



The Case for Searches on Public Transportation

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THE CASE FOR SEARCHES ON PUBLIC TRANSPORTATION

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I. INTRODUCTION

A. Statement of the Problem

Due to increased concerns about security, transit agencies—of their own volition or at the request of federal, state, or local governments—may seek to institute search procedures analogous to those done in airports to ensure that explosives, biological weapons, etc., do not enter the transit system. While security screenings are routine in airports, they have to date been rare in the transit environment.¹ Given their open nature, their high volume of traffic, and the type of trips taken on them, transit systems present a very different security environment than airports. These differences give rise to significant legal questions concerning how to structure constitutional search policies.

1. Purpose

Developing a security screening procedure requires some basic determinations about the scope of the procedure: to search people or just packages, to conduct randomized searches or to search based on some sort of profile, to search at the entrances to facilities or within facilities, to search on transit vehicles, to search on the entire system or at selected stations, or to search as a routine matter or only during certain threat levels. These questions arise in both a legal context and an operational context. This paper addresses the former. The paper is meant to provide transit authorities a solid foundation for conducting more specific research and analyzing the legal viability of a specific type of search policy: one focused on security screening. From a legal standpoint, structuring such a search policy requires determining under what conditions it is constitutional to conduct the searches. It also requires determining what to do when individualized suspicion arises—particularly what to do in the event contraband of any type is uncovered and how to determine when the screening turns into a stop. The purpose of this paper is to review the legal authority that will illuminate those first instance questions rather than those relating to individualized suspicion.²

¹ The Massachusetts Bay Transportation Authority (MBTA) instituted a search policy during the 2004 Democratic Convention. Ferry operators have also instituted search policies in order to comply with the Federal Maritime Transportation Security Act of 2002, *See* I.I.K., *Transit Searches*, *infra* this report.

² In this context, individualized suspicion means a suspicion based on a reasonable belief that a particular person is actu-

2. Focus

The balance of the Introduction presents the historical background and context for the possible need for transit authorities to conduct searches and briefly addresses the legal background and context: basic Fourth Amendment³ requirements, particularly the warrant and individualized suspicion requirements, and the exceptions to those requirements. However, the primary focus for legal analysis of security screening is on the exceptions to the warrant and individualized suspicion requirements. Therefore, the main body of the paper discusses the categories of warrantless searches that provide likely legal models for analyzing transit searches,⁴ most notably cases involving airport security screening and other types of entry screening. After reviewing the applicable legal authority, the paper presents matters to consider in structuring transit search procedures.

3. Scope

The paper will address, or reference, the major federal cases relevant to such an analysis, as well as state authority that advances or differs from the federal cases.⁵ As with all such reviews, however, the paper

ally carrying—as opposed to fitting the profile of someone deemed likely to be carrying—a prohibited item.

³ Challenges to search requirements can also be framed in terms of First and Fifth Amendment issues. *See* plaintiff's briefs in *Gilmore v. Ashcroft*, 2004 WL 603530 (N.D. Cal.), posted at www.papersplease.org/gilmore/legal.html. However, the primary framework for the most analogous cases, those involving airport security and government building entry searches, has been search and seizure under the Fourth Amendment (and corresponding state constitutional provisions). This report will be limited to exploring that area of the law.

⁴ Throughout the report, the term “transit search,” unless otherwise indicated, is meant to refer to a search conducted for security screening purposes, and based upon an administrative procedure, whether randomized or targeted, not upon the individualized suspicion of the individual officer conducting the search. “Transit search” and “transit screening” may be used interchangeably.

⁵ The Fourth Amendment is a mandatory minimum for the states, and some states provide a greater degree of protection. *Cooper v. Cal.*, 386 U.S. 58, 62 (1967); *Sibron v. N.Y.*, 392 U.S. 40, 60–61 (1968); *Or. v. Haas*, 420 U.S. 714, 719 (1975). *See Gannon v. State*, 704 A.2d 272, 276 (Del. 1998). Many state constitutions provide bases for providing greater protection than the Fourth Amendment. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES*, § 1-3(b), at 1-9-1-10 (3d ed. 2000). The paper

provides a starting point for, not the final word on, legal evaluation of a specific policy in a given jurisdiction, particularly in terms of state cases. The paper does not cover all cases for any one jurisdiction. In evaluating the legality of search policy in a specific jurisdiction, further research in this changing—and extremely fact-dependent—area of law is advisable.

It is beyond the scope of this paper to render a legal opinion or recommend a specific search policy. However, the paper will raise questions that transit authorities may wish to examine in crafting their own policies.

A major issue for transit agencies is how to conduct searches effectively without interfering with service. This is an operational question. Practical issues⁶ connected with search policies are beyond the scope of this paper, as are issues surrounding legal liability for officials involved,⁷ tort claims generally,⁸ exclusion of evidence turned up by searches,⁹ removal statutes, and other issues relating to choice of venue.

reviews state constitutions and, to a lesser extent, state cases. See III., *State Constitutional Issues*, *infra* this report.

⁶ Another practical obstacle to transit searches is lack of manpower. For example, the Bay Area Rapid Transit (BART) police, according to the BART police chief, don't have the manpower to conduct searches. Fred Bayles, *Searches Unlikely on Transit Rails: Agencies Lack Funds to Follow Boston's Lead*, USA TODAY, June 16, 2004, at 3A. Posted at www.usatoday.com/usatoday/20040615/6286387s.htm.

⁷ For example, given the difficulty of determining whether a given search comports with the Fourth Amendment, it is possible for the officer who conducted a search that is ultimately ruled unconstitutional to receive qualified immunity. See *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). Also, where the state of law is unclear (or emerging) courts may decline to award damages. See, e.g., *State v. Gunwall*, 720 P.2d 808, 817 (Wash. 1986). A number of the cases cited in the article do discuss the issue of qualified immunity, e.g., *Norwood v. Bain*, 143 F.3d 843 (4th Cir. 1998).

⁸ See generally NATIONAL MATERIALS ADVISORY BOARD, AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES 39–41 (1996) (brief discussion about possible tort actions for personal injuries and privacy violations), posted at <http://books.nap.edu/books/0309054397/html/1.html>; MARK McNULTY, TREATMENT OF PRIVACY ISSUES IN THE PUBLIC TRANSPORTATION INDUSTRY (TCRP Legal Research Digest No. 14, 2000).

⁹ See generally Jeffrey Haningan Kuras et al., *Thirty-First Annual Review of Criminal Procedure: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 90 GEO. L.J. 1130 (2002); Christopher Mebane, *Note: Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 HOUS. L. REV. 177, 203–10 (2003) (discussion of pretext issues). See also Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 287–88 (2000). See generally Francis M. Doherty, *Admissibility of Evidence Not Related to Air Travel Security, Disclosed by Airport Security Procedures*, 108 A.L.R. FED. 658. In addition, many of the cases cited in this paper contain discussions about

4. Historical Background/Context

When a court reviews a transit security search, the dangers posed to transit systems will be relevant to the weight assigned to the government interest. Therefore, the background leading to the current environment in transit security is discussed below.

(A) *Increased Concern for Security on Public Transit/Other Security Efforts to Date.*—On March 20, 1995, the first large-scale terrorist use of a chemical weapon occurred when the Tokyo subway system suffered a sarin gas attack that killed more than 10 people and injured thousands.¹⁰ The attack caused transit agencies managing underground facilities to go on high alert.¹¹ Consequently, there was heightened concern for security at the 1996 Atlanta Olympics. The Metropolitan Atlanta Rapid Transit Authority (MARTA) had personnel check subway tracks, tunnels, and bridges to make sure they were clear.¹² Worldwide there were more than 195 terrorist attacks on surface transportation systems between 1997 and 2000.¹³

While these earlier attacks had already raised concerns about transit security, the attacks in New York and Washington, D.C., on September 11, 2001, of course elevated the importance of transit security.¹⁴ In general, since September 11, 2001, transit agencies have taken actions to increase physical security, as well as making efforts to train employees about suspicious packages and behavior and to sensitize passengers to these is-

the appropriateness of law enforcement procedure once individualized suspicion has been aroused. See, e.g., *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002).

¹⁰ Cf., U.S. GENERAL ACCOUNTING OFFICE, MASS TRANSIT: CHALLENGES IN SECURING TRANSIT SYSTEMS, GAO-02-1075T, at 7 (2002) (killed 11, injured over 5,000); BRIAN MICHAEL JENKINS & LARRY N. GERSTEN, PROTECTING PUBLIC SURFACE TRANSPORTATION AGAINST TERRORISM AND SERIOUS CRIME: CONTINUING RESEARCH ON BEST SECURITY PRACTICES 49 (MTI Report 01-07, 2001) (killed 12, injured thousands). Jenkins and Gersten provide an in-depth look at the Tokyo attack, pp. 49–65.

¹¹ Testimony of William W. Millar, President, American Public Transportation Association before the Subcommittee on Emergency Preparedness, Science, and Technology of the House Homeland Security Committee, July 26, 2005, at 5.

¹² William L. Waugh, Jr., *Securing Mass Transit: A Challenge for Homeland Security*, 21 REVIEW OF POLICY RESEARCH 307, 313 (2004).

¹³ U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 7, MICHAEL JENKINS & LARRY N. GERSTEN, *supra* note 10, at 67–99 (2001); FTA statistics: <http://transitsafety.volpe.dot.gov/Security/Default.asp#FTA%92s%205POINT%20SECURITY%20INITIATIVE>.

¹⁴ U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 13–14, citing steps taken by transit agencies since September 11, 2001, to enhance security. Conducting security screenings was not included in the list.

sues.¹⁵ For example, since the September 11, 2001, attacks, the Washington Metropolitan Area Transit Authority has removed items that could conceal bombs, such as trash bins, newspaper vending machines, and bicycle storage lockers, and has sought funding for high-tech surveillance equipment.¹⁶ Commuter and rapid rail operators have implemented additional measures pursuant to security directives issued by the Department of Homeland Security (DHS), described *infra*.

On March 11, 2004, Madrid was attacked: ten bombs exploded on four crowded commuter trains during the morning rush hour, killing 191 people and wounding almost 2,000.¹⁷ Security concerns were raised further by this attack.¹⁸ And although there have been no attacks within the United States since September 11, 2001, there have been elevated threats against transit.¹⁹ Given this history, security concerns were acute during the 2004 presidential campaign. In Boston, site of the 2004 Democratic Convention, the security perimeter around the Fleet Center ordered by the Secret Service led to random passenger searches on the portions of the transit lines that run under the Center.²⁰ However, in New York, site of the 2004 Republican Convention, despite heavy security concerns, the Secret Service did not close Penn Station, “the nation’s busiest rail hub, with 425,000 passengers a day moving through on subway and rail lines,”²¹ nor were passenger searches carried out.

¹⁵ See, e.g., FTA security initiatives, *infra*; U.S. GENERAL ACCOUNTING OFFICE, TRANSPORTATION SECURITY: POST-SEPTEMBER 11TH INITIATIVES AND LONG-TERM CHALLENGES. Statement of Gerald L. Dillingham, Director, Physical Infrastructure Issues, GAO-03-616T, at 2 (2003). See also “BART Launches Bold New Anti-Terrorism Awareness Campaign,” Aug. 9, 2005, www.bart.gov/news/press/news20050809.asp; McGreevey Announces Increased Transit Security Measures, Governor Signs E.O. Deploying National Guard at Region’s Bridges, Tunnels, Railways, Mar. 20, 2003, www.state.nj.us/cgi-bin/governor/njnewsline/view_article_archives.pl?id=1097; Ferry Gets Major Security Upgrade, February 11, 2005 (describing introduction of high-tech security features on Washington State ferry), posted at <http://komotv.com/news/story.asp?ID=35238>.

¹⁶ Waugh, *supra* note 12, at 313.

¹⁷ <http://news.bbc.co.uk/1/hi/world/europe/3597885.stm>.

¹⁸ See, e.g., Edward L. Lee II, *Mass Transit Security Increases After Madrid Attacks*, May 15, 2004, www.iafc.org/archives/onscene_article.asp?section=morenews&id=316.

¹⁹ E.g., *Feds Warn of Transit Terror Attacks*, Apr. 3, 2004. Posted at www.foxnews.com/story/0,2933,115987,00.html; Susan Gilmore, *FBI Reports No Immediate Threat of Terror Attacks on Washington State Ferries*, THE SEATTLE TIMES, Oct. 14, 2004.

²⁰ See I.L.K., *Transit Searches*, *infra* this report.

²¹ John Mintz, *Security Intensifies for Political Conventions. Events in N.Y., Boston Seen as Terror Targets*, WASH. POST, July 6, 2004, at A01. Posted at www.washingtonpost.com/

On July 7, 2005, four bombs were exploded in London: three on the underground system and one on a bus. Fifty people were killed, 700 injured.²² The DHS raised the threat level to orange for mass transit only. Increased security measures included deploying explosive-sniffing dogs and searching buses on the Washington Metro system and conducting random searches on buses in Miami.²³

(B) *Impact of Transit System Attack; Inherent Difficulties in Screening Transit Passengers.*—The United States has 6,000 public transportation agencies.²⁴ Their mass transit facilities are clearly part of the nation’s critical infrastructure.²⁵ In addition to loss of life and bodily injury,²⁶ an attack on a mass transit system could cause significant economic disruption.²⁷

In addition, the challenges of screening, let alone physically checking, the carry-on bags of everyone entering a transit system far exceed those at airports.²⁸ As the General Accountability Office noted, “the open and accessible nature of these services makes it difficult to apply the kinds of security measures that can be ap-

wpdyn/articles/A29636-2004Jul5.html.

²² Glenn Frankel and Fred Barbash, *Death Toll From London Blasts Rises: 50 Killed in Attacks, 22 More in Critical Condition*, WASH. POST, July 8, 2005. Posted at www.washingtonpost.com/wpdyn/content/article/2005/07/08/AR2005070800139.html.

²³ Lyndsey Layton and Steven Ginsberg, *Patrols on Mass Transit Intensified but Scattered*, WASH. POST, July 8, 2005, at A01. Posted at www.washingtonpost.com/wpdyn/content/article/2005/07/07/AR2005070702278.html; Eric Lipton, *Authorities Step Up Security on American Transit Systems*, N.Y. TIMES, July 7, 2005. Posted at www.nytimes.com/2005/07/08/politics/08security.html?th&emc=th.

²⁴ The Subcommittee on Highways, Transit and Pipelines, Hearing on Public Transportation Security, www.house.gov/transportation/highway/06-22-04/06-22-04memo.html.

²⁵ See, e.g., JOHN MOTEFF, ET AL., *Critical Infrastructures: What Makes an Infrastructure Critical?* 4, 14, 15 (Congressional Research Service, The Library of Congress. Updated Jan. 29, 2003), posted at www.fas.org/irp/crs/RL31556.pdf.

²⁶ For example, the Coast Guard estimates that almost 400 people would likely be killed if a large ferry were attacked, far exceeding the number of deaths likely to result from an airplane crash. Eric Lipton, *Trying to Keep Nation’s Ferries Safe From Terrorists. Coast Guard Studies Security Threats, Screening Methods and Potential for Disaster*, N.Y. TIMES, Mar. 20, 2005, at 12.

²⁷ By definition, damage to critical infrastructure will result in damage to defense or economic security. MOTEFF ET AL., *supra* note 25, at CRS-2, CRS-4; Waugh, *supra* note 12, at 307.

²⁸ BRIAN MICHAEL JENKINS (expert on counter-terrorism measures), MTI Report S-01-04, California Transportation Security Summits, March 28 and 29, 2002, at 33 (airport-level screening unlikely for rail transit). The limitations on screening for commuter rail hold true for transit systems. Passenger screening was deemed impractical in the London and Tokyo subway systems. JENKINS & GERSTEN, *supra* note 10, at 20, 61.

plied at airports.²⁹ In addition to their open nature, the high volume of traffic on transit systems³⁰ makes them both attractive targets for terrorists and impractical environments for deploying strategies like metal detectors.³¹ Moreover, security imperatives may clash with service imperatives: transit agencies compete for riders, making convenience an important factor. Any security measures that cause delays or otherwise cause inconvenience could push people away from transit and back into their cars.³² In addition, the lack of space within transit facilities may pose a problem. Unlike airports, transit facilities do not all have adequate space to accommodate lines of people waiting to clear security; crowding would not only deter riders but could create safety problems.

(C) *Legislative Action.*³³—Several laws were enacted in the last several sessions of Congress that deal with security issues, potentially affecting transit security. An even larger number of bills were introduced but not

²⁹ U.S. GENERAL ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: DEPARTMENT OF TRANSPORTATION, GAO-03-108, at 14 (2003).

³⁰ Every workday, transit systems nationwide carry more than 16 times the number of passengers as the nation's air system. Testimony of Daniel Duff, Vice President—Government Affairs, American Public Transportation Association, Before the House Committee on Government Reform on the 9/11 Commission Recommendation, Aug. 3, 2004, at 2. See also THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 391. Larger jurisdictions face even greater challenges. For example, New York's Penn Station handles more than 1,600 people per minute via multiple access points during a typical rush hour; in 2002, 25 times more trips were taken on Washington, D.C.'s, Metrorail than the 7 million trips out of Washington's Reagan National Airport. Statement of Robert Jamison, Deputy Administrator, Federal Transit Administration, U.S. Department of Transportation, Before the Committee on Commerce, Science, and Transportation, U.S. Senate, Hearing on the Rail Security, March 23, 2004, www.fta.dot.gov/news/testimony/14836_14839_ENG_HTML.htm.

³¹ U.S. GENERAL ACCOUNTING OFFICE, *supra* note 15, at 10; See also Waugh, *supra* note 12, at 309–10 (2004); FTA statistics: <http://transitsafety.volpe.dot.gov/Security/Default.asp#FTA%92s%205-POINT%20SECURITY%20INITIATIVE>. See also Andrew Zajac and Cam Simpson, *Attacks a Reminder of Public Transit Perils in U.S.*, CHI. TRIB., July 8, 2005. Posted at www.chicagotribune.com/news/nationworld/chi0507080201jul08,1,7491756.story?coll=chi-newsnationworld-hed.

³² U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 9. See *Ferry Passenger Causes Security Scare*, July 2, 2004 (describing 20-minute delay when passenger coming from chemotherapy triggered radioactivity detector), posted at www.kirotv.com/news/3485646/detail.html; Lipton, *supra* note 26, at 12.

³³ Relevant provisions are set out in Appendix A.

enacted that provided increased authority and funding for transit security measures.

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001.³⁴—Although the USA Patriot Act amends Title 18 to make a willful violent attack on a mass transportation system a felony, the Act does not appear to provide specific statutory authority for conducting transit searches.

Aviation and Transportation Security Act of 2001 (ATSA).³⁵—The ATSA created a new agency called the Transportation Security Administration (TSA) to conduct airport screening and gave it regulatory authority over all transportation security, including transit security. According to the TSA, the agency has the authority to require transit screening, but has not exercised it.³⁶

Homeland Security Act of 2002 (HSA).³⁷—The HSA established a Directorate of Border and Transportation Security and transferred the TSA to the DHS. The HSA does not create any new authority over transportation security. The HSA does not appear to directly address screening for transit systems.³⁸

Federal Maritime Transportation Security Act of 2002 (MTSA).³⁹—The Coast Guard is responsible for administration of the MTSA, which mandates security measures for vessels and port facilities, including passenger ferries and facilities.⁴⁰ The MTSA mandates

³⁴ Pub. L. No. 107–56, Oct. 26, 2001.

³⁵ Pub. L. No. 107–71, Nov. 19, 2001.

³⁶ Asa Hutchinson, then the Homeland Security Department's Undersecretary for Border and Transportation Security, "said the department has the legal authority to require stations throughout the country to implement screening systems, but has no plans to do so at this time. He said it is not feasible to impose the intense screening regime used at the nation's airports on the country's thousands of transit stations." Chris Strohm, *TSA Searches for Solutions to Shore Up Rail Security*, May 4, 2004, www.govexec.com/story_page.cfm?articleid=28386&printerfriendlyVers=1&.

³⁷ Pub. L. No. 107–296, Nov. 25, 2002. See Appendix A for text of relevant provisions.

³⁸ Cf. § 1710. "Railroad Safety to Include Railroad Security," amending 49 U.S.C. 20105 (See Appendix A for text of relevant provisions).

³⁹ Pub. L. No. 107–295, Nov. 13, 2002. See also Department of Homeland Security, Coast Guard, Final Rule, *Vessel Security*, Fed. Reg. 68, No. 204, 60483 Oct. 22, 2003; Department of Homeland Security, Coast Guard, Final Rule, *Facility Security*, Fed. Reg. 68, No. 204, 60515 Oct. 22, 2003.

⁴⁰ The Coast Guard describes the MTSA as follows: "[The MTSA] requires vessels and port facilities to conduct vulnerability assessments and develop security plans that may include passenger, vehicle and baggage screening procedures; security patrols; establishing restricted areas; personnel identification procedures; access control measures; and/or installation of surveillance equipment." *Maritime Transportation Security Act of 2002*, Source: G-IPA/G-MP, www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/MTSA2002.htm.

screening of vehicles on ferries, which may include physical searches.⁴¹

(D) *Federal Agencies.*—Unlike aviation, which has pervasive federal involvement, transit operations are a local responsibility, as are transit security operations.⁴² Thus, it is not surprising to discover that there is a lack of nationwide mass transit security programs.⁴³ Nonetheless, federal agencies have a significant effect on transit security efforts.

TSA.—Although the TSA has responsibility for security in all modes of transportation under the ATSA, including regulatory authority over transit security, it has primarily focused on aviation.⁴⁴ The President's National Strategy for Homeland Security does not outline the TSA role in transit security.⁴⁵ However, under Homeland Security Presidential Directive-7, TSA will be responsible for developing the Sector Specific Plan (SSP) for Transportation under the DHS's National Critical Infrastructure Protection Plan.⁴⁶ Although the Department of Transportation (DOT) and the DHS signed a memorandum of understanding about handling transportation security issues in September 2004,⁴⁷ the balance of specific roles between TSA and the Federal Transit Administration (FTA) still needs to be worked out.⁴⁸ TSA has done some work with passenger rail to test explosive-detection technology⁴⁹ and has certified explosive-detection canine teams for transit agencies.⁵⁰

DHS.—The DHS, the TSA's parent agency, has initiatives to improve transit security targeting three areas: threat response support, public awareness and participation, and future technological innovations. These efforts include the development of a rapid deployment mass transit K-9 program and a pilot program to test the feasibility of screening luggage and carry-on bags for explosives at rail stations and aboard trains.⁵¹ According to DHS, "the lessons learned from the pilot could allow transit operators to deploy targeted screening in high threat areas or in response to specific intelligence."⁵² DHS has also funded transit security grants.⁵³

Following the Madrid bombing, the DHS advised transit agencies to upgrade security. The mandatory measures included using canine explosive teams to screen passenger baggage, terminals, and trains as needed and ensuring that security levels are consistent with threat levels established by DHS.⁵⁴ In the months preceding the 2004 Democratic Convention, DHS issued three Directives/Bulletins relating to threats to mass transit systems.⁵⁵ Following the July 7, 2005, attack on the London transit system, DHS raised the threat level to high for the mass transit portion of the transportation sector.⁵⁶

FTA.—The FTA is precluded by statute from regulating transit agency safety and security operations.⁵⁷ However, the FTA can encourage safety and security

⁴¹ See "A Statement to Our Passengers on Ferry Security," Sept. 30, 2004, www.wsdot.wa.gov/ferries/commuter_updates/index.cfm?fuseaction=press_releases_content&press_release_id=245; Security at Washington State Ferries, www.wsdot.wa.gov/ferries/security/.

⁴² U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 6.

⁴³ Waugh, *supra* note 12, at 309.

⁴⁴ U.S. GENERAL ACCOUNTING OFFICE, MASS TRANSIT: FEDERAL ACTION COULD HELP TRANSIT AGENCIES ADDRESS SECURITY CHALLENGES, GAO-03-263, at 24 (2002).

⁴⁵ *Id.* at 25.

⁴⁶ The SSP "delineates roles and responsibilities among transportation stakeholders and provides a 'roadmap' for identifying critical infrastructure and key resources, assessing vulnerabilities, prioritizing assets, and implementing protection measures." Testimony of then Under Secretary Asa Hutchinson before the Commerce, Science, and Transportation Committee, Aug. 16, 2004. Posted at www.dhs.gov/dhspublic/display?theme=45&content=3943&print=true.

⁴⁷ www.dot.gov/affairs/shanesp050405.htm.

⁴⁸ *United States: Public Transportation Security Needs & Enhancements Outlined at Congressional Hearing.* Statement issued by US House Committee on Transportation and Infrastructure on June 22, 2004, www.cargosecurityinternational.com/channeldetail.asp?cid=15&caid=2846.

⁴⁹ *TSA Begins Third Phase of Rail Security Experiment: Pilot Marks First Ever Passenger and Baggage Explosives Screening in a Moving Railcar*, July 15, 2004. Posted at www.dhs.gov/dhspublic/display?theme=20&content=3842.

⁵⁰ *MARTA Adds Canine Team for Airport Station Security*, Aug. 18, 2003, www.progressiverailroading.com/transitnews/

article.asp?id=2623.

⁵¹ Chris Strohm, *Debate Rises Over Funding for Public Transportation Security*, April 5, 2004, www.govexec.com/story_page.cfm?articleid=28147&printerfriendlyVers=1&.

⁵² *Fact Sheet: Rail and Transit Security Initiatives*, www.dhs.gov/dhspublic/interapp/press_release/press_release_0376.xml.

⁵³ In fiscal years 2003 and 2004, the DHS Office for Domestic Preparedness provided \$65 million and \$50 million, respectively, for transit security grants for planning, training, security exercises and drills, equipment acquisition, management, and administration, www.house.gov/transportation/highways/06-22-04/06-22-04memo.html.

⁵⁴ *Department of Homeland Security Announces New Measures to Expand Security for Rail Passengers. New Directives Call for Immediate Action from Commuter, Transit and Inter-city Rail*, www.dhs.gov/dhspublic/display?content=3572.

⁵⁵ *American-Arab Anti-discrimination Comm. et al. v. Mass. Bay Trans. Auth., Civil Action No. 04-11652-GAO (D. Mass.)*, July 28, 2004, Opposition of Defendant MBTA to Plaintiffs' Motion for a Preliminary Injunction, at 2.

⁵⁶ Transcript from Secretary Michael Chertoff Press Briefing on the London Bombings, July 7, 2005, www.dhs.gov/dhspublic/interapp/press_release/press_release_0700.xml.

⁵⁷ The FTA is, however, required to issue regulations stating the requirements for complying with the fixed guideway safety mandates under 49 U.S.C. § 5330 and requiring post-accident testing under 49 U.S.C. § 5331.

measures through its grant programs⁵⁸ and has initiated nonregulatory activities.⁵⁹ Much of the FTA's efforts (other than increases in funding of security measures) have been geared toward assessments of emergency response capability and training to enhance that capability, as well as intelligence and information sharing.⁶⁰ The agency's position is that security force deployment is a local agency decision.⁶¹ The threat level response for a red alert does include searching "all suitcases, briefcases, packages, etc., brought into the facility,"⁶² but this appears to refer to facilities for transit employees, not transit stations. There have not been any FTA efforts to provide training for conducting passenger security searches. However, FTA guidance on problem identification⁶³ could be used in structuring a targeted screening policy.

Coast Guard.—The Coast Guard is responsible for regulating security on commuter ferries under the MTSA, *supra*. Since July of 2004, large ferry operators have been required to screen certain percentages of vehicles and passengers. The percentage varies accord-

ing to DHS alert levels. The Coast Guard does not require a specific screening method.⁶⁴

B. Legal Background: Traditional Fourth Amendment Considerations

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶⁵

The amendment applies to the states through the due process clause of the Fourteenth Amendment.⁶⁶

The basic purpose of the amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁶⁷ The Fourth Amendment does this by imposing a standard of reasonableness ("the touchstone of the Fourth Amendment"⁶⁸) on the exercise of discretion by government officials.⁶⁹

Actually applying the amendment to a particular set of facts has proved difficult.⁷⁰ However, the following elements must be considered in determining the applicability of the Fourth Amendment:

What is protected: The Supreme Court has held that Fourth Amendment protection is not limited to the home or other secure places.⁷¹

Government action: A wholly private search is not covered by the Fourth Amendment,⁷² but a search car-

⁵⁸ U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 15, nn. 12–15, citing 49 U.S.C. § 5324(c), 49 U.S.C. § 5327(c)(2), 49 U.S.C. § 5307(d)(1)(J)(i) and (ii).

⁵⁹ Transit security initiatives are described at <http://transit-safety.volpe.dot.gov/Security/Default.asp>. These include the Transit Watch program, which, *inter alia*, trains transit systems to make public announcements reminding passengers to take their carry-ons and report any suspicious packages, <http://transit-safety.volpe.dot.gov/security/TransitWatch/Default.asp>. According to the House Subcommittee on Highways, Transit, and Pipelines of the Committee on Transportation and Infrastructure, following September 11, 2001, FTA has: performed vulnerability assessments of the 37 largest transit systems; provided grant funds for emergency drills; held 18 regional emergency preparedness forums; developed an employee awareness training program that trained 46,000 employees; funded the Intelligence Sharing and Analysis Center (ISAC) for transit, which is managed by the American Public Transportation Association; and developed chemical and biological protocols and guidelines for the industry. www.house.gov/transportation/highway/06-22-04/06-22-04memo.html.

⁶⁰ See generally TRANSIT SECURITY NEWSLETTER (FTA Office of Safety and Security), Issue No. 35, March 2003. Posted at <http://transit-safety.volpe.dot.gov/Security/Newsletter.asp>; U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 16–17.

⁶¹ Federal Transit Administration, Transit Threat Level Response Recommendation, <http://transit-safety.volpe.dot.gov/security/SecurityInitiatives/ThreatLevel/>.

⁶² Measure 102, <http://transit-safety.volpe.dot.gov/Security/SecurityInitiatives/ThreatLevel/default.asp>.

⁶³ FTA has worked to provide training for transit employees to know how to identify and react to "unusual packages, suspicious substances, and people who are acting suspiciously." Office of Safety and Security, *supra* note 60, at 1. Posted at <http://transit-safety.volpe.dot.gov/Security/Newsletter.asp>.

⁶⁴ Lipton, *supra* note 26, at 12.

⁶⁵ U.S. CONST. amend. IV.

⁶⁶ Mapp v. Ohio, 367 U.S. 643, 655 (1961).

⁶⁷ Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

⁶⁸ *E.g.*, Fla. v. Jimeno, 500 U.S. 248, 250 (1991), citing Katz v. United States, 389 U.S. 347, 360 (1967).

⁶⁹ Del. v. Prouse, 440 U.S. 648, 653–54 (1979).

⁷⁰ The *Camara* Court noted that: "Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court." 387 U.S. at 528.

⁷¹ 389 U.S. at 351.

⁷² *Burdeau v. McDowell*, 256 U.S. 465 (1921); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Mithun*, 933 F.2d 632, 634 (8th Cir. 1991) (subsequent warrantless search by government agent, provided it goes no further than initial private search, does not violate Fourth Amendment), *cert. denied*, 502 U.S. 869. Airport searches conducted solely for the benefit of the carrier are not covered by the Fourth Amendment. *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967). A private party acting with a legitimate independent motivation will not be subject to the Fourth Amendment. *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981); *United States v. Howard*, 752 F.2d 220, 227 (6th Cir.), *cert. denied, sub nom. Shelton v. United States*, 472 U.S. 1029 (1985).

ried out by a private party at government suggestion or requirement is subject to the amendment.⁷³

Search or seizure: The Fourth Amendment only applies to government conduct that actually amounts to a search or seizure.⁷⁴ A seizure occurs when a person's liberty is restrained, either through physical force or a show of authority.⁷⁵ Actions short of arrest and full-blown search incident to arrest can be characterized as search and seizure for purposes of the Fourth Amendment.⁷⁶

⁷³ 256 U.S. at 475; *Coolidge v. N.H.*, 403 U.S. 443, 487 (1971); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989), citing 466 U.S. at 113–14. As early as 1973, government involvement in the then privately-operated airport screening program was held to be significant enough to bring the screenings under the Fourth Amendment. *United States v. Davis*, 482 F.2d 893, 904 (1973). The Court went on to note that the

government's role in the airport search program is and has been a dominant one. But even if the government's involvement at some point in the period could be characterized accurately as mere "encouragement," or as "peripheral, or...one of several cooperative forces leading to the [alleged] constitutional violation," (citation omitted), that involvement would nevertheless be "significant" for purposes of the Fourth Amendment. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "private" persons or entities that is prohibited to the government itself.

Id. See also *United States v. Doe*, 61 F.3d 107, 109, n.3 (1st Cir. 1995).

⁷⁴ *United States v. Atton*, 900 F.2d 1427 (9th Cir. 1990) (Fourth Amendment only applies to government conduct reasonably characterized as search or seizure; conduct with independent reason unrelated to government law enforcement or administrative functions not search or seizure).

⁷⁵ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Some courts have required that there be not only a show of authority such that a reasonable person in the surrounding circumstances would not believe he was free to leave, but a yielding to that show of authority. *E.g.* *Cal. v. Hodari D.*, 499 U.S. 621, 624–29 (1991); *United States v. Santamaria-Hernandez*, 968 F.2d 980, 983 (9th Cir. 1992). However, the Fourth Amendment is not implicated if an official merely approaches an individual on the street or in another public place or asks an individual if he is willing to answer some questions and does so if he is willing to listen. *Fla. v. Royer*, 460 U.S. 491, 497 (1983). See also *Fla. v. Bostick*, 501 U.S. 429 (1991).

⁷⁶ *Terry v. Ohio*, 392 U.S. 1, 16–19 (1968). A brief detention short of arrest may constitute a seizure. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). See I.A., *Search and Seizure on Less Than Probable Cause*, *infra* this report. In addition, the Court has held that a violation of the Fourth Amendment need not be based on a physical intrusion. 389 U.S. at 353. The rejection of the *Olmstead* requirement—*Olmstead v. United States*, 277 U.S. 438 (1928)—of physical intrusion opened the door to findings that other non-physical intrusions such as metal detectors could be deemed searches for purposes of the Fourth Amendment. See II.I., *Airport Security Searches*, *infra*, this report.

Reasonable expectation: The Fourth Amendment only attaches when the person searched has reasonable expectation of privacy.⁷⁷ The expectation of privacy cannot, however, be rendered unreasonable by government edict.⁷⁸

Applying these elements to the circumstances of a transit search, transit agencies can be expected to have to meet the requirements of the Fourth Amendment in conducting transit searches.

1. Warrant⁷⁹ and Individualized Suspicion Requirements

The Supreme Court has consistently held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁸⁰ The Court has found a warrant to be critical in safeguarding individual liberty, particularly from arbitrary exercises of discretion.⁸¹ In addition

⁷⁷ 389 U.S. at 361 (Harlan, J., concurring). *Rawlings v. Ky.*, 448 U.S. 98 (1980); *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). Justice Harlan, in his concurring opinion in *Katz v. United States*, suggested a two-part analysis for determining that a person has a reasonable expectation of privacy: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). This test has been generally adopted. *Cal. v. Ciraolo*, 476 U.S. 207, 211 (1986). See also 482 F.2d 905. However, Justice Harlan's test did not reach the question of how to determine that an expectation of privacy has been recognized as reasonable, or, conversely, that an intrusion has been recognized as reasonable.

⁷⁸ The court subsequently suggested that a mere government pronouncement reducing Fourth Amendment rights would not reasonably reduce Fourth Amendment rights. *Smith v. Md.*, 442 U.S. 735, 740 n.5 (1979). The Ninth Circuit has since held that merely repeating a government intrusion numerous times does not make it one that society is prepared to recognize as reasonable. 482 F.2d 905. *Accord* 287 F.3d 81: "[T]he mere fact that airline passengers know that they must subject their personal effects to reasonable security searches does not mean that they are automatically consenting to unreasonable ones."

⁷⁹ It is beyond the scope of this report to discuss the requirements for a valid warrant. See generally 2 W.R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4 (4th ed. 2004).

⁸⁰ 403 U.S. 454–55 (internal quotations and citations omitted).

⁸¹ The Court has termed the procedure of the antecedent justification of the warrant requirement central to the Fourth Amendment. 389 U.S. at 359. The warrant requirement protects several important interests: it limits the discretion of the official who has an interest in conducting the search; it prevents hindsight from coloring the evaluation of the reasonableness of the search; and in the administrative context it provides assurance that the search is required under the municipal code involved, sets forth the lawful limits of the search, and provides notice that the inspecting official is acting

to generally requiring a warrant, the Court has held that a search or seizure is ordinarily unreasonable in the absence of individualized suspicion.⁸²

However, despite the per se rule concerning warrants, the Court has held that although probable cause and the warrant requirement weigh on the reasonableness of a search, there are “certain limited circumstances” in which neither are required.⁸³ The Court has

under proper authorization. *S.D. v. Opperman*, 428 U.S. 364, 382–84 (1976) (Powell, J. concurring). Justice Powell argued that where the interests that a search warrant protects are not at issue, it may be permissible to conduct a search without a warrant. One of the dangers to be avoided by the warrant requirement is the limit on the discretion of the official carrying out the search. *See* 387 U.S. 532–33. The safeguards afforded by an objective assessment of probable cause are thought to be weakened if applied after the fact. *Beck v. Ohio*, 379 U.S. 89, 96 (1964). Even in the case of an administrative search not requiring probable cause of a violation of law, *see* II.G., *Administrative Searches in General*, *infra* this report, a warrant affords important safeguards. In disagreeing that the protections of an administrative warrant were outweighed by the administrative burdens, the Supreme Court noted:

The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

Marshall v. Barlow’s, Inc., 436 U.S. 307, 323 (1978) (citations omitted).

⁸² *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000), citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997). The Court has held that probable cause exists “where the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Draper v. United States*, 358 U.S. 307, 313 (1959) (citation and internal quotations omitted).

⁸³ *N.J. v. T.L.O.*, 469 U.S. 325, 341 (1985). One of the key questions about reasonableness under the Fourth Amendment arises from the question of whether to read Warrant Clause and Reasonableness Clause together or separately. For example, Justice Stevens has argued that there are certain categories of searches that can only be evaluated under the first clause, because they cannot meet the probable cause requirement of the second clause, and therefore would be by definition unreasonable if required to meet the warrant clause. 436 U.S. 325–26 (Stevens, J. dissenting). Justice Stevens further argued that the Warrant Clause does not apply to routine regulatory inspections. *Id.* at 329. The argument has been made that the two clauses should certainly be read separately, as the original concern was not warrantless searches, but overly broad warrants; warrantless searches should be judged on their reasonableness. *See* *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974).

emphasized that the underlying purpose of the warrant requirement is to ensure that a search of private property is supported by “a reasonable governmental interest. But reasonableness is still the ultimate standard.”⁸⁴

2. Exceptions to Warrant and Individualized Suspicion Requirements⁸⁵

The Court has recognized that there are numerous legitimate government interests that would be thwarted by always requiring a warrant and individualized suspicion. Thus, despite the formulation that as a general matter a search must be supported by a warrant supported by probable cause, the Supreme Court has long since taken the position that under certain circumstances a search may be reasonable absent a warrant, probable cause, or even individualized suspicion.⁸⁶ Due

According to at least one prominent commentator on the Fourth Amendment, the drafting of the amendment has caused a lot of confusion: “Can a search or seizure with a warrant or probable cause still be unreasonable? Or, perhaps more important, can a search or seizure without a warrant be reasonable even in the absence of probable cause?” 4 LAFAVE, *supra* note 79, § 9.1(d), at 275–76. *See also* Mebane, *supra* note 9, at 187, n.76.

The Supreme Court has certainly answered the second question in the affirmative, at least in non-criminal cases. *See* 489 U.S. at 624 (1989). The Court has suggested that probable cause is married to the warrant clause, so that when a warrant is not required, neither is probable cause. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

⁸⁴ 387 U.S. 539. *See also* 403 U.S. 509 (Black, J., concurring and dissenting): “[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only ‘unreasonable searches and seizures.’ The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.”

The Court will consider the context in which a search takes place and balance “the need to search against the invasion which the search entails” to determine the reasonableness of the search. 469 U.S. 337, citing 387 U.S. 536–37. The Court has suggested a three-part test for balancing the government interest in the intrusion against the privacy interest at stake:

Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Brown v. Tex., 443 U.S. 47, 50–51 (1979). *See* 440 U.S. 654–55.

⁸⁵ Some have suggested that the exceptions to the requirements for a warrant issued upon probable cause have unduly proliferated. *See, e.g.,* David E. Steinberg, *The Rise of Warrantless Auto Searches: The Need for a Reasonableness Inquiry*, 27 SEARCH AND SEIZURE LAW REPORT 33 (May 2000) (“Instead of assessing whether a particular search falls into one of the numerous arbitrary exceptions to the warrant requirement, litigation should focus on whether a particular search is reasonable under the circumstances.”) (emphasis added).

⁸⁶ *See* 489 U.S. 665.

to the circumstances in which they would occur—warrant/individualized suspicion being impracticable and arguably defeating the purpose of the searches—transit searches would have to be justified under an exception to the warrant and individualized suspicion requirements.

The Court has recognized that the governmental interest in conducting a warrantless search is at its strongest when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”⁸⁷ And although the Court has usually required “some quantum of individualized suspicion,”⁸⁸ it has dispensed with the requirement in certain limited circumstances “where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.”⁸⁹ The Court has found that the probable-cause standard “is peculiarly related to criminal investigations”⁹⁰ and therefore “unhelpful in analyzing the reasonableness of routine administrative functions.”⁹¹

Accordingly, the Supreme Court has approved searches for a variety of administrative purposes without particularized suspicion of misconduct.⁹²

In the exception cases the Court looks to reasonableness as a standard for conducting the search, judged by balancing the intrusion on Fourth Amendment interests against the search’s promotion of legitimate government interest.⁹³ The factors to be considered are the nature of the privacy interest intruded upon, the character of the intrusion, and the nature and immediacy of the governmental interest and the efficacy of the search in meeting it.⁹⁴ In some situations the balance of interest may require relying on safeguards other than individualized suspicion to ensure that the reasonable ex-

pectation of privacy is not subject to the discretion of the searching official.⁹⁵

The review of Fourth Amendment cases is fact-dependent.⁹⁶ Likewise, the determination of whether an exception to the warrant requirement applies is normally case-specific: “There is no hard and fast rule which will provide a ready solution of problems arising from search and seizure on every occasion, but each case must be decided on its own facts.”⁹⁷ Where an administrative search is under review, the court will consider legislative facts—those applicable to a class of cases.⁹⁸

3. *Relevance of Warrantless and/or Suspicionless Search Cases*

As of July 2005 there appears to have been only two district court decisions reviewing a policy by a transit authority to conduct random searches.⁹⁹ While these cases provide possible conceptual frameworks for analyzing the constitutionality of a policy of searching transit passengers, this is clearly a developing body of law. For some time to come, it will be necessary to look at more established exceptions to the requirements of warrant and individualized suspicion to evaluate transit searches.

II. SPECIFIC WARRANTLESS SEARCH CATEGORIES

Cases involving entry to vulnerable facilities, in particular airport screening cases, may be among the most relevant to transit screening.¹⁰⁰ However, overarching Fourth Amendment principles emerge from cases in other categories as well that would apply to possible transit screening policies.¹⁰¹ Therefore, this paper will

⁸⁷ 489 U.S. 623, citing 387 U.S. 533.

⁸⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

⁸⁹ *See* 489 U.S. 624.

⁹⁰ *Colo. v. Bertine*, 479 U.S. 367, 371 (1987), quoting 428 U.S. 370, n.5.

⁹¹ 489 U.S. 668 (1989) (citations omitted).

⁹² Types of searches approved included the inspection of “closely regulated” businesses, the inspection of fire-damaged premises to determine the cause of the fire, and searches to ensure compliance with city housing codes. 531 U.S. 37. The Supreme Court has “upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction; and to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers.” 515 U.S. 653–54 (citations omitted).

⁹³ 515 U.S. 652. “The basic concern of the fourth amendment is reasonableness, [citation omitted] and reasonableness depends on the circumstances.” *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982).

⁹⁴ 515 U.S. 654, 658, 660.

⁹⁵ *See* 440 U.S. 654–55.

⁹⁶ “[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case....” 386 U.S. 59; 392 U.S. 30 (“Each case of this sort will, of course, have to be decided on its own facts.”); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (stating that the Court has “consistently eschewed bright-line rules” in favor of fact-specific inquiry into reasonableness).

⁹⁷ *United States v. Moreno*, 475 F.2d 44, 47, n.2 (5th Cir. 1973), *cert. denied*, 414 U.S. 840 (1973), citing 392 U.S. 30. *See also* 403 U.S. 509–10 (Black, J., concurring and dissenting): “The test of reasonableness [of a seizure] cannot be fixed by per se rules; each case must be decided on its own facts.” *See also* *Kuras et al.*, *supra* note 9, at 1203.

⁹⁸ *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989). *See* I.I.G., *Administrative Searches in General*, *infra* this report.

⁹⁹ *See* I.I.K., *Transit Searches*, *infra* this report.

¹⁰⁰ *Id.*

¹⁰¹ *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (seizure and based on drug profile), citing 469 U.S. 337–42 (school search) for the proposition that reasonableness depends upon “all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *See also* 515 U.S. 675 (special needs), citing, inter

examine the categories that present the most analogous factual situations, as well as review Fourth Amendment principles likely to be applied in assessing the constitutionality of transit screening. The cases that appear most apposite—those involving entry security screening—will be discussed in more detail than the others. In many instances, material not directly applicable to transit searches will be included in footnotes. The categories used are those most commonly employed by courts and commentators. There is some overlap between categories, however: Cases may be put into more than one category.¹⁰² And, as discussed *infra*, a court may decline to precisely categorize a case, relying instead on a general reasonableness/balancing analysis.

At the end of each section there is a brief summary of the principles that are important in the context of transit searches.

A. Search and Seizure on Less than Probable Cause (Stop and Frisk)

The “stop and frisk” cases are relevant to transit searches because they establish that a seizure short of arrest and a limited search—both of which would occur in a transit screening—are subject to the Fourth Amendment¹⁰³ and may occur on less than probable cause.¹⁰⁴ Many of these cases are most relevant to transit searches based on suspicious behavior—a topic beyond the scope of this paper.¹⁰⁵ However, these cases also set forth principles that would apply to the evaluation of any transit search policy: 1) the use of a balancing test to determine the reasonableness of a search;¹⁰⁶ 2) the requirement that the scope of a warrantless search be closely related to and justified by the circumstances that made initiating the search permissible;¹⁰⁷ and the requirement that the stop not be arbitrary, i.e., that it either be based on specific objective facts or be pursuant to a plan with explicit, neutral limitations on the officers’ conduct.¹⁰⁸ In addition, the Court’s holdings on roving patrol searches are relevant to determining where transit searches may take place.

alia, 428 U.S. 543 (search and seizure on less than probable cause).

¹⁰² For example, *Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002) may be considered an administrative search case, a consent case, and/or an airline search case.

¹⁰³ 392 U.S. 1, 16–18.

¹⁰⁴ *Id.* at 20.

¹⁰⁵ In addition to 392 U.S. 1, seminal stop and frisk cases include *Pa. v. Mimms*, 434 U.S. 106 (1977); 443 U.S. 47; and 460 U.S. 491.

¹⁰⁶ 392 U.S. 20–21.

¹⁰⁷ 392 U.S. 19; 460 U.S. 500.

¹⁰⁸ 443 U.S. 51 (arrest of pedestrian for refusing to provide identification, without specific objective facts indicating involvement in criminal activity, violated Fourth Amendment).

1. Federal Courts¹⁰⁹

The Supreme Court first ruled on the constitutionality of a “stop and frisk,”—that is, a seizure short of arrest and a limited search—on grounds not supported by probable cause, in *Terry v. Ohio*.¹¹⁰ The Court held that whenever a police officer restrains an individual’s ability to walk away, the person has been seized under the Fourth Amendment, and that an exploration of even the outside of the person’s clothing is a search under the Fourth Amendment.¹¹¹ The Court then created an exception to the probable cause rule: “certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.”¹¹²

The Court applied the principles of *Terry* to roving-patrol stops on less than reasonable suspicion, holding that it is not reasonable under the Fourth Amendment to make such stops on a random basis.¹¹³ The Court applied the same rationale to find that random traffic stops to check license and registration could not be made without individualized suspicion.¹¹⁴ However, the Court specifically reserved from its holding in *Delaware v. Prouse* traffic spot checks that involve less intrusion or do not involve unbridled exercise of discretion, citing as an example a roadblock that stops all traffic.¹¹⁵

¹⁰⁹ It is beyond the scope of this report to consider the myriad opinions relating to *Terry* in the context of criminal cases. The focus is on the application of *Terry*’s principles to situations that are relevant to security screenings. For a discussion of arguable departures from *Terry*’s reasonable suspicion standard, see J. Michael Hughes, *Criminal Procedure: United States v. Holt: The Exception to the Exception That Swallows the Rule*, 55 OKLA. L. REV. 699, 701 (2002).

¹¹⁰ 392 U.S. 1. A stop based on an officer’s reasonable suspicion that criminal activity is ongoing is known as a *Terry* stop. *E.g.*, Beverly A. Ginn, *Chief’s Counsel: Stop-and-Identify Laws*, THE POLICE CHIEF, Sept. 2004. Posted at <http://policechiefmagazine.org>, archived issues.

¹¹¹ 392 U.S. 16–18.

¹¹² 460 U.S. 498, citing 392 U.S. 1 and 422 U.S. 881–82.

¹¹³ *Id.* at 882–83. The Court applied the same rationale to roving-patrol stops to inquire about citizenship. *Id.* at 884. The Court had already held that probable cause is required for a roving border patrol to conduct a search for illegal aliens (absent consent). *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

¹¹⁴ 440 U.S. 663. In this case, “random” meant utterly at the discretion of the officer conducting the stops, as opposed to subject to a plan calling for stops at specified intervals, not based on suspicion. The Court found that the incremental increase in traffic safety brought about by the discretionary stops was not great enough to justify the intrusion involved. *Id.* at 659.

¹¹⁵ *Id.* at 663. Justices Blackmun and Powell, concurring, noted that traffic checks that are also not purely random, but not 100 percent roadblocks, such as a traffic check that stops every 10th vehicle, should also be included in the reservation in the Court’s holding. 440 U.S. 663–64. Note that Justice

The Court has noted that the general goal of crime prevention is not sufficient to allow stops that are neither grounded in reasonable suspicion nor based on objective criteria.¹¹⁶

A number of courts have construed *Terry* in the context of airport searches.¹¹⁷ When airplane hijacking became a major concern in the 1970s, detection relied heavily upon hijacker profiling and traditional policing, and screening of carry-on luggage was not universal.¹¹⁸ Given the reliance on individualized suspicion, *Terry* was an appropriate precedent, even though the rationale for the airport search did not stem from ordinary law enforcement.¹¹⁹ However, *Terry's* rationale does not extend to airport security screenings of all passengers, because such screenings are not based on individualized suspicion and are not justified by the need to protect an individual officer or others nearby. Extending the rationale would result in an intrusion upon privacy exceeding the need for the search.¹²⁰

2. States

New York relies on a four-tiered common-law test for police encounters short of an arrest.¹²¹

3. Summary of Important Principles

The warrant procedure must be deemed impractical. The officer must have articulable suspicion about the commission of a crime. The court will balance the public interest and the individual right to be free from arbitrary interference from law enforcement. The search must be based on specific objective facts or neutral limits on its execution. The scope of the search must be confined by the circumstances justifying the search.

B. Search and Seizure Without Individualized Suspicion (Fixed Checkpoints)¹²²

Transit searches may be considered a type of fixed checkpoint. Fixed checkpoints, which have been used to

Blackmun used the term “random” to refer to arbitrary stops by a police officer.

¹¹⁶ 443 U.S. 52.

¹¹⁷ 475 F.2d 47, citing *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972); *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971).

¹¹⁸ 475 F.2d 49, n.6.

¹¹⁹ *Id.* at 50; 464 F.2d 674.

¹²⁰ 482 F.2d 907. See also 5 LAFAVE § 10.6(c), at n.56.

¹²¹ *People v. Hollman*, 590 N.E.2d 204 (N.Y. 1992); *People v. DeBour*, 352 N.E.2d 562 (N.Y. 1976).

¹²² It is important to distinguish between border checkpoints and other checkpoints, such as police roadblocks for license and registration checks, as “the Fourth Amendment is weakened in the context of border searches.” *United States v. Bulacan*, 156 F.3d 963, 972–73 (9th Cir. 1998), citing 473 U.S. 531 (holding that a 16-hour detention based on reasonable suspicion is not unreasonable because it occurred at the international border, “where the Fourth Amendment balance of interests leans heavily to the Government”).

screen for traffic violations, illegal immigration, and drunk driving, are clearly seizures and thus subject to the Fourth Amendment.¹²³ The parallel between fixed checkpoints and the airport hijacker detection system (a type of checkpoint for passengers) has already been drawn.¹²⁴ One might consider that transit screening procedures would perform the same function as airport security screening systems, and thus apply the holdings in the fixed checkpoint cases to transit screening programs. Although not dispositive, these cases provide guidance in balancing the public interest against the individuals’ Fourth Amendment interests.¹²⁵ Factors deemed significant in these cases, such as the impracticality of requiring reasonable suspicion (let alone a warrant), substantial government need, and the reduced intrusiveness of a public search subject to neutral criteria, may prove particularly relevant in evaluating transit screening procedures.¹²⁶

1. Federal Courts¹²⁷

An early instance of suspicionless questioning arose in *United States v. Martinez-Fuerte*,¹²⁸ in which the Court noted the substantial public interest at stake;¹²⁹ the impracticality of requiring reasonable suspicion;¹³⁰ and the minimal nature of the privacy intrusion. In particular the Court noted that motorists have notice of the location of fixed checkpoints and that the fixed checkpoints are not subject to the discretion of the official in the field, whether in location or determination of who to stop.¹³¹ Citing administrative search cases, the Court held that it was appropriate to allow stops and

¹²³ 428 U.S. 556.

¹²⁴ 4 LAFAVE § 10.6(c), at 298.

¹²⁵ See 440 U.S. 656–57.

¹²⁶ This analogy would hold true for transit searches conducted at the entry to a transit facility. Should the searches be made by officers moving in the transit system, the more appropriate analogy might be to the border patrol cases, such as 422 U.S. at 884. In that case, the Supreme Court held that roving patrols with the goal of locating illegal aliens were unconstitutional in the absence of individualized suspicion. *Id.* at 882–83. See II.K., *Transit Searches*, *infra* this report.

¹²⁷ Cases involving checkpoints set up at the entrance to special events are discussed at II.J., *Area Entry Searches*, *infra* this report.

¹²⁸ 428 U.S. 543. Justices Brennan and Marshall, dissenting, called this case part of the “continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures.” *Id.* at 567.

¹²⁹ *Id.* at 556. See also 413 U.S. 279 (Powell, J., concurring) (noting that searches at border checkpoints are incidental to the protection of the border). This point may have gained intensity in view of current events. See Douglas Jehl, *U.S. Aides Cite Worry on Qaeda Infiltration from Mexico*, N.Y. TIMES, Feb. 17, 2005. Posted at www.nytimes.com/2005/02/17/international/americas/17intel.html?th.

¹³⁰ 428 U.S. 557.

¹³¹ *Id.* at 559.

questioning at “reasonably located checkpoints” without individualized suspicion.¹³²

However, the Court declined to extend the warrant requirement to the fixed checkpoints at issue.¹³³ The Court found that in the context of the border checkpoint, a warrant requirement would make little contribution to the interests identified in *Camara, supra*.¹³⁴ Finally the Court found that Fourth Amendment interests would be protected at checkpoints through “appropriate limitations on the scope of the stop.”¹³⁵

The Court found that its rationale in *Martinez-Fuerte* did not apply to traffic stops conducted at random by an officer to check licenses and registrations,¹³⁶ finding that on the record before it, discretionary spot checks were not sufficiently productive to justify the Fourth Amendment intrusion.¹³⁷

The Court also applied the rationale of *Martinez-Fuerte* in *Sitz*,¹³⁸ *supra*, a case involving a sobriety checkpoint. The Court rejected *Sitz*’s argument that its decision in *Von Raab*,¹³⁹ *supra*, required a finding of special governmental need beyond the normal need for law enforcement before a balancing analysis was appropriate, applying instead the standards enunciated in *Martinez-Fuerte* and *Brown v. Texas*.¹⁴⁰ Accordingly, the Court’s analysis in *Sitz* focused on the significance of the state interest (magnitude undisputed) and the nature of the intrusion (minimal as to duration and intensity; conducted pursuant to guidelines and requiring all vehicles to stop), which was slight from both an objective perspective and subjective perspective.¹⁴¹ The degree of effectiveness of the checkpoint in *Sitz* appeared to exceed that shown in the *Martinez-Fuerte* checkpoint, and therefore was sufficient.¹⁴²

¹³² *Id.* at 560–62.

¹³³ *Id.* at 564–65.

¹³⁴ The “visible manifestations” of official authority at a checkpoint provide the same assurances as a warrant as to the requirement of the inspection, the lawful limits of the search, and the propriety of the field officer’s actions. The factors that affect the reasonableness of the checkpoint are not susceptible to being distorted through hindsight and are subject to post-stop review. The decision as to who to seize is an administrative one of higher ranking officials, owed deference, not that of the officer in the field. *Id.* at 565–66.

¹³⁵ *Id.* at 566–67. The Court reserved the question of the constitutionality of state and local officials stopping motorists to check vehicle documentation. *Id.* at 560, n.14.

¹³⁶ 440 U.S. 648.

¹³⁷ *Id.* at 659.

¹³⁸ 496 U.S. 444.

¹³⁹ 489 U.S. 656. See II.H., *Special Needs, infra* this report.

¹⁴⁰ 443 U.S. 51. (Fourth Amendment requires either seizure be based on specific, objective facts indicating society’s legitimate interests require seizure of particular individual, or seizure be carried out pursuant to a plan embodying explicit, neutral limitations on conduct of individual officers).

¹⁴¹ 496 U.S. 449–50, 451–53.

¹⁴² *Id.* at 455.

Even Justice Stevens, dissenting, noted that he had no objection to airline passenger and public building screening by metal detectors. Moreover, he observed that:

[p]ermanent, non discretionary checkpoints could be used to control serious dangers at other publicly operated facilities. Because concealed weapons obviously represent one such substantial threat to public safety, I would suppose that all subway passengers could be required to pass through metal detectors, so long as the detectors were permanent and every passenger was subjected to the same search.¹⁴³

In *Edmond*,¹⁴⁴ *supra*, the Court refused to extend the rationale of *Martinez-Fuerte* and *Sitz* to a highway checkpoint program whose primary purpose was discovering and interdicting drugs. The Court distinguished *Martinez-Fuerte* (difficulty of containing illegal immigration at border, impracticality of employing particularized suspicion to detect cars carrying illegal immigrants, longstanding concern for integrity of the border) and *Sitz* (obvious connection between imperative of highway safety and law enforcement practice, gravity of problem, magnitude of State interest in getting drunk drivers off the road). It also noted that in *Prouse* the Court had suggested that roadblocks such as the one in *Sitz* would be constitutional and would have a purpose apart from general crime investigation.¹⁴⁵ In contrast, the Indianapolis checkpoint was primarily aimed at catching drug offenders, which serves a general interest of crime control, and was therefore unconstitutional.¹⁴⁶ The Court did note that there could be circumstances in which a checkpoint that would ordinarily be crime control might be constitutionally permissible, such as “an appropriately tailored roadblock set up to thwart an imminent terrorist attack.”¹⁴⁷ The Court specifically excluded from its holding “searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”¹⁴⁸

State license checkpoints have passed constitutional muster in a number of circuits.¹⁴⁹

¹⁴³ *Id.* at 473–74.

¹⁴⁴ 531 U.S. 32.

¹⁴⁵ *Id.* at 38–40.

¹⁴⁶ *Id.* at 41–42. The Court also noted that “purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.” *Id.* at 47.

¹⁴⁷ *Id.* at 44. The Court subsequently held that *Edmond* did not apply to a checkpoint where police stopped cars to ask for information about a hit-and-run accident. *Illinois v. Lidster*, 540 U.S. 419, 423–26 (2004).

¹⁴⁸ 531 U.S. 47–48.

¹⁴⁹ *United States v. Davis*, 270 F.3d 977, 980 (D.C. Cir. 2001); *United States v. Brugal*, 209 F.3d 353, 357 (4th Cir. 2000); *United States v. Galindo-Gonzales*, 142 F.3d 1217, 1222 (10th Cir. 1998); *United States v. Trevino*, 60 F.3d 333, 335–36 (7th Cir. 1995); *Merrett v. Moore*, 58 F.3d 1547, 1551 & n.3 (11th Cir. 1995).

The Fifth Circuit has held that a search at a checkpoint within a military installation is reasonable without probable cause, with the additional security reasons the military may have weighing even more strongly on the reasonableness of the search than in the case of a normal license and registration checkpoint.¹⁵⁰ The Court rejected the defendant's assertion that stopping every sixth car was ineffective, asserting that it was a reasonable deterrent measure.¹⁵¹

2. States

According to the National Highway Traffic Safety Administration (NHTSA), sobriety checkpoints are legal in 39 states and the District of Columbia and are banned or restricted in Alaska, Idaho, Louisiana, Michigan, Minnesota, Oregon, Rhode Island, Texas, Wisconsin, Washington, and Wyoming.¹⁵² New York has

¹⁵⁰ *United States v. Green*, 293 F.3d 855, 861 (5th Cir. 2002).

¹⁵¹ *Id.* at 862.

¹⁵² *Saturation Patrols and Sobriety Checkpoints: State Case Law Summary*, at <http://www.nhtsa.dot.gov/people/injury/alcohol/SobrietyCheck/caselaw.html>. Cases upholding checkpoints include: *Miller v. State*, 373 So. 2d 1004 (Miss. 1979) (upholding checkpoint that checked licenses of everyone driving as authorized under *Prouse*); *State v. Deskins*, 673 P.2d 1174 (Kan. 1983); *State v. Baldwin*, 475 A.2d 522 (N.H. 1984); *State v. Cloukey*, 486 A.2d 143 (Me. 1985) (holding that a checkpoint need not be approved by supervisory personnel); *Ingersoll v. Palmer*, 743 P.2d 1299 (Cal. 1987); *State v. Record*, 548 A.2d 422 (Vt. 1988); *Simmons v. Commonwealth*, 371 S.E.2d 7 (Va. 1988) (holding that, if traffic checkpoint survives Fourth Amendment scrutiny, it is constitutional under Article I, § 10 of Virginia's Constitution), *rev'd on other grounds*, 380 S.E.2d 656 (Va. 1989); *People v. Rister*, 803 P.2d 483 (Colo. 1990); *Davis v. Kan. Dept. of Revenue*, 843 P.2d 260 (Kan. 1992); *State v. Davis*, 464 S.E.2d 598, 601 (W. Va. 1995) (stressing that "every vehicle approaching the roadblock was stopped"); *State v. Bates*, 902 P.2d 1060 (N.M. Ct. App. 1995); *Commonwealth v. Yastrop*, 768 A.2d 318 (Pa. 2001). Cases invalidating roadblocks or citing to cases that do so: *State v. Koppel*, 499 A.2d 977 (N.H. 1985); *Nelson v. Lane County*, 743 P.2d 692 (Or. 1987) (checkpoints unconstitutional under Article 1, Section 9, Oregon Constitution, in absence of specific statutory authority); *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988) (specific roadblock unconstitutional under Article 1, Section 7, Washington Constitution; unnecessary to reach Fourth Amendment issue); *Pimental v. Department of Transp.*, 561 A.2d 1348 (R.I. 1989) (sobriety roadblocks or checkpoints established to apprehend drunk drivers that operate without probable cause or reasonable suspicion violate the Rhode Island Constitution); *Sitz v. Dept. of State Police*, 506 N.W.2d 209 (Mich. 1993); *State v. Sanchez*, 856 S.W.2d 166, 170 (Tex. Ct. App. 1993); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994) (Article 1, Section 10 of the Minnesota Constitution requires greater evidence that checkpoint advances public interest than is required under Fourth Amendment analysis: checkpoint set up in area with high incidence of accidents and drunk driving violations, stopping every fourth car, less than 2-minute delay, held unconstitutional).

upheld even roving checkpoints if made pursuant to a uniform, non-arbitrary plan.¹⁵³ On the other hand, some states not considered by NHTSA to restrict or ban roadblocks have held them to be unconstitutional under certain circumstances.¹⁵⁴

The Supreme Judicial Court of Massachusetts has created a *sui generis* exception to Article XIV of the Massachusetts Constitution for roadblocks, which the court construes narrowly. The court has found both roadblocks to interdict drugs and other contraband¹⁵⁵ and security-justified roadblocks to violate Article XIV. In the latter instance, the court applied the principles of *Rodriguez* to the constitutionality of a roadblock set up to provide heightened security around the Cobble Mountain Reservoir, rejecting the Commonwealth's argument that constitutionality should be judged by balancing the need to thwart a terrorist attack against the minimal intrusion of the stop.¹⁵⁶

3. Summary of Important Principles

It must be impractical to require reasonable suspicion. The checkpoint cannot be aimed at general law enforcement. The court will balance the intrusion on the individual—both in objective (duration of seizure, intensity of investigation) and subjective (potential for generating fear and surprise) terms—against the governmental interest (compared with interests that have been upheld) and the extent to which the program can reasonably be said to advance that interest¹⁵⁷ and the standard is reasonably effective. The assessment of effectiveness, however, is not meant to give courts discretion in choosing among reasonably effective law enforcement techniques. The search must be carried out under a plan with explicit, neutral limitations on officers' discretion.

¹⁵³ *People v. Scott*, 63 N.Y.2d 518 (1984) (upheld under Fourth Amendment suspicionless stops of vehicles to conduct sobriety checks at checkpoints under written guidelines).

¹⁵⁴ *State v. Henderson*, 756 P.2d 1057 (Idaho 1988) (although checkpoints might be allowed with prior judicial authorization under legislative authority, warrantless roadblock at issue unconstitutional under Article 1, Section 17, of Idaho Constitution); *State v. Blackburn*, 620 N.E.2d 319 (Ohio Mun. Ct. 1993) (Article 1, Section 14 of Ohio Constitution prohibits use of roadblocks in absence of a substantial justification for not using other, less intrusive methods of law enforcement).

¹⁵⁵ *Commonwealth v. Rodriguez*, 722 N.E.2d 429, 434–35 (Mass. 2000).

¹⁵⁶ *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 319–20 (Mass. 2004). Since the court found the roadblock did not meet the constitutional requirements of a roadblock, it analyzed the stop under another theory. See II.J. *Area Entry Searches*, *infra* this report.

¹⁵⁷ Compare 440 U.S. 648 (results not sufficiently productive), with 496 U.S. 444 (empirical data showed effectiveness).

C. Consent¹⁵⁸

Consent is clearly an exception to the requirement that searches be conducted pursuant to a warrant issued upon probable cause.¹⁵⁹ Transit systems may seek to rely on this theory in supporting the legality of transit searches. The argument would be that entering the system is voluntary, so that proceeding into the system constitutes consent to a search. The countervailing argument would be that a passenger may have no other realistic travel alternative to transit, for example, for getting to work, and therefore cannot be said to have consented to the search merely by entering the system. Therefore, an understanding of the factors that have been considered dispositive in proving consent should prove useful in evaluating potential screening policies. This is particularly true since courts that reject the consent rationale may nonetheless look to factors that would be argued as constituting consent as indicia of reasonableness.¹⁶⁰

1. Federal Courts

Schneckloth,¹⁶¹ *supra*, is considered one of the seminal cases on the requirements of consent under the Fourth Amendment. In resolving a conflict in standards between the Ninth Circuit and the California state courts, the Supreme Court held that the voluntariness of consent to search is a question of fact to be determined from “the totality of all the circumstances,” and that knowledge of the right to refuse consent is merely one factor to consider.¹⁶² Therefore, although the government does have the burden of establishing that consent to a search was voluntary, it need not, in order to meet that burden, establish that the person searched knew

that he had the right to refuse the search.¹⁶³ In order to give valid consent, however, the situation must be such that a reasonable person would feel free to leave.¹⁶⁴

The cases contain a number of limitations on the concept of consent. For example, the government may not condition the exercise of one constitutional right upon the waiver of another.¹⁶⁵ Moreover, consent to one type of search does not constitute a consent to all searches. When a person consents to a search, the scope of the consent governs the scope of the search. The standard for measuring scope is one of objective reasonableness: “what would the typical reasonable person have under-

¹⁶³ 412 U.S. 218 at 248–49; 519 U.S. 33; 536 U.S. 194 (principle applies to both search and seizure). The Court remanded *Robinette* to the state court for further proceedings consistent with its holding that the Fourth Amendment did not require officer making traffic stop to tell a motorist after writing ticket that he is free to go before seeking consent to conduct a search. The Ohio Supreme Court found that such notice is not required under the Ohio Constitution, but that under a totality of the circumstances analysis, consent to search had not been freely given, thus affirming its own original disposition. *State v. Robinette*, 685 N.E.2d 762 (1997).

More than one commentator has suggested that the Supreme Court has held voluntary for legal purposes behavior that was not voluntary in any real sense of the word. See Tracey Maclin, *Voluntary Interviews and Airport Searches of Middle Eastern Men: the Fourth Amendment in a Time of Terror*, 31 SEARCH AND SEIZURE LAW REPORT 73 (Nov. 2004). The ACLU has argued that ferry searches cannot be considered voluntary if the alternative is not to ride the ferry. Andrew Garber, *Vehicle Searches at Washington Ferries Trouble American Civil Liberties Union*, THE SEATTLE TIMES, June 8, 2002.

¹⁶⁴ See 460 U.S. at 502. The Court applied the standard it had enunciated in *Mendenhall*, 446 U.S. at 554, for determining whether a seizure had occurred. In the case of a police request to search made on a bus, the Court, reasoning that a bus passenger may not feel free to leave for reasons that have nothing to do with the police presence, modified the “free to leave” standard in the case of a bus encounter to whether a reasonable person would feel free to decline the police request. 501 U.S. 436–37. In dicta the Court noted that the “reasonable person” test presupposes an innocent person. *Id.* at 438.

Where consent is given during the course of an unlawful seizure, the ensuing search is also unlawful. 460 U.S. 491; 501 U.S. 433–34.

¹⁶⁵ *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 664–65 (1981), citing *Frost v. Railroad Comm’n*, 271 U.S. 583 (1925) (striking down unconstitutional condition on use of public highways); See *Blackburn v. Snow*, 771 F.2d 556, 567–68 (1st Cir. 1985) (visits to prison conditioned on unconstitutional strip search of visitor); *Armstrong v. N.Y. State Commissioner of Correction*, 545 F. Supp. 728, 731 (N.D.N.Y. 1982) (continued employment as prison guards conditioned on unconstitutional strip searches); *Gaioni v. Folmar*, 460 F. Supp. 10, 13 (M.D. Ala. 1978) (access to civic center conditioned on consent to unconstitutional searches).

¹⁵⁸ These cases clearly illustrate the point that Fourth Amendment determinations are extremely fact-dependent, as in case after case the majority and minority disagree not on the standard at issue but on whether the facts support a finding of consent. *E.g.*, *United States v. Drayton*, 536 U.S. 194 (2002) (majority finds police did nothing to suggest to passengers that they were barred from leaving bus or otherwise terminating their encounters with police, while dissent finds it clear that under the circumstances passengers would not have felt free to not comply with police requests).

¹⁵⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); 4 LAFAVE § 8.1. Many of the consent cases involve a criminal defendant alleged by the government to have consented to a search by police that turned up incriminating evidence, with the issue being whether there had been genuine consent. A number of the cases involve defendants who were approached by police for questioning because they fit a drug courier profile. Generally these cases involve a challenge to a particular search, not an entire search regime. It should be noted that failure to grant consent cannot be used to establish probable cause to search. *Graves v. City of Coeur D’Alene*, 339 F.3d 828, 842 (9th Cir. 2003).

¹⁶⁰ See II.I., *Airport Security Searches*, *infra* this report.

¹⁶¹ 412 U.S. 218.

¹⁶² *Id.* at 227; *United States v. Lopez-Pages*, 767 F.2d 776, 779 (11th Cir. 1985).

stood by the exchange between the officer and the suspect?”¹⁶⁶

Courts have expressed reservations about implied consent, particularly based on generic notice: a vague warning makes it difficult to establish the scope of the search purportedly consented to. Consequently, a number of courts have balanced six elements in determining consent: notice; voluntary conduct; whether the search was justified by a “vital interest”; whether it was reasonably effective in securing the interests at stake; whether it was only as intrusive as necessary to further the interests justifying the search; and whether it curtailed, to some extent, unbridled discretion in the searching officers. Under this analysis, notice and voluntary conduct are necessary, but not sufficient, to establish consent.¹⁶⁷ Given that these “other indicia of reasonableness” have a bearing on the consent issue, where the need to search is not as vital as in the case of people boarding airplanes (or if the search is too intrusive for the security concerns at issue), courts have often declined to uphold searches based on implied consent.¹⁶⁸

Despite the vital need for the search, the courts have differed as to whether there is implied consent to airport screening. Courts have upheld these searches on the implied consent theory,¹⁶⁹ with some requiring that a person have the option of leaving the security area rather than submitting to the search in order for the proceeding to constitute implied consent.¹⁷⁰ A number of courts have held that once the airport screening process begins, there is implied consent to a further search,¹⁷¹ or that deciding to board a plane where signs warn of a

search constitutes consent to search.¹⁷² However, courts have also reiterated that the scope of the search cannot exceed the scope of the consent.¹⁷³

Many courts have questioned the real voluntariness of consent to search in order to board a plane.¹⁷⁴ For example, the Seventh Circuit noted:

These measures [sobriety checkpoints, administrative inspection searches, and use of metal detectors and x-ray machines at airports and government buildings], moreover, usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity, though we hesitate to put much weight on this point; people are unlikely to feel they can afford to “ground” themselves in order to avoid airport searches.¹⁷⁵

Notwithstanding its holding in *Miner, supra*, the Ninth Circuit has suggested that implied consent in the context of airport security searches is questionable, given that “many passengers have no reasonable alternative to traveling by airplane.”¹⁷⁶ The Second and Fourth Circuits have also expressed doubts on this question.¹⁷⁷ A reservation about not really having an alternative to the form of transportation could also be expressed concerning commuters on mass transit systems.

2. States

A number of states have increased burdens of proof to establish consent. For example, Mississippi,¹⁷⁸ New Jersey,¹⁷⁹ and Washington¹⁸⁰ have held that the subject of a

¹⁶⁶ 500 U.S. 248, 251.

¹⁶⁷ *McGann v. N.E. Ill. Regional Commuter R.R.*, 8 F.3d 1174, 1179–82 (7th Cir. 1993). See also *Serpas v. Schmidt*, 827 F.2d 23, 30 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988).

¹⁶⁸ 8 F.3d 1181. See also *Jeffers v. Heavrin*, 932 F.2d 1160, 1163 (6th Cir. 1991), cert. denied, 502 U.S. 1059 (1992). It has been argued that the “fiction of implied consent” undermines fundamental Fourth Amendment principles. 5 LAFAVE, *supra* note 79, § 10.6(g), at 308–09.

¹⁶⁹ *United States v. Mather*, 465 F.2d 1035 (5th Cir. 1972); *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973); *United States v. DeAngelo*, 584 F.2d 46 (4th Cir. 1978). See II.I., *Airport Security Searches, infra* this report. Commentators have strongly criticized the implied consent theory. *E.g.*, 4 LAFAVE, *supra* note 79, § 8.2(1), at 123–24.

¹⁷⁰ See *United States v. Miner*, 484 F.2d 1075 (9th Cir. 1973). The Ninth Circuit has also found that there may be implied consent to search at the entrance of a closed military base. See II.J., *Area Entry Searches, infra* this report.

¹⁷¹ *E.g.*, *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901, 902 (9th Cir. 1986); 298 F.3d 1087. But see *United States v. Albarado*, 495 F.2d 799, 807–08 (2d Cir. 1974), asserting that prospective passenger can turn and leave after setting off magnetometer, and that that furthers deterrent aspect of search scheme. See II.I., *Airport Security Searches infra* this report.

¹⁷² 482 F.2d 913. See II.I., *Airport Security Searches, infra* this report.

¹⁷³ *E.g.*, 873 F.2d 1247–48 (verbal consent to search carry-on luggage at airport valid but limited to search for weapons and explosives, not currency). The Court also questioned the voluntariness of airport searches, as many travelers have no realistic alternative to flying. The Court further stated that “a compelling state interest must exist before the government can burden the constitutional right to travel, airport searches cannot be justified by consent alone.” 873 F.2d 1248, n.8.

¹⁷⁴ See generally 5 LAFAVE, *supra* note 79, § 10.6(g).

¹⁷⁵ *Edmond v. Goldsmith*, 183 F.3d 659, 664 (7th Cir. 1999), *affd sub. nom.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

¹⁷⁶ 873 F.2d 1248, n.8.

¹⁷⁷ *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) (compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion), 495 F.2d 806–07 (requiring passenger to choose between flying to destination and exercising constitutional right to refuse search is often subtle form of coercion). See also *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (attendant circumstances establish only “acquiescence to apparent lawful authority”).

¹⁷⁸ *Graves v. State*, 708 So. 2d 858 (Miss. 1997).

¹⁷⁹ *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

¹⁸⁰ *State v. Ferrier*, 960 P.2d 927 (Wash. 1998) (requiring police to advise occupants they can refuse entry for consent to be

search must know of the right to refuse in order for consent to be voluntary. Similarly, Arkansas has held that the burden of proving consent is not met by showing only acquiescence to a claim of lawful authority.¹⁸¹ Hawaii has held that in order for consent to a warrantless search to be voluntary, it “must be unequivocal, specific and intelligently given, [and] uncontaminated by any duress or coercion[.]”¹⁸² Consequently, Hawaii has held that consent that is the inherent product of coercion—i.e., where the person searched does not know there is a right to object—cannot justify an otherwise invalid search.¹⁸³

Both Georgia and Indiana have questioned the ability of implied consent statutes to restrict Fourth Amendment rights.¹⁸⁴

Massachusetts has held that notice to searches at a courthouse made the searches consensual, noting that the voluntary nature of the searches reached the intrusiveness of the searches.¹⁸⁵

A Texas court has held that placing a bag on the x-ray conveyor belt at a courthouse constitutes sufficient consent to a search of that magnitude.¹⁸⁶

3. Summary of Important Principles

The government has the burden of proving consent. Consent may be implied—courts have split in airport cases about whether to infer consent from the search procedure itself. Consent must be voluntary. Voluntariness will be judged under totality of circumstances: Would a reasonable person feel free to leave or otherwise cease the procedure? Consent should not be conditioned on a waiver of another constitutional right. Knowledge of the right to refuse consent is only one factor under federal law; some states require knowledge of the right to refuse. The scope of consent governs the scope of the search. Consent to search for one purpose is not necessarily consent to search for all purposes. The degree of intrusiveness affects the reasonableness of the search.

valid; state has burden of proving consent; holding may apply to searches of homes only).

¹⁸¹ *Holmes v. State*, 65 S.W.3d 860, 865 (Ark. 2002).

¹⁸² *Erickson v. State*, 507 P.2d 508, 515 (Alaska 1973) (footnote omitted) (quoting *Rosenthal v. Henderson*, 389 F.2d 514, 516 (6th Cir. 1968)).

¹⁸³ *Nakamoto v. Fasi*, 635 P.2d 946, 951 (Haw. 1981). Note that the court contrasted the relative lack of danger in the stadium context, where it found the search unreasonable, to the “magnitude and pervasiveness” of dangers that airport and courtroom searches, which it implicitly recognized as reasonable, are meant to avert. *Id.* at 953.

¹⁸⁴ *Hannoy v. State*, 789 N.E.2d 977 (Ind. Ct. App. 2003); *Cooper v. State*, 587 S.E.2d 605 (Ga. 2003).

¹⁸⁵ *Commonwealth v. Harris*, 421 N.E.2d 447 (Mass. 1981). This case illustrates the overlapping nature of the categories of warrantless searches, and the flexibility inherent in the analysis.

¹⁸⁶ *State v. Kurth*, 981 S.W.2d 410, 414–15 (Tex. App. San Antonio 1998).

D. Profiling (Border, Drug, Hijacker)¹⁸⁷

The general parameters for profiling are relevant to formulating a transit screening policy, whether a randomized stop policy (which would require that no profiling of any kind be used) or a policy that targets certain individuals or packages (which would require that only profiling reasonably related to the threat at hand be used). This is an area, however, where state law may differ substantially from federal law, as discussed *infra*.

Profiling can distinguish by behavior (e.g., buying one-way airline ticket); combination of behavior and appearance (e.g., wearing large loose overcoat in weather not calling for overcoat); or appearance alone (e.g., apparent racial or ethnic identity). Singling out particular types of clothing (that is clothing that could conceal weapons or explosives) or particular sizes of packages (those that could conceal weapons or explosives) could be deemed profiling, and could be used to target security screening. However, the term “profiling” most commonly calls to mind racial or ethnic profiling, which has given rise to considerable controversy.¹⁸⁸ It

¹⁸⁷ Some judges have expressed concern that airport searches based on hijacking profiles were turning up far more illegal drugs than the weapons that were ostensibly the targets of the searches. See *United States v. Legato*, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., specially concurring), *cert. denied*, 414 U.S. 979 (1973); *United States v. Czewski*, 484 F.2d 509, 515–16 (5th Cir. 1973) (Thornberry, J., dissenting), *cert. denied*, 415 U.S. 902 (1974). However, one commentator has suggested that since air hijacking and drug courier profiling have come into use, the only objections have been in law review articles and dissenting opinions. Jonathan Lewis Miller, *Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight*, 22 *TRANSP. L.J.* 199, 209–11 (1994).

¹⁸⁸ See, e.g., R. Spencer Macdonald, *Notes & Comments: Rational Profiling in America's Airports*, 17 *B.Y.U. J. PUB. L.* 113 (2002); Christine Willmsen, *Profiling Evident in Citizen Reports*, *SEATTLE TIMES*, Oct. 10, 2004, posted at http://seattletimes.nwsourc.com/html/localnews/2002058973_profile10m.html.

Numerous law review articles address the equal protection issues posed by racial profiling. See, e.g., Albert W. Alschuler, *Racial Profiling and the Constitution*. 2002 *U. CHI. LEGAL F.* 163. It is beyond the scope of this report to do so. However, an understanding of a few basic Equal Protection Clause principles is important to assessing whether a nonrandomized security screening policy will be upheld. The Supreme Court has held that “all laws that classify citizens on the basis of race...are constitutionally suspect and must be strictly scrutinized.” *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). However, several circuit courts have held that so long as race is only one factor in a decision, the inclusion of race need not be subject to strict scrutiny. Alschuler, *supra*, at 178, n.55–57, citing *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995), *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992), *cert. denied*, 506 U.S. 1040 (1992); *United States v. Lacy*, 2000 U.S. App. LEXIS 31195, at *3 (9th Cir. 2000) (unpublished); *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1184 (D. Or. 1999); and *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (upholding the

should be noted that the use of racial classifications are not per se unconstitutional, but are subject to strict scrutiny to justify them.¹⁸⁹

Use of profiling in hijacking prevention goes back to 1968, when the Federal Aviation Task Force included a hijacker profile as part of the first anti-hijacking system.¹⁹⁰ In the early years of hijacker prevention efforts, in most airports only passengers who met the profile were subjected to magnetometer screening.¹⁹¹ In the wake of the crash of TWA Flight 800 in 1986, the Federal Aviation Administration (FAA) began the Computer Assisted Passenger Screening (CAPS) program to identify potentially dangerous passengers and subject them to more intense screening. An even more intensive screening program, CAPS II, is scheduled for introduction.¹⁹²

1. Federal Courts

Drug Courier Profiling.—The Supreme Court has upheld a prolonged stop based on a drug courier profile¹⁹³ and has held that the fact that the articulated facts supporting an officer's reasonable suspicion are consistent with the description in a drug courier profile does

stop of a Latino in a white neighborhood because he was out of place). Contrary cases are *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990); *Whitfield v. Board of County Comm'rs*, 837 F. Supp. 338, 340, 344 (D. Colo. 1993); *People v. Bower*, 597 P.2d 115, 119 (Cal. 1979); *State v. Kuhn*, 517 A.2d 162, 165 (N.J. Super. Ct. 1986); and *Lowery v. Va.*, 388 S.E.2d 265, 267 (Va. App. 1990) (declaring that a motorist's race is not "a permissible factor in the decision to stop his vehicle"). See also *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir.) (conducting street sweeps for black suspect did not employ racial classification), *petition for reh'g en banc denied*, 239 F.3d 769 (2000), *cert. denied*, 122 S. Ct. 44 (2001). Although racial profiling has been defined in different ways, a reasonable meaning is "any law enforcement decision based at least in part on the belief that members of a particular racial group are more likely to commit the crime under investigation than are members of other groups." R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1204, n.8 (2004).

¹⁸⁹ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁹⁰ Sanford L. Dow, *Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*. 58 J. AIR L. & COM. 1149, 1160 (1993).

¹⁹¹ Addie S. Ries, *Comment: America's Anti-hijacking Campaign—Will It Conform to Our Constitution?* 3 N.C. J.L. & TECH. 123, 132 n.25 (2001). For a period of time after magnetometer screening became universal, hijacker profiling was abandoned. See 495 F.2d 799.

¹⁹² For a history of both CAPS systems and a discussion of the constitutionality of CAPS II, see Michael J. DeGrave, *Note, Airline Passenger Profiling and the Fourth Amendment: Will CAPS II Be Cleared for Takeoff?*, 10 B.U. J. SCI. & TECH. L. 125 (2004).

¹⁹³ 473 U.S. 531 (holding that a 16-hour detention based on reasonable suspicion is not unreasonable because it occurred at the international border "where the Fourth Amendment balance of interests leans heavily to the Government").

not detract from their evidentiary value.¹⁹⁴ It is of interest that both *Montoya de Hernandez* and *Sokolow* involved defendants who were detained in connection with international flights, and so had border overtones.

Racial Profiling.—The Supreme Court upheld the former by United States Border Patrol agents making stops along the United States–Mexico border.¹⁹⁵ The Court subsequently approved the use of ethnic classifications as one factor in deciding which cars to refer to a secondary fixed checkpoint, stating "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."¹⁹⁶

The Court has set forth a rule for proving selective prosecution that has been applied to cases involving searches: to be unconstitutional the prosecution must have a discriminatory effect and a discriminatory purpose. Discriminatory effect must be established by showing that similarly situated people of other races have not been prosecuted.¹⁹⁷

In a much-discussed decision,¹⁹⁸ the Court rejected Fourth Amendment challenges to pretext searches and

¹⁹⁴ *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Justice Brennan, dissenting, argued that "[r]eflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention." *Id.* at 13.

¹⁹⁵ 422 U.S. 873. The Court weighed the public interest against the individual's personal security interest, *id.* at 878–80, and held that in the case of an officer who has reasonable suspicion that a vehicle contains illegal aliens, the public interest in preventing illegal Mexican immigration outweighed the limited intrusion involved in the officer briefly stopping the vehicle and investigating the circumstances that aroused his suspicion. *Id.* at 881–82. The fact that the agents were policing the border was integral to the Court's determination. Seth M. Haines, *Comment: Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 ARK. L. REV. 105, 122, n.146 (2004). While Mexican ancestry was deemed a relevant factor in developing reasonable suspicion of illegal immigration, it was not deemed sufficient as the sole factor. 422 U.S. 885–86. The officers' experience in enforcing immigration laws was arguably a factor in the Court's finding on this point. Haines, *supra*, at 123.

¹⁹⁶ 428 U.S. 563 (footnote omitted). Justice Brennan, dissenting, stated: "Today we are told that secondary referrals may be based on criteria that would not sustain a roving-patrol stop, and specifically that such referrals may be based largely on Mexican ancestry....That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances." 428 U.S. 571, n.1.

¹⁹⁷ *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁹⁸ *Whren v. United States*, 517 U.S. 806 (1996). Numerous law review articles have been written challenging the assumptions in *Whren*. See, e.g., David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997) (arguing that the ruling in *Whren* that essentially ap-

seizures. The Court held that claims asserting a search was motivated by race will be decided not under the Fourth Amendment, but under equal protection.¹⁹⁹ One of the bases for rejecting the Fourth Amendment argument was that police enforcement practices vary from jurisdiction to jurisdiction, while application of the Fourth Amendment should not.²⁰⁰ This line of reasoning would not apply to an analysis of whether pretextual stops violate state constitution search and seizure protections.

Lower courts have come to different results depending on whether racial identity is the sole factor in developing reasonable suspicion or one of several factors.²⁰¹ The Ninth Circuit has distinguished *Brignoni-Ponce* and held that under the circumstances (lack of probative value of Hispanic appearance in area with large percentage of Hispanics), it was unconstitutional for the Border Patrol to take Hispanic appearance into account in deciding whether to stop someone for a suspected immigration violation.²⁰²

Hijacker Profiling.—The validity of hijacker profiles has generally been recognized without much analysis.²⁰³ The use of such profiles has also generally been upheld to justify a stop and frisk,²⁰⁴ but not sufficient cause to search checked baggage or carry-on baggage outside of the passenger's control.²⁰⁵ An officer's experience in us-

proves pretextual stops will have an imbalanced effect on non-whites); *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 31 (2004). (*Whren* places in doubt previous cases holding that stopping someone merely because of his ethnic background violates the Fourth Amendment).

¹⁹⁹ 517 U.S. 813. The Court rejected the claim that the Fourth Amendment requires consideration of whether “the officer’s conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.” *Id.* at 813–14.

²⁰⁰ *Id.* at 815.

²⁰¹ *Cf.* 966 F.2d 391 (officer had grounds for reasonable suspicion, only one of which was racial identity: no Fourth Amendment violation) and *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994) (racial identity was sole factor, unconstitutional).

²⁰² *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc), *cert. denied* in *Sanchez-Guillen v. United States*, 531 U.S. 889 (2000).

²⁰³ *E.g.*, *United States v. Skipwith*, 482 F.2d 1272, 1274–75 (5th Cir. 1973). *See also* 767 F.2d 778 (upholding Eastern Airlines’ use of behavioral profile for searching passengers).

²⁰⁴ *E.g.*, 464 F.2d 672 (fact that passenger met FAA’s profile of potential hijacker found to be legitimate factor in developing a reasonable suspicion that there was cause to stop and frisk passenger); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) (upheld *Terry*-type frisk of individual at airport boarding gate on grounds of matching hijacker profile and activating magnetometer).

²⁰⁵ *United States v. Allen*, 349 F. Supp. 749, 752 (N.D. Cal. 1971) (fact that defendant matches several characteristics of

ing a profile has been a factor in upholding its legitimacy in developing a reasonable suspicion to search someone.²⁰⁶

2. States

Racial Profiling.—Some states have addressed racial profiling via legislation. For example, California, Connecticut, Oklahoma, and Rhode Island have enacted prohibitions against racial profiling.²⁰⁷ A number of state courts have found pretextual stops to be unconstitutional under their state constitutions, either because such stops violate the state constitution,²⁰⁸ or because the scope of the stop beyond the original reason was not supported by a reasonable articulation of suspicion that criminal activity was afoot.²⁰⁹ State courts have also suppressed evidence as a result of findings of racial profiling.²¹⁰

3. Summary of Important Principles

The Supreme Court has held that racial profiling is not a Fourth Amendment issue, but is subject to strict scrutiny. Racial profiling may be illegal under state law. The question has not really been decided as to whether meeting a hijacker profile is sufficient grounds for search in and of itself.

hijacker profile does not constitute reasonable suspicion to search their luggage).

²⁰⁶ 475 F.2d 50.

²⁰⁷ CAL. PENAL CODE § 13519.4 (West 2001); CONN. GEN. STAT. § 54-11 (West 2002); OKLA. STAT. ANN. tit. 22, § 34.3 (West 2001); R.I. GEN. LAWS § 31-21.2-3 (2004). Connecticut, Oklahoma, and Rhode Island all define racial profiling as “the detention, interdiction or other disparate treatment of an individual solely on the basis of the racial or ethnic status of such individual.” Alschuler, *supra* note 188, at 168, n.24.

²⁰⁸ *State v. Soto*, 734 A.2d 350, 360–61 (N.J. Super. Ct. Law Div. 1996) (relying on un rebutted statistical evidence, court found police had engaged in racial profiling that violated equal protection and due process clauses of New Jersey constitution); *Washington v. Ladson*, 979 P.2d 833, 838 (Wash. 1999) (forcefully rejected holding in *Whren*); *State v. Sullivan III*, 74 S.W.3d 215, 221 (Ark. 2002) (pretextual arrests, “arrests that would not have occurred but for an ulterior investigative motive,” found invalid under Article 2, Section 15 of the Arkansas Constitution).

²⁰⁹ *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (in order to expand search beyond original reason to stop, officer must have reasonable articulable suspicion or inform suspect he is free to refuse consent). The police officer’s failure to inform defendant that he could refuse consent was violation of Minneapolis police procedure.

²¹⁰ *E.g.*, *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 115–16 (Mass. 1999) (Ireland, J., concurring) (supporting the suppression of evidence gathered as a result of racial profiling by police); *State v. Donahue*, 742 A.2d 775, 782 (Conn. 1999) (suppressing evidence gathered during investigatory stop, noting that the case raises the “insidious specter of ‘profiling’”); 734 A.2d 350.

E. Canine Sniff

Generally, using a drug- or explosive-seeking dog to check luggage or vehicles is considered less intrusive than conducting a visual or physical search.²¹¹ Therefore, the viability of using explosive-sniffing dogs rather than other search methods has both legal and practical implications for transit agencies developing search procedures. For example, in Seattle, the State Attorney General's office was concerned that a plan to randomly search vehicles boarding ferries was unconstitutional under the Washington State Constitution, but believed that a plan to use explosive-sniffing dogs was not.²¹²

1. Federal Courts

The Supreme Court has held that the exposure of luggage in a public place to a trained canine is not a search within the meaning of the Fourth Amendment.²¹³ In drawing this conclusion, the Court considered the fact that the canine sniff is less intrusive than a manual search by an officer both in manner (does not expose interior of luggage) and in what it reveals (contraband only).²¹⁴ The case has been interpreted as suggesting that “the less intrusive an inspection, the more likely it is to be deemed constitutional.”²¹⁵

The Court's most recent review of a case involving a canine sniff was *Illinois v. Caballes*.²¹⁶ *Caballes* involved a traffic stop, during which a second policeman walked a drug detection dog around the defendant's car while the original officer wrote the speeding ticket. The dog sniff did not extend the duration of the stop. The Court noted that government conduct that only reveals contraband “compromises no legitimate privacy interest.”²¹⁷

²¹¹ See Raphael Lewis, *T to Check Packages, Bags at Random*, BOSTON GLOBE, June 8, 2004 (canine search does not require opening bag; without dog, bag opened for look inside). Posted at http://www.boston.com/news/local/massachusetts/articles/2004/06/08/t_to_check_packages_bags_at_random?mode=PF.

²¹² Mike Carter, *Washington State Ferries Scramble to Meet New Security Standards*, KNIGHT RIDDER/TRIBUNE BUSINESS NEWS, July 2, 2004. “A dog on its worst day is better than visual inspection on a good day.” Rep. Rick Larsen, quoted by Gilmore, *supra* note 19. The availability (or lack thereof) of trained explosive-sniffing dogs illustrates the impact of practical limitations on legal issues. Use of canines may render searches less intrusive, but transit agencies need funds to supply and train them. See, e.g., Gilmore, *supra* note 19. The plaintiffs in the Boston case, see I.K., *Transit Searches*, *infra* this report, cite to these cases, although the point was not picked up in the district court opinion.

²¹³ *United States v. Place*, 462 U.S. 696, 707 (1983).

²¹⁴ *Id.* at 707.

²¹⁵ Anne Salzman Kurzweg, *A Jurisprudence of “Squeezes”*: *Bond v. U.S. and Tactile Inspections of Luggage*, 27 SEARCH AND SEIZURE L. REP. 73, 74 (Nov. 2000).

²¹⁶ *Illinois v. Caballes*, 543 U.S. ___, 125 S. Ct. 834 (2005).

²¹⁷ *Id.* at 837. Justice Souter, dissenting, remarked that the Court's opinion would allow “suspicionless and indiscriminate

and held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.²¹⁸ The majority did not address the use of canines to detect explosives; both Justices Souter and Ginsburg, dissenting from the majority opinion upholding the canine sniff for drugs during a traffic stop, suggested that sniff searches for explosives would likely be justified because of the societal risk²¹⁹ or under a special needs theory.²²⁰

The Court has not reached the question of whether a canine search of a person has greater Fourth Amendment implications than those it has already reviewed.

By the time *Caballes* was decided, lower courts had already upheld canine sniffs in a variety of circumstances, including sniffing checked luggage,²²¹ vehicles in a motel parking lot,²²² luggage in the luggage racks of a bus stopped for servicing,²²³ and, under certain circumstances, exploratory sniffing of school lockers.²²⁴ While some courts have held that a canine sniff of people, as opposed to luggage, is a search,²²⁵ others have held even a canine sniff of people is not a search.²²⁶

sweeps of cars in parking garages and pedestrians on sidewalks.” *Id.* at 839.

²¹⁸ *Id.* at 837–38.

²¹⁹ *Id.* at 843, n.7 (Justice Souter, dissenting).

²²⁰ *Id.* at 846, 847 (Justice Ginsburg, joined by Justice Souter, dissenting).

²²¹ *United States v. Goldstein*, 635 F.2d 356 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981) (sniffing by dogs of luggage checked in an airport not a search); *United States v. Viera*, 644 F.2d 509 (5th Cir.), *cert. denied*, 454 U.S. 867 (1981) (sniffing by dogs of luggage checked in a bus terminal not a search).

²²² *United States v. Ludwig*, 10 F.3d 1523 (10th Cir. 1993).

²²³ *United States v. Gant*, 112 F.3d 239 (6th Cir. 1997); *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992).

²²⁴ 690 F.2d 473 (dog sniff of car and locker not a search).

²²⁵ *Id.* at 479 (under facts at issue (at very close range) dog search of children's person is a search, reasonable suspicion required); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266–68 (9th Cir. 1999) (where a dog sniffs a person or luggage while it is being carried by a person, the intrusion is a search; random suspicionless dog sniff of person unreasonable under the circumstances).

²²⁶ *United States v. Reyes*, 349 F.3d 219 (5th Cir. 2003) (under circumstances, inadvertent non-contact dog sniff of passenger not a search); *United States v. Williams*, 356 F.3d 1268 (10th Cir. 2004) (defendant not seized where dog sniff occurred in open space under non-threatening circumstances); *United States v. Jackson*, 390 F.3d 393 (5th Cir. 2004) (Fact that bus passenger, on board when officers conducted a canine sniff of bus's interior after giving passengers choice of remaining or disembarking during sniff, had to disembark to avoid encounter with dog did not render encounter a seizure); *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *op. adopted on this issue and rev'd on another issue*, 631 F.2d 91 (7th Cir.) (*per curiam*) (exploratory dog sniff held not to be a search), *cert. denied*, 451 U.S. 1022 (1981).

Where a canine is brought in while another administrative activity is being conducted, the canine sniff cannot prolong the duration of the stop beyond the time that would be expected to accomplish the other activity.²²⁷ While canine sniffs are less intrusive than physical searches, the Fourth Amendment implications of their use will depend upon the particular facts of the case.²²⁸

2. States

Most states have followed *Place*, holding that a canine sniff, at least of property, is not a search under their state constitutions.²²⁹ However, a number of state courts have rejected the holding in *Place* in interpreting the state constitutions at issue, generally requiring reasonable suspicion for a canine sniff of property.²³⁰ Washington reviews canine sniffs on a case-by-case basis.²³¹ Colorado has held that a dog sniff for narcotics in connection with a traffic stop that is prolonged beyond its reasonable purpose to investigate for drugs requires reasonable suspicion of criminal activity.²³² Pennsylvania requires probable cause for a canine sniff of a person.²³³ New York requires reasonable suspicion for a dog sniff of an apartment from a common hallway.²³⁴

²²⁷ *United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5th Cir. 2003) (border patrol agents may only employ drug sniffing dog at immigration stop if it does not lengthen stop beyond time necessary to verify immigration status of vehicle's passengers).

²²⁸ See generally 1 LAFAVE, *supra* note 79, at § 2.2(g).

²²⁹ *State v. Snitkin*, 681 P.2d 980 (Haw. 1984); *State v. Palicki*, 646 N.E.2d 494 (Ohio Ct. App. 1994); *State v. Scheetz*, 950 P.2d 722 (Mont. 1997) (canine sniff of checked luggage); *State v. Smith*, 963 P.2d 642 (Or. 1998).

²³⁰ *McGahan v. State*, 807 P.2d 506, 510 (Alaska Ct. App. 1991); *People v. Unruh*, 713 P.2d 370, 381–82 (Colo. 1986); *State v. Pellicci*, 580 A.2d 710, 717 (N.H. 1990); *People v. Dunn*, 564 N.E.2d 1054, 1059 (N.Y. 1990), *cert. denied. sub. nom. Dunn v. N.Y.*, 501 U.S. 1219 (1991); *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987); *People v. Boylan*, 854 P.2d 807 (Colo. 1993); *State v. Ortiz*, 600 N.W.2d 805 (Neb. 1999); *State v. Tackitt*, 67 P.3d 295 (Mont. 2003) (dog sniff of vehicle parked in public area requires reasonable suspicion; 950 P.2d 722 distinguished). See also *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002) (holding that dog sniff of car for drugs went beyond permissible scope of traffic stop unless officer had developed reasonable articulable suspicion for specific drug-related offense); *People v. Cox*, 782 N.E.2d 275 (Ill. 2002) (state constitution requires reasonable suspicion to call canine unit to scene of routine traffic stop; U.S. Supreme Court distinguished this case in *Caballes*, *supra*, on the basis of the length of the stop). Cf. *State v. Waz*, 692 A.2d 1217, 1220 (Conn. 1997) (because police had reasonable suspicion, court did not have to decide whether dog sniff is search under Connecticut constitution).

²³¹ See *State v. Young*, 867 P.2d 593 (Wash. 1994).

²³² *People v. Haley*, 41 P.3d 666, 672 (Colo. 2001) (rejecting argument that dog allows officer to expand own plain smell ability).

²³³ *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993).

²³⁴ 564 N.E.2d 1054.

3. Summary of Important Principles

Canine sniffs are considered less intrusive than visual or physical searches, and are usually subject to fewer restrictions. The Supreme Court does not consider a sniff of luggage in a public place to be a search. A sniff of packages is generally subject to less restrictions than a sniff of people.

F. Luggage Cases

Since transit searches are likely to entail searching briefcases and similar items, the case law on luggage searches is relevant. Clearly the seizure of personal property can amount to a seizure of the person.²³⁵ Generally the issue is the extent to which the person's possessory right in the property has been interfered with. These cases are also instructive because of the distinctions drawn between the intrusiveness of a brief visual inspection and a physical inspection. For example, *Bond v. United States*²³⁶ was cited by plaintiffs opposing transit searches in Boston.²³⁷

1. Federal Courts

The Supreme Court has held that not only does a person have a privacy interest in his luggage,²³⁸ but also a reasonable expectation that no one will touch that luggage in a probing manner.²³⁹ In *Bond*, *supra*, a border patrol agent checking immigration status squeezed the luggage in a bus's luggage rack as he walked through the bus, thereby uncovering a suspiciously shaped object. In invalidating the subsequent search of Bond's luggage, the Court noted: "Physically invasive inspection is simply more intrusive than purely visual inspection."²⁴⁰

The 11th Circuit found that a 140-minute detention of the defendant's luggage without prompt examination by a detector dog exceeded the scope of a stop justifiable under *Terry*. In reaching that decision, the court examined the time the defendant was detained, the severity of the disruption to his travel plans, how the luggage was seized, and whether the length of the seizure was unnecessarily extended by lack of police diligence.²⁴¹

2. Summary of Important Principles

An individual's privacy interest in luggage has been recognized. It has been deemed reasonable to expect one's luggage will not be touched in a probing manner. The reasonableness of a search or seizure of luggage is judged by the degree of intrusion and duration of intrusion.

²³⁵ See *United States v. Puglisi*, 723 F.2d 779, 788 n.12 (11th Cir. 1984).

²³⁶ 529 U.S. 334 (2000).

²³⁷ See III.K., *Transit Searches*, *infra* this report.

²³⁸ *United States v. Ross*, 456 U.S. 798, 822–23 (1982); 462 U.S. 707.

²³⁹ 529 U.S. at 338.

²⁴⁰ *Id.* at 337.

²⁴¹ 723 F.2d 779.

G. Administrative Searches in General

The administrative search exception is relevant to transit searches because it is the foundation for the more specific exceptions that provide conceptual models for excepting transit searches from the warrant and individualized suspicion requirements. Certain characteristics of administrative searches are likely to be considered by a court in assessing the reasonableness of a search policy, whether or not the court engages in an actual administrative search analysis. Those characteristics are: furthering administrative rather than criminal purposes;²⁴² creating an established procedure that limits discretion and sets the parameters for the searches;²⁴³ and limiting the intrusiveness of the search consistent with meeting the administrative need that justifies the search.²⁴⁴

Factors that have been held to minimize intrusiveness, at least for searches at airports, courthouses, and

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The essence of these [administrative search] decisions is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

482 F.2d 908. However, revealing criminal evidence will not invalidate an otherwise proper administrative search, so long as looking for criminal evidence was not the purpose of the search. *Cf.* 873 F.2d 1240 (once a search is conducted for a criminal investigatory purpose, it can no longer be justified under an administrative search rationale); *United States v. Smith*, 643 F.2d 942, 944 (2d Cir.), *cert. denied*, 454 U.S. 875 (1981) (an airport search instigated by the DEA was constitutional so long as “there was an independent and adequate basis for the security search in its own right,” quoting *United States v. Scott*, 406 F. Supp. 443, 445 (E.D. Mich. 1976)).

While the formality of the regulatory scheme may be an issue in determining that a search falls under the administrative search exception, *see* 143 F.3d 853–54 (“the ad hoc search procedure set up to deal with the perceived threat could not be considered a ‘regulatory scheme’ of the sort courts have considered necessary to treating entry-area searches as a species of ‘administrative search’”), such schemes need not be based on regulations per se, 143 F.3d 853, n.6, citing school searches undertaken pursuant to “formally promulgated school board directives” as valid administrative searches. A district court has upheld as an administrative search regime a policy based on a transit agency’s police department directive. The decision did not contain any discussion of the adequacy of the authority for the regulatory scheme, rather focusing on the substantiality of the government interest at stake and the reasonableness under the circumstances of the privacy intrusion. *See* II.K., *Transit Searches*, *infra* this report.

²⁴³ 156 F.3d 963.

²⁴⁴ *See* *Mich. v. Clifford*, 464 U.S. 287, 297–98 (1984) (as soon as cause of fire discovered, scope of search limited to area of discovery—further warrantless search in another portion of building unconstitutional without prior judicial determination of probable cause).

other governmental buildings,²⁴⁵ are notice,²⁴⁶ limited scope, nondiscretionary application, and the existence of a written policy.

It appears that while the existence of a statute or regulation would make it more likely that a search policy would be upheld under an administrative search analysis, a policy that contained the characteristics of an administrative search could be upheld based on a reasonableness analysis whether or not it could claim the administrative search label.²⁴⁷

1. Federal Courts

*Camara v. Municipal Court*²⁴⁸ was the first case in which the Supreme Court held that the warrant requirement did apply to civil searches. The Court recognized that a civil search may be less hostile than a criminal search, but rejected the notion that the Fourth Amendment interests were therefore peripheral.²⁴⁹

²⁴⁵ Administrative search cases that deal with these more specific exceptions are discussed primarily in sections III.–II.K, *infra* this report.

²⁴⁶ An administrative scheme can also be challenged on the basis that it does not provide adequate notice of its requirements and therefore violates the Due Process Clause of the Fifth Amendment. This argument was raised by the plaintiff in 2004 WL 603530. There is a distinction between the requirements of the administrative scheme, which must be clearly disclosed, and the manner in which the government will attempt to ensure that those requirements are not violated. *See* *Dirksen v. Department of Health and Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986) (distinguishing between “law-enforcement materials, which involve enforcement methods, and administrative materials, which define violations of the laws”). A written copy of the requirements need not be made available. *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001) (due process requires “oral or written notice”).

²⁴⁷ *See* 495 F.2d 804, n.9. *See also* II.K. *Transit Searches*, *infra* this report.

²⁴⁸ 387 U.S. 523. *Camara* involved a resident of San Francisco who refused to allow a housing inspector to enter his residence without a search warrant. *Camara* was arrested for repeatedly refusing entry into his premises and challenged the constitutionality of the Housing Code and requested a writ of prohibition to the criminal court. Relying on *Frank v. Md.*, 359 U.S. 360 (1959), the California courts denied the writ. 387 U.S. 525–27.

²⁴⁹ *Id.* at 530. In so ruling, the Court reversed *Frank*, 359 U.S. 360, in which the Court had held that warrantless civil searches were not unconstitutional. In *Frank*, Justice Frankfurter concluded that the Fourth Amendment relates primarily to searches that are part of a criminal investigation. *See* 5 LAFAVE, *supra* note 79, § 10.1(a), at 7. The *Camara* Court noted “the *Frank* opinion has generally been interpreted as carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment.” 387 U.S. at 529. The Court then went on to say: “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only

The Court reviewed, and rejected, the government's other arguments for warrantless administrative searches: that the administrative procedure contained adequate safeguards and could not proceed under the warrant process (finding that the procedure contained too much discretion by the inspecting official to not be subject to the warrant requirement),²⁵⁰ and that the public interest required warrantless administrative searches (finding that the public interest could be adequately protected through inspections made under a warrant).²⁵¹ The Court set forth an important standard:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but *whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.*²⁵² (emphasis added).

when the individual is suspected of criminal behavior." *Id.* at 530.

²⁵⁰ *Id.* at 531–33.

²⁵¹ *Id.* at 533.

²⁵² *Id.* at 533. The Court went on to hold, however, that probable cause for the administrative search in question was satisfied by meeting reasonable legislative or administrative standards with respect to an individual building, without having specific knowledge of the conditions of that individual building. *Id.* at 538.

See *v. City of Seattle*, 387 U.S. 541 (1967), extended the holding in *Camara* to commercial structures not used as private residences. The *See* Court held that a warrant is required to compel administrative entry (through prosecution or physical force) to portions of a commercial premise not open to the public. The Court left open the question of the constitutionality of regulatory inspections, to be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.* at 546.

The Court recognized a regulated industries exception in *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) (given the history of regulation of the liquor industry, Congress could have designed a regulatory scheme that would have justified a warrantless entry, but had not done so; forced entry and seizure without consent held unconstitutional), and applied it in *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless search of locked storeroom as part of inspection procedure under Gun Control Act of 1968 held not violative of Fourth Amendment).

In developing the "closely-regulated industry" exception, the Court set forth several important standards that came to be used in evaluating other types of administrative searches: A regulatory inspection system that provides for warrantless searches should be carefully limited as to time, place, and scope, and derives its legitimacy from a valid statute, not from consent to search. 406 U.S. 315. A statute that provides for regulatory inspections that further an "urgent federal interest" with minimal possibilities of abuse and threat to privacy may constitutionally authorize warrantless inspections. *Id.* at 317.

In *New York v. Burger*,²⁵³ the Court applied the administrative search analysis to a situation involving penal sanctions. The Supreme Court reversed and set forth three criteria for a warrantless inspection to be deemed reasonable: 1) there must be a substantial government interest underlying the regulatory scheme; 2) the warrantless inspection must be necessary to further the regulatory scheme; and 3) the regulatory statute must advise the property owner that the search is made pursuant to law and has a properly defined scope, and it must limit the inspecting officers' discretion.²⁵⁴ Nei-

While the Court was prepared to find an exception to the warrant clause for businesses long subject to close government supervision such as liquor and firearms—on the theory that businessmen in such industries had effectively consented to restrictions like searches—it at first declined to do so for businesses not historically subject to government supervision. 436 U.S. 307 (holding unconstitutional warrantless search requirement under the Occupational Safety and Health Act of 1970). However, in declining to uphold warrantless searches for the Occupational Safety and Health Administration (OSHA) inspections, the Court noted that its holding did not affect other regulatory schemes: "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321.

The Court distinguished *Barlow's* in *Donovan v. Dewey*, 452 U.S. 594 (1981), in order to uphold warrantless searches under the Federal Mine Safety and Health Act of 1977. *Id.* at 606. The reasons for upholding the warrantless search scheme in *Donovan* were that there was a substantial federal interest; a warrant requirement would frustrate effective enforcement; and the inspection scheme provided a constitutionally adequate substitute for a warrant (frequency of inspections defined, compliance standards specifically set forth, forcible entry prohibited). *Id.* at 602–05. The Court also held that pervasiveness and regularity are the factors for determining whether a regulatory search scheme is constitutional, and that longevity is only one factor in determining pervasiveness. *Id.* at 606. Justice Stevens, dissenting, had argued in *Barlow's*, *supra*, that longevity should not be controlling. 436 U.S. 336–37. He had also rejected the implied consent rationale for allowing warrantless searches of closely regulated industries. *Id.* at 337–38.

²⁵³ 482 U.S. 691 (1987). *Burger* involved the warrantless search of an automobile junkyard under N. Y. VEH. & TRAF. LAW § 415-a by members of the Auto Crimes Division of the New York City Police Department. The New York Court of Appeals found that 415-a did not meet the constitutional requirements for a comprehensive regulatory scheme, but was really a means of enforcing penal sanctions for possession of stolen property. *Id.* at 693–98.

²⁵⁴ *Id.* at 702–03. The Court also held that the government may address the same issue through both an administrative scheme and penal sanctions without violating the Fourth Amendment. *Id.* at 712–13. This case illustrates the fact-dependent nature of Fourth Amendment cases, in that the dissent agrees with the majority as to the appropriate standard to be applied, but argues that the facts do not support the

ther the discovery of criminal evidence nor the mere fact that police officers carry out the administrative search rendered the search unconstitutional.²⁵⁵

The Ninth Circuit, in reviewing one of the seminal airport search cases,²⁵⁶ followed *Camara, supra*, in balancing the need to search against the intrusiveness of the search. The *Davis* court upheld the search after considering whether the administrative screening search was as limited in its intrusiveness as was consistent with satisfaction of the administrative need that justified it.²⁵⁷

Numerous courts have held that searching for explosives and weapons to avoid airplane hijackings²⁵⁸ or attacks within government facilities²⁵⁹ are sufficient government interests to justify warrantless administrative searches. A building-entry search for narcotics has been held to be an insufficient basis for an administrative search.²⁶⁰

Discretion on the part of the officers conducting the search in deciding what to search for and how carefully to search may lead to invalidation of an administrative search. For example, the Ninth Circuit has held that where such broad discretion exists, the existence of a second impermissible motive extends the scope of the search beyond that of the administrative search.²⁶¹ While the administrative search may not be enlarged for other purposes, unrelated contraband inadvertently discovered during such a search may be seized and introduced at trial.²⁶²

Courts have distinguished between types of searches in determining the reasonableness of the search; for

Court's ruling. 482 U.S. 718. In fact, the dissent argued that the majority opinion effectively overruled *See*, 387 U.S. 543. 482 U.S. 721.

²⁵⁵ *Id.* at 716, 717–18.

²⁵⁶ 482 F.2d 893. *See* II.I., *Airport Security Searches, infra* this report.

²⁵⁷ 482 F.2d 910. *See also* *Western States Cattle Co., Inc. v. Edwards*, 895 F.2d 438 (8th Cir. 1990) (courts must scrutinize whether administrative scheme represents substantial government interest; whether warrantless inspection necessary to further regulatory interests; whether rules governing inspection offer constitutionally adequate substitute for warrant requirement of Fourth Amendment).

²⁵⁸ *See* II.I., *Airport Security Searches, infra* this report.

²⁵⁹ *See* II.J., *Area Entry Searches, infra* this report.

²⁶⁰ 156 F.3d 963 (finding intrusion of search for narcotics at government building entry was great, while threat was not, so that intrusiveness of search outweighed government's need to conduct it). *Id.* at 973.

²⁶¹ *Id.* at 970 (9th Cir. 1998); 873 F.2d 1247. In contrast, where warrantless inventory searches have been approved, it has been in part because of the lack of significant discretion in carrying out the inventories. 156 F.3d 970–71, citing *Fla. v. Wells*, 495 U.S. 1 (1990); *United States v. Bowhay*, 992 F.2d 229, 231 (9th Cir. 1993).

²⁶² *E.g.*, 482 F.2d 1277–78; 61 F.3d 110. *See id.* at 110–13 for a discussion of an impermissible additional search of contraband seized during airport security search.

example, finding magnetometer searches reasonable in circumstances where pat-down searches were not.²⁶³

2. States

This has not been a frequently addressed question under state constitutions.²⁶⁴ However, Oregon has articulated its three-part test for assessing the reasonableness of an administrative search: proper authorization (met so long as the search procedure is “promulgated pursuant to authority”); designed and systematically administered to limit the discretion of the officer administering the search; and scope reasonable in relation to its purpose.²⁶⁵ Other states have recognized the importance of limiting the implementing officials' discretion.²⁶⁶

3. Summary of Important Principles

An administrative search must be conducted as part of a general regulatory scheme (although a regulation per se may not be necessary)²⁶⁷ that furthers an administrative purpose, rather than furthering criminal investigation. A warrant is not required where it would frustrate the governmental purpose behind the search. The search derives its legitimacy from governmental authorization, not consent to search. The court will balance these factors: the need to search, which should promote a substantial governmental interest (e.g., search for explosives and weapons prior to boarding aircraft), against the invasion that the search entails. The scope of the search is limited to furthering the administrative need. At least some courts will invalidate such a search notwithstanding a legitimate government interest if there is also an impermissible motive. The search must have a nondiscretionary application. Both notice and methodology will affect the assessment of the intrusiveness of the search.

H. Special Needs²⁶⁸

Special needs are those government interests that go “beyond the normal need for law enforcement”²⁶⁹ that

²⁶³ *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987). *See* II.J., *Area Entry Searches, infra* this report.

²⁶⁴ *Friesen, supra* note 5, § 11-16, at 11-116.

²⁶⁵ *Weber v. Oakridge Sch. Dist.* 76, 56 P.3d 504 (Or. App. 2002). Other states have recognized the importance of limiting the implementing officials' discretion.

²⁶⁶ *See* 421 N.E.2d 447; *State v. Jackson*, 764 So. 2d 64 (La. 2000).

²⁶⁷ *See* II.K., *Transit Searches, infra* this report.

²⁶⁸ The Supreme Court has suggested that at least some administrative search cases are types of special needs cases. 482 U.S. 702; *Griffin v. Wis.*, 483 U.S. 868, 873–74 (1987); 489 U.S. 619–20. Regardless of whether administrative searches are a subset of special needs cases or vice versa, a number of commentators have asserted that the Court's reasoning in the special needs cases is confusing to say the least. *See, e.g.*, George M. Dery III, *A Deadly Cure: The Supreme Court's Dangerous Medicine in Ferguson v. City of Charleston*, 55 OKLA. L. REV. 373 (2002).

would be jeopardized by the individualized suspicion requirement.²⁷⁰ The Supreme Court has ruled that the special needs exception may justify a search without a warrant or probable cause.²⁷¹

Whether special needs is an appropriate framework for evaluating a transit screening procedure is already in dispute,²⁷² but it is possible that a court could consider deterrence of terrorism to be a substantial government interest beyond the needs of law enforcement that would be frustrated by requiring individualized suspicion before carrying out searches.

1. Federal Courts

The Supreme Court first recognized the special needs exception to the requirements of a warrant and probable cause in *New Jersey v. T.L.O.*, in which the Court held that because in the school context a warrant would likely frustrate the government purpose behind the search, a warrant was not required.²⁷³

The special needs test is: “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.”²⁷⁴

The balancing of interests in special needs cases entails examining the individual privacy expectations and the governmental interest and balancing them to determine “whether it is impractical to require a warrant or some level of individualized suspicion in the particu-

²⁶⁹ 483 U.S. 873 (Supervision of probationers is a special need that permits more intrusion on privacy than would be allowed for public at large; special needs of probation system make warrant requirement impracticable and justify lower standard than probable cause). *Id.* at 875–76.

²⁷⁰ Kuras et al., *supra* note 9, at 1202.

²⁷¹ *Id.*

²⁷² See II.K., *Transit Searches*, *infra* this report.

²⁷³ 469 U.S. 340. The case involved the issue of the correct standard for assessing the legality of searches conducted by public school officials. The Court held that students do have a privacy interest cognizable under the Fourth Amendment, and that teachers and administrators have a substantial interest in maintaining discipline at school. The Court then held that the warrant requirement is unsuited to the school environment, and, because it would likely frustrate the government purpose behind the search, was not required. *Id.* at 340. The Court also held that a standard less than probable cause was appropriate. *Id.* at 341–42.

²⁷⁴ *Id.* at 351 (Blackmun, J., concurring). The majority opinion used the term “the special needs of the school environment” in a footnote describing the lower court opinions that had upheld allowing warrantless searches on less than probable cause. *Id.* at 332, n.2. However, it was Justice Blackmun’s concurring opinion that articulated the test that the Court has adopted for use for a “special needs” exception. Richard T. Smith, *Comment: The Special Needs Doctrine After Ferguson v. City of Charleston*, 32 U. BALT. L. REV. 265, 269 (2003).

lar context.”²⁷⁵ The Court determines whether the circumstances are such that “the privacy interests implicated by the search are minimal, and...an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.”²⁷⁶

Courts have allowed special needs exceptions in a wide range of circumstances.²⁷⁷

The Supreme Court has rejected special needs claims where it found that the need asserted was not really special, but merely symbolic.²⁷⁸ Lack of concrete danger to be averted, failure to show the scheme is a credible means to deter the danger, and failure to show the intrusion necessary to avert the danger are factors in finding a need to be symbolic rather than special.²⁷⁹ A search based solely on a symbolic need must comply with the warrant requirement of the Fourth Amendment.²⁸⁰ The Court reserved from its holding in *Chandler, supra*, suspicionless searches in airports and at

²⁷⁵ 489 U.S. 665–66.

²⁷⁶ 489 U.S. 624. The balancing test has also been described as “(1) the nature of the privacy interest involved; (2) the character of the intrusion; and (3) the ‘nature and immediacy’ of the government’s need for testing and the efficacy of the testing for meeting it.” *Gonzalez v. Metro. Transp. Auth.*, 73 Fed. Appx. 986, 988 (9th Cir. 2003), *cert. denied*, 541 U.S. 974 (2004) (upholding drug testing of transit employees).

²⁷⁷ The Supreme Court has permitted special needs exceptions for work-related searches of employees’ desks and offices (*O’Connor v. Ortega*, 480 U.S. 709 (1987)); searches of probationers’ homes (483 U.S. 873); and suspicionless drug testing in several different circumstances: testing of employees of the Customs Service who apply for positions directly involving interdiction of illegal drugs or positions requiring the agent to carry firearms (489 U.S. 656), testing of railroad employees involved in train accidents (489 U.S. 602), testing of student athletes in an effort to prevent the spread of drugs among the student population (515 U.S. 646), and testing of students who participate in competitive extracurricular activities (*Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002)). The *Earls* holding may be considered an extension of *Vernonia* in that the drug-testing policy at issue was neither a response to, nor targeted toward, a specific group of problematic students. *Theodore et al. v. Delaware Valley Sch. Dist.*, 836 A.2d 76, 85 (Pa. 2003).

Circuit Courts have made special needs exceptions for suspicionless drug testing (student athletes, school officials in safety-sensitive positions, EMT technicians, and firefighters); child abuse investigations; investigations of probationers; and requirements for convicted offenders to supply DNA samples. Kuras et al., *supra* note 9. The Ninth Circuit has upheld drug testing of transit employees with even infrequent safety-related responsibilities. 73 Fed. Appx. 986.

²⁷⁸ 520 U.S. 305. *Chandler* involved a Georgia statute that required any candidate for state office to submit to a drug test.

²⁷⁹ *Id.* at 318–21.

²⁸⁰ *Id.* at 322. This point was argued by the plaintiffs in *Cassidy v. Ridge*, *infra* PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, at 12.

entrances to courts and other public buildings, noting that they may be reasonable.²⁸¹

The Supreme Court has also rejected special needs claims where it found the need was not really beyond the normal needs of law enforcement.²⁸² Fourth Amendment protections against warrantless, suspicionless, nonconsensual searches have been required where law enforcement is pervasively involved in developing and applying a search policy.²⁸³ Where there were no standard criteria for a search and no basis for proceeding other than suspicion of criminal activity, or, since *Ferguson*, the immediate goal was related to law enforcement, lower courts have refused to apply the special needs doctrine to warrantless or suspicionless searches.²⁸⁴

Dicta in several special needs cases may prove particularly relevant to assessing transit screening procedures. In reviewing the Federal Railroad Administration's (FRA) regulations for drug and alcohol testing, the Supreme Court remarked on the deterrent effect of the regulations.²⁸⁵ The Court also noted that the fact that the FRA had not used less intrusive means of preventing drug and alcohol use did not make the regulation unreasonable.²⁸⁶

In reviewing the Treasury Department's drug-testing regulations, the Supreme Court rejected the argument that the testing scheme was not productive enough to justify its Fourth Amendment intrusion.²⁸⁷ The Court remarked:

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity.... Where, as here, the pos-

sible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.²⁸⁸

In support of its assertion as to possible harm, the Court cited three seminal circuit court cases involving airport searches²⁸⁹ as illustrating the reasonableness of searching innocent people in order to effectuate special governmental need.²⁹⁰ The Court suggested that given an observable national hijacking crisis, the government need not demonstrate specific danger at one airport to justify security screening there and observed that given the purpose of deterrence, "a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."²⁹¹

In dissenting from a case in which the Court upheld drug testing of student athletes, Justice O'Connor remarked that the cases in which the Court had previously held suspicionless searches to be reasonable involved "situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people."²⁹² It was the devastating nature of even one undetected instance that made an individualized suspicion requirement impractical.

Although the decision predated the use of the phrase "special needs," the Fifth Circuit has recognized "a judicially-recognized necessity to insure that the potential harms of air piracy are foiled."²⁹³

2. States

Several state courts have rejected special needs justifications for statutes that purport to allow warrantless blood-alcohol testing without probable cause.²⁹⁴

3. Summary of Important Principles

The search must be grounded on a substantial governmental need such as protecting public safety or deterring terrorism, rather than merely being a law enforcement mechanism. The court will balance these factors: 1) the magnitude of the asserted need against 2) the privacy intrusion to determine 3) whether the government interest asserted would be jeopardized by a requirement of individualized suspicion. The asserted need should be a response to concrete danger (can be aggregate danger), and deterrence is an acceptable pur-

²⁸¹ 520 U.S. 323.

²⁸² *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). *Ferguson* involved a scheme to test expectant mothers for cocaine use and use the threat of law enforcement to force them into treatment. The Court found that the immediate goal of law enforcement and the pervasive involvement of the police in the policy took the scheme out of the realm of "special needs." *Id.* at 84.

²⁸³ *Id.* at 85–86.

²⁸⁴ 339 F.3d 845, n.22 (search of backpack of person attending political parade could not be justified under "special needs" jurisprudence where officers possessed unguided discretion: there was no specified criteria to carry out suspicionless bag searches, no organized methodology for systematically checking all individuals, and no checkpoints through which all people had to pass before entering the vicinity); *United States v. Jones*, 286 F.3d 1146, 1150–52 (9th Cir. 2002) (search conducted by federal agents invalidated as immediate goal was to secure documents relevant to criminal investigation admissible in criminal prosecution).

²⁸⁵ "While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." 489 U.S. 629 (1989).

²⁸⁶ *Id.* at 629, n.9.

²⁸⁷ 489 U.S. 673.

²⁸⁸ *Id.* at 674–75.

²⁸⁹ 498 F.2d 500; 482 F.2d 1275–76; 482 F.2d 907–12.

²⁹⁰ 489 U.S. 675, n.3.

²⁹¹ *Id.* at 675–76, n.3.

²⁹² 515 U.S. 675 (citations omitted).

²⁹³ 482 F.2d 1275.

²⁹⁴ *Commonwealth v. Kohl*, 615 A.2d 308, 314 (Pa. 1992); *King v. Ryan*, 607 N.E.2d 154, 160 (Ill. 1992); *McDuff v. State*, 763 So. 2d 850 (Miss. 2000). *Cf.* *State v. Roche*, 681 A.2d 472 (Me. 1996) (upholding blood-alcohol test statute that makes test results admissible if there is independent probable cause to believe the driver was impaired).

pose. In assessing the privacy interest, the court will consider whether the privacy interests are minimal. Use of the least intrusive means is not required. In determining the third factor, the court will consider whether: one undetected instance would have serious consequences; the search is reasonably effective in responding to the need; and means other than the suspicionless search would not reasonably meet the special need.

I. Airport²⁹⁵ Security Searches²⁹⁶

Airport security searches provide a parallel to those that might be conducted in transit systems to deter a terrorist threat,²⁹⁷ and they provide useful guiding principles about the acceptable scope and purpose of such searches.²⁹⁸ In addition, some airport security searches have raised the issue of racial profiling,²⁹⁹ which could be an issue in transit security searches, particularly targeted searches. One district court has already found airport cases on point in reviewing the constitutionality of security screening conducted by a transit authority.³⁰⁰

Courts have consistently upheld warrantless airport security searches,³⁰¹ but have not agreed upon the ra-

tionale for doing so.³⁰² The rationales for excepting these searches from the warrant requirement have included: the administrative search exception,³⁰³ analogizing to border searches;³⁰⁴ reasonableness;³⁰⁵ implied consent;³⁰⁶ and analogizing to *Terry*.³⁰⁷ The reasonableness argument is that the airport security search does not really fit within any recognized exception to the warrant requirement but should be judged on its reasonableness, since an airport search cannot as a practical matter be subject to the warrant requirement. Under this analysis, the standard for making the judgment as to reasonableness is whether in the totality of the circumstances the search is reasonable: a passenger's ability to choose not to fly in order to avoid the search is not construed as implied consent, but is a factor in evaluating reasonableness.³⁰⁸

Courts have held that using a metal detector is a search under the Fourth Amendment,³⁰⁹ but a reasonable one,³¹⁰ as they generally consider the nature of the

²⁹⁵ Cases involving airport searches outside of the security areas and involving searches aimed at drug smuggling or illegal immigration are not discussed in this section.

²⁹⁶ See generally James L. Buchwalter, *Validity of Airport Security Measures*, 125 A.L.R. 5th 281.

²⁹⁷ See II.K., *Transit Searches*, *infra* this report.

²⁹⁸ See 14 A.L.R. FED. 286, cited by JOHN WESLEY HALL, 2 SEARCH AND SEIZURE § 32.9, n.96 (3d ed. 2000).

²⁹⁹ See, e.g., Complaint in Racial Profiling Lawsuit Against Transportation Security Administration, posted at http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/rajcoomarcomplaint.cfm; Simon Letter to Florida Officials Regarding Unconstitutional Profiling by U.S. Air Marshals, posted at www.aclufl.org/news_events/archive/2002/rajcoomarletter092402.cfm.

³⁰⁰ See II.K., *Transit Searches*, *infra* this report.

³⁰¹ *E.g.*, 454 F.2d 771 (magnetometer search of all passengers boarding an airline is constitutional even absent a warrant, because “[t]he danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal”); 464 F.2d 667 (upholding use of magnetometer); 464 F.2d 1180 (magnetometer search of all passengers does not violate Fourth Amendment); 482 F.2d 1276 (“[W]e hold that those who actually present themselves for boarding on an air carrier...are subject to a search...unsupported [by] suspicion.”); 498 F.2d 496 (suspicionless search of all passengers by magnetometer is constitutional); *United States v. Dalpiaz*, 494 F.2d 374 (6th Cir. 1974). See also 61 F.3d 109–10 (dicta: warrantless and suspicionless searches of airline passengers is constitutional); *United States v. Allman*, 336 F.3d 555, 556 (7th Cir. 2003) (“[A]ll persons, with all their belongings, who travel by air are subject to search without a warrant.”). Airport searches held unconstitutional have generally not been related to security. *E.g.*, 378 F.2d 588; *United States v. Soriano*, 482 F.2d 469 (5th Cir. 1973); and *United States v. Garay and Torres*, 477 F.2d 1306 (5th Cir. 1973).

³⁰² See *United States v. Hartwell*, 296 F. Supp. 2d 596, 602 (E.D. Pa. 2003); *State v. Salit*, 613 P.2d 245, 250 (Alaska 1980). Some cases, e.g., 475 F.2d 44, have included more than one rationale.

³⁰³ 482 F.2d 908. *But see* 498 F.2d 498, n.5

[T]he principle that seems most nearly applicable to the airport search is that recognized in *Colonnade*...and applied in...*Biswell* sustaining warrantless searches of records maintained or products held by regulated industries. Such “administrative searches,” conducted pursuant to a general regulatory scheme rather than an investigation to secure evidence of a crime, have regularly been upheld where the statutory procedures have been deemed reasonable...But since an attempt to fold airport searches under the rubric of this type of administrative search would entail the question of reasonableness, as well as the need for dealing with language in *Almeida-Sanchez* the issue of reasonableness may as well be faced directly.

(citations omitted).

³⁰⁴ *E.g.*, 475 F.2d 51 (5th Cir.); 480 F.2d 408; 482 F.2d 1272; 484 F.2d 509; 767 F.2d 776; *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985).

³⁰⁵ 482 F.2d 1275 (5th Cir. 1973); see also 495 F.2d 805 (considering need for the search, “inefficiency” of search, and intrusion on privacy interests); *United States v. Herzbrun*, 723 F.2d 773, 775 (11th Cir. 1984) (embracing tripartite analysis set forth in *Skipwith*).

³⁰⁶ See 723 F.2d 775–76.

³⁰⁷ 454 F.2d 769 (danger of air piracy is so well known, governmental interest so overwhelming, and invasion of privacy so minimal, warrant requirement is excused by exigent national circumstances).

³⁰⁸ 495 F.2d 803–04, 808; 498 F.2d 501 (“in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further”).

³⁰⁹ 454 F.2d 770; 495 F.2d 799; 484 F.2d 509; 464 F.2d 1180; 464 F.2d 673.

³¹⁰ 454 F.2d 769; 495 F.2d 806 (use of a magnetometer is a reasonable search despite small number of weapons detected in course of large number of searches).

privacy intrusion to be minimal.³¹¹ In fact, use of the magnetometer has often been key to the constitutionality of the search,³¹² as is staying within the scope of the search.³¹³ Thus, a narrowly defined search for guns and explosives is constitutionally justified by the need for air traffic safety, but generalized law enforcement searches of all passengers as a condition for boarding commercial aircraft would be unconstitutional.³¹⁴ The governmental need justifying airport security searches is generally recognized to be deterrence, rather than actual apprehension of terrorists.³¹⁵ Requiring passengers to pass through metal detectors, submit to visual searches, and occasionally undergo physical searches has been found to fulfill the requirement that the search be reasonably effective.³¹⁶ At least in the early cases, there was no consensus that the danger of hijacking alone was sufficient to justify a search.³¹⁷ Generally

³¹¹ 454 F.2d 771 (“the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events, fully justified the minimal invasion of personal privacy by magnetometer”); 800 F.2d 902 (“a visual inspection and limited hand search of luggage which is used for the purpose of detecting weapons or explosives, and not in order to uncover other types of contraband, is a privacy intrusion we believe free society is willing to tolerate.”) In fact, the Fifth Circuit found that airport searches of passengers’ belongings are arguably less scandalous and embarrassing than other police searches because (1) the owner of the luggage searched must “voluntarily come to and enter the search area” and (2) the frequency of such searches makes the individual whose bags are examined feel that there is less of a stigma attached to the search. Thus, there is a difference between searching people in the general airport area and those ready to board plane. 482 F.2d 1275–76.

³¹² *E.g.*, 454 F.2d 772 (search following magnetometer trigger justified by magnetometer information and limited in scope to initiating circumstances, therefore reasonable). *Cf.* 481 F.2d 723 (failure to subject bag to magnetometer before search factor in finding search unreasonable).

³¹³ *See* 481 F.2d 887 (search of small glassine envelope exceeded scope of search for weapons or explosives). The Fifth Circuit has given wide latitude to determining the appropriate scope. *See* 484 F.2d 513–14 (security search may continue until security official is satisfied that no harm would come from allowing suspect identified by profile to board plane).

³¹⁴ 873 F.2d 1240. *See also* *United States v. Maldonado-Espinosa*, 767 F. Supp. 1176 (D. P.R. 1991) (airport x-ray searches enjoy administrative exception to warrant rule only so far as they are conducted to further compelling administrative purpose of keeping weapons and other items dangerous to flight off aircraft), *aff’d*, 968 F.2d 101, *cert. denied*, 507 U.S. 984.

³¹⁵ *E.g.*, 495 F.2d 804–05.

³¹⁶ 482 F.2d 1275.

³¹⁷ *Compare* 475 F.2d 47 (dictum) (hijacking danger alone not sufficient to justify warrantless airport searches) *with* 464 F.2d 675 (Friendly, J., concurring) (in case of air piracy, danger alone meets the test of reasonableness, provided scope of

courts have rejected the argument that airport security screenings unconstitutionally impinge on the right to travel.³¹⁸

1. Statutory Authority

TSA is required to inspect all checked baggage and screen passengers and carry-on luggage.³¹⁹ Previously, the Air Transportation Security Act of 1974³²⁰ authorized the FAA to conduct security screenings to prevent air piracy.³²¹ The absence of similar statutory authority was not discussed by the district court that looked to airport cases in evaluating the constitutionality of a transit search policy.³²²

2. Federal Courts

The Supreme Court has not directly ruled on the constitutionality of airport security screening procedures.³²³ However, the Court has referred to the reasonableness of airport security searches in other cases.³²⁴ The Court specifically excluded from its holding in *Edmond, supra*, “searches like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”³²⁵

The Ninth Circuit reviewed airport screenings in *United States v. Davis*,³²⁶ one of the seminal airport cases. *Davis* involved a search that took place in 1971. The search consisted of an airline employee informing Davis at the gate that a routine security check was required, reaching for Davis’s briefcase, and opening it.

search is appropriately limited and passenger has notice of search in time to choose not to fly).

³¹⁸ 482 F.2d 912–13.

³¹⁹ 49 U.S.C. § 44901. The Transportation Security Administration screens for “explosives, incendiaries, and weapons.” § 1540.5, 49 C.F.R. pt. 1540—Civil Aviation Security: General Rules. The implementing regulation provides: “No individual may enter a sterile area without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area under this subchapter.” 49 C.F.R. § 1540.107, Submission to screening and inspection.

³²⁰ Pub. L. No. 93-366, 88 Stat. 415 (1974), codified as amended in 49 U.S.C. App. §§ 1356, 1357, 1371, 1372, 1472, and 1516 (1982 & Supp. III 1985).

³²¹ 873 F.2d 1242. Airport security searches began in the wake of a series of airline hijackings in the late 1960s. 495 F.2d 803. All passengers and carry-on bags have been subject to magnetometer searches since 1973. *See generally* 4 LAFAVE, *supra* note 79 § 10.6(a). There was a flurry of airport search cases in the early 1970s when concerns about airline hijackers were inflamed. *See* 495 F.2d 801.

³²² *See* II.K. *Transit Searches, infra* this report.

³²³ 4 LAFAVE, *supra* note 79, § 10.6(c), at 291.

³²⁴ *E.g.*, 489 U.S. 675 n.3; 520 U.S. 323.

³²⁵ 531 U.S. 47–48.

³²⁶ 482 F.2d 895–96 (searches not a *per se* violation of Fourth Amendment or constitutional right to travel, but must meet certain conditions, including obtaining the consent of the person to be searched).

The agent found a gun, which was soon determined to be loaded. A magistrate denied a motion to suppress based on implied consent, a ruling upheld by the district court, which also found no government involvement in the search.³²⁷

The *Davis* court ruled that the appropriate standards for reviewing airport searches were found in a series of administrative search cases.³²⁸ Applying those standards, the court found that the purpose of the administrative scheme in the airport screening was “not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.”³²⁹ The court found that the need to prevent hijackings was great and that pre-board screening of passengers and carry-on bags sufficient in scope to detect explosives or weapons was reasonably necessary to meet that need. Of note was the fact that the decision to screen was not subject to the discretion of the screening official and that a warrant requirement would only have frustrated the purpose of the search.³³⁰ Accordingly, the court held that the screening process was not unconstitutional, provided that it “is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly.”³³¹

In addition, the court examined the question of whether the administrative search scheme unreasonably interfered with the constitutional right to travel.³³² The court noted that although the constitutional right to travel is not absolute, it cannot be conditioned upon giving up another constitutional right, absent a compelling state interest.³³³ Although the court did not explicitly rule that the airport screening promoted a compelling state interest,³³⁴ it did find that its conclusions

³²⁷ *Id.* at 896. After discussion of the history of the anti-hijacking program, *id.* at 896–904, the court of appeals found sufficient government involvement to subject the search to the Fourth Amendment. *Id.* at 904.

³²⁸ *Id.* at 908, citing 406 U.S. 311; *Wyman v. James*, 400 U.S. 309 (1971); 387 U.S. 523; 387 U.S. 541; *United States v. Schafer*, 461 F.2d 856 (9th Cir. 1972); *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972).

³²⁹ 482 F.2d 908.

³³⁰ *Id.* at 910.

³³¹ *Id.* at 913. The importance of limiting the scope of the security screening is now well recognized. *See, e.g.*, UNITED STATES ATTORNEYS’ BULLETIN 3 (Jan. 2004).

³³² The right to travel by specific mode of transportation was also addressed in *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir.) (“travelers do not have a constitutional right to the most convenient form of travel”), *cert. denied*, 502 U.S. 907 (1991).

³³³ 482 F.2d 912–13.

³³⁴ The court did later categorize its opinion in *Davis* as noting that the government interest in air traffic safety is compelling. 873 F.2d 1243. Other courts have held that the government interest in preventing hijackings is compelling, outweighing the limited intrusion of the security search.

about the scheme’s constitutionality were consistent with the right to travel.³³⁵ Finally, the *Davis* court examined the issue of consent. The court stated that as a matter of constitutional law, a prospective passenger who chooses to proceed to board a plane has either relinquished his right to leave or elected to submit to a search, either of which constitutes consent for purposes of the Fourth Amendment, yet suggested that the alternatives must be clear before consent will be presumed. In any event, on the particular facts of the case, *i.e.*, that at the time that *Davis* attempted to board the screening procedure was not so well known, the court found that the government had not proved consent. The case was therefore remanded for reconsideration of the consent issue.³³⁶

The Fifth Circuit reviewed the issue of the proper standard for a search of a passenger at the boarding area in a much cited case, *United States v. Skipwith*.³³⁷ *Skipwith* did not involve a magnetometer search—the defendant was stopped at the boarding gate because he met the FAA hijacker profile and had no identification. The court reserved the question of whether meeting the hijacker profile in and of itself was sufficient grounds for a search.³³⁸ However, the court did not accept on its face the government’s argument that the danger of air piracy in and of itself justified the adoption of the border standard of mere or unsupported suspicion, although it did acknowledge that the dangers of air piracy could be even greater than those at the border. Instead, the court set forth three factors that must be weighed to evaluate the constitutionality of an airport security search: the need for the search in terms of possible public harm, the likelihood that the search procedure will be effective, and the degree and nature of the search’s intrusion into privacy interests.³³⁹ The court then noted the degree of dangers posed by piracy, citing back to its decision in *Moreno, supra*; the efficacy of standard airport search procedures (even though they had not been used in the instant case); and the lesser degree of offensiveness of airport security searches. The court found airport screenings less offensive because there is an “almost complete absence” of stigma; the person to be searched can avoid the search by not entering the search area; and the searches are made under supervision and “not far from the scrutiny of the traveling public,” leading to the likelihood that the searches

United States v. McKennon, 814 F.2d 1539, 1544 (11th Cir. 1987); 61 F.3d 109–10 (“[r]outine security searches at airport checkpoints pass constitutional muster because the compelling public interest in curbing air piracy generally outweighs their limited intrusiveness”) *Accord*, 832 F.2d 1339: “The key factor in the cases allowing such [airport and courtroom] searches was the perceived danger of violence, based upon the recent history at such locations, if firearms were brought into them.”

³³⁵ 482 F.2d 912.

³³⁶ *Id.* at 913–15.

³³⁷ 482 F.2d 1272.

³³⁸ *Id.* at 1274–75.

³³⁹ *Id.* at 1275.

will be more solicitous of Fourth Amendment rights than in more unsupervised, isolated circumstances.³⁴⁰ After the “tripartite weighing of the relevant factors,” the court did adopt the mere or unsupported suspicion standard for searching persons who have presented themselves for boarding.³⁴¹ The court approvingly cited Judge Friendly’s statement:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.³⁴²

The court also found that the appropriate scope of an airport security search is that which will reveal any object or instrumentality that the person searched could reasonably have used to hijack the airplane to be boarded, and the court rejected the notion that the defendant had a right to halt the search once it had started.³⁴³

*United States v. Albarado*³⁴⁴ is a widely cited case reviewing the appropriate standard for boarding area searches. The case involved a would-be passenger who was searched not because he met the hijacking profile (which was not in use), but because he activated the magnetometer. The Second Circuit noted that: airport security searches had become routine, but that courts had reacted differently; neither the magnetometer search nor a subsequent frisk fit into any of the traditional exceptions to the warrant requirement, but seemed reasonable; and an airport search could not, as a practical matter, be subject to the warrant requirement, and its reasonableness should be evaluated under a totality of the circumstances analysis.³⁴⁵ Accordingly, the court looked at the interest alleged to justify the intrusion. The governmental need justifying airport security searches was deterrence, rather than actual

apprehension of terrorists.³⁴⁶ Although the court found the government need compelling, it found it also important to consider whether that need justifies searching all passengers. Given the inefficiency of the magnetometer search, the court found that restricting the scope of the search is critical to preserving its constitutionality: “to be reasonable the search must be as limited as possible commensurate with the performance of its functions.”³⁴⁷ The court found that the use of a magnetometer is a reasonable search based on balancing the minimal invasion of privacy against the threat to hundreds of passengers posed by an armed hijacker.³⁴⁸ The court chose not to rely on consent, questioning the voluntariness of consent that rests on requiring the passenger to decline to fly in order to refuse the search.³⁴⁹ In considering the reasonableness of a frisk after the magnetometer is activated, the court looked to whether the search is as limited as necessary to uncover its object: a weapon that could be used in a hijacking.³⁵⁰

The Second Circuit applied a reasonableness rationale again in *United States v. Edwards, supra*. Although Judge Friendly adopted his statement from *Bell, supra*, about the danger alone supplying reasonableness, the court went on to balance the government need against the privacy intrusion. The court emphasizes that notice of the ability to leave rather than submitting to a search is required for the search procedure to be reasonable.

The Eleventh Circuit followed *Skipwith*, which it characterized as recognizing airport security checkpoints to be *sui generis* under the Fourth Amendment and as holding them to be “critical zones” for purposes of Fourth Amendment analysis.³⁵¹ The *Herzbrun* court also characterized *Skipwith* as standing for the proposition that people presenting themselves at a security checkpoint automatically consent to a search.³⁵² In discussing the facts of the case, the court noted the experience of the two screeners who decided that further search was warranted.³⁵³

The Court in *Davis* did not reach the question of at what point in the boarding process a passenger may elect not to fly, thereby withdrawing consent.³⁵⁴ The Ninth Circuit subsequently decided that in order to avoid a search, the potential passenger must elect not

³⁴⁰ *Id.* at 1275–76.

³⁴¹ *Id.* at 1276. The mere suspicion standard has been rejected in the Ninth Circuit. See *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976) (*Skipwith* mere suspicion standard rejected; encounter upheld as valid Terry stop), *cert. denied*, 431 U.S. 940 (1977).

³⁴² 482 F.2d 1276, citing 464 F.2d 675 (Friendly, J., concurring) (footnote omitted). The Second Circuit subsequently did apply this test in 498 F.2d 500, over the protest of Judge Oakes’ concurring opinion. *Id.* at 501–02.

³⁴³ 482 F.2d 1277. The Fourth Circuit has also held consent cannot be withdrawn once a search has started. See 584 F.2d 48.

³⁴⁴ 495 F.2d 799.

³⁴⁵ *Id.* at 803–04. The court noted that the *Davis* decision, “while styling the airport search as “administrative,” placed no analytical significance on this label. Nor do we.” 495 F.2d 804, n.9.

³⁴⁶ *E.g., id.* at 804–05.

³⁴⁷ *Id.* at 806.

³⁴⁸ *Id.*, reaffirming 464 F.2d 667.

³⁴⁹ 495 F.2d 806–07.

³⁵⁰ *Id.* at 807–10. See also 481 F.2d 886–87 (search must be confined to what would reasonably turn up weapons or explosives). The *Albarado* court found the magnetometer triggering the key factor in allowing even an appropriately limited frisk. 495 F.2d 808–10.

³⁵¹ 723 F.2d 775.

³⁵² 723 F.2d 776; 767 F.2d 779, citing 723 F.2d 776; 814 F.2d 1545.

³⁵³ 723 F.2d 774, n.1.

³⁵⁴ 800 F.2d 902.

to fly before putting his baggage on the x-ray conveyor belt,³⁵⁵ holding that a passenger who submits his luggage for x-ray in a secure boarding area impliedly consents to a visual inspection and hand search of that luggage if the x-ray is inconclusive in determining whether there are weapons or other dangerous objects in the luggage.³⁵⁶

The Northern District of California recently reaffirmed the reasonableness of airport searches, as well as holding that the Constitution does not guarantee the right to travel by any particular form of transportation.³⁵⁷

3. States

A number of state courts have upheld these searches on the basis of consent.³⁵⁸ In fact, at least one court has held that a defendant did not have standing to challenge his search because he did not have a reasonable expectation of privacy in the secure boarding area of the airport.³⁵⁹ However, many other courts have questioned the voluntariness of consent to search in this context, relying instead upon the administrative search excep-

tion in upholding airport security searches.³⁶⁰ Under this analysis, notice does not give rise to implied consent, but is a factor in determining the reasonableness of the search.³⁶¹ The advance notice of inspections afforded airline passengers is significant because it avoids the embarrassment of a surprise search.³⁶² Some courts have cited several reasons for upholding the search.³⁶³

4. Summary of Important Principles

Rationales for upholding these searches include: administrative search, border search analogy, *sui generis* (reasonableness analysis/balancing test), and implied consent. There has not been a consensus that hijacking danger is sufficient in and of itself to justify the search. There is a statutory requirement for the search. Deterrence is considered an appropriate purpose of the search. The impracticality of requiring a warrant is recognized. Although sometimes an issue in analysis, the right to travel has not been deemed violated by these searches.

Regardless of the underlying theory, the court will generally balance these factors: the need to prevent hijackings/possible public harm against the intrusiveness of the search. The scope of the search should be calibrated to the purpose of finding explosives or weapons. The court will consider both the efficacy of the search and the degree of intrusion. Passengers should be allowed to avoid the search by not boarding, although at some point the right to withdraw is withdrawn. Notice of that right may be considered an element of implied consent or may be considered an element of reasonableness.

J. Area Entry Searches (Including Athletic Events, Courthouses/Public Buildings,³⁶⁴ and Military Areas)

As the Fourth Circuit has noted, courts have differed as to the theory for justifying these searches. Some have relied upon the administrative search doctrine,

³⁵⁵ *Id.* at 902; 298 F.3d 1089. *Accord*, 723 F.2d 776.

³⁵⁶ 800 F.2d 901. The court noted the consistency of this approach with that of other circuits ruling on anti-hijacking searches for weapons, citing 723 F.2d 776 (automatic consent to a hand search); *United States v. Wehrli*, 637 F.2d 408, 409–10 (5th Cir.), *cert. denied*, 452 U.S. 942 (1981) (implied consent where x-ray inconclusive); 584 F.2d 47–48; *United States v. Williams*, 516 F.2d 11, 12 (2d Cir. 1975) (*per curiam*) (implied consent). The First Circuit followed 800 F.2d 899 on this point, 61 F.3d 110. *See also* 296 F. Supp. 2d 596 (pants kept setting magnetometer off, so passenger was taken for private screening which produced drugs; whether he requested it or it was directed was of no consequence).

³⁵⁷ 2004 WL 603530, at 5 (challenge to requirement that passenger provide government identification to board plane or submit to search dismissed: identification and search requirements not a search for Fourth Amendment purposes or if search, was reasonable in that it was for limited purpose and could have been avoided by not flying).

³⁵⁸ *E.g.*, *Shapiro v. State*, 390 So. 2d 344, 348 (Fla. 1980), *cert. denied sub. nom.*, *Shapiro v. Florida*, 450 U.S. 982 (1981); *People v. Brown*, 113 A.D. 2d 893, 894, (N.Y. 1985) (deciding that prosecution need not demonstrate defendant's knowledge of a right to refuse x-ray search because, given the common awareness of such security measures in airports, logical conclusion is that defendant voluntarily consented to such a search); *People v. Heimel*, 812 P.2d 1177 (Colo. 1991) (airport security screening procedures for potential passengers held constitutional as form of consensual regulatory search in furtherance of a systematic program directed at ensuring the safety of persons and property traveling in air commerce); *State v. Hanson*, 34 P.3d 1 (Haw. 2001) (implied consent at airport based on notice and security measures in place; surrender of effects at airport carries consent to search for contents that may pose danger to aircraft). *See also* *Turner v. State*, 132 S.W.3d 504 (Tex. App. Houston 2004).

³⁵⁹ *Id.*

³⁶⁰ *People v. Hyde*, 524 P.2d 830 (Cal. 1974) (in evaluating administrative searches, advance notice to airline passengers significant, may avoid embarrassment and psychological dislocation of surprise search); *Salit v. State*, 613 P.2d 245, 250 (Alaska 1980).

³⁶¹ *Schaffer v. State*, 988 P.2d 610, 615 (Alaska Ct. App. 1999).

³⁶² 524 P.2d 830.

³⁶³ 390 So. 2d 344 (no reasonable expectation of privacy, so no Fourth Amendment violation; consent; reasonableness, citing 482 F.2d 1272).

³⁶⁴ *See generally* Russell J. Davis, *Validity, Under Federal Constitution, of Search Conducted as Condition of Entering Public Building*, 53 A.L.R. FED. 888; Jay M. Zitter, *Searches and Seizures: Validity of Searches Conducted as Condition of Entering Public Premises—State Cases*, 28 A.L.R. 4th 1250; Kenneth L. Jesmore, *The Courthouse Search*, 21 UCLA L. REV. 797 (1974).

others merely on balancing the interests at stake.³⁶⁵ A number of courts have grouped these cases together with airport cases as providing an analytical framework for any situation involving security screenings.³⁶⁶ These cases are analogous to transit screening in purpose (preventing attacks within the facilities) and in many cases location (the entrance); they provide a reasonable analytical framework for reviewing transit screening policies.

1. Federal Courts

The Supreme Court has not directly addressed the constitutionality of these searches, but has indicated its acceptance in dicta.³⁶⁷

Courthouses/Public Buildings.—The Ninth Circuit, in upholding a search at the entrance to the superior courthouse,³⁶⁸ enunciated its standard for upholding warrantless, suspicionless searches at the entrance of sensitive facilities: the search must be clearly needed to protect vital government interest; the search must be no more intrusive than needed to protect against danger to be avoided, but nonetheless reasonably effective; and the inspection must be conducted for a purpose other than gathering evidence for criminal prosecutions.³⁶⁹ The Sixth Circuit has also upheld courthouse entry searches,³⁷⁰ as has the Southern District of New York.³⁷¹ The plaintiffs in *Cassidy v. Ridge, infra*, in contrasting the searches under challenge, asserted that there is a legitimate need to conduct searches and identity checks at courthouse entrances.³⁷²

Military Bases.—Circuit courts have held that there can be implied consent to search a vehicle entering a military base,³⁷³ but have differed as to whether consent is implied from the nature of a closed military base,³⁷⁴ or

whether the existence of implied consent is a question of fact.³⁷⁵

Rock Concerts, Sporting Events, Demonstrations.—Federal courts asked to find an exception to the warrant and probable cause requirement for searches going into these events, primarily based on the sensitive area exception, have declined to do so.³⁷⁶

Several lower courts have declined to uphold these searches on an implied consent basis.³⁷⁷

In *Wilkinson v. Forst*,³⁷⁸ the Second Circuit reviewed the constitutionality of searches conducted by Connecticut authorities at 16 Ku Klux Klan rallies held in Connecticut from September 13, 1980, through April 29, 1984.³⁷⁹ Court injunctions were the basis for conducting the searches, but the decision whether or not to search was left to the discretion of the officers on the scene.³⁸⁰

The Second Circuit found first instance pat-down searches to be unreasonable in the context of preventing demonstrators from bringing weapons into the rallies, but found magnetometer searches, followed by

³⁷⁵ 323 F.3d 782. (Federal officers at the gate of a closed military base may not search an entering vehicle without probable cause, unless the driver impliedly consents to the search.)

³⁷⁶ 143 F.3d 852–53, citing *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) (holding airport-search exception not applicable to random drug and weapons searches of rock concert patrons at entrance to municipal auditorium: danger posed “substantially less”; procedure not as effective; intrusion greater because random and not preceded by electronic screening); *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976) (holding airport exception not applicable to random searches for alcoholic beverages and containers of persons attending events at public stadium: risk of violence not equivalent; procedures not as effective; intrusion more substantial because of discretionary administration); 460 F. Supp. 10 (refused to extend exception to random entry searches for drugs and alcohol at civic center rock concert: danger not equivalent; intrusion greater because of discretionary administration; consent from advance notice not constitutionally inferable); *Stroeber v. Commission Veteran’s Auditorium*, 453 F. Supp. 926 (S.D. Iowa 1977) (holding random searches of persons attending rock concert at public auditorium not justified on *Terry* analogy: no individualized suspicion established before physical search conducted).

³⁷⁷ 460 F. Supp. 14; 453 F. Supp. 933; 414 F. Supp. 1366.

³⁷⁸ 832 F.2d 1330 (2d Cir. 1987).

³⁷⁹ *Id.* at 1332.

³⁸⁰ State and local authorities obtained—in advance of a planned Ku Klux Klan rally in Scotland, Connecticut—an injunction banning firearms and other weapons within Scotland on the days of the rally. The injunction was enforced by setting up checkpoints leading to the vicinity of the rally; motorists and pedestrians were informed that they were subject to search only if they proceeded to the area of the rally. *Id.* at 1333. Two rallies then followed for which no injunctions were sought or searches conducted. Violence ensued. *Id.* at 1333–34. The State sought injunctions banning weapons in and around the remaining 13 rallies at issue in *Wilkinson* and authorizing searches of people attending the rallies. *Id.* at 1334.

³⁶⁵ 143 F.3d at 851, n.5 (4th Cir. 1998). The *Norwood* court adopted Judge Friendly’s position that “the question under any theory ultimately turns on whether such searches are ‘reasonable’ under a traditional balancing analysis.” *Id.*

³⁶⁶ *E.g.*, 804 N.E.2d at 320. Nonetheless, because of the unique nature of the airport environment (national danger, analogy to border), it is useful to discuss these entry cases separately.

³⁶⁷ *E.g.*, 520 U.S. 323.

³⁶⁸ *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978).

³⁶⁹ *Id.* at 899.

³⁷⁰ 454 F.2d 1230 (upholding courthouse-entry search for weapons and explosives conducted under General Services Administration (GSA) blanket search program).

³⁷¹ *Legal Aid Society v. Crosson*, 784 F. Supp. 1127, 1131 (S.D.N.Y. 1992).

³⁷² *Cassidy v. Ridge*, Civ. No. 1:04CV258 (Feb. 16, 2005, D. Vt.), PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, at 9.

³⁷³ *United States v. Ellis*, 547 F.2d 863, 866 (5th Cir. 1977); *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993); *Morgan v. United States*, 323 F.3d 776, 782 (9th Cir. 2003).

³⁷⁴ 547 F.2d 866; 986 F.2d 79.

frisks if the magnetometers indicate the presence of weapons, to be reasonable.³⁸¹ In its analysis, the Court noted the relatively non-intrusive nature of magnetometer searches, citing the description in *Albarado*, *supra*:

The passing through a magnetometer has none of the indignities involved in...a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it. Not even the activation of the alarm is cause for concern, because such a large number of persons may activate it in so many ways. No stigma or suspicion is cast on one merely through the possession of some small metallic object. Nor is the magnetometer search done surreptitiously, without the knowledge of the person searched. Signs warn passengers of it, and the machine is obvious to the eye.³⁸²

The search regime that the court upheld in *Wilkinson* included notice that searches would take place and could be avoided by leaving the area, and a procedure of searching all individuals who did proceed into the area.³⁸³

The Fourth Circuit, in an opinion declining to extend the sensitive area exception to searches conducted at a checkpoint created at the entrance to a motorcycle rally, noted that under the checkpoint cases, actual searches would require individualized probable cause.³⁸⁴ The court emphasized that the search it found unconstitutional was not driven by “necessity for lack of any practical alternative means for preventing violence.” The court found this to be a key factor in distinguishing the unconstitutional search from a constitutional sensitive area search program for which “there literally was no other feasible alternative having any chance of success.”³⁸⁵ The court also considered the efficacy (or lack thereof) of the searches, as well as the fact that the officers did not first search via magnetometer.³⁸⁶

The 11th Circuit recently considered the constitutionality of a proposal to require demonstrators at a planned protest against the School of the Americas to pass through a magnetometer, and to submit to possible subsequent physical search of their persons and belongings. The search was conducted at a checkpoint set up at a several block distance from the protest site, and was estimated to create a delay of between 90 minutes and 2 hours in reaching the protest site.³⁸⁷ The court

rejected the argument that the DHS’s threat level advisory of yellow justified the searches.³⁸⁸ The court also rejected the city’s special needs argument, finding the special need alleged to be too bound up in law enforcement purposes, and not falling within an established special needs exception.³⁸⁹ In addition, the court rejected the idea that it could conduct an “ad hoc analysis” of the reasonableness of the search.³⁹⁰ In evaluating First Amendment issues, the court stated that there was no voluntary consent to the searches because the government had conditioned the receipt of one benefit (exercise of First Amendment rights) upon waiver of another (exercise of Fourth Amendment rights). The court also noted the 11th Circuit’s opposition to this sort of unconstitutional condition.³⁹¹

A district court in New York recently considered a Fourth Amendment challenge to a policy of the New York City police (NYPD) concerning bag searches at entry points to political demonstrations.³⁹² The plaintiffs in the case argued that the applicable precedent was *Wilkinson*, *supra*. The defendants also argued that *Wilkinson* was applicable, but that the challenged bag searches were like the magnetometer searches upheld in *Wilkinson*. They also argued that the bag searches should be constitutional under *Edwards*, *supra*.³⁹³ The *Stauber* court distinguished *Edwards* on five grounds: first, that the bag search there only took place after the magnetometer triggered; second, a bag search is not minimally intrusive; third, an airport search does not implicate constitutionally protected expression; fourth, the NYPD provided no advance notice of its intent to search and had no written policy concerning bag searches; and fifth (and most important), the evidence of a threat was overly vague—despite the fact that the Republican Convention might be considered a terrorist target—and there was no information suggesting that the bag search policy would address the kinds of threats

1306, n.2. This case illustrates the overlapping nature of classifications for cases involving exceptions to the Fourth Amendment warrant, probable cause, and individualized suspicion requirements, as the defendants proffered several theories to justify their search scheme.

³⁸⁸ *Id.* at 1312. The court also rejected the city’s argument that following the events of September 11, 2001, non-discriminatory, low-level magnetometer searches at large gatherings should be constitutional as a matter of law. *Id.* at 1311.

³⁸⁹ *Id.* at 1312–13.

³⁹⁰ *Id.* at 1313–16. There was no discussion of airport or sensitive area cases.

³⁹¹ *Id.* at 1324–25.

³⁹² 2004 WL 1593870. This case may be of particular interest because, although it did not involve a transit search, it did touch on the issues of specificity of a terrorist threat and efficacy of a search procedure in reducing that threat required to uphold a suspicionless search program. This case was cited by the plaintiffs in Civ. No. 1:04CV258. (Plaintiff’s Memorandum at 14–15.) See II.K., *Transit Searches*, *infra* this report.

³⁹³ 2004 WL 1593870 at 29–30.

³⁸¹ *Id.* at 1340.

³⁸² *Id.*, citing 495 F.2d 806.

³⁸³ *Cf.* 339 F.3d 845, n.22 (haphazard searches left entirely to officers’ discretion could not be justified under an exception to the requirement for individualized suspicion).

³⁸⁴ 143 F.3d 851.

³⁸⁵ *Id.* at 854. The court noted that while it is not required that a search program be the least intrusive possible, the availability of alternatives is a factor to consider in evaluating the reasonableness of a search program. *Id.* at n.8.

³⁸⁶ *Id.* at 854.

³⁸⁷ *Bourgeois v. Peters*, 387 F.3d 1303, 1306–07 (11th Cir. 2004). The court noted that the magnetometer searches would have done little, if anything, to deter the lawless conduct the city asserted as one of the grounds for the searches. *Id.* at

that might occur at demonstrations.³⁹⁴ The court concluded that “defendants have not shown that the invasion of personal privacy entailed by the bag search policy is justified by the general invocation of terrorist threats, without showing how searches will reduce the threat.”³⁹⁵ The court did note that bag searches could be appropriate if the threat to public safety met the standards laid out in *Wilkinson* and *Edwards*.³⁹⁶ The NYPD was enjoined from:

searching the bags of all demonstrators without individualized suspicion at particular demonstrations without the showing of both a specific threat to public safety and an indication of how blanket searches could reduce that threat. Less intrusive searches, such as those involving magnetometers, do not fall within the scope of the injunction.³⁹⁷

2. States

State courts have also generally upheld sensitive area entry searches on the same bases as have the lower federal courts.³⁹⁸ As a rule, stadium searches have been held unconstitutional,³⁹⁹ but have been upheld upon an appropriate showing of danger and of the effectiveness

of an appropriately limited search policy to reduce that danger.⁴⁰⁰

In a case holding pat-down searches at the entry to a rock concert to be unconstitutional,⁴⁰¹ the Washington Supreme Court stated that there are five exceptions to the warrant requirement: consensual searches; stop and frisk searches; hot pursuit; border searches; and airport and courthouse searches. The court noted the intrusion involved in the brief visual searches performed at courthouse entrances was of a lesser degree than the intrusion of pat-down searches.⁴⁰² The court declined to adopt a new exception for rock concerts, analogous to airport and courthouse searches.⁴⁰³

The Supreme Judicial Court of Massachusetts found that sensitive area cases are an appropriate framework for evaluating random stops of motorists to address an asserted terrorist threat.⁴⁰⁴ The court further noted that deterrence was an acceptable purpose for such a search,⁴⁰⁵ and that there need not be a specific threat against the facility at which searches are carried out. “Rather, based on prior experience with terrorism or violence, some types of facilities have been identified as particularly susceptible to attack, and officials may then take steps to prevent such attacks from occurring at other, similar facilities.”⁴⁰⁶

The court found that because the Commonwealth had not provided notice of the roadblock, it had failed to minimize the intrusiveness of the seizures, and therefore the suspicionless stops failed to meet the requirements of a constitutionally permissible administrative search. The court did not reach the issue of any other defects of the search scheme.⁴⁰⁷

3. Summary of Important Principles

Rationales for upholding these searches include an administrative search analysis and a *sui generis* (reasonableness analysis/balancing test) analysis. The court will balance these factors: whether the search is clearly needed to protect a vital government interest and whether it is no more intrusive than needed to protect against the danger to be avoided, but nonetheless reasonably effective. Generally, an interest in keeping drugs, etc., out of rock concerts/similar events doesn’t meet the vital government interest criterion. The search must be conducted for a purpose other than gathering evidence for criminal prosecutions. Not all security threat levels may be sufficient to establish a vital government interest. A search is not clearly needed when general policing will protect the need at

³⁹⁴ *Id.* at 30–31.

³⁹⁵ *Id.* at 31.

³⁹⁶ *Id.* at 32.

³⁹⁷ *Id.* at 33.

³⁹⁸ *See, e.g.*, 524 P.2d 830; 421 N.E.2d 447 (discussing the need for protective measures at courthouses; announced courthouse searches are constitutional as they are voluntary and, like airport searches, of no surprise); *R.I. Defense Attorneys Ass’n v. Dodd*, 463 A.2d 1370 (R.I. 1983); *Davis v. United States*, 532 A.2d 656 (D.C. App. 1987); *State v. Plante*, 594 A.2d 165 (N.H. 1991), *cert. denied sub. nom.*, *Plante v. N.H.*, 502 U.S. 984 (1999); *Gibson v. State*, 921 S.W.2d 747 (Tex. App. El Paso 1996); *State v. Rexroat*, 966 P.2d 666, 671 (Kan. 1998) (holding that defendant consented to limited search where he triggered metal detector through which everyone entering courthouse passed); *People v. Troutd*, 5 P.3d 349, 351 (Colo. Ct. App. 1999) (relying on 812 P.2d 1177: warrantless search without probable cause or individualized suspicion constitutional when conducted pursuant to a regulatory program calculated to further manifestly important governmental interest under circumstances where program is reasonably tailored to further governmental interest and where intrusion on personal privacy or security is relatively slight in comparison to interest served), *cert. denied sub. nom.*, *Troutd v. People*, 2000 Colo. Lexis 881 (2002); *Smith v. Washington*, 43 P.3d 1171 (Or. App.), *rev. denied sub. nom.*, *Smith v. Wash. County*, 43 P.3d 1171 (Or. 2002).

³⁹⁹ *E.g.*, 635 P.2d 946 (1981) (search at concert entry without showing of threat to public safety held unconstitutional; implied consent argument rejected, unconstitutional condition issue grounds for decision; validity of airport and courthouse searches recognized).

⁴⁰⁰ *Jensen v. Pontiac*, 317 N.W.2d 619 (Mich. 1982) (search for objects that could be thrown onto football field upheld, upon showing of effectiveness of policy).

⁴⁰¹ *Jacobsen v. Seattle*, 658 P.2d 653 (Wash. 1983).

⁴⁰² *Id.* at 655–56 (citations omitted).

⁴⁰³ *Id.* at 656.

⁴⁰⁴ 804 N.E.2d 320–21.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 321, n.5.

⁴⁰⁷ *Id.* at 323.

stake. The result of the search must be able to reduce the threat that is complained of. Notice reduces the intrusiveness of the search.

K. Transit Searches

As there has been very little case law on this precise area, the predominant theories of analysis have yet to be established, and litigants will likely differ as to which are appropriate. For example, the plaintiffs challenging searches on the Boston transit system argued that the special needs doctrine was not relevant,⁴⁰⁸ while the parties challenging ferry searches in Vermont agreed that special need was the appropriate framework.

1. Federal Courts

The Supreme Court has not addressed this specific issue.

*American-Arab Anti-discrimination Committee et al. v. Massachusetts Bay Transportation Authority*⁴⁰⁹ involved a security search policy implemented by the Massachusetts Bay Transportation Authority (MBTA) to comply with the Secret Service's designation of security zones during the 2004 Democratic Convention. Under the policy, the MBTA would search the carry-on items of all passengers on certain designated bus and subway lines. The plaintiffs challenged the policy as applied, arguing that despite the policy on paper, the searches were actually being conducted like the roving patrols condemned in *Brignoni-Ponce, supra*, rather than those upheld in *Sitz, supra*.⁴¹⁰ Defendants countered that the nature of the terrorist threat distinguished the searches from any of the border cases.⁴¹¹ In addition, plaintiffs argued that it was unconstitutional to condition access to the mass transit system upon a waiver of Fourth Amendment rights.⁴¹²

The District Court did not address the plaintiffs' arguments. Instead it reviewed the MBTA's contention that the searches were constitutional administrative security searches similar to those upheld for airports and the entryways to certain public areas such as courthouses and military installations. The court noted that such searches have been upheld, citing *United States v. Doe, supra*; *Torbet v. United Airlines, Inc., supra*; *Morgan v. United States, supra*; and *McMorris v. Alioto, supra*, as well as referring to the suggestion in *Chandler, supra*, that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for ex-

ample, searches now routine at airports and at entrances to courts and other official buildings."⁴¹³

The court reviewed the actual and potential terrorist threats to mass transit systems, including the Madrid bombing and the DHS's reports of credible intelligence concerning threats aimed at disrupting the election process in the United States. While acknowledging that it would be difficult, if not impossible, to assess the likelihood or imminence of an actual attack, the court noted that the absence of specific information is not proof that the transit facilities are not likely targets. The court discussed the fact that the airport cases do not require specific threats to a flight to justify security screening, citing *Davis, supra*, for the proposition that the purpose of the security searches is deterrence. The court then found that there is no reason not to apply the constitutional analysis of the airport cases to mass transportation security searches,⁴¹⁴ and held that there is a substantial government need to conduct the searches.⁴¹⁵ In assessing the reasonableness of the scope and effect of the privacy intrusion, the court noted that it is no greater than that of airport searches. The court did not discuss the fact that there was no statutory basis for the search policy, but did consider the MBTA's efforts at mitigation, citing notice, which reduces subjective anxiety and offers passengers the opportunity to avoid the system during the time the searches are being conducted; the limitation of the plan as to scope (i.e., reach) and duration; and the lack of discretion on the part of the inspecting officers as to whose bags to inspect and what to inspect for.⁴¹⁶

⁴¹³ *Id.* at 1.

⁴¹⁴ *Id.* at 2.

⁴¹⁵ *Id.* at 3.

⁴¹⁶ *Id.* at 3–4. The MBTA's written policy contained guidelines for implementing security inspections that:

- identified the items to be searched for;
- stated the purpose of the inspection;
- provided written selection criteria as to who to search, with searches specifically not to be based on particularized suspicion of criminal activity;
- prohibited racial/ethnic profiling;
- stated a preference for using electronic scanning devices or explosive detection dogs whenever possible;
- required notice of the security inspections at station entrances, in transit vehicles, and elsewhere on MBTA property;
- required screenings to be conducted where possible before passengers pay to get on the system;
- set in writing the search intervals and the procedure for changing the intervals;
- provided no discretion on the part of screening officers absent probable cause;
- afforded passengers the choice to avoid the search by not entering or leaving the system;
- limited the duration and scope of the search to what is required to discover items prohibited in writing under the policy.

The particulars of the General Order setting forth the security inspection guidelines are described in Opposition of Defen-

⁴⁰⁸ 2004 WL 1682859 (D. Mass. 2004), Plaintiffs' memorandum in support of preliminary injunction, at 8–9, n.1.

⁴⁰⁹ 2004 WL 1682859.

⁴¹⁰ *Id.* Plaintiffs' memorandum in support of preliminary injunction, at 7–9.

⁴¹¹ *Id.* Defendants' memorandum, at 9, n.1.

⁴¹² *Id.* Plaintiffs' memorandum in support of preliminary injunction, at 12.

Accordingly, the court denied the motion for injunctive relief. The request for an injunction had been narrowed to implementation of the search policy during the political convention within the designated security zone. The court did not rule on the reasonableness of a search policy not so limited.

*Cassidy v. Ridge*⁴¹⁷ involved a challenge to random searches of automobiles and baggage on the passenger ferries that run on Lake Champlain between New York and Vermont.⁴¹⁸ The searches were conducted pursuant to the MTSA.⁴¹⁹ Plaintiffs argued that the searches—which consisted of opening the trunks of passenger vehicles and visually inspecting carry-on bags of walk-on passengers—did not meet the requirements of the special needs exception to the Fourth Amendment and were therefore unconstitutional.⁴²⁰ The District Court judge adopted the special needs analysis, but ruled that the searches advance a special governmental need to provide domestic security and therefore do not violate the Fourth Amendment.⁴²¹ The court rejected plaintiffs' contention that the need for the searches had not been established,⁴²² noting that the government's assessment of risk was entitled to deference, and found that the searches did further the government's objectives.⁴²³ The court also ruled that the searches were reasonable since they were no more intrusive than necessary to achieve the compelling governmental interest at hand.⁴²⁴ The court did not address plaintiffs' right-to-travel argument, but found that "[g]iven the voluntary nature of plaintiffs' decision to travel by ferry, such searches constitute a minimal invasion of any arguable expectation of privacy."⁴²⁵

dant MBTA to Plaintiff Motion for a Preliminary Injunction, at 4–6.

⁴¹⁷ Civ. No. 1:04CV258. Posted at <http://members.aol.com/acluv/home.html#CHECK%20HERE%20FOR%20NEWS,%20UPCOMING%20EV>.

⁴¹⁸ See Wilson Ring, *ACLU Goes to Court to Block Searches of Cars on Ferry Crossing Lake Champlain*, Oct. 4, 2004, posted at www.signonsandiego.com/news/nation/20041004-1504-ferrysearches.html. Washington State Ferries has also implemented a search policy. Although a subject of local controversy, these searches have not been challenged in court. Ray Rivera, *Officials: Random Searches Not Part of Washington State Ferry-Security Plan*, THE SEATTLE TIMES, Dec. 30, 2003.

⁴¹⁹ See II.A.4., *Background, context, supra*, this report.

⁴²⁰ Civ. No. 1:04CV258. Ruling on motion to dismiss, at 1–4. Plaintiffs had suggested that the result of this analysis might be different for the Staten Island and Puget Sound ferries. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, at 12, n.2.

⁴²¹ *Id.* Ruling on motion to dismiss, at 4–5.

⁴²² *Id.* Compare ruling on motion to dismiss, at 6–7, with plaintiffs' memorandum in support of preliminary injunction, at 11–15.

⁴²³ *Id.* Ruling on motion to dismiss, at 7.

⁴²⁴ *Id.* Ruling on motion to dismiss, at 8.

⁴²⁵ *Id.* Ruling on motion to dismiss, at 8. Plaintiffs had argued, unsuccessfully, that because of the excessive length of

Although unsuccessful, the plaintiffs' memorandum in support of the preliminary injunction is illuminating for making these points: 1) the government has a legitimate need to conduct suspicionless searches and identity checks in the case of airline passengers and visitors to courthouses and other government buildings⁴²⁶ and 2) using explosive-detecting dogs on the ferries would not intrude into Fourth Amendment interests.⁴²⁷

2. Summary of Important Principles

Thus far both an administrative security search and special needs rationale have been used to uphold transit searches. The court, relying on the administrative standard, considered the government interest in preventing terrorist attacks and the intrusiveness of the search. In evaluating the government interest, the court was cognizant of the specific context of the Democratic Convention—i.e., that terrorists had attacked a transit system before an election in Madrid, and that DHS had reported credible intelligence concerning possible election season attacks—and found that the possibility that such an attack might take place was sufficient to establish the requisite government interest. In evaluating the intrusiveness, the court considered the similarity to airport searches; notice provided; the limited duration; the limited area covered; and the lack of discretion afforded the inspecting officials.

The court relying on a special need standard considered the government interest in providing domestic security (there supported by act of Congress), the effectiveness of the search, and whether the search was no more intrusive than necessary to achieve the governmental interest in question.

III. STATE CONSTITUTIONAL ISSUES⁴²⁸

A. Judicial Federalism

While federal cases provide the minimum protection required under the Fourth Amendment, states may provide more protection, based on state constitutions, statutes, and procedural rules.⁴²⁹ Although this princi-

Cassidy's commute if he did not take the ferry, requiring him to subject to a search to ride the ferry interfered with his ability to travel freely from state to state. Plaintiffs' memorandum in support of preliminary injunction, at 9.

⁴²⁶ *Id.* Plaintiffs' memorandum in support of preliminary injunction, at 9, 13.

⁴²⁷ *Id.* Plaintiffs' memorandum in support of preliminary injunction, at 17, n.3.

⁴²⁸ For a comprehensive discussion of these issues, see FRIESEN, *supra* note 5.

⁴²⁹ *E.g.*, 386 U.S. at 62 ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police

ple, known as judicial federalism,⁴³⁰ is not new, until the 1970s state courts generally employed federal constitutional analysis even in interpreting state constitutional provisions. Then differences in state interpretation began to emerge, which some attributed to an influential 1977 law review article by Justice William Brennan that called on state courts to use their own constitutions to provide protections not being sustained by the Supreme Court.⁴³¹

It has been suggested that states may have expanded their protections against search and seizures under their state constitutions in response to the proliferation of exceptions to the Fourth Amendment;⁴³² this reason has been considered both an argument for judicial federalism and against it.⁴³³ From 1970 to 1989, state courts issued over 450 opinions that expanded greater rights under state constitutions than those under the identical federal provision, with over one-third of them involving criminal issues.⁴³⁴ According to one researcher, the Supreme Courts of Alaska, California, Florida, and Massachusetts were the most active in

conduct than does the Federal Constitution.”) See also I.A.3, *Scope*, *supra*, this report.

⁴³⁰ Numerous law review articles discuss the history of judicial federalism and the principle’s significance to constitutional rights. See, e.g., Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions As an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833 (2004).

⁴³¹ See Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 808–10 (2000), referring to William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Some commentators have criticized state courts that appeared to answer that call. See Ken Gormley, *Perspectives: Federal Jurisprudence, State Autonomy: The Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797–98 (2003).

⁴³² James N. G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1196 (2000). In addition, Judith Kaye, of the New York Court of Appeals, observed that when it is apparent that the U.S. Supreme Court has, in a particular area, “diluted constitutional principles,” a state court does not act improperly in “discharging [a] responsibility to support the State Constitution” by examining whether it is wise to “follow along as a matter of state law.” *People v. Scott*, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring).

⁴³³ Some have suggested that it is appropriate to use state constitutions to constrain the abusive exercise of federal power. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L. J. 1003, 1004 (2003). For a discussion of arguments pro and con, citing numerous earlier articles, see Fitzpatrick, *supra* note 430, at 1841–48.

⁴³⁴ Ka Tina R. Hodge, *Comment, Arkansas’s Entry into the Not-So-New Judicial Federalism*, 25 U. ARK. LITTLE ROCK L. REV. 835, 846, n.105 (2003).

expanding state constitutional rights in the period between the 1960s and 1989.⁴³⁵

The United States Supreme Court has long held that it would not review states’ court decisions that rest on adequate and independent state grounds.⁴³⁶ However, the Court has also held that where the state court decision is based primarily upon federal law, or interwoven with federal law, the Court has jurisdiction to review the state decision, and that the state court has to show that its decision was made on independent state law grounds. In order for a state court decision that includes references to federal cases to be considered made on independent and adequate state law grounds, the decision must contain a plain statement that the federal law is only referred to as guidance.⁴³⁷ Where a federal court finds no violation of law and remands, upon remand, the state court may find a rationale for reinstating its own verdict.⁴³⁸

⁴³⁵ BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 166 (1991).

⁴³⁶ *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The *Pitcairn* Court noted: “Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.” *Id.* at 125–26.

⁴³⁷ *Michigan v. Long*, 463 U.S. 1032, 1040-01 (1983), *reaff’d in Arizona v. Evans*, 514 U.S. 1 (1995). The assertion of federal jurisdiction where federal law is primary or interwoven with state law was not new to *Long*; the plain statement requirement was. New Jersey Associate Justice Garibaldi described the *Long* holding as creating a presumption in favor of Supreme Court review. The Honorable Marie L. Garibaldi, *Conference on the Rehnquist Court: The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 69 (1998). The extent of the plain statement requirement was illustrated by the holding in *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (Statement by Pennsylvania Supreme Court that it was basing its decision on “this Commonwealth’s jurisprudence of the automobile exception” was not deemed a plain enough statement of adequate and independent state grounds). Some have asserted that *Long* made it easier for the Court to review—and thus to overturn—decisions of the highest state courts if those decisions straddled the line between relying upon state and federal constitutional precedent. See Gormley, *supra* note 431, at 798. For a review of the effect of the Court’s decision concerning independent state grounds, see Mathew G. Simon, *Note, Revisiting Michigan v. Long After Twenty Years*, 66 ALB. L. REV. 969 (2003).

⁴³⁸ *E.g.*, *People v. Class*, 494 N.E.2d 444, 445 (N.Y. 1986) (reinstated original holding after case was remanded in *New York v. Class*, 475 U.S. 106 (1986)); *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 557–58 (N.Y. 1987) (suppressed under New York Constitution evidence allowed by Supreme Court after case was remanded in *New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986)); *Van Arsdall v. State*, 524 A.2d 3 (Del. 1987) (held that although Federal Constitution was not violated, Delaware Constitution was violated; notwithstanding *Del. v. Van Arsdall*, 475 U.S. 673 (1986) original decision reinstated); *Commonwealth v. Labron*, 690 A.2d 228 (Pa. 1997) (restored court’s earlier order, overturning the order of the Superior Court un-

There are generally three approaches to state constitutional interpretation: lock-step, primacy, and interstitial.⁴³⁹ In addition, some states have followed New Jersey in using a “criteria approach.”⁴⁴⁰ Under the lock-step approach, the state provides the same protection under its cognate provision as under the federal constitution: no less (as required by the Supremacy Clause), but no more, either.⁴⁴¹ Under the primacy approach, the court looks to its state constitution first, only looking to the federal constitution if the defendant’s rights are not protected under state law.⁴⁴² Under the interstitial approach, the court looks to see whether the right asserted is protected under the federal constitution. If not, the court looks to the state constitution. Under this approach, there are three reasons for departing from federal precedent: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.⁴⁴³ In addition, the state may exercise “horizontal federalism” and look to other states’ decisions concerning similar provisions.⁴⁴⁴ Notwithstanding the voluminous commentary,⁴⁴⁵ state courts decide far more cases under the federal constitution than under state constitutions.⁴⁴⁶

der the state constitution, notwithstanding the U.S. Supreme Court’s prior reversal based upon federal grounds in 518 U.S. 938).

⁴³⁹ *State v. Gomez*, 932 P.2d 1, 6–7 (N.M. 1987). See also Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027 (1985); Rachel E. Fugate, *Comment: The Florida Constitution: Still Champion of Citizens’ Rights?*, 25 FLA. ST. U.L. REV. 87, 100 (1997). At least some commentators have identified more approaches. Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 318 (1986) (identifying five sub-categorical approaches). Whatever the number of approaches, states are free to choose the method they deem appropriate. *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 293 (1982) (finding that state court has discretion both in interpretation of state constitutional provision and in mode of analysis utilized in favor of its own model).

⁴⁴⁰ Garibaldi, *supra* note 437, at 74.

⁴⁴¹ 932 P.2d 6.

⁴⁴² *Id.* at 7, citing cases from Maine, New Hampshire, Oregon, and Washington.

⁴⁴³ *Id.* at 7.

⁴⁴⁴ Hodge, *supra* note 434, at 850.

⁴⁴⁵ See, e.g., Susan King, *State Constitutional Law Bibliography: 1989–1999*, 31 RUTGERS L. J. 1623–1708 (2000).

⁴⁴⁶

[S]tate supreme courts based their decisions primarily on state grounds in only twenty-two percent (22%) of their cases. Additionally, in ninety-eight percent (98%) of the decisions based on state law, the state supreme courts deferred to precedents of the United States Supreme Court. According to Professor Esler, only eight states consistently utilize state law, basing at least half of their decisions on state law grounds: Alaska, Arkansas, Florida, New Jersey, New York, South Dakota, Tennessee and Texas.

The approach taken by a particular state court will affect the predictability of its review of a warrantless, suspicionless search scheme. If a court does not analyze the constitutionality of searches solely in terms of the Fourth Amendment, then its decision in a particular case will not only be somewhat unpredictable in terms of its application of a legal standard to the facts, but also in terms of the appropriate legal standard to be applied. For purposes of predictability, it is perhaps less important to know which particular theory the court follows than whether or not it is in lock-step with the Supreme Court.

B. Comparing State Provisions to Fourth Amendment

This section compares the cognate search and seizure provision in each state constitution to the Fourth Amendment. Many are identical: nineteen states include a warrant clause in their constitutions that is identical to that in the Fourth Amendment.⁴⁴⁷ Others are different, but not substantially so. Important differences do exist. For example, some states include an express right to privacy in their state constitutions.⁴⁴⁸ Of course, even state clauses that are identical to the Fourth Amendment may be interpreted differently by state courts.⁴⁴⁹

In the state-by-state review, very slight differences are indicated by “virtually identical.” A number of state constitutions formulate “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” as “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures.” This is indicated by the phrase “alternate Clause I.” Those state provisions whose differences are not easily described are quoted in their entirety.

It is beyond the scope of this paper to provide an in-depth examination of case law for every state. However, as an aid to further research, this section identifies cases that indicate whether or not the state construes its own search and seizure provision in lockstep with the Fourth Amendment. State courts may extend greater protection in a specific circumstance,⁴⁵⁰ which

(footnotes omitted). Garibaldi, *supra* note 437, at 79–80. Examples of cases decided on state grounds include: *People v. Ramos*, 689 P.2d 430 (Cal. 1984); 501 N.E.2d 556; 524 A.2d 3.

⁴⁴⁷ Alaska, Arkansas, California, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, South Carolina, Utah, West Virginia, Wisconsin. Gardner, *supra* note 433, at 1029, n.125.

⁴⁴⁸ FRIESEN, *supra* note 5, § 2-2(a).

⁴⁴⁹ *Id.* § 11-2(a), at 11-5.

⁴⁵⁰ E.g., some states have found their constitutions require more stringent protection in the case of minor misdemeanor arrests than afforded under *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (officer with probable cause to believe that an individual has committed even a very minor criminal offense in his presence may arrest the offender).

does not mean that there will be greater protection in all circumstances, but does indicate that further distinctions are possible. The paper flags this possibility in some instances. Given the fact-dependent nature of these cases, however, these labels are indications of possible future direction, not an indication of likely outcome under every set of circumstances. Nonetheless, these cases should provide a starting point for assessing how a particular state court may evaluate a transit screening policy.

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

Alabama: Article I, Section 5. Uses the term “possessions” instead of “effects;” does not have “particularly describing” clause.

*Lockstep?*⁴⁵¹

Alaska: Article 1, Section 14. Searches and seizures. Uses term “houses and other property” instead of “houses.” Article 1, Section 22. Right of privacy. “The right of the people to privacy is recognized and shall not be infringed.”

*Not in lockstep.*⁴⁵²

Arizona: Article 2, Section 8. Right to privacy. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

*Not in lockstep.*⁴⁵³

Arkansas: Article 2, Section 15. Unreasonable searches and seizures. Virtually identical: adds “of this State” after “people.”

*Not in lockstep.*⁴⁵⁴

⁴⁵¹ No cases on point were found. However, two opinions from the Alabama Office of the Attorney General shed some light. Both the December 1, 1997, opinion on employee drug testing, 98-00044, and the October 31, 1996, opinion on library bag searches, 97-00029, discuss only federal Fourth Amendment cases in responding to questions about the constitutionality of both procedures. The inference is that the Attorney General’s Office, and presumably also the Alabama courts, look to the Fourth Amendment rather than Article I, Section 5 of the Alabama Constitution.

⁴⁵² *State v. Jones*, 706 P.2d 317 (Alaska 1985) (in construing Section 14, Alaska gives careful consideration to Supreme Court holdings on Fourth Amendment, but is not bound by them; court applied stricter standard for warrant under state constitution than federal standard).

⁴⁵³ *Large v. Superior Ct.*, 714 P.2d 399, 405 (Ariz. 1986) (in construing Arizona Constitution, court refers to federal constitutional law only as a benchmark of minimum constitutional protection); *State v. Ault*, 724 P.2d 545, 552 (Ariz. 1986) (Arizona’s constitutional provisions were both generally intended to incorporate federal protections, and specifically intended to create a right of privacy).

⁴⁵⁴ *Griffin v. State*, 67 S.W.3d 582, 584 (Ark. 2002). In deciding whether to provide more protection under Article 2, Section

California: Article 1. Declaration of rights, Section 13. Virtually identical: uses “may” instead of “shall.”

*Not in lockstep, but.*⁴⁵⁵ Since approval of Proposition 8 in June 1982, state claims relating to exclusion of evidence on grounds of unreasonable search and seizure have been measured by the federal standard.

Colorado: Article II, Section 7. *Security of person and property searches seizures warrants.* Uses alternate Clause I; “homes” instead of “houses;” “as near may be” instead of “particularly.” Addition: requires oath or affirmation to be in writing.

*Not in lockstep.*⁴⁵⁶

Connecticut:⁴⁵⁷ Article First, Section 7. Uses alternate formulation; “possessions” instead of “effects;” “as near may be” instead of “particularly.” Arrests also subject to Article 1, Section 9: “no person shall be arrested, detained or punished, except in cases clearly warranted by law.”

*Not in lockstep.*⁴⁵⁸ Standard for considering the scope of the state constitution:⁴⁵⁹ The court should examine the text of the provision, its historical roots, the 1818

15, than under the Fourth Amendment, the court looks to whether it had traditionally viewed issue differently than federal courts. *State v. Sullivan III*, 74 S.W.3d 215, 218 (Ark. 2002).

⁴⁵⁵ While Section 13 affords more protection than the Fourth Amendment, since approval of Proposition 8 (now Section 28(d) of Article 1) in June 1982, state claims relating to exclusion of evidence on grounds of unreasonable search and seizure have been measured by the federal standard. In *re Lance W.*, 694 P.2d 744, 752 (Cal. 1985). As one court explained:

Section 28(d) does not repeal or amend section 13 rights; section 28(d) simply abrogates the remedies fashioned by our courts for section 13 violations....Section 13 continues to pronounce search and seizure rights; section 28(d) requires we look to federal authority to define the remedies for violations of those rights.

People v. Daan, 161 Cal. App. 3d 22, 29, 207 Cal. Rptr. 228, 231–32 (Cal. App. 1984).

⁴⁵⁶ *People v. Galvador*, 103 P.3d 923, 927 (Colo. 2005) (Colorado historically interprets legitimate expectation of privacy more broadly under Article II, Section 7 than under Fourth Amendment; where, however, Fourth Amendment jurisprudence provides sufficiently for expectation of privacy, court looks only to Fourth Amendment and does not determine if state constitution provides greater protection).

⁴⁵⁷ See WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE* (1993); Michael F.J. Picuch, *High Court Study: State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757 (1997).

⁴⁵⁸ See, e.g., *State v. Oquendo*, 613 A.2d 1300, 1308–09 (Conn. 1992) (holding that search and seizure clauses of Connecticut Constitution, Article I, 7, 9, are more protective of individual liberties than Fourth Amendment of United States Constitution); *State v. Miller*, 630 A.2d 1315 (Conn. 1993) (holding a warrantless search of an automobile to be invalid).

⁴⁵⁹ *State v. Geisler*, 610 A.2d 1225 (Conn. 1992) (explaining factors court will consider in diverging from Federal Constitution); *State v. Lamme*, 579 A.2d 484 (Conn. 1990).

Constitutional Convention debates, state precedent immediately before and after the debates, and 20th century cases.⁴⁶⁰

Delaware: Article I, Section 6. Searches and seizures. Uses alternate Clause I; “possessions” instead of “effects;” “as near may be” instead of “particularly.”

*Not in lockstep.*⁴⁶¹

District of Columbia: Article I, Section 104. Virtually identical.

Florida: Article I, Section 12. Searches and seizures. Addition: right of the people to be secure “against the unreasonable interception of private communications by any means”; warrants supported by affidavit, description of “communication to be intercepted, and the nature of evidence to be obtained.” Explicitly ties construction of, and admissibility of evidence under Florida provision to construction of, and admissibility of evidence under, Fourth Amendment.⁴⁶²

*Lockstep, but.*⁴⁶³

Georgia: Article I, Section I, Paragraph XIII. Searches, seizures, and warrants. Virtually identical.

*Not in lockstep?*⁴⁶⁴

Hawaii: Article I, searches, seizures, and invasion of privacy. Section 7. Virtually identical. Addition: protection against “invasion of privacy”; description in warrants of “communications sought to be intercepted.”

*Not in lockstep.*⁴⁶⁵

Idaho: Article I, Section 17. Unreasonable searches and seizures prohibited. Uses phrase “without probable cause shown by affidavit” instead of “but upon probable cause, supported by Oath or affirmation.”

*Not in lockstep.*⁴⁶⁶

Illinois: Article I, Section 6. Searches, seizures, privacy, and interceptions. Uses alternate Clause I, “other possessions” instead of “effects.” Addition: right to be secure from “invasions of privacy or interceptions of communications by eavesdropping devices or other means.”

*Generally in lockstep.*⁴⁶⁷

Indiana: Article 1, Section 11. Virtually identical.

*Rejects lockstep.*⁴⁶⁸

Iowa: Article I, Personal security—searches and seizures. Section 8. Virtually identical.

*Lockstep.*⁴⁶⁹

Kansas: Kansas Bill of Rights, Section 15. Search and seizure. Uses the term “property” instead of “houses, papers and effects”; “inviolable” instead of “not be violated.”

*Lockstep.*⁴⁷⁰

Kentucky: Part 1, Section 10. Uses alternate Clause I, “possessions” instead of “effects,” “as near may be” instead of “particularly.”

*Close to lockstep.*⁴⁷¹

⁴⁶⁰ Piecuch, *supra* note 457, at 1775–76.

⁴⁶¹ 524 A.2d 3.

⁴⁶² See Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653, 654, 665 (1987).

⁴⁶³ *State v. Cross*, 487 So. 2d 1056, 1057 (Fla.), *cert. denied*, 479 U.S. 805 (1986). Where the United States Supreme Court has not addressed a particular search and seizure issue, the state court will look to its own precedent for guidance. *Rolling v. State*, 695 So. 2d 278, 293, n.10 (Fla. 1997), *cert. denied*, 522 U.S. 984 (1997).

⁴⁶⁴ *Dawson v. State*, 554 S.E.2d 137, 139 (Ga. 2001) (Federal constitutional standards are minimum protection state must afford its citizens). Although *Dawson* asserts right to construe its constitution differently, no cases found on search and seizure where court does so.

⁴⁶⁵ The Supreme Court of Hawaii has afforded greater protection under Article I, Section 7, than that afforded under the Fourth Amendment in a number of cases, based on a rule of reason requiring government intrusion into Hawaiians’ personal privacy to be “no greater in intensity than absolutely necessary.” *State v. Lopez*, 896 P.2d 889, 901–02 (Haw. 1995), citing *State v. Quino*, 840 P.2d 358, 362 (Haw. 1992) (declining to adopt the definition of seizure employed by the United States Supreme Court and, instead, choosing to afford greater protection to the citizens of Hawaii). See also *State v. Kaluna*, 520 P.2d 51, 57–59 (Haw. 1974) (providing broader protection under Article I, Section 7, in the area of warrantless searches incident to a valid custodial arrest than is provided on the federal level) (some citations omitted); *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994).

⁴⁶⁶ *State v. Guzman*, 842 P.2d 660, 667 (Idaho 1991) (Idaho seriously considers federal law in determining parameters of state constitution, may accept federal precedent under state constitution, but only to extent state court finds federal law not inconsistent with protections of state constitution). See also *State v. Donato*, 20 P.3d 5, 8 (Idaho 2001).

⁴⁶⁷ *People v. Bull*, 705 N.E.2d 824 (Ill. 1998), *cert. denied*, 528 U.S. 827 (1999); *Cf.*, *People v. Krueger*, 675 N.E.2d 604, 611 (Ill. 1996) (acknowledging application of lockstep in Fourth Amendment cases, but declining to adopt good faith exception to exclusionary rule).

⁴⁶⁸ *Ajabu v. State*, 693 N.E.2d 921, 929 (Ind. 1998); *Indiana Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994) (Questions arising under Indiana Constitution should be resolved by “examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.”).

⁴⁶⁹ *State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986).

⁴⁷⁰ The Kansas Supreme Court has asserted its right to construe its constitution to afford more protection than under the Federal Constitution, but, at least in the case of the Fourth Amendment, has traditionally declined to do so. *State v. Schultz*, 850 P.2d 818 (Kan. 1993) (scope of Section 15 of the Bill of Rights to the Kansas Constitution and of the Fourth Amendment to the United States Constitution is usually identical); *State v. Alexander*, 981 P.2d 761, 765 (Kan. 1999).

⁴⁷¹ Kentucky has exercised its right to construe some of its constitutional provisions differently than the Federal Constitution. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). However, it seems disposed to construe Section 10 in parallel with the Fourth Amendment. *Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky. 1992).

Louisiana: Article I, Section 5. Right to privacy. “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”⁴⁷²

*Not in lockstep.*⁴⁷³

Maine: Article I, Section 5. Unreasonable searches prohibited. Uses alternate Clause I, “possessions” instead of “effects.” Warrant must have “a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.”

*Not in lockstep.*⁴⁷⁴

Maryland: Declaration of rights, Article 26. “That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.”

*Lockstep.*⁴⁷⁵

Massachusetts: Article XIV. Uses alternate Clause I; “all his possessions” instead of “effects”; “special designation” instead of “particularly describing”; warrant “issued but in cases, and with the formalities prescribed by the laws” instead of “upon probable cause.”⁴⁷⁶

*Not in lockstep.*⁴⁷⁷

⁴⁷² See Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974).

⁴⁷³ State v. Hernandez, 410 So. 2d 1381 (La. 1982). However, the court has found broader rights in some instances, but not in all. 764 So. 2d at 71, n.11. Factors for broader interpretation under the Louisiana Constitution: examine history of the constitution and its textual differences with the Fourth Amendment to determine whether additional protections are called for; where state invasion of privacy provision does not in and of itself require additional protection, balance the state’s legitimate interest advanced against privacy right infringed by practice. *Id.* at 70–72.

⁴⁷⁴ City of Portland v. Jacobsy, 496 A.2d 646, 648 (Me. 1985).

⁴⁷⁵ Scott v. State, 782 A.2d 862, 873 (Md. 2001), *cert. denied*, 535 U.S. 940 (2002).

⁴⁷⁶ See Herbert P. Wilkins, *The State Constitution Matters*, BOSTON B.J., Nov.–Dec. 2000, at 4, 15 (discussing development of search and seizure jurisprudence by the Massachusetts Supreme Judicial Court under Massachusetts Declaration of Rights).

⁴⁷⁷ 722 N.E.2d at 434. This case provides a good explanation of the Massachusetts court’s approach to constitutional analysis. The court has found that Article 14 provides broader pro-

Michigan: Article I, Section 11. Uses alternate Clause I, omits “particularly” before “describing.” Addition: “The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.”

*Not in lockstep.*⁴⁷⁸

Minnesota: Article I, Section 10. Unreasonable searches and seizures prohibited. Virtually identical.

*Not in lockstep.*⁴⁷⁹

Mississippi: Article 3, Section 23. Uses alternate Clause I, “specially designating” instead of “particularly describing.”

*Not in lockstep.*⁴⁸⁰

Missouri: Article I, Section 15. Uses alternate Clause I, “as nearly as may be” instead of “particularly describing.” Addition: requires written oath or affirmation.

*Lockstep.*⁴⁸¹

Montana: Article II, Section 10. Right of privacy. “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Article II, Section 11. Searches and seizures. Uses alternate Clause I, omits “particularly” before “describing.” Addition: requires written oath or affirmation. In addition, Montana statutory law requires that a peace officer have “a particularized suspicion that the person...has committed, is committing, or is about to commit an offense” before stopping that person. Section 46-5-401, MCA.

*Not in lockstep.*⁴⁸²

tection than the Fourth Amendment in a variety of circumstances. *Id.* at n.7.

⁴⁷⁸ People v. Goldston, 682 N.W.2d 479, 484–85 (Mich. 2004) (Michigan not bound by Federal Constitution, even where language is identical; Michigan free to interpret state constitution consistent with Federal Constitution unless compelling reason precludes court from doing so. Determination of existence of compelling reasons is based on six factors: 1) textual language of state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of relevant constitutional provision, 5) structural differences between state and federal constitutions, and 6) matters of peculiar state or local interest).

⁴⁷⁹ State v. Carter, 596 N.W.2d 654, 657 (Minn. 1999). (Minnesota will find greater protection where it finds Supreme Court’s decision in particular case is radical departure from precedent; cases both following and departing from Federal Constitution cited).

⁴⁸⁰ Penick v. State, 440 So. 2d 547, 549 (Miss. 1983); 708 So. 2d 858.

⁴⁸¹ State v. Deck, 994 S.W.2d 527, 534 (Mo. banc 1999), *cert. denied*, 528 U.S. 1009 (1999) (subsequent proceedings not related to search and seizure issue).

⁴⁸² State v. Pastos, 887 P.2d 199, 202 (Mont. 1994) (when government intrudes upon fundamental right, any compelling

Nebraska: Article 1, Section 7. Search and seizure. Uses “homes” instead of “houses.”

*Lockstep.*⁴⁸³

Nevada: Article 1, Section 18. Unreasonable seizure and search; issuance of warrants. Virtually identical.

*Not in lockstep.*⁴⁸⁴

New Hampshire: N.H. Constitution, Part I, Article 19: Searches and Seizures Regulated. “Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases and with the formalities, prescribed by law.”

*Not in lockstep.*⁴⁸⁵

New Jersey: Article I, Paragraph 7. Uses “the papers and things to be seized” instead of “the person and things to be seized.”

*Not in lockstep,*⁴⁸⁶ *but.*⁴⁸⁷

state interest for doing so must be closely tailored to effectuate only that compelling interest); *State v. Bauer*, 36 P.3d 892 (Mont. 2001) (under Article II, Section 10 and Section 11 of the Montana Constitution, it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest.).

⁴⁸³ *State v. Vermuele*, 453 N.W.2d 441, 445 (Neb. 1990) (framers intended no greater protection under Article 1, Section 7, than under Fourth Amendment).

⁴⁸⁴ *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003). Arrest made in violation of Nevada Revised Statutes § 484.795 violates a suspect’s right to be free from unlawful searches and seizures under Article 1, Section 18, even though the arrest does not offend the Fourth Amendment. *But see Osburn v. State*, 44 P.3d 523, 526–27 (Nev. 2002) (Rose, J. dissenting) (Nevada usually defers to and follows federal courts, but will construe Nevada Constitution “to give more protection when Federal interpretation falls short in recognizing the right or remedy given to [Nevada’s] citizens”).

⁴⁸⁵ *State v. Ball*, 471 A.2d 347, 350–52 (N.H. 1983); *State v. Wong*, 635 A.2d 470, 473 (N.H. 1993).

⁴⁸⁶ Cases in which New Jersey Supreme Court found more protection under New Jersey Constitution than is available under United States Constitution: *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (guaranteeing the constitutional right of every child in New Jersey to receive a thorough and efficient education), *cert. denied, sub. nom Dickey v. Robinson*, 414 U.S. 476 (1973); *Right to Choose v. Byrne*, 450 A.2d 925, 928 (N.J. 1982) (extending to economically deprived women the guarantee of access to medically necessary abortions); *State v. Schmid*, 423 A.2d 615, 632–33 (N.J. 1980) (extending free speech protections

New Mexico: Article II, Section 10. Uses alternate Clause I, omits “particularly” before “describing.”

*Not in lockstep.*⁴⁸⁸

New York: Article 1, Security against unreasonable searches, seizures, and interceptions, Section 12. First paragraph identical. Addition: “The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.”

*Not in lockstep.*⁴⁸⁹

North Carolina: Article I, Section 20. General warrants. “General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.”

*Not in lockstep.*⁴⁹⁰

North Dakota: Article I, Section 8. Virtually identical.

*Not in lockstep.*⁴⁹¹

Ohio: Article I, Section 14. Uses “possessions” instead of “effects.”

*Lockstep,*⁴⁹² *but.*⁴⁹³

to include political speech in quasi-public private property, including a university campus).

⁴⁸⁷ *Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624, 648–49 (N.J. 2003). The seven circumstances under which the New Jersey Supreme Court will amplify federal constitutional rights were first articulated in a concurring opinion by Justice Handler. *State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982).

⁴⁸⁸ 932 P.2d 8. *See also* Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. REV. 379 (1998).

⁴⁸⁹ 593 N.E.2d 1328 (declining to adopt rule in *Oliver v. United States*, 466 U.S. 170 (1984), on grounds it does not adequately protect fundamental constitutional rights). The *Scott* court cites numerous New York cases finding greater state protections, *Id.* at 1331–32. *But see* Fitzpatrick, *supra* note 430, at 1849: New York has set forth criteria, but hasn’t applied them consistently.

⁴⁹⁰ *State v. Jackson*, 503 S.E.2d 101, 103 (N.C. 1998).

⁴⁹¹ *City of Bismarck v. Uhden*, 513 N.W.2d 373, 378 (N.D. 1994).

⁴⁹² *State v. Robinette III*, 685 N.E.2d 762, 771 (Ohio 1997).

⁴⁹³ Some 6 years later, relying on the statement in *Robinette, supra*, that the court should “harmonize [its] interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise,” the court held that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against war-

Oklahoma: Article II, Section 30. Unreasonable searches or seizures—Warrants, issuance of. Uses “describing as particularly as may be” instead of “particularly describing.”

*Not in lockstep.*⁴⁹⁴

Oregon: Article I, Section 9. Unreasonable searches or seizures. Uses “No law shall violate the right of the people to be secure” instead of “the right of the people to be secure...shall not be violated.”

*Not in lockstep.*⁴⁹⁵

Pennsylvania: Article 1, Section 8. Security from searches and seizures. Uses alternate Clause I, uses “describing them as nearly as may be” instead of “particularly describing.” Addition: “subscribed by the affiant” after “supported by oath or affirmation.”

*Not in lockstep.*⁴⁹⁶

Rhode Island:⁴⁹⁷ Article I, Section 6. Search and seizure. Uses “persons, papers and possessions” instead of “persons, houses, papers, and effects”; “describing as nearly as may be” instead of “particularly describing.” Addition: “on complaint in writing” before “probable cause.”

*Not in lockstep.*⁴⁹⁸

South Carolina: Article I, Section 10. Searches and seizures; invasions of privacy. Addition: “and unreasonable invasions of privacy” after “unreasonable searches and seizures,” “and the information to be obtained” after “the person or thing to be seized.”

*Not in lockstep.*⁴⁹⁹

South Dakota: Article VI, Section 11. Addition: “supported by affidavit” after “probable cause.”

*Not in lockstep.*⁵⁰⁰

Tennessee: Article I, Section 7. “That the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evi-

rantless arrests for minor misdemeanors. *State v. Brown*, 792 N.E.2d 175, 178 (Ohio 2003).

⁴⁹⁴ *Turner v. City of Lawton*, 733 P.2d 375 (Okla. 1986).

⁴⁹⁵ *State v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983); *State ex rel. Juvenile Dep’t of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992).

⁴⁹⁶ 615 A.2d 314; 836 A.2d 88 (privacy protection afforded by Article I, Section 8 is greater than that under Fourth Amendment).

⁴⁹⁷ Rhode Island also protects privacy by statute: R.I. GEN. LAWS § 9-1-28.1(a)(1). See Appendix C.

⁴⁹⁸ 561 A.2d. 1348 (R.I. 1989).

⁴⁹⁹ *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001) (Article I, Section 10, which includes an express right to privacy, “favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.”). See also *State v. Easler*, 489 S.E.2d 617, 622 n.13 (S.C. 1997).

⁵⁰⁰ *State v. Opperman (Opperman II)*, 247 N.W.2d 673, 674 (S.D. 1976) (asserting right of independent interpretation, regardless of similarity in language, reinstated *Opperman I*, citing the state, rather than federal, constitution, after Supreme Court reversal, 428 U.S. at 376).

dence of the act committed, to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.”

*Not in lockstep.*⁵⁰¹

Texas: Article 1, Section 9. Uses alternate Clause I; “as near as may be” instead of “particularly.”

*Not in lockstep.*⁵⁰²

Utah: Article I, Section 14. [Unreasonable searches forbidden—Issuance of warrant.] Virtually identical.

*Not in lockstep.*⁵⁰³

Vermont: Article 1, Article 11th. Search and seizure regulated.

“That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.”

*Not in lockstep.*⁵⁰⁴

Virginia: Article I, Section 10. General warrants of search or seizure prohibited.

⁵⁰¹ *State v. Lakin*, 588 S.W.2d 544 (Tenn. 1979). Tennessee provision to be construed like Fourth Amendment where possible, but court will look at federal search and seizure decisions in light of previous Tennessee holdings before deciding whether to follow federal precedents in a particular circumstance); *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002).

⁵⁰² *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Ct. App. 1991) (the Texas court, when analyzing and interpreting Article I, Section 9, Texas Constitution, “will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue”); *Johnson v. State*, 912 S.W.2d 227, 234 (Tex. Crim. App. 1995) (if court elects to afford greater protection under Article I, Section 9, court will choose in individual cases to interpret Article I, Section 9, in manner justified by facts of the case, state precedent on the issue, and state policy considerations).

⁵⁰³ *State v. Debooy*, 996 P.2d 546 (Utah 2000) (Utah’s interpretation of Article 1, Section 14 has often paralleled that of the Fourth Amendment, but Utah will construe it differently to give more appropriate protection to Utah’s citizens); *Brigham City v. Stuart*, 2005 Utah 13, ¶ 11 (dicta: Article I, Section 14 of the Utah Constitution provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court).

⁵⁰⁴ *State v. Jewett*, 500 A.2d 233, 236–37 (Vt. 1985) (in construing state constitution, court will examine historical analysis; textual analysis; analysis of decisions of sister states with similar or identical provisions; and analysis of economic or sociological materials); *State v. Morris*, 680 A.2d 90, 101–02 (Vt. 1996) (when state constitutional issue is raised squarely on appeal, court will consider all arguments raised, “including historical, textual, doctrinal, prudential, structural, and ethical arguments.”).

“That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”

Lockstep.⁵⁰⁵

Washington: Article I, Section 7. Invasion of private affairs of home prohibited. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Not in lockstep.⁵⁰⁶ The ferry searches implemented by Washington State Ferries have not been challenged in court. However, when random searches of the interior of vehicles were proposed, the Washington State Attorney General opined that they would violate the state constitution, but that external inspections and use of drug-sniffing dogs would not.⁵⁰⁷ However, the Attorney General later stated that because of Coast Guard orders and intelligence of increased threats, the vehicle searches would be justified.⁵⁰⁸

West Virginia: Article III, Section 6. Uses “citizens” instead of “people.”

Not in lockstep.⁵⁰⁹

Wisconsin: Article I, Section 11. Searches and seizures. Virtually identical.

Lockstep.⁵¹⁰

⁵⁰⁵ *Lowe v. Commonwealth*, 337 S.E.2d 273, 274 n.1 (Va. 1985) (explaining that protections under Virginia’s Constitution and statutes are “substantially the same as those contained in the Fourth Amendment”), *cert. denied*, 475 U.S. 1084 (1986); *Janis v. Commonwealth*, 472 S.E.2d 649, 652 (Va. 1996) (holding same).

⁵⁰⁶ *State v. Coe*, 679 P.2d 353, 361–62 (Wash. 1984). The court has found six criteria to be relevant in determining whether the Washington State Constitution provides broader protection than the United States Constitution: the textual language; differences in the texts; constitutional history; preexisting state law; structural differences; and matters of particular state or local concern. 720 P.2d 812–13 (use of pen register held to violate Article I, Section 7). The court noted that it has held in a number of cases that Article I, Section 7’s focus on the protection of its citizens’ private affairs provides for greater protection than that of the Fourth Amendment, citing *State v. Chrisman*, 676 P.2d 419 (Wash. 1984); *State v. White*, 640 P.2d 1061 (Wash. 1982); *State v. Simpson*, 622 P.2d 1199 (Wash. 1980), as examples of cases in which it found greater protection under Article I, Section 7 than under the Fourth Amendment based on its language concerning protection of private affairs. 720 P.2d 814, n.20.

⁵⁰⁷ *Rivera*, *supra* note 418.

⁵⁰⁸ Mike Carter, *No Ferry Car Searches, For Now*, SEATTLE TIMES, Oct. 9, 2004.

⁵⁰⁹ *State v. Flippo*, 575 S.E.2d 170, 190, n.25 (W.Va. 2002) (upheld strict standard of proof for meeting the inevitable discovery exception to the exclusionary rule, because of the stringent warrant requirement under Article III, Section 6 of the West Virginia Constitution).

Wyoming: Article 1, Section 4. Security against search and seizure. Addition: “supported by affidavit” after “probable cause.”

Not in lockstep, but.⁵¹¹

IV. STRUCTURING SEARCH POLICIES

As noted at the outset, it is beyond the scope of this paper to offer legal advice on structuring a search policy. However, this section does discuss matters that transit agencies may want to consider in structuring a policy: 1) the components of the five exceptions reviewed in Section II that suggest possible analytical models for assessing transit searches; 2) additional questions that courts may address in transit cases; and 3) questions to consider in developing a search policy.

A. Common Components of Search Exceptions

The five exceptions that provide possible models are: search and seizure without individualized suspicion (fixed checkpoints); administrative searches in general; special needs; airport security searches; and area entry searches. The components from these search exceptions that should apply to the review of a screening policy implemented by a transit agency are:

- Purpose of search would be frustrated by warrant/reasonable suspicion requirement.
- Search cannot be aimed at general law enforcement.
- Search must further substantial/vital government interest.
- Privacy intrusion must be no greater than required to further governmental interest (although least intrusive means not required), yet reasonably effective.

⁵¹⁰ *Wis. v. Angelia D.B. (In the Interest of Angelina B.)*, 564 N.W.2d 682, 685 (Wisc. 1997) (based on the substantial similarity of Article 1, Section 7 of the Wisconsin Constitution and the Fourth Amendment, Wisconsin “conform[s] the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment to prevent the confusion caused by differing standards”). *See also* *Wis. v. Malone*, 683 N.W.2d 1, 6 (Wis. 2004).

⁵¹¹ Wyoming has reserved the right to independent analysis of Article 1, Section 4, provided that a petitioner presents an argument supporting such analysis, but does not appear to have exercised that right to significantly expand search and seizure protections under its own constitution. *Saldana v. State*, 846 P.2d 604, 621–24 (Wyo. 1993) (greater right under Article 1, Section 4 rejected, but concurrence set forth test for presenting separate state constitutional analysis); *Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996) (rejected state constitutional claim because separate state constitutional analysis not presented); *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999); *Morgan v. State*, 95 P.3d 802 (Wy. 2004) (court would entertain argument that Article 1, Section 4 provides greater protection against canine sniffs than Fourth Amendment if properly presented).

- Hierarchy of intrusiveness of search methodology: canine sniff, magnetometer, visual inspection, physical inspection.

- Generally, more intrusive search that would not be reasonable as initial search may become reasonable as follow-up search.

- Evaluation of intrusiveness may consider both objective (duration and intensity) and subjective (potential for generating fear and suspicion) aspects of search.

- Consent, if any, governs scope of search.
- Search must be conducted pursuant to neutral criteria, strictly limiting discretion of inspecting officials.
- Reasonable notice and opportunity to avoid search must be afforded.

B. On the Horizon

Whatever theory a court applies, it will balance the government interest asserted against the privacy interests at stake, considering whether the search is sufficiently limited to its purpose and yet comprehensive enough to protect the government interest at stake. There are a number of new questions that could arise in the context of transit security screening:

- Is consent voluntary when a search must be agreed to in order to use the transit system? Is the search an unconstitutional condition on access to the public transportation system? The search policy upheld in Boston was implemented for a limited period of time on a limited segment of the system. The reach and duration of a search policy may affect the answer to these questions.

- Is the expectation of privacy in a transit system any greater than in the boarding area of an airport? Airport cases discuss the decreased expectation of privacy due to universal expectation of searches to enter the security area of airports. The difference in the type of travel involved could make a difference in the case of a search policy that was implemented in less limited fashion than that in Boston.

- Will tying searches to a specific threat level make a difference in the defensibility of policies?⁵¹² The search upheld in Boston took place during a presidential nominating convention, after intelligence was received on increased threats to the transit system. A general elevated threat level was not sufficient to justify searches in *Bourgeois v. Peters*, *supra*.

- Must threats be directed at the transit system? Threats during the Republican Convention were not sufficient to justify searches at demonstrations in *Staubert*, *supra*, in part because the court did not see a connection between the searches and the danger allegedly posed. The court evaluating the MBTA search policy, however, upheld the policy despite the lack of specific threats directed at the MBTA system.

⁵¹² See National Materials Advisory Board, *supra* note 8. The authors suggest that in the context of evaluating the legitimacy of an airport search under the Fourth Amendment, there is a stronger government interest when there is a specific credible threat. See *id.* at 35.

- Does the FTA's recommendation on threat level response have any effect on the legality of search policies? Would TSA directives or regulations have any such effect? One difference between airport searches and transit searches is the lack of a nationwide policy and/or statutory/regulatory requirements for searches. Federal guidance on, if not requirements for, searches might alter the assessment of this difference.

C. Issues to Consider When Formulating Search Policy

Regardless of jurisdiction, there are a number of issues that a transit agency should consider in formulating its (written) policy. Does the policy strike a balance between being narrow enough to intrude as little as possible (which will also reduce its effect on the efficiency of the system) and being robust enough to meet the targeted threat? Are the guidelines focused on defining a reasonable scope? Does the policy identify the threat and tie search parameters to factors likely to turn up the threat? For example, if the threat requires looking for 20-pound explosives, do the guidelines prohibit searching small bags and small pockets in big bags?

Some of the questions that a transit agency may want to take into account in formulating its policy follow. The answers to these questions will depend, to some extent, upon the law of the specific jurisdiction. Not all possible questions are addressed here, including how to handle the discovery of contraband.

1. What Is the Purpose of the Search Policy?

Clearly the search policy must advance a substantial government interest separate from general crime control efforts. Just as checkpoints initiated solely for drug interdiction and drug testing with extensive police involvement in policy formulation and implementation have been struck down, transit searches too closely interwoven with general law enforcement could be held invalid. However, the mere fact that transit police were involved in conducting searches would not necessarily turn them into general law enforcement exercises.

Keying searches to articulated threat warnings could help to differentiate them from routine law enforcement, provided that the type of threat warning was in fact related to a relatively specific danger.

Moreover, the intended result of the search may have analytical implications, as it will affect the assessment of the efficacy of the search. Is the search intended to actually discover a threat (explosives, etc.)? Is it to merely deter people from bringing dangerous items into the system?

2. Is the Search Calibrated to Discover the Identified Threat?

This question cuts two ways, as the scope of the search should be no broader than required to reach the identified threat, but must be broad enough to actually do so. For example, if the identified goal of the policy is

to prevent terrorists from bringing explosives into the system, is it possible to determine the likely bulk or weight of the explosives that would be used? If so, does the policy limit searches to containers, or portions of containers, large enough or heavy enough to contain those explosives? If the identified goal were trying to protect against biological/chemical agents, what would it take to search for them? Is it possible to detect such agents by conducting brief visual inspections of briefcases and other carry-on items?

3. How Is the Policy Established?

Given that limits on discretion are critical to upholding warrantless searches, it is questionable whether a search policy would be upheld unless it were reduced to writing. Beyond that, the minimum acceptable basis for a search policy is uncertain. Based on the limited experience to date, a search policy need not be based on statutory requirements to be upheld under an administrative search exception. However, even under a reasonableness/balancing analysis, which does not require a regulatory scheme per se, the greater the authority behind the policy, the greater the chances of a court finding it to be reasonable.

Clearly, though, the policy cannot be ad hoc in either its inception or its administration.

4. Can the Policy Be Implemented as Described on Paper?

Plaintiffs in the Boston case argued unsuccessfully that the policy was unconstitutional as applied. If a policy calls for the use of less intrusive methods, such as dogs and electronic screening devices, but the resources are not there to use those methods, another court could reach a different conclusion, particularly if the policy under consideration were less limited as to area and duration than the Boston policy.

5. How Is the Search Protocol Determined?

Where the protocol is defined (at the command or line level) and how it is executed (ministerially or with discretion) will have enormous implications for its constitutionality. The search policy upheld in Boston was defined at the command level and executed ministerially. In order to be executed ministerially, a policy must have guidelines on what to inspect, how to inspect, and what constitutes prohibited items.

6. Should the Policy Call for Searching People or Packages?

Searching people will be considered more intrusive than searching packages and hence subject to greater justification, including but not limited to reasonable suspicion. Searching people on less than a randomized basis may be considered profiling and, to the extent that it focuses on the characteristics of any protected class, will be subject to strict scrutiny.

Searching packages implicates the Fourth Amendment/state constitutions, but is subject to lower stan-

dards than searching people. Targeting packages based on size, weight, or some other factor related to the purpose of the search should not have the same constitutional implications as selectively searching passengers.

7. Should the Policy Be Randomized or Targeted?

Here randomized means not based on reasonable suspicion and not subject to the discretion of the inspecting official. A randomized search policy could require inspecting the packages of every passenger boarding the transit system or that of every passenger at specific intervals. Intervals can be fixed or changed; for example, by using a random digit table. Targeting packages relates to confining the scope of the search to the interest to be protected. A randomized search policy could target packages based on their size and weight.

8. Where Should Searches Take Place?

An important issue in structuring the protocol is the selection of the search location. An initial decision is whether to conduct searches within the system or only at entrances to the system. Searches within the system may be more difficult to conduct in a truly randomized, non-arbitrary fashion,⁵¹³ which of course has implications for the constitutionality of the searches, and could require a different standard for conducting searches. Even a policy that only allows searches at entrances to the system is likely to have selection issues, either as to location or time of day. Concerns include not creating a pattern discernible to a potential terrorist (which goes to the efficacy of the policy) and not disproportionately affecting certain segments of the population (which may raise equal protection issues, as conducting searches will have an effect on transit service). If the threat is not confined to a particular part of the system, or time of day, the agency should examine whether the checkpoint selection is randomized except as to the objective threat.

9. Does the Policy Provide Adequate Notice/Opportunity to Avoid Search?

Clearly, notice of the search and opportunity to avoid it will enter into an assessment of the reasonableness of the search. Two aspects to consider are: timing—whether notice of the policy is adequate to allow people to make other plans, and prominence—whether notice is clearly visible in system before payment is required.

10. What Search Technology/Methodology Will Be Employed?

Methodologies differ as to degree of intrusiveness. Less intrusive methods such as dogs and electronic screening devices will generally be considered more reasonable, may provide a greater deterrent effect by exposing a greater number of people to screening, and may be used to develop reasonable suspicion. Physical

⁵¹³ See II.B., *Search and Seizure Without Individualized Suspicion (Fixed Checkpoints)*, *supra*, this report.

inspection, in addition to being more intrusive, is more likely to turn up contraband.⁵¹⁴ However, the less intrusive methodologies are more expensive, and their use may be limited by the availability of funding.⁵¹⁵

V. CONCLUSIONS

Although the law on transit security searches is still emerging, transit agencies may look to established case law on suspicionless searches for guidance. Legal authority on checkpoints, special needs, and general administrative searches all provide useful insight into the requirements for constitutional screening policies. Cases on airport security and sensitive area entry screening should prove particularly relevant.

These authorities teach that generally suspicionless searches must be based on a government policy, not the individual decision of the inspecting official. The policy must be grounded on a substantial government interest other than general law enforcement; provide for searches that are reasonably calibrated to support that interest; provide adequate notice and some opportunity to avoid the search; and be based on neutral guidelines that clearly limit the inspecting officers' discretion. The devil is in the details: any review in this area of the law will be fact-specific. However, an understanding of these requirements should provide a starting point for fashioning appropriate policies based on the specific law in a given jurisdiction.

⁵¹⁴ Hall, *supra* note 298, vol. 2, § 32.9, n.99, at 317.

⁵¹⁵ See generally GAO-03-263, *supra* note 44, for a description of funding challenges faced by transit agencies.

APPENDIX A: SECURITY-RELATED LEGISLATION

I. ENACTED LEGISLATION

UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT OF 2001, PUB. L. NO. 107-56—OCT. 26, 2001).

SECTION 801. TERRORIST ATTACKS AND OTHER ACTS OF VIOLENCE AGAINST MASS TRANSPORTATION SYSTEMS.

Chapter 97 of Title 18, United States Code, is amended by adding at the end the following:

“§ 1993. Terrorist attacks and other acts of violence against mass transportation systems

“(a) GENERAL PROHIBITIONS.—Whoever willfully—

“(1) wrecks, derails, sets fire to, or disables a mass transportation vehicle or ferry;

“(2) places or causes to be placed any biological agent or toxin for use as a weapon, destructive substance, or destructive device in, upon, or near a mass transportation vehicle or ferry, without previously obtaining the permission of the mass transportation provider, and with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life;

“(3) sets fire to, or places any biological agent or toxin for use as a weapon, destructive substance, or destructive device facility used in the operation of, or in support of the operation of, a mass transportation vehicle or ferry, without previously obtaining the permission of the mass transportation provider, and knowing or having reason to know such activity would likely derail, disable, or wreck a mass transportation vehicle or ferry used, operated, or employed by the mass transportation provider;

“(4) removes appurtenances from, damages, or otherwise impairs the operation of a mass transportation signal system, including a train control system, centralized dispatching system, or rail grade crossing warning signal without authorization from the mass transportation provider;

“(5) interferes with, disables, or incapacitates any dispatcher, driver, captain, or person while they are employed in dispatching, operating, or maintaining a mass transportation vehicle or ferry, with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life;

“(6) commits an act, including the use of a dangerous weapon, with the intent to cause death or serious bodily injury to an employee or passenger of a mass transportation provider or any other person while any of the foregoing are on the property of a mass transportation provider;

“(7) conveys or causes to be conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this subsection; or

“(8) attempts, threatens, or conspires to do any of the aforesaid acts, shall be fined under this title or imprisoned not more than twenty years, or both, if such act is committed, or in the case of a threat or conspiracy such act would be committed, on, against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce, or if in the course of committing such act, that person travels or communicates across a State line in order to commit such act, or transports materials across a State line in aid of the commission of such act.

“(b) AGGRAVATED OFFENSE.—Whoever commits an offense under subsection (a) in a circumstance in which—

“(1) the mass transportation vehicle or ferry was carrying a passenger at the time of the offense; or

“(2) the offense has resulted in the death of any person, shall be guilty of an aggravated form of the offense and shall be fined under this title or imprisoned for a term of years or for life, or both.

“(c) DEFINITIONS.—In this section—

“(1) the term ‘biological agent’ has the meaning given to that term in section 178(1) of this title;

“(2) the term ‘dangerous weapon’ has the meaning given to that term in section 930 of this title;

“(3) the term ‘destructive device’ has the meaning given to that term in section 921(a)(4) of this title;

“(4) the term ‘destructive substance’ has the meaning given to that term in section 31 of this title;

“(5) the term ‘mass transportation’ has the meaning given to that term in section 5302(a)(7) of title 49, United States and sightseeing transportation;

“(6) the term ‘serious bodily injury’ has the meaning given to that term in section 1365 of this title;

“(7) the term ‘State’ has the meaning given to that term in section 2266 of this title; and

“(8) the term ‘toxin’ has the meaning given to that term in section 178(2) of this title.”

(f) CONFORMING AMENDMENT.—The analysis of Chapter 97 of Title 18, United States Code, is amended by adding at the end: “1993. Terrorist attacks and other acts of violence against mass transportation systems.”

AVIATION AND TRANSPORTATION SECURITY ACT OF 2001 (ATSA), PUB. L. NO 107-71.

Section 101(a) added § 114 to Title 49, United States Code. Section 114 provides in relevant part:

(d) FUNCTIONS.—The Under Secretary shall be responsible for security in all modes of transportation, including—

(1) carrying out Chapter 449, relating to civil aviation security, and related research and development activities; and

(2) security responsibilities over other modes of transportation that are exercised by the Department of Transportation.

(f) ADDITIONAL DUTIES AND POWERS.—In addition to carrying out the functions specified in subsections (d) and (e), the Under Secretary shall—

(1) receive, assess, and distribute intelligence information related to transportation security;

(2) assess threats to transportation;

(3) develop policies, strategies, and plans for dealing with threats to transportation security;

(4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government;

(5) serve as the primary liaison for transportation security to the intelligence and law enforcement communities;

(6) on a day-to-day basis, manage and provide operational guidance to the field security resources of the Administration, including Federal Security Managers as provided by Section 44933;

(7) enforce security-related regulations and requirements;

(8) identify and undertake research and development activities necessary to enhance transportation security;

(9) inspect, maintain, and test security facilities, equipment, and systems;

(10) ensure the adequacy of security measures for the transportation of cargo;

(11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;

(12) require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel;

(13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations;

(14) work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under Section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation; and

(15) carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law.

(1) REGULATIONS.—

(1) IN GENERAL.—The Under Secretary is authorized to issue, rescind, and revise such regulations as are necessary to carry out the functions of the Administration.

HOMELAND SECURITY ACT OF 2002 (HSA), PUB. L. 107–296, NOVEMBER 25, 2002.

SECTION 402. RESPONSIBILITIES.

The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following:

- (1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
- (2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
- (3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under Section 441 takes effect.
- (4) Establishing and administering rules, in accordance with Section 428, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
- (5) Establishing national immigration enforcement policies and priorities.
- (6) Except as provided in subtitle C, administering the customs laws of the United States.
- (7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under Section 421.
- (8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

SECTION 403. FUNCTIONS TRANSFERRED.

In accordance with Title XV (relating to transition provisions), there shall be transferred to the Secretary the functions, personnel, assets, and liabilities of—

- (1) the United States Customs Service of the Department of the Treasury, including the functions of the Secretary of the Treasury relating thereto;
- (2) the Transportation Security Administration of the Department of Transportation, including the functions of the Secretary of Transportation, and of the Under Secretary of Transportation for Security, relating thereto;
- (3) the Federal Protective Service of the General Services Administration, including the functions of the Administrator of General Services relating thereto;
- (4) the Federal Law Enforcement Training Center of the Department of the Treasury; and
- (5) the Office for Domestic Preparedness of the Office of Justice Programs, including the functions of the Attorney General relating thereto.

SECTION 423. FUNCTIONS OF TRANSPORTATION SECURITY ADMINISTRATION.

(a) CONSULTATION WITH FEDERAL AVIATION ADMINISTRATION.—

The Secretary and other officials in the Department shall consult with the Administrator of the Federal Aviation Administration before taking any action that might affect aviation safety, air carrier operations, aircraft airworthiness, or the use of airspace. The Secretary shall establish a liaison office within the Department for the purpose of consulting with the Administrator of the Federal Aviation Administration.

(b) REPORT TO CONGRESS.—Not later than 60 days after the date of enactment of this Act, the Secretary of Transportation shall transmit to Congress a report containing a plan for complying with the requirements of Section 44901(d) of Title 49, United States Code, as amended by Section 425 of this Act.

(c) LIMITATIONS ON STATUTORY CONSTRUCTION.—

(1) GRANT OF AUTHORITY.—Nothing in this Act may be construed to vest in the Secretary or any other official in the Department any authority over transportation security that is not vested in the Under Secretary of Transportation for Security, or in the Secretary of Transportation under Chapter 449 of Title 49, United States Code, on the day before the date of enactment of this Act.

(2) OBLIGATION OF AIP FUNDS.—Nothing in this Act may be construed to authorize the Secretary or any other official in the Department to obligate amounts made available under Section 48103 of Title 49, United States Code.

SECTION 1710. RAILROAD SAFETY TO INCLUDE RAILROAD SECURITY.

(a) INVESTIGATION AND SURVEILLANCE ACTIVITIES.—Section 20105 of title 49, United States Code, is amended—

(1) by striking “Secretary of Transportation” in the first sentence of subsection (a) and inserting “Secretary concerned”;

(2) by striking “Secretary” each place it appears (except the first sentence of subsection (a)) and inserting “Secretary concerned”;

(3) by striking “Secretary’s duties under chapters 203–213 of this title” in subsection (d) and inserting “duties under chapters 203–213 of this title (in the case of the Secretary of Transportation) and duties under section 114 of this title (in the case of the Secretary of Homeland Security)”;

(4) by striking “chapter” in subsection (f) and inserting “chapter (in the case of the Secretary of Transportation) and duties under section 114 of this title (in the case of the Secretary of Homeland Security)”; and

(5) by adding at the end the following new subsection:

“(g) DEFINITIONS.—In this section—

“(1) the term ‘safety’ includes security; and

“(2) the term ‘Secretary concerned’ means—

“(A) the Secretary of Transportation, with respect to railroad safety matters concerning such Secretary under laws administered by that Secretary; and

“(B) the Secretary of Homeland Security, with respect to railroad safety matters concerning such Secretary under laws administered by that Secretary.”

II. PROPOSED TRANSIT-ORIENTED LEGISLATION: 109TH CONGRESS (AS OF MARCH 2005)

- H.R. 3, the Transportation Equity Act: A Legacy for Users
 - Section 3026 requires that project management plans for major capital projects address both safety and security management. Section 3027 authorizes FTA to assist grantees in matters of security and investigate security risks, even without notice of specific security breaches.
- H.R. 153, Rail and Public Transportation Security Act of 2005
 - Directs the Secretary of Homeland Security to award research, development, and demonstration grants to reduce and deter terrorist threats against public transportation systems.
 - Authorizes the Under Secretary to make operating grants and capital grants for mass transportation system security improvements.
- H.R. 1109, Rail Transit Security and Safety Act of 2005
 - Directs the DHS Secretary to award grants directly to public transportation agencies for allowable capital and operational security improvements.
- H.R. 1116, Public Transportation Systems Vulnerability Assessment and Reduction Act of 2005
 - Directs the Secretary of Homeland Security to carry out activities to assess and reduce the vulnerabilities of public transportation systems.

III. Proposed Legislation: 108th Congress

- H.R. 3550, the Transportation Equity Act: A Legacy for Users
 - Section 3026 would have required that project management plans for major capital projects address both safety and security management. Section 3027 would have authorized FTA to assist grantees in matters of security and investigate security risks, even without notice of specific security breaches.
- H.R. 5082, Public Transportation Terrorism Prevention and Response Act of 2004
 - This bill would have provided funding for grants to improve transit security and required DOT and DHS to enter into a memorandum of understanding (MOU) concerning public transportation security roles; does not appear to provide specific authority for searches.
- S. 1072, Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2004
 - Section 3025 would have required that project management plans for major capital projects address both safety and security management. Section 3027 would have authorized FTA to assist

grantees in matters of security and investigate security risks, even without notice of specific security breaches, and would have required DHS and DOT to enter into an MOU defining and clarifying the respective roles and responsibilities of the two departments concerning public transportation security. Section 3029 would have authorized DHS/TSA to promulgate rules prohibiting disclosure of sensitive security information that could prove detrimental to the safety of transportation facilities, infrastructure, and personnel.

- S. 2453, Public Transportation Terrorism Prevention Act of 2004
 - This bill would have created a grant program within DHS based on risks and vulnerabilities identified within transit systems across the country, and required DHS to develop strategies for alleviating those risks and to create a framework for coordination amongst governmental agencies.
- H.R. 4008, Anti-Terrorism Protection of Mass Transportation and Railroad Carriers Act of 2004
 - This bill would have amended Title 18 of the United States Code to include terrorist attacks on mass transportation systems among the criminal offenses therein.
- H.R. 4143, Railroad Carriers and Mass Transportation Protection Act of 2004
 - This bill would have amended Title 18 of the United States Code to include terrorist attacks on mass transportation systems among the criminal offenses therein.
- H.R. 4361, Safe Transit and Rail Awareness and Investments for National Security Act of 2004
 - This bill would have provided for DHS grants to transit agencies for capital investments in security infrastructure and operating assistance for security, required an MOU between DHS and DOT, and authorized \$1.2 billion in federal funding in FY05, \$900 million in federal funding in FY06, and \$700 million in federal funding in FY07.
- S. 2216, Rail Transportation Security Act
 - This bill would have provided increased rail transportation security by requiring risk assessments; creating a capital grant program in DHS to meet needs identified by the risk assessments; and authorizing DOT to award \$677 million in FY05 to upgrade the six Amtrak tunnels in New York City, \$57 million in FY05 to upgrade the Amtrak tunnel in Baltimore, and \$40 million in FY05 to upgrade the Amtrak tunnels in Washington, D.C.
- S. 2273, Rail Security Act of 2004
 - This bill would have provided increased rail transportation security by requiring risk assessments; creating a capital grant program in DHS to meet needs identified by the risk assessments; authorizing DOT to award \$677 million in FY05 to upgrade the six Amtrak tunnels in New York City, \$57 million in FY05 to upgrade the Amtrak tunnel in Baltimore, and \$40 million in FY05 to upgrade the Amtrak tunnels in Washington, D.C.; and requiring system-wide security upgrades for Amtrak and freight railroads.
- S. 2289, Railroad Carriers and Mass Transportation Protection Act of 2004
 - This bill would have amended Title 18, United States Code, to combat terrorism against railroad carriers and mass transportation systems on land, on water, or through the air, and for other purposes, including adding terrorist attacks on mass transportation systems among the criminal offenses therein.

APPENDIX B: MAJOR CASES/MAJOR ISSUES

This appendix is intended to be a quick reference to the leading cases on those exceptions to the warrant and probable cause requirement under the Fourth Amendment discussed in this paper. The appendix is not exhaustive, particularly as to specific jurisdictions. Current research should accompany any use of these materials.

The appendix will highlight relevant United States Supreme Court decisions in the exception categories discussed in the paper, focusing on those aspects of the decisions that are most relevant to transit searches. The appendix will also highlight a limited number of significant cases from lower federal courts. Cases are cited for the proposition that they stand for under a particular exception. Consequently some cases may be cited more than once; if the major holding of case is not relevant to the exception, that holding is not described.

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Search and Seizure on Less than Probable Cause (Stop and Frisk)

U.S. Supreme Court

Terry v. Ohio, 392 U.S. 1 (1968). A stop and frisk is subject to the Fourth Amendment, and is reasonable when based on reasonable suspicion that criminal activity is afoot, provided that the scope of the search is limited to the purpose of the search. In the case of a Terry stop, the purpose is the protection of the officer and nearby members of the public, so the permissible scope is a search reasonably designed to uncover weapons that could be used to assault the investigating officer or passersby.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Even given the importance of policing the border, allowing roving border patrols to make suspicionless stops would violate the Fourth Amendment. Border patrols may stop and briefly question the driver and passengers of vehicles that the officers' observations have reasonably led them to believe may contain illegal aliens. Permissible questioning includes inquiries about citizenship, immigration status, and suspicious circumstances. Detention beyond the brief questioning or search must be based on consent or probable cause.

Delaware v. Prouse, 440 U.S. 648, 663 (1979). Discretionary suspicionless stops by police to check license and registration violate the Fourth Amendment. Unlike the government

interest in policing the border, the government interest in ensuring roadway safety through random stops does not justify the ensuing privacy intrusion.

Fifth Circuit

United States v. Moreno, 475 F.2d 44 (5th Cir. 1973). The severity of the air piracy problem is not in and of itself sufficient to justify warrantless searches. However, an airport, like the border, is a special zone in which special Fourth Amendment considerations apply. Reasonable suspicion is the appropriate standard, based on an officer's observations, for a search calculated to uncover weapons that could endanger the officer and people on the aircraft.

Search and Seizure Without Individualized Suspicion (Fixed Checkpoints)

U.S. Supreme Court

United States v. Martinez-Fuerte, 428 U.S. 543 (1976). A fixed checkpoint at the border making warrantless, suspicionless stops to briefly inquire about citizenship does not violate the Fourth Amendment. The Fourth Amendment does not impose an irreducible requirement of individualized suspicion. In this case a reasonable suspicion requirement would not be practicable because of the heavy flow of traffic and because it would reduce the deterrent value of the checkpoint. The government interest is great, while the intrusion (no searches) is minimal and does not involve the discretion of roving patrols. As to warrant, under the circumstances, the protections that a warrant provides are either unnecessary or provided by the procedure itself.

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990). *Martinez-Fuerte* and *Brown v. Texas*, 443 U.S. 47, 51 (1979), not special needs cases, are the relevant authorities. The checkpoints at issue were conducted according to limited discretion and were constitutionally indistinguishable from those in *Martinez-Fuerte*. The program was as effective as that upheld in *Martinez-Fuerte*.

City of Indianapolis v. Edmond, et al., 531 U.S. 32 (2000). Checkpoints aimed at general law enforcement purposes are unconstitutional. The Court recognized that the need to ensure public safety at places like airports and government buildings can be particularly acute—searches in such locations were expressly excluded from the holding in *Edmond*.

Consent

U.S. Supreme Court

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). When the government asserts consent as the justification for a search, the government must demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances. Knowledge of the right to refuse consent is a factor to be taken into account—the government is not required to prove that the one giving permission to search knew that he had a right to withhold his consent. However, the burden cannot be met by showing a mere submission to a claim of lawful authority.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop.

Florida v. Royer, 460 U.S. 491 (1983). Where the government seeks to justify a seizure based on reasonable suspicion, the scope must be limited to that appropriate to an

investigative seizure. If those bounds are exceeded, any consent provided once the bounds have been exceeded is void.

Florida v. Bostick, 501 U.S. 429 (1991). In the context of police questioning passengers on a bus, the appropriate standard for determining voluntariness of consent is whether a reasonable passenger would feel free to decline the officers' request or otherwise terminate the encounter.

Ohio v. Robinette, 519 U.S. 33 (1996). Voluntary consent to a search under the Fourth Amendment does not always require notice of the right to refuse the search. The Supreme Court does not apply bright-line rules to Fourth Amendment cases, rather measuring reasonableness objectively by looking at the totality of the circumstances.

United States v. Drayton, 536 U.S. 194 (2002). The holding in *Robinette* applies in the context of a search on a bus. There is no per se requirement that police notify a citizen of the citizen's right to refuse a search, no presumption of invalidity in the absence of such notice. The totality of the circumstances will control.

Second Circuit

United States v. Albarado, 495 F.2d 799 (2d Cir. 1974). Consent must be freely given in order to justify a search. Requiring one to choose between flying to one's destination and exercising the constitutional right to refuse a search is often a subtle form of coercion. For many air travelers, using other forms of transportation, if available, would constitute a hardship:

Again by analogy, if the government were to announce that hereafter all telephones would be tapped, perhaps to counter an outbreak of political kidnappings, it would not justify, even after public knowledge of the wiretapping plan, the proposition that anyone using a telephone consented to being tapped. It would not matter that other means of communication exist—carrier pigeons, two cans and a length of string; it is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense.

Seventh Circuit

McGann v. Northeast Illinois Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993). Even where consent is asserted as an independent justification for a search, the court will examine other indicia of reasonableness to evaluate consent. Knowledge of a sign giving notice of a potential search and voluntary conduct subjecting someone to a search is not sufficient to constitute implied consent. Since a consent search is only valid for the search actually consented to, implying consent from vague indicia raises the problem of not knowing what kind of search has allegedly been consented to.

Eighth Circuit

United States v. Kroll, 481 F.2d 884 (8th Cir. 1973). It is not reasonable to infer truly voluntary consent from a person's proceeding to board an airplane in the face of signs warning of searches: requiring the person to decline to fly in order to avoid the search is an unconstitutional condition. In many situations, air travel is the only reasonable option, so that interfering with the right to fly is an interference with the right to travel.

Ninth Circuit

United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986). The Fourth Amendment does not require that passengers be given a safe exit once detection is threatened. Once an

airline passenger places luggage on an x-ray machine's conveyor belt at a secured boarding area, consent to a follow-up visual inspection and limited hand search of luggage is implied if the x-ray scan is inconclusive in determining whether the luggage contains weapons or other dangerous objects. *Davis's* requirement of allowing passengers to avoid the search by electing not to fly does not apply to a passenger who has already submitted his luggage for an x-ray scan.

Torbet v. United Airlines, Inc., 298 F.3d 1087 (9th Cir. 2002). The holding in *Pulido-Baquerizo* allowing a search following an inconclusive x-ray applies to any x-ray scan that does not rule out every possibility of dangerous contents.

Profiling

U.S. Supreme Court

United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Reliance on the appearance of Mexican ancestry is not sufficient grounds in and of itself to justify a roving patrol stopping a car to inquire about the immigration status of the occupants.

United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Referrals to a secondary checkpoint based on appearance of Mexican ancestry are sufficiently minimal to not implicate the Fourth Amendment.

United States v. Armstrong, 517 U.S. 456 (1996). In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

Whren v. United States, 517 U.S. 806 (1996). So long as there was probable cause to believe a traffic violation had occurred, the fact that the traffic stop may have been a pretext to investigate a different kind of violation does not violate the Fourth Amendment.

Eighth Circuit

United States v. Weaver, 966 F.2d 391 (8th Cir. 1992). Where racial identity was only one of the officer's grounds for reasonable suspicion, and the other grounds were colorable, the Fourth Amendment was not violated.

Ninth Circuit

Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994). It was an egregious constitutional violation for INS agents to stop someone solely because of his Hispanic appearance.

United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (en banc), *cert. denied* in *Sanchez-Guillen v. United States*, 531 U.S. 889 (2000). Under the circumstances (lack of probative value of Hispanic appearance in area with large percentage of Hispanics), it was unconstitutional for the Border Patrol to take Hispanic appearance into account in deciding whether to stop someone for a suspected immigration violation.

Canine Sniff

U.S. Supreme Court

United States v. Place, 462 U.S. 696 (1983). A canine sniff is less intrusive than a manual search by an officer both in manner (it does not expose the interior of the luggage) and in

what it reveals (contraband only). Exposure of luggage in a public place to a trained canine is not a search within the meaning of the Fourth Amendment.

Illinois v. Caballes, 543 U.S. ___, 125 S. Ct. 834 (2005). The Fourth Amendment is not violated by a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess. The fact that the dog sniff did not extend the duration of the stop appears to have been a factor in the decision.

Luggage Cases

U.S. Supreme Court

Bond v. United States, 529 U.S. 334 (2000). The privacy expectation in luggage includes a reasonable expectation that no one will touch that luggage in a probing manner.

Eleventh Circuit

United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984). A 140-minute detention of the defendant's luggage without prompt examination by a detector dog exceeded the scope of a stop justifiable under *Terry*.

Administrative Searches in General

U.S. Supreme Court

Camara v. Municipal Court, 387 U.S. 523 (1967). The Court held that the Fourth Amendment does apply to administrative searches. It set forth a standard for determining whether a warrant should be required: whether the authority to search should be evidenced by a warrant, to be determined in part by examining whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. In the case where an administrative warrant is required, it may be issued based on legislative facts.

United States v. Biswell, 406 U.S. 311 (1972). A pervasive legislative scheme may provide the protection of the warrant procedure, so that a warrantless search as part of such an inspection procedure may be permissible under the Fourth Amendment. Where a regulatory inspection system of business premises is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

New York v. Burger, 482 U.S. 691 (1987). There are three criteria for a warrantless inspection to be deemed reasonable: 1) there must be a substantial government interest underlying the regulatory scheme; 2) the warrantless inspection must be necessary to further the regulatory scheme; and 3) the regulatory statute must advise the property owner that the search is made pursuant to law and has a properly defined scope and it must limit the inspecting officers' discretion. The legitimacy of the administrative exception is not undermined by the fact that the same problem is being addressed by both an administrative approach and penal sanctions, nor by the fact that police carry out the administrative inspection.

Ninth Circuit

United States v. \$ 124,570 U.S. Currency, 873 F.2d 1240, 1244 (9th Cir. 1989). An unlawful secondary purpose invalidates an otherwise permissible administrative search scheme. Where airport security screeners have a working relationship with law enforcement officials

to look for, or alert those officials to, contraband, the legislative facts of *Davis*, and therefore the administrative exception, do not apply. Given that officers had wide latitude as to when to search, the impermissible second motive clouded the decision to search a particular bag. Thus the impermissible motive extended the search beyond what was reasonable under the Fourth Amendment.

United States v. Bulacan, 156 F.3d 963 (9th Cir. 1998). Where officers have broad discretion as to the parameters of the search, the addition of an impermissible motive extends the scope of the search, regardless of whether the items searched could have been subject to a valid administrative search.

Special Needs

U.S. Supreme Court

New Jersey v. T.L.O., 469 U.S. 325 (1985). Striking a balance between schoolchildren's privacy expectations and the school's need to maintain an appropriate learning environment makes it impractical to require a warrant and probable cause. Rather, to be constitutional the search must be reasonable under all the circumstances, that is it must be reasonable at its inception and carried out so that its scope is reasonably related to the circumstances that justified the search to begin with.

In a noted concurring opinion, Justice Brennan argued that it is not appropriate to merely proceed to balance interests instead of requiring a warrant. Rather, as regular law enforcement interests are not sufficient to justify a warrantless search, a special governmental interest beyond the need of law enforcement is required to justify a categorical exception to the warrant requirement. Generally such a need makes obtaining a warrant highly impractical if not impossible. Justice Brennan posited that only after finding such a special governmental need exists should the court engage in a balancing test to determine if a warrant should be required.

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989). Warrantless, suspicionless drug testing of railroad employees was justified as a special needs exception to the warrant and probable cause requirements.

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). Drug testing of treasury employees in certain security-sensitive positions was justified under the special needs doctrine. In support of its assertion as to possible harm, the Court cited to three circuit court cases involving airport searches as illustrating the reasonableness of searching innocent people in order to effectuate special governmental need. The Court suggested that given an observable national hijacking crisis, the government need not demonstrate specific danger at one airport to justify security screening there.

Chandler v. Miller, 520 U.S. 305 (1997). A symbolic government need, one that does not relate to a concrete danger, does not outweigh individual privacy interests. Searches such as those at airports and courthouse entries are examples of blanket suspicionless searches that, responding to substantial risk to public safety and conducted in ways calibrated to those risks, may be considered reasonable.

Ferguson v. City of Charleston, 532 U.S. 67 (2001). Where the administrative purposes are intertwined with law enforcement considerations, the special needs exception does not apply.

Ninth Circuit

Graves v. City of Coeur D'Alene, 339 F.3d 828 (9th Cir. 2003) A search of the backpack of a person attending political parade could not be justified under "special needs" jurisprudence where officers possessed unguided discretion: there was no specified criteria to carry out suspicionless bag searches, no organized methodology for systematically checking all

individuals, and no checkpoints through which all people had to pass before entering the vicinity.

Airport Security Searches

Second Circuit

United States v. Albarado, 495 F.2d 799 (2d Cir. 1974). This case involved a search following the triggering of a magnetometer. The Second Circuit adopted a reasonableness analysis for assessing airport security searches, under which the reasonableness of the search would be judged by the totality of the circumstances. The court found that the government need to deter air piracy was great, and outweighed the intrusion of the magnetometer search. However, any search following the magnetometer search must be confined to a search for the object that activated the magnetometer. The court also found that the ability to decline the search did not imply consent, but was a factor in assessing reasonableness.

United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974). The court further articulated its reasonableness analysis, emphasizing that notice of the ability to leave rather than submitting to a search is required for the search procedure to be reasonable. Such notice is provided by the signs advising that all persons going through the security area will be searched.

Fifth Circuit

United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973). The court faced the question of the appropriate standard for reviewing a search undertaken at the boarding gate based on profiling and the passenger's lack of identification. The court set forth a tripartite weighing test to evaluate the constitutionality of an airport security search: the need for the search in terms of possible public harm, the likelihood that the search procedure will be effective, and the degree and nature of the search's intrusion into privacy interests. The court found airport security screenings less offensive than searches in other situations.

Ninth Circuit

United States v. Davis, 482 F.2d 893 (9th Cir. 1973). Airport security searches should be analyzed under the administrative search exception. The government interest—detering terrorism—is great. Consequently, the screening process is constitutional so long as it is limited to detecting the presence of weapons or explosives, it is confined in good faith to that purpose, and potential passengers may avoid the search by electing not to fly. The court will consider the technology available in assessing the intrusiveness of the search. The security search does not unreasonably interfere with the right to travel. The alternative of submitting to the search or not must be clear in order for consent to be implied.

Torbet v. United Airlines, 298 F.3d 1087 (9th Cir. 2002). In order to avoid a search, the potential passenger must elect not to fly before putting his baggage on the x-ray conveyor belt. A passenger who submits his luggage for x-ray in a secure boarding area impliedly consents to a visual inspection and hand search of that luggage if the x-ray is inconclusive in determining whether there are weapons or other dangerous objects in the luggage.

Eleventh Circuit

United States v. Herzbrun, 723 F.2d 773 (11th Cir. 1984). The court applied *Skipwith's* tripartite analysis and held that persons who present themselves at a security boarding area impliedly consent to a search.

Area Entry Searches (Including Athletic Events, Courthouses/Public Buildings, and Military Areas)

Second Circuit

Wilkinson v. Forst, 832 F.2d 1330 (2d Cir. 1987). A police policy of conducting pat-down searches of individuals at a series of rallies without regard to whether individuals were suspected of carrying weapons went beyond the bounds established by the Fourth Amendment. The Court allowed magnetometer searches, based on their less intrusive nature.

Fourth Circuit

Norwood v. Bain, 143 F.3d 843 (4th Cir. 1998). Searches conducted at checkpoints set up to control entrance to a motorcycle rally violated the Fourth Amendment. The government interest in preventing violence could have been reasonably protected through other practical means.

Sixth Circuit

Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972). Courthouse-entry searches for weapons and explosives conducted under a General Services Administration (GSA) blanket search program were found reasonable under the Fourth Amendment. The search was minimal, made for the limited purpose of determining that no explosives or dangerous weapons were transported into the federal courthouse.

Ninth Circuit

McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978). Warrantless, suspicionless searches at the entrance of sensitive facilities are not unconstitutional provided that the search is clearly needed to protect vital government interest; no more intrusive than needed to protect against danger to be avoided, but nonetheless reasonably effective; and conducted for purpose other than gathering evidence for criminal prosecutions.

Eleventh Circuit

Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004). A search procedure that set up a checkpoint a few blocks from an anti-war protest and required protestors to pass through magnetometers, creating a 90-minute to 2-hour delay in entering the site, was unconstitutional. A Homeland Security threat level of yellow did not provide sufficient justification for the warrantless, suspicionless searches. The court rejected the argument that following the events of September 11, 2001, non-discriminatory, low-level magnetometer searches at large gatherings should be constitutional as a matter of law.

Southern District of New York

Stauber v. City of New York, 2004 WL 1593870 (S.D.N.Y. 2004). Suspicionless bag searches at entry points to political demonstrations during the 2004 Republican convention enjoined because the evidence of a terrorist threat asserted as justification was overly vague, there was no advance notice and no written policy, and no information suggested that the bag searches would address the kinds of threats that might occur at the demonstrations.

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