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Searching for Terrorists: Why "Public Safety" is not a Special Need

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**Searching for Terrorists:
Why “Public Safety” is not a Special Need**

*Ric Simmons**

Table of Contents

Introduction

- I. The First Era: 1968-1976**
 - A. The first wave of terror: hijackings and bombings**
 - B. The birth of the administrative search doctrine—and the end of individualized suspicion.**
- II. The Second Era: 1977--2000**
 - A. Order is restored**
 - B. Broadening the scope of suspicionless searches**
 - 1, The birth of “special needs:” searches and drug tests in schools**
 - 2. Searches and drug tests of public employees**
 - 3. Searches of probationers and parolees**
 - 4. Vehicular checkpoints**
- III. The Third Era: 2000-2009**
 - A. The war on terror**
 - 1. Reservoirs**
 - 2. Political protests**
 - 3. Sports arenas**
 - 4. Public transportation**
 - 5. The current status of anti-terrorism searches**
 - B. Special needs in other contexts**
- IV. Can Suspicionless Anti-Terrorism Searches be Justified by the Special Needs Doctrine?**
- V. Other Possible Justifications for Suspicionless Anti-Terrorism Searches**
 - A. Evaluation under a generalized “reasonableness” test**
 - B. Legislatures should decide what is “reasonable”**
 - C. Consent**
 - D. Anti-terrorism searches are *sui generis*, so courts should create a new category of suspicionless searches**
- VI. What if Suspicionless Searches are Unconstitutional?**
 - A. The effect of abolishing anti-terrorism searches**
 - B. The effect of allowing the searches, but precluding the evidence**
 - C. Remaining limits on government searches**

Conclusion

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Introduction

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

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

This is not a hypothetical from our potential future; it is a lesson from our recent past. In the late 1960's and early 1970's, international hijackers and domestic terrorists were the cause of widespread violence and social unrest in our country. These attacks stopped only after the government ordered searches of every airplane passenger and every visitor to federal courthouses. Courts upheld these suspicionless searches by

applying a new legal theory called the administrative search doctrine, which was derived from a line of cases originally intended to allow health inspectors access to homes without needing to demonstrate individualized suspicion. Now, nearly forty years later, entire generations have grown up assuming the only way to board an airplane or enter a courthouse is to be subjected to a search by law enforcement personnel.

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

Following the terrorist attack of 2001, these are no longer academic questions. History is repeating itself. In the wake of the September 11th tests, local police across the country instituted suspicionless search regimes at political protests, sporting events, subway platforms, and public ferries—all in an attempt to prevent further terrorist attacks. Courts are now struggling to determine whether the same doctrine that justified suspicionless searches at airports and public courthouses can be used to support this second generation of searches. And many academics—usually ready to denounce and criticize new restrictions on Fourth Amendment rights—have scrambled to find ways to

justify these searches under existing Fourth Amendment jurisprudence,¹ or have argued that the old Fourth Amendment rules simply do not or should not apply in the face of a terrorist threat.²

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

Of course, suspicionless searches are not confined to the anti-terrorism context.

In fact, just before the first anti-terrorism searches were being reviewed by the appellate

¹ See, e.g., Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L. J. 719, 722 (2007) (stating that the New York City subway searches are “uncontroversial” and that the case for such searches is “relatively easy to make.”); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 Touro L. Rev. 93, 163 (2007) (arguing that suspicionless searches should be seen as “reasonable” and thus constitutional if they have been approved by a representative legislative body, because the legislative process will correct any overreaching by law enforcement). *But see* Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 384 (2007) (criticizing the holdings in the anti-terrorism search cases and noting that “whenever a bright line rule is replaced by a balancing test, civil liberties are likely to lose.”)

² See Ronald M. Gould and Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. Cal. L. Rev. 777, 777 (2004) (arguing that “traditional Fourth Amendment search and seizure doctrine was fine for an age of flintlocks,” but that “large-scale searches undertaken to prevent horrific potential harms may be constitutionally sound.”); *but see* John T. Parry, *Terrorism and the New Criminal Process*, 15 Wm. & Mary Bill of Rights J. 765, 834-35 (2007) (concluding that “the war on terror has generated extraordinary criminal processes applicable to people suspected of terrorism” and arguing that the costs of this change are significant, including “state power over all of us—over our bodies, our mobility, our words and actions, and of course our lives—continues to increase....”)

courts in the early 1970's, the Supreme Court created an entirely new doctrine which allowed the government to conduct a search or seizure without any showing of individualized suspicion. It is this doctrine—known as the administrative search doctrine—which the early courts ultimately used to justify the anti-terrorism searches. Although the Court described these cases as a “closely guarded category of constitutionally permissible suspicionless searches,”³ they in fact cover a broad range of situations. They include searches to enforce regulatory violations, mandatory drug testing of schoolchildren and public employees, inventory searches, immigration and drunk driving checkpoints, and searches of probationers and parolees. The doctrine underlying these cases is murky at best; and judges and commentators disagree as to whether these cases all fall into the same category or should be considered as doctrinally distinct.⁴ For now, we will refer to them all as “suspicionless searches,” meaning searches that are permissible even if the government does not have any amount of individualized suspicion of the subject being searched.

The first three Parts to this Article detail the changes to anti-terrorism searches and the suspicionless search doctrine for each of these three time periods. Part I covers the first era, approximately 1968-1976, and examines both the government's reaction to the first wave of terrorism, and the birth and early application of the suspicionless search doctrine. Part II describes the second era—roughly 1977-2000—which was a time of

³ *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

⁴ The Ninth Circuit, for example, breaks these cases down into three categories which are “not necessarily mutually-exclusive:” searches at “exempted areas,” (such as the international border, prisons, and airports and entrances to government buildings); “administrative searches,” and “special needs” searches. *United States v. Kincade*, 379 F.3d 813, 822-23 (2004). Professor Schulhofer, meanwhile, distinguishes the “administrative” searches and the “internal governance” searches (such as those that occur in schools and public workplaces) from the mandatory drug testing laws that are actually intended to deter and punish use of illegal drugs. Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 162-63 (1989).

relative calm between our two waves of terrorism. Despite this relative calm, during this period the suspicionless searches at airports and courthouses became more firmly entrenched in the law, and among the general public they became an unquestioned—perhaps even a comforting—aspect of travelling by air or entering a federal building. Meanwhile, outside the terrorism context, the suspicionless search doctrine was evolving and expanding to cover a variety of different contexts, acquiring along the way a new name: “special needs” searches. Finally, Part III discusses the modern era—from 2001 to the present—when terrorism again became a palpable threat to this country, and law enforcement once again responded with suspicionless searches to prevent future attacks. During this time, however, the courts have become more critical of suspicionless searches, both in the anti-terrorism context and in other areas, ultimately leading to a confusing legal test and an inconsistent application of that test when it is applied to anti-terrorism searches.

After the Article finishes tracing the development of both anti-terrorism searches and the suspicionless search doctrine, Part IV critically analyzes the special needs doctrine. This part breaks the special needs cases up into different categories, and concludes that the special needs doctrine cannot in fact justify suspicionless anti-terrorism searches. Part V examines other possible justifications for suspicionless anti-terrorism searches, including analyzing these cases under a generalized “reasonableness” test and relying on implied consent. The Part concludes that none of the other justifications are valid, given the very real danger of a slippery slope and the need for a principled distinction between searches which require individualized suspicion and those that do not. This creates a significant problem: if suspicionless anti-terrorism searches

are unconstitutional under the principles of the Fourth Amendment, how can law enforcement protect us from the very real threat of terrorism? Part VI will propose a solution to this problem: suspicionless anti-terrorism searches would be constitutionally justified under the special needs doctrine as long as the contraband that is recovered cannot be used in a criminal prosecution. By giving law enforcement the opportunity to choose between a suspicionless search which is truly aimed only at preventing terrorism and a more traditional search which could result in criminal prosecution, this proposal gives the police more powers to search when there is a true terrorist threat, and still encourages them to develop more sophisticated and less intrusive methods of investigation when they are seeking to apprehend and prosecute wrongdoers.

I. The First Era: 1968-1976

A. The First Wave of Terror: Hijackings and bombings

The late 1960's was a time of severe social unrest in this country. The civil rights movement, opposition to the Vietnam war, protests against the regime of Fidel Castro, and claims of Palestinian sovereignty motivated radical elements of the population to engage in acts of domestic terrorism and violence. Bombings of public buildings and other high-profile targets increased dramatically. Police departments, courthouses, foreign missions, university offices, prisons, the Pentagon, and the United States capitol building were all targets of bomb attacks.⁵ According to a report by the Federal Bureau

⁵ See "The Radical Underground Surfaces With a Fang," *New York Times*, at Week in Review, at <http://select.nytimes.com/gst/abstract.html?res=F70C1EFE3555107A93C7A81788D85F448785F9&scp=10&sq=1970%20courthouse%20bombings&st=cse> (March 15, 1970).

of Investigation, there were 3,000 bombings and 50,000 bomb threats in 1970 alone.⁶ These attacks, alongside a series of high-profile political assassinations, including Robert Kennedy and Martin Luther King, heightened the perception of a tidal wave of violent social unrest sweeping the country.⁷

Around the same time, the country experienced an epidemic of airplane hijackings. In the decade prior to 1968, hijackings had averaged only one per year, but in 1968 there were 18, and in 1969 there were 33.⁸ In 1970, a radical Palestinian group hijacked two American planes and two Swiss planes bound for New York City and flew them to Jordan and Egypt, where the terrorists ultimately blew up all four planes on the landing field.⁹

The government's response to this rise in both domestic and international terrorism included broad new search procedures at the entrances to public buildings and at airports. In the fall of 1970, the federal General Services Administration issued an order requiring searches of all bags and packages at entrances to every federal building.¹⁰ Meanwhile, on September 11, 1970, President Nixon issued a directive the Department of

⁶ See *History of the FBI-Vietnam War Era: 1960s-1970s*, available at www.fbi.gov/librief/historic/vietnam.html.

⁷ See "The American Century, 1960-1969," *Washington Times*, at A10 (August 30, 1999).

⁸ *United States v. Davis*, 482 F.2d 893, 897 (9th Cir. 1973). The high number of hijackings continued into the next decade: 25 in 1970, 25 in 1971, and 26 in 1972. The numbers finally dropped to single digits for most of the rest of the 1970's, and dropped to zero by the 1990's. See United States Department of Transportation, Federal Aviation Administration, Office of Civil Aviation Security, *Criminal Acts Against Civil Aviation*, at <http://cas.faa.gov/crimacts/pf/crim2000.pdf>.

⁹ See "Disclosure Is Made by Amman Radio; Arabs Free 32 Hostages, Say All Will Be Released," *New York Times*, A1 (September 27, 1970) at <http://select.nytimes.com/gst/abstract.html?res=FA0F12FF3F59137A93C5AB1782D85F448785F9&scp=16&sq=1970%20palestinian%20hijacking&st=cse>. The four planes were all destroyed on September 12, 1970. *Id.*

¹⁰ *Downing v. Kunzig*, 454 F.2d 1230, 1231 (6th Cir. 1972). The GSA order stated: "...[B]ecause of the recent outburst of bombings and other acts of violence, effective at once, at all entrances to federal property under the charge and control of GSA, where there are guards on duty, all packages shall be inspected for bombs or other potentially harmful devices. Admittance should be denied to anyone who refuses to voluntarily submit packages for examination." *Id.*

Transportation, requiring its agents to work with the airlines in instituting surveillance programs at all domestic airports.¹¹ When this voluntary cooperation proved ineffective (hijackings continued relatively unabated throughout 1971),¹² the Federal Aviation Administration issued a series of rules in 1972 requiring all airline passengers and their luggage to be screened prior to boarding an airplane.¹³ These requirements have remained in place every since,¹⁴ and security screenings have become a well-known fixture at every federal building and commercial airport in the country.

The suspicionless searches were challenged almost immediately—and were universally upheld by the courts, which went out of their way to emphasize the grave risk posed by the threat of terrorism. The Sixth Circuit conceded that “[o]rdinarily...a person should not have his person or property subjected to a search in the absence of a warrant or probable cause to believe that a crime is being committed,” but went on to argue that, given the recent wave of violence, “the dangers to federal property and personnel [are] imminent.”¹⁵ The court concluded that “in times of emergency[,] government may take reasonable steps to assure that its property and personnel are protected against damage, injury or destruction....”¹⁶ The Ninth Circuit similarly upheld suspicionless searches at the San Francisco County courthouse.¹⁷ In reaching its conclusion, the court relied on the fact that that there were “specific instances of bomb threats and bomb attacks directed at San Francisco police stations, Oakland police stations, and the Los Angeles federal

¹¹ *Davis*, 482 F.2d at 900.

¹² *See supra* note 8.

¹³ *Davis*, 482 F.2d at 901.

¹⁴ In 2002, federal law enforcement agents replaced private airline employees as screeners. “Federal Screeners Just One Component of Air Safety Net,” *USA Today*, 20A (Nov. 19, 2002).

¹⁵ *Downing*, 454 F.2d at 123

¹⁶ *Id.* at 1233. The court also held that the searches were not very intrusive, stating that inspection of bags and packages was a “very minimal type of interference with personal freedom” which was reasonable given the government’s need to protect itself against the “ruthless forces bent upon its destruction.” *Id.*

¹⁷ *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978).

building.” Moreover, the court noted that terrorists had recently kidnapped four individuals and killed a judge in a nearby county.¹⁸ Given this background of violence, the court determined that “a serious threat of violence existed at the Hall of Justice” and therefore courthouse searches were a reasonable precaution to prevent further violence against the courthouse and its personnel.¹⁹

Judges reacted similarly to suspicionless searches in airports.²⁰ In approving the new security measures, these courts emphasized the extraordinary harm which was caused by terrorist attacks. The Ninth Circuit noted that “[t]he need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. The disruption of air traffic is severe. There is serious risk of complications in our foreign relations.”²¹ Suspicionless searches were seen as the only way to prevent such terrorist acts, since “[l]ittle can be done to balk the malefactor after such material is successfully smuggled aboard, and as yet there is no foolproof method of confining the search to the few who are potential hijackers.”²² In upholding suspicionless airport searches, the Fifth Circuit implied that they would be

¹⁸ *Id.* at 900.

¹⁹ *Id.* Legal commentators at the time expressed some concern the government was overreacting, even given this background of violence: “[Courthouse searches] are seldom founded upon an adequate correlation between the scope of the search procedure and the necessity for their implementation.... An ongoing emergency—a current, serious threat of violence—may provide the justification necessary...[but] the threat, of course, can be neither stale nor insignificant, and the intrusion must be limited according to the severity of the emergency.” Kenneth L. Jesmore, *The Courthouse Search*, 21 UCLA L. REV. 797, 625 (1974).

²⁰ *See, e.g., Davis*, 482 F.2d 893; *United States v. Edwards*, 498 F.2d 496 (2nd Cir. 1974); *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973); *United States v. Albarado*, 495 F.2d 509 (2nd Cir. 1974); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Slocum*, 464 F.2d 1180 (3rd Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir.), cert. denied, 406 U.S. 947, 32 L. Ed. 2d 334, 92 S. Ct. 2050 (1972).

²¹ *Davis*, 482 F.2d at 910. The Ninth Circuit also held that these searches have an element of implied consent: “...[A]irport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft. *Id.* at 910-11. As we shall see in Part, *infra*, the consent justification for these searches has recently been questioned by some courts. *See infra* notes 275-282 and accompanying text.

²² *Id.* at 910.

temporary: “Certainly all citizens look forward to the day when skyjackings and their sequels, airport search and security measures, cease. When the threat of air piracy disappears the standards of reasonableness which we here recognize will go with it.”²³

The language of these opinions demonstrates that these suspicionless searches were seen as an extraordinary solution to an extraordinary problem. As one judge noted in 1976:

In the wake of unprecedented airport bombings, aircraft piracy and courtroom violence, the courts have approved precautionary security measures which cannot be reconciled with previously conceived notions of the citizen's protection under the Fourth Amendment against warrantless intrusions without probable cause.²⁴

But although courts generally agreed that these searches were necessary, they initially struggled to find a doctrinal justification for their holdings. Some courts simply applied the “unreasonable searches” language of the Fourth Amendment and concluded that the searches were reasonable given the nature of the threat and the relatively low level of intrusion.²⁵ Others analogized suspicionless searches in airports to searches at the border, and applied a three part balancing test, including the nature of the threat, the level of the intrusion, and the efficacy of the search in actually preventing the harm.²⁶ Still others held that the individual being searched had given a sort of implied consent, since he or she could always avoid the search by simply choosing not to board the plane or enter the government building.²⁷ But for the most part, courts placed these searches into a newly minted category of suspicionless searches known as “administrative searches”—and this is where they have remained for the subsequent four decades.

²³ *Skipwith*, 482 F.2d at 1279.

²⁴ *Collier v. Miller*, 414 F. Supp. 1357, 1362 (S.D.TX 1976).

²⁵ *See, e.g., Downing*, 454 F.2d at 1233.

²⁶ *Skipwith*, 482 F.2d at 1275.

²⁷ *See, e.g., Davis*, 482 F.2d at 910; *Singleton v. Commissioner*, 606 F.2d 52 (3rd Cir. 1979).

B. The birth of the administrative search doctrine—and the end of individualized suspicion.

The Fourth Amendment prohibits “unreasonable searches and seizures,” and states that “no Warrants shall issue, but upon probable cause.”²⁸ This pair of restrictions has led to differing interpretations as to how the Amendment should be applied in practice,²⁹ which in turn has led to a thoroughly confusing body of jurisprudence. Courts have generally held that a search is unconstitutional unless it is supported by a warrant or probable cause,³⁰ but they have also used the “reasonableness” language to support a exceptions to this general rule. For example, courts allow brief pat-downs for weapons on a showing of less than probable cause in order to protect an officer’s safety.³¹ Or when a police officer is in hot pursuit of a suspected criminal, he can enter a house and conduct a search for the suspect and any weapons in order to protect their lives and the lives of others.³² And if there is probable cause to make an arrest, the Supreme Court has held that a search of the suspect and the area under his control is “reasonable” in order to preserve evidence for later use at trial.³³

In each of these cases, however, courts require some form of individualized suspicion (albeit short of probable cause) before the search can take place. In fact, prior

²⁸ U.S. CONST. amend. IV.

²⁹ For a brief summary of this interpretive dispute, see Bascuas, *supra* note 1, at 726-30. Most scholars today focus on the “unreasonable” language, arguing for a broad balancing test in determining whether or not a given search is constitutional. See, e.g., Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1118, 1120-25 (1998) (discussing different factors which may help to determine whether or not a search is “reasonable:” the gravity of the offense; the intrusiveness of the search; other options of acquiring the information or items; and the identity of the subject being searched). *Id.* at 1120-25..

³⁰ See generally *Nat. Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989) (“Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause.”)

³¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

³² *Warden v. Hayden*, 387 U.S. 294 (1967).

³³ *Carroll v. United States*, 267 U.S. 132 (1925); *Chimel v. California*, 355 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981).

to 1967, the only context in which the Supreme Court allowed non consensual suspicionless searches³⁴ was at the international border, pursuant to longstanding and relatively non-controversial case law.³⁵ But all that changed in the case of *Camara v. Municipal Court*.³⁶

In *Camara*,³⁷ the Court held that a health inspector was not required to demonstrate probable cause—nor indeed *any* form of individualized suspicion—in order to obtain a warrant to investigate a home.³⁸ According to the Court, there was no need to require individualized suspicion because the searches were not “aimed at the discovery of evidence of crime.”³⁹ The Court also stated that a probable cause requirement would be impracticable, since the hidden nature of dangerous conditions in homes would prevent an inspector from being able to demonstrate probable cause.⁴⁰

Over the next fifteen years, the Court applied the administrative search doctrine in numerous different regulatory contexts, approving warrants issued in the absence individualized suspicion for OSHA workplace inspections,⁴¹ and permitting warrantless inspections of certain industries which were closely regulated, such as liquor stores,⁴²

³⁴ Of course, the most common form of search used by law enforcement is the consent search, which does not require any amount of individualized suspicion. *United States v. Miller*, 20 F.3d 926, 930 (1994); *United States v. Morris*, 910 F.Supp. 1428, 1446 (1995). However, the consent search doctrine is actually based on a waiver of one’s Fourth Amendment right, and so has no bearing on the meaning or interpretation of the Fourth Amendment itself. *Id.*

³⁵ *Carroll v. United States*, 267 U.S. 132, 154 (1925) (“[N]ational self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in....” *See also infra* notes 113-116 and accompanying text.

³⁶ 387 U.S. 523 (1967).

³⁷ 387 U.S. 523 (1967).

³⁸ The *Camara* case actually overruled a previous case from eight years earlier, in which the Court had said that a health inspector could enter a home without a warrant at all. *Frank v. Maryland*, 359 U.S. 360 (1959).

³⁹ *Camara*, 387 U.S. at 537.

⁴⁰ *Id.* The Court also noted that these types of suspicionless inspections had been traditionally accepted by the courts and by the general public. *Id.*

⁴¹ *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

⁴² *Collonade Catering Corp. v. United States*, 397 U.S. 72 (1970)

sellers of firearms,⁴³ and mines.⁴⁴ In these cases, the Court added another rationale for abandoning the individualized suspicion requirement: the individuals and businesses engaged in such industries were fully aware of the pervasive regulation in their field and therefore had a reduced expectation of privacy.⁴⁵

Courts also applied the administrative search doctrine to a category of cases known as inventory searches. Police officers frequently take custody of personal property, either pursuant to criminal activity (for example, when they arrest an intoxicated driver and impound the car), or pursuant to other duties, (as when they tow a car in violation of parking regulations, or find an abandoned bag in a public place). When police officers take custody of such property, they routinely conduct an “inventory search.” As the Supreme Court noted in 1976, the goals of such searches are not the discovery or investigation of a crime, but rather to (1) protect the owner’s property, (2) avoid false claims of lost or stolen property by the owner, and (3) protect the police from potential danger.⁴⁶ Thus, the Court concluded that inventory searches were part of the “routine, administrative caretaking” functions of the police,⁴⁷ rather than part of its law enforcement functions, and approved of inventory searches even in the absence of individualized suspicion.⁴⁸

In one sense, it is not surprising that the appellate courts turned to the administrative search doctrine when seeking to justify suspicionless anti-terrorism searches in the early 1970’s, since no other doctrinal justification for suspicionless

⁴³ *United States v. Biswell*, 406 U.S. 311 (1972).

⁴⁴ *Donovan v. Dewey*, 452 U.S. 594 (1981).

⁴⁵ *Biswell*, 406 U.S. at 315-16.

⁴⁶ *South Dakota v. Opperman*, 428 U.S. 364, 370 (1976).

⁴⁷ *Id.* at 270 n.5

⁴⁸ *Id.* at 375-76; *Colorado v. Bertine*, 479 U.S. 367, 376 (1987).

searches existed at the time. And given the very real and immediate danger posed by the terrorists who were hijacking airplanes and blowing up public buildings in the late 1960's, the government had a reasonable argument that such searches served a purpose other than crime control: to wit, they were designed to secure the safety of airline passengers and government personnel.⁴⁹ As the Ninth Circuit explained, the searches were “part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime.”⁵⁰

Not surprising, perhaps—and even justifiable, given the quasi-emergency the country was facing at the time. But even during this early stage, the use of the administrative search doctrine to justify anti-terrorism searches was legally suspect. When juxtaposed with the inspections for building code safety violations and the routine cataloging of the contents of impounded vehicles, the widespread suspicionless searches at airports and at courthouses stand out rather dramatically. In the first place, they are much broader in scope, affecting a much larger portion of the population—certainly the vast majority of the country has been subjected to a search at an airport or a courthouse (or both). And in the second place, the “public safety” purpose, while no doubt legitimate, does not seem far removed from general crime control—in fact, if one looks at the searches from a slightly different perspective, the purpose seems to be indistinguishable from crime control. As we will see, the problem of distinguishing between public safety and crime control only becomes more severe, as two changes

⁴⁹ *See, e.g., Davis*, 482 F.2d at 910 (“In this and other relevant respects, the airport search program is indistinguishable, for Fourth Amendment purposes, from the warrantless screening inspection of air passengers and their luggage for plant pests and disease.”)

Although the Supreme Court has never directly reviewed the constitutionality of suspicionless searches at public buildings or in airports, it has cited the circuit court cases with approval in dicta, implying that upholding these suspicionless searches is a proper application of the administrative search doctrine. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

⁵⁰ *Davis*, 482 F.2d at 910.

occurred over the next thirty years. First, the administrative search doctrine itself evolved to allow different types of searches, many of which were *de facto* crime-control searches masquerading as an administrative search. Second, in the most recent era, when terrorism once again became a real threat to the country, law enforcement officers sought to expand the use of suspicionless anti-terrorism searches to other contexts, and the courts—unlike their predecessors in the early 1970s—began to push back.

II. The Second Era: 1977--2000

A. Order is Restored

Over the subsequent two and half decades, the threat of terrorism—perceived and actual—receded from the nation’s concerns. The major outbreaks of violence conducted by such groups as the Weathermen, the Black Panthers, and Cuban exile groups faded into history,⁵¹ while hijackings were virtually eliminated by the end of the 1970s. But the suspicionless searches at airports and most public buildings remained in place, finding a new practical (if not doctrinal) justification in the minds of the populace and in the courts. Given the relative period of calm, courts could no longer defend these suspicionless searches as extraordinary responses to an “emergency” situation in which public buildings and airplanes faced “imminent” danger from the “ruthless forces” bent on harming the United States. Instead, the Supreme Court offered precisely the opposite argument when it gave suspicionless airport searches its stamp of approval (albeit in dicta) in 1989:

In the 15 years the [suspicionless search] program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage

⁵¹ There were some exceptions. The Fuerzas Armadas de Liberación Nacional (“FALN”) a Puerto Rican Marxist terrorist group, carried out a number of bombings between 1974 and 1985. However, none of these incidents provoked a national shift in law enforcement tactics.

have been inspected. By far the overwhelming majority of those persons who have been searched...have proved entirely innocent -- only 42,000 firearms have been detected during the same period. When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.⁵²

There is little dispute that the hijacking epidemic ended in large part *because* of the new security procedures at airports; thus, the Court's emphasis on the efficacy of such a program is entirely sensible. No judge, commentator, or (probably) passenger would have considered eliminating the searches even in the year 2000, after a decade without any domestic passenger airplane hijackings.⁵³ The thought of eliminating them in the wake of the terrorist attacks in 2001 is practically unthinkable. Nevertheless, we have traveled a long way from the Fifth Circuit's sentiment that we all "look forward to the day when skyjackings and their sequels, airport search and security measures, cease;" and also a long way from the promise that the relaxed standards which allow suspicionless airport searches will disappear "when the threat of air piracy disappears." It is now clear that the "threat of air piracy" will never disappear, and thus, the security measures will never disappear either. But if suspicionless searches at airports are now a permanent fixture in our society, it is even more imperative that courts find a principled justification for these searches—and as we will see, the need to justify these searches has been one of the factors that has turned the suspicionless search doctrine into a confusing tangle of inconsistent jurisprudence.

The policy of suspicionless searches at public buildings has also long outlasted the violent epidemic of bombings and shootings which created it. Like searches at

⁵² *Von Raab*, 489 U.S. at 675 n.3 (citations omitted).

⁵³ See www.bts.gov/publications/the_changing_face_of_transportation/html/figure_07_13.html. There was an attempted hijacking of a non-passenger airplane in 1994, when a Federal Express Employee attempted to hijack one of the company's planes. *Id.*

airports, these security procedures have become a familiar—and unquestioned—part of our daily life; we simply accept that there is no way to enter many public buildings—to meet with a public official, or to attend a session of open court—without submitting to a search by a law enforcement official. But searches at public buildings are different from those at airports in two fundamental ways. First, while almost everyone traces the decrease in hijackings to the suspicionless search policy which was implemented, the decrease in bombings and shootings inside public buildings can probably be traced to a number of different factors.⁵⁴ Second, courts continue to point out that suspicionless searches in airports are the only effective way to prevent hijacking,⁵⁵ whereas there may be other ways of keeping public buildings and courtrooms safe.⁵⁶ Finally, the catastrophic harm in terms of loss of life and property damage which could be caused by a hijacking is dramatically greater than that which could be caused by a individual in a public building or courthouse. In short, although the two types of suspicionless searches came into existence at the same time, and were justified under similar theories, there is at least from a policy perspective a much stronger reason for continuing one kind of search than there is for the other. Thus, a doctrine which permits suspicionless searches at airports need not also cover suspicionless searches at public buildings.

B. Broadening the Scope of Suspicionless Searches

During this same time period, courts expanded the suspicionless searches into a number of different areas, including drug testing in schools,⁵⁷ drug testing of public

⁵⁴ See *supra* note 6.

⁵⁵ *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005).

⁵⁶ See *infra* note 314 and accompanying text.

⁵⁷ See *infra* notes 66-84 and accompanying text.

employees,⁵⁸ searches of probationers,⁵⁹ and drunk-driving checkpoints.⁶⁰ But the most dramatic expansion in the law of suspicionless searches was a radical re-casting of what it means for a search to have a non-criminal purpose—and this change occurred subtly, perhaps accidentally, without any express acknowledgement from the courts.

The first example of this change came in the administrative search context. In 1987, the Supreme Court upheld the suspicionless search of an automobile junkyard in *New York v. Burger*.⁶¹ Under then-existing New York law, every automobile junkyard had to keep records of all the auto parts which came onto the premises, and submit both the records and the junkyard itself to inspections whenever requested by an appropriate state official.⁶² Pursuant to this law, police officers from the Auto Crimes Division of the New York Police Department searched Burger’s junkyard, copied down the vehicle identification numbers of some auto parts there, and later determined that the parts had come from stolen vehicles.⁶³ Burger was subsequently charged and convicted for possession of stolen property, and he appealed the conviction, claiming that the lack of individualized suspicion rendered the search unconstitutional.

The Court applied the administrative search doctrine, ruling that the search was not “aimed at the discovery of a crime”—even though it was conducted by police officers and resulted in a criminal prosecution.⁶⁴ The Court explained that “an administrative

⁵⁸ See *infra* notes 85-100 and accompanying text.

⁵⁹ See *infra* notes 101-112 and accompanying text.

⁶⁰ See *infra* notes 113-127 and accompanying text.

⁶¹ 482 U.S. 691 (1987).

⁶² N. Y. Veh. & Traf. Law § 415-a5 (McKinney 1986). The law allowed inspection by an agent of the Department of Motor Vehicles or by a police officer. *Id.*

⁶³ *Burger*, 482 U.S. at 694-95.

⁶⁴ In applying the administrative search doctrine, the Supreme Court found that the defendant had a reduced expectation of privacy because he was in a closely regulated industry, *Id.* at 703-7, and because suspicionless searches were necessary to further a substantial interest of the state. *Id.* at 708-10. The Court

scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower”; and that this particular administrative scheme “serves the *regulatory* goals of seeking to ensure that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified.”⁶⁵

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

1. The birth of “special needs:” searches and drug tests in schools

The term “special needs” was first coined in *New Jersey v. T.L.O.*,⁶⁶ in which a high school assistant principal searched the purse of a student whom he suspected of smoking in school. Although the principal had neither a warrant nor probable cause, the Court upheld the search for two reasons: first, the search was conducted for the purpose of “maintaining discipline in the classroom and on school grounds,”⁶⁷ not law enforcement purposes; and second, high school students have a “lesser expectation of privacy” than the general population.⁶⁸ In his concurrence, Justice Blackmun set out a

also noted that the statute provided notice which was a valid substitute for a warrant, and that it placed legitimate time, place, and scope restrictions on the searches. *Id.* at 711-12.

⁶⁵ *Id.* at 713-14 (emphasis added).

⁶⁶ 469 U.S. 325 (1985).

⁶⁷ *Id.* at 339.

⁶⁸ *Id.* at 348 (Blackmun, J., concurring).

test that would be used in future cases: a lower standard for searches was permitted “only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable....”⁶⁹

In contrast with the administrative search cases, the “special needs” test does not involve any explicit finding that there were no other viable means of meeting the government objective. However, Blackmun’s test incorporates (and dilutes) this standard by stating the traditional requirements of the Fourth Amendment are can only be loosened if the special needs make adherence to those requirements “impracticable.”⁷⁰ In the context of a search conducted by school officials, the majority in *T.L.O.* stated that “[t]he warrant requirement...is unsuited to the school environment” because it “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”⁷¹

This first “special needs” case was not a suspicionless search, since the assistant principal had some reason to believe the defendant was carrying contraband in her purse. Thus, the “special needs” doctrine at first merely meant that a court would relax the strict warrant and probable cause requirements if there were special needs beyond the normal need of law enforcement.⁷² In *T.L.O.*, for example, the Court held that the school officials must have “reasonable grounds” to believe the student had broken a law or a school rule.⁷³

⁶⁹ *Id.* at 351 (Blackmun, J., concurring).

⁷⁰ *See, e.g., T.L.O.*, 469 U.S. at 340 (“The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”)

⁷¹ *Id.* at 340.

⁷² *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 653 (1995).

⁷³ *T.L.O.*, 469 U.S. at 341-42.

But this requirement of individualized suspicion for searches of public school students was abandoned ten years later in *Veronia v. Acton*, in which the Court upheld mandatory, suspicionless drug testing of school athletes.⁷⁴ The special needs doctrine had evolved and broadened considerably over the intervening decade, and suspicionless searches had been approved in a number of other contexts.⁷⁵

As in *T.L.O.*, the Court in *Acton* emphasized that schoolchildren had a reduced expectation of privacy.⁷⁶ And the Court found other factors—not present in *T.L.O.*—which would logically lead to a further loosening of the Fourth Amendment standards: athletes in particular have a lower expectation of privacy than other students;⁷⁷ a urinalysis is in some ways more limited and less intrusive than the search of a purse;⁷⁸ the results of the tests were revealed only to school administrators and parents and not turned over to law enforcement;⁷⁹ and alternate methods of deterring drug use were likely to be less effective.⁸⁰ Unfortunately, the Court did not explain which of these factors justified the critical doctrinal shift from *T.L.O.*'s requirement of “reasonable grounds” to *Acton*'s abandonment of individualized suspicion.⁸¹

At first glance, this shift from requiring “reasonable grounds” to allowing suspicionless searches was the most significant part of the *Acton* opinion. But as we have seen, suspicionless searches had already been allowed in the context of administrative

⁷⁴ *Veronia*, 515 U.S. at 664.

⁷⁵ See *infra* notes 91-100 and accompanying text.

⁷⁶ *Veronia*, 515 U.S. at 655-57.

⁷⁷ *Id.*

⁷⁸ *Id.* at 658.

⁷⁹ *Id.* at 658.

⁸⁰ *Id.* at 663-64.

⁸¹ We can conclude by inference that the “reduced expectation of privacy” of athletes was not one of the dispositive factors, because seven years later the Court approved suspicionless drug testing of all students involved in extracurricular activities. *Bd. of Education Pottawatomie v. Earls*, 536 U.S. 822 (2002).

searches.⁸² In truth, the most significant aspect of *Acton* was the “special need” that the Court used to justify deviation from the strict Fourth Amendment requirements in the first place. Unlike the special need in *T.L.O.* (maintaining discipline in the classroom and on school grounds), *Acton*’s special need was barely distinguishable from a standard law enforcement purpose: “detering drug use by our Nation’s schoolchildren.”⁸³ In the *Acton* case, the Court could still legitimately claim that the test was not designed to serve the “ordinary needs of law enforcement” because the results of the test were not turned over to law enforcement personnel. However, this expansive definition of “special needs” has broadened to other cases in which the results of the search *are* turned over to law enforcement,⁸⁴ thus effectively removing the original justification for departing from the Fourth Amendment’s traditional requirement of individualized suspicion.

2. Searches and drug tests of public employees

Only one year after *T.L.O.* was decided, a plurality of the Court applied the special needs test in *O’Connor v. Ortega*,⁸⁵ upholding a search of a public hospital employee’s desk. As in *T.L.O.*, the reason underlying the intrusion was not the normal need of law enforcement, but rather “the government’s need for supervision, control, and the efficient operation of the workplace”;⁸⁶ thus, the search was permissible even though there was no warrant and no probable cause.

⁸² Suspicionless searches had also already been permitted in the context of automotive checkpoints. *See infra* notes 117-123 and accompanying text.

⁸³ *Id.* at 661.

⁸⁴ *See infra* notes 124-127 and accompanying text.

⁸⁵ *O’Connor v. Ortega*, 480 U.S. 709 (1987).

⁸⁶ *Id.* at 720. (“Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee’s desk for the purpose of finding a file or piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property.”)

Ortega's analysis was similar to *T.L.O.*'s in many ways. The Court noted that a warrant or probable cause requirement would be impracticable in the context of the public workplace, since the supervisors who conduct these searches—like school administrators—are “not in the business of investigating the violation of criminal laws,” and therefore could not be expected to understand or comply with “unwieldy warrant procedures”⁸⁷ or “the subtleties of the probable cause standard.”⁸⁸ Also, just like the schoolchildren in *T.L.O.* and the heavily regulated businesses in *Camara*, the Court noted that office workers have a diminished expectation of privacy in their workplace.⁸⁹ And unsurprisingly, the Court applied the same standard to evaluate the search: whether the government had “reasonable grounds” to suspect that the search would turn up evidence of wrongdoing.⁹⁰

And like *T.L.O.*, *Ortega* laid the groundwork for future cases in which the Court abandoned the individualized suspicion requirement for public employees. In a pair of cases in 1989, the Court upheld suspicionless mandatory drug tests for railroad employees who had been involved in accidents⁹¹ and customs agents who used firearms or engaged in drug interdiction.⁹² In *Skinner v. Railway Labor Executives*, the Court determined that the purpose of drug tests for railroad employees was “ensuring the safety of the traveling public and the employees themselves,” noting that the tests were

To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.”) (citations omitted). *Id.* at 723.

⁸⁷ *Id.* at 722.

⁸⁸ *Id.* at 724-25.

⁸⁹ *Id.* at 717. (“An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual’s office.”)

⁹⁰ *Id.* at 726.

⁹¹ *Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989).

⁹² *Nat. Treasury Employees Union v. Van Raab*, 489 U.S. 656 (1989).

administered “not to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.”⁹³ In *National Treasury Employees Union v. Van Raab*, the Court held that the purpose of drug tests for United States Customs agents was to “deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions.”⁹⁴ Specifically, the Court noted that the Customs Service sought to prevent employees with guns from injuring themselves or others, and to ensure that those protecting the nation’s borders maintained good judgment and were not vulnerable to blackmail.⁹⁵

In both *Skinner* and *Van Raab*, the Court cited the familiar justifications for allowing suspicionless searches: a limited intrusion on privacy,⁹⁶ reduced expectation of privacy on the part of the subjects;⁹⁷ and the fact that imposing a warrant requirement would be impractical and would frustrate the government purpose.⁹⁸ But most significantly, *Skinner* and *Van Raab* paralleled the evolution of “special needs” that was seen in *Acton*: In both cases, the purpose of the test was essentially to deter illegal activity (drug use), with the dubious argument that deterring illegal activity went beyond the standard goals of law enforcement because of the highly dangerous or sensitive

⁹³ *Skinner*, 489 U.S. at 620-21 (internal quotations omitted).

⁹⁴ *Id.* at 666.

⁹⁵ *Van Raab*, 489 U.S. at 668-71.

⁹⁶ *Skinner*, 489 U.S. at 624-25; *Van Raab*, 489 U.S. at 672 n.2.

⁹⁷ *Skinner*, 489 U.S. at 627-28 (finding a diminished expectation of privacy due to the heavy regulation of the industry); *Van Raab*, 489 U.S. at 672 (ruling that customs agents should expect inquiries into their fitness to perform their job).

⁹⁸ *Skinner*, 489 U.S. at 623-4 (noting that drug users sometimes show no outward signs to give rise to probable cause; also, private railway employers are not experts in the warrant requirements or the subtleties of the law on probable cause); *Van Raab*, 489 U.S. at 666-67 (requiring a warrant would “divert valuable agency resources from the Service’s primary mission.”)

positions that the employees occupied.⁹⁹ As with *Acton*, the Court could credibly claim that test was not meant to serve the ordinary goals of law enforcement, since the results of the drug tests were not turned over to the police¹⁰⁰—but as in *Acton*, the Court did not expressly state that this restraint on the part of the state was a necessary element in determining that the search was conducted for a special need.

3. Searches of probationers and parolees

In the same year that *Ortega* was decided, the Court also found a “special need” justifying the search of a probationer’s home in *Griffin v. Wisconsin*.¹⁰¹ Again, the search was conducted without a warrant or probable cause, and again, the Court upheld the search for two reasons: first, because of the lower level of Fourth Amendment protection due to probationers;¹⁰² and second, because the goal of the search was not law enforcement, but instead “ensur[ing] the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.”¹⁰³

And what of the third factor cited in previous special needs cases—that requiring individualized suspicion was infeasible? In past special needs cases such as *T.L.O.* and *Ortega*, the Court relied on this factor, noting that it was “impracticable” for teachers, school administrators, or public agency supervisors to learn and understand the

⁹⁹ The greater danger posed regarding drug use by schoolchildren, railway operators, and customs agents is obviously an important factor: a few years later, the Court found there was no “special need” to justify a Georgia law that required drug testing of all candidates for elected office because the officials did not perform “high risk, safety-sensitive tasks.” *Chandler v. Miller*, 520 U.S. 305, 322 (1997).

¹⁰⁰ *See Skinner*, 489 U.S. at 621 n.5 (noting that although the results of the test *could* be turned over to law enforcement, there was no evidence that the public employer had ever done so, nor that it ever intended to do so); *Van Raab*, 489 U.S. at 666 (stating that the results of the drug tests could not be turned over to law enforcement without the consent of the employee).

¹⁰¹ 483 U.S. 868 (1987).

¹⁰² *Id.* at 874 (probationers and parolees “do not enjoy the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special [probation] restrictions....”) (internal quotations and citations omitted).

¹⁰³ *Id.* at 875.

complexities of the warrant requirement and probable cause. But in *Griffin*, this factor was whittled down more or less into oblivion, since there is no real argument that probation officers cannot understand and apply the warrant or probable cause standards. The best the Court could do was to explain that requiring probable cause might “unduly disrupt the government interest,”¹⁰⁴ because “so long as [the probationer’s] illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected.”¹⁰⁵ This statement is equally true in the traditional law enforcement context; thus, it provides no extra ammunition for the argument that a lesser Fourth Amendment standard should apply.¹⁰⁶

The *Griffin* Court required the government to show “reasonable grounds” before searching a probationer’s home, but as with public schoolchildren and public employees, the Court eventually began allowing such searches without any showing of individualized suspicion at all.¹⁰⁷ As this shift occurred, however, searches of probationers and parolees slowly left the orbit of the “special needs” category. A series of circuit court cases in the early 2000’s focused on mandatory DNA extraction from prison inmates, parolees, and probationers, and these cases made it clear that the primary consideration in analyzing such searches was the subjects’ dramatically reduced expectation of privacy rather than the purpose of the search. Numerous circuits struggled to find a way to characterize the purpose of taking DNA samples as a “special need beyond the normal need for law

¹⁰⁴ *Id.* at 878.

¹⁰⁵ *Id.* at 878.

¹⁰⁶ The *Griffin* Court also added another consideration, unique to the probationer context: that the ongoing, supervisory relationship between the probation officer and the probationer would provide extra information to the probation officer in deciding whether to conduct a search. *Id.*

¹⁰⁷ The latest product of this evolution is *Samson v. California*, 547 U.S. 843 (2006), discussed *infra* at note 112.

enforcement,” which turned out to be an impossible task, since the DNA database being assembled was used for traditional law enforcement purposes.¹⁰⁸ Other circuits abandoned the special needs test altogether and simply applied a “totality of the circumstances” test, allowing the DNA extraction because of the subjects’ substantially diminished expectation of privacy.¹⁰⁹

Finally, in 2001 the Supreme Court itself abandoned the “special needs” requirement for searches of probationers in *United States v. Knights*.¹¹⁰ At issue was a probationary condition which allowed the authorities to search the probationer’s home at any time. The Court acknowledged that the breadth of the probationary condition meant that a search could be conducted for any purpose, including a law enforcement purpose, and so the “special needs” doctrine could not justify the condition. However, the Court cited *Griffin* for the proposition that a probationer’s expectation of privacy was very low,¹¹¹ and thus the search was reasonable, given the strong government interest in monitoring its probationers.¹¹²

4. Vehicular checkpoints

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

¹⁰⁸ See, e.g., *Nicholas v. Gourd*, 430 F.3d 652 (2nd Cir. 2005) (claiming that since the DNA extraction is not trying to solve a specific crime at the time the sample is taken, the activity serves a need beyond the normal needs of law enforcement); accord *Green v. Berge*, 354 F.3d 675, 677-78 (7th Cir.2004).

¹⁰⁹ See, e.g., *United States v. Sczubelek*, 402 F.3d 175, 184 (3^d Cir 2005); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir.1992); *Groceman v. DOJ*, 354 F.3d 411, 413 (5th Cir.2004); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir.2004) (en banc), cert. denied, 544 U.S. 924, 125 S.Ct. 1638, 161 L.Ed.2d 483 (2005); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir.2005).

¹¹⁰ 534 U.S. 1165 (2001).

¹¹¹ *Id.* at 119.

¹¹² *Id.* at 120-21. In a case five years later, the Court similarly ignored the special needs test in upholding a California law that allowed parolees to be subject to suspicionless searches. *Samson v. California*, 547 U.S. 843 (2006).

The first automotive checkpoint cases involved stops to check for immigration violations. As noted above, the legal authority to conduct such stops at the border has been well-established for nearly one hundred years.¹¹³ Similarly, international mail is subject to suspicionless searches by customs officials,¹¹⁴ and even files on laptop computers can be opened and read without individualized suspicion.¹¹⁵ As a circuit court explained, these border searches are conducted “for the purposes of collecting duties and intercepting contraband destined for the interior of the United States.”¹¹⁶

However, after *Camara*, the Court began to use the administrative search doctrine to expand the scope of “border searches” to include seizures that were, in fact, nowhere near the border. In 1975, the Court stated that the warrant and probable cause requirement did not apply to roving patrols inside the border.¹¹⁷ One year later, in *United States v. Martinez-Fuerte*,¹¹⁸ the Court upheld the constitutionality of a suspicionless immigration checkpoint that took place nearly sixty miles inside the border. The Court relied on *Camara* and its progeny for the principle that, “although individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.”¹¹⁹

The Court justified the lower Fourth Amendment standard on numerous grounds. One was the low level of intrusion involved in the stop—a brief detention, a few

¹¹³ See *supra* note 35 and accompanying text.

¹¹⁴ *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Seljan*, 2008 U.S. App. LEXIS 22056 (9th Cir. en banc).

¹¹⁵ *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008).

¹¹⁶ *United States v. Robles*, 45 F.3d 1 (1st Cir. 1995).

¹¹⁷ *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (stating in dictum that law enforcement officers in “border areas” could pull over cars based on less than probable cause, but stated that there must be some individualized “reasonable suspicion.”)

¹¹⁸ 428 U.S. 543 (1976).

¹¹⁹ *Id.* at 560.

questions, the production of documents, and a visual inspection of the car.¹²⁰ Another justification was the diminished expectation of privacy possessed by individuals in automobiles.¹²¹ These rationales alone were not sufficient to justify suspicionless stops, however; so in an attempt to tie the automotive checkpoint cases to the administrative search doctrine, the Court also emphasized two other aspects of the case: the necessity of such techniques to prevent the influx of illegal aliens (a flow which “cannot be controlled effectively at the border”)¹²²; and a non-law enforcement purpose, which it described as the public interest in denying illegal aliens “a quick and safe route into the interior.”¹²³

The Court later upheld vehicular checkpoints for the purposes of detecting and apprehending drunk drivers. In that case, *Michigan Department of State Police v. Sitz*,¹²⁴ the Court rejected the “special needs” test and instead applied a balancing test from other seizure cases.¹²⁵ Since the danger posed to public safety by drunk drivers was so great, and the intrusion on Fourth Amendment rights by the stops was so slight, the Court concluded that the checkpoints were reasonable.¹²⁶

As with the suspicionless searches in *Burger*, *Skinner*, *Von Raab*, and *Acton*, the distinction between vehicular checkpoints designed for “general crime control” and those designed to meet a “special need” or a distinct public interest is a fine one. By the year 2000, the suspicionless search doctrine had evolved from a narrowly defined group of cases involving truly routine and administrative procedures to cover a wide range of searches which revealed evidence of criminal activity—though still being approved on

¹²⁰ *Id.* at 558-59.

¹²¹ *Id.* at 561. *See also* United States v. Chadwick, 433 U.S. 1, 12 (1977).

¹²² *Id.* at 556.

¹²³ *Id.* at 557.

¹²⁴ 496 U.S. 444 (1990).

¹²⁵ The Court relied most prominently on *Brown v. Texas*, 443 U.S. 47 (1979).

¹²⁶ *Sitz*, 496 U.S. at 449-52.

the basis that the *purpose* of the search was something other than detecting criminal activity.¹²⁷ As a result, by the end of the second era, anti-terrorism suspicionless searches at airports and courthouses no longer seemed out of place as an administrative/special needs search—the doctrine had effectively caught up with the reality of anti-terrorism searches.

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

III. The Third Era: 2000-2009

A. The War on Terror

The attacks of September 11, 2001 killed nearly 3,000 Americans in a single day.¹²⁸ They were followed by similar attacks on civilians throughout Europe, including the 2004 bombing of a four commuter trains in Madrid, which killed 191 people and injured nearly 2,000 more;¹²⁹ and the 2005 bombing of three subway trains in London, which killed 52 people and injured over 700.¹³⁰

¹²⁷ In fact, the anti-terrorism searches provided some authority for this shift, since a number of cases which expanded the scope of suspicionless searches cited the earlier courts' unanimous approval of airport and courthouse searches as evidence that "public safety" was a legitimate special need, distinct from general crime control. *See, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

¹²⁸ "War Casualties Pass 9/11 Death Toll". CBS News. September 22, 2006. <http://www.cbsnews.com/stories/2006/09/22/terror/main2035427.shtml>. Retrieved on 24 September 2008.

¹²⁹ *See* <http://www.guardian.co.uk/world/2005/jul/07/terrorism.uk1>

¹³⁰ *See* <http://www.guardian.co.uk/flash/0,,1538819,00.html>.

The threat of terrorist attacks, and the resulting “war on terror,” have been two of the defining characteristics of this decade.¹³¹ Unlike the late 1960’s, when the country faced hundreds of small-scale acts of violence as a result of widespread social unrest, the war on terror in the 2000s is primarily defined by the devastating attacks on a single day in 2001.¹³² But otherwise the popular sentiment and the government reaction has been similar, and just like in the early 1970’s, the government has responded to the terrorist threat with aggressive law enforcement techniques, many of which have restricted civil liberties.¹³³ The most dramatic responses--the USA PATRIOT Act, indefinite detention at Guantanamo Bay, warrantless wiretapping, and “enhanced” interrogation techniques—were subject to significant public criticism.¹³⁴ Most have subsequently been repudiated by the Supreme Court and/or reversed by the Obama Administration.¹³⁵

One of the less-publicized reactions to this second wave of terrorism has been local law enforcement expanding the use of suspicionless searches into new contexts. Local police have conducted suspicionless searches at subway entrances, on ferries, near the Republican and Democratic conventions, near reservoirs,¹³⁶ at protest rallies,¹³⁷ and at

¹³¹ Terrorism did not even register as an election issue in 2000, but in 2002 it was seen as the second-most important challenge for the government to address.

http://www.harrisinteractive.com/harris_poll/index.asp?PID=951

¹³² There have been a series of threats and even fatalities since then, such as an individual who attempted to board a passenger airplane with a bomb in his shoe, (*see* <http://archives.cnn.com/2001/us/12/24/investigation.plane/>), and an unidentified person sending Anthrax through the mail (*see* <http://www.fbi.gov/anthrax/amerithraxlinks.htm>).

¹³³ For an overview and analysis of many of these responses, *see* Parry, *supra* note 2, at 770-782.

¹³⁴ *See, e.g.*, “Gore Criticizes Expanded Terrorism Law,” *New York Times* at A1 (Nov. 10, 2003).

¹³⁵ *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (ruling that the Bush Administration’s tribunals to try enemy combatants held at Guantanamo Bay were unconstitutional); “Obama Reverses Key Bush Security Policies,” *New York Times* at A1 (January 22, 2009), at www.nytimes.com/2009/01/23/us/politics/23obama.html (reporting that President Obama “signed executive orders closing the detention camp at Guantánamo Bay, Cuba, within a year; ending the Central Intelligence Agency’s secret prisons; and requiring all interrogations to follow the noncoercive methods of the Army Field Manual.”).

¹³⁶ *Commonwealth v. Carkhuff*, 441 Mass. 122, 804 N.E.2d 317 (2004).

¹³⁷ *Bourgeois v. Peters*, 387 F.3d 1303, 1306 (11th Cir. 2004).

hockey arenas¹³⁸ and football stadiums.¹³⁹ Courts have analogized these cases to the suspicionless anti-terrorism searches from the past era, applying the “administrative search” doctrine to determine whether the search was permissible. But unlike the searches in airports and public buildings which comprised the first wave of anti-terrorism suspicionless searches, these searches have not met with unanimous approval by the courts.

1. Reservoirs

The opening act in this second stage of anti-terrorism searches occurred one month after the September 11th attacks, in the middle of the night on a small country road near the Cobble Mountain Reservoir in Blandville, Massachusetts.¹⁴⁰ The Cobble Mountain Reservoir supplies water to a number of towns and cities in Massachusetts, and in the wake of the September 11th attacks, the state police were concerned that a terrorist might try to contaminate the water supply or destroy the dam itself.¹⁴¹ Troopers were stationed on the Cobble Mountain Road, which runs along the length of the reservoir, with orders to stop all vehicles that travelled along the road and speak to the drivers.¹⁴² When David Karkuff was stopped, the officers immediately noticed that he was intoxicated, and the arrested him for driving under the influence.¹⁴³ Karkuff challenged the constitutionality of the stop, noting that the troopers had no reason to suspect him of having committed any crime at the time he was ordered to stop.¹⁴⁴ The state urged the court to apply the special needs doctrine, arguing that the troopers’ policy of

¹³⁸ State v. Seglen, 2005 N.D. 124, 700 N.W.2d 702 (2005).

¹³⁹ Johnston v. Tampa Sports Arena, 442 F.Supp.2d 1257 (2006).

¹⁴⁰ Commonwealth v. Carkhuff, 441 Mass. 122, 804 N.E.2d 317 (2004).

¹⁴¹ *Id.* at 123-24, 318-19.

¹⁴² *Id.* at 124, 318-19. The troopers also had orders to conduct a search of every truck that drove down the road. *Id.*

¹⁴³ *Id.* at 124, 319.

¹⁴⁴ *Id.* at 122-23, 318.

suspicionless stops was analogous to the well-established searches at airports and public buildings.¹⁴⁵ As the state noted, “the search and seizure protocols at those facilities,” like the seizure protocol near the reservoir, are not designed for a law enforcement purpose, but rather “to assure that persons entering do not have the means to destroy those facilities or to disrupt their operation.”¹⁴⁶

But the Massachusetts Supreme Court disagreed. The court held that the purpose of the search crossed the line from protecting public safety to straightforward law enforcement, and thus the state troopers’ actions did not meet the requirements of an administrative search.¹⁴⁷ The court based this conclusion on the lack of notice given to the defendant, noting that in the case of searches at airports and public buildings, the individual receives prior notice that the search will occur.¹⁴⁸ This allows the individual to avoid the search altogether by “electing not to board the aircraft (or enter the court house).”¹⁴⁹ Giving prior notice reinforces the argument that the purpose of the search is to protect the vulnerable facility rather than to detect and apprehend criminals, since “the objective of preventing dangerous persons from gaining access is still accomplished” if a terrorist simply avoids the facility altogether.¹⁵⁰

2. Political Protests

One year after Karkuff was illegally searched near the Cobble Mountain Reservoir, another anti-terrorism suspicionless search took place outside a military base in Columbus, Georgia. A protest group was planning its annual demonstration outside of

¹⁴⁵ *Id.* at 125, 320.

¹⁴⁶ *Id.* at 125, 320. The state also used analogies to cases upholding searches at the entrances to military bases. See, e.g., *United States v. Miles*, 480 F.2d 1217 (9th Cir. 1973).

¹⁴⁷ *Carkhuff*, 441 *Mass.* at 126, 804 N.E.2d at 320.

¹⁴⁸ *Id.* at 128-29, 322-23.

¹⁴⁹ *Id.* at 122, 328.

¹⁵⁰ *Id.* at 128-30, 323.

Fort Benning,¹⁵¹ and the city of Columbus instituted a new policy requiring every participant in the protest to submit to a search prior to proceeding to the protest site.¹⁵² The city argued in its brief that the attacks of September 11th had—or at least should have—fundamentally changed the rules for anti-terrorism suspicionless searches, stating that “[l]ocal governments need an opinion that, without question, allows [suspicionless] non-discriminatory, low-level magnetometer searches at large gatherings.”¹⁵³

The Eleventh Circuit refused to give the city such an opinion. In *Bourgeois v. Peters*, the court found the city’s argument was “troubling,” because “the threat of terrorism...cannot [be] use[d]...as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people.”¹⁵⁴ If a generalized “threat of terrorism” were sufficient to justify mass suspicionless searches, law enforcement could institute these searches for any large event, including “a high school graduation, a church picnic, a public concert in the park, an art festival, a Fourth of July parade, sporting events such as a marathon, and fund-raising events such as the annual breast cancer walk.”¹⁵⁵

Like the state of Massachusetts, the city of Columbus invoked the special needs doctrine, arguing that the purpose of searching the protesters was not to detect crime or enforce the criminal law, but instead “ensure the safety of the participants, spectators, and

¹⁵¹ *Bourgeois v. Peters*, 387 F.3d 1303, 1306 (11th Cir. 2004). Fort Benning was the host of the Western Hemisphere Institute for Security Cooperation, otherwise known as the “School of the Americas,” which trains military leaders from other Western Hemisphere countries in counter-insurgency tactics. The protest group was known as the School of the Americas Watch (“SAW”), which had conducted a peaceful protest of approximately 15,000 people every year for the thirteen years prior to this case. *Id.*

¹⁵² The search was essentially identical to what airport screenings—every protester was required to walk through a metal detector, and if the detector indicated the presence of metal, the police would conduct a more thorough search of the protestor’s person and possessions. *Id.* at 1307.

¹⁵³ *Id.* at 1311 (*quoting* Appellee’s Brief).

¹⁵⁴ *Id.* at 1311.

¹⁵⁵ *Id.* (*quoting* Reply Brief of Appellants).

law enforcement.”¹⁵⁶ The *Bourgeois* court rejected this argument, ruling that the goals of public safety and “law enforcement” were “inextricably intertwined” in this context.¹⁵⁷

The difference is no more than semantic, according to the court; under the city’s argument, “a search intended to enforce a given law would be permissible so long as the government officially maintained that its purpose was to secure the objectives that motivated the law’s enactment in the first place (e.g., public safety) rather than simply to enforce the law for its own sake.”¹⁵⁸

But the *Bourgeois* court did not explain why this argument should apply to searches at political protests and not to searches at airports and public buildings, which are also searches intended to detect criminal activity that are justified on the grounds that they protect the public safety. Indeed, the *Bourgeois* court—somewhat inexplicably—does not mention the airport and public buildings cases at all. Thus, the court does not provide any principled way to distinguish between anti-terrorism suspicionless searches at airports and public buildings (which courts have consistently held to be permissible) and anti-terrorism suspicionless searches at political protests (which the court held were impermissible).¹⁵⁹

Two years later, in preparation for the Republican National Convention of 2004, New York City attempted to institute its own suspicionless search policy for political protesters. In order to enhance security during the convention, the New York Police Department planned to search the bags of every protestor before allowing them to

¹⁵⁶ *Bourgeois*, 387 F.3d at 1312.

¹⁵⁷ *Id.* at 1312-13.

¹⁵⁸ *Id.* 12 1313.

¹⁵⁹ The *Bourgeois* court did note in the facts that the demonstrations had been peaceful for thirteen years, with no weapons ever found and no arrests for violence, *id.* at 1306, but it did not refer back to these facts during its legal analysis.

proceed to the demonstration site.¹⁶⁰ In *Stauber v. City of New York*, the protestors challenged this policy and sought a preliminary injunction to prevent the police from conducting such searches.¹⁶¹ Once again, the defendant invoked the special needs doctrine, citing the cases upholding suspicionless searches at airports. And once again, the court rejected this argument.

But unlike the *Bourgeois* court, the judge in *Stauber* addressed the airport cases directly, and distinguished them from searches at protest sites. According to the court, the primary difference between the two cases was the nature of the security threat: for the New York City protestors, the threat was “overly vague:” the defendant had only shown that the United States government “considers the Convention to be a potential terrorist target,”¹⁶² and a “general invocation of terrorist threats” was not sufficient to justify such a search program.¹⁶³ In contrast, searches at airports were “implemented in response to specific information about the threats faced by officials”;¹⁶⁴ thus, the threat was real and concrete, and law enforcement was allowed to respond accordingly.¹⁶⁵

3. Sports Arenas

A year earlier, the issue of suspicionless anti-terrorism searches arose in yet another context: a college hockey game between the University of North Dakota and the

¹⁶⁰ *Stauber v. City of New York*, 2004 U.S. Dist. LEXIS 13350, *3 (S.D. N.Y. 2004). The N.Y.P.D. also announced a number of other security measures, such as requiring demonstrators to assemble within “pens” that were made up of metal barricades and restricting access to the sites of the demonstration. *Id.* at *2-*3.

¹⁶¹ *Id.*

¹⁶² *Id.* at *88.

¹⁶³ *Id.* at *89.

¹⁶⁴ *Id.* at *88-*89.

¹⁶⁵ The court also noted other significant differences between airport searches and protestor searches: (1) the searches at airports involve (as a first step) only metal detectors, which are less intrusive than a bag search; (2) airport searches do not affect a person’s constitutional right to expression; and (3) the police department gives no advance notice as to whether they will be searching at any particular demonstration. *Id.* at *84-*88.

University of Minnesota in Grand Forks, North Dakota.¹⁶⁶ For “security reasons,” University police officers at the entrances to the game subjected every student to a pat-down search before they entered the arena.¹⁶⁷ When the police searched Scott Seglen, an underage student, they detected and recovered a can of Coors Light in his pocket.¹⁶⁸ Seglen challenged the constitutionality of the search, and the state analogized the search to suspicionless searches at airports and public buildings, arguing that such searches were even more reasonable in the wake of the attacks of September 11th.¹⁶⁹

The North Dakota Supreme Court also rejected this analogy, citing *Borgeois*, and held that the suspicionless searches were unconstitutional.¹⁷⁰ Unlike the Eleventh Circuit in *Borgeois*, however, the *Seglen* court did provide one hint as to why searches at hockey arenas should be treated differently than searches at airports and public buildings—and its reasoning was similar to that of the judge in *Stauber*. The court noted that airport and public building searches were held to be constitutional only after “unprecedented airport bombings, aircraft piracy, and courtroom violence;”¹⁷¹ in contrast, there was “no history of injury or violence presented” in the *Seglen* case.¹⁷² Whether a history of injury and violence at sports arenas would actually have changed the outcome of the case—and if so, what level of history of injury and violence would be required—was left unexplained.

¹⁶⁶ State v. Seglen, 2005 N.D. 124, 700 N.W.2d 702 (2005).

¹⁶⁷ One of the original justifications for the search was to prevent students from carrying “animal carcasses” into the arena and then throwing them on the ice during the game, *id* at 705; during the court case, however, the state argued broader “security needs” which are “similar to airports and courthouses, especially in recent years.” *Id.* at 707

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 707-08.

¹⁷⁰ *Id.* at 708.

¹⁷¹ *Id.* at 707.

¹⁷² *Id.* at 708.

The next court to hear a suspicionless search case at a sporting event was even more explicit in its reasoning. In *Johnston v. Tampa Sports Authority*,¹⁷³ a federal District Court judge ruled that suspicionless searches of fans entering a professional football stadium were unconstitutional. The court applied a “special needs” analysis, and (unlike the Eleventh Circuit in *Borgeois*), did not dispute the fact that ensuring public safety *could* be a “special need” distinct from law enforcement purposes.¹⁷⁴ But the court then followed the reasoning of the *Stauber* court, explicitly stating that for an anti-terrorism suspicionless search to be constitutional, the danger of a terrorist attack must be a “concrete danger”—that is, a “substantial and real” danger, not merely a generalized risk.¹⁷⁵ In the case of Tampa Bay stadium, the *Johnston* court concluded that “there was no testimony or evidence of a particularized threat to NFL games or to the [Tampa] stadium,”¹⁷⁶ merely a “general threat that terrorists might attack any venue where a large number of Americans gather.”¹⁷⁷

4. Public Transportation

The final skirmish in the second wave of suspicionless anti-terrorism searches involved public transportation. The first case, *American-Arab Anti-Discrimination Committee vs. Massachusetts Bay Transportation Authority*,¹⁷⁸ arose from searches which took place on the buses and subway trains of Boston in July of 2004. As part of enhanced security surrounding the Democratic National Convention, the Massachusetts

¹⁷³ 442 F.Supp.2d 1257 (M.D. FL. 2006).

¹⁷⁴ *Id.* at 1265-66. The judge in *Johnston* was worried about the slippery slope that would be created if no such principled distinction were drawn. Echoing *Bourgeois*, the court noted that allowing “special needs” to justify any anti-terrorism suspicionless search would lead to searches at “virtually all professional sporting events, high school graduations, indoor and outdoor concerts, and parades.” *Id.* at 1269.

¹⁷⁵ *Id.* at 1266.

¹⁷⁶ *Id.* at 1266.

¹⁷⁷ *Id.* at 1268.

¹⁷⁸ 2004 WL 1682859 (D. Mass).

Bay Transportation Authority (“MBTA”) conducted suspicionless searches of all individuals riding buses or trains that passed near the convention site.¹⁷⁹ When some riders of the buses sought an injunction against the searches, the MBTA responded with the now-familiar argument: these were merely “administrative” searches “similar to the security inspections of personal belongings conducted at airports and the entryways to certain kinds of property, such as courthouses....”¹⁸⁰ But this time the argument won the day. Pointing to the recent subway bombings in Madrid and Moscow, the trial judge noted that “it is not without foundation to worry that a terrorist event might be aimed simultaneously at the convention and the transit system.”¹⁸¹ The judge was not bothered by the lack of a specific threat against the Democratic Convention, noting that “there is also no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack,”¹⁸² and that airport searches take place in the “absence of specific threat information about a particular flight or even a particular airport.”¹⁸³ The court also noted that the visual inspection of bags, while intrusive, is “very similar to the intrusions imposed under other, increasingly common, administrative security regimes.”¹⁸⁴

During the same month, approximately 230 miles to the northwest, the Lake Champlain Transportation Company (“LCT”) began conducting suspicionless searches of passengers on the ferry between Grand Isle, Vermont and Plattsburgh, New York.¹⁸⁵ In

¹⁷⁹ *Id.* at *1. The searches consisted of a “visual search of the hand-carried items of all passengers....” *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *2.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *4.

¹⁸⁵ *Cassidy v. Chertoff*, 471 F.3d 67, 72 (2005). These searches consisted of visual inspection of carry-on bags and of the trunks and interior of automobiles on the ferry. *Id.* at 72-73.

Cassidy v. Chertoff,¹⁸⁶ two of the passengers on the ferry claimed the searches violated their Fourth Amendment rights. Once again, the defendants responded by claiming that the searches served a “special need” beyond those of ordinary law enforcement,¹⁸⁷ and once again, this argument prevailed.¹⁸⁸ Even though there was no record of ferries being targeted in the United States or anywhere else in the world, the Second Circuit held that “the airline cases make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism”;¹⁸⁹ the search is reasonable as long as the government has determined that the ferries “are at a high risk of being involved in a transportation security incident.”¹⁹⁰

One year later, the New York City Police Department (“NYPD”) began a program of suspicionless searches at various subway stations. Unlike the Boston subway searches in *American-Arab*, which targeted every passenger on a certain train or bus line, the New York searches were based on seemingly random “checkpoints” set up at different stations at different times,¹⁹¹ and officers at the checkpoints only searched one out of every series of passengers.¹⁹² The Second Circuit reviewed the constitutionality of these searches in *MacWade v. Kelly*, and the government again invoked the special needs doctrine, leading the court to determine whether the search “serve[d] as [its] immediate purpose an objective distinct from the ordinary evidence gathering associated with crime

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 74.

¹⁸⁸ *Id.* at 85.

¹⁸⁹ *Id.* at 83.

¹⁹⁰ *Id.* at 84.

¹⁹¹ *MacWade v. Kelly*, 460 F.3d 260, 264 (2nd Cir. 2006). Although the times and locations of the checkpoints are meant to “appear random, undefined, and unpredictable,” they are actually based on a “sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by [NYPD’s] other counter-terrorism initiatives, and available manpower.” *Id.*

¹⁹² *Id.* at 264-65.

investigation.”¹⁹³ As in the other two public transportation cases, the court held that the searches did indeed serve a special need, in this case “prevent[ing] a terrorist attack on the subway....”¹⁹⁴ As in all the previous cases, there had been no specific, concrete threat to the New York subway system, but the Second Circuit still found the threat to be “sufficiently immediate.”¹⁹⁵ Unlike the Eleventh Circuit in *Borgeois*, which refused to allow searches of protestors that were merely based on a generalized “threat of terrorism,”¹⁹⁶ the Second Circuit held that “[a]ll that is required is that the ‘risk to public safety [be] substantial and real’ instead of ‘merely symbolic.’”¹⁹⁷

5. The current status of anti-terrorism searches

So where are we now? The first wave of terrorism left us with routine suspicionless anti-terrorism searches at all airports and most public buildings. These searches have been unanimously upheld by courts under the “administrative search” doctrine, based on the theory that the searches furthered an “administrative purpose” and were not primarily designed to detect or investigate criminal activity. And perhaps just as significantly, these searches have now become accepted by nearly every citizen as a necessary part of modern life.

The second wave of terrorism has left us with the possibility of suspicionless anti-terrorism searches at subways and ferries, though such searches are by no means widespread. As of now, these searches have generated very little in the way of political

¹⁹³ *Id.* at 269 (quoting *Nicholas v. Goord*, 430 F.3d 652, 663 (2nd Cir. 2005)).

¹⁹⁴ *Id.* at 263.

¹⁹⁵ *Id.* at 272.

¹⁹⁶ *Borgeois v. Peters*, 387 F.3d 1303, 1311 (2004).

¹⁹⁷ *MacWade*, 460 F.3d at 272 (citing *Chandler v. Miller*, 520 U.S. 305 (1997)).

opposition. Meanwhile, courts have rejected suspicionless searches at sporting events, protest rallies, and other potential terrorist targets.¹⁹⁸

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

In short, the special needs doctrine is not providing much in the way of principled guidance to the courts struggling to evaluate anti-terrorism searches. To make matters worse, outside the anti-terrorism context, the Supreme Court has been engaged in a

¹⁹⁸ Throughout this entire debate, the Supreme Court has still never directly reviewed a single anti-terrorism suspicionless search case. As noted above, it has implicitly approved of the “first wave” of suspicionless searches in dicta—as well as the application of the “special need” doctrine to those searches—in three separate cases. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989); *Chandler v. Miller*, 520 U.S. 303, 323 (1997); *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). And although these cases were all decided before September 11th, 2001, the broad language in their dicta certainly points towards an approval of the second wave of anti-terrorism searches: for example, the *Van Raab* Court stated that even if there were no demonstration of risk or danger, “[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.” *Van Raab*, 489 U.S. at 675 n.3. The Second Circuit relied upon this broad language in upholding ferry searches in *Cassidy*, 471 F.3d at 83. and *MacWade*, 460 F.3d at 272.

similar struggle to find a principled distinction between searches for “special needs” and searches for a “law enforcement purpose.”

B. Special Needs in other contexts

Two cases in particular show the limits that the Court has tried to create for suspicionless searches over the past decade: *Indianapolis v. Edmond*, a vehicular checkpoint case, and *Ferguson v. City of Charleston*,¹⁹⁹ a suspicionless drug testing case.

In *City of Indianapolis v. Edmond*,²⁰⁰ the Court considered a suspicionless vehicular checkpoint meant to detect cars carrying drugs. The defendant argued that their checkpoint was legally identical to the immigration checkpoint in *Martinez-Fuerte* and the sobriety checkpoint in *Sitz*, since those checkpoints “had the same ultimate purpose of arresting those of committing crimes.”²⁰¹ But the Court disagreed, stating that the checkpoint in *Martinez-Fuerte* was designed to “maintain the integrity of the border” and the checkpoint in *Sitz* was designed to “reduc[e] the immediate hazard posed by the presence of drunk drivers on the highways.”²⁰² In contrast, the *Edmond* checkpoint’s primary purpose was “to advance a general interest in crime control,”²⁰³ and the Court noted that it had “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”²⁰⁴

The *Edmond* Court realized that the distinction it was making was difficult to draw, conceding that “[s]ecuring the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and

¹⁹⁹ 532 U.S. 67 (2001).

²⁰⁰ 531 U.S. 32 (2000).

²⁰¹ *Id.* at 42.

²⁰² *Id.* at 39.

²⁰³ *Id.* at 38.

²⁰⁴ *Id.* at 41

criminal prosecutions in pursuit of these goals.”²⁰⁵ However, the Court argued that these valid checkpoints were “closely related” to the distinct public interests of border security and ensuring safe roadways, while the public interest in preventing illegal drug distribution was nothing more than general crime control.²⁰⁶

In *Ferguson v. City of Charleston*,²⁰⁷ a public hospital in Charleston, South Carolina began mandatory drug testing of all pregnant mothers who sought treatment.²⁰⁸ The government argued that these suspicionless searches served the “special need” of protecting the health of the mother and the unborn child,²⁰⁹ citing *Skinner*, *Van Raab*, and *Acton*.²¹⁰ But the Court rejected this argument, holding that the primary purpose of the searches was crime control rather than protecting the fetus’ health.²¹¹ The Court distinguished *Ferguson* from the other drug testing cases, because the test results in *Ferguson* were turned over to law enforcement and used in criminal prosecutions.²¹² Once again the Court reaffirmed that “[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes.”²¹³

²⁰⁵ *Id.* at 42. The dissent also pointed out that the distinction made by the majority was “not at all obvious.” *Id.* at 50 n.2 (Rehnquist, C.J., dissenting).

²⁰⁶ *Id.* at 42-4. The definition of “general crime control” was further refined in *Illinois v. Lidster*, 540 U.S. 419 (2004), in which the Court upheld the use of a suspicionless vehicular checkpoint to ask drivers for information about a recent hit and run that had occurred at the same location. Although the Court conceded that the *Lidster* checkpoint, like the invalid *Edmonds* checkpoint, was designed to meet the “general interest in crime control,” the Court held there was a distinction between determining whether the motorist in the car had committed a crime (as in *Edmond*) and asking the motorist for information about a crime that was probably committed by someone else. *Id.* at 423-24.

²⁰⁷ 532 U.S. 67 (2001).

²⁰⁸ *Id.* at 70-71.

²⁰⁹ *Id.* at 81.

²¹⁰ *Id.* at 77.

²¹¹ *Id.* at 85-86

²¹² *Id.* (“The stark and unique fact that characterizes this case is that [this program] was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.”)

²¹³ *Id.* at 83 n.20.

As in *Edmond*, the Court worked hard to draw a principled distinction between the *Ferguson* holding and other cases in which the Court had upheld suspicionless searches even if when the incriminating evidence was used in a criminal prosecution. The Court noted that the drug tests in *Ferguson* served the “immediate” purpose of law enforcement, while the broader social goal of protecting the health of the mother and fetus was an “ultimate” goal.²¹⁴ In the valid special needs cases, public safety was the “direct and primary” purpose of the search—and using the results in a subsequent prosecution was presumably nothing more than a beneficial side effect of the search-- whereas in *Ferguson* the drug test used law enforcement as a “means to an end.”²¹⁵ “This distinction is critical,” said the Court, “[b]ecause law enforcement involvement always serves some broader social purpose or objective....”²¹⁶ Without this distinction, “virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.”²¹⁷

IV. Can suspicionless anti-terrorism searches be justified by the special needs doctrine?

The law surrounding suspicionless searches is in a state of disarray,²¹⁸ but it is possible to distill some general principles from the various cases . First, there is only one context in which the Supreme Court has openly admitted that a suspicionless search

²¹⁴ *Id.* at 82-83.

²¹⁵ *Id.* at 83-84.

²¹⁶ *Id.* at 84.

²¹⁷ *Id.*

²¹⁸ *See generally* Edwin J, Butterfoss, *A Suspicionless Search and Seizure Quagmire*, 40 CREIGHTON L. REV. 419 (2007).

is permissible for criminal law purposes: searches of probationers and parolees. In these cases, the Court has held that the defendant has such a diminished expectation of privacy that the state has the ability to conduct a suspicionless search and use the results to criminally incriminate the defendant.

For every other type of suspicionless search, the Court has at least claimed the search is invalid unless it serves a purpose other than traditional law enforcement. The Court uses different language in different contexts—the search must not be “aimed at discovery of the evidence of a crime”;²¹⁹ it must serve “special needs beyond the normal need for law enforcement”;²²⁰ or it must fulfill a purpose other than “general crime control”²²¹—but the requirement itself remains constant. This requirement—assuming it is actually followed in practice—implies that the Fourth Amendment’s primary purpose is to prevent the state from invading the rights of citizens during a criminal investigation, and so there is no reason why it should limit the government’s actions outside the criminal context.²²² This is a controversial proposition, but it is an inevitable conclusion when examining the special needs doctrine. One obvious benefit to this rule in theory is that it would result in a clear bright line rule which provides guidance to law enforcement and protects individuals from random, suspicionless searches during criminal investigations.

But as our review of the case law has demonstrated, the non-law enforcement purpose requirement has not been followed in practice. In many of these suspicionless

²¹⁹ *Camara*, 387 U.S. at 536 (1967).

²²⁰ *T.L.O.*, 469 U.S. at 351 (1985).

²²¹ *Edmond*, 531 U.S. at 455 (2000).

²²² *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 563 (Brennan, J., dissenting) (“[The Fourth Amendment safeguards] should govern border searches *when carried out for purposes of criminal investigation.*” (emphasis in original)).

searches, the government is conducting a search that—if it detects what it is designed to detect—will produce evidence of criminal activity: possession of firearms or explosives, possession of stolen vehicles, illegal presence in the country, possession or use of illegal substances, or driving while intoxicated. And to state that the purpose of the search is distinct from the “normal need for law enforcement” is merely a semantic game, since the “special need” which justifies the weaker search standard is usually no more nor less than the policy justification for the original criminalization of the conduct. Hijacking is illegal because of the dangers it poses to airline passengers; immigration laws exist to secure the country’s borders; drugs are illegal because those who use them suffer health effects and an impairment of their abilities; drunk driving is prohibited because those who drink and drive create a danger on the public roadways.

In this sense, the suspicionless search jurisprudence is little more than an exercise in re-defining the nature of criminal activity and thereby re-defining the permissible methods of detecting that activity. A police officer could enforce the law against drunk driving, a law which exists in order to keep the highways safe; or she could set up a checkpoint to detect drunk drivers in order to keep the highways safe, and in so doing detect individuals who are breaking the law. In the former case, she would need to have probable cause before pulling over a car, while in the latter case, she would not need any level of individualized suspicion, since keeping highways safe is a “special need.”

But in truth these objections do not fit all of the suspicionless search cases equally. For many of them, the lack of a law enforcement purpose is more than a semantic difference; it is an important distinction which alters the nature and extent of the

search in significant ways. In order to understand this point, it is helpful to divide the special needs cases into three different categories.

The first category consists of the original administrative searches, in which the search is conducted by non-law enforcement officials to enforce health and safety violations. These include building code inspections, OSHA workplace inspections, mine safety inspections, and the like. Such searches do not seek to enforce the criminal laws, and so the search represents a “less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime.”²²³ This category does not include all the “administrative search” cases, because courts have applied the “administrative search” term to a number of cases in which the search has a clear crime control purpose. For example, the search in *New York v. Burger*—in which the police searched a junkyard for evidence of stolen auto parts and ultimately arrested the junkyard owner on criminal charges—was termed an administrative search even though it was designed to uncover evidence of criminal activity.²²⁴

The second category is comprised of searches which are designed to uncover evidence of unambiguously criminal activity, but which can legitimately be classified as “special needs” searches because the results are not used for a law-enforcement purpose. In these cases, the argument that the search serves a purpose “other than that of traditional law enforcement” is supported not by the type of information being sought, but rather by what is done with the information after it is obtained. This category includes the drug tests of school children and public employees.

²²³ *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

²²⁴ *New York v. Burger*, 482 U.S. 691, 708-10 (1987). *Burger* actually belongs in our third category of suspicionless search cases, since the search was upheld based on the defendant's reduced expectation of privacy. *Id.* at 703-7.

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

Once the suspicionless search cases are organized in this manner, it becomes easy to see that suspicionless anti-terrorism cases do not fall under either of the first two categories. The searches are conducted by law enforcement personnel—police, TSA officers, court officers—and any incriminating results of the search are used against the suspect in a criminal trial. Anti-terrorism searches thus fall into the suspect third category of special needs cases. And what is more, they are even less defensible than the other special needs cases in that category, which all involve situations where the suspect has a reduced expectation of privacy. In contrast, courts have held that in anti-terrorism searches—unlike searches of cars or searches of parolees—the suspect “possesses an undiminished expectation of privacy” for items carried on his or her person or in his or her bags.²²⁵

Furthermore, the ultrafine distinction that courts make between “special needs” and “law enforcement needs” is especially strained in the anti-terrorism context. As the

²²⁵ See, e.g., *MacWade v. Kelly*, 460 F.3d 26, 273 (2nd Cir. 2006).

Eleventh Circuit pointed out in *Borgeois*, the alleged special need of “public safety” is “inextricably intertwined” with the goal of crime control in the anti-terrorism context.²²⁶

Anti-terrorism searches are designed to prevent individuals from intentionally committing acts of violence, and to apprehend those who attempt to commit such acts; to claim that this is a “public safety” purpose rather than a law enforcement or crime control purpose is simply disingenuous.

As noted above,²²⁷ the early cases that justified anti-terrorism searches as “administrative searches” were reacting to an extraordinary situation in which there appeared to be no other way to prevent an epidemic of hijackings and bombings of public buildings. The only doctrine available at the time to justify suspicionless searches was the administrative search rationale from *Camara*. These early courts thus borrowed the terms “administrative” and “regulatory” from *Camara* and used them in a way that had nothing to do with the terms’ actual meaning. The Ninth Circuit, for example, held that searches at airports were “conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”²²⁸ To say that blanket, suspicionless searches of everyone who boards a plane is a “regulatory scheme” is simply an exercise in making a term mean whatever you want it to mean; likewise, the prevention of violent crimes is an “administrative purpose” only if you are inventing a new definition for the term “administrative.”²²⁹

²²⁶ *Bourgeois v. Peters*, 387 F.3d 1303, 1312-13 (11th Cir. 2004); *see also supra* notes 156-158 and accompanying text.

²²⁷ *See supra* notes 15-24 and accompanying text.

²²⁸ *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

²²⁹ Of course, once this terminology had become enshrined in precedent, it was perpetuated by later generations of cases. The Ninth Circuit recently upheld an airport search as an “administrative search,”

This contrivance has been encouraged by the confused way in which the special needs doctrine has evolved over the past few decades, with different justifications becoming significant in different contexts. Using the same doctrine to apply to widely different factual situations (from conducting building code inspections to drug testing schoolchildren to detecting terrorists on the subway) creates confusion when one court interprets the language of another court’s precedent. Consider the Supreme Court in *Van Raab*, the case which upheld suspicionless drug testing of United States customs employees. The search in this case clearly falls into our second category of suspicionless searches—because the results of the test are not used for criminal prosecution, the Court can legitimately claim that the search serves a special need unrelated to law enforcement.²³⁰ But the court also attempts to place this search into the first category—claiming that it serves a purely “administrative” or “regulatory” purpose by analogizing the use of cocaine by customs employees to the inventory searches: “[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person.”²³¹ In making this argument, the Court cites a number of legitimate administrative search cases, including an inventory search case,²³² a border search case,²³³ and a building code inspection

quoting this same language from the *Davis* case. *United States v. Kuualoha*, 497 F.3d 955, 960 (9th Cir. 2007).

²³⁰ *Nat. Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). The Court also notes that customs employees have a diminished expectation of privacy, *id.* at 672, but this was not the primary reason that the searches were found constitutional.

²³¹ *Id.* at 669.

²³² *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

²³³ *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

case.²³⁴ It is already a bit of a stretch to say that cocaine use in customs officials is a “hazardous condition” equivalent to building code violations, just as it is difficult to equate suspicionless drug testing with the “routine administrative function” of searching an automobile before it is impounded. But the Court persisted in its analogy, stating that drug use by customs agents was “a latent or hidden condition,” and “discover[ing]...or... prevent[ing] the development” of such conditions justified a suspicionless search.²³⁵

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

As a legal matter, courts traditionally have considered special the government’s need to “prevent” and “discover...latent or hidden” hazards, *Von Raab*, 489 U.S. at 668, in order to ensure the safety of mass transportation mediums, such as trains, airplanes, and highways. We have no doubt that concealed explosives are a hidden hazard.... Accordingly, preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation. Further, the fact that an officer incidentally may discover a different kind of contraband and arrest its possessor does not alter the [p]rogram’s intended purpose.²³⁶

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

Thus, even the contorted jurisprudence of the special needs doctrine cannot justify these searches. But this conclusion leads to another question: if suspicionless anti-

²³⁴ *Camara v. Municipal Court of San Francisco* 387 U.S. 523, 535-56 (1967).

²³⁵ *Van Raab*, 489 U.S. at 668.

²³⁶ *MacWade*, 460 F.3d at 270-271 (additional citations omitted).

terrorist searches cannot be justified by the special needs doctrine, is there any other way to justify them? We will discuss this question in Part V.

V. Other Possible Justifications for Suspicionless Anti-Terrorist Searches

At first, the search for a legitimate justification for suspicionless anti-terrorist searches may appear to be a waste of time, or at best a purely academic pursuit. In reality, anti-terrorism searches in airports and courthouses are ubiquitous, widely accepted, and seemingly indispensable. But it is important to find a legitimate doctrinal underpinning for these searches for two reasons. First, we have seen that the courts' responses to the second phase of anti-terrorism searches has been wildly inconsistent, both in terms of reasoning and results. And second, continued application of the "special needs" doctrine to these searches will create bad precedents that could be applied to other areas of the law, leading to even greater damage to the individualized suspicion requirement. Thus, it is worth seeking another justification for suspicionless anti-terrorism searches—or, if one cannot be found, to find a way to reconcile these searches with the Fourth Amendment.

A. Evaluation under a generalized "reasonableness" test.

Even if anti-terrorism searches cannot be justified as a special need, most courts and commentators (and indeed lay people) would still find them constitutional under the general test of "reasonableness." As the Supreme Court has repeated dozens of times, reasonableness is the "touchstone of the constitutionality of a governmental search;"²³⁷ and whether or not a search is reasonable depends on "all the circumstances surrounding

²³⁷ *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002).

the search or seizure....”²³⁸ When the circuit courts first began approving the suspicionless anti-terrorist searches in the early 1970’s, many of them relied on a generalized reasonableness standard, balancing “the need for a search against the offensiveness of the intrusion.”²³⁹ Indeed, all of the current suspicionless anti-terrorism cases—after applying the special needs test to bypass the general requirement of a warrant and probable cause—essentially apply a reasonableness analysis. The Second Circuit defines the suspicionless anti-terrorism test as follows:

First, as a threshold matter, the search must “serve as [its] immediate purpose and objective distinct from the ordinary evidence gathering associated with crime investigation. Second, once the government satisfied that threshold requirement, the court determines whether the search is reasonable by balancing several competing considerations. These balancing factors include (1) the weight and immediacy of the government interest; (2) the nature of the privacy interest allegedly compromised by the search; (3) the character of the intrusion imposed by the search; and (4) the efficacy of the search in advancing the government interest.”²⁴⁰

So why not abolish the somewhat artificial threshold test of “special needs” and simply conduct a reasonableness analysis? The extremely violent and destructive nature of terrorist acts surely affects the appropriateness of a search meant to detect or deter such acts, and this factor would be reflected in a general “reasonableness” test. For example, if police have twenty-four hours to find an atomic bomb that they know is hidden in one of a hundred houses, it would be “reasonable” for them to conduct suspicionless searches of each of those houses,²⁴¹ whereas if police are pulling over every car that drives by a reservoir because the dam is a “potential terrorist target,” the search would likely be unreasonable.

²³⁸ *Skinner v. Railway Labor Exec. Ass’n*, 489 U.S. 602, 619 (1989).

²³⁹ *See, e.g., United States v. Edwards*, 498 F.2d 496, 500 (2nd Cir. 1974).

²⁴⁰ *MacWade v. Kelly*, 460 F.3d 260, 268-69 (2nd Cir. 2006).

²⁴¹ *See Gould & Stern, supra* note 8, at 779-780 for a discussion of this hypothetical.

But these are the extreme cases—and therefore the easy cases. As our review of the second wave of anti-terrorism case law has shown, it is indeed the hard cases that make bad, confusing, and inconsistent law. Thus, finding a reasonable, principled justification for these searches is critical—and it is more important now than ever. If there is no principled way to evaluate anti-terrorism searches, then there is no way of knowing the limits of such searches—if indeed they have any limits at all.²⁴² Under the current law, the only thing resembling a principled limitation to the searches is the factor explicitly stated in *Johnston* and *Stauber* (and hinted at in *Seglen* and *Borgeios*): that suspicionless anti-terrorism searches are unconstitutional unless there is a “concrete danger” that was “substantial and real.”²⁴³ In rejecting the suspicionless searches of individuals at sporting arenas, *Johnston* and *Seglen* noted that there had been no history of terrorist attacks or threats against sporting arenas²⁴⁴—in contrast, *Johnston* argues that searches of public buildings were allowed after “an outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats, resulting in massive evacuations of federal property and direct financial loss to the Government,”²⁴⁵ and searches in the New York City subway were allowed because “NYC’s mass transit system, including the subway system, had been targeted by terrorists in the past, and within the last year terrorists had bombed commuter trains in Madrid, the subway system in Moscow and had attempted to bomb the London subway system.”²⁴⁶

²⁴² See *Borgeios v. Peters*, 387 F.3d 1303, 1311-12 (11th Cir. 2004).

²⁴³ *Johnston v. Tampa Sports Authority*, 442 F.Supp.2d 1257, 1266 (M.D. FL 2006). See also *State v. Seglen*, 2005 N.D. 124, 700 N.W.2d 702, 707-8 (2005); *Stauber v. City of New York*, 2004 U.S. Dist. LEXIS 13350, *88-*89 (S.D.N.Y. 2004); *Borgeios*, 387 F.3d at 1306.

²⁴⁴ *Johnston*, 442 F.Supp. at 1266-69; *Seglen*, 700 N.W.2d at 708.

²⁴⁵ *Johnston*, 442 F.Supp.2d at 1268-69 (quoting *Downing v. Kunzig*, 454 F.2d 1230, 1231-32 (6th Cir. 1972).

²⁴⁶ *Id.* at 1269 (citing *MacWade v. Kelly*, 460 F.3d 260, 272 (2nd Cir. 2006).

Thus, under the current “reasonableness” analysis, the only limiting factor for suspicionless anti-terrorist searches is whether a threat is “substantial and real” or whether it is merely the background threat of terrorism that presumably has become part of our everyday existence. But this is rather thin protection; there is little doubt that if a terrorist attack occurred at a sporting arena or a political protest, the holdings in *Johnston* and *Seglen* or *Stauber* and *Borgeios* would be overruled by the next court to consider searches in these contexts. In this sense, it is the terrorists who control the extent of our Fourth Amendment rights: by hijacking planes and blowing up buildings, they force us to allow suspicionless searches at airports and public buildings; by bombing mass transit in London, Madrid, and Moscow, they convince courts to allow suspicionless searches on ferries and subways; if (God forbid) they successfully target a hockey game or an anti-war protest, courts will (under current doctrine) begin to allow suspicionless searches in those contexts as well. And as we have seen from the first wave of suspicionless anti-terrorist searches, the search procedures (and their acceptance by the courts, not to mention by the general population) does not end when the threat subsides. Throughout the 1990’s there was not a single domestic passenger airplane hijacking, and the epidemic of shootings and bombings of courthouses disappeared—yet the suspicionless searches continued, and probably will forever. As noted above, the Supreme Court cited the infinitesimally low number of airplane hijackers caught through the suspicionless search program as evidence that the programs were “successful.”²⁴⁷ Yet when this “successful” suspicionless search program failed spectacularly—resulting in the death of 3,000

²⁴⁷ See *supra* note 52 and accompanying text. In *Nat. Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989), the Court noted that in 15 years, 9.5 billion people and 10 billion pieces of luggage had undergone a suspicionless search, and only 42,000 firearms had been detected—thus, every suspicionless search that occurred had a .00042% chance of catching a terrorist.

Americans—the government reaction was to make the suspicionless searches even more rigorous and intrusive, and the reaction of the courts was to re-affirm (in even stronger language) the necessity and constitutionality of those searches.²⁴⁸

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

In a recent article, Anthony Coveny described the current balancing test for suspicionless searches as a mathematical formula, in which PC stands for public concern, E is a percentage which represents the efficacy of the searches, and LI stands for the level of intrusion of the search. If $PC \times E > LI$, the search should be allowed, while if $PC \times E < LI$, then the search is unreasonable and hence unconstitutional.²⁴⁹ When public concern is preventing terrorism, PC is essentially infinite,²⁵⁰ so “as long as the effectiveness

²⁴⁸ See, e.g., *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) (“the events of September 11, 2001 only emphasize the heightened need to conduct searches at this nation’s international airports.”)

²⁴⁹ Coveny, *supra* note 1, at 379-80.

²⁵⁰ Coveny quotes the Second Circuit as stating that “the government interest in preventing a terrorist attack on the subway was ‘of the very highest order.’” *Id.* at 7, (quoting *MacWade v. Kelly*, 460 F.3d 260, 267 (2nd Cir. 2006)). Other courts use similar language when applying the balancing test; see, e.g., *United States v. Hartwell*, 436 F.3d 174, 179 (3rd Cir. 2005) (“[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance”); *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) (“It is hard to overestimate the need to search air travelers for weapons and explosives....”).

measure is anything but zero, the level of intrusiveness is near immaterial.”²⁵¹ And if PC is not set to infinity, how should it be calculated in evaluating the reasonableness of most anti-terrorist searches? Should a court really give less weight to the government interest in a search seeking to prevent a terrorist attack that may only kill a few hundred people as opposed to many thousands of people? Can a court really evaluate the likelihood of a terrorist attack in any given context, other than by simply accepting the risk assessment the government provides for them?

As the Eleventh Circuit noted in *Bourgeois*, “reasonableness” is a term of art in Fourth Amendment jurisprudence; courts must interpret the term “in the light of established Fourth Amendment principles,” including the warrant requirement, prior judicial scrutiny, probable cause, and individualized suspicion.²⁵² It is very rare for a search which lacks any of these requirements to be deemed “reasonable.” If the term were given its ordinary meaning, the constitutionality of a search would be determined by “the judge’s personal opinions about the governmental and privacy interests at stake.”²⁵³

Therefore, reasonableness alone provides neither a principled reason for allowing suspicionless anti-terrorist searches, nor a sensible, robust limitation on their use. A

²⁵¹ *Id.*

²⁵² *Bourgeois v. Peters*, 387 F.3d 1303, 1313-16 (11th Cir. 2004).

²⁵³ *Id.* at 1314. A number of commentators have also recognized this problem in the context of suspicionless searches. Professor Ricardo Bascuas notes that using a balancing test to determine what is “reasonable” is not even “a legal inquiry or test,” because, “it is not a process of discerning general rules or principles and applying them evenhandedly to specific disputes as they arise. Rather, balancing is for judges, as Justice Scalia put it, ‘a regrettable concession of defeat—an acknowledgement that we have passed the point where ‘law,’ properly speaking, has any further application.’ The vagueness of the term ‘reasonable’ makes not only the outcome but the very criteria of the ‘test’ unpredictable. Bascuas, *supra* note 1, at 748. Professor Thomas Clancy, writing in 1995—well before the second wave of anti-terrorism searches began—warned against suspicionless “checkpoints and detectors...at stadiums, in schools, and other public gatherings,” all justified by a “totally subjective reasonableness standard.” Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem L. Rev. 483, 625-27 (1995). Clancy argues that we must have a “return to the central importance given to individualized suspicion by the framers,” though he does not explain how this will apply to airport searches. *Id.* at 634-35. Bascuas proposes his own test for anti-terrorism searches, which we discuss *infra* at notes 301-303 and accompanying text.

search for a more principled basis to justify these searches will not only help to legitimate them, but also contain them so that they do not swallow up the entire Fourth Amendment.

B. Legislatures should decide what is “reasonable”

Political process theory offers a more sophisticated defense of the “reasonableness” analysis, by arguing that the democratic process will provide the necessary limits on the government’s behavior. The argument runs like this: since the Fourth Amendment’s prohibition on “unreasonable” searches is indeterminate, the task falls to either courts or legislatures to interpret the meaning and scope of the term.²⁵⁴ According to political process theory, the legislature should conduct this task, since the interpretation of democratically elected legislators is more legitimate than the opinions of unelected judges.²⁵⁵ The courts should thus defer to the legislatures in these situations, and only conduct a rational basis review of any legislative interpretations of ambiguous constitutional terms.

Aside from the increased legitimacy from the democratic process, legislative interpretations of “reasonableness” are superior to a court decision for two reasons. First, the legislature is in a far better position than the courts to determine what is “reasonable”—it can run a cost-benefit analysis and has better access to the necessary facts in making such a determination.²⁵⁶ Second, the legislature is more flexible—it can vary from state to state or even city to city, depending on the preferences of the

²⁵⁴ Political process theory focuses on the ambiguous terms in the Constitution, such as “due process,” “equal protection,” or “unreasonable searches and seizures.” See Richard C. Worf, *supra* note 2, at 100-101.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 120-26.

community, and if circumstances change—if terrorists begin a successful campaign—it can adapt much more quickly than the precedent-bound judicial system.²⁵⁷

Political process theory recognizes that the democratic process sometimes breaks down, at which point courts must be more aggressive in reviewing a given search. For example, if the search procedure had been instituted by the executive branch, either without legislative approval or pursuant to an overly broad grant of discretion on the part of the legislature, courts would need to conduct a strict scrutiny analysis.²⁵⁸ Similarly, courts should intervene if the search disadvantages a discrete and insular minority, who may not have adequate representation in the legislature.²⁵⁹ In other words, the Fourth Amendment is only meant to be a check on majoritarian rule when the political process cannot work effectively.²⁶⁰

Suspicionless searches are particularly easy to justify under political process theory—provided they are properly authorized by the legislature—because they are nondiscriminatory by their very nature. Assuming the benefits and costs of the search are spread equally throughout the voting community, the search program cannot be seen as the result of a failure of the democratic process.²⁶¹

Deference to legislators seems even more sensible in the context of anti-terrorism searches. It is hard enough for judges to make reasoned, informed judgments about the necessity and efficacy of other types of searches, such as roadblocks to prevent drunk driving, or frisks of suspects in order to determine if they are carrying a weapon. But this

²⁵⁷ *Id.* at 130. (“If mass terror strikes, it might be disastrous to apply old precedents to determine what constitutes a reasonable general search or seizure.”)

²⁵⁸ *Id.* at 138-152

²⁵⁹ *Id.* at 152-158.

²⁶⁰ *Id.* at 189-190.

²⁶¹ *Id.* at

task becomes even more daunting for anti-terrorism searches. The Second Circuit in *MacWade v. Kelly* explained why it deferred to the government’s experts who testified that the suspicionless subway searches were an effective method of deterring a terrorist attack:

We will not peruse, parse, or extrapolate four months’ worth of data.... Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal their available resources in light of the conditions prevailing on any given day. We will not – and *may not* – second-guess the minutiae of their considered decisions.²⁶²

But *MacWade* is an outlier in this instance. For the most part, courts have rejected applying political process theory to the Fourth Amendment,²⁶³ and with good reason. Given the central role of the Fourth Amendment in our criminal procedure jurisprudence, deferring to the democratically elected legislature to determine what is “reasonable” is deeply troubling. Some commentators—such as Professor Akil Amar—have argued persuasively that the Fourth Amendment should not be thought of primarily as a rule of criminal procedure²⁶⁴—but there is no denying that, rightly or wrongly, this is what the Fourth Amendment has become. And as a rule of criminal procedure—whose primary purpose is to protect the individual citizen from overreaching by the government during criminal prosecutions—the Fourth Amendment is dangerously unsuitable for political process analysis.

It is no accident that political process analysis has not been applied to the rest of the criminal procedure rules in the Bill of Rights—there is no deference to the legislature to determine when *Miranda* rights apply, for example, or when the right to counsel

²⁶² *MacWade v. Kelly*, 460 F.3d 260, 274 (2nd Cir. 2006) (emphasis in the original).

²⁶³ Even the strongest proponents of political process theory concede that the Fourth Amendment has “remained largely invulnerable to political process theory.” *Id.* at 104.

²⁶⁴ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758-59 (1994)

attaches. Granted, the term “unreasonable” is ambiguous enough to require interpretation, but giving a majority of voters the right to interpret it—and thereby set the parameters for how police interact with ordinary citizens—could lead to extreme results, for two reasons. First, a majority of voters (or their representatives who make the laws) will frequently overreact in times of crisis, trading freedoms in exchange for short-term security. The government responses to this decade’s second wave of terrorism are a case in point—in the wake of the September 11th attacks, the federal government took a number of steps to curtail civil liberties in order to detect and prevent other terrorist activities, including detaining citizens indefinitely without charge and without providing counsel, eavesdropping on conversations between attorneys and clients, and broadening the scope of wiretapping programs. The courts have been very active in reviewing and in some cases rejecting these reactions. Some of these reviews would be acceptable under political process review (for example, rules allowing the government to listen in on conversations between criminal law attorneys and clients only burden accused criminals, who hardly have a proportionate say in the legislature). But others—those that apply broadly to all citizens—would be left untouched if the courts deferred to the legislative enactments. But these rules are not the result of a reflective legislative body calmly weighing the costs and benefits—indeed, they are little better than pandering to the political moment.

This short-term pandering might not be so dangerous were it not for the second problem: once civil liberties are restricted, the restrictions are essentially permanent. What the majority of voters think is “reasonable” will inevitably reflect the rules that they have grown accustomed to in their everyday lives. The reason that searches at airports

and public courthouses are now thought to be “reasonable” by the vast majority of citizens has nothing to do with whether they are in fact a sensible, least-intrusive solution to a severe and ongoing problem—though they may in fact be. Rather, they are thought to be “reasonable” because they have been around for so long that we no longer even notice them or perceive them to be intrusive. And regular searches in some contexts also tends to desensitize individuals to identical searches in other contexts—that is, now that suspicionless searches are ubiquitous at airports, people are less likely to find them unreasonable at schools, rock concerts, sporting events, and so on.²⁶⁵

Courts, on the other hand, are far more insulated from the politics of the moment, and far more likely to uphold the principles of the Fourth Amendment—even in times of crisis, which is when such a defense is needed the most. This is not to say that the courts’ analyses and holdings are immune to changes in the world, merely that they are more likely to apply constant principles of law to the evolving threats and dangers that arise.²⁶⁶

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

²⁶⁵ See, e.g., Note, Sara Kornblatt, *Are Emerging Technologies in Airport Passenger Screening Reasonable Under the Fourth Amendment?* 41 LOY. L.A. L. REV. 385, 404-05 (2007).

²⁶⁶ There is even an argument that once a threat has receded, courts are more likely than voters to re-visit the restrictions on liberty that they put into place. Professor William Stuntz has noted that the twentieth century saw a pattern in the way the Supreme Court interpreted the Fourth Amendment: “Crime fell in the 1940s and 1950s; Fourth Amendment rights expanded in the 1960s. Crime rose sharply in the 1960s; Fourth Amendment protection receded in the 1970s and 1980s. Crime fell again in the 1990s, and by the end of that decade Fourth Amendment rights were once again expanding.” William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137, 2155 (2002). Thus, it is not that courts are unresponsive to the changing world, but that they are merely slower to respond—both for institutional reasons, and because they are applying fixed principles of law, which legislatures do not do. This deliberateness is probably a virtue when we are changing the scope of Fourth Amendment protections.

C. Consent

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

Consent is a well-established exception to the Fourth Amendment's requirement of individualized suspicion.²⁶⁷ Law enforcement officers are permitted to search anyone, for any reason, as long as the individual agrees to the search. In the early years, some courts relied—at least in part—on an implied consent argument to justify suspicionless anti-terrorism searches. In *United States v. Davis*,²⁶⁸ for example, the Ninth Circuit argued that airport screenings are constitutional “only if they recognize the right of a person to avoid search by electing not to board the aircraft.”²⁶⁹ This was in part because a consensual search was thought to be less “intrusive” than a compulsory search, but also because this helped to ensure that the purpose of the search was the “special need” of preventing hijackings rather than the law enforcement need of general crime control:

“[A] compelled search would not contribute to barring weapons and explosives from the plane, [and therefore] it could serve only the purpose of apprehending violators of either the criminal prohibition against attempting to board an aircraft while carrying a concealed weapon...or some other criminal statute. Such searches would be criminal investigations subject to the warrant and probable cause requirements of the Fourth Amendment.”²⁷⁰

²⁶⁷ *United States v. Miller*, 20 F.3d 926, 930 (1994).

²⁶⁸ 482 F.2d 893 (9th Cir. 1973)

²⁶⁹ *Id.* at 910-11.

²⁷⁰ *Id.* at 911-12.

Even today, implied consent is frequently cited as one of the factors that courts consider in their balancing test, though not a dispositive one. The Third Circuit has argued that searches of airline passengers are “less offensive” because “[a]ir passengers choose to fly,” and they are on notice that they will be searched at the airport.²⁷¹ Other courts have rejected suspicionless anti-terrorism searches in part because of a lack of implied consent; for example, the District Court which struck down the searches in the Boston subway noted that proper notice would have “provide[d] an opportunity for persons who do not want to permit inspection to avoid traveling on the MBTA;”²⁷² while the court which struck down the searches at Tampa’s stadium noted that the plaintiff was never informed of the search policy before purchasing his tickets, and therefore could not have consented to the search at the time of purchase.²⁷³ Conversely, the Second Circuit upheld suspicionless searches in the New York subway in part because the individuals being searched have a choice to either submit to the search or turn away and not ride the subway.²⁷⁴

But there are two potential problems with relying on the doctrine of implied consent to justify suspicionless anti-terrorism searches. First, a recent Ninth Circuit case, *United States v. Aukai*, appears to hold that the constitutionality of these searches does not depend on consent.²⁷⁵ In *Aukai*, the defendant voluntarily walked through the metal

²⁷¹ *United States v. Hartwell*, 436 F.3d 174, 180-81 (3rd Cir. 2006).

²⁷² *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*, 2004 WL 1682859, *3 (D. Mass. 2004).

²⁷³ *Johnston v. Tampa Sports Authority*, 442 F.Supp.2d 1257, 1271-72 (M.D. Fl. 2006).

²⁷⁴ *MacWade v. Kelly*, 460 F.3d 260, 273, 275 (2nd Cir. 2006). The Second Circuit never used “implied consent” as a legal justification for the search; instead it applied the fact that individuals could choose to walk away as evidence that the search was “minimally intrusive,” which is one of the three factors of the “reasonableness” balancing test for the special needs doctrine. *Id.*

²⁷⁵ 497 F.3d 955, 960 (9th Cir. 2007) (“[T]he constitutionality of an airport screening search...does not depend on consent....”)

detector at the airport, but was then subjected to a secondary screening, which detected some type of metal in his pocket.²⁷⁶ When he was directed to empty his pockets, the defendant refused, and ultimately told the TSA officials that he no longer wished to board the plane and asked to leave the airport.²⁷⁷ This request was refused, and a subsequent search of defendant revealed several baggies of methamphetamine and a glass pipe.²⁷⁸

The Ninth Circuit relied on the administrative search doctrine to uphold the search,²⁷⁹ and went out of its way to note that the constitutionality of the search did not depend on the defendant's consent;²⁸⁰ thus, the defendant could not revoke his consent and tell the officers that he no longer wished to fly. But a few sentences later it noted that "all that is required [for the search to be constitutional] is the passenger's election to attempt entry into the secured area of an airport."²⁸¹ Thus, for all its strong language about consent not being a necessary element, it appears that the *Aukai* case is simply specifying what kind of consent is required, not abolishing a consent requirement altogether. Once an individual has chosen to undertake the activity (and thus implicitly agree to the search), there comes a point at which he or she cannot back out of the activity and withdraw his or her consent. In other words, this holding is not inconsistent with a theory that would justify all suspicionless anti-terrorism searches using implied consent.²⁸²

²⁷⁶ *Id.* at 957. The defendant did not trigger the alarm on the metal detector, but he was subjected to a more comprehensive search pursuant to TSA regulations because he had been unable to produce a government-issued picture identification at the check-in counter. *Id.*

²⁷⁷ *Id.* at 957-58.

²⁷⁸ *Id.* at 958.

²⁷⁹ *Id.* at 960.

²⁸⁰ "Given that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening on an irrevocable implied consent theory." *Id.* at 961.

²⁸¹ *Id.*

²⁸² Although it employs stronger language about the (misleadingly so), *Aukai* is essentially identical in its holding to a Ninth Circuit case decided five years earlier, in which the defendant placed his baggage on the

A much more substantial problem with justifying these searches using implied consent is the doctrine of unconstitutional conditions. This doctrine holds that it could be unconstitutional if the government conditions participation in a certain activity on the waiver of a constitutional right.²⁸³ The *Borgeois* and *Johnston* courts rejected an implied consent justification on these grounds, noting that the individual’s right to attend a protest or even his “property interest in his season tickets and his right to attend [football] games and assemble with other Buccaneers fans” could not be conditioned on a surrender of his Fourth Amendment rights.²⁸⁴

Unfortunately the doctrine of unconstitutional conditions also fails to provide us with any principled, bright-line test. The Seventh Circuit notes that “conditions can lawfully be imposed on the receipt of a benefit--conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures--provided the conditions are reasonable.”²⁸⁵ Thus, attempting to use implied consent as a justification for suspicionless searches leads to the same conclusion, and creates the same problem—in the end it is up to the judge to decide, after balancing all the factors, whether it is reasonable to condition the right to travel by air (or enter a public courthouse, or attend a football game) on the individual’s waiver of his or her Fourth Amendment right. And once again, the case law shows the inconsistency that inevitably results from such a broad, discretionary test: courts have said that it is unreasonable to condition entry to a football game or a rock concert on a Fourth

x-ray scanner and then attempted to leave the airport after he was informed that the officials had decided to conduct a more extensive search of his baggage. See *Torbet v. United Airlines*, 298 F.3d 1087, 1088-1090. (9th Cir. 2002).

²⁸³ See, e.g., *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986); *Bertrand v. United States*, 467 F.2d 901, 902 (5th Cir. 1972); *Boykins v. Fairfield*, 399 F.2d 11, 13 (5th Cir. 1968).

²⁸⁴ *Bourgeois v. Peters*, 387 F.3d 1303, 1324-25 (11th Cir. 2004); *Johnston v. Tampa Sports Authority*, 442 F.Supp.2d 1257, 1271 (M.D. Fl 2006).

²⁸⁵ *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000).

Amendment waiver;²⁸⁶ yet it is not unreasonable to require consent before entering a courthouse or boarding a plane.

D. Anti-terrorism searches are *sui generis*; so courts should create a new category of suspicionless searches.

Another possibility is simply to concede that anti-terrorism searches are *sui generis* and create a new, narrowly tailored exception to the individualized suspicion rule. This rule could be designed so that it would apply only to searches designed to prevent terrorist actions—thus responding to the real dangers of today’s world without unnecessarily broadening the scope of special needs searches in other contexts.²⁸⁷ As one commentator noted: “[T]he exception might expand to cover a variety of different search method employed in new contexts” as the type of weapons and the types of targets changed over time²⁸⁸--and if the exception stood on its own doctrinal basis, none of these changes would affect other types of suspicionless searches.²⁸⁹ This is not a trivial benefit. As one commentator points out, this country has conventionally recognized a “traditional criminal process” and an emergency criminal process.²⁹⁰ The former, defined as “investigation with the goal of proving criminal charges in an ordinary criminal court,” provides substantial rights to defendants, including the right to a speedy and public trial.²⁹¹ The latter, which involve the “military justice system” as well as “special military tribunals” which are created during times of emergency, is a more flexible and

²⁸⁶ *Johnston*, 442 F.Supp.2d at 1271; *Nakamoto v. Fasi*, 64 Haw. 17, 22-26 (1981).

²⁸⁷ See Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?* 74 *FORDHAM L. REV.* 3231, 3287-91 (2006).

²⁸⁸ *Id.* at 3289.

²⁸⁹ *Id.*

²⁹⁰ See, e.g., Parry, *supra* note 2 at 766-67 (2007).

²⁹¹ *Id.* at 791-92.

efficient process in which “constitutional and statutory rules apply more leniently, [so] executive officials have discretion to craft strategies for the specific needs of a particular investigation or activity.”²⁹² Historically, these two types of criminal processes have remained somewhat separate, but the government’s response to the 2001 terrorist attacks have changed that somewhat. Today, many of the extraordinary actions taken by the government in response to the crisis posed by the terrorist threat are affecting the traditional criminal process, resulting in a “hybrid” process in which “legally authorized discretion is increasingly valued as a way to respond to a steady stream of perceived crises.”²⁹³ In practical terms, the current war on terror has resulted not just in detention without charge and trial by special tribunal for terrorist suspects in Guantanamo, but also in enhanced search and seizure powers against all citizens, including warrantless wiretapping of overseas telephone calls, data mining of financial information using “national security letters,” and more frequent detention of material witnesses.²⁹⁴ Although suspicionless searches are (for the most part) carried out by local law enforcement, they are part of this same trend. If these heightened powers of surveillance can be limited more explicitly to terrorism investigations, the incremental expansion of these powers to everyday investigations can be prevented.

Creating a new exception would also help to shore up the integrity of the special needs doctrine—since preventing terrorism is not really a special need distinct from law enforcement, courts would no longer have to use terms like “administrative,” “regulatory,” and “law enforcement purpose” in ways that have nothing to do with their

²⁹² *Id.* at 792.

²⁹³ *Id.* at 834-35.

²⁹⁴ *Id.* at 770-82.

actual meaning. This could be a critical first step to bringing logic and doctrinal consistency to what is now a very confused jurisprudence.

The Supreme Court has even hinted that a new exception might be appropriate for anti-terrorism searches. *Indianapolis v. Edmond*, in which the Court struck down a suspicionless roadblock designed to detect illegal drug trafficking, commented in dicta that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.”²⁹⁵ Although the Supreme Court used the word “imminent,” the Foreign Intelligence Surveillance Act (“FISA”) Court later relied in part on this dictum to approve wiretap applications that were meant to detect terrorist activity²⁹⁶. Noting that the Supreme Court had implicitly approved of applying the special needs doctrine in the case of “an imminent terrorist attack,” the FISA court argued that “[t]he nature of the ‘emergency,’ which is simply another word for threat, takes [anti-terrorism cases] out of the realm of ordinary crime control.”²⁹⁷

In a recent article, Judge Ronald Gould of the Ninth Circuit, writing with his former law clerk Simon Stern, used this language to support a new exception to the individualized suspicion requirement.²⁹⁸ “broadening” the special needs doctrine to allow any search which was (1) meant to prevent catastrophic harm; (2) the searches go beyond “routine police functions;” (3) the searches are as effective as is practical and minimizes harm to the public; (4) the officers’ discretion is constrained and the searches are not discriminatory; and (5) under the totality of the circumstances, the balance favors

²⁹⁵ 531 U.S. 32,44 (2000); *see also* Gould & Stern, *supra* note 2, at 821 (analyzing the implications of this statement).

²⁹⁶ United States Foreign Intelligence Surveillance Court of Review, 310 F.3d 717, 745-46 (2002).

²⁹⁷ *Id.* at 746.

²⁹⁸ Gould & Stern, *supra* note 8, at 823.

the governmental interest when compared with the infringement on the privacy of those searched.²⁹⁹

One problem with creating this new exception is evident both in the FISA court's opinion and in Gould and Stern's proposed test: even with a rule designed specifically for anti-terrorism searches, the slippery slope problem still exists. We see this slippery slope even in the step from *Edmond* to the FISA court opinion: *Edmond* spoke of a search to meet an "imminent" threat in an emergency situation, but the FISA court—inexplicably equating "emergency" with "threat"—used this language to justify a wiretap when there was no evidence of an emergency or imminent harm. And the Gould and Stern test contains a final factor which simply asks courts to balance the "governmental interest" against the privacy infringement—thus providing no principled brightline test to guide courts and limit the types of search which may be permitted.³⁰⁰

Recently, Professor Ricardo J. Bascuas has proposed his own test which avoids the problematic "totality of the circumstances" language found in many of the proposed anti-terrorism exceptions. In an attempt to set out concrete, principled guidelines for suspicionless, anti-terrorism searches, Bascuas proposes a test which permits such searches if: (1) they are justified by credible, non-speculative evidence of danger; (2) the danger must entail imminent physical injury; and (3) anything seized unrelated to that danger is suppressed.³⁰¹ This test goes a long way towards providing stable guidelines

²⁹⁹ *Id.*

³⁰⁰ The Gould & Stern test is only one of many proposed tests that ultimately rely on the "reasonableness" of the search. For example, Professor Edwin Butterfoss proposes a test first developed by Scott Sundby twenty years ago: divide searches into two categories: "initiatory intrusions" and "responsive intrusions." "Responsive intrusions" would be covered by the full range of Fourth Amendment protections, while "initiatory intrusions" would be subject to a balancing test based on the subject's reasonable expectation of privacy, the level of intrusion, and the magnitude of the government interest. See Butterfoss, *supra* note 218 at 488-95.

³⁰¹ Bascuas, *supra* note 1, at 780-91.

for such searches, as well as preventing pretextual searches in which law enforcement officials conducting ordinary crime control claim to be deterring terrorist activity in order to bypass ordinary Fourth Amendment rules. But even a well-crafted, narrowly tailored exception for antiterrorism searches is problematic; depending on how it is interpreted, it is either too narrow or too broad. Bascuas' proposal, for example, requires "credible, non-speculative evidence" and "imminent physical injury." Bascuas uses these terms to distinguish between the vague "alarmist policy arguments" that failed to justify the search of protesters in *Borgeois* with the concrete "sober evidence" produced by the NYPD to justify the subway searches in *MacWade*.³⁰² But what exactly constitutes "credible, non-speculative evidence" of an imminent attack? In *MacWade*, the government showed that there had been two plots to bomb the subway over the past eight years, and that terrorists had recently bombed the subway systems of three European cities.³⁰³ While this surely demonstrates that subway systems are a tempting target for terrorists, does it really represent credible evidence of an imminent attack? And how would a court apply this test to the original anti-terrorism searches at airports and public buildings? We know that terrorists have targeted airplanes, and that they are particularly vulnerable to massively destructive acts of violence, but do we have any evidence that an attack on airplanes is imminent? What about evidence of an attack on judges?

This critique is not specific to Professor Bascuas' test; it applies to any attempt to create a new anti-terrorist exception to the Fourth Amendment. Either it will only apply for the short period of time after a credible threat has been recently detected in a certain area or a certain venue, in which case the search will no longer be justified once the

³⁰² *Id.* at 786.

³⁰³ *MacWade v. Kelly*, 460 F.3d 260, 264 (2nd Cir. 2006).

“imminence” wears off, or it will remain in place in perpetuity, like the searches at airports and public courthouses, long after the concrete and imminent threat has subsided. The latter, of course, is far more likely. And in any case, it will still be the terrorists who control the scope of the exception; successful attacks against a certain type of target—or even foiled plots that are uncovered by law enforcement—will represent credible evidence that an imminent (yet never-ending) threat exists for that category of target nationwide.

VI. What if Suspicionless Anti-Terrorism Searches are Unconstitutional?

We have seen that suspicionless anti-terrorism searches do not fit into the “administrative” or “special needs” category to which they have been assigned; since they are designed to prevent and detect criminal behavior, and since the results of such searches are used by law enforcement, it is a legal fiction to say that they serve a purpose other than law enforcement. Thus, we are left with only three options: abolish the “special needs” threshold and simply analyze these searches under a generalized “reasonableness” standard;³⁰⁴ create a new exception to the individualized suspicion requirement and tailor that exception for anti-terrorism cases; or conclude that suspicionless anti-terrorism searches should be unconstitutional. We have seen the problems with the first two options: an unchecked slippery slope; an ominous but inexorable (and probably irreversible) shift in our perceptions of what constitutes a “reasonable” search by the government; allowing the terrorists themselves to determine

³⁰⁴ As we have seen, the “reasonableness” test will apply even if law enforcement tries to rely on implied consent to justify its searches, due to the doctrine of unconstitutional conditions. *See supra* notes 270-273 and accompanying text.

the scope of our Fourth Amendment liberties.³⁰⁵ In short, the first two options are essentially abandoning principled limitations at a time when those principles are needed the most. Therefore it is at least worth asking: what if these searches were found to be unconstitutional?

A. The effect of abolishing anti-terrorism searches.

At first, this possibility seems unthinkable: surely no court today would forbid the long-standing suspicionless searches at airports and public courthouses. Of course, the very fact that this last option seems unthinkable is itself deeply troubling: in only thirty years, we have created a world in which law enforcement agents subjecting us and our belongings to a suspicionless search is not just constitutional, not just acceptable, but also thought to be indispensable. The searches have become a part of our way of life, a part of our culture, so that we have come to accept that there is no other way to keep us safe on airplanes or in courthouses—and we have come to redefine in our own minds what it means to be free from law enforcement searches. In this sense, it may be instructive to consider how “unthinkable” it was to many Americans when the Supreme Court desegregated public schools,³⁰⁶ or when the Supreme Court required suppression of any confession made without an informed, express waiver of a right to counsel.³⁰⁷ Indeed, the dissent in *Miranda* predicted that “a good many criminal defendants who would otherwise have been convicted...will now, under this new version of the Fifth

³⁰⁵ See *supra* notes 246-266 and accompanying text.

³⁰⁶ *Brown v. Board of Education*, 394 U.S. 294 (1955).

³⁰⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Amendment, either not be tried at all or will be acquitted....”³⁰⁸ Of course, nothing of the kind actually occurred—instead, the court merely forced law enforcement to adhere to the fundamental principles of the right against self-incrimination, and law enforcement officers were able to adapt their tactics so that defendants were still convicted at the same rate.³⁰⁹

As with *Miranda*, the actual effect of declaring such searches unconstitutional might be far less severe than it first appears. Even without suspicionless searches, the police would be far from powerless to detect and apprehend potential terrorists. Professor William Stuntz argues that if suspicionless searches were not allowed, police could use existing authority to great effect.³¹⁰ According to Stuntz, the combination of *Atwater* (which held that the police could make an arrest—and therefore an attendant search—for any crime, regardless of how trivial), and *Whren* (which held that an officer’s motive in conducting a search is irrelevant) already give police broad powers to conduct de facto suspicionless searches in almost any context.³¹¹ When further combined with the

³⁰⁸ *Id.* at 542 (White, J., dissenting). Justice White continued rather dramatically: “In some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.” *Id.*

³⁰⁹ See, e.g., Richard A. Leo, George Conner Thomas, *The Miranda Debate: Law, Justice, and Policing* 56 (Northeastern University Press 1998).

³¹⁰ William J. Stuntz, *Local Policing After the Terror*, 111 *YALE L. J.* 2137, 2141 (2002). Professor William Stuntz argues that the current system which allows police to conduct suspicionless anti-terrorism searches in some contexts—and promises to allow them in many more as time goes on—represents “healthy bribe” to the police to prevent them from engaging more intrusive and discriminatory searches. *Id.*

³¹¹ *Id.* at 2158.

low standard which justifies a *Terry* search and the ease with which police can elicit consent, police have plenty of options without resorting to suspicionless searches.³¹²

In many contexts, particularly commercial air travel, private companies would immediately pick up where law enforcement left off. Allowing airlines to screen their own passengers and luggage would pose no Fourth Amendment problems.³¹³ Public law enforcement could focus on less intrusive methods of preventing air piracy, such as increased use of sky marshals. New technologies could be deployed which do not implicate the Fourth Amendment, such as trace detection machines that only alert if illegal explosives are detected.³¹⁴

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

At any rate, suspicionless searches at the entryway of public buildings do nothing to prevent the threat of a real terrorist attack—a car bomb or other large explosive being detonated outside, next to, or underneath the building; currently, physical impediments

³¹² Given this existing broad authority, Stuntz argues we are better off allowing an even greater range of suspicionless searches and more carefully regulating the manner in which they are carried out. *Id.* at 2168-69.

³¹³ Under the state action doctrine, the Fourth Amendment would be implicated as long as these searches were required by the government, as has been the case since the early 1970’s. Thus, the government would have to abolish the requirement and allow the airlines to take responsibility for their own passengers’ safety.

³¹⁴ A surveillance procedure which can only detect the presence or absence of illegal activity is not considered a search under the Fourth Amendment. *See United States v. Place*, 462 U.S. 696 (1983);

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

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

The special needs doctrine provides us with a ready solution to these problems: suspicionless searches could be permitted as long as the government is not permitted to use any fruits of the search in a subsequent prosecution. In other words, such a search would not be illegal—since it is justified by the special need of protecting public safety—so citizens could not bring any civil suits against government agents who conducted

suspicionless searches for terrorists. However, if the government agents sought to use the evidence recovered in the search, a court would conclude that the search was no longer a “special need” search, but rather was conducted for the purpose of crime control, and so the search would be unconstitutional. Thus, the searches would be allowed to prevent any terrorist attack from occurring, but the exclusionary rule would apply, so that any contraband which was recovered would be precluded from any subsequent criminal trial.

B. The effect of allowing the searches, but precluding the evidence

Although at first this proposal sounds radical (not to mention politically unpalatable), it finds strong support in criminal procedure jurisprudence. Most obviously, it comports with the legitimate justification for “special needs” searches. Originally, suspicionless searches were allowed only if the government agents were conducting the search for a purpose other than generalized crime control. We have seen how this threshold requirement has been watered down to nonexistence over the decades, culminating in the rather absurd—but consistently repeated—assertion that preventing terrorist actions is not a law enforcement purpose. We saw earlier that not every special needs search suffered from this fatal weakness: some—the original “administrative searches”—were seeking information for a legitimate regulatory purpose; while others—the cases involving drug testing of school children or public employees—involved searches for unambiguously criminal activity, but did not use the results for criminal prosecutions. If the government did not use the results of suspicionless anti-terrorist searches in a subsequent prosecution, these searches would fall squarely into the second category of special needs searches. To carry the analogy with the drug testing cases one

step further, suspicionless anti-terrorist searches are currently the same as the invalidated drug tests in *Ferguson*, in which the public hospital tested pregnant mothers—supposedly to protect the health of the mother and fetus—and then turned the results over to law enforcement. If the fruits of the search were barred from use in future criminal prosecution, these searches would become more like those of schoolchildren in *TLO* and public train drivers in *Skinner*.

Essentially, barring the government from using the fruits of the search in a subsequent prosecution would accomplish very simply what many courts have been trying to establish throughout the tortured history of anti-terrorism searches: ensure that the actual purpose of the search is to prevent terrorist actions, rather than to detect, apprehend, and prosecute criminals. The court in *MacWade*, for example, concluded that the New York subway search program served a need other than law enforcement because the officers “search only those containers capable of carrying explosive devices, and they may not intentionally search for other contraband.”³¹⁵ Likewise, some of the first courts to review suspicionless airport searches relied on the implied consent of the suspect being searched as evidence that the search was narrowly tailored to prevent terrorism, and therefore did not serve a general crime control purpose.³¹⁶ But these arguments do not really show that the searches serve a need other than law enforcement; they merely perpetuate the fiction that detecting and arresting people who are seeking to blow up

³¹⁵ *MacWade v. Kelly*, 460 F.3d 260, 270 (2nd Cir. 2006).

³¹⁶ *See, e.g., United States v. Davis*, 482 F.2d 893, 910-11 (9th Cir. 1973) (“To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft. It is difficult to see how the need to prevent weapons and explosives from being carried aboard the plane could justify searching a person who had elected not to board.”) (footnotes omitted).

subway cars or airplanes is not a law enforcement purpose.³¹⁷ If the results of the search were not used in a future criminal prosecution, there would be no doubt that “the essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.”³¹⁸

The focus on suspicionless anti-terrorist searches would thus truly be on prevention, not on apprehension and subsequent punishment. Of course, applying the exclusionary rule would make these searches less effective at prevention. Currently the risk of getting caught and ultimately going to prison is a strong deterrent to at least some potential terrorists, and incapacitation through incarceration can help to ensure that any particular criminal who gets caught will no longer be a threat for the time he is in prison. But many potential terrorists suspects are impossible to deter by any means, and so the absence of a threat of prison is unlikely to alter their behavior. And although they cannot be incapacitated through incarceration based on the recovered items, the government is not without options once a suspect is caught. They could interrogate the suspect in order to gather incriminating evidence. They could begin surveillance on the suspect. In many cases, they would be able to institute deportation proceedings against the suspect. These options would not be as effective as using the results of the search in the criminal prosecution—but again, the focus of the suspicionless searches is by definition not bringing the suspect to justice, it is preventing the terrorist act from occurring.

³¹⁷ Professor Bascuas makes a similar, if more sophisticated argument by proposing to exclude any contraband which is “unrelated to the danger justifying the search.” Bascuas, *supra* note 1, at 787-88. This rule would certainly ensure that anti-terrorist searches are not used as pretexts for generalized crime-control searches, which is one of Bascuas’ chief concerns. *See id.* at 758-69. But it does not go far enough, since it does not address the fundamental hypocrisy of categorizing anti-terrorist searches as special needs searches.

³¹⁸ *Id.* at 908.

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

If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information.³¹⁹

Marshall acknowledged that in certain situations, this would mean the defendant would go free, if there were no other way to prosecute him for the crime. But “however frequently or infrequently such cases arise, their regularity is irrelevant. The Fifth Amendment prohibits compelled self-incrimination.”³²⁰

Of course, the Court rejected Justice Marshall’s argument in the Fifth Amendment context, creating a “public safety” exception to the *Miranda* rule.³²¹ Yet the Supreme Court has confirmed that—outside the “public safety” context—law enforcement officers are faced with a choice: they are free to ignore *Miranda* as long as they do not use any subsequent statements at a criminal trial.³²² Allowing suspicionless anti-terrorism searches but precluding the evidence from trial would give the officers the same choice.

³¹⁹ *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting).

³²⁰ *Id.* at 687 (Marshall, J., dissenting).

³²¹ *Id.* at 657-658. The Court employed reasoning quite similar to what is used to justify suspicionless anti-terrorism searches test in the Fourth Amendment context. *Id.* (“[W]e do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”)

³²² *See, e.g., Chavez v. Martinez*, 538 U.S. 760 (2003). Just as with suspicionless anti-terrorism searches, the courts seem unwilling to apply this doctrine when there is a vague risk to “public safety”—even though the existence of a danger to public safety has no bearing on whether or not a statement is the result of a coercive interrogation. *See also Parry, supra* note 2, at 813-18 (noting that “interrogation issues...are litigated along two tracks,” and using this as an example of how a “new criminal process”—more like war and less like crime control—tends to “restrict the space in which constitutional rights operate to the courtroom alone.”)

Many would argue that the analogy with Fifth Amendment jurisprudence is fallacious. The Fifth Amendment precludes compelled self-incrimination, which naturally leads courts to conclude that the Amendment does not apply if the statements are not used in a criminal case. The Fourth Amendment's text is much broader; it precludes all "unreasonable searches," regardless of how the government uses these searches. And the Supreme Court has told us numerous times that the Fourth Amendment applies with equal force to civil and criminal cases, whether or not the evidence is used in a subsequent trial.³²³

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

The Supreme Court has made it clear that judges should not delve into the subjective intentions of law enforcement officers who conduct a search³²⁴—yet the purpose of the search is a critical issue in deciding whether the special needs doctrine applies. If the fruits of the search are never used in a subsequent criminal prosecution, it is easy to determine that the purpose of the search was other than law enforcement. But otherwise it is almost impossible to distinguish between the "purpose" of the search (the determinative question in special needs cases) and the subjective intentions of those who

³²³ See, e.g., *Camera v. Municipal Court*, 387 U.S. 523, 530 (1967). ("But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.")

³²⁴ See *Whren v. United States*, 517 U.S. 806 (1996).

conduct the search (an improper inquiry under current Fourth Amendment jurisprudence).

One commentator tries to resolve this inconsistency by distinguishing between the “motive” of a search and the “fringe benefits” of the search, or by inquiring whether or not crime control was the “causative or substantive factor” in the decision to conduct the search.³²⁵ The Supreme Court itself in *Ferguson* tried to draw a distinction between the “immediate” purpose of the search and the “ultimate” purpose of the search—or whether law enforcement was a “means to an end” or a happy side effect of the search.³²⁶ But none of this matters to the suspect who is being searched; his reasonable expectation of privacy is being infringed upon to the same degree regardless of the motive of the search.

In other words, we should pay less attention to *why* the search was conducted—which requires courts to delve into the mind of the police officers or police officials, and anyway probably has multiple answers—and instead focus on *how* the results of the search are used once they are acquired: Are they used as evidence in a criminal prosecution or merely to establish regulatory violations, or maintain school discipline, or to prevent a bomb from coming on board an airplane? This distinction is logical: an individual who is being searched by a law enforcement officer does not care why the officer is searching him—a checkpoint and visual search of a car pursuant to a drunk-driving checkpoint³²⁷ is just as intrusive as a checkpoint and visual search of a car by officers looking for information on a recent hit and run.³²⁸ But a subject is likely to care quite a bit whether the results of the search will later be used in a criminal prosecution

³²⁵ Brooks Holland, *The Road ‘Round Edmond: Steering through Primary Purposes and Crime Control Agenda*, 111 Penn St. L. Rev. 293, 302-308 (2006).

³²⁶ See *supra* notes 207-217 and accompanying text.

³²⁷ See *Indianapolis v. Edmond*, 531 U.S. 32 (2000); see also *supra* notes 200-206 and accompanying text.

³²⁸ See *Illinois v. Lidster*, 540 U.S. 419 (2004); see also *supra* note 206.

against him. In short, one of the primary reasons we wish to limit the power of the state when it conducts searches is because the state can use the fruits of the search to prosecute us. What the special needs cases tell us is that these searches become less intrusive—and thus possibly constitutional—if the law enforcement agent does not use the results of the search in a subsequent criminal prosecution.

C. Remaining limits on government searches

A rule allowing suspicionless anti-terrorism searches would find plenty of opposition on both sides of the political spectrum. To conservatives, the idea that a police officer could apprehend a criminal attempting to blow up an airplane or shoot a judge and then not be allowed to use the recovered evidence against the criminal will seem ludicrous. But of course this is already the law in every other Fourth Amendment context: if law enforcement officers search someone without any individualized suspicion whatsoever, and recovers contraband of any kind, the exclusionary rule precludes the contraband from being used in court. There is no reason why some crimes should be exempt from the exclusionary rule, however serious they may be. Of course, the exclusionary rule itself has been the subject of quite a bit of criticism,³²⁹ but as of now it is still the centerpiece of enforcement for criminal procedure violations, and so it should not shock anyone's conscience if it is applied to every search, regardless of the type of crime being investigated.

Liberals, meanwhile, will worry about abuse on the part of law enforcement: if police no longer need to worry about violating the Fourth Amendment, what will prevent

³²⁹ See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

them from conducting overly intrusive searches when searching for terrorists?³³⁰ One response to this concern is to take a realistic look at the current state of suspicionless search doctrine. Many courts have held that anti-terrorism searches meet the “regulatory” purpose of “protecting public safety.” And most of the courts that have rejected the special needs test for anti-terrorism searches (such as *Johnston* or *Seglen*) are willing to change their mind if there is credible evidence of a terrorist threat—thus opening the door to widespread, indiscriminate suspicionless searches in the name of preventing terrorism. The only other check under current law on the government’s ability to conduct such searches is that they must be “reasonable”—and as we have seen, this is at best an unpredictable test, with the government more and more likely to win as the terrorist threat (or the perceived terrorist threat) increases. Thus, under current law the government does not face many obstacles in creating suspicionless anti-terrorism searches—and if the government agents overstep their bounds and conduct a search which is unreasonable, the usual remedy is simply that the evidence cannot be used in court—which would be no different from the result under the proposed rule.³³¹

Another response to those worried about overly intrusive searches is that even if the Fourth Amendment allowed indiscriminate suspicionless anti-terrorism searches, the Due Process Clause would still apply to limit the method of search used by the police and prevent abuses of this power.³³² There is a long history of case law which defines the

³³⁰ Judge Friendly, for example, warned against “unbridled searches” if police were no longer concerned with the Fourth Amendment. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL L. REV. 929, 949 (1965).

³³¹ It is true, of course, that individuals whose Fourth Amendment rights are violated have the right to bring a civil rights suit under 42 U.S.C. § 1983. *See, e.g.,* *Torbet v. United States*, 298 F.3d 1087 (9th Cir. 2002). These lawsuits are rare, however, and are certainly not the primary mechanism for enforcing the Fourth Amendment.

³³² As noted above, Fifth Amendment jurisprudence already has a “two-tiered” system like this: if the government agents want to use an individual’s statements against him in a criminal trial, they must comply

Due Process limits of police activity, leading to a well-established test: police activity which is “so brutal and so offensive to human dignity” that it “shocks the conscience” violates an individual’s Due Process rights.³³³ If an anti-terrorism search was so extremely abusive that it met this high standard, the subject of the search would be able to recover damages from the law enforcement officer.³³⁴

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

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

with Miranda and all the other Fifth Amendment requirements. If they have no intention of using the information at trial, they need not comply with Miranda—but they are not completely unregulated. *See, e.g.,* Chavez v. Martinez, 538 U.S. 760, 773 (2003) (“Our views on the proper scope of the Fifth Amendment’s Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment’s Due Process Clause, rather than the Fifth Amendment’s Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.”)

³³³ Rochin v. California, 342 U.S. 165, 172, 174 (1952); *see also* Breithaupt v. Abram, 352 U.S. 432, 435 (1957).

³³⁴ If this standard is too low, or if the threat of civil lawsuits is so weak that it is insufficient to deter abusive police behavior, there is nothing preventing cities, states, or the federal government from passing legislation to raise the standards, or make lawsuits easier to file, or to prohibit certain specific egregious practices. *See generally* Parry, *supra* note 2, at 819-820. Here is one place where political process theory would predict intervention by the legislature, especially if the abusive practices were used during widespread, indiscriminate suspicionless searches (and if they were not, the subjects of the search could conceivably file an Equal Protection claim).

a search regime which comported with the usual Fourth Amendment requirements, which would include some form of individualized suspicion.

Thus, the rule would have several benefits. First, it would give law enforcement the flexibility to decide which priority is more important for the given context. If there is a credible threat that must be responded to regarding, say, a specific trial or protest, law enforcement officers could develop a suspicionless search regime, emphasizing prevention at all costs and abandoning their crime detection function. But in the absence of a credible threat, law enforcement officers would decide to revert to legitimate surveillance procedures, the results of which could be used in court. The decision of which type of search to use would be made by the individuals in the best position to make such a decision: law enforcement officers themselves. And unlike the searches at airports and courthouses—which became legally and thus culturally entrenched and are now permanently part of our life—intrusive security procedures that are put into place because of the increased threat would only be temporary, until the specific, credible threat receded and the police decided to shift priorities in order to attempt to apprehend and prosecute perpetrators.

Second, the rule would give law enforcement *more* powers to search if they were truly intending only to prevent a terrorist attack—they would no longer have to worry about whether their actions complied with the inconsistent and ever-changing case law in this area, and without having to prove that they had a “specific and concrete” threat—and without having to guess what a judge might think that term means. But the ban on using the fruits of these searches would be an automatic check against police frequently resorting to overly intrusive techniques: the fact that the contraband that is recovered

cannot be used in subsequent criminal proceedings would provide a strong incentive for law enforcement to conduct this type of search sparingly. And, as discussed above, the Equal Protection clause and Due Process clause would still apply, precluding any discriminatory or extraordinarily intrusive searches.

Finally, this rule would provide police with a strong incentive to develop more effective but less intrusive methods of anti-terrorism surveillance. As noted above, banning suspicionless searches entirely would provide an even stronger incentive, but would also compromise security in those situations where there is a real threat of a terrorist attack. This rule still encourages creativity and innovation in developing less intrusive surveillance tools and procedures, but would ensure that law enforcement could still provide protection where necessary.

Conclusion

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

Likewise, the administrative search doctrine began innocently enough. Health inspectors had an important job to do, and they could not do it effectively if they needed to generate individualized suspicion before conducting their inspections. And since their

inspections were far from the evil the Fourth Amendment was meant to prevent, allowing suspicionless searches for purely regulatory purposes seemed harmless, a thoughtful compromise based on the reasonableness language in the Fourth Amendment.

But in both instances, we have seen that these reasonable compromises have grown into an inconsistent tangle of case law, justified by a broad Fourth Amendment loophole whose premise—that detecting and preventing violent crime is not a law enforcement purpose—borders on the absurd. It is long past time to restore logic and principle to this area of the law, and the new wave of suspicionless anti-terrorism searches presents courts with the perfect opportunity to do so. The precedent already exists in the special needs doctrine—numerous drug testing cases such as *Acton* and *Van Raab* look to the how the fruits of the search are utilized as part of the test to determine whether the search was conducted for a law enforcement purpose. The obstacles are the thirty-five year old precedents which—against all logic—held that searching airline passengers and courthouse visitors for weapons was a “regulatory” function. These obstacles are all the more daunting because the searches that they affirm are now a generally accepted—and even welcome—part of our every day life. But if they are left undisturbed, the government will continue to use them to justify anti-terrorism suspicionless searches in dozens of other contexts, and courts will be forced to approve of them all or to manufacture artificial distinctions between cases, creating an inconsistency and unpredictability which will inevitably leach into other special needs cases. By excluding the fruits of these searches from future criminal prosecutions, the courts will provide a simple, principled distinction between legitimate and illegitimate suspicionless

searches—and their claims that these searches fulfill a special need other than law enforcement will actually be true.