. 390 F.Supp.2d 897 (N.D.Cal.,2004)(ruling that the government had not made a case that the No Fly List was exempt from the freedom of information act); Green v. Transportation Security Admin., 351 F.Supp.2d 1119 (W.D.Wash.,2005)(denying relief to passengers with names similar to those of terrorists for want of jurisdiction); Wayson v. U.S., 231 F.R.D. 577 (D.Alaska,2005)(denying relief to individual who postured, hypothetically, that the Secretary of Homeland Security might put his name on the No Fly List).
brought with it a relaxing of the Fourth Amendment protections that have, hitherto, been well established in the American lexicon. This is because terrorism is the ultimate governmental interest, and as long as a balancing test is the only safeguard standing between Americans and the erosion of civil liberties, it is likely that civil Americans will lose. Nowhere is this more true than in the “special needs” cases, where even Blackmon, in his famous *T.L.O.* concurring opinion, warned that the “Court's implication that the balancing test is the rule rather than the exception is troubling for me...”321 He found that a balancing test was not necessary to rule with the majority in *T.L.O.*, and yet it appears that a the preference for a balancing test is becoming even more the norm than the exception.322

Will New York be the first place to take notice of the new landscape? Subways may only be the first in a series of surrenders of Fourth Amendment rights, as one author put it:

> It is quite possible that both protestors and passerby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security...We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely to ever be truly over,

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321 *T.L.O.* 469 U.S. at 351.

322 *Id.*
September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.323

In a way, a balancing test makes just such a prediction possible. As long as efficacy is not a weighty measure, and evidence of its existence is accepted as “deference to political and administrative” persons, civil liberties are not protected. Soon, every citizen of New York may be living in a “Safe New World.”