

SCHOOL CHILDREN AND PAROLEES: NOT SO SPECIAL ANYMORE

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INTRODUCTION

In his contribution to this symposium, *School Searches Writ Large: Broadening the Perspective in Which We View School Search Cases*, Dean Samuel Davis suggests much can be learned by attempting to view the school search cases in a larger context as part of the Supreme Court's overall jurisprudence. That is the goal of this paper: to examine the school search cases through the prism of the Court's suspicionless search and seizure jurisprudence and, on this twenty-fifth anniversary of the Court's decision in *New Jersey v. T.L.O.*,¹ to explore what lessons that landmark case and other school search cases can teach us about the Court's suspicionless search jurisprudence, as well as what some recent non-school suspicionless search cases tell us about the continuing vitality of those lessons in and out of schools.

The title of this article reflects one of *T.L.O.*'s contributions to the area of suspicionless searches—the special needs exception—and tries to capture my contention that the special needs exception has been eliminated, or may be on the verge of elimination, in two areas that gave it its genesis: searches of school children² and searches of probationers/parolees.³ In fact,

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¹ 469 U.S. 325 (1985).

² *See id.* at 351 (Blackmun, J., concurring in the judgment) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”).

the exception may have been eliminated entirely from the Court's suspicionless search jurisprudence in favor of what the Court calls its "general Fourth Amendment approach."⁴

This article first will briefly review the Court's suspicionless search jurisprudence. Next the article will explain where *T.L.O.* and the school searches fit into that jurisprudence and explore the lessons to be learned from those cases. Finally, the article will finish by examining what placing two recent parole/probationer search cases and the most recent school search case, *Safford Unified School District #1 v. Redding*,⁵ into the mix means for the Court's suspicionless search jurisprudence and for searches of students. This final part will analyze what the Court's new "general Fourth Amendment approach" might mean in the school search setting.

I. THE SUPREME COURT'S SUSPICIONLESS SEARCH JURISPRUDENCE⁶

Although the jurisprudence of the Court in the suspicionless search area is muddled and confused,⁷ it starts with a basic and important proposition: the Supreme Court insists that suspicionless searches are the exception to the rule.⁸ The Court

³ See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (holding that the warrantless search of a probationer's home was reasonable within the meaning of the Fourth Amendment "because it was conducted pursuant to a valid regulation governing probationers").

⁴ *United States v. Knights*, 534 U.S. 112, 118 (2001) (citing *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

⁵ 129 S. Ct. 2633 (2009).

⁶ This section of the article draws heavily from a previous article exploring in more depth the Supreme Court's suspicionless search jurisprudence. See Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419 (2007).

⁷ See *id.* at 422 n.23 (citing Stephen J. Schulhofer, *On The Fourth Amendment Rights Of The Law-Abiding Public*, 1989 SUP. CT. REV. 87, 88-89 (referring to "doctrinal incoherence" in this area)).

⁸ See, e.g., *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) ("[A] search must be supported, as a general matter, by a warrant issued upon probable cause."); *id.* at 667 ("Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause.").

has repeatedly stated as a basic tenet of Fourth Amendment jurisprudence that “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”⁹ Of course, that is the ordinary or general rule. The Court has also expressly stated that “such suspicion is not an ‘irreducible’ component of reasonableness.”¹⁰ Nevertheless, the Court has emphasized that permissible suspicionless searches fall within a “closely guarded category,”¹¹ suggesting very few, limited exceptions to the general rule requiring individualized suspicion. The obvious question is what types of searches are within this “closely guarded category” of permissible suspicionless searches? That question is surprisingly difficult to answer.

A. The Starting Point

The Supreme Court’s suspicionless search jurisprudence begins with *Camara v. Municipal Court of San Francisco*.¹² In *Camara*, the lessee of an apartment refused to permit a housing inspector to enter his apartment without a warrant and was criminally charged with “refusing to permit a lawful inspection.”¹³ Under the prevailing law, an inspection such as the one in question was not considered a search.¹⁴ In *Camara*, the Court overruled the existing precedent and found the inspection to be a search governed by the Fourth Amendment, including the warrant requirement.¹⁵ Since the Fourth Amendment is clear that “no Warrants shall issue, but upon probable cause,”¹⁶ and because probable cause had always been understood to re-

⁹ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)); *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). On at least two occasions, the Court has struck down a suspicionless search scheme because it did not “fit within the closely guarded category of constitutionally permissible suspicionless searches.” *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2001); *see also Chandler*, 520 U.S. at 309.

¹⁰ *Edmond*, 531 U.S. at 37 (quoting *Martinez-Fuerte*, 428 U.S. at 561).

¹¹ *Ferguson*, 532 U.S. at 77; *see also Chandler*, 520 U.S. at 309.

¹² 387 U.S. 523 (1967).

¹³ *Id.* at 527.

¹⁴ *Frank v. Maryland*, 359 U.S. 360 (1959).

¹⁵ *See Camara*, 387 U.S. at 534.

¹⁶ U.S. CONST. amend. IV.

quire some level of individualized suspicion,¹⁷ the Court was forced to redefine probable cause in order to authorize warrants to carry out routine administrative inspections that were not premised on the existence of individualized suspicion of code violations.¹⁸ It did so by equating probable cause with “reasonableness” and creating a balancing test to determine reasonableness, declaring that, “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”¹⁹ By utilizing a balancing test, the Court eliminated any requirement of a minimum quantum of individual suspicion and opened the door to suspicionless searches and seizures.²⁰

After *Camara*, there were two ways to assess the constitutionality of a search: the warrant approach and the reasonableness approach.²¹ Under the warrant approach, all searches without a warrant are per se unreasonable unless they fall within one of the “few specifically established and well-delineated exceptions.”²² Moreover, those exceptions generally forgive the requirement of a warrant, not the requirement of probable cause (defined as a quantum of individualized suspicion) to support the search.²³ Under the reasonableness ap-

¹⁷ See *supra* text accompanying note 9.

¹⁸ *Camara*, 387 U.S. at 535-36.

¹⁹ *Id.* at 536-37.

²⁰ WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 230, 231 (4th ed. 2004); Scott E. Sundby, *Protecting the Citizen “Whilst He is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 550 (2004).

²¹ See, e.g., Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) (stating that there are two models of the Fourth Amendment: the reasonableness approach and the warrant approach); Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia’s Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 78 (2004) (“The issue of whether searches and seizures . . . should be governed by a per se rule based on the Warrant Clause of the Fourth Amendment or a more general rule of reasonableness based on the Reasonableness Clause of that Amendment has plagued the United States Supreme Court for decades.”).

²² *Katz v. United States*, 389 U.S. 347, 357 (1967).

²³ See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925) (holding that a warrantless search of an automobile is reasonable and does not violate the Fourth Amendment provided the searching officer has probable cause that the vehicle contains contraband); *California v. Acevedo*, 500 U.S. 565 (1991) (holding that an officer may search a container in a vehicle without a warrant provided the officer has probable cause to

proach of *Camara*, by contrast, the question of whether a search is constitutional is determined through a balancing test.²⁴ A search is reasonable if the interests of the government in carrying out the search outweigh the “costs” to the citizen of being subjected to the search in terms of the intrusion upon the citizen’s privacy or liberty.²⁵ Individualized suspicion is not necessarily required.²⁶

The question for government officials seeking to utilize this new tool was how to qualify to have their actions tested by the balancing test. What justifies using the balancing test rather than the traditional “per se warrant approach”? It is important to keep in mind that the government had a significant incentive to have their actions judged by the balancing test. That test could forgive a warrant, probable cause, and even individualized suspicion. A simple answer to the question of when the use of the balancing test was justified or permitted was not immediately forthcoming from the Court, but there were hints.

In *Camara*, the Court relied heavily on the fact that the search in question was an administrative search, not a search seeking evidence of crime.²⁷ As a result, *Camara* was viewed as having created an administrative search exception that permitted suspicionless searches.²⁸ Although the first case to utilize the reasonableness approach and balancing test was *Terry v. Ohio*, a case involving a search seeking evidence of criminal activity,²⁹ searches without individualized suspicion were viewed as being justified only in the administrative search set-

believe the container contains contraband even if the officer does not have probable cause as to the whole vehicle); *Chimel v. California*, 395 U.S. 752 (1969) (holding that incident to a lawful custodial arrest, officers may search the arrestee’s person and the area within the arrestee’s immediate control without a warrant); *Warden v. Hayden*, 387 U.S. 294 (1967) (holding that a police officer may enter a home and search without a warrant when the exigencies of the situation demand it).

²⁴ *Camara*, 587 U.S. at 536-37.

²⁵ *Id.*

²⁶ LAFAVE ET AL., *supra* note 20, at 213; Sundby, *supra* note 20, at 550.

²⁷ *Camara*, 387 U.S. at 535-38.

²⁸ See Butterfoss, *supra* note 6, at 432 n.75.

²⁹ 392 U.S. 1 (1968).

ting.³⁰ This notion was reinforced in a group of early cases in which the Court upheld suspicionless searches in the form of statutory inspection programs easily classified as administrative searches of the type at issue in *Camara*, including inspections of gun dealers,³¹ liquor distributors,³² and similar businesses.³³ However, the balancing test was also used in situations beyond typical administrative inspections.

B. *The Early Cases*

One of the first cases in which the Court utilized the balancing test to uphold a search outside the context of an administrative search was *United States v. Martinez-Fuerte*, an immigration checkpoint case.³⁴ To attempt to stem the flow of immigrants crossing the border illegally, the government instituted a program of roving patrols and checkpoints.³⁵ When each of these tactics was challenged, the government sought to justify the actions undertaken by Border Patrol agents without individualized suspicion by analogizing to the administrative search cases and arguing the government actions were more like administrative searches (subject to the balancing test) than the typical automobile searches for criminal activity,³⁶

³⁰ See, e.g., Peter S. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011, 1015-16 (1973) (describing the *Camara* individualized suspicion standard as "far too loose to be applied in the criminal search context"); Brief for Respondent at 14, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (No. 74-1560) ("The petitioner's proposed analogy to administrative inspection cases is inapplicable and does not justify the emasculat[i]on . . . of the reasonable suspicion standard for vehicular stops announced in *Brignoni-Ponce*.").

³¹ *United States v. Biswell*, 406 U.S. 311 (1972) (holding that a warrantless search of a gun dealer's locked storeroom during business hours did not violate the Fourth Amendment).

³² *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (holding that, in the absence of congressional authorization, forcible entry to perform an administrative search without a warrant is a violation of the Fourth Amendment).

³³ See *v. City of Seattle*, 387 U.S. 541, 542 (1967) ("*Camara* applies to similar inspections of commercial structures which are not used as private residences.").

³⁴ 428 U.S. 543 (1976).

³⁵ *Id.* at 552.

³⁶ See *id.* at 560-62.

which were subject to the warrant approach and required probable cause.³⁷

In the cases involving searches of automobiles by roving patrols and at checkpoints, the Court rejected the analogy to administrative searches because the officers had largely unfettered discretion to exercise their authority: “The search [in this case] thus embodied precisely the evil the Court saw in *Camara* when it insisted that the ‘discretion of the official in the field’ be circumscribed by obtaining a warrant prior to the inspection.”³⁸ When the government intrusion was limited to a seizure at a permanent checkpoint where every car was momentarily detained, the Court held the government activity constitutional.³⁹ But the Court did not reach this different result because it accepted the analogy to the administrative search cases. The Court emphasized that “[t]he fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one’s right to travel.”⁴⁰ And the Court repeatedly referred to the checkpoints as being for “law enforcement purposes.”⁴¹ The new result was based on the more limited intrusion imposed by the checkpoints—whether for administrative purposes or law enforcement purposes—and the limits on the discretion of the officer in the field.⁴²

Despite these immigration cases where the Court seemed to uphold suspicionless searches outside the administrative

³⁷ Under the automobile exception, only probable cause, but not a warrant, was required. *Carroll v. United States*, 267 U.S. 132 (1925).

³⁸ *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (quoting *Camara v. Mun. Court of S.F.*, 587 U.S. 523, 532-33 (1967)); see also *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (stating that “[m]oreover we are not persuaded that the checkpoint limits to any meaningful extent the officer’s discretion to select cars for search”).

³⁹ *Martinez-Fuerte*, 428 U.S. at 558-59.

⁴⁰ *Id.* at 560 n.14.

⁴¹ The first sentence of the opinion states, “These cases involve criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens.” *Id.* at 545. The Court also stated, “Interdicting the flow of illegal [aliens] poses formidable law enforcement problems.” *Id.* at 552. The Court also noted that “the needs of law enforcement are furthered by this location.” *Id.* at 562 n.15. And, in upholding the “secondary inspection” of a limited number of cars, the Court stated that reliance on apparent Mexican ancestry “clearly is relevant to the law enforcement need to be served.” *Id.* at 564 n.17.

⁴² *Id.* at 557-60.

context, the idea that the exception permitting suspicionless searches was for administrative searches persisted, in large part because that distinction—administrative purpose versus law enforcement purpose—was emphasized in another set of cases where the requirement of individualized suspicion was forgiven: inventory searches.

The distinction between a search with an administrative purpose and a law enforcement purpose was especially emphasized in *South Dakota v. Opperman*, a case involving the search of an automobile towed because it was parked in violation of parking regulations.⁴³ In justifying the use of the balancing test to assess the constitutionality of the search, the Court noted, “The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures.”⁴⁴ The Court also explained, “The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.”⁴⁵ Although the Court has always treated inventory cases as a separate category of permissible suspicionless searches,⁴⁶ this language encouraged the notion that suspicionless searches were permissible only in the noncriminal, administrative setting.⁴⁷ But then along came *T.L.O.*

⁴³ 428 U.S. 364 (1976).

⁴⁴ *Id.* at 370 n.5.

⁴⁵ *Id.*

⁴⁶ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 16.01[B], at 266 (3d ed. 2002) (characterizing inventory searches as a separate category and explaining this resulted “largely for historical reasons”); Butterfoss, *supra* note 6, at 442 (“For reasons that are not apparent, the Court has treated inventory searches as a separate category of intrusion unrelated to the ‘closely guarded category of constitutionally permissible suspicionless searches and seizures’ spawned by *Camara*.” (citation omitted)).

⁴⁷ *See also* *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (stating that “as in *Opperman* . . . there was no showing that the police . . . acted in bad faith or for the sole purpose of investigation”).

*C. New Jersey v. T.L.O. and the Expansion of the
“Constitutionally Permissible Suspicionless Search” Category*

Along with *Camara*, *T.L.O.* is one of the seminal cases in the Supreme Court’s suspicionless search jurisprudence. It is particularly curious how *T.L.O.* came to occupy that status given that it was not a suspicionless search case—the vice principal in the case had reasonable suspicion that T.L.O. was violating school rules.⁴⁸ And *T.L.O.* also does not seem to fit the administrative search category. The search was not part of a program of inspections (for instance, a locker inspection); it was an ad hoc decision by a school official based on a report of a possible violation of school rules.⁴⁹ Nevertheless, the decision in *T.L.O.* seemed to provide a definition of the “category” of permissible suspicionless searches to which the Court had been referring and to lay the groundwork for a broad expansion of that category.⁵⁰

⁴⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 328, 345-47 (1985).

⁴⁹ *Id.* at 328.

⁵⁰ *See id.* at 340-41. In determining that the search of T.L.O. was reasonable, the Court referenced several suspicionless search cases, suggesting a unified category:

Just as we have in other cases dispensed with the warrant requirement when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,” we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon “probable cause” to believe that a violation of the law has occurred. However, “probable cause” is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although “both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.” Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although “reasonable,” do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

Id. at 340-41 (internal citations omitted).

In *T.L.O.*, the Court upheld a search of a student's purse by school authorities without a warrant and without probable cause.⁵¹ In his majority opinion, without any explanation, as if it were the general rule, Justice White proceeded directly to a balancing test as the appropriate test for assessing government conduct subject to the Fourth Amendment's proscriptions.⁵² He baldly stated: "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.'"⁵³ If, as suggested by the majority's approach, the balancing test is the general rule, individualized suspicion could be forgiven by utilizing that test for virtually any search or seizure, not just administrative searches.

In the case before it, the Court struck the balance by requiring individualized suspicion. The Court held that a search of a student by a teacher or other school official was justified 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."⁵⁴ But the Court elaborated in a footnote that it was not deciding whether "individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."⁵⁵ This reaffirmation that the balancing test could, in appropriate circumstances, authorize suspicionless searches, combined with Justice White's statement that the balancing test provided the appropriate analysis for assessing *any* Fourth Amendment conduct by the government, provided the basis for a broad expansion of the use of the balancing test and, by extension, the suspicionless search category.⁵⁶

Justice Blackmun recognized the door had been opened to an expanded use of the reasonableness approach and tried to

⁵¹ *Id.* at 341.

⁵² *Id.* at 337.

⁵³ *Id.* (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536-37 (1967)).

⁵⁴ *Id.* at 342.

⁵⁵ *Id.* at 342 n.8.

⁵⁶ See Stephen J. Schulhofer, *On The Fourth Amendment Rights Of The Law-Abiding Public*, 1989 SUP. CT. REV. 87, 100.

limit the expansion of the suspicionless search category.⁵⁷ In his concurring opinion, he asserted that the majority had “omit[ted] a crucial step” in freeing the government from the warrant approach.⁵⁸ He explained that the Court had used, and should only continue to use, the balancing test—the route to suspicionless searches—when confronted by “a special law enforcement need for greater flexibility.”⁵⁹ Specifically, he stated, “*Only* in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”⁶⁰

Justice Blackmun’s “special needs” rubric was applied once by a plurality of the Court in a case with similarities to a school search—a search of a government worker’s desk for evidence related to work misconduct⁶¹—before being adopted by a majority of the Court in *Griffin v. Wisconsin*, a case which featured a search of a probationer’s home based on reasonable suspicion.⁶² In *Griffin*, after stating the rule that a search “usually” requires a warrant and probable cause, the Court stated that it had permitted exceptions to the rule “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”⁶³

⁵⁷ *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment).

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

⁶⁰ *Id.* (emphasis added).

⁶¹ See *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987). Surprisingly, Justice Blackmun dissented in *Ortega*. However, his disagreement was not with the special needs rubric itself, but with, what he perceived as, the plurality’s misapplication of it: “Because there was no ‘special need’ to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would evaluate the search by applying this traditional standard.” *Id.* at 732 (Blackmun, J., dissenting) (internal citation omitted).

⁶² 483 U.S. 868, 871 (1987).

⁶³ *Id.* at 873 (internal quotation marks omitted) (“Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J. concurring in judgment (internal citation omitted))).

The Court noted instances in which it had found “special needs”—*O’Connor v. Ortega* (the office search case) and *T.L.O.*—and referred to various administrative searches as an example where “for similar reasons” the usual rule had been forgiven.⁶⁴

But after referring to administrative searches as similar to, but apparently separate from, special needs, the Court seemed to bring them within the special needs category when it concluded, “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 that may justify departures from the usual warrant and probable-cause requirements.”⁶⁵ That language suggested the Court was consolidating its “balancing test” cases under the rubric of “special needs.” Reinforcing this idea was language in a case decided two weeks earlier, *New York v. Burger*, which involved a suspicionless inspection of an auto junkyard.⁶⁶ In this seemingly classic administrative search case, the Court characterized the search as a special needs search and justified permitting a suspicionless search because “as in other cases of ‘special need’ . . . a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.”⁶⁷

At this point, courts and commentators were confused about when the balancing test could be used. Some thought there were two exceptions: the special needs exception and the administrative search exception.⁶⁸ Others thought there was

⁶⁴ *Id.*

⁶⁵ *Id.* at 873-74.

⁶⁶ 482 U.S. 691 (1987).

⁶⁷ *Id.* at 702.

⁶⁸ See, e.g., Michael R. Beeman, Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034, 1048-49 (1989) (noting that special needs searches can be distinguished from administrative searches and criminal searches); The Harvard Law Review Association, *The Supreme Court, 1988 Term: Leading Cases*, 103 HARV. L. REV. 137, 269, 275 (1989) (explaining that “the Court constructed three tests to determine the reasonableness of a search or seizure”: the warrant and probable cause requirements for searches in the criminal context; the reasonable suspicion requirement for searches in “exceptional circumstances,” i.e., special needs searches; and no requirement of individualized suspicion for adminis-

one exception—special needs—which included administrative searches and other types of searches.⁶⁹ But at this point, no one was suggesting that the balancing test was the general rule for analyzing searches. And whether it was *the* exception or just merely one of several exceptions, there now clearly was an incentive for government officials to argue a particular search scheme was justified by “a special need beyond the normal need for law enforcement.” And that is just what the government did.

D. The Rise of the “Special Needs” Exception

In a series of cases involving drug testing of school children and others in the late 1980s through the 1990s, the government urged the Court to uphold the search schemes as justified by special needs, and the Court embraced the exception.⁷⁰ In each case, the Court emphasized that searches generally needed to be supported by a warrant and probable cause, but relied on special needs as the justification for departing from the general rule and utilizing the balancing test.

In *Skinner v. Railway Labor Executives’ Association*, a case challenging the suspicionless drug testing of railroad

trative searches); Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1144 n.84 (1984) (“Administrative searches occupy their own exception to the warrant requirement.”).

⁶⁹ See, e.g., Captain Jeffrey D. Smith, *Administrative Inspections in the Armed Forces After New York v. Burger*, 1988 ARMY LAW. 9, 9 (“Administrative [searches] are authorized in a variety of situations and are justified when ‘special need[], beyond the normal need for law enforcement, make the warrant and probable cause requirement impractica[ble].’”).

⁷⁰ See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (holding that school policy requiring all students who participated in competitive extracurricular activities submit to drug testing did not violate the Fourth Amendment); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that random, suspicionless drug testing of school athletes does not violate the Fourth Amendment); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (holding that suspicionless and warrantless drug testing of Customs Agents is reasonable under the Fourth Amendment due to special needs beyond the normal need for law enforcement); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 634 (1989) (holding that alcohol and drug tests of railway workers are reasonable within the meaning of the Fourth Amendment “[even] in the absence of a warrant or reasonable suspicion,” because “any particular employee may be impaired”).

workers,⁷¹ the Court acknowledged that “[e]xcept in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”⁷² But the Court went on to explain that it had “recognized exceptions to this rule . . . ‘when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”⁷³ Similarly, in *National Treasury Employees Union v. Von Raab*, the companion case to *Skinner* involving drug testing of Customs Department employees,⁷⁴ the Court again acknowledged the general rule requiring a warrant and probable cause (or some other level of individual suspicion), but asserted that its cases “establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement,” the Court may balance the interests de novo to determine whether a warrant or individual suspicion is required.⁷⁵

The fact that the Court did not hedge its statements by characterizing special needs as simply one of many instances in which the Court had recognized an exception and freely cited to inventory cases,⁷⁶ traffic checkpoint cases,⁷⁷ and administrative search cases⁷⁸ as if all were within the umbrella of the special needs exception, suggested it had found a unifying principle for its suspicionless search jurisprudence.⁷⁹ Similarly, in assessing the drug testing scheme of student athletes in *Vernonia School District 47J v. Acton*,⁸⁰ the Court again referred to the special

⁷¹ 489 U.S. at 606.

⁷² *Id.* at 619.

⁷³ *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

⁷⁴ 489 U.S. at 659.

⁷⁵ *Id.* at 665.

⁷⁶ *Id.* at 667-68 (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976) and *Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory search cases)).

⁷⁷ *Id.* at 665, 668, 672, 674 (citing *United States v. Martinez-Fuerte*, 482 U.S. 543 (1976) (traffic checkpoint case)).

⁷⁸ *Id.* at 665-66, 668, 671 (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987), an administrative search case); *id.* at 668, 674-75 (citing *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967) (administrative search case)).

⁷⁹ *See id.* at 665-68.

⁸⁰ 515 U.S. 646 (1995).

needs doctrine seemingly as *the* route to qualifying for an exception to the requirement of individualized suspicion when it stated that “a warrant is not required to establish the reasonableness of *all* government searches,”⁸¹ and explained that a search unsupported by probable cause could be justified “when special needs, beyond the normal need for law enforcement, make the warrant probable-cause requirement impracticable.”⁸²

The Court’s rhetoric in these cases seemed to convince commentators that the special needs exception was the gateway to being able to utilize the balancing test (and possibly justify a suspicionless search).⁸³ But there were also hints from the Court that the special needs exception was not the single category of permissible suspicionless searches. In the midst of deciding the drug testing cases, the Court revisited traffic checkpoints in *Michigan Department of State Police v. Sitz*, a civil case challenging a highway sobriety checkpoint program instituted by the Michigan State Police.⁸⁴ The plaintiffs argued the balancing test was not the proper method of analysis to decide the case, relying on *Von Raab* to argue that unless the government demonstrated a special need “‘beyond the normal need’ for criminal law enforcement,” probable cause or reasonable suspicion was required and a balancing analysis was inappropriate.⁸⁵ Rather than finding or even suggesting that such a special need was present, which seemed rather easy to do,

⁸¹ *Id.* at 653.

⁸² *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

⁸³ See Butterfoss, *supra* note 6, at 458-59 nn.207 & 211.

The Court currently has developed a framework that consists of two steps. First, it decides whether to analyze an intrusion under the Warrant or Reasonableness Clause. The Court has struggled to find the proper fulcrum between the two clauses, but currently asks whether a “special governmental need” exists that justifies departure from the Warrant Clause.

Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1796 (1994); see also DRESSLER, *supra* note 46, at § 19.01, at 324 (“[The] ‘special needs’ exception . . . can plausibly subsume the [administrative search and traffic checkpoint] categories of cases.”).

⁸⁴ 496 U.S. 444 (1990).

⁸⁵ *Id.* at 450.

Justice Rehnquist provided a curt and cryptic response to the argument:

But it is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier [traffic checkpoint] decision in *United States v. Martinez-Fuerte*, that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas* are the relevant authorities here.⁸⁶

That is a particularly worrisome statement by Justice Rehnquist. Because it would have been so easy to find a special need in *Sitz*—highway safety—one wonders what his purpose was in avoiding the special needs framework. Despite all the language in the drug testing cases, and the citations to and reliance on non-drug testing cases (including traffic checkpoints) as if all within the same “special needs” exception or category, this statement seems to suggest separate categories.

In later cases, it is again unclear from the Court’s language whether “special needs” was the label for the “closely guarded category of permissible suspicionless searches” or whether it was just one of a number of exceptions under which suspicionless searches were permissible.⁸⁷ Despite the confu-

⁸⁶ *Id.* (internal citations omitted).

⁸⁷ Perhaps the most detailed effort to present a unified suspicionless search and seizure jurisprudence came from Justice Ginsburg in her opinion for the Court in *Chandler v. Miller*, 520 U.S. 305 (1997), a case involving drug testing of candidates for state-wide office in Georgia and the first case in which the Court struck down a government scheme of suspicionless searches. After explaining that the Fourth Amendment “generally bars officials from undertaking a search or seizure absent individualized suspicion,” Justice Ginsburg acknowledged that searches conducted without individualized suspicion had been upheld “in *certain limited circumstances*.” *Id.* at 308 (emphasis added) (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989)). She did not explicitly state how “certain limited circumstances” related to the “closely guarded category” and to “special needs,” but she referenced the full spectrum of suspicionless searches the Court had upheld—drug testing of workers, immigration and sobriety checkpoints, and “administrative inspections in closely regulated businesses”—before explaining the Court was striking down the Georgia scheme because it “does not fit within the closely guarded category of constitutionally permissible suspicionless searches.” *Id.* at 308-09. She initially did not mention “special needs.” Howev-

sion about whether there was a single category labeled “special needs” or whether several categories existed, the important point is that in every case the Court reaffirmed the basic principle that suspicionless searches are permissible *only in limited circumstances*.⁸⁸ For instance, in *City of Indianapolis v. Edmond*, a case involving a traffic checkpoint utilizing drug sniffing dogs to detect drug smugglers,⁸⁹ Justice O’Connor reiterated the rule that “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing,”⁹⁰ and then stated: “[W]e have recognized only limited circumstances in which the usual rule does not apply.”⁹¹ *Ed-*

er, later in her opinion, as she began her analysis of the issues, she reiterated that “particularized exceptions to the main rule [of individualized suspicion] are sometimes warranted based on ‘special needs, beyond the normal need for law enforcement.’” *Id.* at 313-14 (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989)). It is unclear whether Justice Ginsburg was using “special needs” interchangeably with the “limited circumstances” she had referred to earlier in her opinion.

In analyzing the drug-testing scheme before the Court, Justice Ginsburg relied exclusively on the special needs exception. *Chandler*, 520 U.S. at 317-18 (“Our guides remain *Skinner*, *Von Raab*, and *Vernonia*.”). Chief Justice Rehnquist noted this attempt at a unifying theme in his dissent: “Today’s opinion speaks of a ‘closely guarded’ class of permissible suspicionless searches [and seizures] which must be justified by a ‘special need.’” *Id.* at 325. (Rehnquist, C.J., dissenting). He didn’t agree or disagree with the notion of a single category or class; he disagreed with the meaning the Court gave to “special needs” as a demonstrated problem versus simply a government interest. *See id.*

⁸⁸ *E.g.*, *O’Connor v. Ortega*, 480 U.S. 709, 722 (1987) (“[A]lthough ‘both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.’” (quoting *New Jersey v. T.L.O.*, 489 U.S. 325, 340 (1985))); *see United States v. Kincade*, 379 F.3d 813, 853 (9th Cir. 2004) (“And whether one attempts to manufacture neat categories with clever names or groups them all into one large category of cases involving ‘special needs,’ the overriding lesson is clear: when the government wishes to search individuals in order to obtain evidence of ordinary criminal wrongdoing, some level of individualized suspicion is required.”) (internal citations omitted).

⁸⁹ 531 U.S. 32, 34-35 (2000).

⁹⁰ *Id.* at 37.

⁹¹ *Id.* As examples, Justice O’Connor specified “certain regimes of suspicionless searches where the program was designed to serve ‘special needs, beyond the normal need for law enforcement’”; appropriately limited searches for “certain administrative purposes”; and brief, suspicionless seizures of motorists at fixed Border Patrol checkpoints and at sobriety checkpoints. *Id.* (internal citations omitted). Unlike Justice Ginsburg, who listed several “limited circumstances” (not including special needs) and then seemed to label the group as “special needs,” Justice O’Connor demoted special

mond is best known for imposing a “primary purpose” test for roadblocks—their primary purpose cannot be “ordinary crime control”⁹²—but for our purposes, the case is important because whether or not the “limited circumstances” to which it refers are all within one exception (special needs) or special needs is just one of the limited circumstances, the point remains: suspicionless searches are permissible *only in limited circumstances*.

This basic principle was reaffirmed in a later case, *Ferguson v. City of Charleston*, a case involving drug testing of pregnant women receiving prenatal care at a public hospital.⁹³ *Ferguson* continued the confusion between the “special needs as the label for limited circumstances” versus “special needs as one of the limited circumstances” by referring first to the “closely guarded category of constitutionally permissible suspicionless searches,”⁹⁴ and later to the “closely guarded category of special needs.”⁹⁵ Again, however, despite the confusion, *Ferguson* reaffirms the basic principle that suspicionless searches are permissible *only in limited circumstances*.⁹⁶

In light of the Court’s consistent reaffirmation of the basic principle that suspicionless searches are permissible only in limited circumstances, it was rather shocking when the Court decided a pair of cases involving searches of probationers and parolees and declared that, contrary to all its prior declarations, suspicionless searches are in fact permissible not only in

needs to one of the limited circumstances, seemingly substituting special needs for the drug testing cases included by Justice Ginsburg.

⁹² *Id.* at 44.

⁹³ 532 U.S. 67 (2001).

⁹⁴ *Id.* at 77 (“[T]his case differs from the four previous cases in which we have considered whether comparable drug tests ‘fit within the closely guarded category of constitutionally permissible suspicionless searches.’” (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997))).

⁹⁵ *Id.* at 84 (“[T]his case simply does not fit within the closely guarded category of ‘special needs.’”).

⁹⁶ And I would argue, those limited circumstances at this point had been pretty well defined by the Court, as expressed by Justice O’Connor: special needs (drug testing, school searches, probation searches); appropriately limited administrative searches; and brief traffic checkpoints with a primary purpose other than ordinary crime control.

limited circumstances or when justified by a special need, but as a matter of “general Fourth Amendment principles.”

II. NOT SO SPECIAL ANYMORE?

The first of the two probationer/parolee cases where the Court suggested a dramatic change in its suspicionless search jurisprudence was *United States v. Knights*.⁹⁷ *Knights* involved a warrantless search of a probationer’s home.⁹⁸ It was not a “probation search” in the sense that it was to ensure compliance with conditions of probation. Rather, the searching officer was investigating several incidents of property damage to utility company property.⁹⁹ The officer investigated the property damage incidents in typical fashion including surveillance that practically confirmed the defendant’s involvement, but thought a search of the defendant’s home would be useful to his investigation.¹⁰⁰ Aware of the probation condition, the officer searched the home based on what all parties assumed was reasonable suspicion, but not probable cause, and without a warrant.¹⁰¹ In essence, the officer’s search was a typical search for evidence of a crime that took advantage of the probation condition, a fact the lower court relied on to rule the search illegal.¹⁰² Even if the search could qualify as a “special needs” exception search, it seems vulnerable to a challenge because it was for “purposes of ordinary crime control,” a purpose which the Court had deemed unlawful in *Edmond*.¹⁰³

It is worth remembering at this point that the original special needs case—the case in which a majority of the Court

⁹⁷ 534 U.S. 112 (2001).

⁹⁸ *Id.* at 115.

⁹⁹ *Id.* at 114-15.

¹⁰⁰ *Id.* at 115.

¹⁰¹ *Id.* at 115-16.

¹⁰² *Id.* at 116. The district court granted *Knights*’s motion to suppress “on the ground that the search was . . . ‘investigatory’ rather than ‘probationary.’” *Id.* The Ninth Circuit Court of Appeals affirmed. *Id.*

¹⁰³ See *supra* note 92 and accompanying text (explaining that, in *Edmond*, the Court held that when the primary purpose is ordinary crime control, roadblocks do not fall within the special needs exception and thus violate the Fourth Amendment in the absence of another recognized exception).

adopted Justice Blackmun's terminology for the first time—was *Griffin v. Wisconsin*, which involved the search of a probationer's home.¹⁰⁴ In light of that fact, the defendant's argument, as described by Justice Rehnquist, that “a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin*—*i.e.*, a ‘special needs’ search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions,” seems fairly persuasive.¹⁰⁵ But it failed to persuade Justice Rehnquist:

This dubious logic—that an opinion *upholding* the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*'s express statement that its “special needs” holding made it “unnecessary to consider whether” warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.¹⁰⁶

Not only did Justice Rehnquist refuse to analyze the search as a special needs case, he also felt it unnecessary to decide whether Knights's consent to the probation conditions authorized the search.¹⁰⁷ In Justice Rehnquist's view (for a unanimous court no less) any special needs or consent analysis was unnecessary “because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances,’ with the probation search condition being a salient circumstance.”¹⁰⁸

The immediate impact on the case before the Court was that the officer's purpose became irrelevant and was no longer

¹⁰⁴ See *supra* notes 61-64 and accompanying text (explaining that a majority of the Court adopted Justice Blackmun's “special needs” rubric in *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

¹⁰⁵ *Knights*, 534 U.S. at 117.

¹⁰⁶ *Id.* at 117-18 (quoting *Griffin*, 483 U.S. at 878, 880).

¹⁰⁷ *Id.* at 118 (“We need not decide whether Knights'[s] acceptance of the search condition constituted consent in the *Schneekloth* sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances’ with the probation search condition being a salient circumstance.” (internal citation omitted)).

¹⁰⁸ *Id.* (internal citation omitted).

an obstacle to the constitutionality of the search. As Justice Rehnquist explained:

Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose. With the limited exception of some special needs and administrative search cases, “we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.”¹⁰⁹

But the larger impact of the Court’s adoption of its “general Fourth Amendment approach” to assess the search scheme at issue in *Knights* is to broaden considerably the individuals and groups that may be subjected to suspicionless searches.¹¹⁰ Apparently ordinary citizens no longer can lay claim to the general rule requiring individualized suspicion unless the search falls within a closely guarded category or certain limited circumstances. “Ordinary Fourth Amendment analysis” apparently can justify suspicionless searches.¹¹¹ Of course, while ordinary citizens may be subjected to the same analysis, that does not mean the result will be the same. A “salient feature” (to use the Court’s words) is missing: ordinary citizens are not on probation.¹¹² And being subject to probation conditions was a very salient circumstance under the “totality of the circumstances” according to the Court.¹¹³ The Court held that the pro-

¹⁰⁹ *Id.* at 122 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000)).

¹¹⁰ *United States v. Kincade*, 379 F.3d 813, 864 (9th Cir. 2004) (Reinhart, J., dissenting).

¹¹¹ Admittedly, the search at issue in *Knights* was not a suspicionless search, but that provides little comfort. First, the scheme under which the search was authorized by the State also permitted suspicionless searches, and second, the search in *T.L.O.* was based on reasonable suspicion, but soon led to suspicionless search schemes being upheld in schools utilizing the same analysis the Court used to justify the search at issue in *T.L.O.*

¹¹² *Kincade*, 379 F.3d at 835-36 (adopting the “ordinary Fourth Amendment totality of the circumstances” approach for convicted felons subject to DNA testing, but suggesting that the “general citizenry” would be treated differently).

¹¹³ *Knights*, 534 U.S. at 120-21 (noting that the fact that probationers are “more likely than the ordinary citizen to violate the law” strengthens the State’s general interest in “apprehending violators of the criminal law” in this case (citation omitted)).

bation conditions “significantly diminished Knights’[s] reasonable expectation of privacy.”¹¹⁴ It expressly reserved the question whether the probation condition “so diminished, or completely eliminated, Knights’[s] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment,”¹¹⁵ but one does not have to be much of a cynic to believe such a holding was not far behind. Recall the Court’s caution in *T.L.O.* that “[w]e do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.”¹¹⁶ The answer, that individualized suspicion was not an essential element for searches by school authorities, was not long in coming.¹¹⁷ Nor was it long in coming in the probationer/parolee case.¹¹⁸

Five years after *Knights*, the Court decided *Samson v. California*, a case involving the suspicionless search of a parolee on the street.¹¹⁹ In *Samson*, the officer stopped the defendant because he thought Samson was subject to an outstanding warrant.¹²⁰ When that information proved incorrect, the officer searched him anyway because he was aware Samson was on parole and subject to parole conditions.¹²¹ Justice Thomas started his analysis in the case by stating, “[U]nder our general Fourth Amendment approach’ we ‘examin[e] the totality of

¹¹⁴ *Id.* at 120.

¹¹⁵ *Id.* at 120 n.6.

¹¹⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985).

¹¹⁷ *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (explaining that while the school search approved in *T.L.O.* was based on individualized suspicion, the *T.L.O.* Court also “explicitly acknowledged” that “the Fourth Amendment imposes no irreducible requirement of such suspicion” (quoting *T.L.O.*, 469 U.S. at 342)). In fact, not only did the Court determine that suspicionless searches in schools were acceptable, but Justice Scalia asserted that “testing based on ‘suspicion’ of drug use would not be better, but worse.” *Vernonia*, 515 U.S. at 663-64.

¹¹⁸ *See Samson v. California*, 547 U.S. 843, 846 (2006) (holding that a suspicionless search of a parolee did not violate the Fourth Amendment); *see also United States v. Kincade*, 379 F.3d 813, 829 (9th Cir. 2004) (predicting that the application of *Knights* would not be limited to searches supported by individualized suspicion).

¹¹⁹ *Samson*, 547 U.S. at 846-47.

¹²⁰ *Id.* at 846.

¹²¹ *Id.* at 846-47.

the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment."¹²² He explained, "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"¹²³ Relying again on the salient circumstance of parole (which presents a lower expectation of privacy than even probation according to the Court¹²⁴), the Court held, "Examining the totality of the circumstances pertaining to petitioner's status as a parolee, 'an established variation on imprisonment,' including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate."¹²⁵ There was some debate among the Justices whether that statement meant the Court had found that parolees—like prisoners—have *no* reasonable expectation of privacy and therefore no Fourth Amendment rights.¹²⁶ But for our purposes, the more important debate was the one concerning whether the Court could uphold a suspicionless search using "ordinary Fourth Amendment analysis" or whether it was required to find a special need and utilize the special needs exception analysis.¹²⁷

In dissent, Justice Stevens insisted a finding of special need was required:

[O]ur Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a

¹²² *Id.* at 848 (alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

¹²³ *Id.* (quoting *Knights*, 534 U.S. at 118-19).

¹²⁴ *Id.* at 850.

¹²⁵ *Id.* at 852 (internal citation omitted).

¹²⁶ *Id.* at 850 n.2 ("Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights."); *id.* at 861-62 (Stevens, J., dissenting) ("[T]he Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether. The logic apparently is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy.").

¹²⁷ See *infra* text accompanying notes 128-37.

search supported by neither individualized suspicion nor “special needs” is nonetheless “reasonable.”

. . . While individualized suspicion “is not an ‘irreducible’ component of reasonableness” under the Fourth Amendment, the requirement has been dispensed with only when programmatic searches were required to meet a “special need” . . . divorced from the State’s general interest in law enforcement.”¹²⁸

And later in his opinion he declared, “Never before have we plunged below that floor absent a demonstration of ‘special needs.’”¹²⁹

Perhaps more important than whether the Court had abandoned its established approach to suspicionless searches was what was lost by not analyzing the case as a special needs case. Justice Stevens explained:

In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor’s unfettered discretion. Here, by contrast, there are no policies in place—no “standards, guidelines, or procedures,”—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.¹³⁰

Justice Stevens believed the requirement that the search not be for purposes of ordinary crime control made the search in *Samson* illegal, and he further believed that was the precise reason the majority avoided utilizing the special needs exception:

¹²⁸ *Samson*, 547 U.S. at 858 (Stevens, J., dissenting) (internal citations omitted) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Ferguson v. Charleston*, 532 U.S. 67, 79 (2001)).

¹²⁹ *Id.* at 864.

¹³⁰ *Id.* at 860-61 (internal citations omitted) (quoting *Delaware v. Prouse*, 440 U.S. 648, 650 (1979)) (citing *Prouse*, 440 U.S. at 654-55; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)).

Not surprisingly, the majority does not seek to justify the search of petitioner on “special needs” grounds. . . . *Griffin*, after all, involved a search *by a probation officer* that was supported by *reasonable suspicion*. The special role of probation officers was critical to the analysis

It is no accident, then, that when we later [in *Knights*] upheld the search of a probationer *by a law enforcement officer* (again, based on reasonable suspicion), we forwent any reliance on the special needs doctrine.¹³¹

Justice Thomas responded to Justice Stevens’s claim that the Court had broken new ground:

That simply is not the case. . . . [W]hile this Court’s jurisprudence has often recognized that “to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,” we have also recognized that the “Fourth Amendment imposes no irreducible requirement of such suspicion.” Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, *we have never held that these are the only limited circumstances* in which searches absent individualized suspicion could be “reasonable” under the Fourth Amendment.¹³²

The last statement by Justice Thomas seems a bit disingenuous. Although it is fair to say that when the Court says such searches are permissible *only in limited circumstances* the Court is free to add additional categories or circumstances, the statement certainly suggests that the route required to uphold new types of suspicionless searches is to add to the limited categories, not to simply abandon the “limited circumstances” rule and permit such searches under “general Fourth Amendment” analysis.

The likely result of the Court’s shift to “general Fourth Amendment analysis” in suspicionless search cases is a much

¹³¹ *Id.* at 858-60.

¹³² *Id.* at 855 n.4 (majority opinion) (emphasis added) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)).

less constrained “balancing test” approach.¹³³ There will be less concern for whether “measures to protect against the state actor’s unfettered discretion” are in place (which the dissent claims is an indispensable requirement of “special needs” searches),¹³⁴ and there will be no restriction against the primary purpose of the search being for law enforcement purposes. Justice Thomas believed “California’s prohibition on ‘arbitrary, capricious, or harassing’ searches” addressed the first concern.¹³⁵ But the search of Samson seems pretty arbitrary. Samson was stopped and searched on the authority of an outstanding warrant, a warrant the officer discovered did not exist, but the officer searched him anyway.¹³⁶ Justice Thomas explained that “[u]nder California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee.”¹³⁷ Of course, the lawfulness of a search of someone *not* on parol is not the issue; the issue is whether a search of a parolee is arbitrary, capricious, or harassing. Justice Thomas’s opinion suggests a remarkably “hands off” approach to suspicionless searches, an activity that used to be considered an extraordinary action by government officials. Attempting to discern what this shift in the Court’s suspicionless search jurisprudence means for children and the Fourth Amendment brings us to *Safford Unified School District #1 v. Redding*.¹³⁸

¹³³ *United States v. Kincade*, 379 F.3d 813, 864 (9th Cir. 2004) (Reinhart, J., dissenting) (“The danger in the plurality’s approach lies in its willingness to apply the totality of the circumstances test to uphold law enforcement searches where no suspicion at all exists. Under such an approach, all of us would inevitably have our liberty eroded when our privacy interests are balanced against the “monumental” interests of law enforcement.”).

¹³⁴ *Samson*, 547 U.S. at 860 (Stevens, J., dissenting).

¹³⁵ *Id.* at 856.

¹³⁶ *Id.* at 846-47.

¹³⁷ *Id.* at 856 n.5 (citing *People v. Sanders*, 73 P.3d 496, 505-06 (Cal. 2003); Brief for United States as Amicus Curiae Supporting Respondent at 20, *Samson v. California*, 547 U.S. 843 (2006) (No. 04-9728)).

¹³⁸ 129 S. Ct. 2633 (2009).

III. SCHOOL SEARCHES: BACK TO THE FUTURE?

One of the most curious things about *Redding* is that the words “special need” do not appear in any of the opinions.¹³⁹ In contrast, those words appeared seven times in the majority opinion alone in *Earls*,¹⁴⁰ and another six times in Justice Ginsburg’s dissent.¹⁴¹ It seems unlikely that many commentators would have predicted prior to *Redding* that a school search case would be decided without using the term “special needs.” Perhaps the term—and the exception—were not used because the case simply required a straightforward application of the seminal school search case, *T.L.O.*,¹⁴² and a suspicionless search was not involved.¹⁴³ But the same could be said of *Knights*, the case involving a search of a probationer’s home based on reasonable suspicion.¹⁴⁴ That case simply required a straight forward application of a seminal probationer’s search

¹³⁹ *Id.*

¹⁴⁰ *Bd. of Educ. v. Earls*, 536 U.S. 822, 827, 829, 835, 836 (2002).

¹⁴¹ *Id.* at 843, 844, 854 (Ginsburg, J., dissenting).

¹⁴² *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part). Justice Stevens explained:

In *New Jersey v. T.L.O.*, the Court established a two-step inquiry for determining the reasonableness of a school official’s decision to search a student. First, the Court explained, the search must be “justified at its inception” by the presence of “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.” Second, the search must be “permissible in its scope,” which is achieved “when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*”

Nothing the Court decides today alters this basic framework. It simply applies *T.L.O.* to declare unconstitutional a strip search of a 13-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear.

Id. (internal citations omitted).

¹⁴³ *Id.* at 2637 (majority opinion) (“The issue here is whether a 13-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials *acting on reasonable suspicion* that she had brought forbidden prescription and over-the-counter drugs to school.” (emphasis added)).

¹⁴⁴ *United States v. Knights*, 534 U.S. 112, 114 (2001) (“In this case, we decide whether a search pursuant to this probation condition, and *supported by reasonable suspicion*, satisfied the Fourth Amendment.” (emphasis added)).

case, *Griffin v. Wisconsin*,¹⁴⁵ and a suspicionless search was not involved.¹⁴⁶ Yet the Court in *Knights* at least addressed the special needs exception in order to eventually rule that it need not be applied in the case.

Could it be that the special needs exception so obviously does not apply in these situations that the parties do not even raise it? The United States as amicus in *Redding* raised the special needs exception for precisely that purpose, to distinguish the case from the special needs cases.¹⁴⁷ The United States argued that the special needs category applied only to searches “undertaken pursuant to a general program,” not to targeted searches based on suspicion like the one at issue in *Redding*.¹⁴⁸ If that is true, and school searches can be analyzed without resorting to the special needs exception, under what analytical framework should they be analyzed? Perhaps the best hint comes from Justice Thomas, the author of the majority opinion in *Samson v. California*, who insisted in that case that the suspicionless search of a parolee could be decided un-

¹⁴⁵ *See id.* at 118-19.

¹⁴⁶ *Id.* at 114.

¹⁴⁷ Brief for the United States as Amicus Curiae Supporting Reversal [Brief for United States] at 10-12, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479). The United States wrote:

This Court has recognized that the public school context is unique for Fourth Amendment purposes. . . .

The unique character of this context has resulted in two distinct Fourth Amendment frameworks. One framework, developed in *Vernonia* and *Earls*, applies to suspicionless searches that are conducted as part of a systematic drug testing program. As to those searches, the requirement of individualized suspicion is “impracticable” and therefore unnecessary; the Fourth Amendment inquiry instead turns on a balancing of the strength of the governmental interests furthered by the testing program against the intrusion on the subject’s legitimate expectation of privacy. That standard is inapplicable here because the search of respondent was not undertaken pursuant to a general program.

Because this case concerns a search based on individualized suspicion of wrongdoing, it is governed by the separate framework set forth in *New Jersey v. T.L.O.*

Id. (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-38 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-64 (1995)).

¹⁴⁸ *Id.* at 11-12.

der the Court's "general Fourth Amendment approach."¹⁴⁹ Justice Thomas and Justice Scalia recently have been advocating that Fourth Amendment analysis should begin by determining whether the search or seizure was legal or illegal under the common law at the time the Amendment was drafted.¹⁵⁰ Justice Scalia explained this approach in *Wyoming v. Houghton*, a case involving the scope of the automobile exception.¹⁵¹ Specifically, the issue was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband."¹⁵² In his majority opinion, Justice Scalia began his analysis of the constitutionality of the search by stating:

In determining whether a particular government action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.¹⁵³

Under this approach, the balancing test as a means of determining the reasonableness of a Fourth Amendment search or seizure takes a back seat to the common law at the time the Amendment was adopted.¹⁵⁴ Taken seriously, that approach would change dramatically the operation of the Fourth

¹⁴⁹ 547 U.S. 843, 848 (2006).

¹⁵⁰ See *infra* note 151 and accompanying text.

¹⁵¹ 526 U.S. 295 (1999). In support of this proposition, Justice Scalia cited Justice Thomas's majority opinion in *Wilson v. Arkansas*, 514 U.S. 927 (1995), which established that the "knock and announce" rule was of constitutional magnitude, based largely on the conclusion that this was the recognized rule "at the time of the framing." *Houghton*, 526 U.S. at 299 (citing *Wilson*, 514 U.S. at 934).

¹⁵² *Houghton*, 526 U.S. at 297.

¹⁵³ *Id.* at 299-300 (citing *Wilson*, 514 U.S. at 931; *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)).

¹⁵⁴ *Houghton*, 526 U.S. at 299-300.

Amendment in schools, essentially eliminating the current protections the Amendment provides. Justice Thomas was quite clear about this in *Redding*.¹⁵⁵ In his concurring and dissenting opinion, he set forth what he seemingly envisions as a “general Fourth Amendment approach” as it relates to school searches:

[T]he most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.

“[I]n the early years of public schooling,” courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to “command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.” So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms.¹⁵⁶

And he was equally clear what this approach meant for the search at issue in *Redding*:

If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have “immunity from the strictures of the Fourth Amendment” when it comes to searches of a child or that child’s belongings.¹⁵⁷

In Justice Thomas’s view, if parents and children want protection from rules or actions by school officials that they (and like-

¹⁵⁵ *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2655-56 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (“If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. . . . Parents have ‘immunity from the strictures of the Fourth Amendment’ when it comes to searches of a child or that child’s belongings.”).

¹⁵⁶ *Id.* at 2655 (internal citations omitted).

¹⁵⁷ *Id.* at 2656.

ly others) consider unreasonable, they need to look elsewhere than the Fourth Amendment for relief:

Restoring the common-law doctrine of *in loco parentis* would not, however, leave public schools entirely free to impose any rule they choose. “If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.”¹⁵⁸

He expressed a similar view concerning the role of *in loco parentis* in determining the First Amendment rights of students in *Morse v. Frederick*,¹⁵⁹ the well-known “Bong Hits for Jesus” case, where he also asserted, “At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools.”¹⁶⁰

Of course, Justice Thomas stood alone in *Redding* and *Morse*, so perhaps school children are still secure in at least having some Fourth Amendment rights. But he is not alone in championing a return to *in loco parentis*. Justice Scalia “re-vived” *in loco parentis* in his opinion in *Vernonia*,¹⁶¹ and Justice

¹⁵⁸ *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring)).

¹⁵⁹ *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

¹⁶⁰ *Id.* at 416 n.6.

¹⁶¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995). In *Vernonia*, Justice Scalia wrote:

In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, “is not entirely ‘consonant with compulsory education laws,’” and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses. But while denying that the State’s power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. “[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.” While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional “duty to protect,” we have acknowledged that for many purposes “school authorities ac[t] *in loco parentis*,” with the power and indeed

Breyer seemed warm to the idea in his concurring opinion in *Earls*.¹⁶²

Following *Vernonia, in loco parentis*, although rejected in *T.L.O.*, began creeping back into play. In an article published shortly after *Vernonia*, Professor Martin Gardner, another participant in this symposium, quoted three other scholars to make this suggestion:

Moreover, the *Acton* Court's recognition that "schoolmasters stand *in loco parentis*" to their students at least for "many purposes" signals that the Court is "struggling to empower

the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school.

Id. (alterations in original) (internal citations omitted). Justice Scalia carefully noted that while *T.L.O.* officially renounced the applicability of *in loco parentis* in public schools, the Court, only one year later, described the duties of public schools as remarkably similar to typical parental duties. *Id.* Thus, while not expressly challenging *T.L.O.*'s assertion that *in loco parentis* is no longer appropriate in the public school context, Justice Scalia suggested that the issue may be more complex; he suggested that school officials may act *in loco parentis* in certain circumstances and may be traditional state actors in others. *See id.* By pointing out this potential ambiguity, Justice Scalia has created an opportunity for a future partial reinstatement of *in loco parentis*.

¹⁶² *Bd. of Educ. v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring). Seven years after Justice Scalia noted a possible opportunity for the partial restoration of *in loco parentis*, Justice Breyer indicated modest support for such a move:

Today's public expects its schools not simply to teach the fundamentals, but "to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services," all in a school environment that is safe and encourages learning. The law itself recognizes these responsibilities with the phrase *in loco parentis*—a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions. A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead—with help from the State.

Id. (internal citations omitted). Justice Breyer justifies his support for a return to *in loco parentis* by asserting that the doctrine means no more than that the Fourth Amendment rights of children in public schools are different than the rights of adults, or the rights of those same children outside the public school context. *See id.* Arguably, Justice Breyer slightly mischaracterizes the nature of *in loco parentis*, but, nonetheless, he demonstrates that he is certainly persuadable on the issue.

school officials to effectively address rising threats to children” perhaps leading “down a path that promises to end the Fourth Amendment rights of students in public schools.”¹⁶³

Are we now heading down that path? Could a revival of *in loco parentis* result in an end to the Fourth Amendment rights of students in public schools? A few recent cases suggest it is a possibility and, at a minimum, demonstrate that the views of the few justices who have suggested *in loco parentis* still plays a role in school cases are influencing lower courts perhaps more than they should.

In *Lopera v. Town of Coventry*, a visiting boys soccer team was accused by football players of stealing iPods and cell phones from the locker room where several of the visiting players had used the bathroom prior to the game.¹⁶⁴ In response to these allegations made following the game, the coach of the visiting team searched the bags of the players and found no stolen items, but this failed to satisfy the football players or the adults and athletic director who had joined them at the visiting team’s bus.¹⁶⁵ As the coach discussed the situation with the athletic director, four police officers arrived with sirens activated and “boxed in” the bus.¹⁶⁶ To appease the officers and the crowd, the coach “consented” to a search of his players’ bags by the officers. A thorough search failed to turn up any of the missing items.¹⁶⁷

¹⁶³ Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373, 385 (2000) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); Bill O’Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71, 113; Jacqueline A. Stefkovich & Michael O’Brien, *Drug Testing of Students in Public Schools: Implications of Vernonia School District v. Acton for other Types of School-Related Drug Searches*, 113 EDUC. L. REP. 521, 538 (1996)).

¹⁶⁴ 652 F. Supp. 2d 203, 209 (D.R.I. 2009). Apparently, while inside, one of the visiting players noticed a security guard keeping an eye on them. *Id.*

¹⁶⁵ *Id.* (“When Coach Marchand exited the bus, the original group of twenty football players had grown to about fifty or sixty students and adults. The Coventry Athletic Director was also waiting. According to Coach Marchand, at this point the crowd was extremely vocal, shouting derogatory and racist remarks at his team and threatening not to disperse until the missing items were found.”).

¹⁶⁶ *Id.* at 210.

¹⁶⁷ *Id.*

Later, members of the soccer team filed suit alleging, in part, that the officers violated their Fourth Amendment right to be free from unreasonable searches.¹⁶⁸ Defendants conceded that no reasonable suspicion existed to justify the searches, but argued no constitutional violation occurred because the coach consented to the search *in loco parentis*.¹⁶⁹ They claimed qualified immunity and argued that it was reasonable for the officers on the scene to believe the coach, acting *in loco parentis* over the players, had at least apparent authority to consent to a search.¹⁷⁰ The plaintiffs responded that it was well settled that the *in loco parentis* doctrine cannot justify the search of a student.¹⁷¹ They acknowledged that at one time the law considered school officials as acting broadly *in loco parentis*, but argued that notion had become seriously outdated over the previous thirty years.¹⁷²

The district court responded to the plaintiffs' argument by conceding that "[i]n *T.L.O.*, the Supreme Court appeared to soundly reject the doctrine of *in loco parentis* as a rationale to justify a search of a student,"¹⁷³ but explained that the Supreme Court later added confusion when, in *Vernonia*, it "referred to the powers school officials have over students as custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."¹⁷⁴ And the district court cited *Redding* to note, "Recently, the Supreme Court passed up an opportunity to clarify whether the *in loco parentis* doctrine has any significance in school search cases."¹⁷⁵ The district court found it meaningful, however, that

¹⁶⁸ *Id.* at 209, 211.

¹⁶⁹ *Id.* at 212.

¹⁷⁰ *Id.* at 212-13.

¹⁷¹ *Id.* at 213.

¹⁷² *Id.*

¹⁷³ *Id.* ("In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985))).

¹⁷⁴ *Id.* at 213-14 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

¹⁷⁵ *Id.* at 214 (quoting *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2637 (2009)).

Justice Thomas had urged the Supreme Court to adopt *in loco parentis* as the standard to govern all school search cases, but that the majority declined to address his suggestion.¹⁷⁶ That led the district court to conclude that, “[i]n light of the Supreme Court’s silence on the issue and the rather clear language of *T.L.O.*, a persuasive argument could be made that the *in loco parentis* doctrine serves no purpose in cases involving the Fourth Amendment rights of public school students.”¹⁷⁷

Nevertheless, the court pointed to Justice Thomas’s statement in *Morse v. Frederick* that “at least nominally the Supreme Court continues to recognize the applicability of the *in loco parentis* doctrine to public schools”¹⁷⁸ to ultimately rule that “based on the full record of commentary on the issue, this Court cannot conclude that [the notion that *in loco parentis* is outdated] was a clearly established principle of constitutional law in 2006.”¹⁷⁹ The district court said that such a conclusion was “not possible without ignoring the Supreme Court’s statements in *Vernonia* and *Frasier* [sic],”¹⁸⁰ and explained that a review of circuit court cases also failed to clarify the issue.¹⁸¹

¹⁷⁶ *Id.* at 214 n.6 (“Justice Thomas’s partial dissent urged the Court to adopt an *in loco parentis* standard to govern all school search cases, a point the majority declined to address.”). The district court also noted that Justice Thomas “advocat[ed] for a ‘return to the common-law doctrine of *in loco parentis*’ and a ‘complete restoration’ of the doctrine.” *Id.* at 214 n.6 (quoting *Redding*, 129 S. Ct. at 2646, 2655 (Thomas, J., concurring in the judgment in part and dissenting in part)).

¹⁷⁷ *Id.* at 214.

¹⁷⁸ *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 416 n.6 (2007) (Thomas, J., concurring)).

¹⁷⁹ *Id.* at 214.

¹⁸⁰ *Id.* This reference to *Frasier* [sic] was to *Bethel School District No. 403 v. Fraser*, which the *Vernonia* Court quoted for the proposition that “for many purposes school authorities act *in loco parentis* with the power and indeed the duty to inculcate the habits and manners of civility.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 684 (1986) (citation omitted)).

¹⁸¹ *Lopera*, 652 F. Supp. 2d at 214. The district court cited nine cases from six different circuits offering some level of support for the viability of the *in loco parentis* doctrine. *Id.* at 214-15 (citing cases from the Fifth, Second, Third, First, Sixth, and Fourth Circuits). The Court contrasted this with a citation to a case from the Second Circuit stating that “the Supreme Court has rejected the notion that public schools generally act *in loco parentis* in their dealings with students.” *Id.* at 215 (quoting *Tenenbaum v. Williams*, 193 F.3d 581, 594 n.9 (2d Cir. 1999)).

According to the district court, “Courts have bandied about the phrase to such an extent that it is far from clear exactly what role the *in loco parentis* doctrine plays in a Fourth Amendment analysis, particularly in the specific factual context presented here.”¹⁸² In the end, the district court granted the defendants’ motion for summary judgment on the basis of qualified immunity.¹⁸³ The court carefully explained in a footnote that it was not holding that the coach had the authority to consent by virtue of *in loco parentis* authority, but instead that “the case law on the limits of a school official’s *in loco parentis* authority in the specific factual context of this case is not sufficiently clear so that a reasonable police officer would be on notice that searching players based on the consent of their coach is unconstitutional.”¹⁸⁴ The district court further concluded that “[w]hat is clear, however, is that Fourth Amendment rights ‘are different in public schools than elsewhere; [and] the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”¹⁸⁵

The result in *Lopera* suggests that at some level *in loco parentis* has vitality in the school search setting to justify searches (or at least grant qualified immunity to officials carrying out searches) that otherwise might be found unconstitutional. The possibility of additional searches being upheld as constitutional will be amplified if courts stop utilizing the special needs exception. This is so because despite early criticism that the special needs exception opened the door to searches being found constitutional, it now appears the special needs exception, in contrast to the Court’s “general Fourth Amend-

¹⁸² *Id.* at 215.

¹⁸³ *Id.* (“[I]t cannot be said that the law in 2006 was clearly established concerning whether a high school coach chaperoning his players during an away game could or could not consent to a search of his players by police *in loco parentis*. What is clear, however, is that Fourth Amendment rights ‘are different in public schools than elsewhere; [and] the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.’ Therefore, because the law was not clearly established concerning Coach Marchand’s authority to consent to the search, the Defendant officers were entitled to rely on the consent.” (alteration in original) (quoting *Vernonia*, 515 U.S. at 656)).

¹⁸⁴ *Id.* at 215 n.7.

¹⁸⁵ *Id.* at 215 (alteration in original) (quoting *Vernonia*, 515 U.S. at 656).

ment approach,” has a limiting effect on the range of government conduct justified under the Fourth Amendment.

An example of how application of the special needs exception can constrain a court from upholding a search is *Spencer v. City of Bay City*.¹⁸⁶ *Spencer* was a challenge to the constitutionality of a Bay City, Michigan ordinance that allowed police officers with reasonable suspicion to demand a breath test from individuals under age twenty-one without obtaining a search warrant.¹⁸⁷ The City defended the ordinance by asserting the special needs exception, contending that the main purposes of the ordinance were “to stem the pernicious trend of increased under-age drinking, and to protect the public from the damage that can be caused by young people under the influence of alcohol.”¹⁸⁸ The district court agreed that a strong interest existed in preventing “‘harms associated with the use of alcohol by persons lacking the maturity necessary to do so responsibly’ and ‘to reduce underage drinking and, by extension, the fatalities and serious injuries caused by teenage drunk driving,’”¹⁸⁹ but rejected the City’s argument that the search was lawful under the special needs exception because it determined that the primary purpose of the search was to gather evidence to enforce criminal laws.¹⁹⁰

¹⁸⁶ 292 F. Supp. 2d 932 (E.D. Mich. 2003).

¹⁸⁷ *Id.* at 934.

¹⁸⁸ *Id.* at 941.

¹⁸⁹ *Id.* (quoting *State v. Stark (In re Stark)*, 645 N.W.2d 340, 342 (Mich. Ct. App. 2002)).

¹⁹⁰ *Id.* at 941-42. To reach this conclusion, the district court compared the ordinance to *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and the municipal hospital’s practice of conducting drug tests on urine samples of pregnant women at issue in that case. *Id.* at 942. In *Ferguson*, the hospital conducted the testing in an effort to identify pregnant women using illegal drugs and provide them with substance abuse treatment; however, the hospital also turned the results over to the police. *Ferguson*, 532 U.S. at 82. The Supreme Court determined that the primary purpose of the drug testing was ordinary law enforcement; thus, despite its additional acceptable purpose (identifying pregnant women in need of substance abuse treatment), the testing violated the Fourth Amendment and was not saved by the special needs exception. *Id.* at 82-84. In making its comparison, the *Spencer* Court explained that, “[even though] there may also be another purpose behind the law [reducing under-age drinking], which might be characterized as a ‘special need,’ [that purpose] does not shelter the ordinance from demands of the Fourth Amendment’s warrant requirement.” *Spencer*, 292 F. Supp. 2d at 941-42.

Arguably, had the Court been free to apply an “ordinary Fourth Amendment approach,” it might have found that the significant government interest it was willing to recognize—that of preventing “harms associated with the use of alcohol by persons lacking the maturity necessary to do so responsibly” and “reduc[ing] underage drinking and, by extension, the fatalities and serious injuries caused by teenage drunk driving”¹⁹¹—outweighed the intrusion on underage individuals under the statutory scheme. But the court felt constrained under the special needs exception precedent (in particular *Ferguson v. City of Charleston*) to find the scheme unconstitutional.¹⁹²

Confusion about the Supreme Court’s approach to suspicionless searches—whether to apply special needs analysis or general Fourth Amendment analysis—is also evident in the DNA sample cases. Courts are so confused about which test to apply that some are applying both. A recent example is *Friedman v. Boucher*,¹⁹³ a case in which a DNA swab was taken from a pretrial detainee in hopes of solving a cold case.¹⁹⁴ The detainee was a prior sex offender, but at the time of the pretrial detention in question on unrelated charges, he was under no restrictions or conditions from his prior sex offense conviction.¹⁹⁵ He brought suit alleging the forcible taking of his DNA violated his Fourth Amendment right to be free from unreasonable searches.¹⁹⁶ The district court granted summary judgment in favor of the government officials on the basis of qualified immunity.¹⁹⁷

The Ninth Circuit held the dismissal of the lawsuit was improper, ruling that the suspicionless search of the detainee could not be upheld under the special needs exception because

¹⁹¹ *Spencer*, 292 F. Supp. 2d at 941 (quoting *Stark*, 645 N.W.2d at 342).

¹⁹² See *supra* notes 190-91 and accompanying text.

¹⁹³ 580 F.3d 847 (9th Cir. 2009).

¹⁹⁴ *Id.* at 850-51. Taking the swab apparently did not result in the detainee being implicated in any cold case. *Id.* at 851-52.

¹⁹⁵ *Id.* at 851.

¹⁹⁶ *Id.* at 852.

¹⁹⁷ *Id.* at 851.

the purpose was “law enforcement.”¹⁹⁸ Although in the majority’s view the search was improper under the special needs exception due to its law enforcement purpose, the majority addressed the possibility that the search might be justified under the general Fourth Amendment approach, ultimately rejecting that argument as well because it determined the *Samson* case could not be used as precedent to uphold a search of a pretrial detainee rather than a parolee.¹⁹⁹

The dissenting judge would have affirmed the district court and dismissed the case by finding qualified immunity utilizing a “general Fourth Amendment approach.”²⁰⁰ Under that approach, the law enforcement purpose did not prevent the search from being lawful, and the lower expectation of privacy of a pretrial detainee meant the search was (at least arguably) permissible under the balancing test or totality of the circumstances test.²⁰¹

The result reached by the dissent suggests a scenario where a search that is unconstitutional under the special needs exception is nevertheless permissible under general Fourth Amendment analysis. That seems backwards. The Court’s suspicionless search jurisprudence began with the Court trying to determine which searches that would be unconstitutional under traditional Fourth Amendment analysis (the warrant approach) might nevertheless be permissible because they came within a closely guarded category (including special needs) allowing the Court to forgive the usual requirement of individualized suspicion.²⁰² Now, we seem to be in a strange place where

¹⁹⁸ *Id.* at 853 (“The ‘special needs’ exception is limited to ‘important non-law enforcement purposes.’ The only government interest asserted by Nevada in taking Friedman’s DNA was to help solve ‘cold cases.’ Solving crimes is clearly a normal law enforcement function. Because the ‘special needs’ exception applies only to non-law enforcement purposes, and the State’s interest here is the use of data for purely law enforcement purposes, the ‘special needs’ exception is inapplicable.” (quoting *United States v. Kincaid*, 379 F.3d 813, 823 (9th Cir. 2004))).

¹⁹⁹ *Id.* at 857-58.

²⁰⁰ *Id.* at 862, 866 (Callahan, J., dissenting).

²⁰¹ *Id.* at 864-65.

²⁰² *See, e.g.*, *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (“[I]t is settled . . . that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search war-

the special needs exception has the opposite effect: being within the special needs exception may prevent a search from being upheld rather than having its original effect of permitting the Court to find an otherwise impermissible search justified.

IV. WHERE ARE WE NOW?

The Court needs to delineate when it is appropriate to simply use “general Fourth Amendment” analysis to analyze suspicionless search cases and to clarify the reach of the special needs exception and the necessity of finding a special need (or other limited circumstance) to justify a suspicionless search. Guidance as to exactly what “general Fourth Amendment” analysis constitutes also would be helpful.²⁰³ The door appears to be open to finding the school setting no longer demands the application of the special needs exception, but permits suspicionless searches by school officials to be upheld under the Court’s new “general Fourth Amendment approach.”²⁰⁴ That, in turn, frees the Court from some of the limits of that excep-

rant. . . . In particular, a warrant requirement is not appropriate when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. Or . . . [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.” (internal citations omitted)); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. . . . When faced with . . . special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (“[A] search must be supported, as a general matter, by a warrant issued upon probable cause [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.”).

²⁰³ The only guidance the Court has offered so far has been to equate “general Fourth Amendment” analysis with the totality of the circumstances test. For a discussion of the inappropriateness of using the totality of the circumstances test in this setting, see *United States v. Kincade*, 379 F.3d 813, 862 (9th Cir. 2004) (Reinhart, J., dissenting).

²⁰⁴ See *supra* notes 147-48 and accompanying text (discussing that the special needs exception may only apply to suspicionless searches conducted pursuant to a general program and not to *T.L.O.*-type searches based on individualized suspicion).

tion—e.g. the primary purpose test²⁰⁵ and demonstrating a significant need²⁰⁶—and may lead to suspicionless searches that currently may seem impermissible being upheld as constitutional.

Civil libertarians used to, and still do, lament the “standardlessness” of the special needs exception²⁰⁷ and the lack of protection it provides.²⁰⁸ Few would have speculated that the exception would ultimately protect us from something worse. This article suggests the special needs exception may have a second career as a constraint on government actions that implicate the Fourth Amendment. More likely, however, the exception will fade in importance as government activity that constitutes a search is upheld under the standardless and amorphous “general Fourth Amendment analysis.” It will not

²⁰⁵ *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that because a checkpoint program’s primary purpose was “indistinguishable from the general interest in crime control,” the checkpoints constituted a violation of the Fourth Amendment).

²⁰⁶ *Von Raab*, 489 U.S. at 665 (explaining that the warrant and probable cause requirements can be excused as long as there is a showing of special governmental needs beyond the normal needs of law enforcement).

²⁰⁷ See, e.g., Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 109 (2005) (“When considered as a whole . . . the Court’s special needs cases do not provide an overarching theory that clearly identifies which searches will satisfy the Court’s constitutional scrutiny.”); George M. Dery III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment “Special Needs” Balancing*, 40 ARIZ. L. REV. 73, 74 (1998) (“[I]n the surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstays.”); Michael S. Vaughn & Rolando V. del Carmen, *“Special Needs” in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. C.R. L.J. 203, 220 (1993) (“The ‘special needs’ exception is virtually without standards, hence lower courts can fashion an endless stream of exceptions under the guise of ‘special needs.’”).

²⁰⁸ See, e.g., Jennifer Y. Buffaloe, Note, *“Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 531 (1997) (“The special needs rationale is making it remarkably easy for the state to bypass the rigorous requirements of a warrant and probable cause in a large and growing number of contexts.”); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 90 (1992) (“[U]nless the Supreme Court realigns its Fourth Amendment jurisprudence to parallel the historical intent of the Fourth Amendment, citizens’ Fourth Amendment privacy protections will be subject to methodical erosion.”).

be surprising to discover that all of us, not just school children and parolees, are not so special anymore.