A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess

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Publication Information
40 Creighton Law Review 419 (2007)


Repository Citation
http://open.mitchellhamline.edu/facsch/335

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Abstract
This Article contends the Supreme Court's use of a primary purpose test to regulate suspicionless searches and seizures by the government is misguided and will provide little or no protection against the evils that apparently led the Court to strike down recent schemes by government officials. The evil of the government schemes is less the purpose of the schemes than their expansion into areas and activities in which citizens should be protected from government intrusion in the absence of any suspicion of wrongdoing. Rather than facing this head on and carefully assessing whether the government schemes infringe on such areas or activities, the Court has taken the indirect route of applying the primary purpose test, a test that is difficult to apply and will enjoy no more success than it did when proposed as a limit on pretextual activity by the government in other settings. The Court—and citizens and law enforcement officials—would be better served by focusing on the privacy interest infringed upon by the government activity and whether the government scheme includes appropriate safeguards against arbitrary actions by government officials rather than the "primary purpose" of the scheme.

Keywords
Administrative searches and seizures, Pretexting, Special needs doctrine (Searches and seizures)

Disciplines
Criminal Law | Evidence | Fourth Amendment

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A SUSPICIONLESS SEARCH AND SEIZURE QUAGMIRE: THE SUPREME COURT REVIVES THE PRETEXT DOCTRINE AND CREATES ANOTHER FINE FOURTH AMENDMENT MESS

EDWIN J. BUTTERFOSS†

I. INTRODUCTION

It has been said that one thing that unifies liberal and conservative commentators on the jurisprudence of the United States Supreme Court is "virtual unanimity, transcending normal ideological dispute, that the Court simply has made a mess of search and seizure law."¹ The Court's decisions in the area of suspicionless searches and seizures amply support that proposition.²

To believe the pronouncements of the United States Supreme Court, "lawful suspicionless searches and seizures" should be almost an oxymoron. Time and again the Court has declared as a basic tenet of Fourth Amendment jurisprudence that "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing"³ and on at least two occasions has stuck down a suspicionless search scheme because it did not "fit within the closely guarded category of constitutionally permissible suspicionless

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¹ Silas J. Wasserstrom & Louis M. Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 20 (1988). See also Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 383 (1988) (stating "in its Fourth Amendment jurisprudence, the United States Supreme Court has struggled continually, and unsuccessfully, to develop a coherent analytical framework.").


³ City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (citing Chandler v. Miller, 520 U.S. 305, 308 (1997)). See also United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). Historically, individualized suspicion in the form of probable cause was a prerequisite for finding the government's fourth amendment activity reasonable and therefore constitutional. Generally, a warrant based on the individualized suspicion was also required. In circumstances in which a warrant was excused (due to exigent circumstances), individualized suspicion was still required. New Jersey v. T.L.O., 469 U.S. 325, 340, 342 n.8 (1985).
searches [and seizures]." But the notion that only a single "category" of permissible suspicionless searches and seizures exists and that the category is "closely guarded" is a fantasy.5

Although many discussions of suspicionless searches begin with the Court's decision in New Jersey v. T.L.O.6 and focus on the "special needs" doctrine that finds its genesis in that case, the Court's suspicionless search jurisprudence begins much earlier and extends far beyond government activity serving "special needs." The door to suspicionless searches and seizures under the Fourth Amendment was opened in the landmark case of Camara v. Municipal Court of San Francisco,7 when the Court for the first time8 authorized a search without a showing of individualized suspicion.9 Since opening the door in Camara, the Court has upheld suspicionless searches in numerous contexts, creating several categories of constitutionally permissible suspicionless searches.10

Although even after Camara the general rule ostensibly remained that a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, the corollary that such suspicion is not an "irreducible" component of reasonableness11 more often carried the day.12 For thirty years, the Court upheld virtually every government scheme of suspicionless searches and seizures that came

5. Even the Court routinely identifies several categories or classes of suspicionless searches. See infra note 265 and accompanying text.
8. As a theoretical matter, the principle was never absolute; it states the ordinary rule, not the universal rule. See Martinez-Fuerte, 428 U.S. at 561 (stating the "Fourth Amendment imposes no irreducible requirement of such suspicion"). But as a practical matter, until Camara in 1967, the Supreme Court had never upheld a search not justified by individualized suspicion of wrongdoing, although lower courts had apparently assumed such searches were justified at the border and in other limited circumstances. Sundby, 72 MINN. L. REV. at 386-89, 386 n.9.
9. In Camara, the Court declared lawful area inspections supported by warrants based on reasonable administrative standards rather than individualized suspicion. The Court redefined probable cause in the administrative inspection context to include such standards, rather than individualized suspicion. See infra notes 63-65 and accompanying text. The particular inspections before the Court had not been authorized by a warrant and therefore were found unconstitutional, but the Court held that inspections authorized by a warrant supported by the "new," suspicionless probable cause would be lawful. Camara v. Mun. Court of San Francisco, 387 U.S. 523, 536-39 (1967).
10. See Scott E. Sundby, Protecting the Citizen "Whilst He is Quiet": Suspicionless Searches, "Special Needs" and General Warrants, 74 Miss. L.J. 501, 550 (2004) (stating Camara's reasonableness balancing test spawned later "special needs" cases and "opened the door to unintended mischief").
12. See Sundby, 74 Miss. L.J. at 518 (describing the cases as a "steady march of victories" for the government); see also Robert D. Dodson, Ten Years Of Randomized Jurisprudence: Amending the Special Needs Doctrine, 51 S.C. L. Rev. 258, 288 (2000).
before it,\textsuperscript{13} belying the Court's description of the category as a "closely guarded" exception to the general rule that individualized suspicion is required to undertake a search or seizure.\textsuperscript{14} Despite the Court's description of the category of permissible suspicionless searches and seizures as "closely guarded," the Court has never defined a discrete category\textsuperscript{15} and has failed to identify precisely the characteristics that qualify government searches for treatment outside the ordinary rule requiring individualized suspicion. Instead, the Court at times has spoken of "regulatory" or "administrative" searches, at other times has invoked the "special needs" label, and on still other occasions has upheld suspicionless seizures at "checkpoints" and "inventory searches," apparently treating them as \textit{sui generis}. Most recently, the Court upheld a suspicionless search scheme under its "general Fourth Amendment approach."\textsuperscript{16} For each new category—or "subcategory" if the Court insists there is only one "closely guarded category"—the Court created, it invoked different standards by which to assess the constitutionality of the search. Over the years, the "category" of suspicionless searches became a jurisprudential mess, with the only consistent theme being that suspicionless search schemes were regularly upheld as lawful.

A particularly confusing aspect of the Court's suspicionless search and seizure analysis over the years has been the relevance of a "non-criminal" or "non-law enforcement" purpose motivating the search. In several early suspicionless search and seizure cases, the presence of a law enforcement purpose seemed unimportant in the Court's assessment of the permissibility of the government scheme.\textsuperscript{17} In other cases, the Court ruled that such a purpose was relevant only if it was the "sole" purpose motivating the scheme.\textsuperscript{18} More recently, the Court imposed a new "primary purpose" test to strike down government schemes to conduct suspicionless searches or seizures.\textsuperscript{19} While this new restriction on suspicionless searches and seizures should be a

\textsuperscript{13} See Sundby, 74 Miss. L.J. at 511 (stating the Court upheld suspicionless searches in a variety of settings at a "dizzying pace for the world of constitutional law").

\textsuperscript{14} Chandler, 520 U.S. at 309.

\textsuperscript{15} The Court itself at times refers to "classes of cases" and describes several categories or subcategories, often in the same cases in which it refers to the "closely guarded category" of permissible suspicionless searches and seizures. See Edmond, 531 U.S. at 37 (stating the Court has recognized "limited circumstances" in which usual rule requiring individualized suspicion does not apply); see also Chandler, 520 U.S. at 308-09 (referring to "limited circumstances" and "closely guarded category").


\textsuperscript{17} See infra notes 84-110 and accompanying text.

\textsuperscript{18} See infra notes 119-131 and accompanying text.

\textsuperscript{19} See infra notes 43-53 and 261-328 and accompanying text.
welcomed change from the apparently limitless\textsuperscript{20} reach of these government schemes suggested by the Court's early decisions, celebrating the new test as an effective limit on suspicionless searches and seizures would be premature. Although the Court claimed to have imposed the test to "prevent such intrusions from becoming a routine part of American life,"\textsuperscript{21} the new test is unlikely to reduce significantly the suspicionless searches to which citizens are subjected. Instead, the new test only adds to the jurisprudential "mess" in this area,\textsuperscript{22} creating nothing less than a suspicionless search quagmire.

An initial difficulty with the primary purpose test is ambiguity about the precise purpose the Court finds improper\textsuperscript{23} In various cases, the Court has expressed concern over, or suggested a different outcome for, searches motivated by a "law enforcement purpose,"\textsuperscript{24} "general crime control purposes,"\textsuperscript{25} "a general interest in crime control,"\textsuperscript{26} an "intent to aid law enforcement efforts,"\textsuperscript{27} a "purely investigative purpose,"\textsuperscript{28} an "investigatory police motive,"\textsuperscript{29} a "purpose . . . to detect evidence of ordinary criminal wrongdoing,"\textsuperscript{30} "ordinary needs of law enforcement,"\textsuperscript{31} the "normal need for law enforcement,"\textsuperscript{32} a "general interest in law enforcement,"\textsuperscript{33} a purpose to "discover evidence of criminal wrongdoing,"\textsuperscript{34} a purpose "to obtain[ ] evidence of . . . viola-

\textsuperscript{20} During this period of expansion, commentators almost uniformly criticized this new category of searches and seizures as being without standards or limits. See Sundby, 72 Minn. L. Rev. at 385 (balancing test expanded without justification or limits); see also Dodson, 51 S.C. L. Rev. at 261-62, 284, 288 (stating special needs never adequately defined leading to broad expansion); see also Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 Harv. C.R.-C.L. L. Rev. 529 (1997) (stating special needs exception so broad and far reaching it is poised to turn the warrant preference rule on its head).

\textsuperscript{21} Edmond, 531 U.S. at 42.

\textsuperscript{22} See, Joshua Dressler, Understanding Criminal Procedure § 19.01, at nn. 12-14 (LexisNexis 3d ed. 2002) (stating recent Court opinions leave the law "muddier than before").

\textsuperscript{23} See Schulhofer, 1989 Sup. Ct. Rev. at 89 (discussing the Court's inability to discriminate among the sorts of non-law-enforcement objectives as one cause of the "doctrinal incoherence" in this area).

\textsuperscript{24} Ferguson, 532 U.S. at 69, 74 (referring also to "law enforcement ends").

\textsuperscript{25} Edmond, 531 U.S. at 47.

\textsuperscript{26} Id. at 39, 47 (also referring to "general purpose of investigating crime").

\textsuperscript{27} Ferguson, 532 U.S. at 75.

\textsuperscript{28} Edmond, 531 U.S. at 45 (citing Colorado v. Bertine, 479 U.S. 367, 372 (1987)).

\textsuperscript{29} South Dakota v. Opperman, 428 U.S. 364, 376 (1976).

\textsuperscript{30} Edmond, 531 U.S. at 41.

\textsuperscript{31} Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).


\textsuperscript{33} Ferguson, 532 U.S. at 79.

\textsuperscript{34} Vernonia, 515 U.S. at 653.
sion[s] of the penal laws," and searches "in any way related to the conduct of criminal investigations."

Even if the Court were to unambiguously define the purpose it considers improper, another weakness of the primary purpose test as a limit on suspicionless search schemes by the government is that it apparently applies only to certain "subcategories" of suspicionless searches. If that is the case, the Court can avoid the new limitation by upholding suspicionless search schemes utilizing a "subcategory" not limited by the "primary purpose" test. Even if the test is broadly applied, because the test restricts only schemes where the primary purpose is improper, it is open to manipulation by the government. Unless the Court is willing to scrutinize carefully the government's true motivation in "mixed motive" schemes, governments will be free to accomplish their improper objective by articulating a primary purpose that passes muster. If the Court is willing to engage in close scrutiny of the government purpose, it will face the charge that it has revived the pretext doctrine that it appeared to bury in Whren v. United States. Although the Court continues to declare irrelevant the subjective motivations of an individual officer acting with probable cause, the new primary purpose test raises the issue of "institutional pretext" that, while perhaps different from the pretext deemed irrelevant in Whren, nevertheless requires the Court to embark on an exploration of the motivations of the government actors who devise and implement the schemes in question, something the Court has resisted doing in the past and has labeled unworkable.

By injecting a "primary purpose" test into the analysis of these government schemes, the Court has injected significant uncertainty into the area of suspicionless searches without clearly identifying its

35. New York v. Burger, 482 U.S. 691, 716 n.27 (1987); see also Ortega, 480 U.S. at 724 (plurality opinion) ("gather evidence of a criminal offense").
37. This would include categories governed by the "sole purpose" test as well as categories where government purpose does not disqualify the use of a suspicionless search scheme. See United States v. Knights, 534 U.S. 112, 122 (2001) (stating that because the holding rests on "ordinary Fourth Amendment analysis," no basis exists for examining official purpose; such examination limited to "some special needs and administrative search cases"); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 230, 244, 245 (4th ed. 2004) (explaining how the Court can avoid this limitation by creating a new supporting theory).
38. See infra notes 124-30, 197-206 and 336-38 and accompanying text.
39. See infra notes 289-91 and 346-47 and accompanying text.
40. 517 U.S. 806 (1996). See Knights, 534 U.S. at 122 (explaining examination of motivation of officers after Whren limited to "some special needs and administrative search cases"); Edmond, 531 U.S. at 51-52 (Rehnquist, C.J., dissenting) (citing Whren to argue the majority improperly examined the purpose of the traffic checkpoint).
41. See infra notes 283-92 and accompanying text.
42. See infra notes 338-45 and accompanying text.
goal in adopting the new test—it is not clear what “evil” the Court is attempting to protect against. More fundamentally, if the Court is successful in policing suspicionless searches and seizures with a criminal purpose, citizens will remain subject to “non-criminal” suspicionless search and seizure schemes. The Court’s new test is based on the flawed notion that searches for “non-criminal” purposes are somehow less intrusive, an assumption the Court historically has rejected and which the present Court failed to satisfactorily explain or justify.

This Article contends the Court’s use of a primary purpose test to regulate suspicionless searches and seizures by the government is misguided and will provide little or no protection against the evils that apparently led the Court to strike down recent schemes by government officials. The evil of the government schemes is less the purpose of the schemes than their expansion into areas and activities in which citizens should be protected from government intrusion in the absence of any suspicion of wrongdoing. Rather than facing this head on and carefully assessing whether the government schemes infringe on such areas or activities, the Court has taken the indirect route of applying the primary purpose test, a test that is difficult to apply and will enjoy no more success than it did when proposed as a limit on pretextual activity by the government in other settings. The Court—and citizens and law enforcement officials—would be better served by focusing on the privacy interest infringed upon by the government activity and whether the government scheme includes appropriate safeguards against arbitrary actions by government officials rather than the “primary purpose” of the scheme.

II. REVIVING THE PRETEXT DOCTRINE: THE PRIMARY PURPOSE TEST OF CITY OF INDIANAPOLIS V. EDMOND

In City of Indianapolis v. Edmond, the United States Supreme Court for the first time declared unconstitutional a suspicionless seizure scheme based on an improper primary purpose of the government in carrying out the scheme. In Edmond, the Court declared unconstitutional a program of vehicle checkpoints operated on Indianapolis roads in an effort to interdict unlawful drugs based on the law enforcement purpose of the checkpoint. Although the Court previ-
ously had discussed government purpose in various cases in which suspicionless searches and seizures were challenged, a "law enforcement purpose" had never been the basis for the Court to strike down such a scheme. Of course, over the years, the Court had struck down very few suspicionless search or seizure schemes on any basis. But when the Court did so, it was not the law enforcement purpose that doomed the scheme. Despite that fact, the accepted wisdom seemed to be that a "non-law enforcement purpose" was important—if not a prerequisite—to a suspicionless search or seizure scheme qualifying within "the closely guarded category of permissible suspicionless searches [and seizures]." But that proposition would have been hard to prove prior to Edmond. It was a misconception based on an imprecise reading of Camara and a mischaracterization of one of the main doctrines in the area—the so called "special needs" exception.

Nevertheless, in her opinion for the Court in Edmond, Justice O'Connor focused immediately on the purpose of the checkpoint program. She described the checkpoint as having a "primary purpose of interdicting drugs," and stated that the Court had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Justice O'Connor described the checkpoints it previously had upheld as "designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety," and held that "[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."

Chief Justice Rehnquist's dissenting opinion highlights the confusion the Court's suspicionless search and seizure jurisprudence has spawned. First, he accused the Court of imposing a new "non-law-enforcement primary purpose test" on traffic checkpoints operated by the government. Justice O'Connor vehemently denied the charge, explaining that the Court's opinion did not turn on the purpose of the checkpoints being "primarily related to criminal law enforcement," but rather "on the fact that the primary purpose . . . is to advance the

46. See Ferguson v. City of Charleston, 532 U.S. 67, 74 (2001) (referring to Court of Appeals reliance on "our line of cases recognizing that 'special needs' may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends"); see also Ferguson, 532 U.S. at 79 n.15 (stating that "In other special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was no law enforcement purpose behind the searches in those cases. . . . "). See infra notes 151-56 and accompanying text.

47. Edmond, 531 U.S. at 41.

48. Id. at 41-42.

49. Id. at 53 (Rehnquist, C. J., dissenting).
general interest in crime control." It is fair to say Chief Justice Rehnquist likely was not the only one confused by that distinction. Chief Justice Rehnquist also criticized the Court for improperly re-injecting the subjective intention of government officials into the Fourth Amendment analysis of traffic stops contrary to the Court's pretext decision in *Whren v. United States*.51 He asserted that such a test was "both unnecessary to secure Fourth Amendment rights and bound to produce wide-ranging litigation over the 'purpose' of any given seizure."52 The majority denied improperly reinjecting purpose into the analysis, drawing a distinction between *Whren* pretext issues and an inquiry into the "programmatic purposes . . . of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."53 Once again, the Court's explanation seems unlikely to clarify the pretext issue in a manner sufficient to avoid confusion going forward.

The dispute between Chief Justice Rehnquist and Justice O'Connor is a direct result of the uncertainty the Court has engendered in its suspicionless search and seizure jurisprudence by failing to identify clearly the purpose it finds improper and indiscriminately using different terms to describe that purpose, by its *ad hoc* use of numerous categories to analyze the cases while insisting that a "closely guarded category of constitutionally permissible suspicionless searches" exists, and by never confronting the fundamental issue of whether a criminal purpose on the part of the government (however described or defined) should matter when assessing the permissibility of suspicionless search and seizure schemes. A review of the Court's suspicionless search and seizure jurisprudence and the role of government purpose in that jurisprudence demonstrates how the Court got itself into this mess.

III. THE BIRTH OF SUSPICIONLESS SEARCHES: CONFUSION ABOUT GOVERNMENT PURPOSE FROM THE START

The Court's decision in *Camara* marks the birth of suspicionless searches. In *Camara*, the Court extended the reach of the Fourth Amendment to administrative inspection programs but watered down

50. *Id.* at 44 n.1.


53. *Id.* at 45-46.

54. It represents the "birth" in the sense of being characterized as a search and permitted by the Court. The same type of activity was at issue in *Frank v. Maryland*, 359 U.S. 360 (1959), overruled by *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967), but the Court held it not to be a search. See *United States v. Martinez-Fuerte*,
the protections of the Amendment by redefining probable cause and adopting a balancing test that opened the door to suspicionless searches.\textsuperscript{55} The Court gave little guidance as to when this new balancing test could be utilized to excuse individualized suspicion. In particular, the Court sent conflicting signals as to whether a non-criminal investigatory purpose for the government activity mattered in determining whether the balancing test was appropriate and failed to define "non-criminal" purpose, sowing the seeds of confusion that grew into the current quagmire.

In \textit{Camara}, the lessee of an apartment refused to permit a housing inspector to enter his apartment without a warrant and was criminally charged with "refusing to permit a lawful inspection."\textsuperscript{56} The first, and perhaps most important, holding of \textit{Camara} was that the Fourth Amendment—including the warrant requirement—governed such routine, administrative inspection programs.\textsuperscript{57} The Court rejected the idea that Fourth Amendment protections diminish when the government is not engaged in "a search for 'evidence of criminal action' which may be used to secure the [subject's] criminal conviction. . . ."\textsuperscript{58} The Court refused to accept the "rather remarkable premise" that the Fourth Amendment issues at stake in such

\textsuperscript{55} In the words of one commentator, "\textit{Camara} had the seemingly paradoxical effect of both expanding the scope of Fourth Amendment protection beyond law enforcement while at the same time sanctioning broad suspicionless searches for administrative purposes." Robert S. Logan, \textit{Note, The Reverse Equal Protection Analysis: A New Methodology For "Special Needs" Cases}, 68 Geo. Wash. L. Rev. 447, 450 (2000); see also Peter S. Greenberg, \textit{The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See}, 61 Cal. L. Rev. 1011, 1013 (1973) (noting the most striking innovation of \textit{Camara}-See was in the probability requirement); Sundby, 72 Minn. L. Rev. at 392-94 (noting the Court's effort to satisfy warrant clause gave reasonableness a foot in the door); Erik G. Luna, \textit{Sovereignty and Suspicion}, 48 Duke L.J. 787, 795 (1999) (stating the \textit{Camara} Court clung to warrant requirement but expressly rejected need for predicate of individualized suspicion). This paradoxical effect was magnified by the fact that the protections of the warrant requirement the Court imposed for administrative inspection programs was soon to be blunted by the creation of a "heavily regulated industry" exception, which excused many administrative inspection schemes from that requirement. At the same time, the balancing test the Court created was soon to expand beyond the "non-criminal" cases and beyond being a test for determining probable cause, and become the vehicle by which the Court determined the legality of many traditional law enforcement activities. Thus, the Court extended the protections of the Fourth Amendment to "non-criminal" government activities, but later crafted an exception that exempted many such schemes from the requirement, and created a balancing test that had a far greater impact on traditional criminal investigation activities of the government.

\textsuperscript{56} \textit{Camara v. Mun. Court of San Francisco}, 387 U.S. 523, 527 (1967).


\textsuperscript{58} \textit{Camara}, 387 U.S. at 530.
administrative inspection programs were "merely ‘peripheral’" and suggested the opposite was true, declaring, "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." But later cases seemed to permit this anomalous result, and the Court's new primary purpose test is difficult to square with the concern expressed in *Camara*.

The notion that *Camara* stands for the proposition that a non-criminal purpose permits suspicionless searches and seizures comes from the portion of the *Camara* decision relating to probable cause. Having found the Fourth Amendment, including the warrant requirement, fully applicable to the administrative inspection program before it, the Court was in a bind. The words of the Fourth Amendment are clear: "no Warrants shall issue, but upon probable cause. . . ." Probable cause had always been understood to require some level of individualized suspicion of wrongdoing. Because the administrative inspections were not premised on the existence of such suspicion, probable cause as traditionally understood could not be established. Thus, the Court was forced to redefine probable cause. It did so by equating probable cause with "reasonableness" and creating a balancing test to determine reasonableness, declaring, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." By utilizing a balancing test, the Court eliminated any requirement of a minimum quantum of individual suspicion and opened the door to suspicionless searches and seizures.

Analyzing the administrative inspection scheme before it, the Court rejected the idea that probable cause required a showing that a particular dwelling contained code violations. Instead, the Court concluded that, in this context, "area code enforcement inspections" were "reasonable searches" that could be justified by its newly created balancing test. It based this conclusion on the facts that such programs

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59. *Id.* at 531-32.
60. *Id.* at 530.
61. See infra notes 208-328 and accompanying text.
62. See infra notes 347-55 and accompanying text.
63. The Court found the warrant requirement applicable because without a warrant, the "practical effect of this system is to leave the occupant subject to the discretion of the official in the field." *Camara*, 387 U.S. at 532.
64. Interestingly, the Court prefaced this statement with the word "unfortunately." The Court gave no indication why it felt that the use of a balancing test to determine reasonableness was unfortunate, or why it felt such a test was the only way to decide reasonableness. *Id.* at 536-37.
65. LAFAYE ET AL., supra note 37, at 231; Sundry, 74 Miss. L.J. at 550.
66. The Court applied the balancing test as part of "new," suspicionless probable cause analysis. *Camara*, 387 U.S. at 537.
have a long history of judicial and public acceptance and that the public interest demands that dangerous conditions be abated or prevented and the unlikelihood that any other "canvassing technique" would be effective; finally, the conclusion was reached "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."\(^6\)

Because the Court did not clearly explain why an inspection not aimed at the discovery of evidence of a crime necessarily could be characterized as a "relatively limited invasion . . . of privacy," this language spawned confusion about the relevance of a "non-criminal" purpose motivating a government search or seizure scheme. The Court's reliance on the non-criminal purpose of the inspections to find a lesser intrusion on privacy and to forgive individualized suspicion seemed to contradict its earlier rejection of the argument that the non-criminal nature of the inspection could justify less than the full protection of the Fourth Amendment for housing and other regulatory inspections. Professor LaFave proposed a reading of the opinion that explains this apparent inconsistency. He asserts that although the Court's language was inartful, the Court likely was not suggesting that the non-criminal purpose of the search in and of itself made the search less intrusive, but was simply making the point that given the purpose of the search in this case—inspecting for civil code violations—as a practical matter the searches were likely to be less thorough and, therefore, a more limited intrusion. Professor LaFave points out such searches likely would be relatively brief and not involve rummaging through private papers and effects, would not cause apprehension in the citizen or cause damage to the citizen's reputation, would not be undertaken by armed officers "whose presence may lead to violence," and would not be conducted at any time of the day or night or by surprise. Professor LaFave criticized the Court's "failure to be more precise about the significance of the fact that evidence of a crime was not sought."\(^6\)

That failure led to an inappropriate focus on government purpose as the dividing line between permissible and impermissible suspicionless search schemes. The concern is not so much that schemes with a "criminal purpose" will be unjustifiably struck down, but that a "non-criminal purpose" will be viewed as "per se" less intrusive and therefore sufficient to justify suspicionless searches and seizures with-

\(^6\)  Id. (emphasis added).
\(^6\)  LAFAVE ET AL., supra note 37, at 231. Professor Schulhofer offers a similar reading: "Presumably, . . . the Court meant to stress not motivation but effects." Schulhofer, 1989 SUP. CT. REV. at 93 (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE §10.1(b), at 606-07 (2d. ed. 1987)).
out a careful assessment of the severity of the resulting intrusion. A non-criminal purpose has to be relevant at some level. The Court obviously did not intend its decision in \textit{Camara} to eliminate the requirement of individual suspicion from the Fourth Amendment entirely. In its opinion, the Court stated that to apply the standard of reasonableness, "it is obviously necessary first to focus upon the governmental interest which allegedly justifies [the] intrusion. . . .\" It pointed to searches for specific stolen goods or contraband in a "criminal investigation" as an example of a government interest that would not justify a broad suspicionless area search but instead required individual suspicion in the form of "probable cause to believe the goods were in a particular dwelling."\textsuperscript{69} Several more times in its opinion, the Court justified utilizing a balancing test (without requiring some quantum of individual suspicion) by distinguishing the case before it from "a search pursuant to a criminal investigation." These statements certainly justify reading \textit{Camara} as imposing a requirement that suspicionless searches and seizures are limited to "non-criminal investigations," but there is little indication of how broad or narrow that requirement was intended to be. At one end of the spectrum, by its reference to "criminal investigation," the Court may have been referring narrowly to a search undertaken to gather evidence against a particular individual relating to a particular crime. Thus, for "classic" criminal searches of that sort, the Court was not willing to deviate from traditional probable cause. But for other types of searches, the Court would engage in balancing, meaning individual suspicion may or may not be required.\textsuperscript{71} At the other end of the spectrum, the Court could have intended a broad meaning for "criminal investigation." In other words, if a search is undertaken for any law enforcement purpose (as opposed to as a community caretaking function or for a health and safety purpose) a minimum quantum of individual suspicion is required. The failure of the Court to be specific about what type of criminal or law enforcement purpose mattered in \textit{Camara} continues to cause confusion in the Court's suspicionless search and seizure jurisprudence. Despite deciding dozens of cases, the Court has never clarified this central issue\textsuperscript{72} and, as mentioned earlier, has exacerbated

\textsuperscript{69.} \textit{Camara}, 387 U.S. at 534.

\textsuperscript{70.} \textit{Id.} at 535.

\textsuperscript{71.} Another way to view this is that for these classic searches, the balancing has already been done, and requires probable cause. See \textit{Skinner v. Ry. Labor Executives' Ass'n}, 489 U.S. 602, 619 (1989) (stating that "[i]n most criminal cases, we strike this balance in favor of the . . . Warrant Clause" generally requiring probable cause).

\textsuperscript{72.} In one of the Court's earliest opportunities to apply \textit{Camara} to a suspicionless search scheme, its schizophrenia about the relevance of criminal purpose in deciding whether and how to apply the Fourth Amendment was on full display. In \textit{Wyman v. James}, 400 U.S. 309 (1971), decided just four years after \textit{Camara}, a welfare recipient
brought a civil rights action challenging the termination of her benefits based on her refusal to consent to a home visit by a case worker. The plaintiff contended that home visits by government caseworkers were searches that violated the Fourth Amendment because they were not supported by a warrant based on probable cause. The Court began by recognizing that when a case involves an official intrusion into a home, "an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford." Wyman, 400 U.S. at 316. The Court quoted Justice White's statement in Camara that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant," and further noted Justice White's observation that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior. Id. at 317. Nevertheless, the Court then ruled that "this natural and quite proper protective attitude" was not a factor in the case before it, "for the seemingly obvious and simple reason" that the government conduct in the case was not a search "in the Fourth Amendment meaning of that term." Id. The Court conceded that the visits were mandatory and that the purpose was "perhaps, in a sense, both rehabilitative and investigative," but stated that it believed the investigative purpose had been given "too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context." Id. It pointed to the fact that the visitation itself was not "forced or compelled," and denial of permission was not a criminal act. The only consequence was denial of welfare benefits under the scheme. Justice White, the author of Camara, concurred in all but this portion of the majority opinion. Id. at 326 (White, J., concurring).

Perhaps uncertain of its conclusion that the government conduct was not a search, the Court went on to state that even if it were to assume the home visit "does possess some of the characteristics of a search in the traditional sense," the visit did not violate the Fourth Amendment because it was not unreasonable. Id. at 318. The Court catalogued eleven factors supporting the conclusion that the visits were not unreasonable, including that the visit was not made by police or uniformed authority, but by a caseworker "whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility." Id. at 322-23. The Court also stressed that the program "does not deal with crime or with the actual or suspected perpetrators of crime" and, as a separate factor, emphasized that the "home visit is not a criminal investigation, does not equate with a criminal investigation, and... is not a criminal proceeding..." Id. at 323. The Court stated that if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution, "that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." Id. As a final factor, the Court pointed to the inapplicability of the warrant procedure in part because it "necessarily would imply conduct either criminal or out of compliance with an asserted governing standard." Id. at 324. Of course, that was no longer true after Camara. As Professor LaFave has stated, "the Camara reasoning would seem to be equally applicable here, for the primary concern in this context is that the search be related to a coherent policy followed by the agency and not merely an excuse for harassing a particular unpopular welfare recipient." LaFave et al., supra note 37, at 234. The Court, having gone to the trouble to create a new, suspicionless probable cause standard just four year earlier in Camara, acted as if such a concept were absurd and necessarily prevented the application of the warrant requirement when individualized suspicion was not part of the equation.

Aware of its apparent departure from Camara (and See), the Court explained that both Camara and See were decided "by a divided Court," but were not inconsistent with the result in the present case. The Court stated that "each case arose in a criminal context where a genuine search was denied and prosecution followed." Wyman, 400 U.S. at 324-25. But Camara and See were treated as administrative searches, not criminal cases. The crime with which the defendants were charged was refusing government officials entry, not charges relating to evidence discovered during the search. The Court seemed to be missing the larger concern of Camara that "it is surely anomalous to
the problem through "terminological inexactitude." The more broadly criminal purpose is read, obviously the greater impact it has as a limit on suspicionless searches and seizures. If criminal purpose, read broadly, prevents application of the balancing test and thus prevents suspicionless search and seizure schemes, many such schemes will fall victim to the "purpose" test. Thus, if the Court wants to police suspicionless search schemes and restrict their use, it could do so with a broad criminal purpose test. If criminal purpose is read narrowly—as exemplified by "a search undertaken to gather evidence against a particular individual relating to a particular crime"—the door is open to a wide variety of schemes. In that case, if the Court desires to limit the schemes, it has to create non-purpose limits. This is the heart of the dispute between Chief Justice Rehnquist and Justice O'Connor in Edmond. Chief Justice Rehnquist reads the Court's opinion in Edmond as imposing a broad "non-law enforcement" test, a charge that Justice O'Connor resists. Although the label of "administrative or regulatory search case" attached to Camara by the Court and commentators suggests a broad reading of "criminal purpose" and a limited authority for suspicionless searches and seizures, the early cases in the Court's suspicionless search and seizure jurisprudence suggest a narrow reading and a limited role for "criminal purpose."

say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara, 387 U.S. at 530.

The Frank, Camara-See, and Wyman line of cases resemble a tennis match model of constitutional jurisprudence, with the ball first on one side of the net and then the other. Unlike Camara, which recognized its inconsistency with Frank and overruled that case, the Court in Wyman distinguished Camara and suggested it was consistent with that decision. But Wyman seems directly contrary to Camara and adds to the confusion surrounding the importance of a non-criminal purpose behind a government inspection scheme. Curiously, the Court has rarely cited Wyman in later cases dealing with that issue. The initial holding of the case that the government conduct was not a search limited the case's relevance as the Court later found most government schemes to be searches governed by the Fourth Amendment; Wyman's dicta finding the conduct not unreasonable has not played a significant role in later debates.

73. I use this term in its original sense of inexact or inaccurate terminology, rather than its more modern use as a euphemism for an outright lie. See supra notes 23-36 and accompanying text.

74. This debate raises two issues: who is correct about the type purpose test Edmond imposes (or will be read to impose) and, more fundamentally, which test is appropriate as a matter of Fourth Amendment policy and in light of the "evil" the Court apparently seeks to avoid. See infra notes 268-94 and accompanying text.

75. See Coolidge v. New Hampshire, 403 U.S. 443, 475 n.31 (1971) (characterizing Camara and See as "administrative search" cases). See also, Greenberg, 61 Cal. L. Rev. at 1011-13 (same); Sundby, 72 Minn. L. Rev. at 406-07 (describing Camara's characterization as an administrative search).
IV. ADMINISTRATIVE SEARCHES AND BEYOND: THE IMPORTANCE OF GOVERNMENT PURPOSE POST-CAMARA

Although the Court in Camara created the balancing test in part to provide an analytical framework for administrative or regulatory searches in which the traditional notion of probable cause did not apply, the Court quickly extended the balancing test to criminal investigations, utilizing the test to uphold various police actions on individualized suspicion amounting to less than probable cause. In its very next term, in one of the first cases to apply Camara’s balancing test, the Court in Terry v. Ohio\(^7\) utilized the test in the criminal investigation context to uphold stops and frisks on the basis of reasonable suspicion.\(^7\) Greater confusion ensued around the question of when individual suspicion would be excused entirely. Despite the Court’s statements in Camara that “it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior,”\(^7\) there later developed a pervasive notion that a non-criminal purpose was the path to the “closely guarded category of constitutionally permissible suspicionless searches.” This was understandable given the description of the conduct in Camara as an “administrative inspection”\(^7\) and the Court’s reliance on the non-criminal purposes of the inspection to excuse the lack of individualized suspicion. As it decided various suspicionless search cases, the Court failed to clarify the meaning or scope of what constituted a criminal investigatory purpose and sent confusing and conflicting signals on the effect of the government purposes motivating the schemes. Although the Court later would refer to the “closely guarded category of constitutionally permissible suspicionless searches,”\(^8\) after Camara opened the door to such searches, the Court decided numerous cases and upheld many suspicionless search and seizure schemes, but never clearly defined a single “category.” Initially, the Court dealt with statutory inspection programs easily classified as “administrative searches” of the type at issue in Camara and with a clear “non-criminal” purpose. The focus

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76. 392 U.S. 1 (1968).
77. The application of Camara in the criminal investigation context was later extended to include “frisks” of automobiles, Michigan v. Long, 463 U.S. 1032 (1983), and cursory inspections of homes following arrests on the premises. Maryland v. Buie, 494 U.S. 325 (1990).
78. Camara, 387 U.S. at 530.
79. Id. at 525.
in those cases was on whether a warrant was required. That such a search could be conducted without individualized suspicion seemed a given after Camara, fueling the idea that the "closely guarded category of constitutionally permissible suspicionless searches" was defined by the "non-criminal" or administrative government purpose motivating the scheme. But as the government sought to expand the Camara balancing test beyond classic administrative inspection schemes to intrusions more closely related to criminal investigation, the Court in several different contexts faced the issue whether government purpose related to criminal law enforcement was relevant. Rather than developing a well-defined category and a single coherent doctrine, the Court seemed to decide simply these cases on a confusing ad hoc basis, or at best in several rough "subcategories," sending conflicting signals as to the importance of the government motive behind the scheme.

A. Early Cases: Traffic and Immigration Searches, Seizures, and Checkpoints

The first group of cases in which the Court was urged to permit suspicionless searches or seizures in settings beyond the classic administrative search schemes of the type at issue in Camara—a series of cases involving stops and searches of automobiles by border patrol agents for the purpose of enforcing immigration laws—offers no support for a law enforcement purpose test. In fact, the cases suggest the opposite. Although the Court characterized the government intrusions in the cases as "for law enforcement purposes," that purpose played no role in the Court's assessment of whether the suspicionless intrusions were permissible. Instead, the Court focused on the invasiveness of the government conduct and the level of discretion exercised by individual officers in the field in deciding whether to authorize suspicionless searches.

81. See Dressler, supra note 22, § 19.02 and n.21 (collecting cases where Court found businesses to be "closely regulated" and therefore no warrant required).

82. It would be almost two decades before the effect of the government's purpose behind a "classic" statutory administrative inspection scheme was questioned and addressed by the Court. See infra notes 194-207 and accompanying text (discussing New York v. Burger, 482 U.S. 691 (1987)).


84. Delaware v. Prouse, 440 U.S. 648, 656 (1979) ("The crucial distinction [in these cases] was the lesser intrusion upon the motorist's Fourth Amendment interests.").

85. When the Court later created the "special needs" exception, however, some courts and commentators suggested that, in hindsight, these early traffic/immigration checkpoints were, in fact, special needs cases, in which government purpose played an important role. See MacWade v. Kelly, 460 F.3d 260, 268 (2d Cir. 2006); Nicholas v.
To enforce immigration laws and prevent smuggling of illegal aliens into the country, the government utilized permanent traffic checkpoints, temporary traffic checkpoints, and roving patrols to conduct "surveillance," which entailed stops and searches for questioning. The government concededly undertook these activities without individualized suspicion of violations and defended their actions by "relying heavily on cases dealing with administrative inspections," at that point the only type of case in which the Court had authorized suspicionless searches. But the arguably non-criminal, administrative purpose behind the schemes was not the determining factor in whether the Court found the searches valid.

In a series of decisions, the Court invalidated suspicionless stops and searches by roving patrols and suspicionless searches at checkpoints, but upheld suspicionless stops at checkpoints. The government purpose behind the searches and seizures was the same in each case and thus did not play a role in the distinction drawn by the Court between lawful and unlawful suspicionless searches. The Court refused to authorize the first group of activities—searches by roving border patrols and at checkpoints—because of the unfettered discretion of the officers in the field and the magnitude of the intrusions. Only when the discretion was constrained at checkpoints and the intrusion

Goord, 430 F.3d 652, 660-63 (2d. Cir. 2005), cert. denied, 127 S. Ct. 384 (2006); Sundby, 74 Miss. L.J. at 520. The Court later rejected the idea that these cases were "special needs" cases, but nevertheless injected government purpose into the equation when assessing the legality of later checkpoint cases. See infra notes 319-20 and accompanying text.

86. See Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973).

87. The government relied on § 287(a)(3) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357(a)(3), which provided for "warrantless searches of automobiles and other conveyances 'within a reasonable distance from any external boundary of the United States,' as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation, 8 CFR § 287.1, defined 'reasonable distance' as 'within 100 air miles from any external boundary of the United States.'" Almeida-Sanchez, 413 U.S. at 268.

88. As the Court stated, the government "understandably sidestep[ed] the automobile search cases" that would have forgiven a warrant, but required individualized suspicion. Almeida-Sanchez, 413 U.S. at 270.

89. The Court later explained in Delaware v. Prouse that the crucial distinction between the roving patrol and checkpoint cases was the lesser intrusion upon the motorist's Fourth Amendment interests, explaining "we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." Prouse, 440 U.S. at 656 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)). The Court also rejected the government's attempt to analogize to the "heavily regulated industries" exception, noting the "central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." Almeida-Sanchez, 413 U.S. at 271.
limited to brief seizures did the Court authorize suspicionless intrusions.

In the initial case involving a stop and search of a vehicle as part of a roving patrol, *Ameida-Sanchez v. United States*, the Court rejected the government's attempt to bring the case within the rationale of the administrative search cases not because of its law enforcement purposes, but because the search was conducted in the "unfettered discretion of the members of the Border Patrol" and "thus embodied precisely the evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection." The reasoning and result were the same in *United States v. Ortiz*, when the searches took place at a checkpoint rather than as part of a roving patrol. The Court concluded that the checkpoints did not limit "to any meaningful extent" the officer's discretion to select cars for search and did not "mitigate the invasion of privacy that a search entails." It was not the government purpose behind the checkpoints that troubled the Court, but the manner in which the scheme was carried out and the invasion of privacy it entailed. Consistent with Professor LaFave's reading of the importance of the non-criminal purpose in *Camara*, the Court made the point that unlike the search scheme at issue in *Camara*, the "non-criminal" purpose of the searches in question did not serve to limit the scope of the intrusion.

When the intrusion at the checkpoint was limited to a stop rather than a search, the Court was willing to uphold the government scheme. But the Court's decision in *United States v. Martinez-Fuerte* was not based on the purpose of the checkpoint scheme being "non-criminal", the Court repeatedly described the checkpoint as being "for law enforcement purposes." The Court relied on the limited

90. 413 U.S. 266 (1973).
91. *Ameida-Sanchez*, 413 U.S. at 270.
92. 422 U.S. 891 (1975).
93. On the issue of stops, as opposed to searches, by roving patrols, the Court applied the balancing test to require reasonable suspicion as opposed to probable cause to justify such a stop. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
94. *United States v. Ortiz*, 422 U.S. 891, 896 (1975). The Court found that "a search, even of an automobile, is a substantial invasion of privacy."
95. *Ortiz*, 422 U.S. at 895.
97. The Court spent little time on this issue, stating simply that "the purpose of the stop is legitimate and in the public interest." *Martinez-Fuerte*, 428 U.S. at 562. Earlier the Court had explained, "Our previous cases have recognized that maintenance of a traffic checkpoint program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border." *Id.* at 556.
98. The first sentence of the opinion states, "[t]hese cases involve criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens." *Martinez-Fuerte*, 428 U.S. at 545. The Court also stated, "[i]nterdicting the flow of illegal aliens
intrusion on privacy that the brief detentions represented and the lack of discretion on the part of individual officers in deciding which cars to detain. In response to the defendants' argument that individualized suspicion is usually a prerequisite to a constitutional search or seizure, the Court reinforced the proposition that a non-law enforcement purpose is not a prerequisite to excusing individual suspicion by analogizing it to the widely used and accepted practice of similar stops at state and local levels to enforce laws regarding drivers' licenses, safety requirements, and the like. According to the Court, these accepted practices were an apt analogy to the case before it despite their non-law enforcement purpose: "The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel."

The Court affirmed the limited relevance of a non-criminal purpose and the controlling nature of the manner in which suspicionless seizure schemes were carried out when it declared unconstitutional random, suspicionless stops for purposes of license and registration checks in Delaware v. Prouse. The intrusiveness of the roving patrol stops and the unlimited discretion exercised by the officer in the field was crucial to the Court. The purpose of the stop did not change the calculus. When the state attempted to distinguish the case from the roving immigration stops (which the Court had characterized as for law enforcement purposes) on the basis that the license and registration checks formidable law enforcement problems. The Court also noted that "the needs of law enforcement are furthered by this location." And in upholding the "secondary inspection" of a limited number of cars the Court stated that reliance on apparent Mexican ancestry "clearly is relevant to the law enforcement need to be served." Id. at 564 n.17.

This was true on two levels. First, the intrusion on those stopped was minimal because the detention was brief, neither the vehicle nor its occupants were searched, and checkpoint stops were less likely to generate concern or fright on the part of lawful travelers. The Court also considered the fact that routine checkpoints stops do not intrude on the motoring public as significantly as roving patrols because motorists using the highways near the border are not taken by surprise by the checkpoints as they may know, or obtain knowledge of, the location and will not be stopped elsewhere. Martinez-Fuerte, 428 U.S. at 557-60.

As to the initial stop at the checkpoint, every car was stopped. Only selected cars were referred for secondary inspections, apparently at the discretion of the individual officers. The Court did not require any individual suspicion for this secondary procedure and found the discretion of the officers limited. Although that conclusion seems highly debatable, it nevertheless is a conclusion based on factors other than the purpose of the government action. In fact, the Court justified the referrals to the secondary inspection on the basis of Mexican ancestry because it "clearly is relevant to the law enforcement need to be served." Id. at 546 n.17.

The Court was careful to state that since such laws were not before it, it was intimating no view "respecting them," but noted "this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." Id.

tration checks advanced the state's interest in roadway safety as opposed to the state's interest in fighting crime, the Court rejected the argument, stating, "Only last Term we pointed out that 'if the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'"103 The Court was unwilling to subject citizens to "unfettered government intrusion" every time they utilized an automobile, which the Court characterized as a "basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities."104 Once again, the Court intimated that a checkpoint to check license and registration would be permissible because the intrusion on privacy would be less and the discretion of the individual officer would be limited. But the distinction had nothing to do with the purpose of the stop.105 Perhaps more important for purposes of critiquing the Edmond primary purpose test, the Court suggested that just as a non-criminal purpose could not validate the stop, a law enforcement purpose would not defeat it. When the state tried to bolster its case in Prouse by arguing the activity also furthered the state interest of apprehending stolen motor vehicles, the Court did not label such a purpose improper; it simply characterized it as "not distinguishable from the general interest in crime control," apparently suggesting that such an interest added little to the state's side of the ledger for purposes of balancing.106

These initial cases applying Camara suggest a suspicionless search and seizure jurisprudence in which a law enforcement or criminal purpose on the part of the government plays an extremely limited role.107 The "gateway" to the category of permissible suspicionless searches and seizures is not a "non-law enforcement" or "non-criminal" government purpose. It is demonstrating circumstances that

104. Prouse, 440 U.S. at 662.
105. See Schulhofer, 1989 Sup. Ct. Rev. at 97 ("The [Prouse] opinion rejected, as had Camara, the notion that a regulatory motivation diminishes the intrusive quality of the search.").
107. This is particularly supported by the Court's ruling on the secondary inspection in Martinez-Fuerte. The Court justified the secondary inspections because "intrusion here is sufficiently minimal that no particularized reason need exist to justify it" even though it recognized the secondary inspection served a "law enforcement need." Martinez-Fuerte, 428 U.S. at 563, 564 n.17.
make developing individual suspicion unfeasible or impractical. In those circumstances, the Court will utilize the balancing test to determine whether the government interest is sufficiently important to justify the suspicionless intrusion. The crucial factor in the balancing test is not the purpose of the search, but whether safeguards other than a requirement of individual suspicion exist to protect the citizen. As the Court stated in Prouse, "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's expectation of privacy is not 'subject to the discretion of the officer in the field.'"

The immigration/traffic checkpoint cases demonstrated the Court was more inclined to allow a suspicionless intrusion when it was not at the discretion of the officer in the field and when it intruded less on privacy because it did not involve a home or office, did not cause a high level of subjective concern in the citizen, and did subject citizens to a search every time they engaged in "basic, pervasive, and often necessary" activities. Following these cases, it would seem that the Court's suspicionless search and seizure jurisprudence would focus on these factors, not the purpose of the intrusion. But suspicionless search and seizure cases decided by the Court in other contexts muddied the water by utilizing government purpose to varying degrees in assessing the validity of the government conduct at issue.

B. More Early Suspirationless Search and Seizure Cases: Inventory Searches

At the same time the Court was deciding the validity of suspicionless search and seizures for immigration purposes by roving patrols and at checkpoints, it was addressing another type of suspicionless search: the inventory search. In South Dakota v. Opperman, the Court upheld suspicionless, warrantless "inventory

108. Explaining its decision not to permit suspicionless stops by roving Border Patrol agents, the Court explained, because, "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators [ ], a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." Brignoni-Ponce, 422 U.S. at 883. This rationale seems to be precisely what Justice Blackmun was attempting to articulate in New Jersey v. T.L.O., 469 U.S. 325 (1985), when he referred to "special needs beyond the normal needs of law enforcement" and a "special law enforcement need for greater flexibility." See infra notes 145-56 and accompanying text.


110. This is generally the approach the Court took in deciding whether intrusions in the criminal investigatory context could be justified on individual suspicion less than probable cause. See Davis v. Mississippi, 394 U.S. 721 (1969).

searches" of impounded automobiles conducted pursuant to a standard policy. Given the Court's characterization of the government conduct in *Opperman* as a "routine administrative function," a label virtually synonymous with its characterization of the conduct in *Camara* as both "routine" and "administrative," it seems the case should have been analyzed using the *Camara* precedent. The Court apparently saw it differently. First, it expressly distinguished *Camara* on the issue of whether a warrant was required, utilizing the distinction between automobiles and homes or offices previously drawn by the Court based on the mobility of automobiles and the significantly reduced expectation of privacy that citizens enjoy in their cars. Having distinguished *Camara* for warrant requirement purposes, the Court refused to equate "reasonableness" with "probable cause" as the Court in *Camara* had done. The *Opperman* Court viewed "the Fourth Amendment standard of reasonableness" as distinct from probable cause, which it read to require individual suspicion. It rejected probable cause (including individual suspicion) as a measure of reasonableness because "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures" and therefore is "unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions. . . ." The Court then decided the "reasonableness" of the

112. While the Court in *Camara* emphatically rejected the notion that the non-criminal nature of the government intrusion permitted classifying it as not a search, the *Opperman* Court seemed ready to backtrack and find inventory inspections not to be searches. The Court cited *Wyman v. James*, 400 U.S. 309 (1971), and noted that although some states had concluded that "[g]iven the benign noncriminal context of the intrusion . . . an inventory does not constitute a search for Fourth Amendment purposes," the government "has expressly abandoned the contention that the inventory in this case is exempt from the Fourth Amendment standard of reasonableness." *South Dakota v. Opperman*, 428 U.S. 364, 370 (1976).

113. The Court referred to the government conduct in *Camara* variously as a "routine area inspection," "routine periodic inspection," "routine systematized inspection," "routine inspection," and a "routine annual inspection," as well as an "administrative inspection program" and "administrative searches." *Camara*, 387 U.S. at 525, 526, 530, 533, 534, 535-36, 539.

114. Just months earlier, in the same term, the Court relied on *Camara* to uphold suspicionless seizures at traffic checkpoints for immigration purposes in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

115. The Court explained that while *Camara* required a warrant for administrative entry and inspection of private dwellings or commercial premises, that "procedure has never been held applicable to automobile inspections for safety purposes." *Opperman*, 428 U.S. at 367-68 n.2.

116. *Id.* at 370 n.5. This statement seems directly contrary to the Court's statement in *Camara* that probable cause is "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." The *Opperman* Court's rejection of probable cause as the standard likely was due to its desire to avoid a requirement of individualized suspicion. But that narrow view of probable cause ignored the "redefinition" of probable cause in *Camara* to include "reasonableness" based on a balancing of the state and individual interests. The *Opperman* Court could have
search without utilizing the *Camara* balancing test— the Court never even used the words “balance” or “balancing.” Rather than assessing whether inventory searches fell within the “closely guarded category of constitutionally permissible suspicionless searches,” the Court seemed to create a separate category.

More important than the fact that the Court was assessing “reasonableness” as a separate standard apart from probable cause was the fact that in order to utilize this reasonableness test and excuse individualized suspicion, the Court seemed to impose a requirement of a “non-criminal” government purpose. In addition to rejecting the standard of probable cause as “peculiarly related to criminal investigations,” the Court emphasized that its conclusion that the searches were justified without individual suspicion depended in part on the fact that “no claim is made that the protective procedures are a subterfuge for criminal investigations” and that there was “no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory motive.” By suggesting a “non-criminal” purpose limitation, *Opperman* supports the view that a non-criminal government purpose matters in assessing suspicionless search and seizure.

The majority cited *Camara* in a footnote only to illustrate its contention that “the expectation of privacy with respect to one’s automobile is significantly less that that relating to one’s home or office.” *Camara*, 428 U.S. at 367, 367-68 n.2.

Despite not explicitly using a balancing test, it seemed the Court was balancing the interests. Nevertheless, Justice Powell concurred in the judgment in *Opperman*, but wrote separately to emphasize the need to follow *Camara* and undertake a balancing of interests. *Id.* at 376-84 (Powell, J., concurring). Justice Marshall, in a dissenting opinion, also stressed the need to balance the interests of the government against the intrusion on citizens and stated, “the Court fails clearly to articulate the reasons for its reconciliation of these interests in this case. . . .” *Id.* at 385 (Marshall, J., dissenting). In later inventory cases, the Court explicitly utilized a balancing test but continued to ignore *Camara*. See *Illinois v. Lafayette*, 462 U.S. 640 (1983).

*See DRESSLER, supra note 22, § 16.01[B] (characterizing inventory searches as a separate category and explaining this resulted “largely for historical reasons”).

*Opperman*, 428 U.S. at 377. This language and similar language in other inventory cases was relied on by one of the leading commentators who argued that the Supreme Court would strike down pretextual searches when presented with the opportunity, a prediction that was proved inaccurate in *Whren.* See John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 394-99 (1989) (arguing *Opperman, Lafayette and Bertine* support the contention that the Court would invalidate pretextual searches on a case-by-case basis based on the motive of the officer).
However, in Edmond, the Court did not rely on Opperman or other inventory search cases to support its new primary purpose test. For reasons that are not apparent, the Court has treated inventory searches as a separate category of intrusion unrelated to the “closely guarded category of constitutionally permissible suspicionless searches and seizures” spawned by Camara. To some extent, this “outlier” status as a separate category suggests Opperman is of limited relevance in assessing the Court’s suspicionless search and seizure jurisprudence. But that very status demonstrates the fantasy of a single category of “constitutionally permissible suspicionless searches and seizures.” Even when the Court admits to several “classifications” of permissible suspicionless searches, it generally omits inventory searches. This treatment of inventory searches is further evidence of the mess the Court has made of its suspicionless search and seizure jurisprudence, but it also demonstrates the Court’s facility in simply creating a separate category if it serves its purposes to ignore the “closely guarded category of constitutionally permissible suspicionless searches” it touts. Even more important for purposes of assessing the Court’s new primary purpose test, the transformation of the role of “non-criminal” purpose in the inventory search doctrine serves as a cautionary tale. As developed in the inventory cases, the “non-criminal purpose” limitation is a particularly ineffective one, a fate that the primary purpose test may come to share.

By emphasizing that there was “no suggestion” of a criminal investigatory motive in Opperman, the Court seemed to suggest that if criminal investigation played any role—and certainly if it played a significant or primary role—in motivating the search, the result would change and the search would be found unlawful. Such a rule would seem to exclude “mixed motive” searches from the “category” of permissible suspicionless searches. This is important for purposes of assessing the Court’s new test because a primary purpose test, by definition, permits mixed motive searches. Mixed motive searches are

121. In one respect, it was necessary for the Court to limit the search in Opperman to non-criminal purpose—if it had been a search for evidence of a crime, the prevailing law would seem to require the police to have probable cause to believe the evidence would be found in the car.

122. The Court seemed to confirm investigatory searches are a separate category in later cases. In Illinois v. Lafayette, the Court upheld an inventory search without citing Camara and described inventory searches as a “well-defined exception.” Lafayette, 462 U.S. at 643.


124. This makes keeping distance between the inventory searches and other suspicionless search and seizure categories necessary if the Court intends to enforce a strong non-criminal purpose test in those other categories. See infra notes 130-31 and accompanying text.
searches where, in the inventory context for example, the police have some idea (not sufficient to justify a search) that a car contains evidence of criminal wrongdoing and utilize a different violation to impound the car and conduct an inventory search. If such a car is parked illegally, may the police take advantage of that fact and tow and inventory the car? Such behavior seems to justify the owner alleging that the inventory was a "subterfuge for criminal investigation" or "a pretext concealing an investigatory motive," arguably taking the search outside the category of constitutionally permissible searches the Court created in Opperman. If the Court intended that result, it would create the anomaly the Court warned against in Camara—an individual suspected of a crime would receive greater protection under the Fourth Amendment than a citizen not suspected of wrongdoing. If the police tow and inventory the car of someone suspected of criminal activity, that individual has a potential challenge to the search (pretext); the "innocent" citizen does not.

But the limitation on government purpose imposed by the Opperman Court is less than it seems. The Court clarified the rule to prevent the "anomalous" result in a later inventory search case, Colorado v. Bertine. In Bertine, the defendant was taken into custody for driving under the influence of alcohol. While awaiting the tow truck to take Bertine's van to the impound lot, a backup officer inventoried the contents of the van, including a closed backpack he found directly behind the front seat of the van, and discovered drugs, drug paraphernalia, and cash that was used to prove narcotics charges against Bertine.

In upholding the inventory search of the van and backpack, the Court emphasized that "as in Opperman . . . , there was no showing that the police . . . acted in bad faith or for the sole purpose of investigation." By limiting "pretextual" searches to those in which the criminal investigatory motive is the sole purpose, the Court made clear that "mixed motive" inventory searches were within the exception and lawful. Upholding "mixed motive" cases as legal avoids the anomaly that the Camara Court warned of—that citizens enjoy the full protection of the Fourth Amendment only when they are suspected of criminal activity—but it does so by reducing the "full protection" of the Amendment for everyone. It insures citizens not suspected

125. 479 U.S. 367 (1987). Bertine was the first suspicionless search case decided after New Jersey v. T.L.O., 469 U.S. 325 (1985); it was decided two years after that case. See infra notes 157-61 and accompanying text.
128. See Dressler, supra note 22, § 16.02[A].
of criminal activity and those who are suspected are treated the same—neither can challenge the intrusion.

Of course, if the citizen suspected of criminal activity can prove that such suspicions were the "sole" purpose of the intrusion, the anomaly is back—that suspected citizen can challenge the search but the non-suspected citizen cannot. But it is very unlikely that a suspected citizen will be able to prove criminal investigation was the "sole" purpose for the officer's conduct. If she is able to do that, arguably the search is no longer an inventory (or other regulatory-type) search, and the anomaly disappears because the different treatment theoretically is not based on the purpose of the search, but on the type of search. Neither citizen is protected from suspicionless inventory searches; both are protected from suspicionless automobile searches. But if the intrusion is the same, why should purpose matter? That it should not is the lesson of Whren, and perhaps also of Camara.

Professor LaFave's view of the Camara language was that the purpose of the search in that case was relevant only because as a practical matter it limited the intrusion. The same is true of the inventory searches. The non-criminal purpose limits the scope of the search to that specified in the standard policy being followed, typically "areas in which valuables . . . customarily are stored." If the search does not exceed those areas, the logic of Whren suggests it is a proper inventory search regardless of the purpose of the officer—primary or sole—and lawful if a basis (e.g. a parking violation) existed for impounding and inventorying, whether or not the parking violation motivated the officer. One wonders if the Court would not apply Whren to this situation if it ever faced it. Although the Court has emphasized that Whren applies only to searches analyzed under "ordinary, probable-cause Fourth Amendment analysis," it seems consistent with Whren to find that the motivation of the individual officer in exercising her authority to impound and inventory a car are irrelevant provided, as in Whren, the objective facts existed to justify an officer exercising the authority. This suggests that even the sole purpose test the Court nominally imposed in the inventory context may not survive. What does it mean for the primary purpose test?

The important point is that the "purpose" test imposed on the inventory cases is a very limited one, eliminating only those cases where the "sole purpose" of the police conduct is criminal investigation. That

130. See Edmond, 531 U.S. at 46 (noting that the Court’s analysis in Whren was extended in Bond v. United States, 529 U.S. 334 (2000), to an "analytical rubric" that was not "ordinary probable cause Fourth Amendment analysis" in part because precedent required the Court to focus "on the objective effects of the actions of the individual officer").
is a very different “purpose” test than the “primary purpose” test the Court nominally has imposed on the suspicionless search scheme in *Edmond*. Given the similarity of the government conduct—conducting searches and seizures pursuant to neutral procedures without individualized suspicion of criminal wrongdoing—one has to wonder why two categories are needed or even appropriate. Even if the Court intends and retains separate tests, the evolution of the Court’s concern in the *Opperman* inventory case with a possible “suggestion of a pretext concealing an investigatory motive” to the “sole purpose” test for the inventory category in *Bertine* may provide insight into how the new “primary purpose” test eventually will be interpreted.\textsuperscript{131}

Even if both the sole purpose test of the inventory cases and the *Edmond* primary purpose test survive in their current form, at this point a lawyer trying to define a single “category” of cases that permitted suspicionless searches and seizures without individualized suspicion would be hard pressed. But the Court was not through. If the inventory search cases are outliers that should not confuse the analysis of the “closely guarded category of constitutionally permissible suspicionless searches,” that label cannot be attached to the next group of cases the Court decided—the “special needs” cases.

**V. SPECIAL NEEDS—DEFINING THE CATEGORY?**

If there is a seminal case (other than *Camara*) in the Court’s suspicionless search jurisprudence, it is *New Jersey v. TLO*.\textsuperscript{132} Almost two decades after deciding *Camara*, the Court (or at least Justice Blackmun in his concurring opinion) in *T.L.O.* seemed to lay the groundwork for the Court to define the “category” of constitutionally permissible suspicionless searches. Somewhat paradoxically, this happened even though *T.L.O.* did not involve a suspicionless intrusion by the government. Nor did it involve an administrative inspection program or a regulatory search pursuant to a statutory scheme. Rather, the case was a challenge to an ad hoc decision by a school official to search a student’s purse based on suspicion of a violation of school rules and criminal laws. Nevertheless, not only was the case later viewed as an application of the Court’s administrative or regula-

\textsuperscript{131} Even if the Court retains the primary purpose test over the sole purpose test, the limitation may still be without teeth if courts are unwilling to examine critically the articulated purposes of the government executing the search or seizure in question. In that case, the government need only articulate a non-criminal purpose as its primary purpose to mask its “true” purpose, now labeled “secondary” See supra notes 283-94 and accompanying text.

\textsuperscript{132} 469 U.S. 325 (1985). As mentioned earlier, many discussions of suspicionless searches start with *T.L.O*. See Dodson, 51 S.C. L. Rev. at 259 (stating the special needs exception is one of the most “striking and sweeping”); see also Schulhofer, 1989 Sup. Ct. Rev. at 99 (noting *T.L.O.* marks a watershed).
It spawned an analysis—the "special needs" doctrine—some viewed as preempting the field and defining the "category" of constitutionally permissible suspicionless searches, and including a "non-law enforcement" purpose limitation. But *T.L.O.* and the cases that followed do not support that characterization.

In *T.L.O.*, the Court upheld a search of a student's purse by school authorities without a warrant and without probable cause. In his majority opinion, Justice White proceeded directly to a balancing test as the appropriate test for assessing government conduct subject to the Fourth Amendment's proscriptions, declaring, "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"

In striking the balance, the Court concluded that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law." The Court held that a search of a student by a teacher or other school official was justified when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."
Although application of the balancing test resulted in a requirement of individualized suspicion in the case before it, the Court explained in a footnote that it was not deciding whether "individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." Justice White's suggestion, or reaffirmation, that the balancing test could authorize suspicionless searches, combined with his suggestion that the Camara balancing test provided the appropriate analysis for assessing any Fourth Amendment conduct by the government, provided the basis for a broad expansion of the suspicionless search category.\textsuperscript{141}

Had the Court faced the issue of whether individualized suspicion was an essential element of the reasonableness test, the determination whether the government should be freed from the requirement of individualized suspicion likely would have depended not on the purposes of the search, but on the degree to which the search invaded privacy. After once again noting the general rule that "'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,'" the Court explained that exceptions to that rule "are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"\textsuperscript{142} Once again, the Court was suggesting the path to the "closely guarded category of constitutionally permissible suspicionless searches" was a demonstration of a limited infringement on expectations of privacy and the existence of safeguards to substitute for individual suspicion, not a demonstration of a non-criminal or non-law enforcement purpose motivating the intrusion. This was even more clear in the Court's response to the state's argument that the Fourth Amendment was intended only to regulate searches and seizures by law enforcement officers. The Court rejected the argument, stating, "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'"\textsuperscript{143} As it was, the Court justified excusing the government from "strict adherence to the requirement that searches be based on probable cause" on the basis of

\begin{footnotes}
\item 140. \textit{Id.} at 342 n.8.
\item 141. \textit{See} Schulhofer, 1989 Sup. Ct. Rev. at 100.
\item 142. \textit{T.L.O.}, 469 U.S. at 342 n.8.
\item 143. \textit{Id.} at 335 (citations omitted).
\end{footnotes}
the lesser expectation of privacy enjoyed by students, not the purpose of the search, which was, in part, to investigate for evidence of criminal behavior and resulted in delinquency proceedings against the student.\textsuperscript{144}

Justice Blackmun tried to limit Justice White's apparent expansion of the use of the balancing test. He wrote a concurring opinion because he believed the Court had "omit[ted] a crucial step in freeing the government from the strict application of the "Fourth Amendment's Warrant and Probable-Cause Clause."\textsuperscript{145} He explained that the Court had and should use the balancing test "only when we are confronted with a 'special law enforcement need for greater flexibility.'\textsuperscript{146} Utilizing a phrase that would come to define the "category" of suspicionless searches, he elaborated, "[o]nly in those exceptional circumstance 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."\textsuperscript{147} At the outset, it is important to make two points about Justice Blackmun's "special needs" analysis, an analysis that would play such an important role in later suspicionless search and seizure cases. First, Justice Blackmun was proposing the "special needs" analysis as a limit on the Court utilizing the balancing test, not as a means of determining when it was appropriate to forgive individualized suspicion. Second, he was not referring to "non-law enforcement" purposes when he used the term "special needs."\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.} at 341. Justice Powell, in his concurring opinion, in which Justice O'Connor joined, explained that he would place greater emphasis on the special characteristics of elementary and secondary schools, including the lesser expectation of privacy enjoyed by students, to justify granting protection less than probable cause. \textit{Id.} at 348 (Powell, J., concurring). Justice Brennan also expressed the view that the probable cause standard could only be relaxed if the government conduct in question represented a limited invasion of privacy. \textit{Id.} at 361 (Brennan, J., dissenting). \textit{See also} Dodson, 51 S.C. L. Rev. at 259 ("Initially, the Court justified the doctrine by reasoning that schoolchildren have a diminished expectation of privacy while at school."). The Court did note in a footnote that it was expressing no opinion on the legality of searches conducted in conjunction with or at the request of law enforcement agencies, a distinction some lower courts had found dispositive. \textit{T.L.O.}, 469 U.S. at 341 n.7.
  \item \textsuperscript{145} \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring).
  \item \textsuperscript{146} \textit{Id.} (Blackmun, J., concurring).
  \item \textsuperscript{147} \textit{Id.} (Blackmun, J., concurring). Justice Brennan similarly sought to limit the use of the balancing test to excuse a warrant "[o]nly where the governmental interests at stake exceed those implicated in any ordinary law enforcement context—that is, only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary." \textit{Id.} at 357 (Brennan, J., dissenting). In Justice Brennan's view, such an extraordinary interest was involved in the school setting, but he would forgive only a warrant, not probable cause. \textit{Id.} (Brennan, J., dissenting).
  \item \textsuperscript{148} \textit{See} Maclin, J.L. MED. & ETHICS, Spring 2005, at 108.
\end{itemize}
Justice Blackmun's "special needs" terminology soon would be adopted by a majority of the Court, but in doing so, its meaning and application changed. As conceived by Justice Blackmun, a demonstration of "special needs" was the only way the Court could be freed from the Warrant Clause's probable cause requirement, and thus the only path for utilizing a balancing test. Twice he emphasized that the Court was free to utilize the balancing test only when confronted with a special or extraordinary need on the part of law enforcement. If the restriction had held, it would have brought some clarity to the debate over whether Fourth Amendment intrusions should be assessed utilizing the Warrant Clause or the balancing test. And to the extent that the only way to uphold suspicionless searches and seizures was through the balancing test, the special needs requirement also would have limited that category of searches. But "special needs" eventually came to be treated as simply one of several types of searches within the "closely guarded category of constitutionally permissible suspicionless searches," and was utilized not as a limit on applying the balancing test, but as a justification for excusing individual suspicion. Even more curiously, "special needs" came to mean "non-law enforcement purposes." But Justice Blackmun was not limiting the category of special needs to non-law enforcement purposes. Earlier he had identified the situation in which the Court was justified in utilizing the balancing test as those situations where the Court was confronted with a "special law enforcement need for greater flexibility." He was concerned with situations in which the practicalities of the situation prevented the application of the warrant and probable cause requirement. And he did not view these situations as limited to those in which the police were not seeking evidence of criminal activity. As an example of such a "special need" he pointed to the need for law enforcement officers to take immediate steps to assure their safety when stopping individuals, justifying the "stop and frisk" tactic upheld in Terry—a classic criminal investigatory situation. Interestingly, especially in light of the Court's later characterization of traffic check-

149. In Ferguson v. City of Charleston, 532 U.S. 67 (2001), the Court described the Court in O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion), as having "adopted the special needs terminology." Ferguson, 532 U.S. at 74 n.7.
150. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).
151. See Nicholas v. Goord, 430 F.3d 652 (2005) (describing this transformation); see also MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006) (applying the exception in this fashion).
152. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).
153. Id. at 352 (Blackmun, J., concurring). In particular, in the case before the Court, Justice Blackmun identified the school setting and the need for teachers to be able to take immediate action as the "special need" justifying departure from the Warrant Clause (but not individualized suspicion), not the purpose of the government in undertaking the particular search, which was, of course, to discover evidence of criminal
points cases as not being special needs cases, Justice Blackmun also cited Martinez-Fuerte, as well as Camara. Justice Blackmun was advocating the “special needs” test as a means to restrict the use of the balancing test. He was not limiting special needs to non-law enforcement purposes (even in the narrow sense), nor was he proposing the test as the path to suspicionless searches. But this aspect of Justice Blackmun’s opinion seemed to get lost in later cases adopting his new “category,” and the “special needs” category came to be viewed as a justification for upholding suspicionless searches, and “special needs” was read to mean a non-law enforcement purpose.

VI. FOUR CASES: THE MYTH OF A SINGLE CATEGORY AND MORE CONFUSION ABOUT GOVERNMENT PURPOSE

Four cases decided within six months of each other shortly after T.L.O. support the proposition that the special needs doctrine—even when adopted by a majority of the Court—was not meant to define a single category of suspicionless searches and was not meant to impose a non-law enforcement purpose requirement. Only two of the four cases involved suspicionless searches; the other two involved searches based on reasonable cause or suspicion. The Court utilized its new special needs doctrine not in the suspicionless search cases, but in the cases involving searches based on reasonable suspicion, and analyzed the two suspicionless search cases as falling into completely different categories.

The first “suspicionless search” case after T.L.O. was Colorado v. Bertine, the inventory case discussed earlier. If the Court intended its new “special needs” doctrine to define the “closely guarded category of constitutionally permissible suspicionless searches,” Bertine presented a good opportunity to apply the new doctrine. In Oppen-
man, its previous inventory case, the Court had justified the inventory search based largely on the special needs facing police officers who tow and store automobiles.\textsuperscript{159} And the inventory situation fit within the analysis suggested by the early checkpoint cases and Justice Blackmun's special needs doctrine\textsuperscript{160}—a situation where probable cause is inapplicable and other safeguards (the standard inventory policy and procedures) are in place to limit the discretion of individual officers in the field. But rather than bringing inventory searches within the category of constitutionally permissible suspicionless searches by applying the special needs doctrine, the Court simply relied on the principle that "inventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment."\textsuperscript{161} Of course, had inventory searches not been kept separate from other suspicionless searches, the Court later would have been required to reconcile the "sole purpose" law enforcement test of the inventory cases with its new "primary purpose" test. Keeping the situations separate avoids that problem, but it certainly casts doubt on the Court's insistence that it has closely guarded a single category of permissible suspicionless searches and seizures.

Slightly more than two months after deciding Bertine without reference to T.L.O. or "special needs," a plurality of the Court invoked Justice Blackmun's "special needs" doctrine for the first time in O'Connor v. Ortega.\textsuperscript{162} Like T.L.O., Ortega was not a suspicionless search case; it involved the search of a government employee's office by his supervisors to retrieve government property and to seek evi-

dclosed backpack he found directly behind the front seat of the van and discovered drugs, drug paraphernalia, and cash that were used to prove narcotics charges against the defendant. Bertine starkly presented the issue of whether the Court's precedent relating to criminal investigations involving searches of automobiles (the Carroll automobile exception) or the precedent relating to "non-criminal" investigatory activities or intrusions by the government controlled the search of the backpack. In choosing the latter, the Court cited neither T.L.O. nor Camara. As explained earlier, not utilizing Camara when assessing inventory procedures the Court itself describes as "administrative"—the same label the Court placed on the Camara searches—is difficult to explain.

159. The Court identified "three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." South Dakota v. Opperman, 428 U.S. 364, 369 (1976) (citations omitted).

160. Interestingly, Justice Blackmun wrote separately in Bertine to emphasize the need to insure police were acting in accordance with standard procedures, but did not cite T.L.O. or suggest the "special needs" test or rationale was implicated.


162. 480 U.S. 709 (1987) (plurality opinion). Justice Scalia, in his concurring opinion, also accepted the special needs doctrine: "While as a general rule warrantless searches are \textit{per se} unreasonable, we have recognized exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. . . .'" O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (Scalia, J., concurring).
idence of workplace misconduct. In *Ortega*, the plurality applied Justice Blackmun's special needs rubric to excuse the warrant and probable cause for both "legitimate work-related, non-investigatory intrusions as well as investigations of work-related misconduct."\(^{163}\) Although some language in the plurality's opinion supports the notion that a law enforcement purpose is relevant in assessing special needs cases, that language does not support a broad "primary purpose" restriction on suspicionless searches.

In excusing the warrant requirement for the searches, the plurality relied heavily on the fact that, unlike police who conduct searches "for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct."\(^{164}\) The plurality relied on this different nature of employer searches to excuse the warrant requirement because such a requirement "would seriously disrupt the routine conduct of business and would be unduly burdensome."\(^{165}\) The plurality similarly excused the need for probable cause for non-investigatory work-related searches because "it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons."\(^{166}\) The plurality noted that "when employers conduct an investigation, they have an interest substantially different from the 'normal need for law enforcement.'"\(^{167}\) This subtle change in Justice Blackmun's standard, from when "special needs beyond the normal needs for law enforcement" were present to "an interest substantially different from the 'normal need for law enforcement,'" could suggest the "special needs" exception applies to "non-criminal" or non-law enforcement searches rather than criminal or law enforcement searches in special circumstances.

The plurality added further support for this notion by characterizing public employers as "not enforcers of the criminal law"\(^{168}\) and explaining that "while law enforcement officials are expected to 'schoo[l]
themselves in the niceties of probable cause,' no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense.” In the end, relying on the fact that the privacy interests in the case were “far less than those found at home or in some other contexts,” and that the intrusions “involve[d] a relatively limited invasion of employee privacy,” the plurality held that ordinarily a search of an employee's office by a supervisor requires only “reasonable grounds” for suspecting the search will turn up evidence of misconduct. As in T.L.O., because individualized suspicion was present in the case before it, the plurality did not decide whether individualized suspicion was an essential element of the “standard of reasonableness that we adopt today.”

While some language in Ortega focuses on the non-law enforcement purpose in the case before it, the plurality's concerns seem to be not so much that a law enforcement purpose would be improper, but that if law enforcement personnel were involved, it would negate the practical difficulties of requiring probable cause. Several times, the opinion emphasized that it was the practical realities and burdens that justified excusing the warrant and probable cause, finding Justice Blackmun's conclusion in T.L.O. that “[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill equipped to make a quick judgment about the existence of probable cause” to be an “equally apt description” of public employers and supervisors. This distinction—drawn both by the plurality and by Justice Blackmun—was lost in later cases when the Court suggested the involvement of law enforcement indicated an improper purpose, not simply a

169. Id. (plurality opinion) (emphasis added).
170. Id. at 725 (plurality opinion).
171. Id. (plurality opinion).
172. Id. at 726 (plurality opinion).
173. Id. (plurality opinion).
174. “The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency’s work. . . .” Id. at 724 (plurality opinion). “It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard.” Id. at 724-25 (plurality opinion).
175. Id. at 725 (plurality opinion).
176. In his dissent, Justice Blackmun quoted his special needs language from his T.L.O. concurrence to emphasize the point that “[i]n sum, only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a ‘balancing’ test to formulate a standard of reasonableness for this context.” Id. at 741 (Blackmun, J., dissenting) (emphasis added).
change in the practicality of requiring probable cause. It also ignored the plurality's reminder early in its opinion that,

[a]s we observed in T.L.O., "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' . . . it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth amendment only when the individual is suspected of criminal behavior.'"\textsuperscript{177}

Justice Blackmun's "special needs" doctrine was finally adopted by a majority of the Court in \textit{Griffin v. Wisconsin}.\textsuperscript{178} In \textit{Griffin}, after stating the rule that a search "usually" requires a warrant and probable cause, the Court stated that it had permitted exceptions to the rule when "‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’"\textsuperscript{179} The Court noted instances in which it had found "special needs"—\textit{Ortega} and \textit{T.L.O.}—and referred to various administrative searches as an example where "for similar reasons" the usual rule had been forgiven.\textsuperscript{180} But after referring to administrative searches as similar but apparently separate from special needs, the Court seemed to bring them within the special needs category when it concluded, "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."\textsuperscript{181}

After declaring the operation of a probation system a "special need," the Court emphasized that probation is "a form of criminal sanction" imposed after conviction of a crime to justify the conclusion that supervision of probationers "permit[ed] a degree of impingement upon privacy that would not be constitutional if applied to the public at large."\textsuperscript{182} The Court then focused on the practical realities of the needs of the system to find that a warrant requirement and a requirement of probable cause would interfere with and unduly disrupt the system, thus permitting the search on reasonable cause.\textsuperscript{183}

\textsuperscript{177.} \textit{Ortega}, 480 U.S. at 715 (plurality opinion) (citations omitted).
\textsuperscript{180.} \textit{Griffin}, 483 U.S. at 873. It is also interesting that the Court did not refer at all to its inventory cases, including \textit{Bertine}, which it had decided just six months earlier.
\textsuperscript{181.} \textit{Griffin}, 483 U.S. at 873-74 (emphasis added).
\textsuperscript{182.} \textit{Id.} at 874, 875.
\textsuperscript{183.} \textit{Id.} at 876.
The importance of a law enforcement purpose is unclear in *Griffin*. The Court justified forgiving the warrant in part because “[a]lthough a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen,” and also pointed out that the probation officer “is an employee of the State Department of Health and Social Services who, while assuredly is charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer.” Presumably the Court felt this duty to the “client” would safeguard the probationer against unjustified or harassing searches. Although the probation purpose was crucial to the case, it is not clear that probation can be considered a “non-law enforcement” purpose. It is hard to overlook the close relationship to ordinary law enforcement in the case. Given the fact that the probation officer was alerted to the possibility of weapons in Griffin’s home by a police officer, that three police officers accompanied the probation officer to Griffin’s home (but did not participate in the search), and that Griffin was charged with a criminal offense, at a minimum *Griffin* runs counter to the notion that significant involvement of law enforcement tarnishes a search that otherwise can be justified by a “non-criminal” government purpose.

Perhaps most interesting, in the case in which his special needs doctrine was adopted by a majority of the Court, Justice Blackmun dissented. He agreed that the operation of a probation system represented a special need, but disagreed that the presence of a special need automatically justified exempting the search from the warrant and probable cause requirements. He reemphasized his position in *T.L.O.*—the special needs doctrine serves as a gateway to the balancing test, but whether a warrant and probable cause can be excused depends on the existence of “practical realities of a particular situa-

184. Id.
185. Id.
186. This was the conclusion Justice Blackmun drew from the Court’s statement. *Id.* at 886 (Blackmun, J., dissenting).
187. See United States v. Kincade, 379 F.3d 813, 824 (9th Cir. 2004) (stating that “[a]lmost as soon as the ‘special needs’ rationale was articulated, however, the Court applied special needs analysis in what seemed—at least on the surface—to be a clear law enforcement context.”), *cert. denied*, 544 U.S. 924 (2005).
188. See *Kincade*, 379 F.3d at 825 (stating that “[t]hus, the Court concluded, the Constitution permits the execution of probation and parole searches based on no more than reasonable suspicion—even where the search at issue is triggered by law enforcement information and motivated by apparent law enforcement purposes.”).
189. In *Ortega*, a four justice plurality applied the “special needs” doctrine and Justice Scalia, concurring in the judgment, also applied the special needs doctrine. *Ortega*, 480 U.S. at 732 (Scalia, J., concurring).
190. *Griffin*, 483 U.S. at 881 (Blackmun, J., dissenting).
tion suggest[ing] that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute.”

While willing to permit the search on less than probable cause, Justice Blackmun was unwilling to forgive the warrant requirement. He emphasized the probation purpose itself could not justify forgoing a warrant. He pointed out that “[i]f the police themselves had investigated the report of a gun at petitioner’s residence, they would have been required to obtain a warrant.” The fact that the search that took place was a probation search did not change the result for Justice Blackmun because it presented no practical obstacles to obtaining a warrant. In addition, Justice Blackmun focused on the expectation of privacy enjoyed by the probationer. In his view, unlike administrative cases in which warrants had been forgiven, the search in question involved a home and therefore the reasoning of the administrative inspection cases “simply does not extend to the invasion of the special privacy the Court has recognized for the home.”

The fourth case in this group, *New York v. Burger*, decided just two weeks prior to *Griffin*, suggests a limited role for “criminal purpose” and directly contradicts the idea that excessive entanglement or involvement of law enforcement officials renders suspicionless searches invalid. In *Burger*, the Court upheld the warrantless, suspicionless search of an automobile junkyard pursuant to a state regulatory scheme. The Court initially justified the possible “lessened application” of the warrant and probable cause requirements of the Fourth Amendment based on the reduced expectation of privacy enjoyed by the owner of commercial premises in a closely regulated industry. In that setting, a warrantless inspection was permissible if a “substantial government interest” existed, warrantless inspections were necessary as a practical matter to further the interest, and safeguards existed in place of the warrant to limit the discretion of the inspecting officers. After finding the scheme in question met those requirements, the Court turned to the issue of whether the possible law enforcement purpose behind the scheme made it impermissible.

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191. *Id.* (Blackmun, J., dissenting).
192. *Id.* at 885. (Blackmun, J., dissenting). “[The probation supervisor] thus had plenty of time to obtain a search warrant.” *Id.* (Blackmun, J., dissenting).
193. *Id.* at 884 (Blackmun, J., dissenting).
197. *Id.* at 712.
Despite the state court finding that the scheme had “no truly administrative purpose but was ‘designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property,’” the Court felt the scheme at worst was designed with mixed or dual motives. The court of appeals’ mistake, according to the Court, was its failure “to recognize that a State can address a major social problem both by way of an administrative scheme and through penal sanctions.” The Court explained that “administrative statutes and penal laws may have the same ultimate purpose of remediying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem.”

The Court declared that “to state that [the statute] is ‘really’ designed to gather evidence to enable convictions under the penal laws is to ignore the plain administrative purposes” of the statutory scheme. The Court believed the legislative history demonstrated that “the New York Legislature had proper regulatory purposes for enacting the administrative scheme and was not using it as a ‘pretext’ to enable law enforcement authorities to gather evidence of penal law violations.” In addition, the Court also found no reason to believe the particular inspection before it was a “pretext” for obtaining evidence of a criminal violation, declaring that it was “undisputed that the inspection was made solely pursuant to the administrative scheme.”

The Court failed to see any constitutional significance either in the fact that police officers carried out the search, that in the course of conducting the administrative inspection the officers discovered evidence of crimes, or that arguably even before the “administrative” search was executed, the government was aware that no further evidence of an administrative violation would be discovered by a search of the junkyard.

The effect of a criminal investigatory purpose is still unclear after Burger. Burger certainly stands in the way of any assertion that extensive law enforcement involvement necessarily taints a suspicionless search and seizure scheme when the government articulates a “non-law enforcement” purpose. It also suggests the Court is unlikely

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198. Id.
199. Id.
200. Id. at 712. The Court explained that an administrative scheme establishes how a business should be operated, setting forth rules to guide the business person’s conduct and allowing government officials to ensure those rules are followed. By contrast, the major emphasis of penal laws is punishment of individuals for specific behavior. Id. at 712-13.
201. Id. at 715.
202. Id. at 716 n.27.
203. Id. (emphasis added).
204. Id. at 694, 698, 715, 716-17.
to undertake a careful assessment of the government motive or purpose in mixed motive cases. In *Burger*, the Court was unwilling to accept the state court’s determination that the search was “intended solely to uncover evidence of criminality.”

It could be that, like inventory searches, administrative searches are a separate and distinct category, despite the fact that the Court in *Burger* characterized the case as one presenting a “special need.” And if the Court’s characterization of the case as a special needs case is dismissed as a mischaracterization early in the development of the special needs doctrine, that brings us back to characterizing administrative searches as a separate and distinct category of suspicionless searches, again casting doubt on the Court’s frequent reference to a single category of constitutionally permissible suspicionless searches. More importantly, it raises the question of why labels such as “administrative inspection,” “traffic checkpoint,” and “special needs” should demand separate analysis. And even if separate analysis is called for, why should a law enforcement or criminal investigation purpose play a lesser role (disqualifying the scheme only if it is the sole purpose) in determining the validity of administrative searches that presumably depend on their administrative or regulatory character to be valid, than it plays (disqualifying the scheme if it is the primary purpose) in cases that depend only on the government demonstrating a “special law enforcement” need—not a non-law enforcement need?

At this point, if *Burger* is not a special needs case, the special needs doctrine had not been utilized to uphold a suspicionless search or seizure scheme. The question following these cases was whether an entirely new exception had been created, whether the Court had defined a new type of administrative search, or whether “special needs” was the new “administrative” search. It seemed that most commentators interpreted the Court as either working within the administrative search exception or redefining the entire category. Categories aside, it seems fair to characterize the Court’s suspicionless search and seizure jurisprudence at this point as focused less on the government purpose motivating the scheme and more on the expectation of

205. *Id.* at 698, 712.

206. “Rather, we conclude that, as in other situations of ‘special need,’ see *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) . . . a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.” *Burger*, 482 U.S. at 702.

207. *See* Schulhofer, 1989 *Sup. Ct. Rev.* at 107-10 (discussing the impact of *Ortega, Griffin* and *Burger* on what he variously refers to as the administrative search “doctrine,” “rubric,” and “category”); Maclin, *J.L. Med. & Ethics*, Spring 2005, at 109 (“[A] majority of the Court soon adopted [the] special needs formula as the controlling standard for measuring the constitutionality of suspicionless searches outside of traditional law enforcement contexts.”).
privacy compromised by the intrusion, the practical obstacles to obtaining a warrant or probable cause, and the existence of safeguards to limit the discretion of the individual officers in the field. But the development of the special needs doctrine had barely begun.

VII. THE DEVELOPMENT OF THE SPECIAL NEEDS DOCTRINE AND THE EMERGING IMPORTANCE OF GOVERNMENT PURPOSE

In the decade following T.L.O., a series of decisions by the Court in cases challenging suspicionless drug testing of railroad workers, Customs Department employees, and school children brought the "special needs" doctrine into prominence and signaled the emergence of government purpose as an important, if not determinative, factor in the Court's special needs analysis. In the companion cases of Skinner v. Railway Labor Executives' Ass'n208 and National Treasury Employees Union v. Von Raab,209 the Court upheld suspicionless drug testing of railroad workers involved in accidents and Customs Service employees seeking promotions or transfers to jobs directly involving drug interdiction or requiring the employee to carry a firearm. And in Vernonia School District 47J v. Acton,210 the Court upheld urine tests for students involved in athletics. These cases came to define the "special needs" exception and seemed to suggest that "special needs" now defined the "closely guarded category of constitutionally permissible suspicionless searches."211

In the drug testing cases, the Court's reliance on a showing of a "special need" to justify the use of the balancing test suggested it had found a unifying principle for its suspicionless search and seizure jurisprudence. In deciding Skinner—the challenge to suspicionless drug testing of railroad workers—the Court acknowledged that even when assessing searches by a balancing of interests, generally the warrant clause governed and required a warrant supported by probable cause. But the Court then explained that "we have recognized exceptions to

211. See Schulte, 1989 Sup. Ct. Rev. at 87 (stating Skinner and Von Raab widened the "administrative search exception"); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?," 94 COLUM. L. REV. 1751, 1796 (1994) (stating that in deciding to utilize the Warrant Clause or reasonableness approach, the Court has struggled to find the proper fulcrum, but currently asks whether a special need exists (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989))); Sundby, 74 MISS. L.J. at 511 (noting that during this period it became a familiar Fourth Amendment sight to see courts finding a special need and required a warrant supported by probable cause. But the Court then explained that "we have recognized exceptions to
this rule, however, ‘when “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”’\textsuperscript{212} Similarly, in the companion case to \textit{Skinner}, \textit{National Treasury Employees Union v. Von Raab}, the Court again acknowledged the general rule requiring a warrant and probable cause (or some other level of individual suspicion), but asserted that its cases “establish that where a Fourth Amendment intrusion serves special needs beyond the normal need for law enforcement” the Court may balance the interests de novo to determine whether a warrant or individual suspicion was required.\textsuperscript{213} In neither case did the Court hedge its statement by characterizing special needs as simply one of many instances in which the Court had recognized an exception.\textsuperscript{214} And in these cases the Court freely cited to inventory cases, traffic checkpoint cases, and administrative search cases as if all were within the umbrella of the special needs exception.\textsuperscript{215}

Similarly, in the public school drug testing case, when explaining that a warrant and probable cause are “not required to establish the reasonableness of all government searches,”\textsuperscript{216} the Court again referred to the special needs doctrine seemingly as the route to an exception: “a search unsupported by probable cause can be constitutional, we have said, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”\textsuperscript{217} And in explaining that even individualized suspicion was not necessarily required in these cases, the Court referred to \textit{Skinner} and \textit{Von Raab}, as well as its cases permitting traffic checkpoints “looking for illegal immigrants and contraband” and drunk drivers, as if all were in the same category of searches. Thus, it seemed justified to conclude that the “closely guarded category of constitutionally permissible suspicionless searches and seizures” to which the Court frequently had referred was, in fact, the “special needs” ex-

\begin{enumerate}
\item \textsuperscript{212} Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 619 (1989).
\item \textsuperscript{213} Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).
\item \textsuperscript{214} See Edmond v. Goldsmith, 183 F.3d 659, 662 (7th Cir. 1999) (stating “the Supreme Court has insisted that ‘to be reasonable under the Fourth Amendment a search must be based on individualized suspicion of wrongdoing,’ save in cases of ‘special need’ based on ‘concerns other than crime detection’”), \textit{aff’d sub nom.} City of Indianapolis v. Edmond, 531 U.S. 32 (2000).
\item \textsuperscript{215} See \textit{Skinner}, 489 U.S. at 619-20 (“The government’s interest in regulating the conduct of railroad employees to insure safety, like its supervision of probationers and regulated industries, or its operation of a government office, school or prison ‘likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.’”).
\item \textsuperscript{216} Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).
\item \textsuperscript{217} Acton, 515 U.S. at 653.
\end{enumerate}
ception.\textsuperscript{218} If that were the case, however, it would make the introduction of a "non-law enforcement purpose" test problematic because, as discussed earlier, many of the earlier suspicionless search and seizure cases had not drawn such a distinction. But in the new "special needs" cases, the Court seemed to be imposing such a test.

In the drug testing cases, the Court seemed to rely more explicitly than in previous cases on the non-criminal nature of the schemes before it to justify freeing itself from the requirement of a warrant and individual suspicion.\textsuperscript{219} As discussed previously, in the early cases, the non-criminal nature of the searches was relevant as a factor to be balanced—the fact that school officials and employers less familiar with the intricacies of probable cause were carrying out the search meant the warrant requirement was less practical—but did not serve as a prerequisite to the scheme qualifying to be assessed under the balancing test. In the drug testing cases, particularly \textit{Skinner}, the Court more explicitly stated that the general rule requiring a warrant and probable cause applied in "most criminal cases"\textsuperscript{220} or "where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing."\textsuperscript{221} More importantly, the Court seemed to use the non-criminal purpose as a prerequisite to the balancing test or the special needs exception, rather than simply as a factor to be weighed in the balance in determining if a warrant was practical.\textsuperscript{222} The Court did not explain—or even acknowledge—this new emphasis on the non-criminal nature of the search.\textsuperscript{223}

Several times in his opinion for the Court in \textit{Skinner}, Justice Kennedy alluded to the "non-criminal enforcement" purpose of the

\textsuperscript{218} See also Ferguson v. City of Charleston, 532 U.S. 67, 77, 84 (2001) (referring first to the "closely guarded category of constitutionally permissible suspicionless searches" and later to the "closely guarded category of special needs").

\textsuperscript{219} Christopher Mebane, Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston, 40 Hous. L. Rev. 177, 205-06 (2003) (noting the Court's previous caveats against using samples obtained in criminal prosecution were made explicit in \textit{Skinner}).

\textsuperscript{220} \textit{Skinner}, 489 U.S. at 619.

\textsuperscript{221} \textit{Acton}, 515 U.S. at 653.

\textsuperscript{222} See Dodson, 51 S.C. L. Rev. at 275 ("The bulk of the Court's opinion in both \textit{Von Raab} and \textit{Skinner} is devoted to justifying the special needs exception and showing that a special need existed thus triggering the balancing approach." In \textit{Skinner}, Justice Kennedy justified the government's interest in regulating the conduct of railroad employees as a special need in part by emphasizing that the agency "has prescribed toxicological tests not to assist in the prosecution of the employees, but rather 'to prevent accidents and casualties that result from impairment of employees by alcohol or drugs'.")

\textsuperscript{223} See Ronald F. Wright, The Civil and Criminal Methodologies of the Fourth Amendment, 93 Yale L.J. 1127, 1128 (1984) (noting that quite by chance the boundary line between civil and criminal cases has formed the dividing line between balancing and probable cause methodology as distinct ways of defining unreasonable searches and seizures).
scheme. That purpose seemed to play two different roles in the decision. One was the same "non-criminal" purpose played in previous cases—as a factor in the balancing undertaken by the Court. It meant that because the supervisors were "not in the business of investigating violations of the criminal laws," as a practical matter they were less familiar with the intricacies of the Fourth Amendment, thereby justifying the Court in excusing the warrant (and perhaps the probable cause) requirement when it applied the balancing test. But the Court in Skinner also suggested another role for government purpose. Earlier in his opinion, in justifying the government's interest as a special need, Justice Kennedy emphasized that the agency "has prescribed toxicological tests not to assist in the prosecution of the employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" That statement in the course of determining whether the government interest qualified as a "special need" suggests a law enforcement purpose could preclude a scheme from qualifying within the "closely guarded category of permissible suspicionless searches." In a footnote, Justice Kennedy elaborated. He conceded that the regulation could be read to authorize release of the samples to law enforcement authorities, but declared that the record "does not disclose that it was intended to be, or actually has been, so read." He went on to state that although the plaintiffs "aver generally that test results might be made available to law enforcement authorities, . . . they do not seriously contend that . . . the administrative scheme was designed as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations." Justice Kennedy declared that absent a "persuasive showing" that the testing program was pretextual, the court would assess the scheme "in light of its obvious administrative purpose." He expressly left for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext. . . .

Although the Court left the question for another day, the possibility that the question may be a relevant one elevates the role of government purpose and seems to open the door to a pretext argument by

225. Id. at 620-21.
226. Ferguson, 532 U.S. at 77; see also Chandler v. Miller, 520 U.S. 305, 309 (1997).
227. Id. at 621 n.5.
228. Id.
229. Id.
230. Id. The Court's framing the issue in terms of an administrative scheme further supports the notion that the Court viewed the "special needs" doctrine as encompassing at least that category of suspicionless search.
individuals challenging suspicionless search and seizure schemes. The Court's citation to New York v. Burger, however, suggests it was unlikely the Court would strike down an administrative scheme on such a basis. In Burger, the Court rejected the state court's characterization of the scheme as one designed solely for criminal purposes and chastised the state court for failing "to recognize that a state can address a major social problem both by way of an administrative scheme and through penal sanctions." That suggests that, at least for "mixed motive" or "dual motive" schemes, the pretext argument was unlikely to prevail.

In the end, the decision in Skinner turned on the factors identified earlier—the limited discretion exercised by the railroad supervisors in charge of the drug tests and the diminished expectation of privacy of employees in a highly regulated industry—but also on "surpassing safety interests served by the toxicological tests," setting the stage for government purpose to emerge as a controlling factor in the Court's suspicionless search and seizure jurisprudence. Justice Marshall, in his dissent, recognized this shift. He feared that once the Court drew the line based on government purpose, it would be too easy to uphold schemes with a non-criminal purpose. He argued that the majority had "complet[ed] the process begun in T.L.O. of eliminating altogether the probable cause requirement for civil searches—those undertaken for reasons "beyond the normal need for law enforcement." He made the point that "the Fourth Amendment—unlike the Fifth and Sixth—does not confine its protection to either criminal or civil actions. Instead, it protects generally "[t]he right of the people to be secure." He noted the irony of the fact that this principle—that the Fourth Amendment applies equally to criminal and civil searches—was emphasized in the Court's holding in T.L.O., the genesis of the special needs doctrine Justice Marshall expressed con-

232. Justice Kennedy's statement is eerily reminiscent of statements made in cases prior to Whren that led commentators to suggest that a showing of pretext would result in searches based on probable cause being struck down by the Court—only to be sorely disappointed. See infra at notes 342-46 and accompanying text.
234. This fear seems to be validated by Justice O'Connor in Vernonia where she emphasized the need for careful scrutiny of suspicionless schemes outside the criminal context and expressed concern that the Court had failed to apply such scrutiny in the case before it. Acton, 515 U.S. at 672-79. See also Dodson, 51 S.C. L. Rev. at 275 (stating the fact that the Court has never invalidated a law using the special needs balancing test suggests that if "non-criminal" is the path to balancing, there will be few, if any, limits on such searches).
236. Id. at 641 (Marshall, J., dissenting).
237. Id. at 641 n.5 (Marshall, J., dissenting).
cern over the “manipulable balancing inquiry” which the Court utilized upon the “mere assertion of a ‘special need’” to uphold significant intrusions on individuals’ privacy.\textsuperscript{238} He argued that regardless of the purpose behind the scheme, the requirement of probable cause should only be excused when the “government action in question had a ‘substantially less intrusive’ impact on privacy,” thereby clearly falling short of a full-scale search.\textsuperscript{239}

In addition to his concern that schemes with a “non-criminal” purpose would be too easily upheld, Justice Marshall revealed skepticism that even searches with a criminal purpose would be found impermissible when he criticized the majority’s failure to be clear about the impact of the possibility that the samples in \textit{Skinner} could be utilized to generate criminal prosecutions. He asserted that if the majority believed the prospect of criminal prosecution did not change the balance, it should say so. He accused the majority of a grave disservice to Fourth Amendment values by “ducking this important issue.” Although he took solace from the fact that the majority had preserved for another day the possibility of a pretext defense, he characterized the majority as “belittling” the defense.\textsuperscript{240}

In \textit{Von Raab}, Justice Kennedy similarly relied on the non-criminal purposes of the testing program for two distinct purposes: first, to justify utilizing the balancing test and, second, to justify forgiving the requirement of probable cause when applying the balancing test. After reiterating the familiar standard that “a search must be supported, as a general matter, by a warrant issued upon probable cause,” Justice Kennedy explained that previous cases “establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement,” the balancing test is appropriate.\textsuperscript{241} He then immediately declared that “it is clear that the Customs Service drug testing program is not designed to serve the ordinary needs of law enforcement,”\textsuperscript{242} supporting that statement by relying, at least in part, on the fact the test results could not be used in a criminal prosecution.\textsuperscript{243} Later, in the course of applying the balancing test, he justified excusing probable cause by citing the inventory search cases for the proposition that, “Our cases teach, however, that the probable-cause standard ‘is peculiarly related to criminal in-
vestigations." He further explained this was particularly true "where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." For that proposition, Justice Kennedy cited Camara and Martinez-Fuerte, a traffic checkpoint case. Again the Court relied on cases across the spectrum of its suspicionless search cases, suggesting the Court either viewed the special needs doctrine as a unifying thread or was unifying its suspicionless search jurisprudence under the special needs doctrine in these cases. And while the non-criminal purpose seemed to have been elevated in importance, particularly as a threshold requirement to the balancing test, the bulk of the Court's analysis focused on the governmental interest at stake and the diminished expectation of privacy enjoyed by the group subject to the testing scheme.

Non-criminal purpose played an even smaller role in the school drug testing case. Justice Scalia justified utilizing the balancing test to determine "reasonableness" because "there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted." He acknowledged that "where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing," reasonableness generally required a warrant, but again explained that a warrant and probable cause could be excused when special needs justified the scheme. Because the Court had previously found "such 'special needs' to exist in the public school context" and to forgive a warrant and probable cause, the Court quickly dispensed with those requirements and turned its attention to applying the balancing test to determine whether individual suspicion was required to justify the search. On that issue, the Court focused very little on the non-criminal purpose of the scheme. The Court discussed what it described as the "first factor"—the expectation of privacy—at great length. The fact that the test results were not turned over to law enforcement played a minor role in the second factor—the character of the intrusion. When the Court turned to "the nature and immediacy of the govern-

244. *Id.* at 667-68 (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)). Justice Kennedy's reliance on the inventory search cases, to this point treated as a separate category of suspicionless searches, was another indication that the Court may have been unifying its suspicionless search jurisprudence under the special needs doctrine.
245. *Id.* at 668.
246. *Id.*
249. *Id.*
250. *Id.* at 654-58.
251. *Id.* at 658.
mental concern at issue here,” it focused on the extent of the drug problem the government was attempting to combat, not the criminal or non-criminal character of the intrusion.252 At the conclusion of the opinion, however, the Court did “caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”253 The Court explained that the most significant factor in the present case and the cases involving drug testing of government employees was the responsibilities the government undertook as a guardian and tutor in the school setting and as an employer.254 Although the Court did not emphasize or characterize these responsibilities as “non-criminal,” its “caution” certainly suggests the government as criminal law enforcer might be given less latitude.

In any case, the indications that criminal purpose did or would play an important role in the Court’s suspicionless search and seizure jurisprudence, which the Court seemed to be unifying under the special needs doctrine, were fairly strong after the drug testing cases. At a minimum, the stage seemed set for the Court to clarify the role it saw for the purpose motivating the scheme. But not every signal the Court sent pointed in that direction.

In the midst of deciding the drug testing cases, the Court revisited traffic checkpoints in Michigan Department of State Police v. Sitz,255 a civil case challenging a highway sobriety checkpoint program instituted by the Michigan State Police. The lower court256 had invalidated the program utilizing a balancing test derived from an earlier United States Supreme Court case, Brown v. Texas.257 Although they had prevailed below, the plaintiffs argued the balancing test was not the proper method of analysis to decide the case. The plaintiffs relied on Von Raab to argue that unless the government demonstrated a special need “beyond the normal need” for criminal law enforcement,” probable cause or reasonable suspicion was required and a balancing analysis was inappropriate.258 Rather than finding or even sug-

252. Id. at 661-64.
253. Id. at 665.
254. Id.
256. The case came to the Court from the Michigan Court of Appeals, the Michigan Supreme Court having declined review. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 448 (1990).
258. Sitz, 496 U.S. at 449. This is a confusing assertion in that utilizing reasonable suspicion itself required resort to a balancing test to forgive a warrant and probable cause. In fact, in Brown v. Texas, 443 U.S. 47 (1979), the Court utilized the balancing test as it had in Terry to require reasonable suspicion for the stop at issue, which the state justified on individual suspicion, not a suspicionless scheme. Brown, 443 U.S. at 51.
suggesting that such a special need was present, Justice Rehnquist pro-
vided a curt and cryptic response to the argument:

But it is perfectly plain from a reading of Von Raab, which
cited and discussed with approval our earlier decision in
United States v. Martinez-Fuerte, that it was in no way de-
signed to repudiate our prior cases dealing with police stops
of motorists on public highways. Martinez-Fuerte, which uti-
lized a balancing analysis in approving highway checkpoints
for detecting illegal aliens, and Brown v. Texas are the rele-
vant authority here.259

He went on to find the sobriety checkpoint satisfied the balancing test
and was constitutional.

The meaning of Justice Rehnquist's response is unclear. He may
have intended to convey that because Von Raab cited and discussed
Martinez-Fuerte with approval, the Von Raab Court believed traffic
checkpoints represented a special need. That seems unlikely because,
unlike the public school context, it is the reason behind the check-
point, not the "setting" of a checkpoint, which would constitute the
special need. Even if immigration control represented a special need
in the Von Raab Court's view, the question of whether sobriety check-
points likewise did would be an issue. It seems more likely that Jus-
tice Rehnquist was ruling the special needs doctrine irrelevant in
traffic checkpoint cases. Nevertheless, many courts and commenta-
tors continue to refer to Sitz as a special needs case.260 If that is accu-
rate, Sitz stands in the way of any assertion that significant law
enforcement involvement in a suspicionless search or seizure scheme
taints the validity of such a scheme under the special needs doctrine.
The Sitz checkpoint was a law enforcement operation from beginning
to end, designed and executed by the State Police. In his balancing
analysis, Justice Rehnquist never suggested the extensive law en-
forcement involvement or the resulting criminal prosecution compro-
mised the scheme. In fact, the "effectiveness" of the scheme in terms
of arrests made was used to bolster the state side of the balancing
scale.

More likely than asserting traffic checkpoints constitute a special
need, Justice Rehnquist was treating traffic checkpoints as a separate
category of permissible suspicionless seizures. If that is so, the
Court's suspicionless search and seizure jurisprudence is further frac-
tured among categories rather than unified under special needs, and
government purpose plays a different role among the categories. That

259. Sitz, 496 U.S. at 449.
260. See MacWade v. Kelly, 460 F.3d 260, 268 (2d Cir. 2006) (citing both Sitz and
Martinez-Fuerte as cases applying the special needs exception); Sundby, 74 Miss. L.J. at
520 (discussing Sitz as a special needs case).
made the next development in the Court's suspicionless search and seizure jurisprudence all the more confusing—the Court chose a traffic checkpoint case to elevate a government purpose to control crime to a disqualifying factor for suspicionless search and seizure schemes.

VIII. A NEW LIMIT ON SUSPICIONLESS SEARCHES AND SEIZURES: THE PRIMARY PURPOSE TEST

The relevance of a "criminal" or "law enforcement" purpose motivating a government suspicionless search or seizure scheme moved to the forefront of the Court's jurisprudence in City of Indianapolis v. Edmond.261 As briefly discussed earlier, in Edmond the Court de-

261. The first case in which the Court struck down a government scheme of suspicionless searches was Chandler v. Miller, 520 U.S. 305 (1997). Chandler involved a challenge to a Georgia statute that required candidates for designated state offices to certify that they had tested negative for illegal drugs through a urinalysis drug test within thirty days prior to qualifying for nomination or election. The Court's decision had nothing to do with an improper "criminal" purpose. The defect in Georgia's professed justification for the scheme—that the use of illegal drugs draws into question an official's judgment and integrity, jeopardizes the discharge of public functions, including antidrug law enforcement efforts, and undermines public confidence and trust in elected officials—was that nothing in the record suggested that these hazards were "real and not simply hypothetical for Georgia's polity." Chandler, 520 U.S. at 319. The Court emphasized that the statute was not enacted in response to any fear or suspicion of drug use by state officials and explained that a demonstrated problem of drug abuse would shore up the validity of a testing regime. Id. Although Chandler adds little to the issue of a "non-criminal" governmental purpose, it nevertheless offers insights into the Court's search and seizure jurisprudence.

Justice Ginsberg's introduction to her opinion demonstrates an attempt to describe a unified suspicionless search and seizure jurisprudence. After explaining that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion," she acknowledged that searches conducted without individualized suspicion had been upheld "in certain limited circumstances." Id. at 308. She cited the full spectrum of suspicionless cases the Court had upheld—drug testing of workers, immigration and sobriety checkpoints, and "administrative inspections in closely regulated businesses"—before explaining the Court was striking down the Georgia scheme because it "does not fit within the closely guarded category of constitutionally permissible suspicionless searches." Id. at 308-09. Although she did not initially label this "closely guarded category" as "special needs," later in her opinion, as she began her analysis of the issues, she reiterated that "particularized exceptions to the main rule [of individualized suspicion] are sometimes warranted based on special needs beyond the normal need for law enforcement." Id. at 313-14. Either the special needs exception defines the closely guarded category and drug testing, certain traffic checkpoints and administrative searches are "limited circumstances" within that category, or the category is unnamed and includes special needs as one of the limited circumstances. If the latter is the case, it is curious that Justice Ginsberg did not list special needs when she originally delineated the types of searches included in the "limited circumstances." And in analyzing the drug testing scheme before the Court, Justice Ginsberg relied exclusively on the special needs exception. Because the Court was striking down the scheme, if another, separate "circumstance" existed under which the scheme could pass muster, the Court should have considered that possibility. The Court's description of a single category and its focus exclusively on special needs supports the notion of a unified search and seizure jurisprudence centered on "special needs." Chief Justice Rehnquist noted this attempt at a unifying theme in his dissent: "Today's opinion
clared unconstitutional a program of vehicle checkpoints operated in Indianapolis in an effort to interdict unlawful drugs. Justice O'Connor, writing for the Court, immediately focused attention on the purpose of the checkpoint program. In the second sentence of the opinion, she explained, "[w]e now consider the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics." After describing the checkpoint program at issue, Justice O'Connor began her analysis by focusing not on whether a balancing test was appropriate, but directly on the issue of individualized suspicion. She reiterated the rule that "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion." But rather than referring to a single "closely guarded category of constitutionally permissible suspicionless searches" as the Court had done previously, Justice O'Connor explained the court had recognized exceptions "only in limited circumstances," giving as examples "certain regimes of suspicionless searches where the program was designed to serve 'special needs, beyond the normal need for law enforcement';" appropriately limited searches for "certain administrative purposes;" and brief, suspi-

speaks of a 'closely guarded' class of permissible suspicionless searches [and seizures] which must be justified by a 'special need.'" Chandler, 520 U.S. at 325 (Rehnquist, C.J., dissenting).

Chandler also provides some insight into how the Court might treat "dual purpose" schemes in this "closely guarded category." Although the Court found the purposes articulated by Georgia not sufficiently substantial to qualify as a "special need" and justify the drug testing scheme, as a final note in her opinion Justice Ginsberg emphasized that "Georgia’s singular drug test for candidates is not part of a medical examination designed to provide certification of a candidate's general health, and we express no opinion on such examinations." Chandler, 520 U.S. at 323. That suggests that a "dual motive" scheme created by the Georgia legislature—a medical exam designed to provide certification of a candidate's health that included a drug test—might allow Georgia to accomplish its purpose. Chief Justice Rehnquist noticed this as well. He expressed disbelief that the result could conceivably be different because the intrusion would be identical, and he did not believe the Court should distinguish based on the purpose behind the scheme. Chandler, 520 U.S. at 327-28 (Rehnquist, C.J., dissenting).

262. The case came to the Court on stipulated facts concerning the operation of the checkpoints. The checkpoints were staffed by approximately thirty police officers and operated pursuant to written directives issued by the chief of police. The officers stopped a predetermined number of vehicles, and at least one officer approached the vehicle and advised the driver that he or she was being stopped briefly at a drug checkpoint. The officer asked the driver to produce a license and registration. While doing so, the officer looked for signs of impairment and conducted an "open view" examination of the vehicle while a narcotics-detection dog walked around the outside of the stopped vehicle. The officers had no discretion to stop any vehicle out of sequence, and were instructed that they could only conduct a search if they obtained consent or developed the appropriate quantum of particularized suspicion. The operation of the checkpoint was designed to limit the total duration of the stop, absent particularized suspicion, to five minutes. City of Indianapolis v. Edmond, 531 U.S. 32, 35-36 (2000).

263. Edmond, 531 U.S. at 34.

264. Id. at 37.
cisionless seizures of motorists at fixed Border Patrol checkpoints and at sobriety checkpoints. After noting that the Court also had “suggested” that a checkpoint established to verify drivers’ licenses and registrations would be permissible, Justice O’Connor quickly noted, “In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” True enough, but neither had the Court ever indicated such checkpoints were impermissible. The Court had described the purpose of the checkpoint programs it had upheld as for “law enforcement” purposes, if not “to detect evidence of ordinary criminal wrongdoing,” and further, at least in Sitz, the checkpoint program the Court upheld had in fact detected “evidence of ordinary criminal wrongdoing”—driving under the influence.

Nevertheless, after describing the checkpoints the Court previously upheld as “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety,” the Court held that “[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”

Despite this emphatic holding, the Court had difficulty explicating the distinction it was attempting to make. In response to the State’s argument that the checkpoints upheld by the Court in the earlier cases had the same ultimate purpose of arresting those suspected

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265. Id.
266. Id. at 38.
267. Before addressing the particular checkpoint at issue in the case, Justice O’Connor went to great lengths to identify the particular contexts in which it upheld previous checkpoints. She described Martinez-Fuerte as one of a number of Fourth Amendment cases reflecting longstanding concern for the protection of the border, but also noted the importance in that case of the “formidable law enforcement problems” posed by the flow of illegal entrants into the United States. She also pointed out that the checkpoint program in Sitz “was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways,” explaining “there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue.” Id. at 39. Finally, Justice O’Connor noted that although the Court had invalidated a discretionary, suspicionless stop for a spot check of a motorist’s driver’s license and vehicle registration in Delaware v. Prouse, it had suggested in that case that a traffic checkpoint for the same purpose would be lawful. She asserted that the Court in Prouse had considered “the purposes of such a hypothetical roadblock to be distinct from a general purpose of investigating crime,” stating that “Prouse itself reveals a difference in the Fourth Amendment significance of highway safety interest and the general interest in crime control.” Id. at 39-40. While this may be true, it is not clear that the Prouse majority viewed the general interest in crime control as an improper purpose that precluded the balancing test altogether. Rather, as discussed earlier, the Court in Prouse seemed simply to suggest that such an interest added little to the government side of the ledger when undertaking the balancing test. See supra notes 102-06 and accompanying text.
268. Edmond, 531 U.S. at 41-42.
of committing crimes, the Court acknowledged that "[s]ecuring the border and apprehending drunk drivers are, of course, law enforce-
ment activities, and law enforcement officers employ arrests and crim-
inal prosecutions in pursuit of these goals," but went on to state, "[i]f we were to rest the case at this high level of generality, there would be little check on the ability of authorities to construct roadblocks for almost any conceivable law enforcement purpose."269

If the Court is concerned with the primary purpose rather than the ultimate purpose, it seems to have the two confused. The ultimate purpose of the program in Sitz was to increase highway safety; the government sought to accomplish this through criminal sanctions—using arrests and the threat of arrest and criminal sanctions to keep impaired drivers off the road—and the "primary purpose" of the checkpoint was to generate evidence and to make those arrests. Similarly, the ultimate purpose of the program in Martinez-Fuerte was to stem the flow of illegal immigration. Again, the government sought to accomplish this through criminal sanctions—using arrests and the threat of arrests to deter individuals from smuggling illegal immi-
grants across the border—and the primary purpose of the checkpoint was to generate evidence and make those arrests.270 Thus, although the Court expressly eschews reliance on the ultimate purpose, it seemed to do just that. If it had focused on the primary purpose, it would have recognized that all three programs had the same purpose: attempting to generate evidence to make arrests in order to serve the ultimate purpose of battling a larger societal problem—highway safety, border security, or the drug epidemic.

The Court's statement could be read as identifying immigration control and highway safety as "special needs beyond the normal needs of law enforcement," thus distinguishing among "law enforcement purposes" rather than having its decisions turn on the presence of any purpose that could generally be described as "law enforcement."271 The Court repeatedly distinguished the Indianapolis program as aimed at detecting ordinary criminal wrongdoing. Presumably the Sitz and Martinez-Fuerte programs were different because they were aimed at special wrongdoing or special governmental needs. But in Sitz the Court had rejected characterizing traffic checkpoint cases as

269. Id. at 42.
270. In Burger, the auto scrap yard inspection case, the Court characterized the ultimate purpose as combating auto theft, not carrying out inspections. New York v. Bur-
er, 482 U.S. 691, 693 (1987).
271. The Court later characterized its language in Edmond in just this manner. See Illinois v. Lidster, 540 U.S. 419, 424 (2004) (emphasizing that the Court in Edmond specified that the "general interest in crime control" with which it was concerned did not refer to every "law enforcement" objective and citing Sitz and Martinez-Fuerte as addressing "special law enforcement concerns").
“special needs” cases, and at the beginning of her opinion in Edmond, Justice O'Connor had placed traffic checkpoint cases in a separate “limited circumstance” of permissible suspicionless search and seizure. Importing a “non-law enforcement primary purpose test” from the “special needs” cases—which Chief Justice Rehnquist in his dissent accused the Court of doing—would be problematic. While a plausible argument could be made that “special needs” as previously used by the Court referred to a “non-law enforcement” purpose or at least precluded significant involvement of law enforcement in the scheme or use of the evidence obtained that same argument is difficult to make in the traffic checkpoint cases. They all involved extensive law enforcement personnel and a basic law enforcement purpose: to arrest individuals for criminal offenses. Such arrests were a goal of the programs and a measure of their effectiveness. Justice O'Connor's careful parsing of the Court's previous statements relating to the purposes of various search and seizure schemes to distinguish between “law enforcement purposes” and “the general interest in crime control” is a dramatic change from the “terminological inexactitude” that had characterized the Court's previous opinions. Even if the Court's new precision could be defended as consistent with those previous cases, the Court offered no explanation why this should serve as the dividing line between permissible and impermissible suspicionless search and seizure schemes. The Court stated that “without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.” But how does drawing such a line limit roadblocks, especially when the government apparently can set up all the roadblocks it wants to check licenses and registrations? Perhaps, the Court thinks license and registration checks will not be sufficiently attrac-

272. Edmond, 531 U.S. at 53-54 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist identified the source of this test as “a distinct area of Fourth Amendment jurisprudence relating to the searches of homes and businesses,” which he then identified as the “special needs doctrine.” Id. (Rehnquist, C.J., dissenting).

273. See supra notes 219-55 and accompanying text.


275. Edmond, 531 U.S. at 42.

276. See United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989) (in two-month period, seventy-seven roadblocks were established in one police district in the District of Columbia as part of “Operation Cleansweep” to “control the traffic congestion that resulted from street drug sales”; court upholds searches as having “main purpose” of allowing police to regulate vehicular traffic by checking drivers' licenses and vehicle registrations; police acknowledged they were hopeful of “halo” effect of deterring drug trafficking).
tive to law enforcement to motivate frequent checkpoints.\textsuperscript{277} Relying on the possibility that government officials will be dissuaded by practical difficulties or resource limitations seems an abdication of the Court's responsibility to protect Fourth Amendment rights, but even that protection depends, in part, on how carefully the Court will police for improper motives in establishing the checkpoints. If law enforcement agencies can set up license and registration checkpoints in the hope of also catching some drug traffickers—the classic "mixed motive" situation—the Court's new limit will not have changed the calculus on whether checkpoints are worth the effort. The Court's track record of dealing with pretext in other contexts suggests rigorous policing for pretext is unlikely.

In \textit{Edmond}, the state argued that "prior cases preclude an inquiry into the purposes of the checkpoint program."\textsuperscript{278} The state was relying on the Court's decisions in \textit{Whren} and \textit{Bond}, in which the Court held that prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."\textsuperscript{279} To justify imposing a purpose test, Justice O'Connor pointed out that in \textit{Whren} the Court had expressly distinguished "cases where we had addressed the validity of searches conducted in the absence of probable cause," and cited the cases \textit{Whren} had distinguished: two inventory cases and \textit{New York v. Burger}, the auto junkyard inspection case.\textsuperscript{280} Justice O'Connor made the point that in those cases the Court had warned against the state utilizing such searches as a pretext to hide a "purely investigative purpose" or as a "pretext for gathering evidence of violations of the penal laws."\textsuperscript{281} The Court concluded, "\textit{Whren} therefore reinforces the principle that, while 'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, \textit{Whren} does not preclude an inquiry into programmatic purpose in such contexts."\textsuperscript{282}

While the Court may be correct to distinguish \textit{Whren} pretext issues from an inquiry into the programmatic purpose of a suspicionless

\textsuperscript{277} See \textit{Lidster}, 540 U.S. at 426 (concluding an "\textit{Edmond}-type rule" unnecessary to prevent an unreasonable proliferation of police checkpoints of the type in question because "[p]ractical considerations [of] limited police resources and community hostility to traffic tieups seem likely to inhibit any such proliferation. . . .")

\textsuperscript{278} \textit{Edmond}, 531 U.S. at 45.

\textsuperscript{279} \textit{Id}.

\textsuperscript{280} \textit{Id}.


\textsuperscript{282} \textit{Id}. at 45-46.
search scheme—which I will label "institutional pretext"—such an inquiry into programmatic purposes raises additional problems. Foremost, if the Court is willing to undertake such an inquiry into improper purpose and expects lower courts to do so, a clear definition of the improper purpose is imperative. Although the Court apparently believes its new distinction between a "law enforcement purpose" and a purpose "to advance the general interest in crime control" is clear, lower courts may be as confused as Chief Justice Rehnquist claimed to be. More importantly, once the improper purpose is defined, when does such an improper purpose invalidate a scheme? The Court explained that "our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue." But those cases suggest very little scrutiny of the government purpose motivating the scheme. In inventory cases, the Court will only strike down a search as improper if it finds bad faith or that the sole purpose of the search was investigatory. Similarly, in New York v. Burger, identified by Whren and Edmond as a case supporting an inquiry into "institutional pretext," the Court seemed to impose a similar "sole purpose" test. The Court chastised the lower court for not recognizing that a proper scheme could have dual motives.

The Court in Edmond likely cited the inventory cases and Burger simply to support the notion that an inquiry into programmatic purpose is appropriate, not as examples of the level of inquiry or the proper test for institutional pretext. The Court nominally imposed a primary purpose test, not a sole purpose test. The Court ruled that the secondary purposes advanced by the state of keeping impaired motorists off the road and verifying licenses could not save the scheme, which they presumably would under a "sole purpose" pretext test. If it permitted the secondary purposes to legitimize the checkpoint, the Court feared law enforcement authorities would be able "to establish checkpoints for virtually any purpose so long as they also included a

283. This could be termed a concern for "institutional pretext" versus the individual subjective motivation pretext with which the Court dealt in Whren.
284. See United States v. Kincade, 379 F.3d 813, 825 (9th Cir. 2004) (referring to Edmond and Ferguson and concluding "the Court's more recent 'special needs' cases have emphasized the absence of any law enforcement motive underlying the challenged search and seizure" (emphasis added)), cert. denied, 544 U.S. 924 (2005). And in the Court's very next suspicionless search case, Justice Stevens, writing for the majority, used the terms interchangeably. See infra notes 300-10 and accompanying text.
285. Edmond, 531 U.S. at 47.
license or sobriety check."\textsuperscript{288} That is precisely what was argued in the \textit{Whren}-type pretext cases—that officers could stop anyone for any purpose so long as they included a routine traffic violation—and also in the "institutional pretext" cases to which the Court purported to look for authority. But in those cases, despite the potentially improper motive, the fact that the objective intrusion was no greater than could be accomplished legally with a proper purpose convinced the Court to uphold the intrusions. In \textit{Edmond}, the Court seems concerned not just with the objective intrusion, but with the motivation behind the intrusion and how often citizens are subjected to it.\textsuperscript{289} But in a footnote, the Court refused to rule out the possibility that it would be permissible for police to "expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car."\textsuperscript{290} If the Court is willing to permit that, the "primary purpose" test becomes, in effect, a "sole purpose" test, and the "institutional pretext" inquiry will be no more effective than the traditional pretext inquiry in cases like \textit{Whren}.\textsuperscript{291} It suggests the only mistake the City of Indianapolis officials made was being blatant about their desire to catch

\textsuperscript{288} \textit{Edmond}, 531 U.S. at 46.
\textsuperscript{289} \textit{Id.} at 47.
\textsuperscript{290} \textit{Id.} at 47 n.2.
\textsuperscript{291} See United States v. Faulkner, 450 F.3d 466 (9th Cir. 2006) (upholding U.S. Park Service "informational checkpoint" set up partly in response to complaints about intoxicated motorists, increased litter, illegal fires, underage consumption of alcohol and controlled substances, and gang activity and finding primary purpose was to provide information to visitors to the recreation area of the regulations governing its use, which include but are not limited to the possession or consumption of alcohol); United States v. Green, 293 F.3d 855 (5th Cir. 2002) (upholding a "Force Protection Vehicle Checkpoint" operated by military police to inspect vehicles and make sure they had valid license, registration, and proof of insurance, finding the purpose of this checkpoint was not the "general interest in crime control," but the more narrow purpose "to protect a military post, distinct from a general law enforcement mission"); United States v. Davis, 143 F. Supp. 2d 1302 (M.D. Ala. 2001) (upholding roadblock set up by an intergovernmental drug enforcement task force that included law enforcement officials from the federal Drug Enforcement Administration ("DEA"), the United States Marshal's Service, the Alabama Bureau of Investigation, the Lee County Sheriff's Department, and the Opelika City Police Department as part of a comprehensive operations plan to arrest six of eight individuals named in two federal indictments issued the previous week); Wrigley v. State, 546 S.E.2d 794 (Ga. Ct. App. 2001) (upholding roadblock set up by the Motorcycle Squad of the City of Atlanta Police Department as a part of "Operation Street Sweep," a "department-wide operation aimed at cleaning the streets of crime," because the primary purpose was checking for driver's licenses and insurance cards and the presence of the DUI countermeasures team suggested a secondary purpose of detecting drunk drivers); Burns v. Commonwealth, 541 S.E.2d 872 (Va. 2001) (upholding a roadblock with a primary purpose not simply to investigate ordinary criminal wrongdoing but specifically designed to investigate a particular murder that had recently occurred in the area where the roadblock was placed). \textit{But see State v. Abell}, 70 P.3d 98 (Utah 2003) (finding "constitutionally infirm" a checkpoint ostensibly established as a drivers' license check, but which included a half-dozen other checks unrelated to driver license violations, including alcohol and/or controlled substance violations).
drug traffickers. Had they set up the scheme with the purpose of checking licenses and registrations, even if they used virtually identical procedures, the checkpoint may have been permissible. In addition to suggesting a weak institutional pretext inquiry in future cases, the Court’s use of “special needs” and other suspicionless search cases—including inventory cases—as authority justifying an examination of the government’s purpose for a scheme further blurs the line the Court appeared to be attempting to draw between these cases and traffic checkpoint cases. The Court treats different “classifications” or categories differently for some purposes, but feels free to rely on cases across the spectrum of suspicionless search classifications when it suits its purpose.

The Court did little to clarify the situation when it next addressed, and struck down, a suspicionless search scheme in Ferguson v. City of Charleston. Ferguson involved a challenge to a policy developed by the staff of a public hospital in Charleston, South Carolina. Concerned about an apparent increase in the use of cocaine by patients receiving prenatal care, the hospital began ordering drug screens on the routine urine samples taken in the course of providing prenatal care for maternity patients who were suspected of using cocaine. Patients who tested positive were referred to the county substance abuse commission for counseling and treatment. When the incidence of cocaine use did not appear to change, the staff approached the Charleston Solicitor to offer the hospital’s cooperation in prosecuting mothers whose children tested positive for drugs at birth. The re-

292. See Thomas K. Clancy, The Fourth Amendment’s Concept of Reasonableness, 2004 UTAH L. REV. 977, 1025 (2004) (nothing in the Court’s opinion in Edmond prevents Indianapolis from simply relabeling the checkpoint and conducting the same screening for drugs). Although the case did not involve a suggestion of an improper purpose to detect evidence of criminal offenses, in Chandler v. Miller, 520 U.S. 305 (1997), the Court revealed a similar approach to ferreting out an improper purpose. While it struck down a drug testing scheme for candidates for elected office because the government need was “symbolic, not ‘special,’” the Court noted that “Georgia’s singular drug test for candidates is not part of a medical examination designed to provide certification of a candidate’s health, and we express no opinion on such examinations,” Id. at 323, suggesting that the Georgia officials’ only mistake may have been being too blatant about their desire to prevent drug users from being elected to office as opposed to having an interest in the health of those elected to office, an interest that included a concern about drug use.

293. See Edmond, 531 U.S. at 47 (“While reasonableness under the Fourth Amendment is predominately an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.”).

294. Justice Rehnquist expressed grave concern over the blurring of the line between traffic checkpoint cases and special needs cases. Edmond, 531 U.S. at 53-56 (Rehnquist, C.J., dissenting).

sult of a series of meetings and a task force on this issue was the development of "Policy M-7." 296

The policy set forth criteria to determine which patients should be tested for cocaine through a urine drug screen and provided for education and referral to a substance abuse clinic for patients who tested positive. It also added the threat of law enforcement intervention in order to enhance the effectiveness of the program. Patients who tested positive during pregnancy were to be arrested only if the patient tested positive a second time or if she missed an appointment with a substance abuse counselor. 297 Patients who tested positive for drug use after labor were to be arrested immediately. 298 Ten women who received obstetrical care at the hospital and were arrested after testing positive for cocaine challenged the policy. They claimed that the warrantless and nonconsensual drug tests were conducted for criminal investigatory purposes and were unconstitutional searches. 299

Justice Stevens, writing for the majority, began his opinion, as did Justice O'Connor in Edmond, by focusing on the government purpose motivating the scheme. 300 But Justice Stevens expressed concern with a search conducted for "law enforcement purposes," the precise purpose Justice O'Connor had insisted in Edmond was not the relevant purpose. In the very first sentence, he described the Court's task as deciding "whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search. . . ." 301 Throughout his opinion, Justice Stevens frequently described the purpose that concerned the Court as a "law enforcement purpose," occasionally using "ordinary crime control" purpose interchangeably. Terminological inexactitude was back. If Justice O'Connor believed her distinction between "law enforcement purposes" and "ordinary crime detection" was clear—and important—Justice Stevens did not seem to appreciate the distinction. 302 After describing the program in question, Justice Stevens began his analysis by distinguishing the case from the "four pre-
previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." He explained the present case was different, in part, because "the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients. ..." In Justice Stevens' view, that meant "the invasion of privacy in this case is far more substantial than in those cases."

But the "critical difference" between the present case and the previous cases, according to Justice Stevens, "lies in the nature of the 'special need' asserted as justification for the warrantless searches." In the previous cases, the justification for the warrantless, suspicionless search was a government interest "divorced from the State's general interest in law enforcement." In a footnote, Justice Stevens explained that the "'special needs' doctrine" was an exception to the general rule that a search must be based on individual suspicion of wrongdoing, and had "been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement." Again Justice Stevens was relying on a "law enforcement" purpose as a dividing line, something Justice O'Connor in Edmond denied the Court was doing or had done in previous cases. In Edmond, Justice O'Connor explained the improper purpose was not a "law enforcement" purpose, but an "ordinary crime control" purpose. Arguably, the testing in Ferguson could be characterized as being for ordinary crime control purposes, but even so, Justice Stevens did not articulate such a purpose or rely on it as Justice O'Connor had done in Edmond. Either the distinction was lost on Justice Stevens or he believed different tests applied to special needs and to traffic checkpoint cases. Even if different tests applied to the different types of cases, that would not explain Justice Stevens using the terms interchangeably. Later in the opinion he described the purpose of the scheme to be "ultimately indistinguishable from the general interest in crime control," using Justice O'Connor's standard from Edmond and citing

303. Id. at 77. He later referred to "the closely guarded category of 'special needs.'"
304. Id. at 77.
305. Id. at 78. Apparently this was so because in the previous cases "there was no misunderstanding about the purpose of the test or the potential use of the tests, and there were protections against the dissemination of the results to third parties." Id. Justice Scalia, in his dissent, made the point that the idea that dissemination to third parties constituted a greater intrusion was contrary to the Court's precedent. Ferguson, 532 U.S. at 95 (Scalia, J., dissenting).
306. Id. at 79.
307. Id.
308. Id. at 79 n.15.
309. Id. at 81.
that case. But he went on to state that in the present case, "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."310 In response to the state's argument that "in essence . . . their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one," the Court rejected the purpose articulated by the state and, citing Indianapolis v. Edmond, instead found that the purpose served by the searches "is ultimately indistinguishable from the general interest in crime control."311 In the Court's view, the record demonstrated a focus on "the arrest and prosecution of drug-abusing mothers."312 The policy incorporated the police department's operational guidelines and devoted attention to chain of custody, the range of possible criminal charges, and the logistics of police notification and arrest, while nowhere discussing different courses of medical treatment other than treatment of the mother's addiction. Moreover, the prosecutors and police were extensively involved throughout the application and development of the policy.313

While conceding that the "ultimate goal" of the program may have been to get the women in question into substance abuse treatment, the Court again refused to evaluate suspicionless search and seizure schemes on their ultimate purpose. Instead, the immediate objective or primary purpose was the crucial factor.314 The Court determined that the "immediate objective" of the searches in the present case was to generate evidence for law enforcement purposes. Given this "primary purpose," the Court held that "this case simply does not fit within the closely guarded category of 'special needs.'"315

The scheme in Ferguson looks an awfully lot like the scheme in Sitz and Martinez-Fuerte. In each case the government had a beneficent—or at least non-criminal—ultimate goal, but the immediate objective of the traffic checkpoints was to "generate evidence for law enforcement purposes." Recognizing this, the Court attempted to distinguish those cases in a footnote. First, the Court stated, "those cases involved roadblock seizures, rather than 'the intrusive search of the body or the home.'"316 Second, the Court pointed out that it had "explicitly distinguished the cases dealing with checkpoints from those dealing with 'special needs.'"317 While the Court's first point focusing

310. Id. at 80.
311. Id. at 81.
312. Id. at 82.
313. Id. at 82.
314. Id. at 82-83.
315. Id. at 84.
316. Id. at 83 n.21.
317. Id.
on the level of intrusion may have merit, the second point is completely unpersuasive. When the Court “explicitly distinguished” the traffic checkpoint cases in *Sitz*, it did so without any justification or explanation. The Court has never explained why traffic checkpoint cases should be treated jurisprudentially differently than the “special needs” cases. The Court certainly relied heavily on the special concerns of immigration enforcement and protecting highway safety when deciding the cases, much as it would if they were special needs cases. But more damning, when the Court dealt with the precise issue of government purpose in *Edmond*—a traffic checkpoint case—it relied on the special needs and administrative search cases to support imposing a government purpose test. And although Justice Stevens felt it necessary to distinguish the traffic checkpoint cases in this part of his opinion, he earlier had cited *Edmonds* to justify imposing the primary purpose test in the special needs cases: “In this case, a review of the M-7 policy plainly reveals that the purpose actually served by the searches ‘is ultimately indistinguishable from the general interest in crime control.’” If the same primary purpose test is applicable to both special needs cases and the traffic checkpoint cases, the traffic checkpoint cases must be relevant as precedent, at least on this precise issue.

But the Court’s distinction fails even when analyzed in light of the other special needs cases. Justice Kennedy wrote a concurring opinion to make the point that the distinction the majority made between immediate purpose and ultimate goal “lacks foundation in our special needs cases.” In his view, “[a]ll of our special needs cases have turned upon what the majority terms the policy’s ultimate goal.” Thus, in *Skinner*, the Court identified as the special need the ultimate goal of regulating the conduct of railroad employees to insure safety, rather than the collection of evidence of drug and alcohol use by employees. Similarly, in *Von Raab* and *Veronia*, the Court focused on the seemingly ultimate goals of deterring drug use among certain U.S. Customs employees and deterring drug use by schoolchildren,

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318. This led many lower courts to understand these traffic checkpoint cases were, in fact, special needs cases. See Nicholas v. Goord, 430 F.3d 652, 661 (2d Cir. 2005) (discussing checkpoint cases as special needs cases), cert. denied, 127 S. Ct. 384 (2006); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005); Sundby, 74 Miss. L.J. at 520 (discussing *Sitz* as a special needs case).

319. *Ferguson*, 532 U.S. at 81 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 34 (2000)). See Sundby, 74 Miss. L.J. at 532 (stating the *Ferguson* majority worked hard to distinguish *Sitz*, viewing it as a “checkpoint case” rather than a “special needs” case, even though the majority in *Edmonds* had relied upon the special needs cases to strike down the narcotics checkpoint based on the primary purpose).

320. *Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring).

321. Id. (Kennedy, J., concurring).
particularly student-athletes. In each case, the immediate goal was the collection of evidence for disciplinary action, albeit not criminal sanctions.\footnote{322}

The majority emphasized that the criminal law enforcement purpose for collecting the samples was a crucial factor, insisting “in none of our previous cases have we upheld the collection of evidence for criminal law enforcement purposes.”\footnote{323} And the Court dismissed the fact that the collection of the samples also served a therapeutic purpose. In the Court’s view, the “extensive involvement of law enforcement and the threat of prosecution were . . . essential to the program’s success,” and therefore trumped the therapeutic purpose.\footnote{324} Having drawn this line, the Court was compelled to distinguish \textit{New York v. Burger} in which it had chastised the lower court for failing to recognize a state could have dual motives for designing a scheme to address a societal problem. It distinguished the case by pointing to the lower expectation of privacy enjoyed by operators of the commercial premises in that case, to the “plain administrative purposes” that motivated the scheme, and to the fact that the “discovery of evidence of other violations would have been merely incidental.”\footnote{325} Because it also relied on “extensive entanglement of law enforcement” to strike down the Charleston scheme, the Court was forced to distinguish the traffic checkpoint cases as well. It did so by pointing to the fact that “those cases involved roadblock seizures, rather than ‘the intrusive searches of the body or the home’” and by again relying on the fact that “the Court explicitly distinguished the cases dealing with checkpoints from those dealing with ‘special needs’” in \textit{Sitz}.\footnote{326}

\textit{Ferguson} certainly muddies the waters of the Court’s suspicionless search jurisprudence.\footnote{327} It does so first by returning to “terminological inexactitude,” describing the purpose it finds improper both as “for law enforcement purposes” and later as “the general inter-
est in crime control,” two descriptions Justice O'Connor insisted in *Edmond* were different in important ways. And in order to justify its new concern with “mixed motive” schemes and extensive law enforcement involvement, the Court was forced to “fracture” its suspicionless search jurisprudence by distinguishing traffic checkpoint cases, a probation search case, and an administrative search case, despite treating all of these cases as relevant authority when it first struck down a scheme based on government purpose in *Edmond*. The result is a suspicionless search and seizure quagmire.

IX. THE PROBLEM WITH A PURPOSE TEST: A LIMIT WE SHOULD LIVE WITHOUT

For those who believe the Court has not sufficiently protected citizens’ rights against unreasonable search and seizure, particularly in the area of suspicionless searches and seizures, it is tempting to applaud the Court’s recent cases imposing limits on the government’s power to carry out such searches. Unfortunately, the Court’s primary purpose test is unlikely to enhance effectively the protections enjoyed by citizens in this area.

First, as applied by the Court, it is a very confusing test. The Court has used a variety of labels to describe the purpose it finds improper. Given the fractured state of the Court’s suspicionless search and seizure jurisprudence, the purpose to which the Court refers takes on different meanings in different contexts. In the traffic checkpoint cases, the Court rejected drawing the line between permissible and impermissible schemes based on whether the checkpoints were primarily motivated by “law enforcement purposes,” and insisted on drawing the line at suspicionless search schemes motivated by a primary purpose of “advancing the general interest in crime control.”

328. In its most recent decision addressing suspicionless searches, *Board of Education v. Earls*, 536 U.S. 822 (2002), the Court upheld a policy requiring all students engaged in competitive extracurricular activities to be tested for drugs. The decision included no discussion of primary or ultimate purpose or pretext. Because the Court had previously found the school context to constitute special needs, debate focused on application of the balancing test—the extent of the invasion of privacy and the nature and immediacy of the government’s concerns motivating the policy. If the Court had earlier created a quagmire of the suspicionless search exception, there was no evidence of it in *Earls*. The case perhaps is an example of how all these cases should be decided—a debate about the infringement of privacy and whether the infringement is justified by governmental interests, rather than a concern with labels. See infra notes 358-62 and accompanying text.

329. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 n.1 (2000) (“The . . . dissent erroneously characterizes our opinion as resting on the application of a ‘non-law enforcement primary purpose test.’ Our opinion nowhere describes the purposes of the *Sitz* and *Martinez-Fuerte* checkpoints as being ‘not primarily related to criminal law enforcement.’”)(citations omitted)).
was a distinction that seemed to elude Justice Rehnquist. In the very next case, when dealing with a drug testing scheme that the Court characterized as a “special needs” case, the Court drew the line at the point it had previously rejected, describing as permissible those schemes “designed to serve non-law enforcement ends.” The absence of a unified or comprehensive suspicionless search and seizure jurisprudence means the permissible purpose changes within the category—or among the subcategories—often with no explanation, and allows the Court to simply change and distinguish categories at its convenience. In Ferguson, the Court again referred to “category” in the singular, but was forced to distinguish Griffin, Burger, Sitz and Martinez-Fuerte in order to justify its holding. The concept of “category” suggests more consistent treatment of cases within the category.

Not only does the dividing line between a permissible and impermissible purpose fluctuate, the characterization of the “primary” purpose seems to change. The Court in Edmond deemed traffic checkpoints set up to detect and arrest individuals smuggling immigrants or driving under the influence of alcohol to have the “ultimate purpose of arresting those suspected of committing crimes” and to “primarily... serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.” But the Court seemed to reverse the ultimate and primary purposes when assessing a drug testing scheme set up to detect cocaine use in pregnant women. That scheme was deemed to have “the ultimate goal... to get the women in question into substance abuse treatment [to protect the health of the fetus],” but the “primary purpose... to use the threat of arrest and prosecution to force women into treatment....”

Determining the relevant primary purpose is crucial because the Court claims it is willing to police for institutional pretext. In most

330. It likewise eluded some lower courts. See United States v. Kincade, 379 F.3d 813, 825 (9th Cir. 2004) (referring to Edmond and Ferguson and concluding “the Court’s more recent ‘special needs’ cases have emphasized the absence of any law enforcement motive underlying the challenged search and seizure”), cert. denied, 544 U.S. 924 (2005).


332. See Sundby, 74 Miss. L.J. at 533 (labor necessary to distinguish past cases highlights the difficulty and potential confusion of using a dividing line that turns on whether the “immediate objective” was gathering of evidence).

333. The importance of the “category” was further diminished in Samson v. California, 126 S. Ct. 2193 (2006), where the Court upheld a suspicionless search scheme utilizing its “ordinary Fourth Amendment approach.”

334. Edmond, 531 U.S. at 41-42.

335. Ferguson, 532 U.S. at 82-83. The Court also described the “immediate objective” of the searches to be “to generate evidence for law enforcement purposes,” Ferguson, 532 U.S. at 83, which is the precise objective it described as the “ultimate purpose” in Edmond. Edmond, 531 U.S. at 42.
suspicionless search and seizure schemes, mixed motives will be present. The Court asserts that it is imposing the primary purpose test “to prevent such intrusions from becoming a routine part of American life,” but the Court itself recognizes that in order to prevent that from occurring, it must be willing to police for pretext in mixed motive cases. If government schemes generally are upheld in mixed motive cases, the Court’s institutional pretext inquiry will provide little protection. But the Court’s track record dealing with pretext—and even its recent opinions—suggests such careful scrutiny is unlikely.

In Edmond, the Court expressed optimism about overcoming “the challenges inherent in a purpose inquiry” that was in stark contrast to its reaction to the suggestion for a similar type of “institutional pretext” inquiry in Whren v. U.S. As an alternative to the subjective intent inquiry the defendants in Whren sought (and which the Court rejected), the defendants suggested what they asserted was an objective inquiry: 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. In response, the Court expressed reluctance to attempt to divine a “collective consciousness”: “Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act upon the traffic violation.” One wonders how willing the Court will be “to plumb the collective consciousness” of the officials who devised a suspicionless search and seizure scheme to discover “institutional pretext” and strike down the scheme.

To truly ferret out institutional pretext requires an inquiry similar to that rejected in Whren. When citizens challenge a scheme on the basis that the “primary” purpose is not the “regulatory,” “administrative,” or “non-criminal” purpose the government asserts, but a “criminal” or “law enforcement” purpose the government insists is secondary, the Court will be forced to assess whether the government’s

336. Edmond, 531 U.S. at 42.
337. Ferguson, 532 U.S. at 84 (“Because law enforcement involvement always serves some broader social purpose or objective, . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.”); Edmond, 531 U.S. at 42, 46 (“If we were to rest the case at this high level of generality, there would be little check on the ability of authorities to construct roadblocks for almost any conceivable law enforcement purpose”; if the checkpoint program can be justified by a lawful secondary purpose, “law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.”).
claimed concern with the permissible purpose it asserts is believable. A relevant inquiry would seem to be whether reasonable government officials would take such action based on such a concern.341 If the Court is unwilling to "plumb the collective consciousness" in this manner to divine the true primary purpose, and instead accepts whatever purpose the government professes to be its primary one, the protection against institutional pretext will be lost.342 Unfortunately, this is the level of inquiry suggested by some of the language in the Court's decisions.

Prior to Whren, one leading commentator argued that pretextual searches were unlawful and pointed to statements in the Court's opinions similar to those in the Court's suspicionless search and seizure cases suggesting a showing of pretext would change the result.343 Proponents of that view were sorely disappointed to be told in Whren that they had misread the cases.344 They had hoped the Court would

341. Galberth v. United States, 590 A.2d 990, 993, 997 n.9 (D.C. 1991) (holding checkpoint unconstitutional in part because trial judge found the primary purpose of roadblock was to deter drug traffic and violence in connection with Operation Clean Sweep and that traffic issues alone would not have caused the police to set up a roadblock).

342. Compare United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989) (upholding searches established in the District of Columbia as part of “Operation Cleansweep” to control traffic congestion that resulted from street drug sales as having “main purpose” of allowing police to regulate vehicular traffic by checking drivers’ licenses and vehicle registrations despite police acknowledging hope of “halo” effect of deterring drug trafficking), with Galberth v. United States, 590 A.2d 990, 993, 997 n.9 (D.C. 1991) (holding checkpoint established in District of Columbia as part of “Operation Cleansweep” unconstitutional in part because trial judge found the primary purpose of roadblock was to deter drug traffic and violence and that traffic issues alone would not have caused the police to set up a roadblock).


We are reminded that in Florida v. Wells, 495 U.S. 1, 4 (1990), we stated that “an inventory search” must not be a ruse for a general rummaging in order to discover incriminating evidence”; that in Colorado v. Bertine, 479 U.S. 367, 372 (1987), in approving an inventory search, we apparently thought it significant that there had been “no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation”; and that in New York v. Burger, 482 U.S. 691, 716-17, n.27 (1987), we observed, in upholding the constitutionality of a warrantless administrative inspection, that the search did not appear to be “a ‘pretext’ for obtaining evidence of . . . violation of . . . penal laws.”

Whren, 517 U.S. at 811 (footnotes omitted).

344. Whren, 517 U.S. at 811 (“[O]nly an undiscerning reader would regard these [prior] cases as endorsing the principle that ulterior motives can invalidate police con-
police against pretext in mixed motive cases, only to learn that the Court's early expressions of concern for pretextual searches related only to cases where the sole motivation was an improper criminal investigatory motive, or where the permissible basis for action was fabricated.\textsuperscript{345} Although the Court has nominally imposed a "primary purpose" test in the suspicionless search and seizure cases, as discussed above, there are indications that the test the Court has in mind is unlikely to provide significantly more scrutiny or protection than the sole purpose test eventually adopted in other contexts.

Although the primary purpose test imposed in \textit{Edmond} and \textit{Ferguson} nominally suggests greater scrutiny than the sole purpose test or the treatment of mixed motives in the administrative search and inventory search cases, in both cases the Court, while asserting an inquiry into purpose was appropriate, included a caveat in a footnote that leaves the door open for the Court to engage in very limited scrutiny of whatever purpose the government labels primary.\textsuperscript{346} If that is the end result of the primary purpose test, it will be effectively converted into a sole purpose test.\textsuperscript{347}

Even if the Court surprises by policing suspicionless search schemes based on government purpose, such an inquiry is fundamentally flawed. It revives the anomaly the Court has insisted for years it is trying to avoid—providing more protection to those suspected of criminal behavior than to ordinary, innocent citizens. Time and again, the Court has made the point that the Fourth Amendment pro-

\textsuperscript{345} See Butterfoss, 79 Ky. L.J. at 13-46.

\textsuperscript{346} See \textit{Edmond}, 531 U.S. at 47 n.2 ("we need not decide whether a state may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics."); \textit{Ferguson}, 532 U.S. at 85 n.24 ("We do not address a case in which doctors independently complied with reporting requirements. Rather, as we point out above, in this case, medical personnel used the criteria set in [the policy] to collect evidence for law enforcement purposes, and law enforcement officers were extensively involved in the initiation, design, and implementation of the program."). Chief Justice Rehnquist noted a similar "end around" might be accomplished in \textit{Chandler}. Chandler v. Miller, 520 U.S. 305, 327-28 (1997) (Rehnquist, C.J., dissenting). \textit{See also}, Sundby, 74 Miss. L.J. at 520, 526 (discussing Chief Justice Rehnquist's position in \textit{Chandler} and describing the Court's response to a possible "end around" in footnote two in \textit{Edmond} as "rather tepid' after its earlier and bolder warnings in the opinion against ruses and pretexts"); Sundby, 74 Miss. L.J. at 534 (discussing the concurring and dissenting opinions in \textit{Ferguson} that suggest the only part of the program the city got wrong was the order in which it took the steps of drug testing and involving the police; Professor Sundby notes that if those opinions are correct, the \textit{Ferguson} holding is reduced to more form over substance).

\textsuperscript{347} See Sundby, 94 \textit{COLUM. L. REV.} at 1786 n.132 (discussing administrative searches and making the point that despite the benign label of "administrative," there is great potential for abuse if the government is permitted to piggyback non-administrative objectives on top).
vides protection for everyone, especially the innocent. Yet drawing the line between permissible and impermissible suspicionless searches based on a law enforcement or crime detection purpose has precisely the effect of leaving law abiding citizens more vulnerable—it establishes as law the anomaly the Court has decried.\footnote{348}

It is a “bizarre turn of doctrinal events”\footnote{349} that the government is licensed to exercise more power to intrude on citizens’ lives when it is not seeking to ferret out criminal behavior.\footnote{350} As a law abiding citizen, the government purpose behind a government intrusion matters very little to me—it is the intrusion itself that concerns and bothers me. To use the traffic checkpoint as an example, I am irritated and inconvenienced by the fact that my ability to continue on my way is interfered with when I have done nothing to give the government reason to suspect me of wrongdoing. It is no comfort to me that the government intrusion is merely for a “regulatory” purpose. In fact, just the opposite may be true;\footnote{351} I am more likely to be bothered by a “non-criminal” intrusion. Catching criminals seems more important to me than checking licenses and registrations,\footnote{352} so I am more willing to understand and appreciate the need for the government to act especially since I am not a criminal. If the stop is for a regulatory purpose, I may be affected and inconvenienced to a greater extent. I do not have drugs in my car, but I may have forgotten my license, registration or insurance card, or they may have lapsed by a few days. While the consequences are unlikely to be grave, they will inconvenience me by costing me time and money.\footnote{354} And I am likely to be even more upset because “I wasn’t doing anything wrong” when the

\footnote{348.} See Schulhofer, 1989 Sup. Ct. Rev. at 114-115 (the most surprising aspect of the special needs doctrine is its return to the “remarkable premise” of \textit{Franks v. Maryland}); Clancy, 2004 Utah L. Rev. at 1025 (distinguishing between criminal and “non-criminal” is illusory and unwise, leading to anomaly identified in \textit{Camara}).

\footnote{349.} Schulhofer, 1989 Sup. Ct. Rev. at 88. \textit{See also}, \textit{Dressler, supra} note 22, § 19.01 nn.9-11 (“remarkable irony”).

\footnote{350.} Sundby, 94 Colum. L. Rev. at 1787 (stating the message that must be conveyed is that the Fourth Amendment is not just for the criminally accused); Schulhofer, 1989 Sup. Ct. Rev. at 163 (Fourth Amendment intended to safeguard the “dignity and security of the law-abiding public”).

\footnote{351.} Sundby, 72 Minn. L. Rev. at 434 (“[T]he fourth amendment’s threshold concern is with the intrusion itself and not the intrusion’s scope or the government’s motivation.”); Schulhofer, 1989 Sup. Ct. Rev. at 115 (reviewing historical evidence suggesting Framers more concerned with non-law enforcement searches).

\footnote{352.} Sundby, 72 Minn. L. Rev. at 434 (stating that when the government intrudes for a non-criminal purpose or benign purpose, its need to intrude is less urgent than when it intrudes for a criminal investigatory purpose).

\footnote{353.} This is especially so when the criminal investigation is of a particularly urgent nature, such as the examples set forth by Justice O’Connor in \textit{Edmond}. \textit{Edmond}, 531 U.S. at 47-48.\footnote{354.} The inconvenience may become fairly substantial. The officer may be unwilling to let me drive the car if I cannot produce the required documents, and may not permit
government discovered my errors. I am much less likely to complain if I am caught speeding and the license and registration offenses are discovered collateral to that. I am still inconvenienced and not happy, but I am less likely to feel I have been treated unfairly or the government has been overbearing. And a license and registration check in the middle of the day on my usual route to work or shopping or recreation certainly makes it seem that traffic checkpoints have become more “an everyday part of American life” than a sobriety checkpoint in the early morning hours in the vicinity of bars or a narcotics checkpoint along routes frequented by drug traffickers. Of course, implementing a rule that suspicionless schemes with a criminal purpose are unconstitutional does not mean those with a non-criminal purpose are necessarily constitutional, but focusing on the purpose makes such a result more likely. Justice Marshall warned of this in *Skinner*: “[T]he majority endorses the applicability of the Fourth Amendment to civil searches in determining whether a search has taken place, but then wholly ignores it in the subsequent inquiry into the validity of that search.”

If the Court is to provide the protection of the Fourth Amendment to all citizens, it needs to refocus its search and seizure jurisprudence. It needs a comprehensive and unified jurisprudence that provides a framework to analyze suspicionless search and seizure schemes by the government. The framework must be one that recognizes the significant intrusion involved in these schemes whatever their purpose and fairly balances the government interest and the interests of the law abiding citizen. The solution may lie in a model of Fourth Amendment jurisprudence suggested by Professor Sundby twenty years ago. Early in the Court’s struggle to determine when to apply the traditional warrant and probable cause approach to analyze government searches and seizures and when to turn to its newly crafted reasonableness/balancing approach, Professor Sundby proposed distinguishing between “initiatory intrusions” by the government and “responsive intrusions.” Recognizing this demarcation in assessing suspicionless search and seizures avoids many of the pitfalls identified in the Court’s suspicionless search and seizure jurisprudence.

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356. See *Dressler*, supra note 22, § 19.01 (line between criminal investigation and search and seizure designed primarily to serve non-law enforcement goals “is thin and, quite arguably, arbitrary”).

357. Sundby, 72 Minn. L. Rev. at 418-21.
First, it avoids the anomaly the Court has professed a desire to avoid but instead has made part of the law by bringing all suspicionless search and seizure cases into a single category. The unifying theme in administrative, regulatory, and drug tests, as well as traffic checkpoints, is that they are initiatory. The focus is on protecting others or society generally; the schemes are not conducted in response to a specific, perceived or reported offense, and are not aimed at catching the culprit who has committed such an offense. The Court already recognizes this distinction. In several cases it has justified excusing probable cause by explaining that the “traditional probable cause standard” is particularly “unhelpful” or “unsuited” in situations where the government is attempting to prevent hazardous conditions from arising. Recognizing the different character of government initiatory intrusions versus responsive intrusions allows the Court to develop a unified framework for analyzing such intrusions. Rather than treating similar intrusions differently based on the government purpose motivating the scheme, similar intrusions will be assessed using the same standard. Not only will the anomaly of providing greater protection to those suspected of a crime be avoided, such a test will encourage focusing on a careful assessment of whether the scheme can be justified, rather than having the determination turn on a label. At present, there is the notion that a scheme with a “non-criminal” purpose is less intrusive and therefore more likely lawful. Focusing on the initiatory nature of the intrusion allows the Court to recognize that such searches, contrary to enjoying a presumption of reasonableness, present a greater risk to the “right to be let alone,” which the Court should be more concerned with than the right “not to get caught.” With the presumption of permissibility removed, the Court will have to undertake a more careful balancing to determine whether to uphold the scheme. Hopefully the focus will be on what is important—the intrusion on privacy—rather than on labels. Although the Court currently often includes the intrusion on privacy in its assessment of government schemes, it is a secondary consideration. When the Court is boxed in by its labels, it often distinguishes searches it has upheld by explaining they involved situations in which the individuals involved enjoyed a lesser expectation of privacy. The

358. Or, in some cases, about to commit a specific offense. Terry v. Ohio, 392 U.S. 1 (1968).
360. See Ferguson, 532 U.S. at 78 (stating intrusion “far more substantial” due to purpose to turn results over to law enforcement for prosecution).
361. See Wright, 93 Yale L.J. at 1136 (“[B]ecause the Fourth Amendment protects privacy interests rather than the interest in avoiding punishment, purpose is not relevant.”).
privacy analysis should be primary rather than secondary. Rather than government purpose being the disqualifying factor, initiatory search and seizure schemes should be upheld only in situations where individuals enjoy substantially reduced expectations of privacy and procedures exist to provide the safeguards normally provided by the warrant requirement and the requirement of individualized suspicion.

Because the Court has utilized expectation of privacy as a factor, we have some indication of how elevating this factor to primary status may affect the cases. Hopefully, the fact that government purpose is removed from the equation will cause the Court to reassess its position in some of these cases. If the Court is willing to accept that an initiatory search scheme poses a grave threat to citizens' Fourth Amendment interests even if for a non-criminal purpose, then the fact to which the Court so often points—that the samples or evidence obtained will not be turned over to law enforcement—does not initially tip the balance in the government's favor. Thus, unless the intrusion on privacy is otherwise truly minor, the scheme should be in jeopardy of being struck down. The presumption that such searches are extraordinary will return and they will have to be justified more convincingly than simply deciding they are justified by where they fall on the spectrum of "reasonable" searches, some requiring a warrant and probable cause, some only probable cause, some reasonable suspicion, and some no quantum of individualized suspicion. The best example of how this new emphasis may change the Court's analysis is in the traffic checkpoint cases.

After upholding traffic checkpoints "designed to intercept illegal aliens" and "aimed at removing drunk drivers from the road," the Court in Edmond struck down a checkpoint with the "primary purpose of interdicting illegal narcotics." Although the Court admitted that the "challenged [government] conduct may be outwardly similar," it found the checkpoint impermissible because the primary purpose of the checkpoint was to pursue general crime control purposes. The Court did not deny the "gravity of the threat" posed by the "severe and intractable nature of the drug problem," but unlike in the case of the immigration and sobriety checkpoints, it was unwilling to engage in a balancing of the interests. Because the purpose was primarily gen-

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362. But see MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (rejecting a "threshold" requirement for application of the special needs exception that the subject of the search possesses a reduced expectation of privacy).
363. See Sundby, 72 Minn. L. Rev. at 401-03, 402, n.64 (suggesting a similar presumption should be overcome to excuse the requirement of probable cause and permit a search on reasonable suspicion).
364. Edmond, 531 U.S. at 32.
365. Id. at 47.
366. Id. at 42.
eral crime control, the stops required some quantum of individual suspicion. The only reason the Court gave for imposing such different treatment on “outwardly similar conduct”—other than the fact that it had never upheld a scheme for such a purpose—was that unless it drew the line at roadblocks with such a purpose, “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”

But if the Court simply wanted to limit the number of such intrusions, it could have drawn the line almost anywhere. And given its apparent willingness to uphold “mixed motive” checkpoints, the line it drew was likely to be ineffective in limiting the number of checkpoints to which citizens are subjected. Thus the Court is able to profess a willingness to protect citizens from this perceived evil, but in reality will have provided little protection.

Under the proposed model, each of the checkpoints the Court assessed would be treated as initiatory and subjected to the same balancing of the interests. Conceivably the Court could distinguish among them, but given identical intrusions and important government interests in each case, and without the easy out of permitting those checkpoints established to advance interests other than “the general interest in crime control,” the Court would be forced to address the issue of whether law abiding citizens should be subjected to traffic checkpoints. Given the Court’s concern that these checkpoints not become a routine part of American life, which is consistent with its concern in earlier cases that citizens not be subjected to a search or seizure whenever they engage in “a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities,” the Court very well might rule traffic checkpoints impermissible. Several states have done so, and in his dissenting opinion in Edmond, Justice Thomas believed such a result may be the proper one, articulating a reasoning that may appeal to a

367. Id.
368. The “non-law enforcement” purpose test the Court imposed on the special needs cases has not kept drug testing from becoming something of an “everyday occurrence.” See Luna, 48 Duke L.J. at 876-878 nn.466-80 & 485-88 (documenting court decisions upholding drug testing of attorneys, automobile drivers, carpenters, clerks, computer specialists, custodians, federal executive branch employees, firefighters, health and safety inspectors, high school students, law enforcement officers, secretaries, soldiers, teachers, truck drivers/commercial vehicle operators, horse trainers, chemists, elevator maintainers, and cashiers; also documenting court decisions striking down drug testing of many of the same occupations).
369. See id. at 864-66 (suggesting possible different treatment under “anti-discrimination” and “individual sovereignty” models of the Fourth Amendment).
conservative Court. This approach would also alleviate the pretext issue. The incentive for government authorities to play games in articulating the primary purpose of the scheme would disappear.

A similar analysis might be applied to all drug testing cases. Again, whether to enhance railroad safety, combat a drug problem among teenagers, ensure the security of the government agency charged with interdicting drugs, or protect the health of an unborn child, each scheme would be classified as an initiatory scheme and subjected to the same balancing test. While all seek to further important government interests, it could be that the expectation of privacy for expectant mothers seeking pre-natal care would be recognized as greater than children in the school setting or workers in a highly regulated industry or in sensitive government jobs. In fact, while the Court in Ferguson blamed the law enforcement purpose behind the scheme in that case, given the importance of the goal and the similarity of the intrusion to those upheld in previous cases, the Court was forced to distinguish many of its previous cases based on the expectations of privacy involved.

If it seems radical to suggest the Court should abandon its fairly recently developed special needs doctrine and primary purpose test when evaluating suspicionless searches and seizures, one answer is that it may already have done so. In Samson v. California, when faced with a government scheme authorizing suspicionless searches of parolees by parole officers or police officers "at any time," the Court refused to analyze the case under the special needs doctrine, as it had the probation search in Griffin v. Wisconsin, "because our holding under general Fourth Amendment principles renders such an examination unnecessary." The Court diminished the importance of its numerous previous statements that the "category" of constitutionally permissible suspicionless searches was a "closely guarded" one, and that such searches were permissible only in "limited circumstances," explaining in a footnote that "although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be 'reasonable' under the Fourth Amendment."

372. "I am not convinced that Sitz and Martinez-Fuerte were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing." Edmond, 531 U.S. at 56 (Thomas, J., dissenting).
373. Ferguson, 532 U.S. at 83 n.21.
376. Samson, 126 S. Ct. at 2201 n.4.
Once again, the Court's statement may be true, but it seems disingenuous. Over several decades the Court had decided cases by first exploring whether the search in question fell within the "closely guarded category of constitutionally permissible suspicionless searches," which it explained included only limited circumstances. It never suggested there were other circumstances or, more importantly, that those circumstances permitted upholding suspicionless searches under "ordinary probable-cause Fourth Amendment analysis."377

Freed from the requirements of the special needs exception, including the requirement of a non-law enforcement or non-criminal purpose, the Court determined whether the search was reasonable "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."378 The Court recognized two important government interests—an interest in close supervision of parolees to promote successful completion of parole and reintegration into society and an interest in protecting society from criminal acts by reoffenders. The second interest, in essence, was an interest in ordinary crime control focusing on parolees, who the Court pointed out were more likely to engage in crime than the general population.379 On the other side of the ledger, the Court concluded that Samson, as a parolee subject to extensive conditions as part of his parole, "did not have an expectation of privacy that society would recognize as legitimate."380

Samson demonstrates the Court's facility for conveniently changing categories when that tack suits its purposes. With a non-law enforcement purpose obstacle standing in the way of upholding the search under the special needs exception that seemed to apply,381 the

377. See Edmond, 531 U.S. at 45 (finding the seizure at issue unconstitutional by emphasizing that the Court had recognized "only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion" and not suggesting the possibility that the seizure could be sustained under "general Fourth Amendment principles"). See also Nicholas v. Goord, 430 F.3d 652, 661-63 (2d Cir. 2005) (reading Edmond and Ferguson as limiting suspicionless searches to those justified by "special needs"), cert. denied, 127 S. Ct. 384 (2006).
379. Id. at 2200. See United States v. Kincade, 379 F.3d 813, 825 n.20 (9th Cir. 2004), ("At various points, Griffin explained that the focus of conditional release is controlling criminal recidivism—that is, the ordinary commission of ordinary crimes by ordinary criminals."), cert. denied, 544 U.S. 924 (2005).
381. In a similar case involving a probation search supported by reasonable suspicion that foreshadowed the Samson analysis and result, the Court explained, "Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose." United States v. Knights, 534 U.S. 112, 122 (2001).
Court simply switched categories to uphold the search.\(^{382}\) The Court offered no explanation as to why the search in question did not have to qualify within the limited circumstances the Court had previously delineated, or why a "general Fourth Amendment approach" was appropriate.\(^{383}\) This easy creation of a new category, if it can be called a category,\(^{384}\) again demonstrates the need for a unified suspicionless search and seizure jurisprudence that does not depend on labels to determine the proper analysis for assessing the constitutionality of the intrusion. In its early cases addressing the constitutionality of suspicionless searches and seizures, prior to creating any "categories" or "limited circumstances" of constitutionally permissible suspicionless searches or seizures, the Court treated such searches as exceptional and analyzed them by limiting them to situations in which the citizen enjoyed a lower expectation of privacy, in which the government interest was substantial, and where the practicalities of the situation and the balance of interests precluded insistence upon "some quantum of individualized suspicion" but other safeguards were in place "to assure that the individual's reasonable expectation of privacy is 'not subject to the discretion of the official in the field.'"\(^{385}\) Although the Court's finding in \textit{Samson} that parolees "d[o] not have an expectation of privacy that society would recognize as legitimate" may have doomed any claim that the search was unreasonable, the Court also seemed too easily to permit the government interests to overcome the need for "some quantum of individualized suspicion."\(^{386}\) While the early decisions required that the balance of interest be such that it precluded insistence upon individualized suspicion, the Court in \textit{Samson} merely found the California system that forgave such a require-


\(^{383}\) A similar approach in a similar probation case, \textit{United States v. Knights}, 534 U.S. 112 (2001), has led lower courts to struggle over which analysis to apply. This is particularly evident in the DNA sample cases where it has led to a split among the courts. \textit{See Nicholas}, 430 F.3d at 658-68 (applying the special needs analysis and documenting the split among the Circuits: the Second, Seventh, and Tenth Circuits have applied the special needs test; the Third, Fourth, Fifth, Ninth, and Eleventh Circuits have applied a general balancing test).

\(^{384}\) On the one hand, it could be said the Court did not create a new category, but simply ignored the "category of constitutionally permissible suspicionless searches" including the "limited circumstances" it had previously delineated; on the other hand, by default, the Court created a new "category" of constitutionally permissible suspicionless searches: those analyzed using a "general Fourth Amendment approach."


\(^{386}\) See \textit{Samson}, 126 S. Ct. at 2199, 2201 n.4; \textit{see also Nicholas}, 430 F.3d at 659 (describing the special needs analysis as "more stringent" than the general balancing test).
ment was "drawn to meet [the state's] needs and is reasonable." The Court also seemed to undervalue the need for "other safeguards" to limit the discretion of the officer in the field, and was satisfied that California's prohibition on "arbitrary, capricious or harassing" searches was a sufficient limit.

The real danger of Samson is not the particular outcome of the case, but the ease with which the Court ignored all its suspicionless search and seizure precedent by treating the case as a routine application of "our general Fourth Amendment approach." A unified search and seizure jurisprudence might not have changed the result, but it would have at least required the Court to examine how this case fit in the "closely guarded category of constitutionally permissible suspicionless searches." Instead, the existing "categories" became irrelevant and the Court had no reason to reconcile prior cases because it was utilizing "general Fourth Amendment principles."

X. CONCLUSION

The Oxford American Dictionary defines quagmire as "a soft, boggy or marshy area that gives way underfoot"—an apt description of the Court's suspicionless search and seizure jurisprudence. Although the Court continues to refer to a "closely guarded category of permissible suspicionless searches and seizures," it has failed to develop a unified jurisprudence to guard the category. Its fractured jurisprudence means litigants are never on firm ground. The second definition offered by the Oxford American Dictionary is "hazardous situation," which is what the Court has created. The Court pur-
ports to take seriously Justice Brandeis' admonition that "[I]t is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." It is hard to justify drawing the line between permissible and impermissible search and seizure schemes based on the government having a "law enforcement" or "crime detection" purpose. By striking down suspicionless search and seizure schemes in a few cases, the Court provided momentarily relief from government intrusion on citizens undertaking "basic, pervasive and often necessary" daily activities. In relying on a government purpose test to justify its actions, however, the Court has opened the door to greater intrusions on the most cherished right of citizens—the right to be let alone. If the Court's "institutional pretext" doctrine is as impotent as predicted here in policing for improper government motives, citizens who have given the government no reason to suspect them of criminal behavior will have lost significant protection.

The only solution is for the Court to rethink its suspicionless search and seizure jurisprudence, and to construct a unified jurisprudence that provides true scrutiny of government intrusions, no matter what the purpose. It can do that by recognizing the importance of carefully policing "initiatory" intrusions by the government, and subjecting all such intrusions to careful scrutiny (and skepticism), regardless of the criminal or non-criminal government purpose. Although citizens' rights will still depend on the Court being willing to engage in such scrutiny, at least the decision will be at the forefront, not buried beneath ever-changing labels. Hopefully, the Court will finally heed Justice Marshall's call for the Court not simply to extend the Fourth Amendment to "non-criminal" schemes on the part of the government, but actually to provide Fourth Amendment protection to citizens whose privacy is infringed by such schemes.

395. See Chandler v. Miller, 520 U.S. 305, 322 (1997) (quoting with approval this language from Justice Brandeis' dissenting opinion in Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).