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Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers To Prevent Terrorism?

Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Daniel Richman for his guidance and invaluable insight.

SUBWAY SEARCHES: WHICH EXCEPTION TO THE WARRANT AND PROBABLE CAUSE REQUIREMENTS APPLIES TO SUSPICIONLESS SEARCHES OF MASS TRANSIT PASSENGERS TO PREVENT TERRORISM?

*Charles J. Keeley III**

INTRODUCTION

The Fourth Amendment has become increasingly important in recent years. Modern technology continues to expand the government's capacity to collect information about its citizens to a degree that must have been unfathomable to the Amendment's authors. The courts have a vital role to play in assuring that increasing surveillance by all levels of government does not unreasonably encroach upon privacy. In an age of terrorism, however, the courts must also take caution not to unduly restrict the ability of citizens, acting through their government, to protect themselves against catastrophic attack.¹

The high ridership and economic importance of urban mass transit systems make them prime targets for terrorists. Designed to be highly accessible, the systems are difficult to secure and, in recent years, have proven vulnerable to terrorist attacks.² In response to bombings of foreign subway and commuter rail systems by international terrorists, U.S. cities and transit system operators have implemented security programs subjecting passengers to random and suspicionless searches by police.³

Suspicionless searches depart from the traditional Fourth Amendment requirements that searches be based upon probable cause and preauthorized by a warrant. The U.S. Supreme Court has never reviewed the routine, suspicionless search of passengers conducted to prevent a terrorist attack on

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1. Ronald Jay Allen et al., *Criminal Procedure: Investigation and Right to Counsel* 334 (2005).

2. U.S. Gen. Accounting Office, *GAO Reports GAO-05-851, Passenger Rail Security: Enhanced Federal Leadership Needed to Prioritize and Guide Security Efforts* 10 (2005), available at <http://www.gao.gov/new.items/d05851.pdf> [hereinafter *Passenger Rail Security*].

3. See *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *1 (S.D.N.Y. Dec. 7, 2005); *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

urban mass transit systems. Lower courts have long upheld analogous searches at airports to prevent air piracy, deeming such searches "reasonable" after balancing the competing government and privacy interests.⁴ Yet these courts have never reached consensus on which exception justifies departure from the warrant and probable cause requirements.⁵ While the Supreme Court has shown approval of suspicionless airport searches,⁶ it has never reviewed an airport search case to clarify which exception applies.⁷

The Supreme Court has recognized the validity of suspicionless searches in three circumstances: administrative inspections, roadblock checkpoints conducted by law enforcement officials, and searches that serve "special needs."⁸ In each circumstance, the warrant and probable cause requirements are excused and the validity of a search or seizure hangs in the Court's balancing of government and privacy interests. As municipalities have employed suspicionless search programs on urban mass transit systems to prevent terrorist attacks,⁹ it remains unclear which exception the Court would apply.

This Note will describe the various approaches that the Court could take in excusing the subway searches from the warrant and probable cause requirements. The Court might, as lower courts have done, deem the subway searches as fitting within the administrative search doctrine, the special needs doctrine, or the roadblock checkpoint exception. Still, the Court could characterize the searches as consensual, or even abandon the warrant and probable cause requirements in favor of a general reasonableness standard. This Note concludes that none of the eligible approaches can be used to justify the subway searches without injuring the consistency of search and seizure jurisprudence or undermining the protections of the Fourth Amendment. Therefore, this Note recommends that the Court adopt a *sui generis* exception for antiterrorism mass transit searches in order to enable communities to defend themselves from this unique threat.

Part I discusses the role of individualized suspicion under the traditional warrant preference model and under the competing general reasonableness standard. Part I will also describe the contexts in which the Court has permitted suspicionless searches or seizures. Part II outlines the ways in which the Court might analyze subway searches and evaluates these approaches. Part III argues that the adoption of a *sui generis* exception best maintains the consistency of Fourth Amendment law. Finally, this Note concludes that the political process adequately safeguards privacy when a

4. See *infra* Part I.C.1.

5. See *infra* notes 332-35 and accompanying text.

6. See *infra* Part I.C.2.

7. See 5 Wayne R. LaFare, Search and Seizure § 10.6(c), at 291 n.58 (4th ed. 2004).

8. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000).

9. See *infra* Part I.D.

search program equally affects a majority of a community and cedes no discretion to officials in selecting whom to search.

I. SUSPICIONLESS SEARCHES AND THE FOURTH AMENDMENT

Part I.A.1 will briefly describe the debate stemming from ambiguity in the Fourth Amendment's text over whether all searches and seizures must comply with the warrant procedure in order to be reasonable. It will then describe the warrant preference rule: the Court's traditional interpretation that all searches and seizures are subject to the warrant procedure's strictures unless a recognized exception applies. Part I.A.2 will establish that passengers possess a recognized privacy interest in luggage and that this interest entitles them to the protections of the Fourth Amendment. In Part I.A.3, this Note will discuss how requiring individualized suspicion before a search or seizure protects privacy and limits the arbitrary use of discretion of government officials in selecting individuals for search. Part I.A.4 will describe the Court's introduction of a reasonableness balancing test into Fourth Amendment analysis as an alternative to the warrant preference rule, highlighting the role of individualized suspicion in this competing model.

A. *The Fourth Amendment*

1. Original Intent and the Warrant Preference Rule

The Fourth Amendment, made binding on the states through the Fourteenth Amendment,¹⁰ states that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹¹

The relationship between the Amendment's two clauses is not clear from the text. One interpretation, the warrant preference model, defines the reasonableness of a search or seizure by whether it complies with the warrant procedure.¹² Under this view, a search or seizure is unreasonable unless authorized by a warrant satisfying the Warrant Clause's probable cause, oath, and particular description requirements.¹³ A competing interpretation treats the two clauses as independent. Only searches and seizures authorized by a warrant must satisfy the Warrant Clause's

10. *Mapp v. Ohio*, 367 U.S. 643, 650 (1961).

11. U.S. Const. amend. IV.

12. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977, 993.

13. *Id.*

requirements; all others must simply be "reasonable."¹⁴ A third view maintains that "unreasonable searches and seizures" refers only to those conducted pursuant to the general warrants issued by Great Britain in the years leading up to the founding era.¹⁵ Under this theory, the framers did not intend for the Amendment to regulate warrantless searches and seizures, which were governed by common law.¹⁶

The ambiguity in the Amendment's text and the lack of consensus about its original intent has led to inconsistency in search and seizure jurisprudence. Traditionally, the Court has espoused a warrant preference rule,¹⁷ holding searches and seizures presumptively unreasonable unless supported by a warrant and probable cause or unless a recognized exception applies.¹⁸ Generally, these exceptions involve exigent circumstances where

14. *Id.* at 999-1000. Professor Telford Taylor has argued that the framers were chiefly concerned with abuses in the issuance of warrants. Therefore, reading the Fourth Amendment to require warrants for all searches and seizures "stood the amendment on its head." Telford Taylor, *Two Studies in Constitutional Interpretation* 46-47 (1969). A paradoxical consequence of Taylor's interpretation is that the government may avoid the restrictions of the Warrant Clause simply by conducting a warrantless search or seizure. Professor Akhil Reed Amar has attempted to explain this paradox. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994). During the founding era, officials conducting searches or seizures without a warrant were subject to civil actions for trespass and false arrest. The threat that a civil jury would impose damages for unreasonable conduct sufficiently restrained officials. Authorization by warrant, however, immunized officials from liability. *Id.* at 774. The framers thus were concerned only with the issuance of warrants, where "central officers on the government payroll in ex parte proceedings would usurp the role of the good old jury in striking the proper balance between government and citizen after hearing lawyers on both sides." *Id.*

15. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999). Davies criticizes both the warrant preference model and Taylor and Amar's interpretations as sharing the flawed assumption that the Fourth Amendment was intended to comprehensively regulate all searches or seizures. He argues that the framers did not intend for the Fourth Amendment to apply to warrantless searches or seizures because officials at that time lacked authority to conduct many warrantless searches and seizures, and it was assumed that warrants would be used. *Id.* at 551-552. Rather, "unreasonable searches and seizures" referred to those authorized by general, "too-loose" warrants granting officials wide discretion to search houses. *Id.* at 552. Because warrantless intrusions lay outside the amendment's scope, it is erroneous to subject them to either the warrant requirement or to a mere "reasonableness" requirement. *Id.* at 560-90. However, Davies notes that the modern practice of vesting officials with broad discretionary authority to act without a warrant marks a departure from the common law that was unanticipated by the framers. *Id.* at 668, 747-48. He concludes that adapting the Fourth Amendment's authentic meaning to this modern context requires "refocus[ing] attention on the critical question of what a 'right to be secure' should mean." *Id.* at 750; see also David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 Fla. L. Rev. 1051, 1083 (2004) ("The most plausible reading of the historical record leads to the following conclusion: The framers intended that the Fourth Amendment would apply only to physical searches of residences, pursuant to a general warrant or no warrant at all.").

16. Davies, *supra* note 15, at 576-83.

17. Clancy, *supra* note 12, at 993.

18. See, e.g., *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise

obtaining a warrant would frustrate the purpose of the search or seizure.¹⁹ For example, searches of automobiles based on probable cause,²⁰ searches incident to arrest,²¹ seizures after hot pursuit,²² and temporary seizures of luggage based on reasonable suspicion²³ all constitute recognized exceptions to the warrant requirement.²⁴

The Court's various expressions of the warrant preference rule reveal inconsistency in the strength of this preference over time.²⁵ At times, the Court has stated that a general reasonableness standard governs Fourth Amendment analysis and has confined the warrant and probable cause requirements to searches by police officers for evidence to be used in a criminal prosecution.²⁶ Many commentators have noted a trend away from the warrant requirement and toward a general reasonableness standard.²⁷

of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

19. See, e.g., *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967) (requiring warrants for building inspections because "the burden of obtaining a warrant is [not] likely to frustrate the governmental purpose behind the search"); *Carroll v. United States*, 267 U.S. 132, 156 (1925) (permitting a warrantless seizure of an automobile because securing a warrant would not be "reasonably practicable" and seizure would be "impossible except without warrant").

20. *Carroll*, 267 U.S. at 151.

21. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

22. *Warden v. Hayden*, 387 U.S. 294, 297-98 (1967).

23. *United States v. Place*, 462 U.S. 696, 706 (1983).

24. This list is not exhaustive. See Elise Bjorkan Clare et al., *Warrantless Searches and Seizures*, 84 Geo. L.J. 743, 743 (1996) ("[E]xceptions include investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause requirement impracticable.").

25. Compare *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (citations omitted)), with *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("[The Fourth Amendment's] 'central requirement' is one of reasonableness. In order to enforce that requirement, this Court has interpreted the Amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests. Sometimes those rules require warrants." (citation omitted)).

26. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) ("In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment.").

27. See Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 512, 529-30 (1991); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 Am. Crim. L. Rev. 119 (1989); see also *Groh v. Ramirez*, 540 U.S. 551, 571-73 (2004) (Thomas, J., dissenting).

2. The Privacy Interest in Luggage

The privacy interest protected by the Fourth Amendment includes anything in which a person has an actual expectation of privacy that society is prepared to acknowledge as reasonable.²⁸ This protection extends to hand-carried containers such as luggage. A traveler's luggage or bag is an "effect" within the meaning of the Fourth Amendment.²⁹ By using an opaque container kept close at hand to store personal items, an individual demonstrates an actual expectation of privacy.³⁰ This expectation remains reasonable even if the traveler places the container in an overhead compartment, thereby exposing it to potential contact or handling by other passengers.³¹ While the Court has held that police may, upon less than probable cause, temporarily seize luggage for investigative purposes, a warrantless search or extended seizure is presumptively unreasonable.³²

3. The Individualized Suspicion Requirement

Even when a recognized exception excuses the warrant requirement,³³ a search or seizure usually must be justified by some individualized suspicion of wrongdoing.³⁴ Ordinarily, the requisite level of individualized suspicion is probable cause,³⁵ but the Court accepts a lesser quantum, reasonable suspicion, in some circumstances. *Carroll v. United States* illustrates the traditional role of individualized suspicion in Fourth Amendment analysis.³⁶ The Court there concluded that police officers did not need a warrant to search an automobile which they had stopped on the highway

28. *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).

29. *United States v. Place*, 462 U.S. 696, 707 (1983).

30. *Bond v. United States*, 529 U.S. 334, 338 (2000).

31. *Id.*

32. *Place*, 462 U.S. at 706 ("[S]ome brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime."). If probable cause does exist and the luggage is stowed in an automobile, police may search the luggage's contents along with the automobile without a warrant. See *California v. Acevedo*, 500 U.S. 565 (1991) (allowing a warrantless search of an automobile and all containers within it where there was probable cause that contraband was contained inside).

33. An exception can excuse the warrant requirement while demanding probable cause, can excuse both the warrant and probable cause requirements, or, more rarely, can excuse probable cause while still requiring a warrant. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1473-74 (1985) (listing twenty exceptions and describing which requirements they excuse).

34. *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."); *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (noting that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion").

35. See, e.g., *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

36. See *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

and suspected of transporting illegal alcohol.³⁷ The Court stated the “true rule” to be that “if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains [contraband], the search and seizure are valid.”³⁸ The Court regarded this rule as according with what the framers “deemed an unreasonable search and seizure” and as striking the proper balance between public and private interests.³⁹ In contrast, allowing officials to subject all motorists to “the inconvenience and indignity of such a search” without probable cause would be “intolerable and unreasonable.”⁴⁰ Such suspicionless searches would infringe upon a citizen’s “right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband.”⁴¹

Individualized suspicion limits the government’s discretion to intrude upon the privacy interests safeguarded by the Fourth Amendment.⁴² Officers may only initiate a search or seizure when objective circumstances give rise to suspicion that the search or seizure will uncover evidence of wrongdoing.⁴³ This not only curtails the threat that officials may arbitrarily single out an individual, but also allows individuals to avoid government interference by refraining from suspicious behavior.⁴⁴ Although the Fourth Amendment’s text does not expressly make individualized suspicion a prerequisite for a reasonable search or seizure, some commentators assert that the Warrant Clause’s insistence on probable cause makes individualized suspicion an “*inherent* quality of reasonable searches and seizures,”⁴⁵ even in situations where no warrant is required.

Under a “representation reinforcement” theory of the Fourth Amendment, some commentators have argued that searches and seizures lacking individualized suspicion are relatively unproblematic if conducted against the general public using procedures that restrain the discretion of

37. See *id.* (stating that subjecting highway automobile searches to the warrant requirement would be too impractical because the motorist might drive away before a warrant could be issued).

38. *Id.* at 149.

39. *Id.*

40. *Id.* at 153-54.

41. *Id.* at 154. The U.S. Supreme Court made an exception for searches at international borders. *Id.*

42. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 485 (1995).

43. Clancy, *supra* note 12, at 996-97.

44. See *id.* at 996.

45. Clancy, *supra* note 42, at 489; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 670 (1995) (O’Connor, J., dissenting) (stating that the Warrant Clause’s requirement of objective probable cause to prevent abuses of general warrants implies the framers’ disdain for all suspicionless searches and seizures).

officers in selecting whom to search.⁴⁶ The premise of this theory is that judicial review should not be used to displace the substantive values of the majority,⁴⁷ but only to repair defects in the political process, such as discrimination against "discrete and insular minorities" preventing them from using the political process to further their interests.⁴⁸ Accordingly, the Fourth Amendment is primarily concerned that officials will undervalue the privacy interests of political minorities by targeting them for arbitrary intrusions based upon illegitimate criteria such as race or class.⁴⁹ By ordinarily requiring a warrant and probable cause, the Fourth Amendment ensures that a search or seizure will be based upon objective and legitimate criteria and will accord equal weight to the privacy interests of each citizen.⁵⁰ Suspicionless searches and seizures visited upon the general public without any discretion spread the privacy costs more widely and avoid the danger that political minorities will be impermissibly targeted. If the majority found such a search program unreasonable, nothing would prevent it from repealing the program through the political process.⁵¹

4. The Balancing Test and Its Effect on Individualized Suspicion

a. *Camara v. Municipal Court*

The Court vacillated between a general reasonableness standard and the warrant preference rule throughout the twentieth century, but by the late 1960s the latter seemed to reign supreme.⁵² In 1968, however, the Court in

46. See John Hart Ely, *Democracy and Distrust* 96-97 (1980); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 92-103 (1988) (discussing representation reinforcement theory).

47. Cf. *Ferguson v. Charleston*, 532 U.S. 67, 92 (2001) (Scalia, J., dissenting) ("The Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process—which would produce a decision by citizens . . . through their elected representatives, to forbid or permit [a particular] police action . . .").

48. Wasserstrom & Seidman, *supra* note 46, at 92-93.

49. *Id.*; see also Ely, *supra* note 46, at 97 ("[T]he Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment."). But see *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (stating that the "greatest dangers" to the liberty protected by the Fourth Amendment "lurk in insidious encroachment by men of zeal, well-meaning but without understanding").

50. Ely, *supra* note 46, at 172-73.

51. See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 588 (1992) ("The likeliest explanation for giving greater leeway to group stops is that politics provides an adequate remedy for overzealous police action; groups of drivers, unlike the solitary suspect, can protect themselves from overzealous police tactics at the polls.").

52. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("For some years . . . our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. . . . By the late 1960's, the preference for a warrant had won out, at least rhetorically." (citations omitted)); see also

*Camara v. Municipal Court*⁵³ imported a reasonableness balancing test into Fourth Amendment analysis that has since offered a competing model to the traditional warrant and probable cause requirements. Instead of assessing a search's reasonableness by determining if there is probable cause, the Court in *Camara* couched probable cause itself within a reasonableness standard.⁵⁴ Overruling a decision that had permitted warrantless housing inspections,⁵⁵ the Court declined to excuse from the warrant requirement a municipality's program of inspecting homes for compliance with housing regulations. A warrant was required because adherence to the warrant procedure would not frustrate the ends of the search program.⁵⁶ Yet the Court rejected the argument that warrants permitting such inspections could only issue upon probable cause that a particular house contained safety violations.⁵⁷ Instead, the court redefined⁵⁸ probable cause as the "standard by which a particular decision to search is tested against the constitutional mandate of reasonableness."⁵⁹ The determination of whether a search meets this reasonableness standard entails balancing the government interests against the intrusion upon privacy interests.⁶⁰

The Court drew a distinction between what is considered a reasonable search in a criminal investigation, which "would hardly justify a sweeping search of an entire city," and the housing inspections, which seek "to prevent even the unintentional development of conditions which are hazardous to public health and safety."⁶¹ *Camara* found three factors to be persuasive of the area inspection program's reasonableness: a long history of judicial and public acceptance for housing inspections; the necessity of detecting non-obvious but dangerous conditions combined with the unlikelihood that techniques other than the area-wide searches could "achieve acceptable results;" and the limited intrusiveness of a search that is "neither personal in nature nor aimed at the discovery of evidence of crime."⁶² Deeming the inspection program reasonable, the Court found it "obvious" that probable cause existed, as long as "reasonable legislative or administrative standards for conducting an area inspection are satisfied with

Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 Minn. L. Rev. 383, 386-87 (1988).

53. 387 U.S. 523 (1967).

54. See Sundby, *supra* note 52, at 394.

55. See *Frank v. Maryland*, 359 U.S. 360 (1959).

56. *Camara*, 387 U.S. at 533.

57. *Id.* at 538-39.

58. See *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987) ("In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness. In other contexts, however, we use 'probable cause' to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.'" (citations omitted)).

59. *Camara*, 387 U.S. at 534.

60. *Id.* at 534-35.

61. *Id.* at 535.

62. *Id.* at 537.

respect to a particular dwelling.”⁶³ These standards would consider the general conditions of the neighborhood, the length of time between inspections, and the type of dwellings to be inspected. However, the standards do “not necessarily depend upon specific knowledge of the condition of the particular dwelling.”⁶⁴

b. *Terry v. Ohio*

One year after deciding *Camara*, the Court in *Terry v. Ohio*⁶⁵ employed a balancing test to determine the level of suspicion required to justify an officer's brief detention and frisk of a suspect. Unlike *Camara*, no warrant was required to authorize this intrusion. The Court determined the “stop-and-frisk” to be a limited seizure and search⁶⁶ that had not historically been, and could not practically be, subjected to the warrant requirement because it necessitates immediate police action.⁶⁷ Because the warrant requirement did not apply to the police conduct in question, the Court found it unnecessary to ascertain whether probable cause existed to justify the encounter.⁶⁸ Instead, “the Fourth Amendment’s general proscription against unreasonable searches and seizures” provided the test for the validity of the stop and frisk.⁶⁹ Citing *Camara*, the Court stated that there is “no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.”⁷⁰

Although *Terry* deemed the stop and frisk reasonable despite the absence of probable cause, the existence of individualized suspicion played a central role in *Terry*’s reasonableness analysis:

63. *Id.* at 538. Responding to the concern that this standard for probable cause permitted a “synthetic search warrant” that diluted the Fourth Amendment’s protections, the Court stated:

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.

Id. at 539 (internal citations omitted).

64. *Id.* at 538.

65. 392 U.S. 1 (1968).

66. *Id.* at 16-19.

67. *Id.* at 20.

68. *Id.*

69. *Id.*; see also *United States v. Place*, 462 U.S. 696, 704-06 (1983) (holding that reasonable suspicion, a lesser quantum of individualized suspicion than probable cause, suffices to validate a temporary seizure of luggage that is minimally intrusive on privacy interests and justified by a substantial government interest).

70. *Terry*, 392 U.S. at 21.

In order to assess the reasonableness of [police] conduct as a general proposition, it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. . . . And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.⁷¹

The detention and frisk must be justified by objective facts that would cause a reasonable person to believe that the suspect might be armed and pose a danger to the officer or others.⁷² The rationale underlying this requirement parallels that of the warrant requirement: It ensures that a neutral magistrate can review the reasonableness of the officer's decision to search, albeit *ex post*.⁷³ It thereby limits the officer's discretion and avoids intrusions "based on nothing more substantial than inarticulate hunches."⁷⁴ Although *Terry* struck the constitutional balance at reasonable suspicion, *Camara* and the cases discussed below demonstrate that the balancing test contains no built-in requirement of individualized suspicion.⁷⁵

B. Suspicionless Searches and Seizures

The traditional warrant preference rule makes individualized suspicion a prerequisite to a lawful government search. *Camara* expanded the scope of the Fourth Amendment by bringing housing inspections within its regulation, but in so doing the case redefined probable cause as a reasonableness standard allowing inspection to proceed without any individualized suspicion that violations exist.⁷⁶ *Terry* deemed the probable cause requirement inapplicable to a search not subject to the warrant requirement, and balanced the competing government and privacy interests to determine that frisks may proceed upon a lesser quantum of individualized suspicion.⁷⁷ The remainder of Part I is devoted to suspicionless searches and seizures. Part I.B will discuss exceptions to the warrant and probable cause requirements which permit searches and seizures without any individualized suspicion at all, describing the Supreme

71. *Id.* at 20-21 (citations omitted).

72. *See id.* at 21.

73. *Id.* ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

74. *Id.* at 22.

75. *See* Wasserstrom, *supra* note 27, at 127 ("[*Terry*] paved the way for a more conservative court that assigns greater weight to governmental interests to invoke *Terry* not only to strike the balance in a way that gives the police enlarged authority to stop and frisk on reasonable suspicion, but also to use a balancing approach to justify even full scale searches and seizures without a warrant, probable cause, or even individualized suspicion, where the governmental need is determined to be especially acute.").

76. *Camara v. Mun. Court*, 387 U.S. 523, 533, 538-39 (1967). *See generally* 5 LaFave, *supra* note 7, § 10.1.

77. *Terry*, 392 U.S. at 20-21.

Court precedents which define these exceptions. Part I.C will focus on the lower courts' and Supreme Court's treatment of airport searches, which are highly analogous to mass transit searches to prevent terrorism. Part I.D will introduce the suspicionless subway search programs implemented in New York in July of 2005 and in Boston in July of 2004.

1. Early Suspicionless Searches and Seizures

a. Border Searches

Prior to *Camara*, suspicionless searches and seizures were permitted in only two contexts: searches and seizures occurring at the United States's borders and consensual searches. The Court has found the Fourth Amendment inapplicable to border searches,⁷⁸ in part because the First Congress, which proposed the Amendment, also passed a customs act authorizing the warrantless search of goods entering the country.⁷⁹ Dictum in the 1925 case of *Carroll v. United States* distinguished searches of motorists lawfully in the country, which must be based on probable cause, from searches of persons entering the country, which do not require probable cause.⁸⁰ In the 1970s, the Court relied on this language to hold

78. Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007, 1007-08 (1968).

79. *Boyd v. United States*, 116 U.S. 616, 623 (1886); see also *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977) (discussing *Boyd*, 116 U.S. 616). In *Boyd*, the Court interpreted the fact that the same Congress which proposed the Fourth Amendment also passed the Collection Act of 1789, authorizing officials to search for and seize goods to mean "that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and [these searches and seizures] are not embraced within the prohibition of the amendment." *Boyd*, 116 U.S. at 623. However, it is not entirely clear that the Collection Act discussed in *Boyd* contemplated suspicionless searches. The Act reads as follows:

Sec. 23 *And Be it Further Enacted*, That it shall be lawful for the collector, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof

Sec. 24 *And Be it Further Enacted*, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial

Act of July 31, 1789, ch. 5, § 1 Stat. 29, 43 (1789) (repealed 1790); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting) (noting that the Collection Act of 1789 required suspicion before search).

80. *Carroll v. United States*, 267 U.S. 132, 154 (1925) ("Travelers may be [stopped without probable cause] in crossing an international boundary because of national self

that searches of persons entering the country "are reasonable simply by virtue of the fact that they occur at the border."⁸¹ This inherent reasonableness derives from the government's sovereign right of self-protection.⁸² Therefore, the Fourth Amendment permits border searches without any suspicion of the targeted individual.⁸³

b. *Consensual Searches*

Consensual searches are also valid regardless of whether there is individualized suspicion.⁸⁴ As the Supreme Court has recently explained in *United States v. Drayton*, "Even when law enforcement officers have no basis for suspecting a particular individual, they may . . . request consent to search luggage—provided they do not induce cooperation by coercive means."⁸⁵ The Court has analyzed searches of passengers at airports⁸⁶ and on buses⁸⁷ as consent searches.⁸⁸ The Court's analysis in these cases follows a two-part inquiry. First, the Court determines whether law enforcement has illegally seized the individual, in which case "any consent to [a] search [is] plainly invalid as a product of the illegal seizure."⁸⁹ If no seizure has occurred or if the individual is legally seized, then the Court evaluates whether the consent to search was voluntarily given.

In determining whether the search is voluntary, the Court "examin[es] all the surrounding circumstances to determine if in fact the consent to search was coerced."⁹⁰ Early cases considered consent subjectively and asked whether the individual actually consented to the search voluntarily.⁹¹

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.").

81. *Ramsey*, 431 U.S. at 616.

82. *Carroll*, 267 U.S. at 154.

83. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant.").

84. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

85. *United States v. Drayton*, 536 U.S. 194, 201 (2002).

86. *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

87. *Drayton*, 536 U.S. 194; *Florida v. Bostick*, 501 U.S. 429 (1991).

88. These searches, each of which involved police singling out individuals for search, differ from the general searches of all passengers seeking to use mass transit. *See infra* Part I.C-D.

89. *Drayton*, 536 U.S. at 208-09 (Souter, J., dissenting). A seizure occurs when a "reasonable person would [not] feel free to terminate the encounter [with the officers]." *Id.* at 201 (majority opinion). However, no seizure occurs when a police officer simply approaches an individual and asks questions, requests identification, or requests permission to search the individual. *Id.* at 200-01. A seizure may be lawful, even if it is based upon a level of suspicion short of probable cause, so long as it is an "investigative detention," it lasts no longer than necessary, and it uses the least intrusive means to confirm or dispel the officer's suspicion. *Royer*, 460 U.S. at 500.

90. *Schneekloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

91. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980); *United States v. Watson*, 423 U.S. 411, 424 (1976); *see also* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L.J. 773, 779-81 (2005).

However, more recent cases focus on the objective inquiry of whether a "reasonable person would . . . feel free to decline the officers' requests [to search] or otherwise terminate the encounter."⁹²

Drayton provides a recent illustration of the Court's highly fact-driven voluntariness analysis for consent searches. Making a scheduled stop at a refueling station during a bus trip from Ft. Lauderdale, Florida, to Detroit, Michigan, a bus driver permitted three plainclothes officers from the Tallahassee police department to board the bus.⁹³ One officer remained at the front of the bus but did not block the exit.⁹⁴ The other two officers walked to the back of the bus and then, moving towards the front, questioned each of the passengers and matched them up with luggage in the overhead rack.⁹⁵ One officer later testified that anyone who refused to cooperate or wished to leave the bus would have been permitted to do so.⁹⁶ He further testified that, during previous bus interdiction efforts, he had informed passengers of their right to refuse cooperation, but did not do so on this occasion.⁹⁷ The officer reached the row in which Christopher Drayton and his companion, Clifton Brown, Jr., were seated.⁹⁸ Speaking in a low voice, the officer informed the men that they were conducting drug interdiction searches and requested and received permission from the men to search their sole piece of luggage, a green duffel bag.⁹⁹ After confirming that the bag contained no contraband, the officer noticed that the men were wearing baggy clothing inappropriate for the warm weather.¹⁰⁰ The officer asked and received from Brown permission to conduct a pat-down search, which revealed nearly half a kilogram of cocaine taped to Brown's legs underneath his pants.¹⁰¹ After arresting the companion, the officer requested and received permission to frisk Drayton, which also revealed possession of cocaine.¹⁰²

The Court found that Drayton's consent to the search was voluntarily given. The fact that the officer asked permission to frisk would indicate to a reasonable person that he was free to refuse it.¹⁰³ While expressly informing an individual of his freedom to withhold consent is a factor

92. *Drayton*, 536 U.S. at 202; see *Simmons*, *supra* note 91, at 781-84. Thus, the test for determining whether a seizure has occurred and whether a search is voluntary "turn[s] on very similar facts." *Drayton*, 536 U.S. at 206 (internal quotation omitted); *Simmons*, *supra* note 91, at 782 ("[I]n practice, the voluntariness test for consent has become so inextricably linked to the objective Fourth Amendment test for seizure that it is unlikely that the subjective elements will ever be reaffirmed by the courts.").

93. *Drayton*, 536 U.S. at 197.

94. *Id.* at 197-98.

95. *Id.* at 198.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 198-99.

100. *Id.* at 199.

101. *Id.*

102. *Id.*

103. *Id.* at 206.

bearing on the voluntariness of a search, such notice is not “the *sine qua non* of an effective consent.”¹⁰⁴ Under the totality of the circumstances—the fact that there was “no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice”¹⁰⁵—the Court could draw no inference of coercion that would vitiate consent.¹⁰⁶

2. Suspicionless Searches and Seizures Recognized After *Camara*

In the years following *Camara*, the Court developed new doctrines that permit other types of suspicionless searches and seizures. Individualized suspicion proves problematic when the government seeks to protect the public from a harm not ordinarily foreshadowed by observable suspicious activity. In 1976, the Court expressly recognized that, while “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.”¹⁰⁷ Subsequent cases have confirmed that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.”¹⁰⁸ In three contexts—administrative inspections, roadblock checkpoint seizures, and “special needs” searches—the Court has permitted departure from the warrant and probable cause requirements and has upheld suspicionless searches and seizures.¹⁰⁹

a. *Administrative Searches*

The administrative search doctrine permits warrantless inspections of business premises and activities in highly regulated industries without any suspicion that a regulatory violation exists. In *Colonnade Catering Corp. v. United States*,¹¹⁰ the Court held that Congress had the power to authorize IRS officials to inspect the business premises of federally licensed liquor distributors upon demand and without a warrant.¹¹¹ On the grounds that there was a “long history of the regulation of the liquor industry during pre-Fourth Amendment days,” the Court found the framework of the warrant procedure inapplicable to statutory liquor-licensing programs that required

104. *Id.* at 206-07.

105. *Id.* at 204.

106. *Id.* at 207.

107. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976).

108. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

109. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000).

110. 397 U.S. 72 (1970).

111. *Id.* at 76-77. The Court found that Congress did not exercise this power but instead imposed a fine on licensees who refused to allow entry. *Id.* at 77. Thus, the Court concluded that the official's forcible entry was unauthorized by Congress without reaching the Fourth Amendment question. *Id.*; see also 5 LaFave, *supra* note 7, § 10.2(a), at 41.

inspections.¹¹² Rather, the validity of such programs would be "resolved on a case-by-case basis under the general Fourth Amendment standard of reasonableness."¹¹³

In *United States v. Biswell*, the Court permitted a warrantless inspection, authorized by federal statute, of a federally licensed gun dealer's pawnshop.¹¹⁴ Although regulation of interstate firearms trafficking was not as "deeply rooted in history" as regulation of the liquor industry, the Court permitted the search because obtaining a warrant might "easily frustrate inspection" and because a dealer who decides to "engage in this pervasively regulated business . . . does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."¹¹⁵ Therefore, the Court concluded that, where "regulatory inspections further urgent federal interest[s], and the possibilities of abuse and the threat to privacy are not of impressive dimensions," warrantless inspections could proceed.¹¹⁶

A 1987 case, *New York v. Burger*, summarized the "*Colonnade-Biswell* doctrine" as standing for "the reduced expectation of privacy by an owner of commercial premises in a 'closely regulated' industry" because of pervasive and regular regulation.¹¹⁷ The Court there upheld a state statute authorizing police to search automobile junkyards for evidence of possession of stolen property.¹¹⁸ Significantly, the Court held that searches by police pursuant to an administrative scheme governing the operation of an industry are not rendered illegal simply by the fact that the searches are also intended to facilitate enforcement of the penal law.¹¹⁹

If the business has not been subject to such pervasive regulation that its proprietor relinquishes her reasonable expectation of privacy, a warrant is required.¹²⁰ Yet the warrant may be issued without "probable cause to believe that conditions in violation of [the law] exist on the premises."¹²¹ Later cases have reaffirmed *Camara's* holding that probable cause is established so long as "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment."¹²² Thus, suspicionless inspections of non-heavily regulated businesses are permissible, but only if authorized by a warrant.

112. *Colonnade Catering Corp.*, 397 U.S. at 75. This history of regulation distinguished the case from *See v. City of Seattle*, 387 U.S. 541, 545 (1967), in which the Court had held that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."

113. *Colonnade Catering Corp.*, 397 U.S. at 77.

114. *United States v. Biswell*, 406 U.S. 311, 316-17 (1972).

115. *Id.* at 315, 316.

116. *Id.* at 317.

117. *New York v. Burger*, 482 U.S. 691, 701 (1987).

118. *Id.* at 694, 716-17.

119. *Id.* at 712-13.

120. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-20 (1978).

121. *Id.* at 320.

122. *Id.* (quoting *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967)).

b. Roadblock Checkpoints

The roadblock checkpoint exception allows law enforcement officials to temporarily detain motorists at roadside checkpoints without warrant or suspicion of any wrongdoing. The checkpoints must be carried out pursuant to neutral criteria that limit the discretion of officials in the field in selecting whom to stop.¹²³ The checkpoints must also be primarily intended to serve an interest distinct from the "general interest in crime control."¹²⁴ Because these seizures are less intrusive than a traditional arrest, the Fourth Amendment does not demand satisfaction of the warrant procedure's requirements. Rather, courts will uphold the checkpoint seizure if it is reasonable. A determination of reasonableness here "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."¹²⁵

This exception was first recognized in the 1976 case of *United States v. Martinez-Fuerte*.¹²⁶ The Court upheld the U.S. Border Patrol's use of permanent checkpoint stops on highways near the U.S.-Mexican border to detain motorists for brief questioning without warrant or individualized suspicion.¹²⁷ Relying on *Terry*, the Court weighed the public interest served by the checkpoints against the privacy interest of motorists in order to "delineat[e] the constitutional safeguards applicable in particular contexts" and determined that no individualized suspicion was required for the checkpoint stops.¹²⁸ It would be too impractical to require officials to form suspicion that occupants of any car had entered the country illegally before initiating a search because "the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens" and "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations."¹²⁹ The Court also found the warrant requirement inapplicable, distinguishing *Camara* on the basis that, unlike the brief detention of motorists, the search of homes traditionally required a warrant.¹³⁰

After excusing the warrant and individualized suspicion requirements, the Court conducted a balancing test to assess the reasonableness of the

123. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

124. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

125. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979); see also *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (stating that the *Brown v. Texas* balancing test applies to checkpoint seizures).

126. 428 U.S. 543 (1976).

127. *Id.* at 562.

128. *Id.* at 555; see also 5 LaFave, *supra* note 7, § 10.8(d), at 360 ("The teaching of *United States v. Martinez-Fuerte* . . . is that the constitutionality of a roadblock must be determined by application of the *Camara* balancing test.").

129. *Martinez-Fuerte*, 428 U.S. at 557.

130. *Id.* at 565.

checkpoint program.¹³¹ The Court distinguished the program from the one that it had invalidated the previous year¹³² because the checkpoints there at issue authorized officials not only to stop motorists for questioning but also to search their automobiles.¹³³ Noting that individuals had a diminished expectation of privacy in their automobiles and that the Court was "deal[ing] neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection," the Court concluded that the checkpoint stops were reasonable.¹³⁴

In one case, *Delaware v. Prouse*, the Court seemed to demand that a suspicionless police stop must attain a minimum level of effectiveness, or even be more effective than an alternative suspicion-based technique, in order to be reasonable under the Fourth Amendment.¹³⁵ The Court struck down the use of roving police patrols to stop motorists for the purpose of checking compliance with licensing and registration regulations, deeming the procedure unreasonable absent reasonable suspicion.¹³⁶ The Court found that the intrusions upon privacy interests outweighed the government interest, particularly in light of the stop's ineffectiveness in furthering the detection of violations.¹³⁷ However, the Court reserved determination of

131. The Court determined that the stops were necessary to curtail illegal immigration and substantially furthered this government interest. *Id.* at 556-57. The Court then assessed the intrusion upon a motorist's privacy interest and determined it to be "quite limited." *Id.* at 557-58. The Court found the checkpoints less intrusive than the suspicionless roving patrol stops that it had previously struck down "because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *Id.* at 558 (discussing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). In *United States v. Brignoni-Ponce*, the Court struck down suspicionless roving patrol stops near the border because "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators." *Brignoni-Ponce*, 422 U.S. at 883. Thus, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Id.* The Court in *Martinez-Fuerte* further found the routine checkpoint stops reasonable because they granted officials in the field minimal discretion, in determining both the location of the checkpoint and which motorists to seize. *Martinez-Fuerte*, 428 U.S. at 559; see also 5 LaFave, *supra* note 7, § 10.8(d), at 367.

132. See *United States v. Ortiz*, 422 U.S. 891, 896-97 (1975) (holding that "[a] search, even of an automobile, is a substantial invasion of privacy" and therefore requires probable cause because accepting a lesser quantum of suspicion would grant officials a "degree of discretion . . . not consistent with the Fourth Amendment").

133. *Martinez-Fuerte*, 428 U.S. at 558.

134. *Id.* at 561.

135. *Delaware v. Prouse*, 440 U.S. 648, 659-62 (1979).

136. *Id.* at 663.

137. *Id.* at 654-63. The Court recognized that Delaware had a "vital interest" in enforcing state licensing and registration requirements and thereby maintaining highway safety. *Id.* at 658. Nonetheless, it struck down the state's use of roving patrols to conduct random spot checks of motorists because this practice was not a "sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests." *Id.* at 659. The Court assumed that, absent data showing otherwise, the police were more likely to detect vehicle regulation violations through the traditional method of enforcement—vehicle stops after police observation of traffic violations—than by "choosing randomly from the entire universe of drivers." *Id.* Likewise, the Court found it inconceivable that an unlicensed driver, undeterred

whether the “[q]uestioning of all oncoming traffic at roadblock-type stops” would be permissible, because such stops are less intrusive and limit the potential for officers to use arbitrary discretion.¹³⁸

Although the Court struck down the suspicionless patrol stop, *Prouse*’s discussion of the Fourth Amendment indicated a much broader application of the balancing test. The Court declared that “[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials.”¹³⁹ The Court then suggested that the balancing test is the rule for determining reasonableness, rather than an exception to the warrant preference rule that applies in specific circumstances.¹⁴⁰ Furthermore, the Court stated that the balancing test determines whether the search must be predicated upon probable cause, reasonable suspicion, or whether “the balance of interests precludes insistence upon some quantum of individualized suspicion.”¹⁴¹

Any implication created by *Prouse* that the Court would engage in a “searching examination” of a suspicionless checkpoint stop’s effectiveness in assessing its reasonableness was put to rest in *Michigan Department of State Police v. Sitz*.¹⁴² The Court repudiated the lower court’s finding that suspicionless seizures of motorists at roadblock sobriety checkpoints were not sufficiently effective to be constitutional.¹⁴³ The Court then applied the balancing test and permitted the sobriety checkpoints. Citing statistics of the number of casualties and amount of property damage caused annually

by the prospect of some incident or accident requiring him to prove his qualification to drive would be deterred by a random spot check. *Id.* at 660. Therefore the Court concluded that the practice’s “incremental contribution to highway safety” was “marginal at best” and did not justify departure from the Fourth Amendment’s usual requirement of individualized suspicion. *Id.* at 659-60. The Court held that roving patrols could only stop motorists to enforce licensing vehicle regulations upon “articulable and reasonable suspicion” that the driver is unlicensed or that the automobile is unregistered. *Id.* at 663.

138. *Id.* at 663. Justice Blackmun wrote in concurrence to emphasize that the Court’s reservation “also includes other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop.” *Id.* at 664 (Blackmun, J., concurring).

139. *Id.* at 653-54.

140. *Id.* at 654. The Court stated that “the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Id.* Later in the opinion, a footnote added that the warrant clause “generally requires that prior to a search a neutral and detached magistrate ascertain that the requisite standard is met.” *Id.* at 654 n.11. However the Court excused the roving patrol stops from the warrant requirement by analogizing them to the street encounters in *Terry*, which required no warrant. *Id.* at 655-56.

141. *Id.* at 654-55 (internal quotation omitted).

142. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990).

143. *Id.* at 453-54. The Court stated that the inquiry into the degree to which a program furthers the governmental interest is “not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.” *Id.* at 453. The Court pointed to evidence that 1.6% of motorists stopped were arrested for drunk driving as proof that the program was sufficiently effective and distinguished *Prouse* on the grounds that no empirical evidence of effectiveness had been offered in that case. *Id.* at 454-55.

by drunk driving, the Court found the states' interest in eradicating drunk driving as beyond dispute.¹⁴⁴ In terms of the level of intrusion upon motorists' privacy interests, the checkpoints were indistinguishable from the minimal intrusion caused by the checkpoints in *Martinez-Fuerte*.¹⁴⁵ The Court concluded that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped" favored the use of the sobriety checkpoints.¹⁴⁶

The Court has recently imposed a threshold rule that, in order to be reasonable, suspicionless checkpoints must have a primary purpose distinct from ordinary law enforcement.¹⁴⁷ In the 2000 case of *City of Indianapolis v. Edmond*, the Court struck down a roadblock checkpoint program designed primarily for narcotics interdiction.¹⁴⁸ The Court distinguished Indianapolis's program from other permissible checkpoints on the grounds that the "primary purpose" of those approved programs addressed the problems of policing the border and maintaining highway safety, not "uncover[ing] evidence of ordinary criminal wrongdoing."¹⁴⁹ Even though securing the border and apprehending drunk drivers are law enforcement activities that might lead to arrests and criminal prosecutions, allowing checkpoints erected for a mere "general interest in crime control" would make suspicionless seizures "a routine part of American life."¹⁵⁰

The Court's discussion of the Fourth Amendment in *Edmond* is interesting in two respects. First, the Court did not even mention the warrant preference rule. Rather, the Court began its discussion by stating that "[t]he Fourth Amendment requires that searches and seizures be reasonable."¹⁵¹ Second, the analysis elevated the importance of individualized suspicion. The Court declared that it has condoned departure from the norm of individualized suspicion in only three "limited circumstances": searches that serve "special needs"; searches conducted for "administrative purposes"; and seizures of motorists at highway checkpoints to intercept illegal aliens, prevent drunk driving, and to detect violation of vehicle operation regulations.¹⁵²

In its most recent checkpoint decision, *Illinois v. Lidster*,¹⁵³ the Court upheld the stopping of motorists by police seeking information about a hit-and-run accident that had occurred on the same road one week earlier.¹⁵⁴ During the course of complying with the stop, Robert S. Lidster exhibited

144. *Id.* at 451.

145. *Id.* at 451-53.

146. *Id.* at 455.

147. *See* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

148. *Id.*

149. *Id.* at 42.

150. *Id.* at 41-42.

151. *Id.* at 37.

152. *Id.* at 37-38.

153. 540 U.S. 419 (2004).

154. *Id.* at 422.

signs of intoxication and was arrested for drunk driving.¹⁵⁵ Overruling the state court decision that the checkpoint seizure violated the Fourth Amendment because its primary purpose was to investigate a crime, the Court distinguished *Edmond* on the grounds that Illinois's checkpoint was not intended to discover evidence that the seized motorists had committed a crime.¹⁵⁶ Rather, the stop sought to elicit information that would lead to the apprehension of others.¹⁵⁷ Finding *Edmond*'s threshold rule against checkpoints with a general interest in crime control not implicated, the Court applied the balancing test and found the information-seeking checkpoint to be reasonable.¹⁵⁸

c. *The Special Needs Doctrine*

The special needs doctrine applies to "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement."¹⁵⁹ Once a court identifies a government interest as a special need, the warrant, probable cause and individualized suspicion requirements no longer apply, and the validity of the search hangs in the balance of government and privacy interests. By its terms, the doctrine suggests applicability to a range of interests as broad as one can define "special." Yet, in recent years, the Supreme Court has predominantly invoked this doctrine to test the validity of suspicionless drug testing.¹⁶⁰

The term "special needs" comes from Justice Harry Blackmun's concurrence in the 1985 case of *New Jersey v. T.L.O.*, in which he stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."¹⁶¹ In *T.L.O.*, a school official searched a student's purse expecting to find cigarettes and found evidence that the girl was dealing marijuana. The majority did not adopt Justice Blackmun's standard to analyze the validity of the search. Rather, the Court declared that the Fourth Amendment's "underlying command" is reasonableness and cited *Camara* for the proposition that "[t]he determination of the standard of reasonableness governing any specific

155. *Id.*

156. *Id.* at 423-24.

157. *Id.* at 423.

158. *Id.* at 423-28.

159. *City of Indianapolis v. Edmond* 531 U.S. 32, 37 (2000).

160. Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. Med. & Ethics 102, 108-09 (2005).

161. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also* *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001); Maclin, *supra* note 160, at 108.

class of searches requires balancing the need to search against the invasion which the search entails."¹⁶²

The search in *T.L.O.* was not suspicionless. The search's reasonableness rested on the existence of "reasonable grounds for suspecting that the search [would] turn up evidence that the student has violated or is violating either the law or the rules of the school."¹⁶³ The Court in *T.L.O.*, citing *Martinez-Fuerte*, expressly declined to consider whether searches of students by school officials required any individualized suspicion as an "essential element" of reasonableness.¹⁶⁴ Justice Blackmun concurred in the judgment because, although he agreed that maintaining discipline in the public schools provided a special need justifying a search on a lesser quantum of individualized suspicion than probable cause, he found "troubling" the majority's "implication that the balancing test is the rule rather than the exception."¹⁶⁵

Justice Blackmun's term "special needs" was officially adopted in *O'Connor v. Ortega*, where the Court found that state hospital officials could lawfully conduct a warrantless search of a physician-employee's office and seize his effects.¹⁶⁶ The Court determined that government employers had a special need in the efficient and effective operation of governmental agencies.¹⁶⁷ The next case to invoke the special needs exception, *Griffin v. Wisconsin*, upheld a statute authorizing probation officers to conduct warrantless searches of probationers' living quarters where there were reasonable grounds to believe that contraband would be found.¹⁶⁸

All subsequent special needs cases have concerned drug testing of certain groups without any suspicion of drug use. The 1989 case of *Skinner v. Railway Executives' Ass'n* upheld a program authorizing the random drug testing of railroad employees involved in accidents or in violation of safety rules.¹⁶⁹ The Court's analysis began by stating that "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"¹⁷⁰ The Court justified departure from the Fourth Amendment's traditional requirements by explaining that, when special

162. *T.L.O.*, 469 U.S. at 337.

163. *Id.* at 342.

164. *Id.* at 342 n.8.

165. *Id.* at 352 (Blackmun, J., concurring).

166. *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987).

167. *Id.* at 724. Justice Blackmun dissented, reiterating his criticism from *T.L.O.* that the majority proceeded to the balancing test without identifying a "special need" to dispense with the warrant and probable cause requirements. *Id.* at 742 ("Although the plurality mentions the 'special need' step, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because, given the facts of this case, no 'special need' exists here to justify dispensing with the warrant and probable-cause requirements.").

168. *Griffin v. Wisconsin*, 483 U.S. 868, 875-76 (1987).

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

170. *Id.* at 619 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

needs exist, the Court “ha[s] not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”¹⁷¹

Only after justifying the absence of a warrant and probable cause did the *Skinner* Court cite *Martinez-Fuerte* for the proposition that, although ordinarily required, “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.”¹⁷² The Court described the rule on suspicionless searches as follows: “In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion.”¹⁷³

A companion case decided the same day, *National Treasury Employees Union v. Von Raab*, upheld the random drug testing of federal customs employees seeking promotion or transfer to positions involving drug interdiction or the carrying of a firearm.¹⁷⁴ The Court cited *Martinez-Fuerte* and *T.L.O.* for the proposition that a warrant, probable cause, or any suspicion at all is not “an indispensable component of reasonableness in every circumstance.”¹⁷⁵ Where a search or seizure serves special needs “beyond the normal need for law enforcement,” the Court balances the competing interests “to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”¹⁷⁶ The Court deemed the warrant requirement impractical because it would divert the U.S. Customs Service’s resources away from its mission of enforcing the customs laws and interdicting contraband.¹⁷⁷ Furthermore, requiring a warrant would not further the protection of privacy interests: Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply no special facts for a neutral magistrate to evaluate.”¹⁷⁸ The Court then dismissed the probable cause standard as “peculiarly related to

171. *Id.* The Court found that the regulation of railroad employees’ conduct to prevent drug- and alcohol-related railway accidents constituted a special need. The Court dispensed with the warrant requirement because the standardized nature of the drug tests achieved the warrant’s dual purposes of limiting the scope of the intrusion and the discretion of officials; thus a warrant would furnish no additional protection of privacy. *Id.* at 621-22. Also, requiring judicial pre-authorization would “impede the achievement of the Government’s objective” because physical evidence of an employee’s impairment might be lost in the time it would take to secure a warrant. *Id.* at 623-24. The Court also determined that it would be unreasonable to expect the private railroads charged with administering the drug tests to comply with the warrant procedure. *Id.*

172. *Id.* at 624.

173. *Id.*

174. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

175. *Id.* at 665.

176. *Id.* at 665-66.

177. *Id.* at 666-67.

178. *Id.* at 667.

criminal investigations” and inapplicable to routine tests that seek to detect violations that do not ordinarily generate grounds for suspicion.¹⁷⁹ The Court found the government’s need to conduct suspicionless testing to be “sufficiently compelling” to dispense with a requirement of individualized suspicion,¹⁸⁰ and the Court explained its balancing analysis to arrive at this conclusion.¹⁸¹

The Court has since determined that suspicionless drug testing of student athletes¹⁸² and student participants in extracurricular activities¹⁸³ constitutes a special need that triggers the balancing test analysis. These cases represent a significant departure from the decisions in *Skinner* and *Von Raab* because it is much less clear that a drug testing regime based upon some measure of individualized suspicion would be impractical in a school setting, where all aspects of a student’s behavior are subject to supervision and control.¹⁸⁴ The majority in *Vernonia School District v. Acton* rejected an individualized suspicion requirement because “accusatory drug testing . . . transforms the process into a badge of shame,” risks that “troublesome but not drug-likely students” would be arbitrarily singled out, and would burden school-teachers who are unqualified to detect signs of drug use.¹⁸⁵ Surveying the checkpoint seizure and drug testing cases, the dissent in *Acton* vigorously argued that the Court has “upheld the suspicionless search only after first recognizing the Fourth Amendment’s longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented.”¹⁸⁶

In two instances the Court has found that certain drug testing programs do “not fit within the closely guarded category of constitutionally permissible suspicionless searches.”¹⁸⁷ In *Chandler v. Miller*, the Court held that Georgia’s interest in drug testing candidates for state office was not “sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion”¹⁸⁸ because there was no evidence of drug use among state officials,¹⁸⁹ and the officials did not perform “high-

179. *Id.* at 667-68.

180. *Id.* at 668.

181. *Id.* at 667-79.

182. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

183. *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

184. *See Acton*, 515 U.S. at 678-81 (O’Connor, J., dissenting); 5 LaFave, *supra* note 7, § 10.11(c), at 518-20.

185. *Acton*, 515 U.S. at 663; *see also Earls*, 536 U.S. at 837 (questioning “whether testing based on individualized suspicion in fact would be less intrusive” because “[s]uch a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline” and “might unfairly target members of unpopular groups”).

186. *Acton*, 515 U.S. at 674 (O’Connor, J., dissenting).

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

188. *Id.* at 318.

189. *Id.* at 319.

risk, safety-sensitive tasks.”¹⁹⁰ Furthermore, the drug tests could not be effective because candidates could simply abstain from drugs before the testing date, which was known in advance.¹⁹¹ The Court concluded that where “public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”¹⁹²

The Court in the 2001 case of *Ferguson v. City of Charleston* struck down a state hospital’s policy, developed in conjunction with law enforcement, of testing pregnant women for drug use and reporting positive test results to the police.¹⁹³ Although the city defended its policy on the grounds that the drug tests furthered the special need of getting mothers into treatment, the Court stated that the “immediate objective of the searches was to generate evidence for law enforcement purposes.”¹⁹⁴ The reporting of results to police for the purpose of criminal prosecutions distinguished the case from prior cases in which the Court had permitted suspicionless drug testing.¹⁹⁵

Professor Tracey Maclin has surveyed the special needs cases and has isolated factors that the Court considers in deciding whether a special need exists.¹⁹⁶ The most important factor is the purpose of the search—whether it is intended to serve a need unrelated to law enforcement.¹⁹⁷ *Ferguson* struck down the hospital’s drug testing program because it was “ultimately indistinguishable from the general interest in crime control”: deterring drug use through the threat of criminal prosecution.¹⁹⁸ A second factor that the Court considers is whether law enforcement officials have access to the information obtained from the search for use in criminal prosecutions.¹⁹⁹ The early cases, *T.L.O.* and *Griffin*, determined that a special need existed despite the fact that the evidence discovered was handed over to law enforcement to prosecute the student and the probationer.²⁰⁰ But subsequent cases have found law enforcement’s lack of access to test results to indicate that the tests were not conducted to further ordinary law enforcement needs.²⁰¹ The Court in *Ferguson* emphasized this factor: “The fact that positive test results were turned over to police does not merely provide a basis for distinguishing our prior cases applying the

190. *Id.* at 321-22.

191. *Id.* at 319-20.

192. *Id.* at 323.

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

194. *Id.* at 83.

195. *Id.* As the Court explained, “Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.” *Id.* at 84.

196. Maclin, *supra* note 160, at 115.

197. *Id.* at 115-116.

198. *Id.* (quoting *Ferguson*, 532 U.S. at 81).

199. *Id.* at 116-117.

200. *Id.* at 116.

201. *Id.*

'special needs' balancing approach It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment."²⁰² Thus, police access to the fruits of the search makes the search less likely to qualify for special needs treatment.

A third factor, according to Professor Maclin, is whether law enforcement is involved in conducting the search.²⁰³ In *Griffin*, the fact that police conducted the search of the probationer's home did not disqualify the search from special needs treatment.²⁰⁴ Concurring with the Court's decision in *Ferguson*, however, Justice Kennedy stated that "[n]one of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives."²⁰⁵ The drug testing program in *Ferguson* was invalidated because its "primary and immediate purpose" was for criminal law enforcement.²⁰⁶ As Professor Maclin points out, it remains unsettled whether a search conducted primarily for administrative purposes but with a secondary purpose of discovering evidence for criminal prosecution could qualify as a special needs search.²⁰⁷

The relationship among administrative inspections, roadblock checkpoint seizures, and the "special needs" searches is not settled.²⁰⁸ *Edmond* discusses these cases as distinct "limited circumstances" where suspicionless searches may be reasonable.²⁰⁹ The Court in *Ferguson* distinguished special needs searches from checkpoint seizures and administrative searches.²¹⁰ The opinion stated that special needs searches must meet a higher standard because they do not merely involve brief detentions (like checkpoints) or searches where the subject's expectation of privacy is diminished by participating in a closely regulated industry (like administrative searches).²¹¹ However, the doctrines share a common

202. *Ferguson*, 532 U.S. at 84; see Maclin, *supra* note 160, at 116.

203. Maclin, *supra* note 160, at 117.

204. *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987).

205. *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring); see also *id.* at 84 (Stevens, J.) (stating that the policy did not qualify as a special need because of "the extensive involvement of law enforcement officials at every stage of the policy"); Maclin, *supra* note 160, at 117.

206. Maclin, *supra* note 160, at 117.

207. *Id.* at 117-118.

208. *Compare City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting) ("[T]he 'perfectly plain' reason for not incorporating the 'special needs' test in our roadblock seizure cases is that seizures of automobiles 'deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection.'" (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976))), with *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (describing the government's supervision of a regulated industry as a special need, "like its operation of a school, government office or prison" and allowing departure from the warrant and probable cause requirements).

209. *Edmond*, 531 U.S. at 37-38.

210. *Ferguson*, 532 U.S. at 84.

211. *Id.* at 83 n.21 ("Accordingly, this case differs from *New York v. Burger* That case involved an industry in which the expectation of privacy in commercial premises was

origin: The Court crafted each exception when it deemed the traditional warrant and probable cause requirements as unnecessary prerequisites to Fourth Amendment reasonableness in a specific context, and instead applied the balancing analysis introduced in *Camara*.²¹²

C. Suspicionless Airport Searches

1. Lower Court Approval

Since the early 1970s, the lower courts have unanimously excused from the warrant and probable cause requirements suspicionless airport searches of passengers conducted to prevent air piracy.²¹³ When these courts first considered airport screening procedures, the warrant preference rule remained strong; these cases were decided before the implications of the balancing test would manifest in the suspicionless checkpoint and special needs cases. Some courts justified the airport search's departure from the traditional Fourth Amendment requirements by folding the search into recognized exceptions such as the administrative search or border search doctrines.²¹⁴ Another found that the danger of air piracy alone justified the absence of a warrant and probable cause, even though no recognized exception applied.²¹⁵ The Supreme Court never granted certiorari to settle

particularly attenuated given the extent to which the industry in question was closely regulated. More important for our purposes, the Court relied on the plain administrative purposes of the scheme to reject the contention that the statute was in fact designed to gather evidence to enable convictions under the penal laws This case also differs from the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness. First, those cases involved roadblock seizures, rather than the intrusive search of the body or the home. Second, the Court [has] explicitly distinguished the cases dealing with checkpoints from those dealing with special needs." (citing *New York v. Burger*, 482 U.S. 691, 701 (1987)); see also *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (distinguishing the standard for departing from individualized suspicion in special needs searches from the standard for suspicionless checkpoint seizures).

212. But see Jennifer Y. Buffaloe, Note, "*Special Needs*" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 Harv. C.R.-C.L. L. Rev. 529, 536 (1997) (arguing that "[t]he special needs cases differ radically from the administrative inspection cases" because "[w]hile the administrative cases involve essentially limited, nonpersonal investigations, the special needs cases are full-fledged searches aimed at discerning evidence of individual wrongdoing" and "none of the special needs searches presents a situation where a search based on individualized suspicion is unworkable").

213. See, e.g., *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973); *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Miller*, 480 F.2d 1008 (5th Cir. 1973); *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973); *United States v. Echols*, 477 F.2d 37 (8th Cir. 1973); *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972).

214. See, e.g., *Davis*, 482 F.2d 893 (characterizing airport screening procedures as an administrative search); *Skipwith*, 482 F.2d at 1276 ("[T]he standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations.").

215. *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974).

this controversy.²¹⁶ As late as December 2003, one court admitted that "no consensus has been reached as to the grounds justifying such a search."²¹⁷

After an alarming increase in the incidence of skyjacking in the late 1960s, the Federal Aviation Administration ("FAA") in 1969 devised screening procedures for airlines to implement to prevent the carrying of weapons and explosives onboard.²¹⁸ Under this first set of procedures, only passengers who fit a hijacker profile and who could not pass through a metal detector without activating it were searched.²¹⁹ The searches predictably led to thousands of arrests, mostly for crimes unrelated to skyjacking, and to a flurry of Fourth Amendment challenges to suppress the evidence obtained from the searches.²²⁰

Initially, courts upheld these selective airport screening procedures under the *Terry* doctrine.²²¹ One case illustrative of this analysis is *United States v. Bell*.²²² A ticket vendor at New York's La Guardia Airport found that Henry Bell matched the FAA's hijacker profile and gave him a marked ticket envelope designating his suspect status.²²³ A federal marshal was summoned to meet him at the boarding gate.²²⁴ After passing through a magnetometer, Bell triggered the alert, indicating the presence of metal.²²⁵ Following another pass through and a second request for identification, Bell stated that he had just been released from jail on bail for homicide and narcotics charges.²²⁶ The marshal requested and received consent to conduct a pat-down search of Bell, which produced two bags filled with glassine envelopes of heroin.²²⁷

216. 5 LaFave, *supra* note 7, § 10.6(c), at 291 n.58.

217. *United States v. Hartwell*, 296 F. Supp. 2d. 596, 602 (E.D. Pa. 2003).

218. On September 11, 1970, President Nixon announced that airlines would be required to employ electronic surveillance equipment at all U.S. airports. *See Davis*, 482 F.2d at 899 & n.17.

219. Airplane ticket agents would designate persons checking in at the airport as "selectees" if they had characteristics fitting a secret hijacker profile developed by the Federal Aviation Association ("FAA"). Notices were posted conspicuously around the terminals warning passengers of a potential search of their luggage and persons. All passengers passed through a magnetometer device, but only activation by selectees attracted further investigation. Airline officials would summon a federal marshal to question the selectee. If the selectee failed to furnish adequate identification and pass through the device again without activating it, the federal marshal might frisk the selectee or search his carry-on luggage. *See* 5 LaFave, *supra* note 7, § 10.6(a), at 279-80.

220. *See* Patrick W. McGinley & Stephen F. Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 Fordham L. Rev. 293, 306 (1972).

221. A contemporary article described the controversy over airport searches as follows: "Since [the] traditional exceptions to the warrant rule are not applicable to the airport search, the only justifiable exception is the protective 'frisk' for weapons authorized by *Terry v. Ohio*." *Id.* at 307.

222. *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972).

223. *Id.* at 668.

224. *Id.* at 668-69.

225. *Id.* at 669.

226. *Id.*

227. *Id.*

The U.S. Court of Appeals for the Second Circuit found the pat down of Bell reasonable under “the test of *Terry v. Ohio*.”²²⁸ The marshal knew that Bell fit the FAA profile, activated the metal detector, could not provide identification, and had a serious criminal history. Thus, he reasonably believed that Bell might commit a crime or pose a danger to the marshal or others.²²⁹ The court dismissed Bell’s contention that the initial use of the metal detector was an unreasonable search because “[n]one of the personal indignities of the frisk discussed . . . in *Terry* are here present.”²³⁰ The court deemed the magnetometer screening to be reasonable “[i]n view of the magnitude of the crime sought to be prevented, [and] the exigencies of time which clearly precluded the obtaining of a warrant”²³¹

Other courts rejected justifying airport procedures under *Terry* because fitting the profile did not provide reasonable suspicion for the initial magnetometer screening.²³² Only six percent of passengers designated by the profile as selectees and searched actually possessed weapons.²³³ This hardly would “warrant a reasonably prudent man in the belief” that any

228. *Id.* at 672.

229. *Id.*

230. *Id.* at 673.

231. *Id.* Chief Judge Henry Friendly of the Second Circuit wrote in concurrence to assert that the power to search passengers for weapons extended beyond situations where articulable facts—such as a profile match or activation of the magnetometer screening—give rise to suspicion of the targeted passenger. *Id.* at 674 (Friendly, C.J., concurring). The Fourth Amendment limits this power only by requiring reasonableness, which is determined simply by the “weighing of the harm against the need.” *Id.* at 675. Chief Judge Friendly noted that probable cause is usually the appropriate standard when a search seeks to discover evidence of a past crime. *Terry*’s lower standard applies when a suspect’s behavior leads an officer to reasonably believe that “‘criminal activity may be afoot and that the persons whom he is dealing with may be armed and presently dangerous.’” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1962)). However,

[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the tests of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.”

Id. While the use of the hijacker profile was a permissible means of minimizing inconvenience, Chief Judge Friendly would “have no difficulty in sustaining a search . . . based on nothing more than the trained intuition” of officials. *Id.* This concurrence incited Judge Walter Mansfield to write a concurring opinion in response. He disagreed that the gravity of the threat of air piracy in itself justified searching all passengers, “measured only by the good faith of those conducting the search, regardless of the absence of grounds for suspecting that the passengers searched are potential hijackers.” *Id.* Such a “vague” principle would eliminate the Fourth Amendment’s “carefully constructed” and time-tested safeguards—the warrant and probable cause requirements. *Id.* It would also lack a limiting principle to prevent extension of suspicionless searches to many other contexts (for example, searches of individuals within high crime areas in response to increasing crime rates). *Id.* at 675-76.

232. *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973); *People v. Hyde*, 524 P.2d 830, 832-34 (Cal. 1974).

233. *United States v. Lopez*, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

particular selectee was armed.²³⁴ Thus the profile method provided a weak justification for the initial magnetometer search under *Terry*.²³⁵

Bell presented a fairly straightforward case for application of the *Terry* exception because the detained individual exhibited highly suspicious behavior. However, applying *Terry*'s rationale, which was grounded in objective facts creating reasonable suspicion of danger, became untenable when the FAA mandated the search of all passengers and carry-on luggage.²³⁶ No longer did the use of the hijacker profile present objective grounds for suspicion that justified the search.²³⁷ The lower courts all continued to apply the balancing test and to validate airport search procedures, provided that the search was limited in scope to prevent the smuggling of weapons on board and passengers had notice of the search and could avoid it by electing not to fly.²³⁸ However, as will be discussed in more detail below, the U.S. Courts of Appeals never reached consensus on the exception excusing airport searches from the warrant or probable cause requirements.²³⁹

2. Supreme Court Treatment

The Supreme Court has never reviewed airport screening procedures or explained which exception justifies departure from the warrant and probable cause requirements.²⁴⁰ On several occasions, the Supreme Court has cited with approval the consistent finding by lower courts that the Fourth Amendment permits airport searches. In *Von Raab*, the Court described airport search cases as illustrative of the proposition that where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal."²⁴¹ The Court characterized these opinions as "applying our precedents dealing with administrative searches."²⁴² In fact, of the three airport search cases cited by the Court, only one justified the airport search as an administrative search.²⁴³ A footnote in *Von Raab* went

234. *Hyde*, 524 P.2d at 833; 5 LaFave, *supra* note 7, § 10.6(b), at 287.

235. Some court decisions, like *Bell*, took the position that the magnetometer screening alone was so minimally intrusive that it did not constitute a search under the Fourth Amendment. *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972); *Bell*, 464 F.2d at 673; *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972); *see also* Note, *The Constitutionality of Airport Searches*, 72 Mich. L. Rev. 128, 135 (1973).

236. This mandate took effect in January 1973. Note, *Airport Searches: Fourth Amendment Anomalies*, 48 N.Y.U. L. Rev. 1043, 1044 (1973).

237. 5 LaFave, *supra* note 7, § 10.6(c), at 291 & n.56; *see* *United States v. Edwards*, 498 F.2d 496, 497-98 (2d Cir. 1974).

238. *See, e.g.*, *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

239. *See infra* Part II.

240. 5 LaFave, *supra* note 7, § 10.6(c), at 291 n.58.

241. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-75 (1989).

242. *Id.* at 675 n.3.

243. *Id.* The other two airport cases cited in *Von Raab* are *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) and *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

on to quote one circuit opinion holding that the “danger [of air piracy] *alone* meets the test of reasonableness” if the search is conducted in good faith to prevent hijacking, is reasonable in scope to achieve this end, and provides the passenger with notice and an opportunity to avoid the search by electing not to fly.²⁴⁴ The Court continued that the government’s power to conduct airport searches does not hinge upon demonstration of a threat to a particular airport or airline.²⁴⁵ This is because the searches were implemented “in response to an observable national and international hijacking crisis” and “[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.”²⁴⁶ Finally, the Court asserted that the search’s validity did not “necessarily turn[]” on its success in exposing piracy attempts.²⁴⁷ To the contrary, the Court viewed the fact that nearly all of the billions of passengers searched possessed no weapons as evidence of successful deterrence.²⁴⁸

In *Chandler*, the Court referenced airport searches to support the proposition that “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable.’”²⁴⁹ Citing *Von Raab*, the Court in *Chandler* qualified this statement by adding that where the “public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”²⁵⁰ The Court also showed approval of airport searches in the recent checkpoint seizure case, *City of Indianapolis v. Edmond*.²⁵¹ The Court stated that its inquiry into the primary purpose of the checkpoint program did not “affect the validity of . . . searches in airports . . . , where the need for such measures to ensure public safety can be particularly acute.”²⁵² In the 2002 case of *United States v. Drayton*, the dissent recognized that “[a]nyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft.”²⁵³ However, the dissent further stated that “[t]he commonplace precautions of air travel have not, thus far, been justified for ground

Edwards found the administrative search doctrine “most nearly applicable” to the airport search context rather than other proposed exceptions. 498 F.2d at 498 n.5. The court there declined, however, “to fold airport searches under the rubric” of administrative searches. *Id.* Rather, it proceeded directly to the reasonableness analysis, in apparent defiance of the “heavy judicial gloss that a warrantless search is invalid unless within an appropriate ‘exception.’” *Id.* at 498. *Skipwith* relied upon the border search doctrine. 482 F.2d at 1276.

244. *Von Raab*, 489 U.S. at 675 n.3. (quoting *Edwards*, 498 F.2d at 496).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

250. *Id.*

251. 531 U.S. 32 (2000).

252. *Id.* at 47-48.

253. *United States v. Drayton*, 536 U.S. 194, 208 (2002) (Souter, J., dissenting).

transportation . . . and no such conditions have been placed on passengers getting on trains or buses.”²⁵⁴

The Court has also suggested approval of suspicionless measures to prevent terrorism in other contexts. The Court in *Edmond* averred to the probable constitutionality of a police roadblock checkpoint to prevent a terrorist attack, stating that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”²⁵⁵ In a dissenting opinion to the 2005 case of *Illinois v. Caballes*, Justice David Souter expressed “concern[] not to prejudice a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion,” stating that “what is a reasonable search depends in part on demonstrated risk.”²⁵⁶ In the same case, Justice Ruth Bader Ginsburg’s dissenting opinion posited that “the immediate, present danger of explosives would likely justify a bomb [dog] sniff under the special needs doctrine.”²⁵⁷

D. *The Mass Transit Search Programs in New York City and Boston*

Recent years have witnessed an upsurge of terrorist attacks upon passenger rail systems worldwide.²⁵⁸ According to one study, over two hundred and fifty attacks upon rail systems between 1995 and June 2005 have claimed nearly nine hundred lives and injured over six thousand people.²⁵⁹ These attacks include the 1995 sarin gas attack on Tokyo’s subway system that killed twelve and injured over five thousand,²⁶⁰ the February 2004 bombing of the Moscow Metro by Chechen rebels that killed approximately forty people, and the March 2004 bombing of a Madrid commuter train by an Al Qaeda affiliate organization that killed over two hundred.²⁶¹

Urban mass transit systems are designed to be highly open and accessible, making them difficult to secure against attack.²⁶² A high number of passengers access the system through multiple points of entry spread over large geographical areas.²⁶³ This makes monitoring and controlling persons entering the system far more difficult than at an

254. *Id.*

255. *Edmond*, 531 U.S. at 44.

256. *Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (2005) (Souter, J., dissenting). This case held that a dog sniff of a vehicle pulled over for a traffic violation did not constitute a search. *Id.* at 409-10.

257. *Id.* at 425 (Ginsburg, J., dissenting).

258. Passenger Rail Security, *supra* note 2, at 10.

259. *See id.*

260. *Id.*

261. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

262. Passenger Rail Security, *supra* note 2, at 10.

263. *Id.*

airport.²⁶⁴ The openness, high ridership, expensive infrastructure, and economic importance of mass transit systems have made them attractive targets for terrorists because an attack can produce high casualties and cause economic disruption to an entire metropolitan area.²⁶⁵

1. New York City's Program

On July 22, 2005, New York City's Mayor Michael Bloomberg and Police Commissioner Ray Kelly announced that the New York Police Department ("NYPD") would begin searching the backpacks and bags of subway riders as they entered the City's subway system.²⁶⁶ The announcement of the Container Inspection Program came just hours after terrorists tried to detonate four bombs within the London Underground and two weeks after successful attacks there claimed fifty-six lives.²⁶⁷ The Mayor assured riders of the safety of New York's transit system, emphasizing that no specific threat had been made against it.²⁶⁸ The Police Commissioner promised that the program would take a "systematic approach" and that officers in the field would receive instruction on how to conduct the searches "in accordance with the law and the Constitution."²⁶⁹ Another police spokesperson indicated that the searches would continue "indefinitely."²⁷⁰

The New York City subway system runs twenty-four hours a day and consists of twenty-six interconnected lines and 468 passenger stations, many of which have multiple entrances.²⁷¹ The system is the most heavily used subway system in the United States.²⁷² Each weekday it carries upwards of 4.7 million passengers.²⁷³

Under its Container Inspection Program, the NYPD establishes daily checkpoints at the entrances of selected subway stations, setting up tables in front of the entrances' turnstiles to conduct inspections just before riders

264. *Id.*

265. *Id.*

266. Sewell Chan & Kareem Fahim, *New York Starts To Inspect Bags On The Subways*, N.Y. Times, July 22, 2005, at A1.

267. Alan Cowell, *Bombs Set at 4 London Sites, but Fail to Explode*, N.Y. Times, July 22, 2005, at A1.

268. Plaintiffs' Memorandum of Law in Support of Request for Declaratory and Injunctive Relief at 5, *MacWade v. Kelly*, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005) (No. 05CIV6921) [hereinafter NYCLU's Pre-Trial Brief]. One day after the announcement, New York City Mayor Michael Bloomberg stated that "[the program] is partially designed to make people feel comfortable. That's part of the security thing. You want to make people comfortable. You also want to have substance and make sure you keep the potential threats away. We still have not had any specific threats that the public should worry about." *Id.*

269. Chan & Fahim, *supra* note 266, at A1.

270. *Id.* at B5.

271. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *4.

272. *Id.*

273. Chan & Fahim, *supra* note 266, at A1.

enter the system.²⁷⁴ Notices posted at the selected stations inform riders that "backpacks and other containers [are] subject to inspection."²⁷⁵ The NYPD does not disclose to the public the number or location of stations where searches are being conducted each day or the frequency of inspections at each checkpoint.²⁷⁶ At any given time, no inspections are conducted at most of the entrances to the system's 468 stations.²⁷⁷ On certain days in early October 2005, the city increased the number of checkpoints and inspections in response to information reporting a heightened threat of terrorist attack against the system.²⁷⁸

Officers select riders according to a numerical formula. For instance, every twelfth, fifteenth, or twentieth rider carrying a container large enough to conceal an explosive device is selected for search.²⁷⁹ A supervising officer sets the numerical formula based upon factors such as the number of available officers and the volume of people entering the stations.²⁸⁰ Officers have been instructed that the inspections must be limited in scope to determine whether a backpack or bag contains an explosive device and have been trained to recognize explosive devices.²⁸¹ Officers may not inspect containers too small to hold an explosive device. The determination of what size container may be subject to inspection is left to the discretion of the officers.²⁸² Officers also may not intentionally look for other contraband or attempt to read any printed material in the container.²⁸³ During a typical inspection, which lasts "seconds and not minutes," a passenger opens up his or her containers to expose its contents to the inspecting officer's view.²⁸⁴ Officers have discretion to manipulate the contents of the container in order to move items obstructing their view.²⁸⁵

Selected riders can refuse the search and leave the station. However, they are prohibited from passing through the turnstile and entering the transit system at that time.²⁸⁶ Refusing the search does not provide a basis for arrest.²⁸⁷ In fact, no action is taken against individuals who refuse a search and walk away, or who walk away after seeing the checkpoint but

274. Defendant's Pre-Trial Memorandum of Law at 3-4, *MacWade v. Kelly*, 2005 WL 3338573 (No. 05CIV6921) [hereinafter City's Pre-Trial Brief].

275. *MacWade*, 2005 WL 3338573, at *7.

276. *Id.*

277. *Id.*

278. *Id.* at *7 n.13.

279. *Id.* at *7.

280. *Id.*

281. *Id.* at *6.

282. *Id.* at *6-*7. *But see* NYCLU's Pre-Trial Brief, *supra* note 268, at 6 ("The NYPD is searching the bags or containers of people without the bag or container having to be any minimum size. Thus, everything from women's purses to large backpacks are subject to search.").

283. *MacWade*, 2005 WL 3338573, at *6.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

before the officer requests to search.²⁸⁸ Presumably, behavior that causes the inspecting officer to become reasonably suspicious of the individual would justify further investigation under the *Terry* principle.²⁸⁹ Absent such suspicion, nothing prevents individuals who refuse the search from attempting to access the subway system at another station.²⁹⁰

The New York Civil Liberties Union ("NYCLU"), representing five subway riders, filed a § 1983 action against the City and its Police Commissioner in the Southern District of New York in August of 2005, challenging the search program as a violation of the Fourth Amendment.²⁹¹ The complaint alleged that thousands of riders have had their possessions illegally searched and requested a declaratory judgment and an injunction against the program.²⁹² The NYCLU's principal challenge was that, under Second Circuit precedent,²⁹³ the search cannot qualify as a special needs search because it is neither minimally intrusive nor maximally effective, and it does not target individuals with a diminished expectation of privacy.²⁹⁴ The City also framed the subway search program as a special needs search, implemented to "increase deterrence and detection of potential terrorist activity and to give greater protection to the mass transit riding public."²⁹⁵

288. *Id.*; NYCLU's Pre-Trial Brief, *supra* note 268, at 6.

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

290. However, individuals that refuse to submit to an inspection and are caught attempting to enter at the same station through another entrance may be arrested. *See MacWade*, 2005 WL 3338573, at *7 n.14.

291. Complaint, *MacWade v. Kelly*, No. 05 Civ 6921 (S.D.N.Y. Dec. 7, 2005) [hereinafter NYCLU Complaint].

292. *Id.* at ¶¶ 1, 41.

293. *See United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004).

294. *See* NYCLU's Pre-Trial Brief, *supra* note 268, at 13-15. The New York Civil Liberties Union ("NYCLU") challenged the effectiveness of the Container Inspection Program in preventing an attack. First, the NYCLU noted that no instance of terrorist activity has been detected, despite its estimation that the subway system had been entered 400 million times between the adoption of the policy and the trial. *Id.* at 6. Second, the NYCLU contended that the voluntary nature of the inspections, combined with the subway system's design, makes the program devoid of any "meaningful value" in preventing terrorists from carrying explosives into the system. *Id.* at 7. Each subway line connects to multiple other lines and many lines run twenty-four hours a day, allowing riders to access any point in the system from any station at all hours. *Id.* at 4. Many of the stations have multiple entrances, and generally these entrances are not visible to an officer conducting searches at another entrance. *Id.* at 3. Furthermore, many stations, particularly within Manhattan, are within close walking distance of others. *Id.* at 3-4. The NYCLU claimed that these features make the City's search program futile. Nothing prevents a selected rider who withholds consent to a search from attempting to enter the system at another station or even at a different entrance to the same station. *Id.* at 4. Because searches are conducted at only a minority of stations at any given time, such an attempt is likely to succeed. *See id.* at 7. The NYCLU argued that terrorists could easily evade checkpoints and access any point within the subway system despite the program checkpoints, thus calling into doubt the program's efficacy in detecting and deterring terrorist attempts. *Id.*

295. City's Pre-Trial Brief, *supra* note 274, at 8. The City asserted that the special needs doctrine is available when, "based upon special needs unrelated to law enforcement . . . the searches (1) address a serious special threat to public health and safety; (2) minimally implicate privacy interests; and (3) reasonably promote the goal of countermanning the

Following a two-day bench trial, the district court in *MacWade v. Kelly* found that New York City's random search program fell within the special needs exception, excusing the program from the warrant and probable cause requirements and from the norm that searches must usually be predicated on some measure of individualized suspicion.²⁹⁶ The court then balanced the competing interests to assess the program's reasonableness. The court found the government's interest compelling, simply stating that "[t]he need to prevent a terrorist bombing of the New York City subway system is a governmental interest of the very highest order."²⁹⁷ It then concluded that the City's expert witnesses persuaded the court that the program is a reasonable method of accomplishing this end and that reasonable effectiveness is all that the Fourth Amendment demands.²⁹⁸ The City's experts had testified that the randomness of the search program deters terrorist attempts because it injects "uncertainty and unpredictability [in]to the planning and implementation of a terrorist attack which, in turn, increases the risk of failure and helps to deter an attack."²⁹⁹ This rebutted the NYCLU's claim that because checkpoints are erected at only a few

threat." *Id.* at 5 (citing *Illinois v. Lidster*, 540 U.S. 419, 427 (2004); *Bd. of Educ. v. Earls*, 536 U.S. 822, 830, 834, 837-38 (2002)). Claiming that suspicionless searches were first permitted in airports and courthouses, New York City noted that courts have approved of extending such searches to new contexts and urged a similar extension to meet the emerging terrorist threat against mass transit systems. *Id.* at 6-7. To surpass *Edmond*'s limitation that suspicionless intrusions may not primarily intend to further a "general interest in crime control," the City noted that it implemented the program shortly after the attacks upon London's subway system. *Id.* at 8. It also distinguished the program from a "typical crime control tactic" by stating that the New York Police Department ("NYPD") permits riders selected for inspection to leave the subway station without being searched, although persons found with contraband would be arrested. *Id.* at 8-9. Addressing the government interest in the balancing analysis, the City presented expert witnesses to testify that mass transit systems have become a more attractive target since airport security was tightened following September 11, 2001, that recovered Al Qaeda manuals explicitly endorse "blasting and destroying bridges leading into and out of the cities," and that the NYPD has uncovered plots to bomb tunnels and subway stations. *Id.* at 9. Furthermore, the City pointed to recent mass transit bombings in Moscow, Madrid, and London as revealing the vulnerabilities of mass transit systems and the desire and capacity of terrorists to exploit them. *Id.* The City argued that "protective measures need not await intelligence of a specific threat." *Id.* at 10. Rather, it urged the court to take judicial notice of the threat in light of the 9/11 attack and recent international attacks, as courts have done with respect to courthouse, airport, and mass transit security. *Id.* at 9-10. The City then asserted that the search minimally intrudes upon privacy interests. First, widespread media coverage of the program, as well as loud-speaker announcements and posted notices warning of a potential search, provides riders with advance notice of the searches. *Id.* at 12-13. The City maintained that such advance notice mitigates the intrusiveness of the search by reducing surprise and allowing riders to avoid the search by avoiding the transit system or carrying containers into it. *Id.* Finally, the City asserted that the Container Inspection Program was a "reasonable means of advancing the city's goal of detecting and deterring mass transit terrorist activity," and that the search need only be reasonably effective in advancing a special need. *Id.* at 17-18.

296. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *16-*20 (S.D.N.Y. Dec. 7, 2005). The court's application of the special needs doctrine will be discussed *infra* Part II.B.

297. *Id.* at *17.

298. *Id.* at *18-*19.

299. *Id.* at *12.

stations each day and selected passengers can refuse the search, the program had little deterrent effect.³⁰⁰

The court then turned to the privacy interest of subway riders implicated by the program and found the intrusion to be minimal for four reasons.³⁰¹ First, a “prominently displayed sign” and public announcements give subway riders notice of the searches, reducing the riders’ subjective fright or surprise by the encounter.³⁰² Second, searches are conducted in the open, near a subway’s entrance, by uniformed police officers.³⁰³ The program prohibits officers from exercising discretion in selecting whom to search, other than deciding what size bag or backpack is large enough to contain an explosive.³⁰⁴ Third, a selected rider can refuse the search and leave the station, and this “‘element of voluntariness’” serves to mitigate the intrusion.³⁰⁵ Finally, the scope of the search is limited: Officers may not inspect containers too small to hold an explosive device and may not attempt to read any written or printed material inside the container.³⁰⁶ Officers only manipulate the contents of the container when necessary to confirm that no explosives are inside, and the entire inspection typically lasts only a few seconds.³⁰⁷ Balancing the compelling need to deter terrorist attacks and the effectiveness of the program against the minimal privacy intrusion, the court deemed New York City’s subway search program constitutional.³⁰⁸

2. Boston’s Program

A year before New York City instituted its Container Inspection Program, the Massachusetts Bay Transportation Authority (“MBTA”) implemented a subway search program during the 2004 Democratic National Convention at Boston’s Fleet Center.³⁰⁹ Originally, the MBTA program was designed similar to New York City’s, with officers conducting random searches of passengers as they entered the system according to a numerical formula.³¹⁰ However, on the days that the convention took place,

300. *Id.* at *13 (“Apart from presenting the ironic position that less intrusiveness renders the Program less effective, [plaintiffs’ expert] offered no evidence of the measure of ‘enough uncertainty,’ and he did not at all rebut the evidence presented by Defendants that the Program has a meaningful deterrent effect.”).

301. *Id.* at *18-19.

302. *Id.* at *19.

303. *Id.*

304. *Id.*

305. *Id.* (quoting *United States v. Albarado*, 495 F.2d 799, 807-08, 808 n.15 (2d Cir. 1974)).

306. *Id.*

307. *Id.*

308. *Id.* at *19-20.

309. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004).

310. *See Memorandum in Support of Preliminary Injunction, American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859 (D. Mass. July 28, 2004) [hereinafter *American-Arab Anti-Discrimination Comm.’s Brief*].

MBTA officials searched the hand-carried items of all passengers while they rode on certain subway lines and bus routes that passed underneath or near the convention center.³¹¹ This policy accorded with a Secret Service directive requiring the search of bags and backpacks of all persons who passed through a perimeter established around the convention center.³¹² The American-Arab Anti-Discrimination Committee filed suit requesting a temporary injunction against the search program, which the district court denied.³¹³

The district court deemed the subway searches to fall within the administrative search exception to the warrant and probable cause requirements, relying on circuit court decisions applying this rationale to airport searches.³¹⁴ Turning to the balancing test to determine if the program was reasonable, the court determined that the MBTA's policy implicated a compelling public interest. The court noted that international terrorists had bombed the public transit systems in Moscow and Madrid within the previous year and that the Madrid bombing was targeted to disrupt Spain's national elections.³¹⁵ Therefore, the court found it reasonable to suppose that "national party nominating conventions could become terrorist targets, and when the conventions are held in cities with significant mass transportation systems that serve the convention locations, it is not without foundation to worry that a terrorist event might be aimed simultaneously at the convention and the transit system."³¹⁶ Although no intelligence warned of a specific threat against the MBTA system or the Fleet Center, the court found it too speculative to assume that such information would precede an attack.³¹⁷ Thus, the court declined to assess the probability of an attack as part of the determination that there was a sufficient government need to conduct the searches.³¹⁸ The court also pointed out that the absence of a specific threat does not destroy the authority to conduct blanket airport screenings, because "[w]hen the threat is to any flight, every flight may be protected by the security searches."³¹⁹

After finding a compelling interest for the searches, the court next addressed the searches' intrusion on privacy. The court described the intrusion as "not insignificant" because "[p]assengers are required to open all bags and similar carried-on items to visual inspection, exposing to view what they would otherwise have kept unseen."³²⁰ The court immediately turned to two aspects of the MBTA's policy which mitigated the intrusion.

311. *American-Arab Anti-Discrimination Comm.*, 2004 WL 1682859, at *1.

312. *Id.*

313. *Id.* at *1, *4.

314. *Id.* at *1. Plaintiffs urged the trial court to analyze the searches under the checkpoint seizure exception. See *American-Arab Anti-Discrimination Comm.*'s Brief, *supra* note 310.

315. *American-Arab Anti-Discrimination Comm.*, 2004 WL 1682859, at *2.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at *3.

First, the MBTA published “in a variety of ways” notice that passengers “may be subject to search.”³²¹ Notice “tends to reduce the subjective anxiety” that would be caused by an unexpected search.³²² Notice also allows passengers objecting to the intrusion to avoid it by refraining from use of the transit system on the days that the MBTA conducted the searches.³²³ The court would have preferred notice that each passenger on certain routes would be searched, rather than the notice actually provided by the MBTA that passengers on all routes may be searched.³²⁴ However, this flaw did not undermine the program’s reasonableness because notice, while important, is not a “necessary element” of a search plan.³²⁵

The second mitigating fact, according to the court, was the program’s limited scope and duration. Searches were conducted only of passengers traveling past the convention center and only during the four days that the convention was held.³²⁶ The court also noted that the policy ceded officers no discretion over whom to search, provided for supervision, and required record-keeping to facilitate later review of the inspections.³²⁷ Because the intrusion was reasonable and “very similar to the intrusions imposed under other, increasingly common, administrative security search regimes,” the plaintiffs failed to establish a likelihood of success on their Fourth Amendment challenge and the court denied their motion for injunctive relief.³²⁸

II. HOW SHOULD COURTS CHARACTERIZE SUSPICIONLESS SEARCHES OF MASS TRANSIT PASSENGERS TO PREVENT TERRORISM?

The Supreme Court has not developed a coherent doctrine that explains when the reasonableness balancing test supplants the warrant and probable cause requirements,³²⁹ a threshold question for considering the validity of a suspicionless search or seizure. Early cases following *Camara* seemed to indicate that individualized suspicion is unnecessary whenever such requirements would frustrate the search or seizure’s ends.³³⁰ In *Edmond*, however, the Court enumerated three “limited circumstances” in which a suspicionless search or seizure is permitted under the Fourth Amendment: an administrative search, a roadblock checkpoint, and a special needs search.³³¹

Noticeably absent from this list are the screening procedures conducted at airports. The Supreme Court never granted certiorari of the lower courts’

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at *4.

328. *Id.*

329. See *supra* notes 17-27 and accompanying text.

330. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

331. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000).

consistent and longstanding validation of these searches,³³² but the Court has discussed these decisions with approval.³³³ Although all circuits have excused airport searches from the warrant and probable cause requirements,³³⁴ they never reached consensus on the justification for this departure.³³⁵ Perhaps paying heed to the then-predominant warrant preference rule, some courts fit airport searches into recognized exceptions such as the administrative search³³⁶ or border search³³⁷ doctrines. The Second Circuit, perhaps anticipating the rise of the general reasonableness standard to compete with the warrant preference rule as a model of Fourth Amendment analysis, applied the balancing test without relying on a recognized exception.³³⁸

Airport searches are highly analogous to the searches recently implemented on urban mass transportation systems. Courts considering mass transit search programs might adopt one of the exceptions applied to airport searches by the circuit courts, as did the district court in *American-Arab Anti-Discrimination Committee*.³³⁹ Courts might also characterize the mass transit searches as fitting within the checkpoint or the special needs doctrines, both of which developed after the circuit courts validated airport searches.³⁴⁰ Because passengers receive notice that entry into the mass transit system is conditioned on surrendering to the search, the Court could characterize the searches as consensual. Still, the Court might declare that a general reasonableness standard applies, abandoning the warrant preference rule and, consequently, the need to fit a recognized exception. Finally, the Court could determine that searches on mass transportation systems to prevent terrorism fall within a *sui generis* exception, distinct from the other recognized doctrines.³⁴¹

Any approach, except one finding that the searches are consensual, would ultimately culminate in a balancing of competing interests to determine the search's reasonableness. Therefore, the specific exception applied might not affect the constitutionality of the mass transit searches. However, the manner in which the Court squares the suspicionless subway searches with the traditional warrant and probable cause requirements impacts the consistency of search and seizure jurisprudence and the strength of the warrant preference rule. The following sections will evaluate the

332. 5 LaFave, *supra* note 7, § 10.6(c), at 291 n.58.

333. See *supra* Part I.C.2.

334. See *supra* note 213 and accompanying text.

335. See, e.g., *United States v. Hartwell*, 296 F. Supp. 2d 596, 602 (E.D. Pa. 2003).

336. See *United States v. Davis*, 482 F.2d 893, 905-08 (9th Cir. 1973).

337. See *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973) ("[T]he standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations.").

338. *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974).

339. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859 (D. Mass. July 28, 2004).

340. See *supra* Part I.B.2.b-c.

341. See Note, *The Constitutionality of Airport Searches*, *supra* note 235, at 153.

advantages and disadvantages of applying the eligible doctrines to mass transit search programs.

A. *The Administrative Search Doctrine*

When airports adopted screening procedures requiring the search of all passengers and their carry-on luggage, the Ninth Circuit in *United States v. Davis* rejected characterizing the airport search as a variant of the *Terry* stop and frisk.³⁴² Rather, the court found that “[t]he appropriate standards for evaluating the airport search program under the Fourth Amendment are found in a series of Supreme Court cases relating to ‘administrative’ searches.”³⁴³ *Davis* defined this exception very broadly. Grouping together *Camara*,³⁴⁴ *Biswell*,³⁴⁵ *See*,³⁴⁶ and a Supreme Court decision allowing warrantless inspections of the residences of public assistance recipients,³⁴⁷ the court determined that

[t]he essence of these decisions is that searches conducted as 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, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.³⁴⁸

The court deemed airport screenings to be carried out as part of a general regulatory scheme for the “administrative purpose” of preventing weapons and explosives from being carried on board.³⁴⁹ The fact that weapons or explosives detected would be used for a criminal prosecution did not change the administrative nature of the airport search.³⁵⁰ The court noted that one purpose of the inspections upheld in *Biswell* and *Camara* was the discovery of regulatory code violations. Thus, the potential that airport searches would reveal contraband and lead to arrests for violations of the

342. *United States v. Davis*, 482 F.2d 893, 905-08 (9th Cir. 1973).

343. *Id.* at 908. A recent decision of the U.S. Court of Appeals for the Ninth Circuit confirmed that *Davis* remains good law. *Gilmore v. Gonzales*, No. 04-15736, slip op. 1135, 1157-58 (9th Cir. Jan. 26, 2006). However, the decision seems to place less emphasis on labeling airport searches as “administrative,” stating simply that “[a]irport screening searches . . . do not per se violate a traveler’s Fourth Amendment rights, and therefore must be analyzed for reasonableness.” *Id.* at 1158.

344. *Camara v. Mun. Court*, 387 U.S. 523 (1967); *see supra* notes 53-64 and accompanying text.

345. *United States v. Biswell*, 406 U.S. 311 (1972); *see supra* notes 114-116 and accompanying text.

346. *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (holding that determining whether probable cause for a warrant exists for an administrative agency’s seizure of corporate records will be measured “against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved”).

347. *Wyman v. James*, 400 U.S. 309 (1971) (holding that requiring a warrantless home visit as a condition for receipt of welfare benefits does not violate the Fourth Amendment).

348. *Davis*, 482 F.2d at 908.

349. *Id.*

350. *Id.*

criminal law “does not alter the essentially administrative nature of the screening process.”³⁵¹ However, the airline screenings would cease to be administrative if they became “subverted into a general search for evidence of crime.”³⁵²

The district court in *American-Arab Anti-Discrimination Committee* found there to be “no reason to have separate constitutional analyses for urban mass transportation systems and for airline transportation.”³⁵³ Despite differences in the security measures employed, “the fundamental issues should not be substantially affected by the mode of transportation involved.”³⁵⁴ Citing *Davis*, the court determined that the MBTA’s search program fell within the administrative search exception.³⁵⁵

Davis’s broad interpretation of the administrative search doctrine—that searches furthering any non-law-enforcement purpose may be conducted without probable cause directed to a particular person—is arguably faithful to the holding of *Camara*.³⁵⁶ *Camara* did not limit its redefined probable cause standard to housing inspections. Rather, the Court there drew a distinction between what reasonableness demands in searches to uncover evidence of past crimes and in searches to prevent the development of inconspicuous but highly dangerous conditions.³⁵⁷ The latter requires only that the need to search or seize outweighs the injury to privacy. And, as early cases applying *Camara* found, if this balancing test favors the government interest in taking the administrative action, reasonableness does not necessarily require officials to form suspicion if such a requirement would frustrate the ends of the search.³⁵⁸

Such an expansive view of the administrative search doctrine is subject to criticism on several grounds. First, in a recent decision the Court has indicated that this doctrine is limited to inspections of highly regulated businesses.³⁵⁹ *Colonnade Catering Corp.*, *Biswell*, and later cases permit

351. *Id.*

352. *Id.* at 909.

353. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

354. *Id.*

355. *Id.* The court also stated that “administrative searches have been upheld in the face of objections that they violated the Fourth Amendment.” *Id.* at *1. To support this proposition, the court cited authorities finding airport searches and searches at the entrances to courthouses to be administrative. It also cited cases that excused the warrant and probable cause requirements by applying the consent and special needs exceptions. *Id.*

356. See Note, *Airport Searches: Fourth Amendment Anomalies*, *supra* note 236, at 1058 (“Courts that adopted the *Camara* approach in the context of airport searches recognized that these searches are prompted by a unique kind of administrative necessity and are separable from the normal routine of law enforcement.”).

357. *Camara v. Mun. Court*, 387 U.S. 523, 535 (1967).

358. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

359. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001). However, the Court in *Edmond* described the administrative search exception as encompassing not only searches of heavily regulated businesses, but also investigative searches of fire-damaged commercial premises and inspections of residential structures to ensure compliance with local housing

warrantless inspections of business premises because the Court found that a business proprietor's participation in a heavily regulated industry corresponds to a decreased expectation of privacy.³⁶⁰ Even though the airline and mass transit industries have traditionally been heavily regulated, it is operators, not passengers, who have a diminished expectation of privacy.³⁶¹ Soon after *Davis* was decided, the Supreme Court rejected extension of the administrative search doctrine to permit warrantless seizures of persons not engaged in business.³⁶² The Court held that "[a] central difference between [*Colonnade* and *Biswell*] and this [case] is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business."³⁶³ The Court might declare that a passenger's expectation of privacy in luggage is diminished when he or she enters a mass transit system so as to allow warrantless and suspicionless inspections, but this exception to the warrant and probable cause requirements would be distinct from the cases allowing warrantless inspections of business premises.

Second, it is unclear whether warrantless searches of passengers could be justified under *Camara*, which did not involve a heavily regulated industry but nevertheless allowed inspections without individualized suspicion.³⁶⁴ *Camara* itself does not provide an exception to the warrant requirement for all searches that might be labeled "administrative." In fact, *Camara* overruled a decision which had upheld warrantless housing inspections, finding that statutory safeguards regulating inspections were an insufficient substitute for the protections of the warrant procedure and that the public interest in enforcing the housing code did not preclude securing a warrant.³⁶⁵

Even if the warrant requirement were excused, some commentators have argued that the airport searches could not satisfy *Camara*'s reasonableness

codes. *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (citing *Michigan v. Tyler*, 436 U.S. 499, 507-09, 511-12 (1978); *Camara*, 387 U.S. at 534-39).

360. *New York v. Burger*, 482 U.S. 691, 701 (1987); *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-76 (1970).

361. See Note, *The Constitutionality of Airport Searches*, *supra* note 235, at 144. But see Simcha Herzog, *Constitutional Problems Posed By Aviation Security Post September Eleventh*, 6 Fla. Coastal L. Rev. 361, 376 (2005) ("Airport searches fit neatly into the administrative search rationale because air travel is a heavily regulated activity and has become more regulated post September 11.").

362. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

363. *Id.* at 271. This language dissuaded other circuits from adopting *Davis*'s expansive administrative search rationale in considering airport searches. See *United States v. Edwards*, 498 F.2d 496, 498 n.5 (2d Cir. 1974) ("[T]he principle that seems most nearly applicable to the airport search is that recognized in *Colonnade Catering Corp. v. United States*, and applied in *United States v. Biswell* . . . But since an attempt to fold airport searches under the rubric of this type of administrative search would entail the question of reasonableness, as well as the need for dealing with language in *Almeida-Sanchez v. United States*, the issue of reasonableness may as well be faced directly." (citations omitted)).

364. *Camara*, 387 U.S. 523.

365. *Id.* at 533.

standard.³⁶⁶ *Camara* found the housing inspections to be reasonable because of a long history of public acceptance, because dangerous conditions must be corrected but “acceptable results” would not be achieved if officials must first develop suspicion that violations exist in any particular dwelling, and because the inspections were not “personal in nature.”³⁶⁷ Airport searches enjoyed no long history of public acceptance when the circuit courts first deemed them to be administrative searches, nor is there any history of acceptance of suspicionless subway searches.³⁶⁸ *Camara*’s second prong is arguably established: A terrorist attack is a threat that the public interest demands be prevented. Requiring officials to develop suspicion that any particular passenger poses a threat would fail to achieve “acceptable results” because there is little reason to expect that a terrorist would exhibit suspicious behavior while entering a mass transit system with explosives.³⁶⁹ Furthermore, acceptable results in preventing terrorism demand a higher level of deterrence than that generally achieved by ordinary, suspicion-based law enforcement techniques.³⁷⁰

As to *Camara*’s third prong, searches of luggage could arguably be considered more personal in nature than housing inspections.³⁷¹ The latter are “directed toward such facilities as the plumbing, heating, ventilation, gas, and electrical systems.”³⁷² In contrast, passenger luggage is used to store personal items that one would like to keep private.³⁷³ However, as Professor Wayne LaFave asserts, *Camara*’s third prong can be interpreted as allowing a departure from the normal standard of probable cause whenever the intrusiveness is less than that of a search in the context of a criminal investigation.³⁷⁴ Airport screening procedures and subway searches, which are brief, narrow in scope, and conducted with notice, are “similarly less intrusive than the usual search of a criminal suspect’s person and belongings.”³⁷⁵

Another issue is that *Camara* did not hold that area warrants for housing inspections could issue without any suspicion at all.³⁷⁶ Rather, the Court found probable cause established if legislative or administrative standards,

366. See, e.g., Note, *The Constitutionality of Airport Searches*, *supra* note 235, at 142.

367. *Camara*, 387 U.S. at 536-37.

368. But see 5 LaFave, *supra* note 7, § 10.1(b), at 11 (questioning the validity and significance of *Camara*’s finding that housing inspections enjoyed a long history of public acceptance).

369. See *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) (“[T]here is also no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack, so its absence cannot be taken to indicate that the facilities are not likely targets.”).

370. 5 LaFave, *supra* note 7, § 10.6(c), at 296.

371. See *id.* § 10.1(b), at 15.

372. *Id.*

373. See Note, *Airport Searches: Fourth Amendment Anomalies*, *supra* note 236, at 1058.

374. 5 LaFave, *supra* note 7, § 10.6(c), at 297.

375. *Id.*

376. See *Camara v. Mun. Court*, 387 U.S. 523, 538-39 (1967).

based upon neighborhood housing conditions, suggested that inspections would likely reveal the existence of code violations in a general area.³⁷⁷ Some have argued that airport searches cannot meet this standard of probable cause because there is no reason to believe that searching any group of passengers will uncover weapons or explosives.³⁷⁸ However, the airport and subway searches are confined to a general area that officials have determined is subject to a heightened risk of terrorist attack.³⁷⁹ *Camara's* probable cause standard does not demand any minimum amount of probability that a dangerous condition will be found.

A major problem with applying *Davis's* expansive interpretation of the administrative search doctrine is that this interpretation destroys any internal coherence that this exception attains when "administrative" refers only to inspections of highly regulated commercial activities or premises.³⁸⁰ Circuit courts rejecting the administrative search rationale for airport searches criticized this approach because the label "administrative" lacked "analytical significance."³⁸¹ By expanding the scope of "administrative" to encompass all regulatory searches intended to protect public safety rather than investigate crime, "there seems [to be] no rational limit to what searches can be ultimately justified on the basis of *Camara v. Municipal Court* and *See v. City of Seattle*, once the reasoning of those cases is expanded beyond facts which involved detection of local building code violations."³⁸² Such an expansion could allow the administrative search exception to significantly undermine the warrant preference rule. An expansive definition of "administrative" would also cause this exception to overlap with other exceptions, which might make these other exceptions redundant.

B. The Special Needs Doctrine

Although the Supreme Court has never held that the special needs doctrine applies to suspicionless searches on mass transit systems to prevent terrorism, both parties in *MacWade v. Kelly* argued that the court should

377. *Id.*

378. See Note, *The Constitutionality of Airport Searches*, *supra* note 235, at 143 ("[T]he *Camara* standard of 'reduced' probable cause [could] not be met. In the current inspection system, . . . no evidence is produced that would indicate that violations of the law might exist in the 'area' or group [of passengers] searched.").

379. American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) ("It is not unreasonable, then, to think that national party nominating conventions could become terrorist targets, and when the conventions are held in cities with significant mass transportation systems that serve the convention locations, it is not without foundation to worry that a terrorist event might be aimed simultaneously at the convention and the transit system.").

380. See *supra* Part I.B.2.a.

381. *United States v. Albarado*, 495 F.2d 799, 804 n.9 (2d Cir. 1974) ("*United States v. Davis*, while styling the airport search as 'administrative,' placed no analytical significance on this label." (citation omitted)).

382. *United States v. Barbera*, 514 F.2d 294, 299 n.12 (2d Cir. 1975) (citations omitted).

view New York City's search program as a special needs search.³⁸³ The district court agreed. It stated that the risk to public safety of a terrorist bombing of New York City's subway system "is substantial and real," satisfying the limitation imposed by *Chandler*.³⁸⁴ It also found that the Container Inspection Program "addresses a problem well beyond the normal need for law enforcement or a general interest in crime control."³⁸⁵ In explaining the special needs doctrine, the court cited not only special needs cases but also roadblock checkpoint seizure cases.³⁸⁶ By conflating the two doctrines, the court in *MacWade* contradicted the Supreme Court's statements in *Sitz* and more recently in *Ferguson* that the two exceptions are distinct.³⁸⁷ This oversimplification also allowed the court to elide a fundamental and difficult question: whether the special needs doctrine can apply to a search conducted by law enforcement officials to deter and detect a criminal act where the fruits of the search would surely be used in a criminal prosecution.³⁸⁸ The case law defines special needs as those "beyond the normal need for law enforcement."³⁸⁹ However, the doctrine has developed so as to allow searches that are "unrelated" to law enforcement.³⁹⁰

Applying Professor Maclin's framework, the most important question is whether the primary purpose of the search is a law enforcement purpose, i.e., to obtain evidence to be used in a criminal prosecution.³⁹¹ The courts in *MacWade* and *American-Arab Anti-Discrimination Committee* both emphasized that the primary purpose of the subway searches was to deter a terrorist attack.³⁹² As Professor Maclin noted, *Ferguson* leaves unsettled the question whether a search that primarily focuses on achieving a non-law enforcement purpose—such as public safety—might still qualify as a special need even though a secondary purpose is to gather evidence for use in criminal prosecutions.³⁹³ Allowing the general protection of public

383. See City's Pre-Trial Brief, *supra* note 274, at 8; NYCLU's Pre-Trial Brief, *supra* note 268, at 12. The NYCLU asserted, however, that the special needs exception applies in "highly unusual circumstances" and that the Supreme Court has yet to rule upon this doctrine's applicability to antiterrorism search programs. NYCLU's Pre-Trial Brief, *supra* note 268, at 12-13.

384. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *17 (S.D.N.Y. Dec. 7, 2005) (quoting *Chandler v. Miller*, 520 U.S. 305, 323 (1997)).

385. *Id.* (internal quotations omitted).

386. See *id.*

387. *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001); Mich. Dep't of State Police v. *Sitz*, 496 U.S. 444, 450 (1990).

388. See City's Pre-Trial Brief, *supra* note 274, at 9 ("[P]olice officers conducting Program inspections would arrest people found carrying illegal substances . . .").

389. *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

390. *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting).

391. Maclin, *supra* note 160, at 115-16.

392. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *5 n.9 (S.D.N.Y. Dec. 7, 2005); *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

393. Maclin, *supra* note 160, at 117-18.

safety to qualify as a special need, even where the searches are conducted by police to enforce the criminal law, might considerably expand the doctrine's reach. Most criminal laws have public safety as an ultimate goal. Consequently, one could argue that any search intended to prevent a violent crime is primarily intended to protect the public's safety and that the use of the discovered evidence in a criminal prosecution would merely be a subsidiary purpose. The warrant preference rule has traditionally applied without regard to the dangerousness of the offense under investigation.³⁹⁴ Furthermore, the magnitude of the risk to public safety is not the focus of the special needs exception; rather the focus is the search's non-law-enforcement character.³⁹⁵

The second and third factors of Professor Maclin's framework—whether information obtained from the search is made available to law enforcement and whether law enforcement is involved in designing and implementing the search program³⁹⁶—weigh against characterizing the subway searches as special needs. The program in New York City was designed and implemented exclusively by the NYPD, and the NYPD maintains that contraband found during the course of the search will be used in a criminal prosecution.³⁹⁷ In *T.L.O.* and *Griffin*, the fruits of the searches were provided to law enforcement for use in prosecutions, and the Court did not consider this fact to affect whether the special needs doctrine applied.³⁹⁸ However, *Ferguson* suggests that a search designed and conducted by law enforcement to uncover evidence for use in a criminal prosecution cannot be excused from the warrant and probable cause requirements on special needs grounds—even if the ultimate purpose of the intrusion is to deter the threatened harm.³⁹⁹

If the Court were to apply the special needs doctrine to the subway searches despite the heavy involvement of law enforcement, it seems likely that the subway searches would fall within this “closely guarded category of constitutionally permissible suspicionless searches.”⁴⁰⁰ Recent and successful targeting of foreign urban mass transit systems by international terrorists⁴⁰¹ indicate the threat to the public safety to be “substantial and

394. *Buffaloe*, *supra* note 212, at 548 (“To conduct a search, a police officer must first secure a warrant supported by probable cause, whether the crime is writing a check for less than one dollar or killing thousands of people.”).

395. Maclin, *supra* note 160, at 117-18. However, safety clearly “factors into the special needs analysis.” *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

396. Maclin, *supra* note 160, at 116-17.

397. See generally *supra* notes 274-90, 388.

398. *Griffin v. Wisconsin*, 483 U.S. 868, 870 (1987) (dealing with a probationer charged with a state-law weapons offense); *New Jersey v. T.L.O.*, 469 U.S. 325, 328-29 (1985) (addressing delinquency charges brought against a student).

399. *Ferguson v. City of Charleston*, 532 U.S. 67, 81-84 (2001).

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

401. See *supra* notes 255-62 and accompanying text.

real.”⁴⁰² Moreover, this threat is “sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”⁴⁰³

Chandler shows that the Court will evaluate a special needs program’s effectiveness in determining whether the suspicionless search may take place.⁴⁰⁴ In *Chandler*, the Court invalidated Georgia’s drug testing program partly on the grounds that the program was unlikely to be effective; a candidate could pass the test simply by refraining from drug use in the weeks prior to the testing date, which was known in advance.⁴⁰⁵ This might pose a problem for subway search programs like New York City’s. Although the locations of daily checkpoints are not publicly disclosed,⁴⁰⁶ the ability to circumvent inspection simply by leaving a guarded station and entering the system through one of the many unguarded stations calls into question the program’s effectiveness.⁴⁰⁷ However, the deterrence of drug use was not a goal of Georgia’s one-time drug test. The Court could find, as did the district court in *MacWade*, that a random mass transit search injects an element of unpredictability that will deter a terrorist attack.⁴⁰⁸

Some commentators have criticized the *MacWade* decision as unduly deferential to New York City’s assertion that the program will deter terrorism.⁴⁰⁹ Because preventing terrorism is necessarily a compelling interest, searches implemented for this purpose will nearly always trump privacy interests unless the courts engage in a serious review of the search program’s efficacy.⁴¹⁰ There is no public interest in an ineffective program, and the government may not “diminish[] personal privacy for a symbol’s sake.”⁴¹¹

Even if the subway searches do not violate the criteria set forth in prior special needs cases, extending the doctrine might make it, as one commentator has put it, “an exception poised to swallow the warrant

402. *Chandler*, 520 U.S. at 323.

403. *Id.* at 318.

404. *Id.* at 319-20.

405. *Id.*

406. City’s Pre-Trial Brief, *supra* note 274, at 4.

407. See NYCLU’s Pre-Trial Brief, *supra* note 268, at 14-15.

408. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *12 (S.D.N.Y. Dec. 7, 2005) (“[The City’s experts] testified persuasively that, because of the random nature of the Container Inspection Program, *i.e.*, because when and where an inspection will occur is not revealed in advance, the Program adds uncertainty and unpredictability to the planning and implementation of a terrorist attack which, in turn, increases the risk of failure and helps to deter an attack.”).

409. Daniel J. Solove, *NYC Subway Searches Upheld: A Critique of the Court’s Decision*, Concurring Opinions, Dec. 5, 2005, http://www.concurringopinions.com/archives/2005/12/nyc_subway_sear.html.

410. *Id.* Professor Daniel Solove points out that “[t]he reasonableness of the policy . . . depends upon balancing the efficacy of the searches against their intrusiveness” and asserts that “if the court defers to the government in this regard, it is essentially rubber-stamping the government in this determination.”

411. *Chandler v. Miller*, 520 U.S. 305, 322 (1997); see also *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, Stevens, J.J., dissenting) (stating that “the impairment of individual liberties cannot be the means of making a point; that symbolism . . . cannot validate an otherwise unreasonable search”).

preference rule.”⁴¹² Most cases—and all of the recent ones—invoking this doctrine have involved drug testing conducted by government employers and school officials. Under none of these programs were the results of the tests made available for use in criminal prosecutions.⁴¹³ Allowing law enforcement’s need to protect the public from criminal terrorist acts to qualify as “special need” might open the door too wide for suspicionless searches.⁴¹⁴

C. The Checkpoint Exception

The subway search could be considered analogous to the roadblock checkpoint seizure because persons attempting to pass a certain point are subject to government interference for the purpose of protecting the safety of others nearby.⁴¹⁵ Unlike the special needs doctrine, this exception unequivocally permits law enforcement officials to conduct the intrusion. Also, the subway searches arguably satisfy *Edmond*’s threshold rule against checkpoints that merely serve a general interest in crime control.⁴¹⁶ The searches are not primarily conducted to uncover evidence to be used in prosecution for violation of antiterrorist criminal laws. Rather, the primary purpose is to deter and detect terrorist attempts.⁴¹⁷ *Edmond* stated in dicta that police may establish a checkpoint for the purpose of thwarting an “imminent terrorist attack,” as long as the checkpoint was “appropriately tailored.”⁴¹⁸ While the programs in New York and in Boston were implemented without any specific or imminent threat, the Court’s statement in *Edmond* might better be characterized as presenting the easy case for upholding a terrorist checkpoint rather than establishing an imminence requirement. The validity of the checkpoints upheld in *Martinez-Fuerte* and *Sitz* did not rest upon the imminence of illegal entry or drunk driving. Rather, the Court noted the significance of the problems of illegal

412. *Buffaloe*, *supra* note 212, at 529.

413. *See supra* notes 193-207 and accompanying text.

414. *But see* Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. Cal. L. Rev. 777, 824 (2004) (arguing that the special needs doctrine should be extended to permit neighborhood house searches to discover a hidden weapon of mass destruction). The authors conclude that “[b]uilding on the special-needs cases would provide continuity of precedent and greater protection of individual privacy than would the construction of an entirely new and ad hoc catastrophic-threat or national-security exception to probable-cause requirements.” *Id.* at 831-32.

415. *See* 5 LaFave, *supra* note 7, § 10.6(c), at 298 (characterizing airport searches as “a variety of checkpoint, albeit involving people on foot rather than in vehicles”).

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

417. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *5 (S.D.N.Y. Dec. 7, 2005); *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004). However, the Court in *Edmond* might have exempted airport searches from this primary purpose requirement by stating that its holding “does not affect the validity of border searches or searches in airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.” *Edmond*, 531 U.S. at 47-48.

418. *Id.* at 44.

immigration and of vehicular accidents caused by intoxicated drivers.⁴¹⁹ The bombings of foreign urban mass transit systems by the same terrorist organization responsible for the 9/11 attacks suggest that the vulnerability of U.S. systems to terrorist attacks poses just as significant a problem.⁴²⁰

Not surprisingly, the application of the roadblock checkpoint exception also poses several problems. First, this exception has justified only the brief detention of motorists; it has never authorized any type of search.⁴²¹ In upholding the border patrol checkpoint, *Martinez-Fuerte* distinguished a case decided just a year earlier that had prohibited officials from searching automobiles detained at checkpoints without probable cause.⁴²² The Court has recently reiterated the significance of the distinction between a brief seizure and a search.⁴²³ Another ground justifying the checkpoint seizures is that the heavy regulation of automobiles corresponds to a diminished expectation of privacy.⁴²⁴ The Court may have to find that a mass transit passenger's privacy interest is similarly decreased in order to justify application of the roadblock checkpoint exception.⁴²⁵

Another potential issue with a program like New York City's is whether the random selection of passengers rather than searching all of them is unduly intrusive.⁴²⁶ On two occasions, the Supreme Court has struck down suspicionless seizures made by roving patrol stops⁴²⁷ but has permitted or suggested approval for checkpoints erected for the same purpose where all motorists are stopped.⁴²⁸ The stopping of all motorists is considered less

419. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976).

420. *Passenger Rail Security*, *supra* note 2, at 10.

421. *Sitz*, 496 U.S. at 455; *Martinez-Fuerte*, 428 U.S. at 558.

422. *Martinez-Fuerte*, 428 U.S. at 555 (distinguishing *United States v. Ortiz*, 422 U.S. 891 (1975)).

423. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) ("This case also differs from the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness [T]hose cases involved roadblock seizures, rather than 'the intrusive search of the body or the home.'" (citations omitted)).

424. *Compare Martinez-Fuerte*, 428 U.S. at 561 (noting that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different" from one's expectation of privacy in the home), *with Delaware v. Prouse*, 440 U.S. 648, 662 (1979) ("An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.").

425. *Cf. Florida v. Rodriguez*, 469 U.S. 1 (1984). The Court in this case held that a police officer's detention of individuals for questioning at an airport before the individuals attempted to board the plane was not a seizure. *Id.* at 5-6. In the alternative, the Court found that there was sufficient suspicion to justify the seizure because at a "major international airport where, due in part to extensive anti-hijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude." *Id.* at 6. *But see Bond v. United States*, 529 U.S. 334, 337 (2000) (Rehnquist, C.J.) (holding that a bus passenger possessed a privacy interest in his baggage, so that a Border Patrol agent's suspicionless manipulation of it while it was in an overhead compartment violated the Fourth Amendment).

426. *See supra* notes 279-80 and accompanying text.

427. *Prouse*, 440 U.S. 648; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

428. *Prouse*, 440 U.S. at 663 (stating that the Court's holding did not preclude Delaware from using less intrusive methods to check motorists' licensing and registration, such as

intrusive than roving patrol stops for two reasons. First, the “subjective intrusion” of the seizure is mitigated by the fact that “[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, [and] he can see visible signs of the officers’ authority.”⁴²⁹ While the officers’ uniforms and posted notices provide indicia of the officers’ authority to conduct subway searches, it is quite likely that a randomly selected passenger might not see others stopped and might not know the basis of her selection. Even if New York City’s random search program is more akin to the checkpoint than the roving patrol because NYPD officers are stationary when conducting searches,⁴³⁰ the Court has never upheld a random checkpoint seizure,⁴³¹ and this randomness may make the subway search too intrusive.

Second, the seizure of all individuals at checkpoints limits the discretion of officers in selecting whom to seize.⁴³² While searching every twentieth passenger may limit discretion just as much as searching all who pass, the former method may be more readily abused.⁴³³ Deviations from the numerical selection formula, which may constitute an impermissible use of discretion, would be very difficult to prove. The randomness may serve as a subterfuge for the invidious targeting of individuals based upon race, yet such abuse would likely evade review.⁴³⁴

Finally, the checkpoint seizure exception requires the Court to consider the efficacy of the program in achieving its purpose.⁴³⁵ The NYCLU’s main challenge was that conducting searches of only consenting individuals at only a few of New York City’s 468 subway stations at a time could not effectively prevent a terrorist attack; thus the privacy costs to the many passengers searched produced no offsetting gain in security.⁴³⁶ *Prouse* struck down a suspicionless patrol stop upon a finding that it contributed very little to highway safety beyond what a suspicion-based regime could

“[q]uestioning of all oncoming traffic at roadblock-type stops”); see also *Martinez-Fuerte*, 428 U.S. at 556.

429. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 452-53 (1990) (citing *Martinez-Fuerte*, 428 U.S. at 558).

430. See *supra* notes 274-78 and accompanying text.

431. See, e.g., *Sitz*, 496 U.S. at 456 (Brennan, Marshall, J.J., dissenting) (“Today, the Court rejects a Fourth Amendment challenge to a sobriety checkpoint policy in which police stop all cars and inspect all drivers for signs of intoxication . . .”). But see *Prouse*, 440 U.S. at 664 (Blackmun, J., concurring) (writing separately to emphasize that the Court should uphold “not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop”).

432. *Martinez-Fuerte*, 428 U.S. at 559-60.

433. See 5 *LaFave*, *supra* note 7, § 10.8(a), at 345-47.

434. See NYCLU Complaint, *supra* note 291, at 2 (“[T]he volume of people entering subway stations and the lack of NYPD control over that volume result in many people being selected for search in a discretionary and arbitrary manner, which creates the potential for impermissible racial profiling.”).

435. See, e.g., *Sitz*, 496 U.S. at 450.

436. NYCLU’s Pre-Trial Brief, *supra* note 268, at 14-15.

achieve.⁴³⁷ However, *Sitz* took the bite out of the Court's effectiveness inquiry, declaring that the inquiry is

not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. . . . [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.⁴³⁸

Similarly, the NYPD's limited resources influence the decision of how many checkpoints to establish.⁴³⁹ As noted by the district court in *MacWade*, the NYCLU took the paradoxical position that a more intrusive program—one with more checkpoints and compulsory searches—is required for the subway searches to attain a constitutionally mandated level of efficacy.⁴⁴⁰ After *Sitz*, the effectiveness inquiry for a checkpoint seizure requires only that the intrusion be reasonably effective in advancing the program's ends—a highly deferential standard.⁴⁴¹ The court in *MacWade* found New York City's program to be reasonably effective in preventing a terrorist attack despite the apparent ease with which one could avoid a search and enter the subway system.⁴⁴²

D. The Consent Search Exception

The *Davis* court alternatively looked at the airport search question as "one of 'consent.'"⁴⁴³ The court explained that

a prospective passenger has a choice: he may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a "consent," granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment.⁴⁴⁴

437. *Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979).

438. *Sitz*, 496 U.S. at 453-54.

439. City's Pre-Trial Brief, *supra* note 274, at 3.

440. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *13 (S.D.N.Y. Dec. 7, 2005) (noting the NYCLU's "ironic position that less intrusiveness renders the Program less effective").

441. John M. Copacino, *Suspicionless Criminal Seizures After Michigan Department of State Police v. Sitz*, 31 Am. Crim. L. Rev. 215, 243-46 (1994).

442. *MacWade*, 2005 WL 3338573, at *12 (finding that "[d]efendants effectively countered [p]laintiffs' argument that the Program is not effective due to the ease with which one can evade checkpoints and enter the subway system").

443. *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973).

444. *Id.*; accord *Gilmore v. Gonzales*, No. 04-15736, slip op. 1135, 1159 (9th Cir. Jan. 26, 2006). But see *United States v. Lopez*, 328 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971) (rejecting the notion that passengers implicitly consent to a search by proceeding to a boarding gate after receiving notice of search).

The district courts in *MacWade* and *American-Arab Anti-Discrimination Committee* did not characterize the subway search programs as consensual. Instead, the courts viewed the fact that subway riders were apprised of the potential search and chose to enter the system as minimizing the search's intrusion and thus making it more reasonable. In *MacWade*, the court found that passengers' ability to refuse the search mitigated the level of intrusion, which tipped the balance in favor of the search program's reasonableness.⁴⁴⁵ *American-Arab Anti-Discrimination Committee* found posted notices of the search relevant to measuring the search's intrusiveness because they "provide[d] an opportunity for persons who do not want to permit inspection to avoid traveling on the MBTA during the time when security searches are being conducted."⁴⁴⁶ Although neither court considered whether the subway searches were consensual, the searches resemble Supreme Court consent search precedents where law enforcement officials have requested to search passengers' luggage at airports and on buses.⁴⁴⁷

For example, in New York City, NYPD officers do not command selected individuals to open their containers. Rather, officers advise passengers "that their entry into the [subway] system is subject to a search."⁴⁴⁸ Further, the "preferred method for inspecting is to ask the individual to show the officer what is in the container."⁴⁴⁹ There is no "application of force" or "blocking of exits," factors which the Court in *Drayton* deemed significant in finding the search of bus passengers to be consensual.⁴⁵⁰ Although nothing in the *MacWade* opinion or the parties' submissions indicates that NYPD officials inform selected passengers of their right to refuse the search and walk away,⁴⁵¹ the court in *Drayton* expressly rejected the notion that such information is needed for a voluntary consent.⁴⁵²

In Boston, the argument that the searches were consensual may be more attenuated. The MBTA posted notices that "broadly advised riders that their carried-on items could be subject to search while they were riding on MBTA facilities."⁴⁵³ The district court recognized that the MBTA did not provide notice that all passengers riding on particular trains and buses passing near the convention center would certainly be searched during those

445. *MacWade*, 2005 WL 3338573, at *19.

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

447. See *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).

448. *MacWade*, 2005 WL 3338573, at *6.

449. *Id.*

450. *Drayton*, 536 U.S. at 204.

451. *MacWade*, 2005 WL 3338573, at *1-*19; City's Pre-Trial Brief, *supra* note 274, at 3-4.

452. *Drayton*, 536 U.S. at 206-07.

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

four days.⁴⁵⁴ However, the absence of such notice did not render the search unreasonable because the court found that notice was not a "necessary element" of an administrative search.⁴⁵⁵ Nothing in the *American-Arab Anti-Discrimination Committee* opinion indicates that MBTA police requested permission to search subway riders bags,⁴⁵⁶ which under *Drayton* is necessary to "dispel[] inferences of coercion."⁴⁵⁷

The difficulty with characterizing the subway searches as consensual lies in the fact that entry into the subway system is conditioned upon such consent.⁴⁵⁸ The Supreme Court has struck down a search of a passenger in an airport terminal, finding the encounter nonconsensual because the passenger "was never informed that he was free to [refuse the search and] board his plane if he so chose."⁴⁵⁹ Although *Drayton* found express notice unnecessary, it did clarify that consent means freedom to "terminate the encounter" rather than freedom to leave, emphasizing that "[a] passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard."⁴⁶⁰ In other words, a consensual search leaves the individual free to refuse the search and to continue on with his travel plans. Compelling a prospective subway rider to consent to a search in order to access public transportation is a form of coercion.⁴⁶¹ In fact, some commentators have argued that in the airport search context, forcing such a choice constitutes an unconstitutional condition on the right to travel.⁴⁶²

454. *Id.*

455. *Id.* However, *Davis* clearly contemplated that passengers would receive notice of the search. The court stated that airport searches were "reasonable under the Fourth Amendment provided each prospective boarder retains the right to leave rather than submit to the search." *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973). Passengers unaware of the Massachusetts Bay Transportation Authority's ("MBTA") search policy may have not had such an opportunity to leave. *Cf. American-Arab Anti-Discrimination Comm.'s Brief, supra* note 310 ("Under the policy, Security Inspections are to be conducted where practical before persons proceed through the paid entrance area of an MBTA station. In fact, it is not practical to do this throughout the system and searches take place on the trains themselves.").

456. *American-Arab Anti-Discrimination Comm.*, 2004 WL 1682859, at *1-*4.

457. *Drayton*, 536 U.S. at 207.

458. *See Note, Airport Security Searches and the Fourth Amendment*, 71 Colum. L. Rev. 1039, 1048 (1971) (arguing that airport searches should not be considered as consent searches).

459. *Florida v. Royer*, 460 U.S. 491, 503 (1983).

460. *Drayton*, 536 U.S. at 201.

461. *See United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973); 5 LaFave, *supra* note 7, § 10.6(g), at 308.

462. *See, e.g., Note, Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. Crim. L., Criminology, & Police Sci. 356, 363-64 (1972); *cf. American-Arab Anti-Discrimination Comm.'s Brief, supra* note 310 (citing circuit court opinions prohibiting the conditioning of a public benefit on the waiver of a constitutional right). *But see* *Gilmore v. Gonzales*, No. 04-15736, slip op. 1135, 1154 (9th Cir. Jan. 26, 2006) (holding that the right to interstate travel does not prohibit the government from placing restrictions on any particular mode of transportation); *United States v. Davis*, 482 F.2d 893, 912-13 (9th Cir. 1973) (allowing right to travel to be conditioned upon relinquishment of Fourth Amendment rights where there is a compelling state interest and search is appropriately tailored). The Supreme Court has stated that "constitutional concepts of personal liberty . . . require that all

This concern might be even greater in the subway search context because many who depend on the subway cannot afford alternative means of transportation.⁴⁶³

Another problem with applying a consent analysis is that the Court might have to engage in a case-by-case evaluation of individual passengers' subjective state of mind to determine if the consent had actually been voluntarily given.⁴⁶⁴ Although the Court has recently focused on objective factors,⁴⁶⁵ the subjective standard established in *Schneckloth v. Bustamonte*⁴⁶⁶ for determining the voluntariness of consent has never been overruled.⁴⁶⁷ This standard would burden municipalities wishing to implement mass transit searches. The validity of each of the thousands of searches conducted pursuant to the program would depend upon whether the individual passenger felt coerced.⁴⁶⁸

E. A General Reasonableness Standard

Writing for the majority in the Second Circuit airport search case, *United States v. Edwards*, Chief Judge Friendly noted that "no one could reconcile all the views" of the circuit courts that had considered the validity of airport searches.⁴⁶⁹ However, he perceived that "a consensus does seem to be emerging that an airport search is not to be condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant."⁴⁷⁰ The opinion then questioned the validity of the warrant preference rule, noting that this construction of the Fourth Amendment is not commanded by the Amendment's text:

Surprise has been expressed that the Amendment nowhere connects the two clauses; it nowhere says in terms that one might expect it to say: that all searches without a warrant issued in compliance with the condition

citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

463. Dave Hoffman, *Deterrence and Subway Searches*, Conglomerate, July 24, 2005, http://www.theconglomerate.org/2005/07/deterrence_and_.html ("The privacy losses created by these searches will fall most heavily on poor and working class New Yorkers, who . . . will be unable to opt out of the system by regularly taking cabs/town cars instead of the subway.").

464. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

465. See *supra* note 92 and accompanying text.

466. *Schneckloth*, 412 U.S. at 229.

467. See *United States v. Drayton*, 536 U.S. 194, 208 n.1 (2002) (Souter, J., dissenting) ("[C]onsent [must] satisfy the voluntariness test of *Schneckloth v. Bustamonte*, which focuses on the nature of a person's subjective understanding, and requires consideration of the characteristics of the accused [in addition to] the details of the interrogation." (internal quotation omitted)); see also Simmons, *supra* note 91, at 782.

468. Cf. Simmons, *supra* note 91, at 774 (criticizing the consent search doctrine as "meaningless" because "no action taken by anybody in any situation is wholly 'voluntary' or 'involuntary,' but rather is a result of myriad pressures, some internal and some external").

469. *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974).

470. *Id.*

specified in the second clause are *eo ipso* unreasonable under the first. . . . While the heavy judicial gloss that a warrantless search is invalid unless within an appropriate "exception" is surely here to stay . . . [n]othing in the history of the Amendment remotely suggests that the framers would have wished to prohibit reasonable measures to prevent the boarding of vessels by passengers intent on piracy.⁴⁷¹

Indeed, the gloss of the warrant preference rule remains,⁴⁷² but the Court has vacillated between this model of Fourth Amendment analysis and a general reasonableness standard.⁴⁷³ Generally speaking, those valuing law and order over privacy favor the latter model because it is more flexible than the warrant preference rule.⁴⁷⁴ Thus, a general reasonableness standard can accommodate more types of government searches and seizures and presumably will exclude evidence in fewer instances.⁴⁷⁵

A general reasonableness approach is attractive for two reasons. First, it would simplify search and seizure jurisprudence by eliminating the need to determine in every instance if the warrant requirement applies and whether one of the dozens of exceptions excuses it.⁴⁷⁶ Second, this approach is arguably consistent not only with the Amendment's text, which sets forth the Reasonableness and Warrant Clauses in the conjunctive, but also with the Supreme Court's limited discussion of airport searches. The Court's references to airport searches have emphasized the reasonableness of the intrusion.⁴⁷⁷ Through the Court's silence about which exception applies,⁴⁷⁸ one might infer that no exception is needed and that reasonableness alone in the absence of a warrant or probable cause suffices.

471. *Id.* (internal quotation omitted). Chief Judge Friendly found the administrative search doctrine "most nearly applicable to the airport search," but stated that "since an attempt to fold airport searches under the rubric of this type of administrative search would entail the question of reasonableness . . . the issue of reasonableness may as well be faced directly." *Id.* at 498 n.5.

472. *See Arizona v. Hicks*, 480 U.S. 321 (1987) (rejecting the reasonableness balancing test and requiring a warrant to pick up stereo equipment and read its serial number); *cf. Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

473. *See, e.g., Bradley, supra* note 33, at 1468; *see also Sundby, supra* note 52, at 383 ("[T]he Court retain[s] a semblance of coherent fourth amendment analysis only by resorting to exceptions or an ill-defined balancing test.").

474. *See Groh*, 540 U.S. at 571-73 (Thomas, Scalia, J.J., & Rehnquist, C.J., dissenting) (criticizing the warrant-preference rule and asserting that a search conducted pursuant to defective warrant was nonetheless reasonable).

475. For a discussion of the exclusionary rule, *see Allen et al., supra* note 1, at 336-48.

476. *Bradley, supra* note 33, at 1475 ("The reason that all of these exceptions have grown up is simple: the clear rule that warrants are required is unworkable and to enforce it would lead to exclusion of evidence in many cases where the police activity was essentially reasonable. By its continued adherence to the warrant requirement in theory, though not in fact, the Court has sown massive confusion among the police and lower courts." (footnote omitted)).

477. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings.").

478. *See supra* note 240 and accompanying text.

There are significant drawbacks to adopting a general reasonableness standard. As a textual matter, it fails to account for the existence and applicability of the Warrant Clause.⁴⁷⁹ Second, as Professor Scott Sundby points out, such a standard might lead to a proliferation of suspicionless searches because, unlike the warrant procedure, a reasonableness standard does not require probable cause or any individualized suspicion.⁴⁸⁰ An individualized suspicion requirement allows citizens at least some control over whether the government will interfere with their privacy, because acting suspiciously is a necessary prerequisite to a search.⁴⁸¹ Suspicionless searches and seizures subject persons involved in innocuous activities—such as applying for a government job, driving, and participating in extracurricular school activities—to an invasion of privacy.⁴⁸² A general reasonableness standard might allow such intrusions to become “a routine part of American life.”⁴⁸³

F. *A Sui Generis Exception*

The Court might also declare that the terrorist threat to mass transportation systems merits a unique exception to the warrant and probable cause requirements. Expanding the list of exceptions to the warrant requirement poses several problems. First, the proliferation of exceptions calls into question the wisdom of a general rule that all searches and seizures must comply with the warrant procedure. Justice Antonin Scalia is of the opinion that “the ‘warrant requirement’ [has] become so riddled with exceptions that it [is] basically unrecognizable.”⁴⁸⁴ Most commentators would agree that the Court’s search and seizure jurisprudence already suffers from a lack of analytical consistency.⁴⁸⁵ The Court’s wavering loyalty to, and unprincipled departure from, the warrant preference rule accounts for much of this confusion. Crafting a new exception might exacerbate the problem.

479. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1, 21 (1994) (arguing that “[a]n interpretation that detaches the Reasonableness Clause from the Warrant Clause runs the risk of making the Warrant Clause ‘virtually useless’”).

480. Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs,” and General Warrants*, 74 Miss. L.J. 501, 511 (2004) (“[B]ecause the generalized-reasonableness approach does not view probable cause as an essential prerequisite, the role of individualized suspicion lost some of its Fourth Amendment swagger.”).

481. *Id.* at 511-12.

482. *Id.* at 512.

483. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

484. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

485. Erik G. Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 787, 788 (1999) (“Academics of all stripes agree that search and seizure law is a ‘mess.’”); Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 Geo. Mason U. Civ. Rts. L.J. 261, 261 (2005) (“If there is any statement to which virtually all constitutional scholars would agree, it is that orthodox Fourth Amendment jurisprudence is a theoretical mess”); Wasserstrom & Seidman, *supra* note 46, at 20.

A second problem with this approach is that the ad hoc recognition of exceptions to the warrant requirement provides little guidance to the lower courts, which will inevitably review new fact situations that do not track narrowly defined exceptions.⁴⁸⁶ If an antiterrorism mass transportation search exception is recognized, would searches conducted at entrances of courthouses and other public buildings to exclude weapons, which have similarly evaded Supreme Court review, become part of this exception?⁴⁸⁷ Also, the government might identify new areas as subject to a high risk of terrorist attack. In such cases, lower courts would have little guidance on whether a mass transit antiterrorism exception should cover all searches where there is a credible terrorist threat. The Court has previously rejected a broad "domestic security" exception to the warrant and probable cause requirements.⁴⁸⁸

An advantage of recognizing searches on mass transit systems to prevent terrorism as a *sui generis* exception, rather than folding it into the other doctrines, is that it maintains the integrity of the other exceptions. As one commentator on the airport search cases asserted: "Defining a new exception to the warrant requirement would . . . preserve the integrity of the existing exceptions, for it would avoid extending them beyond their initial justifications to cover an entirely new fact situation."⁴⁸⁹ In order to avoid further obfuscation of what is "administrative" or "special" about searches permitted by other doctrines, the Court could find that "the danger alone" presented by terrorism,⁴⁹⁰ and the fact that the traditional standard is unable to achieve "acceptable results" in deterring it, justifies departure from the general rule.⁴⁹¹

486. See Bookspan, *supra* note 27, at 475.

487. See, e.g., *Justice v. Elrod*, 832 F.2d 1048 (7th Cir. 1987) (upholding a search at a civic center); *McMorris v. Alioto*, 567 F.2d 897, 898 (9th Cir. 1978) (upholding searches at courthouse entrances).

488. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 316-317 (1972) (rejecting the creation of a broad "domestic security" exception allowing warrantless wiretap surveillance because "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch"). *But see* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (2006), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf> [hereinafter DOJ Domestic Spying Memo]. The DOJ asserts that the President has authority to conduct warrantless wiretaps within the United States for foreign intelligence purposes under his inherent Article II powers as the commander in chief and under the Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (reprinted in a note to 50 U.S.C.A. § 1541 (West Supp. 2005)). DOJ Domestic Spying Memo, *supra*, at 6-17. The DOJ points out that the Supreme Court in *Keith* declined to address whether the Fourth Amendment prohibits warrantless wiretaps of agents of foreign powers "acting within or without this country." *Id.* at 8 (citing *Keith*, 407 U.S. at 308, 321-22, 322 n.20). See generally James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

489. Note, *The Constitutionality of Airport Searches*, *supra* note 235, at 153.

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

491. See *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967).

A narrowly drawn exception specific to the threat of mass transportation terrorism also avoids the danger that by expanding other exceptions, suspicionless police searches might become commonplace. For example, the roadblock checkpoint exception could easily be extended to permit not only temporary seizures of motorists but also searches of their automobiles, once the exception is applied to searches of passenger luggage. Applying the special needs doctrine would leave little doubt that searches designed and implemented by police to prevent crime fall within the scope of the doctrine. With the removal of these limitations, only an amorphous balancing test would restrain the proliferation of suspicionless searches.

In contrast, a *sui generis* exception would be exclusively applicable to searches for explosives or other weapons for the purpose of preventing terrorism. The parameters of the exception would not be rigid but would likely respond to factors such as the search technology employed, the type of weapons searched for, and the mode of transportation identified as subject to a credible terrorist threat. Thus, the exception might expand to cover a variety of different search methods employed in new contexts. However, searches implemented for a purpose other than the prevention of mass transit terrorism would have to find another exception or comply with the warrant and probable cause requirements. Therefore, crafting a unique exception would invalidate more warrantless and suspicionless searches than would the expansion of the other doctrines. Those doctrines permit intrusions targeting any social harm, subject only to the vague limitation that the intrusion's purpose be distinct from the needs of ordinary criminal law enforcement.

Camara provides a guidepost for determining whether the Court should recognize an exception to the warrant requirement:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.⁴⁹²

Requiring a warrant for searches of individual passengers in airports and on urban mass transit systems might frustrate the government's interest in conducting the search. Given the need to screen all or many individuals, such a requirement would shut airports and subways down. The Court could take *Camara's* approach⁴⁹³ and authorize "area-warrants" for the locations where checkpoints are established. In New York City, the decision about the number of checkpoints to establish and their location

492. *Id.* at 533.

493. *Id.* at 539.

depends on day-to-day assessments of risks based upon intelligence.⁴⁹⁴ Details such as the frequency of searches at a particular checkpoint is set by a supervising officer after consideration of conditions such as the number of individuals passing through the checkpoint and the number of officers available.⁴⁹⁵ Such a program requires flexibility and might be frustrated by requiring a warrant. Of course, a warrant could preapprove a range of permissible options or set out more general guidelines for officers to follow, and an exception might be made for departures from pre-authorized standards in response to exigent circumstances. The search program in Boston seems more amenable to the warrant procedure because the need to search was known in advance and required only searches on routes passing by the Fleet Center on the four days that the Democratic National Convention was taking place.⁴⁹⁶

A better question is whether "such searches when authorized and conducted without a warrant procedure [would] lack the traditional safeguards which the Fourth Amendment guarantees to the individual."⁴⁹⁷ By defining the lawful scope of a search, a warrant apprises the targeted individual of the search's legality and limits the discretion of the officer.⁴⁹⁸ Both the use of a numerical formula to randomly select passengers and the search of all passengers on particular trains and buses limit the officer's discretion in choosing whom to search. Substituting a magistrate's judgment seems unnecessary because no judgment is used: If the program's protocol is followed, objective factors alone determine who is selected for search.

As to providing notice of the officer's lawful authority to search, a warrant would still have utility. Even if passengers receive notice that the police intend to search their belongings, without a warrant the legality of such a search is not known.⁴⁹⁹ However, as seen in New York and Boston, a broad and well-publicized search program tends to draw legal challenges from civil liberties groups seeking to enjoin it. This adversarial setting offers greater assurances than an *ex parte* warrant application that courts

494. *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *7, n.13 (S.D.N.Y. Dec. 7, 2005) (noting that on certain days the number of checkpoints were increased in response to threats against the subway system).

495. City's Pre-Trial Brief, *supra* note 274, at 3-4.

496. See *supra* notes 309-12 and accompanying text.

497. *Camara*, 387 U.S. at 534.

498. Cf. *United States v. Martinez-Fuerte*, 428 U.S. 543, 565-66 (1976).

499. *Camara* stated,

Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

387 U.S. at 532.

will carefully review the search's reasonableness.⁵⁰⁰ These arguments all suggest that the Court could create an exception for suspicionless searches on mass transit systems, as it did in *Martinez-Fuerte* for checkpoint seizures⁵⁰¹ and in *T.L.O.* for searches of students by school officials.⁵⁰²

III. THE VALIDITY OF SUSPICIONLESS SUBWAY SEARCHES TO PREVENT MASS TRANSIT TERRORISM

A. *The Supreme Court Should Recognize Suspicionless Searches on Mass Transit Systems as a Sui Generis Exception to the Warrant and Individualized Suspicion Requirement*

The district court in *American-Arab Anti-Discrimination Committee* found no reason to have distinct Fourth Amendment analyses for the screening procedures of urban mass transit systems and airports.⁵⁰³ In both contexts, the personal luggage of travelers is searched in order to prevent persons from carrying dangerous weapons aboard. Yet it remains unclear whether the Supreme Court would excuse the subway searches from the warrant and probable cause requirements on grounds that they are administrative searches;⁵⁰⁴ that there is a special need for the searches;⁵⁰⁵ that the searches are similar to roadblock checkpoints;⁵⁰⁶ that they are consensual;⁵⁰⁷ that the searches are simply reasonable;⁵⁰⁸ or because the threat of terrorist attacks upon mass transportation systems merits a sui generis exception to the Fourth Amendment's ordinary requirements.⁵⁰⁹

Determining which exception applies to searches such as those implemented in New York and in Boston is important for two reasons. First, the Court has not provided a coherent set of rules for determining when a warrant and probable cause are required and when the alternative "reasonableness" balancing standard applies.⁵¹⁰ At times, the Court has employed the balancing test to determine the reasonableness of a search without mentioning the warrant preference rule or providing an explanation for choosing one model over the other.⁵¹¹ A coherent doctrine that explains

500. As the court in *MacWade* put it, "[T]he use of suspicionless searches always must be examined carefully, and Plaintiffs have played an important (vigilant) role in this process." *MacWade v. Kelly*, No. 05CIV6921, 2005 WL 3338573, at *1 (S.D.N.Y., Dec. 7, 2005).

501. *Martinez-Fuerte*, 428 U.S. at 561.

502. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

503. *American-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004).

504. See *supra* notes 342-82 and accompanying text.

505. See *supra* notes 383-414 and accompanying text.

506. See *supra* notes 415-42 and accompanying text.

507. See *supra* notes 443-68 and accompanying text.

508. See *supra* notes 469-83 and accompanying text.

509. See *supra* notes 484-502 and accompanying text.

510. See *Bradley*, *supra* note 33, at 1475.

511. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979).

all exceptions to the general rule would add consistency to Fourth Amendment jurisprudence. Second, the exception applied might serve as a barometer indicating the strength of the warrant preference rule. An exception that is broad and vague, like the "special needs" doctrine, would allow application of the balancing test greater expansion, whereas a narrower exception would do more to limit when the balancing test applies.

Searches to prevent terrorism on mass transit systems should not be folded into any existing exception. The administrative search exception permits warrantless and suspicionless searches of business premises in highly regulated industries.⁵¹² If the Court were to endorse a more expansive definition of "administrative,"⁵¹³ this would tend towards a dichotomy in which only searches conducted pursuant to a criminal investigation would be subject to the requirements of the Warrant Clause. Likewise, the Court has recently limited the scope of the special needs doctrine to exclude search programs designed and implemented by police for the purposes of criminal law enforcement.⁵¹⁴ If this limitation is recanted to make room for subway searches, then almost any police search that both enhances public safety and collects evidence for use in criminal prosecutions could be excused from the strictures of the warrant procedure. The roadblock checkpoint exception permits brief detentions of motorists.⁵¹⁵ Expanding this exception to sanction full-blown searches would be contrary to decades of precedent⁵¹⁶ and would permit a significantly greater intrusion.

Nor should the searches be considered consensual. Conditioning one's right to use public transportation on submission to a search employs a level of coercion inconsistent with any plausible understanding of consent.⁵¹⁷ Finally, adoption of a general reasonableness standard would eliminate the protections of the warrant procedure altogether. The Court in *Edmond* stated that searches without any measure of individualized suspicion are rare exceptions appropriate only in "limited circumstances."⁵¹⁸ Abandoning the warrant preference rule in favor of a general reasonableness standard, which contains no built-in requirement of individualized suspicion, could make suspicionless searches "a routine part of American life."⁵¹⁹

Recognizing the airport and subway searches as a sui generis exception is the best option for two reasons. First, unlike the other approaches discussed, such a characterization furthers rather than undermines the doctrinal consistency of search and seizure jurisprudence.⁵²⁰ Extending

512. See *supra* notes 110-22 and accompanying text.

513. See *supra* notes 343-52 and accompanying text.

514. *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001).

515. See *supra* notes 123-58 and accompanying text.

516. See *supra* notes 421-24 and accompanying text.

517. See *supra* notes 458-63 and accompanying text.

518. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

519. *Id.* at 41-42.

520. See *supra* note 489 and accompanying text.

other exceptions beyond the factual circumstances that originally justified them or redefining consent would add greater uncertainty into the law. Also, recognizing a new exception to the warrant preference rule is more consistent with precedent than abandoning it in favor of a general reasonableness standard.

Adopting a narrow exception, rather than expanding upon a broad exception such as the special needs doctrine, also moves the Fourth Amendment back toward the warrant preference model. Requiring a warrant and a showing of probable cause before a search occurs generally affords greater protections to privacy.⁵²¹ Ex post reviews of warrantless searches typically take place at suppression hearings during criminal trials.⁵²² At this point, judges are likely to undervalue privacy interests to avoid the exclusion of incriminating evidence that would allow a charged suspect to go free.⁵²³ Furthermore, searches that do not result in criminal prosecutions generally evade court review.⁵²⁴ A narrow exception ensures that more searches will be subject to the warrant requirement. Recognition of a sui generis exception for mass transit searches takes judicial notice of the fact that terrorism is a unique threat. In combating this threat, law enforcement officials should not be constrained by ordinary limitations.

B. The Political Process Provides an Adequate Safeguard when a Search Affects Equally the Privacy Interests of a Majority

While identifying which exception to the warrant and probable cause requirements applies is an important step in evaluating a search, it is just the first step. Once an exception is found to apply, the validity of a subway search usually depends upon its reasonableness, which is measured by balancing the government need to conduct the search against the intrusion upon privacy effected by it. The outcome of this highly factual inquiry will depend upon the specific features of the mass transit search program under consideration. However, "representation reinforcement" theory makes a strong case that the Court's review should be deferential in cases such as this.⁵²⁵

The probable cause requirement seeks to limit the discretion of officials and prevent them from singling out individuals for intrusion without good reason. However, general search programs such as New York City's and Boston's, which do not grant officials discretion in selecting whom to search, do not pose a threat of the arbitrary abuse of police authority.⁵²⁶

521. See *supra* notes 42-45 and accompanying text.

522. Allen et al., *supra* note 1, at 335-36.

523. Beck v. Ohio, 379 U.S. 89, 96 (1964) (warrantless arrest "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

524. See Allen et al., *supra* note 1, at 336.

525. See *supra* notes 46-54 and accompanying text.

526. See *supra* notes 279-82, 324 and accompanying text.

Such programs spread the privacy costs of maintaining security across a broad swath of a community. In a sense they are democratically reasonable: The subway search programs, although enacted by local executive agencies rather than local legislatures,⁵²⁷ affect a majority of the people in the communities in which the searches are conducted. If the majority found the privacy costs of preventing terrorism on mass transit systems to be unreasonable, then the program can be rescinded through the political process. Although the suspicionless searches conducted prior to the founding era inspired the adoption of the Fourth Amendment, these searches were imposed upon colonists by a government that was not accountable to the people.⁵²⁸

Courts still must play a vigilant role in ensuring that a proper balance is struck. First, the courts should scrutinize general search programs to ensure that they are tailored to meet a genuine terrorist threat and that they do not serve merely as a pretext for ordinary criminal law enforcement. The political process would not serve as an adequate check if the public did not have accurate information allowing it to understand the cost-benefit calculus in balancing security and privacy. One way for courts to prevent the use of antiterrorism search programs for ordinary law enforcement would be to exclude the use of evidence of crimes unrelated to terrorism produced by the searches.⁵²⁹ Second, courts should make sure that statutory or administrative safeguards that limit the discretion of officials are enforced, lest the random search devolve into one subjecting individuals to the unbridled discretion of police. In order for the subway search to be reasonable, it must spread the privacy costs evenly throughout a community and cannot impose a disproportionate burden on any particular group. Such neutrality can be assured by implementing technology allowing police to search all passengers carrying baggage, as is done at the airport,⁵³⁰ or to record the selection process so that there exists proof of its randomness.

CONCLUSION

Terrorism poses a threat not only to our national security, but also to our civil liberties. Officials may be overzealous in seeking to prevent a terrorist threat or may use the threat as a pretext to implement measures that the Fourth Amendment would otherwise prohibit. On the other hand, the judiciary should not prevent communities from protecting themselves or from experimenting in methods to improve security. In drawing a proper

527. See *supra* notes 266, 309 and accompanying text.

528. See Davies, *supra* note 15, at 561 (noting that the conventional history of the Fourth Amendment is rooted in "episodes of controversy regarding search and arrest authority that preceded the American Revolution").

529. See, e.g., *United States v. Skipwith*, 482 F.2d 1272, 1281 (5th Cir. 1973) ("Where special circumstances are allowed to reduce the ordinary conditions precedent to a lawful search there should be special safeguards to see that the opportunity is not abused. . . . [The] same prophylactic principle that dictates exclusion of property unlawfully seized should be employed to temper possibly overzealous airport searches." (citations omitted)).

530. See *supra* note 236 and accompanying text.

line, the Supreme Court should employ an analysis that does not diminish the doctrinal consistency of an already confused search and seizure jurisprudence by stretching existing exceptions to the warrant and probable cause requirements. Nor should the Court water down the Fourth Amendment's protections by overlooking coercion or adopting a reasonableness standard for all types of searches. Recognizing a unique exception for the credible threat of terrorism on mass transit systems enhances the integrity of search and seizure law and best preserves the protections afforded by generally requiring searches to be pre-authorized by a warrant and supported by probable cause.

Notes & Observations