

THE “SPECIAL NEEDS” OF PRISON, PROBATION, AND PAROLE

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Although government searches generally must be supported by warrant and probable cause, the Supreme Court rarely has applied this requirement in penal contexts such as prison, probation, and parole. In order to justify the government’s broad search authority in those contexts, the Court has created a patchwork of categorical rules and skewed balancing tests based on search targets’ diminished expectations of privacy. This Note argues that the Court’s current approach is unsound: Broad government search authority is justified in certain penal settings, but only because those settings create compelling government needs, not because the search targets have diminished privacy interests. Penal searches should therefore be analyzed under the “special needs” doctrine, which was designed for just this type of situation—where the government has compelling interests above and beyond those found in typical law enforcement contexts. A special needs analysis would allow courts to address the government’s unique interests without devaluing the strong privacy interests at stake. Most importantly, it would impose an additional safeguard to cabin discretion and protect against harassment: Warrantless penal searches could be performed only with individualized suspicion of wrongdoing or through a neutral, nondiscretionary plan.

INTRODUCTION

The Fourth Amendment broadly protects “[t]he right of the people to be secure . . . against unreasonable searches and seizures”¹ Yet for one out of every forty-two Americans—the nearly seven million citizens in prison, on probation, or on parole²—these protections exist only in name. Whereas most government searches must be supported by warrant and probable cause, these citi-

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¹ U.S. CONST. amend. IV.

² See LAUREN E. GLAZE & SERI PALLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES 1–2 (2005) (reporting 4.9 million individuals on parole or probation and 2.1 million individuals incarcerated in 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf>.

zens can be searched at any time without a warrant, without probable cause, and even without any individualized suspicion.³

This diminished protection is understandable: Prison, probation, and parole are complex government programs that demand special treatment. Prison can be a hostile and unpredictable environment, where guards and inmates live under the continuous threat of violence and officials must be vigilant in preventing escape attempts. Outside of the prison walls, parolees and probationers face constant temptations to recidivate, posing difficult challenges to their rehabilitation and reintegration into society. In many situations, enhanced search authority can be the most—if not the only—effective means to address these issues. The government thus has a pressing need.

Nevertheless, searches in these contexts are highly invasive. Prisoners are often subjected to degrading strip and body-cavity searches in the presence of their fellow inmates.⁴ Parolees and probationers may be forced to submit to full searches of their persons or their homes, which normally would receive the utmost Fourth Amendment protection.⁵

When unusually compelling government needs clash with privacy interests, the Supreme Court generally invokes the “special needs” doctrine.⁶ “[I]n those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the war-

³ See *infra* text accompanying notes 71–78, 156–61. For the purposes of this Note, “individualized suspicion” means at least a reasonable suspicion that the specific search in question will uncover evidence of a crime. See *infra* notes 51–53 and accompanying text. This standard is also referred to as “reasonable suspicion,” “founded suspicion,” or “articulable suspicion,” see *Florida v. Royer*, 460 U.S. 491, 505 n.10 (1983) (using all three terms interchangeably), and falls below the traditional probable cause threshold. Compare *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (noting that probable cause exists when “given all the circumstances set forth in the [warrant] affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place”), with *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987) (plurality opinion) (justifying special needs searches of employees’ offices by employers where “there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct”).

⁴ See *infra* text accompanying notes 76, 83.

⁵ See *infra* note 195.

⁶ The “special needs doctrine” is a term of art that commentators use to describe the Supreme Court’s analytical framework for determining the reasonableness of searches performed outside of general law enforcement contexts. See, e.g., Jonathan Kravis, Case Comment, *A Better Interpretation of “Special Needs” Doctrine After Edmond and Ferguson*, 112 *YALE L.J.* 2591, 2596 (2003) (interpreting special needs doctrine to apply “when the context of the search differs from everyday police work”). In some cases, the Court employs this analytical framework without explicitly using the term “special needs.” See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–38, 47 (2000) (applying special needs analysis to roadside checkpoints without labeling them “special needs” searches). For simplicity, this Note refers to all searches analyzed under this framework—including administrative and checkpoint searches—as “special needs” searches. See *infra* Part I (describing special needs doctrine).

rant and probable-cause requirement impracticable," a court can dispense with these traditional requirements and engage instead in a more tailored balancing of the relevant interests.⁷ This doctrine provides far less protection than the normal Fourth Amendment analysis, but it nonetheless provides important safeguards.⁸ In particular, the Court has generally required warrantless special needs searches to be either based on reasonable, individualized suspicion or conducted as part of a neutral, nondiscretionary plan.⁹ Thus, even where warrants are impracticable, the doctrine helps cabin discretion and prevent arbitrary, abusive, or harassing searches.

The Supreme Court, however, does not currently analyze penal searches under the special needs doctrine; instead, it has created a patchwork of modified balancing tests and categorical rules. The Court has never explained this doctrinal inconsistency. More importantly, these alternative tests are flawed: They force courts to undervalue—if not entirely dismiss—the privacy interests of the individuals being searched, rather than focus on the contextual circumstances that provide the compelling government needs. Above all, these tests fail to establish adequate safeguards to prevent arbitrary searches and unbridled discretion.

This Note argues that penal searches are justified only by their unique settings and compelling government interests, and therefore should be analyzed under the special needs doctrine. Such a reexamination might not dramatically change the major substantive protections available in these contexts, but it would bring much-needed consistency to the doctrine and provide crucial safeguards against penal officers' abuses of discretion. It could also serve an important expressive role by publicly recognizing the continuing privacy interests of individuals under government supervision.

Part I introduces the special needs exception and its various components. Part II criticizes the current case law governing prison searches and argues that these searches are better analyzed under the special needs doctrine. Part III does the same for searches of parolees and probationers but suggests that some of these searches might not be sufficiently distinct from those conducted for law enforcement purposes to justify waiving the traditional warrant and probable cause requirements.

⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (upholding school official's warrantless search of student's bag for contraband).

⁸ See *infra* Part I.C.

⁹ See *infra* Part I.B.

I

THE SPECIAL NEEDS DOCTRINE

The text of the Fourth Amendment requires that government searches be “reasonable.”¹⁰ Generally, a reasonable search must be supported by both (1) a warrant specifically delineating the scope of the search and (2) probable cause to believe the search will uncover evidence of a crime.¹¹ Yet numerous exceptions have been carved out of this general rule.¹²

One major exception to the warrant and probable cause requirements is the special needs doctrine governing administrative, regulatory, and other non-law enforcement searches. The doctrine has its roots in *Camara v. Municipal Court*,¹³ which held that the Fourth Amendment applied to municipal housing inspections but did not require any individualized suspicion of a violation.¹⁴ The Court justified this lower standard based on the unique, non-law enforcement nature of the searches, and because routine inspections were the only practicable means of meeting the government’s needs.¹⁵ Since *Camara*, this reasoning has often been used to justify other searches designed to enforce compliance with government regulations.¹⁶ It has

¹⁰ U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . .”).

¹¹ *Id.* (“[N]o 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.”). Although the Fourth Amendment’s Warrant Clause does not explicitly qualify its Reasonableness Clause, *see id.*, it has generally been interpreted to create a presumption of unreasonableness for warrantless searches. *See Horton v. California*, 496 U.S. 128, 133 (1990) (noting “the general rule that warrantless searches are presumptively unreasonable”); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (“[I]t is a cardinal principle that searches 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.” (internal quotation marks omitted) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

¹² *See, e.g., United States v. Robinson*, 414 U.S. 218, 224 (1973) (stating traditional exception to warrant requirement for searches incident to lawful arrest); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (describing exception for consent searches from warrant and probable cause requirements); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (holding stop and frisk conduct by police not subject to warrant and probable cause); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (excepting exigent circumstances from warrant requirement).

¹³ 387 U.S. 523 (1967).

¹⁴ *Id.* at 534. Instead, the Court required warrants to be upheld “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Id.* at 538. These standards do not require any individualized suspicion of a violation; they can be based on the passage of time, the general condition of the neighborhood, etc. *Id.*

¹⁵ *Id.* at 535.

¹⁶ *E.g., New York v. Burger*, 482 U.S. 691, 693, 703 (1987) (upholding warrantless searches of automobile junkyards); *Donovan v. Dewey*, 452 U.S. 594, 602–04 (1981) (allowing warrantless safety inspections of mines and stone quarries if inspected at speci-

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also grown to uphold relaxed standards in a wide range of nonregulatory contexts, including schools,¹⁷ roadside checkpoints,¹⁸ borders,¹⁹ and employee drug tests.²⁰

Although the Supreme Court has at times been unclear about the scope of the special needs exception, the relevant case law suggests that three basic requirements must be satisfied before a search can be upheld on this ground. First, the search must serve some “special need[], beyond the normal need for law enforcement.”²¹ Second, the search typically must either (1) be supported by individualized, articulable suspicion, or (2) be executed as part of a neutral plan that removes arbitrary discretion from the searching parties. Third, the benefits to the government from the search must outweigh the costs to the individual’s privacy interests. This Part discusses each of these requirements in turn.

A. *The Threshold Requirement: A Special Need Distinct from Law Enforcement*

When should the special needs doctrine apply? Most cases²² point to Justice Blackmun’s concurrence in *New Jersey v. T.L.O.*,²³ which would require “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”²⁴ But, of course, this raises the question: Which needs are “special”?

At first glance, the Supreme Court’s application of the doctrine seems so broad that it is difficult to discern a limiting principle. Suspi-

fied frequencies); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320–21, 325 (1978) (requiring that OSHA inspections be supported by warrant and *Camara*-style “general administrative plan,” but not requiring individualized suspicion or probable cause); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (upholding warrantless inspections of federally licensed firearms dealers because “[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme”).

¹⁷ *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

¹⁸ *E.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990).

¹⁹ *E.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–62 (1976).

²⁰ *E.g.*, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 623–24 (1989).

²¹ *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).

²² *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (citing *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)).

²³ 469 U.S. 325.

²⁴ *Id.* at 351 (Blackmun, J., concurring in judgment). Similar language has since been adopted in majority opinions. *E.g.*, *Von Raab*, 489 U.S. at 665–66 (“[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).

cionless housing inspections are justified by the special need to prevent dangerous housing conditions.²⁵ Border checkpoints are justified by the special need to interdict the flow of illegal immigrants.²⁶ Sobriety checkpoints are justified by the special need to eradicate drunk driving.²⁷ Warrantless searches in public schools are justified by the special need to maintain safe environments conducive to learning.²⁸ Suspicionless junkyard searches are justified by the special need to regulate the vehicle-dismantling industry.²⁹ And mandatory drug testing schemes are justified by the special need to deter drug use among railroad workers,³⁰ customs officials,³¹ and school children.³²

Despite this broad application, the Supreme Court has recently reaffirmed the principle that a special need must be “beyond the normal need for law enforcement.” In *City of Indianapolis v. Edmond*,³³ the Court invalidated a system of roadside checkpoints designed to interdict unlawful drugs, because its “primary purpose . . . [was] ultimately indistinguishable from the general interest in crime control.”³⁴ Similarly, in *Ferguson v. City of Charleston*,³⁵ the Court invalidated a public hospital’s policy of performing drug tests on pregnant patients without their consent and reporting patients with positive results to law enforcement officials.³⁶ In *Ferguson*, the government argued that the searches helped protect the health of the mother and child, but the Court nonetheless found that “the central

²⁵ *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967).

²⁶ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976) (upholding border checkpoints); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 880 (1975) (same).

²⁷ See *Mich. Dep’t of State Police v. Sitz*, 406 U.S. 444, 451 (1990) (upholding roadside checkpoints).

²⁸ *T.L.O.*, 469 U.S. at 352–53 (Blackmun, J., concurring in judgment).

²⁹ See *New York v. Burger*, 482 U.S. 691, 698 (1986) (upholding certain warrantless junkyard inspections).

³⁰ See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 620–21 (1989) (finding that deterring drug use among railroad employees “prevent[s] accidents and casualties in railroad operations”).

³¹ See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666, 672 (1989) (finding substantial government interest in preventing promotion of drug users to sensitive positions directly involved in illegal drug interdiction).

³² See *Bd. of Educ. v. Earls*, 536 U.S. 822, 834, 838 (2002) (“[T]he drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District’s interest in protecting the safety and health of its students.”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (upholding random urine tests of students in school athletics programs).

³³ 531 U.S. 32 (2000).

³⁴ *Id.* at 48. The Court distinguished the sobriety checkpoints it had upheld in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), noting that those checkpoints had specifically addressed a special need for highway safety. *Edmond*, 531 U.S. at 43.

³⁵ 532 U.S. 67 (2001).

³⁶ *Id.* at 70, 77, 84.

and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."³⁷

Even after *Edmond* and *Ferguson*, special needs are awkwardly defined. As the Court itself has pointed out, almost all criminal laws serve some underlying special need.³⁸ Drunk driving and illegal immigration are both criminal offenses, and it is difficult to explain how the detection of these crimes is any less law enforcement–related than the detection of drug trafficking. Nevertheless, the Court has approved roadblocks that detect the former, but rejected those that detect the latter.³⁹ Faced with this discrepancy, commentators and lower courts have tried to pin down what exactly it means for a search to be “beyond the normal need for law enforcement.”⁴⁰

³⁷ *Id.* at 80.

³⁸ *Id.* at 84 (“[L]aw enforcement involvement always serves some broader social purpose or objective”); *Edmond*, 531 U.S. at 43 (“The detection and punishment of almost any criminal offense serves broadly the safety of the community”).

³⁹ Compare *Sitz*, 496 U.S. at 455 (approving sobriety checkpoint), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–62 (1976) (approving immigration checkpoint), with *Edmond*, 531 U.S. at 48 (rejecting narcotics checkpoint).

⁴⁰ Commentators have proposed various theories for defining the scope of the special needs exception. For example, Professor Stephen Schulhofer argues that the doctrine is best viewed as two distinct exceptions: one to address pressing health and safety concerns, and the other to facilitate the administration of self-contained government programs. Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law Abiding Public*, 1989 SUP. CT. REV. 87, 120. The former exception applies to housing inspections, sobriety checkpoints, and the drug testing of railroad employees, each of which serves important health and safety functions. *Id.* at 112, 116. The latter exception applies to school searches, border searches, and searches of government employees, each of which helps manage broad governmental administrative enterprises. *Id.* at 116. Professor Schulhofer’s theory helps explain the Court’s decision in *Edmond*: Unlike the sobriety checkpoint in *Sitz*, the narcotics checkpoint does not serve any pressing health and safety concern; and unlike the immigration checkpoint in *Martinez-Fuerte*, it plays no “internal governance” role. Instead, as the Court suggests, the search serves only one purpose: law enforcement.

Professor William Stuntz provides an alternative reading of the cases, and argues that “special needs” is actually a misnomer: What justified these searches was not the government’s need, but instead was the presence of alternative means by which the government could achieve its ends. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 590 (1992). If the government can freely achieve its goals in ways that would harm the individual even more than the search would (e.g., if a school principal cannot search a student suspected of selling drugs, she can expel the student), both parties are made better off by reducing Fourth Amendment protections. *Id.* at 565, 573.

Finally, the United States Foreign Intelligence Surveillance (FIS) Court of Review offered a narrower interpretation of *Edmond*. *In re Sealed Case*, 310 F.3d 717, 745 (FISA Ct. Rev. 2002). The court distinguished between “law enforcement” searches and searches whose primary purpose was “general crime control,” holding that *Edmond* only prohibited the latter. *Id.* at 745–46. Relying on this distinction, the court upheld the portions of the USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (codified as amended at 18 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (Supp. I 2001)), that amended the

Although the scope of the exception is not perfectly defined, its general rationale is sound. The Fourth Amendment requires that a search be reasonable, meaning, in the abstract, that its benefits outweigh its costs.⁴¹ In the general law enforcement context, this balance is struck by requiring a warrant and probable cause.⁴² But in other contexts, different interests are at play. When the government has some substantial interest above and beyond those found in traditional criminal searches, warrants and probable cause may not be appropriate. Instead, courts must find an alternative method to determine a search's reasonableness.

*B. Cabining Discretion When Warrants Are Impracticable:
Individualized Suspicion or Neutral Plan*

In a traditional law enforcement search, the warrant requirement plays a critical role. "The basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁴³ Warrants are the primary means of reducing arbitrariness. They provide a second pair of eyes, from a "neutral and detached magistrate," to review the probable cause determination.⁴⁴ They "oblige[] the police to deliberate before making a search, to determine in advance how wide the search will be, and to articulate the reason for the search with some specificity."⁴⁵ They "freeze" the police officer's justification for suspecting and searching the individual, making it harder for the officer to change her story post hoc.⁴⁶ And they inform the search target of

Foreign Intelligence Surveillance Act (FISA) to authorize warrantless electronic surveillance of an "agent of a foreign power" even when the primary purpose of the surveillance was criminal prosecution. *In re Sealed Case*, 310 F.3d at 719–20, 735–36, 746. FISA's primary purpose—to protect against terrorists and espionage threats—was admittedly "law enforcement" but was "out of the realm of ordinary crime control." *Id.* at 746.

⁴¹ Stuntz, *supra* note 40, at 556; *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("The determination of the standard of reasonableness governing any specific class of searches requires balancing the need to search against the invasion which the search entails." (citation and internal quotation marks omitted)).

⁴² *See* Schulhofer, *supra* note 40, at 118.

⁴³ *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

⁴⁴ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁴⁵ Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 72 (1974).

⁴⁶ *United States v. Ross*, 655 F.2d 1159, 1194 (D.C. Cir. 1981) ("By providing a written record of the basis for the search, a warrant thus helps to limit the range of post hoc rationalizations that can later be used to justify a search of broader sweep than was constitutionally authorized at the outset."); *The Supreme Court, 1981 Term: Constitutional Law: Search and Seizure*, 96 HARV. L. REV. 176, 186 (1982) ("[T]he very purpose of the warrant requirement was to prevent general searches and post hoc rationalizations by providing an advance record of the object of a search and the area to be searched." (citing *Beck v. Ohio*, 379 U.S. 89, 96 (1964))).

both the proper scope of the search and the official authority of the searching party.⁴⁷

In *Camara*, the Court found that the special needs of the regulatory scheme made it necessary to conduct housing inspections without individualized suspicion, but nonetheless required a form of warrant so as to prevent arbitrary searches.⁴⁸ The Court recognized that to do otherwise would "leave the occupant subject to the discretion of the official in the field."⁴⁹ This would have given officials "precisely the discretion to invade private property which [the Court] ha[s] consistently circumscribed [with] a requirement that a disinterested party warrant the need to search."⁵⁰

Subsequent special needs cases have typically allowed warrantless searches, but only when sufficient safeguards are in place to limit discretion and prevent arbitrariness. For instance, some cases limit discretion by requiring the searching party to have a reasonable suspicion that the specific search will uncover evidence of wrongdoing.⁵¹ This approach falls well below the usual standard of probable cause⁵² and lacks most of the benefits of a warrant, but at least requires the searching party to prove that the search "was justified at its inception."⁵³

Suspicionless searches have required more significant safeguards: They generally must be performed according to a neutral plan that strips the searching parties of discretion. For example, the mandatory drug testing cases have involved schemes that apply universally to a group of people.⁵⁴ The traditional roadside checkpoint uniformly

⁴⁷ See *Camara*, 387 U.S. at 532 ("[Without a warrant requirement, the search target] has no way of knowing whether enforcement of the [law] 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.").

⁴⁸ *Id.* at 534, 538.

⁴⁹ *Id.* at 532.

⁵⁰ *Id.* at 532–33.

⁵¹ E.g., *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987) (upholding searches of public employees' offices when supported by "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct"); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) ("[A] search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 886–87 (1975) (finding that automobile stop based solely on officers' observations of occupants' Mexican ancestry violated Fourth Amendment as observations did not give rise to reasonable suspicion that search targets were undocumented aliens).

⁵² *Ortega*, 480 U.S. at 722–23; *T.L.O.*, 469 U.S. at 341; *Brignoni-Ponce*, 422 U.S. at 880–81.

⁵³ *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁵⁴ E.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (approving drug testing of all students in competitive extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515

applies to all cars passing through it.⁵⁵ And opinions authorizing “administrative” searches of well-regulated industries tout the antidiscretionary safeguards built into the search plans at issue.⁵⁶

*Delaware v. Prouse*⁵⁷ provides perhaps the strongest statement for requiring that governmental discretion be strictly cabined in suspicionless searches.⁵⁸ In that case, the Court considered a system of suspicionless and completely discretionary roadside stops.⁵⁹ The Court balked: “This kind of standardless and unconstrained discretion is the evil” that the special needs safeguards are meant to address.⁶⁰ Shedding these safeguards “would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.”⁶¹

U.S. 646, 650, 664–65 (1995) (approving drug testing of all students taking part in athletic activities); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660–61 (1989) (approving drug testing for all employees promoted to U.S. Customs positions that are involved in drug interdiction or that require use of firearm); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 609, 624 (1989) (approving drug testing of all railroad employees involved in certain types of train accidents).

⁵⁵ *E.g.*, *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (“All vehicles passing through a [sobriety] checkpoint would be stopped and their drivers briefly examined for signs of intoxication.”).

⁵⁶ *E.g.*, *Donovan v. Dewey*, 452 U.S. 594, 603–04 (1981) (holding that plan requiring mines to be inspected at guided time intervals “provide[d] a constitutionally adequate substitute for a warrant”); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323–25 (1978) (invalidating warrantless search plan that “devolve[d] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search”). In *Donovan*, it is unclear whether the government officials retained some discretion in scheduling the searches; the opinion mentions only that surface mines were to be inspected “at least twice annually,” underground mines “at least four times annually,” and all mining operations that generate explosive gas “at irregular 5-, 10-, or 15-day intervals.” *Donovan*, 452 U.S. at 603–04. However, the Court emphasized that “rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence.” *Id.* at 604.

⁵⁷ 440 U.S. 648 (1979).

⁵⁸ *Id.* at 663.

⁵⁹ *Id.* at 650–51.

⁶⁰ *Id.* at 661.

⁶¹ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). The Court has occasionally failed to live up to its strong words. In *United States v. Martinez-Fuerte*, the Court approved border searches that allowed officers to pull cars aside arbitrarily in order to question the occupants about their citizenship. 428 U.S. 543, 546, 563 (1976) (allowing these searches “even if . . . made largely on the basis of apparent Mexican ancestry”). Similarly, in *New York v. Burger*, the Court upheld suspicionless junkyard searches that provided no fixed intervals and gave officers discretion in choosing which sites to search. 482 U.S. 691, 711–12 (1987). In light of the Fourth Amendment's general concern with preventing arbitrary searches, *see supra* note 43 and accompanying text, these cases seem wrongly decided. However, taking them as given, they seem to create, at most, an exception for small intrusions of privacy. *See Burger*, 482 U.S. at 700 (“An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.”); *Martinez-Fuerte*, 428 U.S. at 560, 563 (noting vehicle stops “should

The requirement that intrusive, warrantless searches be performed with limited discretion—through either individualized suspicion or a neutral nondiscretionary plan—is critical to the special needs exception. Unbridled discretion can easily lead to unchecked harassment and abuse, caused either by personal enmity or broader prejudices against an entire group. Furthermore, neutral search schemes can be designed with the primary beneficial property of a discretionary search: unpredictability.⁶² When special needs justify a suspicionless search, courts must require the search regime to provide alternative safeguards against arbitrary searches; otherwise, they would be condoning the very evil against which the Fourth Amendment was designed to protect.

*C. Testing Reasonableness: Balancing Government Needs
Against Privacy Interests*

Once a search has been found to implicate a special need, and assuming there is an adequate procedural substitute for a warrant in place,⁶³ one must still determine whether it is “reasonable” within the meaning of the Fourth Amendment. Taking a page from the tort law of negligence, the Court determines “reasonableness” through a cost-benefit analysis.⁶⁴

The Court generally phrases this determination as a balancing between two broad competing interests: the government’s legitimate interest in performing the search and the individual’s privacy interest in preventing the search.⁶⁵ On the government’s side of the scale, one considers not only the importance of the “special need,” but also the extent to which the search is effective in furthering this need.⁶⁶ On

not be frightening or offensive” and intrusion was “sufficiently minimal that no particularized reason need exist to justify it”). Penal searches, in contrast, are typically extremely intrusive (e.g., prison strip searches, searches of a parolee’s home or person, searches of inmates’ intimate personal possessions), so this exception should not apply.

⁶² See *infra* notes 119–23 and accompanying text.

⁶³ See *supra* Parts I.A, I.B.

⁶⁴ See Stuntz, *supra* note 40, at 553, 555–56 (comparing Fourth Amendment balancing tests to negligence law).

⁶⁵ E.g., *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (balancing government’s “intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests”). Generally, the government receives most of the benefits from the search, whereas the costs rest predominantly on the individual. In some circumstances, however, a search might also impose costs on third parties—for example, if the target of the search had roommates—and these costs logically should also be considered in the balancing.

⁶⁶ See *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (invalidating requirement that political candidates pass drug test in part because scheme was “not well designed to identify candidates who violate antidrug laws”). Although *Chandler* is a rare case invalidating a search for lack of effectiveness, most cases invoke the search’s effectiveness when finding a

the individual's side of the scale, one weighs both the physical intrusiveness of the search (measured by its "nature, duration, and scope") and its psychological intrusiveness (measured by its likelihood of subjectively inspiring "fright, surprise, embarrassment," etc.).⁶⁷ Within these parameters, courts have enormous flexibility in weighing the various factors.

This flexibility has been criticized for underprotecting privacy rights. The interests on both sides of the scale are unquantifiable, so a vague balancing test will undoubtedly produce more variable results

special need. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) ("As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs."); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (balancing "the State's interest in preventing drunken driving, the extent to which [sobriety checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped"); *Camara v. Mun. Court*, 387 U.S. 523, 535-36 (1967) (noting "unanimous agreement" that routine periodic inspections were "the only effective way" to ensure compliance with municipal housing codes). The effectiveness inquiry informs the balancing analysis, but the availability of a more effective alternative will not necessarily invalidate the search scheme. *See Sitz*, 496 U.S. at 453 ("[The effectiveness inquiry] was 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." (clarifying *Brown v. Texas*, 433 U.S. 47, 51 (1979))).

⁶⁷ Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1183 (1988) (internal quotation marks omitted).

When measuring the psychological intrusiveness of a search, the Court occasionally considers the individual's "reduced expectation of privacy." *See, e.g., Vernonia*, 515 U.S. at 657 ("[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."). This makes sense when the search is truly less harmful than it would be in other contexts—for example, in *Vernonia*, the Court suggested that the "element of 'communal undress' inherent in athletic participation" was relevant when measuring the privacy invasion of a mandatory drug urinalysis performed in a public bathroom. *See id.* at 657-58 (citation omitted). However, one can take this analysis only so far. For example, advance notice of a government search regime would destroy the target's subjective "expectation" of privacy, but that alone could not justify the search regime under the Fourth Amendment. *Cf. Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (noting that if "actual expectation[s] of privacy" were strictly necessary for Fourth Amendment protection, "the Government [could] suddenly . . . announce on nationwide television that all homes henceforth would be subject to warrantless entry"); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (using similar hypothetical to illustrate same point). The balancing test is designed to weigh the cost of a search against its benefits, so a "reduced expectation of privacy" is only relevant to the extent that it actually reduces the psychological harm (i.e., the cost) of the search in question.

Confusing matters further, the Court often uses the terms "privacy expectations" and "privacy interests" interchangeably. *See, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 668 (1989) (noting that where special needs exist, "it is necessary to balance the individual's privacy expectations against the Government's interests," before holding that "the Government's need to conduct the suspicionless searches . . . outweighs the privacy interests of [the search targets]" (emphasis added)).

than a bright-line rule.⁶⁸ Without clear guidelines for police conduct, the scope of behavior that is considered "reasonable" will almost certainly expand.⁶⁹

Despite its flaws,⁷⁰ the special needs doctrine provides fundamental Fourth Amendment protections. The open-ended balancing might lead to unpredictable results, but it gives judges the authority to invalidate highly invasive or ineffective search regimes. The discretion-cabining safeguards provide far less protection than warrants but are crucial to preventing arbitrary and harassing searches. Finally, the special needs threshold requirement helps ensure that these diminished protections do not spill into the general arena of law enforcement searches, where warrants and probable cause protect our fundamental right to privacy.

The remainder of this Note examines searches of prisoners, probationers, and parolees; criticizes the current justifications put forth for these searches; and suggests that they should instead be analyzed under the special needs doctrine. This alternative analysis provides much-needed doctrinal consistency, and it helps acknowledge that such searches create very real intrusions on privacy. More importantly, its use would force the Court to cabin discretion in penal contexts, where arbitrary searches are currently rampant and the risk of abuse and harassment is high.

II

PRISON SEARCHES

As the Supreme Court has noted, managing a prison is exceedingly difficult.⁷¹ Prison officials must maintain order and security, which generally requires strict prohibitions on weapons, narcotics, and

⁶⁸ *Id.* at 1175–76.

⁶⁹ As Professor Anthony Amsterdam points out: "If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable"; as a result, a "sliding scale" approach will provide "more slide than scale." Amsterdam, *supra* note 67, at 393–94.

⁷⁰ In arguing that penal searches should be analyzed under the special needs doctrine, this Note does not intend to suggest that the doctrine itself could not be improved. For example, some commentators believe courts should consider the presence of less intrusive alternatives when balancing the interests. See Strossen, *supra* note 67, at 1176–77. Whether special needs balancing should be made more protective of individuals' rights is a question worthy of further debate. The main point is that, even in its current form, the special needs doctrine would better protect privacy rights in penal searches than the Court's current approaches. See *infra* Parts II.B, II.C, II.D, III.C, III.D.

⁷¹ See *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) ("The administration of a prison . . . is at best an extraordinarily difficult undertaking." (internal quotation marks omitted)); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("A detention facility is a unique place fraught with serious security dangers.").

other contraband.⁷² Furthermore, inmates sometimes go to extreme lengths to circumvent these prohibitions.⁷³ Beyond questions of internal security, prison officials must be vigilant in thwarting any plans of escape.⁷⁴

These unique circumstances create a strong government interest in searching inmates. Prisons routinely conduct full searches of prisoners' cells, known as "shakedown" searches.⁷⁵ Strip searches and body cavity inspections have become routine in many prison settings.⁷⁶ Sometimes prisons also conduct more subtle searches, such as mail inspections⁷⁷ or electronic surveillance.⁷⁸

Despite the compelling government needs, these searches are generally not considered to be special needs searches. At one point, prison searches were analyzed under a balancing test very similar to the one used in the special needs context; over time, however, the doctrines have drifted apart. Under current law, searches within a prisoner's cell are considered categorically reasonable, and searches of a prisoner's person are evaluated under different standards in the various circuits.

This Part describes the evolution of prison search jurisprudence and argues that it is on a wayward path. As in other contexts mentioned in Part I, the government's heightened search interest within the prison setting can be fully accounted for under a special needs balancing test. Adopting such an approach would acknowledge the privacy interests at stake and protect inmates from harassment and abuse, with little overall impact on the government.

⁷² See *Hudson*, 468 U.S. at 527 ("[Prison administrators] must be ever alert to attempts to introduce drugs and other contraband . . . ; they must prevent . . . the flow of illicit weapons into the prison . . ."); *Bell*, 441 U.S. at 540 ("[T]he Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees."); William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129, 133 (1969) ("Routine searches are necessary to prevent dangerous riots and internal violence.").

⁷³ See *Bell*, 441 U.S. at 559 (noting inmate attempts to smuggle money, drugs, weapons, and other contraband concealed in body cavities).

⁷⁴ *Hudson*, 468 U.S. at 527; see also *Smith v. Shimp*, 562 F.2d 423, 426 (7th Cir. 1977) (upholding searches of inmates' outgoing mail in order to check for escape plans).

⁷⁵ 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE 402 (4th ed. 2004); see also *Hudson*, 468 U.S. at 519, 536 (upholding "shakedown" search); *Bell*, 441 U.S. at 555 (describing "unannounced searches of inmate living areas at irregular intervals").

⁷⁶ See *Bell*, 441 U.S. at 558 (upholding strip searches after every visit).

⁷⁷ See, e.g., *Smith*, 562 F.2d at 426 (upholding two-level mail inspection scheme for all prisoner correspondence).

⁷⁸ See, e.g., *Lanza v. New York*, 370 U.S. 139, 141 (1962) (describing electronic surveillance of conversation between defendant and his brother in jail visitation room).

A. Bell v. Wolfish: *Balancing in the Prison Context*

In *Bell v. Wolfish*,⁷⁹ the Court considered constitutional challenges to a wide range of practices at a New York pretrial detention center.⁸⁰ The primary Fourth Amendment challenge involved the requirement that inmates submit to a visual body cavity search after every contact visit.⁸¹ The search was designed to prevent the smuggling of weapons, drugs, and other contraband,⁸² and required inmates to disrobe and expose their genitals and anal cavity for inspection, often in the presence of other inmates.⁸³

In many ways, the Court proceeded as if it were a special needs case.⁸⁴ First, the Court identified a compelling government interest: Prisons are uniquely dangerous environments, and the threat of smuggled weapons and drugs cannot be adequately addressed through less invasive means.⁸⁵ Second, the Court balanced the need for these searches against the resulting invasion of personal rights.⁸⁶ Finally, although it had no opportunity to examine abuses of discretion because the search was performed through a neutral plan,⁸⁷ the Court noted that abusive search techniques would not be tolerated.⁸⁸ In its analysis, the Court repeatedly cited to its recent border search decisions for support.⁸⁹

⁷⁹ 441 U.S. 520 (1979).

⁸⁰ *Id.* at 523, 526–27.

⁸¹ *Id.* at 558. The inmates also brought a second Fourth Amendment challenge, claiming that when the center performed unannounced shakedown searches, the search target should be allowed to observe the process to verify nothing was stolen. *Id.* at 555–56. The Court found such observation would not lessen the invasion of privacy; as a result, the center's policy did not implicate the Fourth Amendment. *Id.* at 557. Because the Court never reached a full Fourth Amendment analysis, this claim is less germane to this discussion.

⁸² *Id.* at 558.

⁸³ *Id.* at 577 (Marshall, J., dissenting).

⁸⁴ The term "special needs" was not coined until five years later. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

⁸⁵ See *Bell*, 441 U.S. at 559. The Court found that metal detectors "simply would not be as effective as the visual inspection procedure," because "[m]oney, drugs, and other non-metallic contraband still could easily be smuggled into the institution." *Id.* at 559 n.40. The Court also rejected close monitoring of contact visits in lieu of inspections before and after the visits because such monitoring would destroy the confidentiality and intimacy that the visits were meant to create. *Id.*

⁸⁶ *Id.* at 559 ("The test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.").

⁸⁷ Under the center's policy, all inmates were searched after each contact visit. *Id.* at 558.

⁸⁸ *Id.* at 560.

⁸⁹ *Id.* at 559 & n.40 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

Under this approach, five Justices upheld the searches. Although they found the practice instinctively worrisome, they felt that the detention center's significant and legitimate security interests outweighed the inmates' strong privacy interests.⁹⁰

One can criticize certain aspects of *Bell's* balancing analysis. First, it was perhaps overly deferential to prison authorities.⁹¹ To justify this deference, the Court noted the difficulties that prison officials face, their expertise in the area, and the legislative and executive nature of their administrative decisions.⁹² Each of these points, however, could apply as strongly to police officers in the general law enforcement context, or to school officials.⁹³ Moreover, to the extent that the prison setting poses stronger government needs, this would already be accounted for in the reasonableness balancing.

In his dissenting opinion, Justice Marshall leveled another criticism at the majority: It should have more convincingly examined whether the search was effective at furthering the government's need.⁹⁴ In the New York facility, the inmates wore one-piece jumpsuits and were under constant surveillance throughout their contact visits; as a result, it would take an incredible feat of both contortion and sleight-of-hand to insert an object into one's body cavity.⁹⁵ It was therefore unclear whether the body cavity searches substantially furthered the center's legitimate institutional interest.⁹⁶

These criticisms aside, the Court seems to have gotten the basic analytic framework about right. The Court recognized that the searches were highly invasive and claimed to have factored that into its analysis.⁹⁷ The searches applied to all inmates taking part in con-

⁹⁰ *Id.* at 558, 560.

⁹¹ *Id.* at 547 (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”).

⁹² *Id.* at 547–48.

⁹³ The special needs cases in the school context have typically found searches reasonable but without giving any explicit deference to the judgment of school officials. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 828–31 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653–56 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–43 (1985).

⁹⁴ *Bell*, 441 U.S. at 577–78 (Marshall, J., dissenting). For a discussion of the “effectiveness” requirement, see *supra* note 66 and accompanying text.

⁹⁵ *Bell*, 441 U.S. at 577–78 (Marshall, J., dissenting).

⁹⁶ *See id.* at 559 (majority opinion) (describing how, in four years of detention center's operation, searches only uncovered one instance of attempted smuggling). In response to Justice Marshall's criticism, the majority argued that this statistic might instead indicate the policy's effectiveness as a deterrent. *Id.* *But see* Strossen, *supra* note 67, at 1201–02 (arguing that many courts simply accept without question that law enforcement methods will effectively serve law enforcement needs).

⁹⁷ *Bell*, 441 U.S. at 560.

tact visits, and hence stripped officers of discretion.⁹⁸ The Court should have more explicitly considered the effectiveness of the searches, but it reasonably might have disagreed with the dissent's argument that these particular searches could not effectively further the special need.⁹⁹ Finally, the Court made clear that the Fourth Amendment would still protect against arbitrary, abusive searches, which were not before the Court.¹⁰⁰ Under current case law, the special needs doctrine demands no more.¹⁰¹

B. Hudson v. Palmer: Prison Searches as Categorically Reasonable

Five years after *Bell*, in *Hudson v. Palmer*,¹⁰² a prisoner challenged a shakedown of his cell, claiming that the prison officer had conducted the search solely to harass him.¹⁰³ The trial court granted summary judgment for the officer.¹⁰⁴ The court of appeals reversed, holding that shakedown searches were permissible only if "done pursuant to an established program of conducting random searches . . . or upon reasonable belief that the particular prisoner possessed contraband."¹⁰⁵

The Supreme Court reversed the appellate court's decision,¹⁰⁶ dramatically changing course from its analysis in *Bell*. The five-Justice majority again began by stressing how prison environments create critical government needs, which stem from inmates' proclivity for antisocial and often violent conduct, the constant threat of drugs and contraband, and the threat of escape.¹⁰⁷ However, instead of moving on to the standard balancing analysis, the Court found itself "satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security."¹⁰⁸ Justice O'Connor—the deciding vote—explained in her concurrence that, although balancing was normally appropriate, some contexts need a categorical rule:¹⁰⁹ "[T]he government's compelling interest in prison safety, together with the necessa-

⁹⁸ *Id.* at 558.

⁹⁹ *See supra* note 96.

¹⁰⁰ *Bell*, 441 U.S. at 560.

¹⁰¹ *See supra* Part I.

¹⁰² 468 U.S. 517 (1984).

¹⁰³ *Id.* at 520.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 521–22.

¹⁰⁶ *Id.* at 536.

¹⁰⁷ *Id.* at 526–27.

¹⁰⁸ *Id.* at 528.

¹⁰⁹ *Id.* at 537–38 (O'Connor, J., concurring).

rily ad hoc judgments required of prison officials, make prison cell searches . . . appropriate for categorical treatment.”¹¹⁰

The Court’s rationale for categorical treatment is not particularly convincing. The majority opinion described the compelling government interests¹¹¹ but never explained why these interests would not be satisfied by a standard balancing test. Moreover, the prison context seems qualitatively different from the other contexts of categorically reasonable searches.¹¹²

Even if prison cell searches were appropriate for bright-line treatment, that bright line should not be drawn to include abusive or harassing searches. Because *Hudson* was decided on the pleadings, the Court was required to accept as true that the shakedown was conducted solely to harass the inmate.¹¹³ Furthermore, the opinion acknowledged that “intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society.”¹¹⁴ Nevertheless, the Court found the prisoner’s claim categorically barred by its conclusory holding that “the Fourth Amendment’s prohibition on unreasonable searches does not apply in prison cells.”¹¹⁵

To justify this result, the Court found that arbitrary, discretionary searches serve an important government interest.¹¹⁶ It rejected the lower court’s holding that shakedown searches be either supported by reasonable suspicion or conducted through a neutral plan, finding it “simply naïve to believe that prisoners would not eventually decipher any plan officials might devise for ‘planned random searches.’”¹¹⁷

¹¹⁰ *Id.* at 538.

¹¹¹ *Id.* at 526–28 (majority opinion).

¹¹² Justice O’Connor suggested a comparison between prison searches and searches incident to lawful arrests. *Id.* at 538 (O’Connor, J., concurring) (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)). In *Robinson*, the Court did forgo case-by-case balancing for searches incident to arrest. However, it did so for two clear reasons. First, searches in the arrest context are fast paced and often life threatening, making it hard to second-guess officers’ judgment calls. *Robinson*, 441 U.S. at 234–35; *see also* Wayne R. LaFare, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 143 (“[T]he fact of arrest gives rise to an immediate need to reach a search decision, for at the moment of arrest the arrestee is motivated to conceal, destroy, or furtively abandon any incriminating evidence.”). In contrast, suspicionless shakedown searches do not seem to demand spur-of-the-moment decisionmaking; instead, they seem administratively focused and, hence, appropriate for case-by-case review. Second, the type of search authorized in *Robinson* could only be performed after a valid arrest, which needed its own probable cause determination. *Robinson*, 441 U.S. at 235. This threshold requirement helps address the risk of arbitrary, harassing searches; in contrast, the categorical treatment of the searches in *Hudson* provides no such safeguards.

¹¹³ *Hudson*, 468 U.S. at 541 (Stevens, J., dissenting in part).

¹¹⁴ *Id.* at 528 (majority opinion).

¹¹⁵ *Id.* at 530.

¹¹⁶ *Id.* at 529.

¹¹⁷ *Id.*

The Court found "wholly random searches" essential to prison administration, because they "prevent[] inmates from anticipating, and thereby thwarting, a search for contraband."¹¹⁸

The majority's rationale stemmed from a fundamental misunderstanding of what it means for a process to be "random." The Court assumed that any nondiscretionary neutral process would always be predictable; but, in fact, neutral schemes can easily be devised to create unpredictable results. The most obvious example is flipping a coin to choose between two outcomes: The coin flipper has no discretion as to the result, yet the outcome is completely unpredictable. To select between numerous outcomes, one can draw straws or pick choices from a hat. Or for the more technically inclined, computers can generate random numbers instantly.¹¹⁹ Using any of these methods, a prison administrator could pick names each day and conduct shakedown searches of those inmates' cells.¹²⁰ This would be "random" in the mathematical sense and would have all of the properties desired by the *Hudson* majority,¹²¹ yet would strip officials of discretion and maintain the Fourth Amendment's crucial protections against arbitrariness. And, of course, if the prison administrator ever developed a reasonable, individualized suspicion against a particular inmate, she would be free to conduct a shakedown of that specific cell.¹²²

¹¹⁸ *Id.* (quoting *Marrero v. Commonwealth*, 284 S.E.2d 809, 811 (Va. 1981)).

¹¹⁹ Most computer-based random number generators are not technically random, but they can easily be designed so that a human could not discern any predictable pattern. See *Random Number Generator*, in WIKIPEDIA, http://en.wikipedia.org/wiki/Random_number_generator (last visited Jan. 23, 2007) (describing random and "pseudo-random" number generation).

¹²⁰ Or, for even more unpredictability, the administrator could first pick a random number x between zero and the total number of prisoners, and then could select x names at random. That way, it would be impossible to predict not only which inmates would be selected, but even how many would be selected on any given day.

¹²¹ Indeed, an arbitrary, discretionary scheme would be more predictable than one based on a mathematically random process. Humans are notoriously bad at generating random sequences. See Eric W. Weisstein, Random Number, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/RandomNumber.html> (last visited Jan. 23, 2007) ("[I]t is . . . very difficult for humans to produce a string of random digits, and computer programs can be written which, on average, actually predict some of the digits humans will write down based on previous ones."). For example, a guard would not likely perform a shakedown search of an inmate whom he had just searched the day before; a clever inmate could use that information to store contraband during this brief expected window. Likewise, inmates might notice if a guard tended primarily to search inmates of a particular race and use that information to their advantage. In contrast, a mathematically random scheme would give each inmate the same odds of being searched every day, and hence would be truly unpredictable.

¹²² See *supra* text accompanying notes 51–53.

Given the availability of effective nondiscretionary search plans, the *Hudson* Court was mistaken to hold that arbitrary searches were “essential to the effective security of penal institutions.”¹²³ As a result, the Court lost its only rationale for including admittedly harassing searches in its categorical determination, and should have allowed the prisoner’s claim to go forward.

In *Hudson*, the Court departed from its commonsense analysis in *Bell*; however, nothing in the opinion suggested that its categorical holding would apply to anything other than searches of a prisoner’s cell.¹²⁴ The Court’s balancing in *Bell*, therefore, still appeared to apply to strip searches.

C. *Turner v. Safley: An Alternative Framework*

Within a few years, what was left of *Bell*’s balancing test was called into question by a case that did not even involve the Fourth Amendment. In *Turner v. Safley*,¹²⁵ the Court considered challenges to two Missouri prison regulations: a prohibition against nonlegal correspondence between unrelated inmates at different institutions and a requirement that inmates obtain permission before getting married.¹²⁶ Emphasizing the broad deference granted to prison officials, the Court set forth a new standard of review: “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹²⁷ The Court then set forth four relevant factors in determining the reasonableness of a prison regulation: (1) whether there is a valid, rational connection between the regulation and a legitimate and neutral gov-

¹²³ *Hudson*, 468 U.S. at 529.

¹²⁴ See *id.* at 530 (“[T]he Fourth Amendment’s prohibition on unreasonable searches does not apply in prison cells”); *id.* at 555 n.31 (Stevens, J., dissenting in part) (“The Court[] . . . appears to limit its holding to a prisoner’s ‘papers and effects’ located in his cell. Apparently it believes that at least a prisoner’s ‘person’ is secure from unreasonable search and seizure.”); *Jordan v. Gardner*, 986 F.2d 1521, 1534 (9th Cir. 1993) (Reinhardt, J., concurring) (“Although the Supreme Court has held that prisoners have no right to privacy in their cells, the limitation on privacy rights has not been extended to searches of prisoners’ bodies.”). In fact, some courts have interpreted *Hudson* to allow some challenges to searches of an inmate’s cell. See, e.g., *United States v. Cohen*, 796 F.2d 20, 24 (9th Cir. 1986) (suppressing evidence of shakedown search ordered by prosecutor, reading *Hudson* as only applying to shakedown searches ordered by prison officials). On the other hand, some courts have interpreted *Hudson* broadly. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (upholding cross-gender monitoring of naked inmates in showers on theory that, under *Hudson*, prisoners retain no right to privacy under Fourth Amendment).

¹²⁵ 482 U.S. 78 (1987).

¹²⁶ *Id.* at 81–82.

¹²⁷ *Id.* at 89.

ernment interest;¹²⁸ (2) whether alternative means exist for the inmate to exercise the asserted right;¹²⁹ (3) whether overturning the regulation would adversely impact guards, other inmates, or prison resources generally;¹³⁰ and (4) whether a ready alternative could fully satisfy the prisoner's right at de minimis cost to valid penological interests.¹³¹ Under this analysis, the Court upheld the restriction on inmate-to-inmate communication but invalidated the marriage restriction.¹³²

Lower courts have been uncertain about whether and how *Turner* affects *Bell*'s analysis. The Supreme Court has suggested in dicta that *Turner* applies to all constitutional challenges in prison¹³³ but has never applied its factors to a Fourth Amendment case. As a result, lower courts—even within the same circuit—have applied widely varying tests. One Ninth Circuit judge thought it “clear that *Bell*'s Fourth Amendment balancing test does not survive *Turner* and *Harper*.”¹³⁴ Yet several panels from the same circuit have analyzed strip searches under *Bell* without even mentioning the *Turner* factors.¹³⁵ A number of other appellate panels have treated the two tests as complementary,¹³⁶ in line with Judge Reinhardt's proposal that “we derive guidance as to how the *Turner* factors are to be applied in

¹²⁸ *Id.* at 89–90. Regarding the requirement that the legitimate interest be “neutral,” the Court mentions only that it will consider whether restrictions that implicate First Amendment rights do so “in a neutral fashion, without regard to the content of the expression.” *Id.* at 90.

¹²⁹ *Id.* at 90.

¹³⁰ *Id.*

¹³¹ *Id.* at 90–91.

¹³² *Id.* at 91.

¹³³ *Washington v. Harper*, 494 U.S. 210, 223–24 (1990) (rejecting due process challenge to forced medication of inmates with antipsychotic drugs).

¹³⁴ *Jordan v. Gardner*, 986 F.2d 1521, 1567 (9th Cir. 1993) (Wallace, C.J., dissenting).

¹³⁵ *See, e.g., Way v. County of Ventura*, 445 F.3d 1157, 1158, 1160 (9th Cir. 2006) (invalidating blanket strip search policy for arrestees charged with controlled substance offense); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1445, 1449–50 (9th Cir. 1991) (finding strip search of arrestee invalid when intended to uncover evidence of crime rather than to address jail security concerns); *Kennedy v. L.A. Police Dep't*, 901 F.2d 702, 712–14 (9th Cir. 1989) (invalidating strip search policy as insufficiently tailored to institutional safety concerns). Each of these cases involved jails rather than prisons, which could arguably justify *Turner*'s inapplicability. *See infra* note 139 and accompanying text (describing Second Circuit practice). However, the panels never suggested that this distinction was relevant to their holdings.

¹³⁶ *E.g., Farmer v. Perrill*, 288 F.3d 1254, 1259–60 (10th Cir. 2002) (citing *Bell*'s balancing instruction when applying *Turner*); *Thompson v. Souza*, 111 F.3d 694, 700 (9th Cir. 1997) (“[W]e consider the reasonableness of [the] strip search [under *Bell*] to help us determine if it was reasonably related to legitimate penological interests [as required by *Turner*].”); *Michenfelder v. Sumner*, 860 F.2d 328, 332–33 (9th Cir. 1988) (applying *Bell* and *Turner* concurrently).

'unreasonable search' cases from *Bell*[’s] . . . balancing test.”¹³⁷ The Second Circuit applies both tests, but in different circumstances: It applies the *Turner* test to prison regulations¹³⁸ but applies the balancing test to jails and youth detention facilities.¹³⁹

This confusion is understandable: The *Turner* factors fit awkwardly into Fourth Amendment doctrine. First, they are functionally at odds with the modern concept that a search is reasonable if the benefits outweigh the costs.¹⁴⁰ The *Turner* factors provide no means to consider the critical element in determining a search’s cost: its intrusiveness. Without taking into account the costs of the search, a strict *Turner* analysis of an invasive prison search cannot approximate the cost-benefit analysis that a reasonableness determination normally demands. Second, the *Turner* factors were designed to analyze constitutional rights that create categorical restrictions on government action, such as those rights protected by the First Amendment or the Due Process Clause.¹⁴¹ For these rights, the only way to account for unique circumstances is to create some exception under which an alternative analysis would apply. The Fourth Amendment, however, is not categorical; it only prohibits “unreasonable” searches.¹⁴² Furthermore, Fourth Amendment jurisprudence already has developed a mechanism for addressing unique circumstances with strong government interests: the special needs doctrine.

Lower courts therefore are justified in not strictly applying *Turner* in prison search cases. Indeed, the doctrine would be more consistent had they simply recognized that *Turner* was designed only for categorical constitutional rights. Without an explicit Supreme

¹³⁷ *Jordan*, 986 F.2d at 1535 (Reinhardt, J., concurring); see also Deborah L. MacGregor, Note, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 181 (2003) (suggesting first *Turner* factor should be addressed in light of *Bell* balancing).

¹³⁸ *Covino v. Patrissi*, 967 F.2d 73, 78–80 (2d Cir. 1992) (applying balancing test to prison regulations).

¹³⁹ *N.G. v. Connecticut*, 382 F.3d 225, 235 (2d Cir. 2004) (applying balancing test to youth detention facilities); *Shain v. Ellison*, 273 F.3d 56, 65–66 (2d Cir. 2001) (applying balancing test to jails).

¹⁴⁰ See *supra* notes 64–67 and accompanying text.

¹⁴¹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .” (emphasis added)); U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” (emphasis added)); *Turner v. Safley*, 482 U.S. 78, 81–82, 93, 95 (1987) (involving First Amendment challenge and due process challenge based on fundamental right to marry); *Washington v. Harper*, 494 U.S. 210, 213 (1990) (addressing due process challenge).

¹⁴² U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

Court mandate to the contrary, lower courts should avoid extending *Turner* to the Fourth Amendment context.

D. Prison Searches Under the Special Needs Doctrine

Instead of carving out different tests for different types of prison searches, all prison searches should be analyzed under the special needs doctrine. The balancing inquiry is robust enough to account for the government's varied needs, and the safeguards against harassment and abuse are just as necessary in the prison context as in other special needs areas.¹⁴³

Prison management presents "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable."¹⁴⁴ Searching inmates is often the only way to prevent violence, smuggling, and escape, and to protect the health and safety of guards and inmates.¹⁴⁵ These needs are no more law enforcement-related than those that have been upheld in hospitals and schools.¹⁴⁶ While some courts have required warrants for the most invasive prison searches,¹⁴⁷ there is a general consensus that warrants issued on probable cause would be impracticable in a prison environment.¹⁴⁸

Once a special need is found, it seems likely that most prison searches would still be approved under the balancing analysis. Courts have been extremely deferential to the judgment of prison officials with respect to the regulation of inmates.¹⁴⁹ There appears to be a

¹⁴³ The Second Circuit accordingly treats *Bell*'s balancing test—which it performs for jails and youth detention centers, see *supra* note 139 and accompanying text—as part of the special needs doctrine. See *N.G.*, 382 F.3d at 230–31 (citing *Bell v. Wolfish*, 441 U.S. 520, 559–60 (1979), in discussion of special needs balancing).

¹⁴⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

¹⁴⁵ See *supra* notes 72–74, 85 and accompanying text; see also *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) ("Unfettered access to [prison] cells . . . is imperative if drugs and contraband are to be ferreted out and sanitary surroundings are to be maintained."); *Bell*, 441 U.S. at 559 ("A detention facility is a unique place fraught with serious security dangers.").

¹⁴⁶ See *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (upholding searches in hospitals); *T.L.O.*, 469 U.S. at 341 (upholding searches in schools). Prison searches also satisfy Professor Schulhofer's alternative rationales for allowing an exception to the warrant and probable cause requirements: They address pressing health and safety concerns and also further the "internal governance" of an important public endeavor. See *supra* note 40.

¹⁴⁷ See *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449–50 (9th Cir. 1991) (requiring warrant and probable cause for body cavity search of arrestee to discover evidence of crime).

¹⁴⁸ See *Bell*, 441 U.S. at 557 ("[E]ven the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct [a shakedown] search.").

¹⁴⁹ *E.g.*, *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration . . . [and have] reason to

consensus among courts that most prison search techniques are reasonable despite the countervailing privacy interests.

A balancing analysis would serve important goals even if it did not affect the outcome in most cases. First, it would force courts to articulate the constitutional rationale for prison searches: They would be justified by the government's administrative needs, not because inmates' privacy is somehow worth less than the privacy of non-prisoners. Categorical rules like those proposed in *Hudson* and *Turner* invariably devalue the humanity of the prison population.¹⁵⁰ An explicit special needs justification would be strong evidence of the character of our society: It would reaffirm that a prisoner's privacy is valued as highly as anyone else's, and that these searches are justified only because critical administrative needs outweigh those important privacy interests.

Second, balancing would force courts to articulate the privacy interests at stake in each case. Categorical rules make it easy for courts to ignore the harms associated with a search by simply declaring that the Fourth Amendment does not apply.¹⁵¹ In contrast, a full balancing test would make the tradeoff explicit and not obscure the very real costs involved.

Third, beyond the expressive benefits of a balancing test, the analysis would produce different outcomes in some cases. When the benefits derived from a search—considering its effectiveness in furthering the underlying special need—do not justify the invasion of privacy, a court would be bound to find that the search violated the Fourth Amendment.¹⁵² The Supreme Court has held that “[t]here is

accord deference to the appropriate prison authorities.”); *see also supra* note 91 and accompanying text (describing *Bell's* deference to prison administrators).

¹⁵⁰ *See Hudson*, 468 U.S. at 526 (emphasizing that prisoners “have a demonstrated proclivity for anti-social criminal, and often violent, conduct” and “have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint”). As then-Chief Judge Posner noted, “We must not exaggerate the distance between ‘us,’ the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.” *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., concurring and dissenting). The Supreme Court itself has observed: “[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society.” *Hudson*, 468 U.S. at 523–24.

¹⁵¹ *See, e.g., Hudson*, 468 U.S. at 530 (concluding that “the Fourth Amendment’s prohibition on unreasonable searches does not apply in prison cells”).

¹⁵² Lower courts have been willing to find Fourth Amendment violations using balancing tests in strip search cases. *See, e.g., N.G. v. Connecticut*, 382 F.3d 225, 237–38 (2d Cir. 2004) (finding violation in strip search of minor); *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (finding violation in suspicionless strip search of misdemeanor arrestees); *Kennedy v. L.A. Police Dep’t*, 901 F.2d 702, 715–16 (9th Cir. 1989) (finding violation in mandatory suspicionless strip search of all felony arrestees). In circumstances with low

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no iron curtain drawn between the Constitution and the prisons of this country.”¹⁵³ For this statement to have meaning in the Fourth Amendment context, there must be at least minimal review of prison search policies. Courts should not second-guess broad assertions of prison needs (e.g., that drugs pose a grave threat), but they must use common sense to decide whether a particular search will effectively serve those needs.

Finally, and most importantly, a special needs analysis would force courts to consider the extent to which the search regime strips officers of discretion. If a prison has an articulable, individualized suspicion that an inmate is engaging in prohibited conduct, a court should uphold any search reasonably designed to uncover evidence of such conduct.¹⁵⁴ But if the prison seeks to perform suspicionless searches, courts must ensure that the scheme adequately cabins discretion and protects against potential harassment and abuse. Nondiscretionary schemes—potentially using mathematically random methods to ensure unpredictability—should more than adequately serve the government’s interests.¹⁵⁵ In the absence of a warrant, therefore, courts should demand a neutral plan for suspicionless searches, unless the prison can convincingly prove that no such plan would be feasible.

This Part has argued that prison searches should be analyzed under the special needs doctrine to promote doctrinal consistency, to articulate the privacy interests of inmates, and to protect prisoners against harassment and abuses of discretion. The next Part suggests that similar considerations are at play in the contexts of parole and probation.

III

PAROLE AND PROBATION SEARCHES

To qualify for parole or probation, one must often agree to a complete waiver of Fourth Amendment rights. For example, one might be required to “[s]ubmit his . . . person, property, place of residence, personal effects, to search at anytime, with or without a search

government needs (e.g., low-security prisons), even less intrusive searches might also be unreasonable.

¹⁵³ *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974); see also *Hudson*, 468 U.S. at 523 (quoting *Wolff*, 418 U.S. at 555–56); *Bell*, 441 U.S. at 545 (reaffirming *Wolff* principle and noting “that convicted prisoners do not forfeit all constitutional protections by reason of their . . . confinement”).

¹⁵⁴ Unless, of course, the search is so intrusive and/or ineffective that its costs outweigh its benefits.

¹⁵⁵ See *supra* notes 117–22 and accompanying text.

warrant, warrant of arrest or reasonable cause by any probation officer or law-enforcement officer.”¹⁵⁶

The constitutionality of parole searches has generally been upheld, but under a wide range of rationales. Some courts have justified the searches on the grounds that parolees remain in “constructive custody” of their prisons.¹⁵⁷ Others have found that the waivers constitute valid consent for all future searches.¹⁵⁸ The Supreme Court formerly analyzed these searches under the special needs doctrine.¹⁵⁹ More recently, however, the Court has changed course and analyzed parole and probation searches under a broad “totality of the circumstances” test.¹⁶⁰

This Part argues that these searches should be analyzed under the special needs doctrine and that the alternative justifications are unsound. The Supreme Court’s most recent rationale is especially worrisome: It lacks the safeguards traditionally required by the special needs analysis and is so vaguely defined that it threatens to subsume the entire special needs doctrine.¹⁶¹ A special needs inquiry raises difficult issues as to which searches are truly “beyond the normal need for law enforcement,” but it would be a far more principled approach.

A. Parole Searches as “Constructive Custody” Prison Searches

A few courts have upheld warrantless parole searches under the rationale that a parolee is still in the “constructive custody” of the prison.¹⁶² As a result, she cannot complain that a search is unreasonable unless it would also be unreasonable in a prison context.¹⁶³ In short, she retains upon release the same level of Fourth Amendment protection she had in her cell.

This reasoning might be compelling at first blush, but it overlooks the fact that parole searches lack the fundamental characteristics used to justify prison searches. The critical government needs that result from the dangers of a confined atmosphere are wholly absent from

¹⁵⁶ *United States v. Knights*, 534 U.S. 112, 114 (2001) (quoting defendant’s probation order).

¹⁵⁷ *E.g.*, *People v. Hernandez*, 40 Cal. Rptr. 100, 103–04 (Dist. Ct. App. 1964).

¹⁵⁸ *E.g.*, *United States v. Barnett*, 415 F.3d 690, 691 (7th Cir. 2005).

¹⁵⁹ *E.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 875–77 (1987).

¹⁶⁰ *E.g.*, *Samson v. California*, 126 S. Ct. 2193, 2197 (2006); *Knights*, 534 U.S. at 118.

¹⁶¹ *See infra* Part III.C.1.

¹⁶² *E.g.*, *McFerrin v. State*, 42 S.W.3d 529, 534 (Ark. 2001) (“[T]he parolee remains in the custody of the penal institution from which he is released”); *Hernandez*, 40 Cal. Rptr. at 103 (“The parolee, although physically outside the walls, is still a prisoner”).

¹⁶³ *Hernandez*, 40 Cal. Rptr. at 104.

parole administration.¹⁶⁴ Indeed, "the life of a parolee more nearly resembles that of an ordinary citizen than that of a prisoner."¹⁶⁵ If the justification for prison searches vanishes, so does the justification for "constructive" prison searches.

B. Parole and Probation Searches as Consent Searches

Searches of parolees and probationers have alternatively been upheld as consent searches¹⁶⁶—finding consent in the waiver signed as a condition of release—or on the theory that parole or probation is an "act of grace" by the government.¹⁶⁷ Each of these theories depends on the same logic: The individual received some benefit (i.e., freedom) that outweighs the harm of the search condition; as a result, the individual cannot complain because she was made better off by the transaction.¹⁶⁸

Judge Posner recently provided an illustrative example of this rationale. In *United States v. Barnett*,¹⁶⁹ a Seventh Circuit panel upheld a suspicionless probation search, finding that the probationer had explicitly waived his Fourth Amendment rights.¹⁷⁰ Judge Posner characterized the situation as follows: The defendant did not want to go to prison; the government offered probation as an alternative, but only on the condition that he waive his Fourth Amendment rights; preferring not to go to prison, where he would undoubtedly be subject to far more intrusive searches, the defendant agreed to probation.¹⁷¹ Analogizing the plea bargain to a contract, Judge Posner had no qualms about allowing individuals to bargain away their constitutional rights: "Often a big part of the value of a right is what one can get in exchange for giving it up."¹⁷²

The common counterargument to Judge Posner's logic is the doctrine of "unconstitutional conditions."¹⁷³ For example, in *United States v. Scott*,¹⁷⁴ a Ninth Circuit panel held that the government could not require a Fourth Amendment waiver as a condition of pretrial

¹⁶⁴ Rapson, *supra* note 72, at 133.

¹⁶⁵ *Id.*

¹⁶⁶ *E.g.*, *United States v. Barnett*, 415 F.3d 690, 691–92 (7th Cir. 2005).

¹⁶⁷ See LAFAYE, *supra* note 75, at 437–38 (citing and critiquing cases that invoked "act of grace" theory).

¹⁶⁸ See *Barnett*, 415 F.3d at 692.

¹⁶⁹ 415 F.3d 690.

¹⁷⁰ *Id.* at 691–92.

¹⁷¹ *Id.*

¹⁷² *Id.* at 692.

¹⁷³ See *United States v. Scott*, 450 F.3d 863, 866–68 (9th Cir. 2006) (discussing unconstitutional conditions doctrine and rejecting pure contract theory); *People v. Hernandez*, 40 Cal. Rptr. 100, 103 (Dist. Ct. App. 1964) (same); LAFAYE, *supra* note 75, at 437–42 (same).

¹⁷⁴ 450 F.3d 863.

release.¹⁷⁵ Judge Kozinski found it “tempting” to say that bargained-for constitutional waivers were efficient and contributed to social welfare; nevertheless, he held that our Constitution demands otherwise.¹⁷⁶ “Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.”¹⁷⁷ Therefore, the government lacked the power to demand a waiver of constitutional rights.¹⁷⁸

However, the unconstitutional conditions doctrine itself is the source of much debate. Although the Court has restricted the government’s power to impose constitutionally questionable conditions upon the receipt of a government benefit,¹⁷⁹ it has also allowed such restrictions in some circumstances.¹⁸⁰ This tension is understandable: The government should not be allowed to abuse its monopoly power, yet it seems irrational to prevent a bargain if all parties would end up better off. Unfortunately, as commentators have lamented, “[t]he Court has provided no coherent explication of when and how it will apply the doctrine,”¹⁸¹ leaving the framework “riven with inconsistencies.”¹⁸² Particularly problematic is the Court’s focus on whether a condition is “coerced”; this analysis invariably degenerates into the purely normative question of whether one morally approves of the government’s offer.¹⁸³

Scholars have proposed various frameworks for understanding unconstitutional conditions,¹⁸⁴ but Professor William Stuntz provides a particularly intuitive tool: Look to whether the government would

¹⁷⁵ *Id.* at 866–68.

¹⁷⁶ *Id.* at 866.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 868.

¹⁷⁹ *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (invalidating state requirement that veterans take loyalty oath in order to receive tax exemption).

¹⁸⁰ *E.g.*, *Lyng v. UAW*, 485 U.S. 360, 364, 368–69 (1988) (upholding food stamps denial for workers who became needy while on strike).

¹⁸¹ Lynn A. Baker, *The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 *CORNELL L. REV.* 1185, 1187 (1990).

¹⁸² Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1416 (1989).

¹⁸³ *Id.* at 1446.

¹⁸⁴ *See, e.g.*, Baker, *supra* note 181, at 1217 (arguing that courts should defer to legislatures unless unconstitutional conditions adversely impact poor citizens); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *HARV. L. REV.* 4, 97 (1988) (noting that unconstitutional conditions doctrine is used to “forestall redistribution of wealth along forbidden dimensions”); Sullivan, *supra* note 182, at 1490 (suggesting unconstitutional conditions doctrine should be used to regulate distribution of constitutional rights throughout society, focusing on three primary distributive concerns).

have granted the benefit in the alternative.¹⁸⁵ If the government would rather terminate the benefit program than provide it without conditions, these conditions are necessary to the bargain and make all parties better off. But if the government would have granted the benefit either way, it is simply imposing the conditions because (as a monopolist) it can. As an example, Professor Stuntz notes that the government could not require Fourth Amendment waiver from all residents of public housing.¹⁸⁶ This makes sense: The condition is obviously not central to the bargain, since the government currently offers public housing without such a condition.¹⁸⁷ In cases like these, the entire theory of efficient bargaining—on which the consent search rationale relies—is inapplicable.¹⁸⁸

In the parole context, it seems clear that the government would generally grant the benefit even without the condition.¹⁸⁹ Incarceration is expensive,¹⁹⁰ and locking up every parolee and probationer would more than triple the inmate population.¹⁹¹ In the face of these insurmountable costs, the government would likely still grant probation or parole to most of the individuals currently in these programs. The government might insist on retaining broad supervisory powers over a few individuals,¹⁹² but the vast majority would be released either way. Therefore, the ability to bargain away constitutional rights actually makes most parolees and probationers worse off: They lose their Fourth Amendment rights without getting anything in return.¹⁹³

¹⁸⁵ Stuntz, *supra* note 40, at 567–69.

¹⁸⁶ *Id.* at 567–68.

¹⁸⁷ *Id.* at 568 n.53.

¹⁸⁸ That many individuals would accept such a condition does not tell us that they value their Fourth Amendment rights less than the government values the right to search them (which would make the bargain efficient); instead, it just tells us that the individuals value their public housing above their Fourth Amendment rights. As a monopolist, the government can impose heavy burdens on the public even when it receives only a slight benefit from the imposition, thereby decreasing overall social welfare.

¹⁸⁹ Stuntz, *supra* note 40, at 580.

¹⁹⁰ Incarceration is six times as expensive as probation. *FY 2004 Costs of Incarceration and Supervision, THIRD BRANCH* (Admin. Office of U.S. Courts, Wash., D.C.), May 2005, at 9, available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs>.

¹⁹¹ See GLAZE & PALLA, *supra* note 2, at 1 (suggesting that incarcerating every parolee and probationer would increase prison population from 2.1 million individuals to nearly 7 million individuals).

¹⁹² This is true in other unconstitutional conditions contexts as well. In the housing example described above, the government might grant public housing to some individuals who would otherwise be banned (e.g., those with prior felony records), if it were allowed to impose unconstitutional search conditions across the board. Although this would benefit the small minority of individuals who would otherwise be banned, most residents of public housing would be harmed by the transaction, and the condition would not be upheld.

¹⁹³ Stuntz, *supra* note 40, at 580.

The parole and probation contexts are even more problematic than the standard unconstitutional conditions cases, because the government controls not only the benefit but also the status quo. If a potential probationer were to refuse the government's condition, she would likely face a prison sentence. Yet the government controls the length of her sentence and can therefore manipulate the cost of her alternative decision. In the housing example, it is as if the government could not only impose unconstitutional conditions on public housing, but could correspondingly increase the cost of private housing to sweeten its offer. In such a scenario, it seems especially troublesome to call the transaction an efficient bargain.

In short, consent searches are generally allowed on the theory that both parties benefit from the transaction, but most parolees and probationers are actually made worse off when given the ability to bargain away their Fourth Amendment rights. This is the prototypical example of an unconstitutional condition: The government is not engaging in an efficient transaction; instead, it is abusing its monopoly power simply because it is in the position to do so. Searches of parolees and probationers might well be reasonable under some other justification, but they should not be considered consensual.

C. Parole and Probation Searches as "Reasonable Under the Totality of the Circumstances"

The Supreme Court recently has developed a new framework under which to analyze the Fourth Amendment rights of parolees and probationers. In *United States v. Knights*,¹⁹⁴ the Court upheld the warrantless search of a probationer's apartment based on a reasonable suspicion that did not rise to the level of probable cause.¹⁹⁵ The Court declined to decide whether the waiver constituted valid consent, instead finding the search "reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances.'"¹⁹⁶ The Court ignored the traditional requirement that searches be supported by warrant and probable cause, or fall within the "jealously and carefully drawn" exceptions to this requirement.¹⁹⁷

¹⁹⁴ 534 U.S. 112 (2001).

¹⁹⁵ *Id.* at 121–22. In other contexts, the home generally receives the highest Fourth Amendment protection. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

¹⁹⁶ *Knights*, 534 U.S. at 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

¹⁹⁷ *Jones v. United States*, 357 U.S. 493, 499 (1958); see also *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—

Instead, it went directly to balancing the invasion of privacy against the legitimate government interests.¹⁹⁸

The Court recently applied the same analysis to parolees in *Samson v. California*.¹⁹⁹ In that case, an officer stopped an individual whom he knew to be on parole. After verifying that the parolee had no outstanding warrants, the officer searched the individual based solely on his parole status. Again, the Court upheld the search under its "general Fourth Amendment approach" of balancing benefits against costs.²⁰⁰

The framework resulting from *Knights* and *Samson* is flawed on several levels. First, the Court provides no guidance as to when to apply its new "general Fourth Amendment approach" instead of the standard warrant, probable cause, and special needs analyses. Second, the Court authorizes suspicionless searches without requiring any safeguards against harassment and abuse of discretion. Third, the balancing takes into account impermissible factors and explicitly discounts the privacy interests at stake.

1. *Dispensing with the Threshold Requirement*

The Court's new "general Fourth Amendment approach" of "examining the totality of the circumstances"²⁰¹ through cost-benefit balancing is difficult to reconcile with the presumption that criminal searches must be supported by warrant and probable cause.²⁰² The special needs doctrine allows cost-benefit balancing, but Justice Blackmun made clear 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

subject only to a few specifically established and well-delineated exceptions." (citations omitted)).

¹⁹⁸ *Knights*, 534 U.S. at 118–19. *But see infra* note 204 (considering whether *Knights* created implicit threshold requirement based on probationer's diminished expectation of privacy).

¹⁹⁹ 126 S. Ct. 2193 (2006).

²⁰⁰ *See id.* at 2196–97.

²⁰¹ The Court had previously invoked the totality of the circumstances rationale when determining the reasonableness of specific search requirements. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996) (finding "under the totality of the circumstances" that, after traffic stop is complete, officers need not inform driver that he is "free to go" before requesting to search his car); *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (applying "totality of the circumstances" approach to determine whether probable cause exists). Until *Knights*, however, it had not used that test alone to justify a warrantless search.

²⁰² *See Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001) (noting "the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant"); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant.").

court entitled to substitute its balancing of interests for that of the Framers.”²⁰³ Unlike the special needs doctrine, *Knights* provides no threshold test to decide when balancing can appropriately replace the warrant and probable cause requirements.²⁰⁴

By applying a balancing test without justification, the Court calls into doubt the entire special needs doctrine. What purpose is served by the requirement that special needs be “beyond the normal need for law enforcement,” if law enforcement searches can be reviewed under the same balancing analysis? Moreover, as the next two subsections describe, the Court applies its new “general” balancing test far more loosely than it ever has in the special needs context. If this approach is expanded beyond parole and probation searches, it poses a very real threat to the warrant and probable cause requirements that form the bedrock of Fourth Amendment jurisprudence.

2. *Failing to Require an Adequate Warrant Substitute*

Samson’s biggest flaw lies in its failure to require even basic safeguards against harassment and abuse of discretion.²⁰⁵ As the dissent pointed out, “The suspicionless search is the very evil the Fourth Amendment was intended to stamp out.”²⁰⁶ To uphold the constitutional reasonableness requirement in cases where warrantless searches are justified, the Court has always required an adequate procedural

²⁰³ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment); see also *MacWade v. Kelly*, 460 F.3d 260, 263, 268 (2d Cir. 2006) (upholding New York City’s subway searches under special needs doctrine and quoting Justice Blackmun’s opinion in *T.L.O.* in full).

²⁰⁴ Some have interpreted *Knights* as creating an implicit threshold requirement: Balancing is allowed only because of the probationer’s “diminished expectation of privacy.” *E.g.*, *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (plurality opinion) (“*Knights* . . . affirmed the . . . possibility that conditional releasees’ diminished expectations of privacy may be sufficient to justify the judicial assessment of a parole or probation search’s reasonableness outside the strictures of special needs analysis.”). Although *Knights* did find a diminished expectation of privacy in its balancing analysis, see *infra* notes 217–24 and accompanying text, it never suggested that this was the justification for balancing in the first place. *United States v. Knights*, 534 U.S. 112, 118 (2001) (referring only to “our general Fourth Amendment approach of examining the totality of the circumstances” (internal quotation marks omitted)). Furthermore, even if the Court did intend the diminished expectation of privacy to serve as a threshold requirement for the balancing analysis, that would not render the approach any more principled. See Paul M. Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 269–70 (2007) (“[A] diminished privacy interest is a conclusory finding, and its use to justify an exception to the warrant requirement is thus circular.”).

²⁰⁵ *Knights* did not confront this issue, as the search in that case was based on individualized suspicion. See *Knights*, 534 U.S. at 115 (noting search occurred after officer observed suspicious objects in defendant’s truck).

²⁰⁶ *Samson v. California*, 126 S. Ct. 2193, 2203 (2006) (Stevens, J., dissenting).

substitute.²⁰⁷ In *Samson*, however, the Court upheld a "blanket grant of discretion untethered by any procedural safeguards" ²⁰⁸

The Court attempted to allay these fears by noting that California law prohibits "arbitrary, capricious or harassing" searches,²⁰⁹ but the Fourth Amendment requires more. It requires that affirmative safeguards be in place *ex ante* to prevent these types of abuse.²¹⁰ If we were satisfied with *post hoc* reprimands of harassing and abusive searches, there would be no need for a warrant requirement. Yet warrants have long been required to ensure that an officer's reasoning can be verified before a constitutional violation is committed.²¹¹

To defend its holding, the *Samson* majority quoted *Hudson's* faulty reasoning that "planned random searches" could always be "anticipate[d],"²¹² but this argument is no more convincing in the parole context than it is for prison cell shakedowns.²¹³ Using true mathematical randomization, parole administrators could conduct unpredictable searches without relying on the unbridled discretion of police officers.

3. *Skewing the Balancing Test Based on Parole or Probation Status*

The *Knights/Samson* approach becomes particularly problematic when one considers the way in which the Court performed its cost-benefit analysis. The Court first relied on broad statistical generalizations about parolees and probationers as a class. It then skewed the balance further by discounting these individuals' legitimate privacy interests.

On the government's side of the scale, the Court focused on the high recidivism rates among parolees and probationers.²¹⁴ Weighing such crime rates is perhaps intuitively appealing, but the repercussions of using statistical propensities in the "general" Fourth Amendment analysis are troubling. Suddenly, "an individual, no matter how law abiding, who belongs to a group that in its entirety has a higher per-capita crime rate than the general populace, is by virtue of that fact a

²⁰⁷ See *supra* Part I.B.

²⁰⁸ See *Samson*, 126 S. Ct. at 2202 (Stevens, J., dissenting).

²⁰⁹ *Id.* at 2202 (majority opinion) (quoting *People v. Reyes*, 968 P.2d 445, 450, 451 (Cal. 1998)).

²¹⁰ See *supra* Part I.B.

²¹¹ See *supra* notes 43–47 and accompanying text.

²¹² *Samson*, 126 S. Ct. at 2201 (quoting *Hudson v. Palmer*, 468 U.S. 517, 529 (1984)).

²¹³ See *supra* notes 116–21 and accompanying text.

²¹⁴ *Samson*, 126 S. Ct. at 2200 (noting sixty-eight to seventy percent recidivism among California parolees); *United States v. Knights*, 534 U.S. 112, 120 (2001) (noting forty-three percent recidivism among probationers in seventeen-state study).

candidate for [suspicionless] police searches”²¹⁵ Nothing in the Court’s language suggests that the same logic could not be applied to high-crime neighborhoods or other demographic groups. But decreasing Fourth Amendment protections for such groups would be at odds with the fundamental principle that warrants and probable cause represent the appropriate balance for all law enforcement contexts.²¹⁶

On the prisoners’ side of the scale, the Court found that parolees and probationers have “severely diminished expectations of privacy by virtue of their status alone”;²¹⁷ however, this finding does not withstand scrutiny. The Court’s analysis relied on three faulty premises. First, to the extent that the Court’s calculation of the search target’s interests relied on the government’s administrative needs,²¹⁸ that factor had already been accounted for on the government’s side of the balance.²¹⁹ Second, to the extent that it relied on parole and probation as forms of punishment,²²⁰ this reasoning cannot be squared with the Court’s prison search jurisprudence, which looks not to the punitive nature of the environment but solely to the government’s institutional needs.²²¹ Finally, to the extent that it relied on the principle that regulated activities can lead to a reduced expectation of pri-

²¹⁵ LAFAYE, *supra* note 75, at 453–54 (quotation altered to reflect *Samson*).

²¹⁶ See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (“In most criminal cases, we strike [the reasonableness] balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (“Only [when a special need exists] is a court entitled to substitute its balancing of interests for that of the Framers.”).

²¹⁷ *Samson*, 126 S. Ct. at 2199 (concluding that parolees have *no* legitimate expectation of privacy as result of probation search condition); *Knights*, 534 U.S. at 119–20 (finding that probationers have “significantly diminished” expectation of privacy as result of probation search condition).

²¹⁸ See *Knights*, 534 U.S. at 119 (“[The defendant’s] status as a probationer subject to a search condition informs both sides of th[e] balance.”); *id.* at 119–21 (considering goal of “protecting society from future criminal violations” on defendant’s side of balance, while similarly considering government’s “interest in apprehending violators of the criminal law” on other side).

²¹⁹ Finding a diminished expectation of privacy based on the government’s interests “creates confusion (not to mention double-counting). . . . [Such] analysis amounts to putting the thumb down on one side of the scale and using the fingers to push up on the other.” Schulhofer, *supra* note 40, at 135–36.

²²⁰ “Threaded through the Court’s reasoning is the suggestion that deprivation of Fourth Amendment rights is part and parcel of any convict’s punishment.” *Samson*, 126 S. Ct. at 2206 (Stevens, J., dissenting).

²²¹ Even *Hudson v. Palmer*’s finding that prisoners have no expectation of privacy in their cells was not based on their “status” as prisoners; instead, it was “necessary, as a practical matter, to accommodate a myriad of ‘institutional needs and objectives’ of prison facilities” 468 U.S. 517, 524 (1984) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)).

vacy,²²² it is unclear how the other parole conditions cited by the Court (e.g., mandatory drug testing, mandatory meetings with one's parole officer, restrictions on weapons possession, and, occasionally, psychiatric treatment and substance abuse restrictions)²²³ would make a criminal search by a police officer inherently any less intrusive.

The balancing test is designed to approve searches whose benefits outweigh their costs. Instead of considering the actual costs of the intrusion, the Court in *Knights* and *Samson* relies on conclusory findings that parolees and probationers have diminished privacy interests.²²⁴ A parolee or probationer suffers the same dignitary harms as any other member of society when subjected to an invasive search. Such a search might still be reasonable if it furthers a legitimate need that outweighs the parolee's privacy interest, but the Court should consider the full ramifications of the government's actions in making that determination.

D. Parole and Probation Searches Under the Special Needs Doctrine

Parole and probation searches cannot be justified under theories of constructive custody, consent, or totality of the circumstances balancing; however, they can be justified under the special needs doctrine.

At one point, the Court did use the special needs doctrine to analyze probation searches. Twenty years ago, in *Griffin v. Wisconsin*,²²⁵ the Court upheld a warrantless probation search that the state court found to have rested on "reasonable grounds."²²⁶ Five Justices approved the search, finding that "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement"²²⁷ In particular, searches were necessary to "assure that the probation serve[d] as a period of genuine rehabilitation and that the community [was] not

²²² *Samson*, 126 S. Ct. at 2199 ("The extent and reach of [the general parole] conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy . . ."). For a discussion of the permissible scope of this principle, see *supra* note 67.

²²³ *Samson*, 126 S. Ct. at 2199.

²²⁴ The Court's reasoning does little to suggest the scope of this diminution. For example, do all ex-felons—even those no longer on probation or parole—similarly have a diminished expectation of privacy "by virtue of their status alone"?

²²⁵ 483 U.S. 868 (1987).

²²⁶ *Id.* at 872.

²²⁷ *Id.* at 873–74. The opinion also suggests that prisons should be analyzed under the special needs doctrine, even though the Court has never explicitly described its analysis of prison searches in this manner. See *supra* Part II.

harmful by the probationer's being at large."²²⁸ The Court found that requiring warrants for such searches would have been impracticable.²²⁹

As suggested in *Griffin*, rehabilitation does provide a compelling special need. Parole and probation are meant to supervise individuals and reintegrate them into law-abiding society.²³⁰ If supervision encourages lawful behavior and successful reintegration, searches serve an important role in the parole and probation contexts beyond mere law enforcement. The most important question, then, is: Which specific searches actually further the rehabilitation of the individual being searched? If a parole or probation search does not further rehabilitation, then its sole purpose is law enforcement, and it cannot qualify for the special needs exception.

Commentators have considered which searches of parolees and probationers should be admitted under a special needs analysis, but their proposals vary. Eighteen years before *Griffin*, Professor Welsh White suggested that the Court should allow brief, suspicionless, daytime home inspections by a parole officer, but should require probable cause for full home searches.²³¹ In contrast, Professor Stephen Schulhofer would allow reduced-suspicion parole and probation searches as long as the supervision was not "simply a rubric under which the state reduces privacy" ²³² Others would require that searches be supported by "statutory or regulatory standards for conducting the warrantless searches,"²³³ or would draw a bright line between searches conducted by police officers and those conducted by parole and probation officers.²³⁴ Furthermore, it is unclear whether

²²⁸ *Griffin*, 483 U.S. at 875.

²²⁹ The Court explained:

A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.

Id. at 876 (citation omitted).

²³⁰ *Samson v. California*, 126 S. Ct. 2193, 2200 (2006); *Griffin*, 483 U.S. at 875.

²³¹ Welsh S. White, *The Fourth Amendment Rights of Parolees and Prisoners*, 31 U. PITT. L. REV. 167, 187, 194–96 (1969).

²³² See Schulhofer, *supra* note 40, at 118–19. For example, Professor Schulhofer would not allow special needs searches for "non-reporting" probation, where an offender never actually meets with a probation officer. *Id.* at 119.

²³³ See LaFAVE, *supra* note 75, at 449–50 (quoting *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1160 (W.D.N.Y. 1975)).

²³⁴ See *id.* at 451 (suggesting search in *Knights* could never have been justified under special needs as it was conducted by police).

the permissible scope of reduced-suspicion parole and probation searches has changed in light of the Court's recent decisions in *United States v. Edmond* and *Ferguson v. Charleston*, which reaffirmed that special needs must be "beyond the normal need for law enforcement."²³⁵

Rather than answer these difficult questions, the Court has relied on its flawed totality of the circumstances approach.²³⁶ Yet if parole and probation searches are justified, it is because the unique government interests that arise in those contexts make warrants supported by probable cause impracticable. Whether or not these searches merit special consideration should depend upon whether or not these interests pass the special needs threshold.²³⁷ By dodging these crucial questions, the Court has done a grave disservice to the doctrine and, more importantly, to the individuals subjected to these searches.

Once a proposed search passes the threshold test, it is crucial that the Court require adequate procedural substitutes and avoid the hazards of *Knights* and *Samson* balancing. First, as in the other special needs contexts, parole and probation searches upheld under the special needs doctrine must be supported by reasonable suspicion or be performed pursuant to a neutral plan stripping officers of discretion. Second, the cost-benefit analysis must completely recognize the privacy interests at stake. An intrusive search is no less invasive for parolees and probationers than it is for members of the general public, and the balancing must fully take into account that harm. Many otherwise unreasonable searches will likely be found reasonable in the parole and probation contexts; however, it must be because reasonable institutional interests justify the invasion of privacy, not because individuals have diminished privacy interests "by virtue of their status alone."²³⁸

²³⁵ See *supra* notes 34–37 and accompanying text. As discussed above, the doctrinal distinction between law enforcement and non-law enforcement needs is somewhat tenuous. See *supra* notes 38–40 and accompanying text. This is especially true when applied to government supervision of individuals on parole or probation. On the one hand, these programs create a compelling interest in rehabilitation not present in the ordinary law enforcement context. See *supra* text accompanying note 230. On the other hand, the public hospital's searches that the Court rejected in *Ferguson v. City of Charleston* also had rehabilitative implications. See 532 U.S. 67, 80 (2001) (invalidating mandatory drug testing whose "central and indispensable [purpose] was the use of law enforcement to coerce the patients into substance abuse treatment"). *Ferguson* explicitly distinguished *Griffin*'s approved warrantless probation search from the disapproved hospital drug testing, but did so based on the questionable rationale that probationers have "lesser expectation[s] of privacy than the public at large." *Id.* at 79 n.15.

²³⁶ See *supra* Part III.C.

²³⁷ See *supra* Part I.A.

²³⁸ *Samson v. California*, 126 S. Ct. 2193, 2199 (2006).

CONCLUSION

When analyzing claims of unreasonable searches in the contexts of prison, probation, and parole, the Supreme Court has created an unnecessarily complex jurisprudence that lacks coherence, consistently undervalues privacy interests, and fails to protect against arbitrary and harassing searches.

The current patchwork of rationales is particularly frustrating because the Court has already forged the tool that is needed to resolve such claims with certainty and consistency: the special needs doctrine. Prison, probation, and parole each create compelling government search interests because they each generate specific administrative needs. In these contexts, invasive searches impose the same costs on individuals as they would in the outside world, but the extra administrative benefits often outweigh these costs.

Analyzing these searches under the special needs doctrine would have several positive effects. First, it would bring coherence to the doctrine and create a single, common framework for addressing searches in unique, non-law enforcement contexts. Second, it would acknowledge the privacy rights of individuals in these settings and would avoid “diminished expectations of privacy” and categorical denials of Fourth Amendment protection. Third, and most importantly, it would provide the critical safeguards against harassment and abuse that the Fourth Amendment guarantees for all citizens.