

CATASTROPHIC THREATS AND THE FOURTH AMENDMENT

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I. INTRODUCTION

The traditional Fourth Amendment search-and-seizure doctrine was fine for an age of flintlocks, and maybe even for an age of automatic weapons. In the past, ordinary crime, even heinous crime, almost always had a limited impact. But one must wonder whether our traditional constitutional doctrine, without more, is up to the task of governing all searches and seizures in an age of weapons of mass destruction and potential terrorism. This Article explores this question and concludes that traditional doctrine falls short in an age of threats unprecedented in their potential for harm.

We propose that, because of the potential harms posed by catastrophic threats, courts should come to recognize that a fresh look at the probable-cause standard is necessary. We contend that, if properly conducted, large-scale searches undertaken to prevent horrific potential harms may be constitutionally sound even when the search of each particular location does not satisfy the traditional probable-cause requirement that such search

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have a “fair probability”¹ or a “substantial chance”² of yielding the object sought. As we discuss at more length below, established Fourth Amendment doctrine requires “individualized suspicion”³ for each person or place to be searched. We argue, however, that even where that element is lacking, the government’s search for a weapon of mass destruction⁴ may be permissible if the Supreme Court’s “special needs” exception to the probable-cause requirement is extended. Specifically, such a search should be permissible if (1) the search is justified by special needs that go beyond routine police functions; (2) the search program is reasonably designed to be as effective as is practical with the aim of preventing or minimizing harm to the public; (3) the procedure will give law enforcement constrained discretion in executing the search, and the search is not discriminatory in application; and (4) weighing the total circumstances, the balance between the governmental and societal need to search, weighed against the infringed-upon privacy of individuals, favors search.

1. Illinois v. Gates, 462 U.S. 213, 238 (1983).

2. *Id.* at 243 n.13.

3. Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002). For further discussion of this requirement, also sometimes called “particularized suspicion,” see *infra* text accompanying notes 149–204.

4. Though we have framed our hypothetical to describe the threat of an atomic bomb, the same principles would apply to any government effort to inhibit the deployment of chemical, biological, radiological, or other weapons capable of causing mass destruction and loss of life. Some may think the need for police to search for catastrophic weapons too remote to warrant reexamination of applicable legal doctrine. Few informed persons today, however, could think this exercise totally unnecessary. Joseph S. Nye, Jr., dean of Harvard’s Kennedy School of Government, has recently pointed out that “[t]errorism itself is nothing new, but the ‘democratization of technology’ over the past decades has been making terrorists more lethal and more agile, and the trend is likely to continue.” Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, FOREIGN AFF., July–Aug. 2003, at 60, 62. In support of this observation, Nye notes that “in September 2002, the Bush administration issued a new national security strategy, declaring that ‘we are menaced less by fleets and armies than by catastrophic technologies falling into the hands of the embittered few.’” *Id.* at 61 (quoting Release, President George W. Bush, Foreword, National Security Strategy of the United States, at <http://www.state.gov/r/pa/ei/wh> (last visited Apr. 6, 2004)). This theme has more recently been seconded by U.S. Secretary of State Colin Powell, who has suggested that “terrorism—potentially linked to the proliferation of weapons of mass destruction (WMD)—now represents the greatest threat to American lives.” Colin L. Powell, *A Strategy of Partnerships*, FOREIGN AFF., Jan.–Feb. 2004, at 22, 22. In February 2004, George J. Tenet, director of Central Intelligence, testified before the U.S. Senate that “[i]n addition to Al Qaeda, more than 24 terrorist groups are pursuing chemical, biological, and radiological and nuclear weapons.” Douglas Jehl, *Tenet Says Dangers to U.S. Are at Least as Great as a Year Ago*, N.Y. TIMES, Feb. 25, 2004, at A15. Such concerns are only intensified by recent fears of nuclear proliferation that have been evoked by revelations about the network developed by Abdul Qadeer Kahn, a key developer of Pakistan’s nuclear bomb, to transfer nuclear-weapons technology secretly to other countries, including Libya and North Korea. See, e.g., David Rohde & Amy Waldman, *Pakistani Leader Suspected Moves by Atomic Expert*, N.Y. TIMES, Feb. 10, 2004, at A1. Further, Ayman al-Zawaheri, reportedly a leading al-Qaida planner and tactician, allegedly told an interviewer that al-Qaida had purchased a suitcase nuclear bomb. See Pamela Hess, *Experts Doubt Al-Qaida Nuclear Claim*, UNITED PRESS INT’L, Mar. 22, 2004.

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To explore this idea, we present the following hypothetical: The government has received a credible report from a reliable source stating that an atomic bomb, no larger than a suitcase, has been smuggled into a major city.⁵ The bomb could kill tens or hundreds of thousands of residents, and the vicinity around the blast could be rendered uninhabitable for many years. The report is confirmed by sensors disclosing a track of radiation consistent with atomic weaponry within an area that includes 100 separate homes and no other structures. Unfortunately, the sensors cannot precisely identify the bomb's location, perhaps because of the limitations of the sensors, because of shielding technology, or because the bomb was moved. Besides alerting government officials to the presence of the bomb, the source of the information has warned them of a planned date and time for the bomb's detonation. The deadline does not allow time for investigation of the inhabitants of each home in the area, or of whether a bomb may have been planted in one of the homes without the inhabitants' knowledge. Nor does the deadline permit evacuation of the populace. Determined to prevent the disaster if possible, and unable to find any way to focus the search more narrowly, authorities decide to search all 100 premises within the area immediately without a warrant and without warning to residents.⁶ Within twenty hours, all the homes are searched, and the bomb is discovered, seized, and neutralized.⁷

5. Anyone who finds it inconceivable that a criminal might conspire to detonate an atomic bomb in one of America's cities should consider that mass destruction and loss of life might also follow a destructive use of other weapons of mass destruction; a biological attack using anthrax is only one such example. See, e.g., Richard Danzig, *Academics and Bioterrorists: New Thinking About the New Terror*, 24 *Cardozo L. Rev.* 1497, 1500 (2003) ("[I]f you released aerosolized anthrax from a high building out over an urban area, something between two and fifty pounds could cause potentially somewhere between 10,000 and 1,000,000 deaths."). One need not credit worst-case scenarios to see that a legal analysis of cause needed to search for weapons of mass destruction may inform policies, procedures, and protocols relating to any such search. And if there is confusion about what the law requires, there will also be confusion about when a search will be permissible if such a dire occasion were to arise.

6. The officials in our hypothetical do not seek consent to search from any homeowner involved. They are concerned that any culpable homeowner, if consent were requested, might have a chance to deploy the weapon, might alert another homeowner about the pending search, or might take other steps to frustrate the interdiction effort.

7. To maintain the focus, we have not added complications, such as the discovery of evidence of other crimes. If, during the search, police saw evidence of another crime in plain view and later sought to prosecute the offender for that crime, a more difficult issue would be presented than we pose here. But such an issue, although important, is ancillary to the core issue we address—namely, whether a preventive search for an atomic bomb can be sustained.

The occupants of the home where the bomb was found are charged with possession of a weapon of mass destruction,⁸ conspiracy to commit mass murder, and conspiracy to commit terrorist acts, and the government plans to bring them to trial. Before trial in their criminal case, the defendants seek to exclude the evidence of the bomb at their home, and any other evidence stemming from its discovery, as the fruits of an illegal search.⁹ They say it is better for even the most dangerous terrorists to go free than to permit the government's unreproached constitutional blunder.¹⁰ Confident in their views of the Fourth Amendment and the exclusionary rule, they take the offensive on cable talk shows and start to negotiate with a publisher for book rights.

In a civil suit, the owners of the other ninety-nine homes assert that the government lacked probable cause to believe that a bomb could be found at any one of their homes, and they sue the government for conducting an invasive, unconstitutional search of their homes. The plaintiffs issue a press release saying that they are grateful that the explosion was prevented, but that they still want at least nominal damages, as well as declaratory and injunctive relief, to set future standards if this issue were to reoccur. They also start to negotiate with a publisher for book rights.

* * *

Our hypothetical raises the question whether there is constitutionally justifiable cause to conduct a search, even though probable cause for the search is lacking under traditional Fourth Amendment standards. We present an extreme case to focus on the problem of whether a search for a hidden atomic bomb, or similar catastrophic device, will be justifiable,

8. 18 U.S.C. § 831(a)(1) (2000) (prohibiting "transactions involving nuclear materials"). See also the U.S. SENTENCING GUIDELINES MANUAL § 2M6.1 (2003), as well as the following related statutory provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 842(p)(2), 1993(a)(2), (a)(3), (b); 42 U.S.C. §§ 2077(b), 2122, 2131 (2000).

9. The defendants could make this argument only if the bomb were found in their own home. If the weapon were concealed in the home of another person who is not charged, and police seized the evidence without probable cause and without the homeowner's consent, that homeowner might prevail in a suit alleging Fourth Amendment violations under 42 U.S.C. § 1983, but the evidence could be used when prosecuting the criminal, because

"[the] house of any one is not a castle or privilege but for himself, and shall not extend to protect . . . the goods of any other which are brought and conveyed into his house . . . for the privilege of his house extends only to him and his family, and to his own proper goods."

Steagald v. United States, 451 U.S. 204, 219 (1981) (quoting Semayne's Case, 77 Eng. Rep. 194, 198 (K.B. 1604)).

10. Cf. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (discussing the exclusionary rule as it was articulated by the Supreme Court between 1914 and 1925, but refusing to adopt the doctrine under which "[t]he criminal is to go free because the constable has blundered").

even if it cannot be satisfactorily explained under the traditional probable-cause standard, which requires at least a “fair probability,”¹¹ if not a “more probable than not” assessment,¹² that the search will lead to discovery of its object. If the search is permissible, then any evidence of wrongdoing revealed should not be excluded from use during a prosecution, and the officers conducting the search should not have civil liability for offending federal rights in violation of 42 U.S.C. § 1983.¹³ But under what doctrine or theory could a court uphold a search on the precise facts assumed, which do not show individualized suspicion relating to any particular home? A consensus on a basis for upholding or rejecting our hypothetical search could have implications for other searches involving less extreme circumstances.

It might be objected, at this point, that the hypothetical does not justify any reconsideration of the probable-cause doctrine. Those who are concerned about any erosion of that doctrine might argue that when faced with such an imminent and catastrophic threat, law-enforcement officers should search for the bomb and not worry about prosecuting the guilty parties, so that the exclusionary rule would not come into play. Justice Thurgood Marshall, in a thoughtfully crafted dissent in *New York v. Quarles*,¹⁴ raised a similar argument concerning the right against self-incrimination. The majority opinion established a “public safety” exception to the *Miranda* rule, so that if bystanders were at risk, police officers might ask a suspect where he or she had concealed his or her weapon, and the answer would be admissible in court. Justice Marshall would have permitted the safety measures, but would have made the answer inadmissible: “If a bomb is about to explode or the public is

11. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

12. For a discussion of cases and commentaries showing that “probable” cause does not mean “more probable than not,” see 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.2(e), at 62–82 (3d ed. 1996). For further discussion of probabilistic aspects of probable cause, see *infra* text accompanying notes 39–120.

13. If the search is determined to be unconstitutional, then our law generally has not distinguished between precluding law enforcement’s later use of the fruits of the invalid search for prosecutorial purposes and imposing potential liability on the offending police officers conducting the search. If the search is unconstitutional, invalidation of the search will permit a homeowner, if prosecuted in a related criminal case, to invoke the exclusionary rule. See *Mapp v. Ohio*, 367 U.S. 643 (1961). A constitutionally invalid search also will potentially subject law enforcement to liability for the constitutional violation, either through an action against state officials under 42 U.S.C. § 1983 or through an action against federal officials under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Liability of participating officials may follow an unconstitutional search absent qualified immunity, which is given only when the offended constitutional principle and its application are not “clearly established.” *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001).

14. *New York v. Quarles*, 467 U.S. 649 (1984).

otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . [But] the Fifth Amendment forbids . . . the introduction of coerced statements at trial.”¹⁵

We do not recommend adopting the approach of Justice Marshall’s dissent in *Quarles*, that safety measures may be adopted freely while evidence is excluded. First, questioning without the *Miranda* warning is not, by itself, a constitutional violation: It becomes a violation only when the coerced statements are introduced at trial.¹⁶ But as we have noted, a search without probable cause is a Fourth Amendment violation whether or not the evidence is used at trial. Second, putting aside that distinction, we would be troubled if law-enforcement officers felt free to interrogate suspects and search their homes without regard for fundamental rights, so long as none of the evidence that emerges is used at trial. That approach, we fear, would breed disrespect for law. Judge Henry Friendly made a similar observation almost forty years ago when he argued that,

[f]rom a constitutional standpoint, it is not a satisfactory answer to say that in cases [where there is a compelling need for information] the police may interrogate if they are willing to forego use at trial of admissions or physical evidence obtained in the course of their efforts at restoration or prevention. . . . Here, as in the case of the Fourth Amendment, exclusion is only a remedy in aid of a right; no one would suggest that the police may engage in unbridled searches if they will dispense with use of the provable fruits.¹⁷

Due concern about the possibility of “unbridled searches” may explain the Court’s divided opinion in *Chavez v. Martinez*, which held that when a suspect is wounded and awaiting medical care, questioning him or her without a *Miranda* warning does not violate the right against self-incrimination if he or she is never prosecuted.¹⁸ Justice John Paul Stevens, in dissent, attacked the interrogation as “the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods.”¹⁹ For such reasons, if the conduct is unconstitutional, we do not wish to encourage the police to search on the assumption that the evidence will be suppressed. There should be no search unless it can be permitted under a proper application of the probable-cause doctrine that takes modern

15. *Id.* at 686 (Marshall, J., dissenting) (citation omitted).

16. *See, e.g., Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality opinion).

17. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 949 (1965) (footnotes omitted), reprinted in HENRY J. FRIENDLY, BENCHMARKS 235, 258 (1967).

18. *See Chavez*, 538 U.S. at 769–70.

19. *Id.* at 783 (Stevens, J., concurring in part and dissenting in part).

risks into account in framing the delicate balance between individual privacy and societal protection.

According to the premises of the hypothetical, there is “probable cause” to believe that a bomb is in one of 100 homes in the sense that a search of all 100 homes appears likely to prevent the risk. However, the probable-cause doctrine has never thus been used, for on the terms of the hypothetical, there is not a fair probability, let alone a substantial likelihood, that the bomb is in any particular home. For a search of any particular home, the probability of finding the bomb is at most one percent if the information is accurate and if the bomb has not been moved.²⁰

20. If the search is unconstitutional, then under current constitutional doctrine, the fruits of search must be excluded in the criminal case. *Wong Sun v. United States*, 371 U.S. 471, 484–86 (1963). See also Guido Calabresi & Yale Kamisar, *Debate: Exclusionary Rules*, 26 HARV. J.L. & PUB. POL’Y 109 (2003) (debating the efficacy and desirability of the exclusionary rule). It might be argued that Congress could by legislation provide that a search for a weapon of mass destruction on some cause, but less than probable cause, will not invoke an exclusionary-rule remedy in any subsequent criminal prosecution. After the Supreme Court’s decision in *United States v. Leon*, 468 U.S. 897 (1984), which created a good-faith exception to the exclusionary rule, Yale Kamisar suggested that *Leon* implied that the questions whether there was a constitutional violation and whether resulting evidence would be excluded were distinct. As Kamisar wrote, the *Leon* case “renders the [exclusionary] rule almost defenseless against Congressional efforts to repeal it, most likely by a statute that purports to replace the rule with what we shall be assured is an ‘effective’ alternative remedy.” Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS* 143, 168 (Herman Schwartz ed., 1987). But even if Congress could, consistent with the Constitution, eliminate the exclusionary rule for constitutional violations involving weapons of mass destruction, this potential change of remedy would not address the concern that many law-enforcement officials might not proceed with a search if they thought it unconstitutional, for their training, protocols, instincts, and habits might constrain them from proceeding other than in accord with their perception of what the law required.

There is also a potential concern about damages. If the search is unconstitutional, and if the violated law is “clearly established,” *Saucier v. Katz*, 533 U.S. 194, 201–02, 207–09 (2001), then the responsible officials may be civilly liable to the homeowners. Such an outcome may deter law-enforcement officials from searching as broadly, if later confronted with the question of whether to undertake a similar search.

It may seem to defy logic to award damages to the homeowners whose homes were searched, considering that, absent search, those homes would likely have been destroyed. One need only look to the decisions of the federal courts, however, to see how frequently police are held liable in damages under 42 U.S.C. § 1983 when the Fourth Amendment has been offended by an unconstitutional search. Even if no trier of fact would award compensatory damages to the homeowners, if successful they could obtain at least nominal damages. See, e.g., *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (stating that it is “clearly established in our case law” that a plaintiff alleging due-process violations is “entitled[d] to recover at least nominal damages under § 1983”); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (holding that a plaintiff who received one dollar in nominal damages for civil-rights violations under 42 U.S.C. §§ 1983 and 1985 was the prevailing party but was not entitled to \$280,000 in attorney’s fees under 42 U.S.C. § 1988). In any event, whatever a jury might say on damages, if the homeowners prevailed on liability, perhaps they would be entitled to declaratory and injunctive relief.

We begin in Part II by outlining the rules governing searches and the measure of probability required for probable cause to justify a search. Courts often have been confronted with cases that raise questions about the requisite degree of certainty. These questions arise, for example, when police, before conducting a search, identify a small pool of suspects or a short list of places that almost certainly include the person or evidence sought.²¹ The precedents suggest that even if we reduced the number of homes in our hypothetical to ten, a finding of probable cause would be very unlikely, and if we leave the number at 100 homes, a finding of probable cause would be unprecedented. We conclude that the traditional probable-cause test, which normally would have to be satisfied before searching a home, would not permit the hypothetical search.

After surveying this background of precedent, in Part III we examine several alternative theories under which the search might be upheld, and we briefly review these possibilities, concluding that no identified doctrine is adequate to sustain the search. In Part IV, we reexamine the special-needs cases and propose that this exception may be extended beyond its established reach to offer a solid basis for the search under the hypothetical circumstances. Part V offers a few closing reflections on the problem we have posed and the need for further discussion.

We stress that in the case of a catastrophic threat, the interest is primarily on interdiction—to prevent the explosion of a nuclear bomb that would kill thousands of persons. Saving innocent lives and preserving our society are among the most powerful government interests and incentives to search that we can imagine. The case for a search aimed at preventing the catastrophic threat from developing is conceptually different from the case for search after an explosion to find evidence of the guilt of particular wrongdoers.²² While the urgency of capturing the malefactors after the

21. See *infra* text accompanying notes 70–78.

22. We focus on interdiction because cases applying the “special needs” exception have emphasized that that doctrine may not be used in routine criminal investigations. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.20 (2001) (“In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes.”). The special-needs doctrine may allow for a distinction, at least under the circumstances of our hypothetical, between criminal law enforcement and the interdiction of crime. See *United States v. Knights*, 534 U.S. 112, 117, 119–20 (2001). According to the Court, “a State’s operation of its probation system present[s] a ‘special need’ for the ‘exercise of supervision to assure that [probation] restrictions are in fact observed,’” and where the probationer’s consent to suspicionless search was a condition of receiving probation, “[i]t was reasonable to conclude that the search condition would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations.” *Id.* at 117, 119 (second alteration in original) (footnote omitted). Although it does not anticipate the details of our hypothetical, *Knights*

explosion would be very strong, the urgency of preventing the explosion is incalculably greater. Further, while established Fourth Amendment principles undergirding certain warrant exceptions—such as exigent circumstances and immediate threats to public safety—could not be invoked to sanction our hypothetical search,²³ these exceptions show that exigent danger has been recognized as an important consideration in Fourth Amendment analysis and, thus, that preventative measures involve necessities that punitive measures may not share.

II. INDIVIDUALIZED SUSPICION IN TRADITIONAL PROBABLE-CAUSE ANALYSIS

A. THE PROBABLE-CAUSE STANDARD

The Fourth Amendment guards the sanctity of individual privacy. It provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”²⁴ It thus prohibits all unreasonable searches. The Fourth Amendment further provides that no warrants shall issue “but upon probable cause,” supported by a sworn statement “particularly describing the place to be searched, and the persons or things to be seized.”²⁵

In a long series of cases, however, the Supreme Court has made it clear that almost all searches and seizures require a prior warrant issued with probable cause, and that law enforcement may act without a warrant only in certain circumstances that have been defined categorically and narrowly.²⁶ Thus, any law-enforcement conduct falling in the ordinary range of searches and seizures will be considered unreasonable and, hence, unconstitutional if not preceded by a warrant. The warrant must show particularity regarding any place, person, or item to be searched and seized, and it must be supported by an affidavit showing probable cause. And

supports the idea that a special-needs search may be permissible to prevent certain kinds of foreseeable criminal acts.

23. While these exceptions may permit search and arrest without a warrant, they do not eliminate the probable-cause requirement. *See, e.g.,* *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (“[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.”). *See also* the discussion of the “emergency aid” doctrine, *infra* note 120.

24. U.S. CONST. amend. IV.

25. *Id.*

26. The exceptions permitting warrantless entry into a suspect’s home include such exigent circumstances as hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967), imminent destruction of evidence, *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and fires or other emergencies, *Michigan v. Tyler*, 436 U.S. 499 (1978).

even where exceptional circumstances or other exceptions apply that would permit search without a warrant, the courts have almost always required a showing of probable cause.

This probable-cause requirement, under long-established case law, has been held to mean that the law-enforcement official must have good reason to believe that the search will uncover evidence of a crime, or that the seizure is warranted because there is good reason for an arrest. The justifications needed for probable cause must be directed to the individual whose personal privacy is disturbed. In other words, general suspicion will not do; there must be individualized suspicion and cause to permit the government's intrusion.²⁷

These concerns apply with particular force to the home. The Supreme Court explained long ago that search of a home is impermissible without both probable cause and a warrant: "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."²⁸ The Court recently reaffirmed this principle in *Kirk v. Louisiana*,²⁹ which held that, "[b]ecause 'the Fourth Amendment has drawn a firm line at the entrance to the house . . . [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'"³⁰ In *Steagald v. United States*,³¹ the Court held that an arrest warrant does not entitle police to arrest the suspect in the home of another person:

Because [the warrant] does not authorize the police to deprive the third person of his liberty, it cannot embody any derivative authority to deprive this person of his interest in the privacy of his home. Such a deprivation must instead be based on an independent showing that a legitimate object of a search is located in the third party's home.³²

27. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 22 n.18 (1968) ("[The] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.").

28. *Agnello v. United States*, 269 U.S. 20, 33 (1925) (citations omitted).

29. *Kirk v. Louisiana*, 536 U.S. 635 (2002).

30. *Id.* at 638 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)) (second alteration in original) (citation omitted).

31. *Steagald v. United States*, 451 U.S. 204 (1981).

32. *Id.* at 214 n.7. The Court anticipated a variant on our hypothetical when it warned of the potential for invasive large-scale searches:

A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse. Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances. . . . Moreover, an arrest warrant may serve as

That independent showing, again, requires probable cause. In the hypothetical, the likelihood of finding evidence in any home is too low to meet the probable-cause standard. While the Supreme Court has developed several exceptions to that standard, virtually all of them apply to searches in public places, and, as we explain below,³³ in the very few cases that have permitted search of a home without probable cause, the place to be searched was a probationer's home, and the search was based on individualized suspicion. Neither of those elements is present in our hypothetical.

B. PROBABLE CAUSE AND PROBABILITY

Our hypothetical dramatizes a tension that haunts any analysis of probable cause under the Fourth Amendment. More than a half century ago, Justice Wiley Rutledge captured that tension when he identified the essential goals and concerns of the probable-cause doctrine in *Brinegar v. United States*,³⁴ which involved a challenge to an arrest for importing liquor across state lines. Justice Rutledge explained that the probable-cause requirement is designed "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,"³⁵ while also giving "fair leeway for enforcing the law in the community's protection."³⁶ "The rule of probable cause," he concluded, "is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests."³⁷ Our hypothetical involves the acute interests of many homeowners in the privacy of their homes³⁸ and of law enforcement and society in preventing an unthinkable

the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.

Id. at 215 (citations omitted). One of the cases cited to illustrate an abusive large-scale search was *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), which, as the Court explained, rejected as unconstitutional a police search of "300 homes . . . pursuant to arrest warrants for two fugitives." *Steagald*, 451 U.S. at 215.

33. See *infra* text accompanying notes 158, 170–75.

34. *Brinegar v. United States*, 338 U.S. 160 (1949).

35. *Id.* at 176.

36. *Id.*

37. *Id.*

38. Many Supreme Court decisions have honored and protected the privacy of the home. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.") (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604)); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to maintain control over [a person's] home, and to be free from governmental interference, is a private interest of historic and continuing importance."); *Segura v. United States*, 468 U.S. 796, 810 (1984) ("The sanctity of the home is not to be disputed."). This may be traced back to

crime that would cause catastrophic harm. Just as the need to protect the community takes on an incomparable urgency, the search of 100 homes for one target is extremely invasive in the lives of many innocents.

If the rule of probable cause involves a comparison between the need to protect the community from crime and the need to protect citizens' privacy, then it may be misleading to define the rule purely in terms of statistical probability. In fact, in the 17th and 18th centuries, the phrase "probable cause" was one of several synonyms for the standard used to determine how much suspicion was necessary to permit a search or arrest.³⁹ Some legal commentators said that an arrest was justified if based on "common fame" for which there was "some probable ground,"⁴⁰ or if based on circumstantial evidence creating "a strong presumption of guilt."⁴¹ Others wrote that an accuser must have "some cause and reason"⁴² to suspect the accused, that there must be "good cause"⁴³ for suspicion, and that there must be a "reasonable Cause of Suspicion."⁴⁴ Sir Matthew Hale's *Pleas of the Crown*, posthumously published in 1678, may be the source of the phrase "probable cause."⁴⁵ The subject received more extensive treatment in his *The History of the Pleas of the Crown*, published

the English common-law maxim that "a man[']s house is his castle," SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 142 (London, M. Flesher for W. Lee & D. Pakeman 1644) (1641) (citing Semayne's Case, 77 Eng. Rep. 194, 194–96 (K.B. 1604)) (internal quotation marks omitted), and also to the fact that protection of the home from government intrusion was a key concern of the colonists who courageously broke with England. If reason is to control our law, however, we must at least assess whether this valuable principle, like any sound principle, may nonetheless be limited by circumstance and countervailing principle.

39. For a useful analysis of the various ways in which legal commentators described this standard, see BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 131–47 (1991). The discussion in this paragraph draws, in part, on the sources that Shapiro cites.

40. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 76 (2d ed., London, E. & R. Nutt & R. Gosling for J. Walthoe & J. Walthoe, Jr. 1724) (1716–21).

41. *Id.*

42. WILLIAM SHEPPARD, AN EPITOME OF ALL THE COMMON & STATUTE LAWS OF THIS NATION NOW IN FORCE 650 (London, W. Lee et al. 1656).

43. 1 WILLIAM SHEPPARD, THE WHOLE OFFICE OF THE COUNTRY JUSTICE OF THE PEACE 34 (2d ed., London, W. Lee et al. 1652) (1650).

44. HENRY FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS 74 (London, A. Millar 1751).

45. SIR MATTHEW HALE, PLEAS OF THE CROWN: OR, A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT 91 (2d ed., London, Richard & Edward Atkyns for William Shrewsbury & John Leigh 1678) ("If a Felony be in fact committed, and a private person suspect another upon probable cause, he may be arrested, though in fact innocent."). For the view that Hale's formulation is the origin of the language in the Fourth Amendment, see SHAPIRO, *supra* note 39, at 146–47.

nearly sixty years later.⁴⁶ Some of Hale's explanations in the latter work show that he was interested in statistical likelihood; for example, he wrote that a magistrate was "a competent judge of the probabilities offered to him of . . . suspicion."⁴⁷ Hale also used the term "probable" in its root sense of "provable,"⁴⁸ however, as when he wrote that arrest was permissible if someone names a suspect and "shows probable causes of suspicion."⁴⁹

That sense accords well with the other contemporaneous formulations, which express the idea that suspicion to search or arrest must have a substantial basis, but which do not involve a statistical requirement of likelihood. The word "probable" continued to be used in the sense of "provable" throughout the 18th century,⁵⁰ and there is no reason to assume that when the framers of the Fourth Amendment adopted Hale's phrase, they meant to give it a more limited meaning than it had in contemporaneous usage.

Brinegar held that "[p]robable cause exists where the facts and circumstances . . . warrant a [person] of reasonable caution in the belief that an offense has been or is being committed."⁵¹ This rule emphasizes credibility and experience rather than statistical certainty. There is good reason to look to belief guided by reasonable caution, rather than using a standard involving a precisely quantified likelihood. Often, it is impossible to specify the likelihood of success with any statistical precision. If the police are approached by an informant who has no track record, but who claims to have inside information about criminal activity, it might be feasible to assess the plausibility of the informant's story, but it will be

46. See SHAPIRO, *supra* note 39, at 146-47. Published sixty years after Hale's death, *The History of the Pleas of the Crown* reflects the state of English law in the mid-17th century.

47. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 92 (London, E. & R. Nutt & R. Gosling for F. Gyles, T. Woodward & C. Davis 1736).

48. See the OXFORD ENGLISH DICTIONARY, *available by subscription at* <http://dictionary.oed.com> (last visited Apr. 6, 2004), which first defines "probable" in the now rare sense as "[c]apable of being proved; demonstrable, provable."

49. 1 HALE, *supra* note 47, at 59. For another contemporaneous instance, see SIR GEORGE MACKENZIE, *THE LAWS AND CUSTOMES OF SCOTLAND, IN MATTERS CRIMINAL: WHEREIN IS TO BE SEEN HOW CIVIL LAW, AND THE LAWS AND CUSTOMS OF OTHER NATIONS DO AGREE WITH, AND SUPPLY OURS* 418 (Edinburgh, James Glen 1678) ("[I]t was found that executions by a Barrons Officer are valid, though not given in Writ, and that the same are probable by Witnesses.').

50. See, e.g., 2 WILLIAM PARKER CUTLER & JULIA PERKINS CUTLER, *LIFE, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER* 204 (Cincinnati, R. Clarke & Co. 1878) (writing the following in a 1778 entry: "That these acids may produce such appearances is probable from the easy experiment of Pyrophorus").

51. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citation and internal quotation marks omitted).

difficult, if not impossible, to measure its probability with exactitude.⁵² Recognizing that such measurements are often difficult, the Supreme Court has said that no “numerically precise degree of certainty”⁵³ is required to establish probable cause. Instead, building on Justice Rutledge’s formulation, the Supreme Court has said that probable cause to search exists when “the facts available to the officer would warrant a [person] of reasonable caution to believe that certain items [in the area to be searched] may be contraband or stolen property or useful as evidence of a crime.”⁵⁴

That test, of course, has been broken down into various components, including the requirement that suspicion must be directed individually at each person to be searched. The crucial problem for our hypothetical stems from that requirement: When the police search 100 homes for evidence that is expected to surface at only one of them, it would seem that individualized suspicion is lacking.⁵⁵ While the phrase “particularized suspicion” is of recent vintage,⁵⁶ the requirement is not. The Fourth Amendment states that a warrant must “particularly describ[e] the place to be searched, and the persons or things to be seized.”⁵⁷ Historians of the Fourth Amendment have shown that one of the essential forces behind its passage involved the American colonists’ hostility to general warrants, which permitted wide-ranging searches, seizures, and arrests based on warrants that did not name any particular suspect, place, or object of search, but only provided for the search and apprehension of those responsible for the crime under investigation. From the outset, the Fourth

52. Perhaps for this reason, among others, the Supreme Court abandoned the two-prong *Aguillar-Spinelli* test, which included the informant’s reliability as a separate factor, and instead held in *Illinois v. Gates*, 462 U.S. 213, 231–33 (1983), that probable cause must be determined on the basis of “the totality of the circumstances.”

53. *Gates*, 462 U.S. at 213.

54. *Texas v. Brown*, 460 U.S. 730, 742 (1983).

55. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1994) (giving a full discussion of the history and application of this requirement).

56. The phrase first appeared in *United States v. Cortez*, 449 U.S. 411 (1981), in which then-Chief Justice Warren Burger explained that detaining officers lack reasonable grounds for a *Terry* stop unless “an assessment of the whole picture . . . yield[s] a particularized suspicion” of the person being detained. *Id.* at 418. Soon afterwards, *Gates* applied the language of particularized suspicion to probable-cause determinations generally. *Gates*, 462 U.S. at 231 (“Our observation in *United States v. Cortez*, 449 U.S. 411, 418 (1981), regarding ‘particularized suspicion,’ is also applicable to the probable cause standard . . .”).

57. U.S. CONST. amend. IV. See also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O’Connor, J., dissenting) (stating that the particularized-suspicion requirement “has a legal pedigree as old as the Fourth Amendment itself”).

Amendment was designed to require that searches proceed only against identified persons.⁵⁸

This requirement arose, in part, in response to the British government's prosecution in 1763 of John Wilkes, a journalist, libertine, and politician. After he published an article criticizing King George III,⁵⁹ Wilkes was arrested along with forty-eight others under a general warrant for a "strict and diligent search for the said authors, printers, and publishers of the . . . seditious libel intitled *The North Briton*, No. 45 . . . and them or any of them having found, to apprehend and seize, together with their papers."⁶⁰ Those charged with executing the warrant apprehended Wilkes for interrogation, ransacked his study, and confiscated many of his documents. On his release from the Tower of London, Wilkes sued for trespass, arguing that his arrest and the search of his home were illegal because he was not named in the warrant. In *Wilkes v. Wood*,⁶¹ one of the

58. On the history of the Fourth Amendment, general warrants, and the question of specificity in particular, see NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Surrel Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 93–98 (2000); William J. Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371 (1980); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369–72 (1983); H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 (1989); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 757–825* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with authors).

Hale opposed what he called "general warrants" in his *The History of the Pleas of the Crown*. His criticism, however, did not address warrants permitting search of any suspected person, but was directed only at warrants permitting search of any suspected place: "[A] general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before this justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact." 2 HALE, *supra* note 47, at 150.

59. The article attacked the king for ceding to France, under the Treaty of Paris and the Peace of Hubertusberg, the Caribbean islands of Haiti, Martinique, and Guadeloupe—a decision that Wilkes lambasted as "[t]he most abandoned instance of ministerial effrontery ever attempted to be imposed on mankind." PETER D.G. THOMAS, *JOHN WILKES: A FRIEND TO LIBERTY* 60 (1996).

60. *Money v. Leach*, 97 Eng. Rep. 1075, 1076 (K.B. 1765). See also LASSON, *supra* note 58, at 43. For a useful account of the historical events surrounding this case, see Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285, 325–39 (1999). See also Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 583–89 (1990); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 877–80, 884–94 (1985).

61. *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

first cases recognizing a claim for “exemplary damages,”⁶² the jury awarded Wilkes £1000. *Wilkes* enjoyed widespread support in the North American colonies,⁶³ and the case played an important role in the creation of the constitutional standard governing probable cause. Provisions barring general warrants were included in several of the state constitutions preceding the federal union of the United States, including the Massachusetts Declaration of Rights of 1780,⁶⁴ which provided the model for the Fourth Amendment.⁶⁵

62. The phrase “exemplary damages” seems to have appeared first in *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763), a trespass and false-imprisonment action brought by one of Wilkes’s employees. The jury’s courage in establishing these punitive damages against the government in *Huckle* may be viewed as a milestone in a longer history of the development of the independent jury as a counterforce to the crown. A notable predecessor case establishing the jury’s independence was *Bushell’s Case*, 124 Eng. Rep. 1006 (C.P. 1670). For a discussion of the importance of the jury’s independence and the role of *Bushell’s Case* in establishing it, see WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE* 58–59 (2002). For a discussion of then-Chief Justice John Vaughan’s decision in *Bushell’s Case* and its contemporary reception, see Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815 (2002).

63. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 n.54 (1994) (noting that “[t]he *Wilkes* case was a cause célèbre in the colonies, where ‘Wilkes and Liberty’ became a rallying cry for all those who hated government oppression”); Schnapper, *supra* note 60, at 912–13 (explaining that “[t]he *Wilkes* controversy . . . directly influenced the framers of the fourth amendment. The English search and seizure cases received extensive publicity in England and in America, and the *Wilkes* case was the subject of as much notoriety and comment in the colonies as it was in Britain”) (footnotes omitted). In the American colonies, the analogue of the general warrant was the writ of assistance. See *Stanford v. Texas*, 379 U.S. 476, 481–86 (1965) (discussing the history of the Fourth Amendment in relation to the writs of assistance, *Wilkes v. Wood*, and *Entinck v. Carrington*).

64. See MASS. DECL. OF RIGHTS of 1780, art. XIV (requiring that warrants “be . . . accompanied with a special designation of the person or objects of search, arrest, or seizure”). See also MD. DECL. OF RIGHTS of 1776, art. XXIII (prohibiting “general warrants—to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special”); PA. CONST. of 1776, art. X (requiring that warrants issue only upon “sufficient foundation . . . whereby any officer or messenger may be commanded or required to search in suspected places, or to seize any person or persons, [or] his [or her] or their property”); VA. DECL. OF RIGHTS of 1776, art. X (prohibiting “general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence”).

65. See *Harris v. United States*, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (“When Madison came to deal with safeguards against searches and seizures in the United States Constitution, he did not draw on the Virginia model but based his proposal on the Massachusetts form.”). The requirement of “probable cause,” however, appears neither in the Massachusetts Declaration of Rights nor in any of the other contemporaneous state constitutions, but has a separate lineage. See *supra* text accompanying notes 39–50. The inflammatory and negative experience of the colonies under British rule with the general writs of assistance used by Great Britain to enforce its tax and trade regimes against the colonies may have motivated the states after independence to prohibit general warrants in their Declarations of Rights or other fundamental law. According to Woodrow Wilson,

John Adams used to say . . . that the trouble seemed to him to have begun, not in 1765, but in 1761. It was in that year that all the colonies, north and south, had heard of what James Otis had said in the chief court of the province at Boston against the general warrants, the

Despite the long history of colonial protest and then Fourth Amendment doctrine favoring particularized suspicion,⁶⁶ the Supreme Court, commencing in 1984 with *New Jersey v. T.L.O.*,⁶⁷ took a new approach by upholding a warrantless search on suspicion less than probable cause because of “special needs.”⁶⁸ Thereafter, continuing sporadically in this direction over two decades, the Court has from time to time upheld searches not supported by individualized suspicion in a limited set of cases involving administrative searches and other special needs beyond routine policing functions. We will examine those cases to determine whether they can support a search for catastrophic weapons, but first we proceed with a discussion of probable cause under conventional analysis.

Our hypothetical squarely raises the question of whether it may be constitutionally permissible to search for a dangerous weapon thought to be within the control of a particular group of persons when the identity of the culprit and location of the weapon cannot be determined without

sweeping writs of assistance, for which the customs officers of the crown had asked, to enable them to search as they pleased for goods brought in from foreign parts in defiance of the acts of trade. The writs were not new, and Mr. Otis's protest had not put a stop to their issue. It had proved of no avail to say, as he did, that they were an intolerable invasion of individual right, flat violations of principles of law which had become a part of the very constitution of the realm, and that even an act of Parliament could not legalize them. But all the colonies had noted that hot contest in the court at Boston, because Mr. Otis had spoken with a singular eloquence which quickened men's pulses and irresistibly swung their minds into the current of his own thought, and because it had made them more sharply aware than before of what the ministers at home were doing to fix upon the colonies the direct power of the government over sea. These writs of assistance gave the officers who held them authority to search any place they pleased for smuggled goods, whether private residence or public store-house, with or without reasonable ground of suspicion, and meant that the government had at last seriously determined, at whatever cost, to break up the [American colonial] trade with the West Indies and the Spanish Main.

2 WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 143–44 (1902).

The historical case that prompted Otis's speech was *Paxton's Case*, 1 Quincy 51 (Mass. 1761). Additional historical materials are found in the appendices to the reports. For an historical treatment of colonists' concerns about the writs of assistance, insofar as these motivated the revolutionary states' and then our Fourth Amendment's ban on general search warrants, see M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978) (including appendices with notes, an abstract by John Adams about the argument against the writs of assistance, and a related article from the *Boston Gazette* dated Jan. 4, 1762). For a general treatment of the writs of assistance in the colonies, see LASSON, *supra* note 58, at 51–78.

66. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *United States v. Di Re*, 332 U.S. 581 (1948). There is evidence of a rule akin to particularized suspicion as far back as the 17th century, though it is hard to tell how prevalent the rule was. Hale writes that when raising “hue and cry” to call for assistance in pursuing a suspected felon, the pursuer had to describe the suspect as carefully as possible: “If he knows the name of him that did it, he must tell the constable the same. If he know it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery.” 2 HALE, *supra* note 47, at 100.

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

68. *Id.* at 351 (Blackmun, J., dissenting).

investigating the whole group. We first consider cases in which police were able to target a particular person, but could not limit the search to a single place, or, conversely, where suspicion was focused on a specific location, but could not be narrowed down to one person. We then turn to cases in which law-enforcement officials have not been able to limit their suspicions to a single person or a single place. Courts have, with adequate reason, sought to avoid framing the question of probable cause in terms of precise statistics, but, in some cases, such a framework must be confronted.

C. CASES INVOLVING SEARCHES OF MULTIPLE PLACES OR MULTIPLE PERSONS

Our hypothetical features a search of 100 homes, and the persons there, for evidence believed to be at only one place. Many cases have required courts to assess the probable-cause standard in circumstances that are analytically similar, at least insofar as they involve searches of multiple places, even if the number is not as high as 100. When it is impossible during a criminal investigation to narrow the search to a single person or a single place, courts are faced with the question of how particularized the suspicions of the police must be to support a finding of probable cause. While some cases raising this question have involved arrests, not searches, a similar understanding of probable cause applies in either context,⁶⁹ and so we consider both kinds of cases here. A close examination shows that many of the cases, but not all, preserve the particularized-suspicion requirement.

In some settings, the police have information leading them to suspect a particular person of crime, but pointing to several possible locations for the evidence connecting the suspect to the crime. When suspicion points to a single person, courts have almost always permitted searches in several places.⁷⁰ In other cases, the police have evidence of crime in a single place,

69. See 2 LAFAYE, *supra* note 12, § 3.1(a), at 6.

It is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search. For this reason, discussions by courts of the probable cause requirement often refer to and rely upon prior decisions without regard to whether these earlier cases were concerned with the grounds to arrest or the grounds to search.

Id. But see *id.* § 3.1(a), at 6 n.22 (suggesting that it would be reasonable to require different measures of evidence for probable cause for arrest in public, on the one hand, and for an invasive private search, on the other) (citing Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 69–70).

70. One commentator has suggested that if there is reason to believe that one location is more likely than others to yield evidence, the search must begin there. See *id.* § 3.2(e), at 75 (discussing this requirement and offering illustrative cases).

but the evidence does not show that everyone to be found there is necessarily associated with the crime. Indeed, it may be that the evidence shows affirmatively that some persons there are innocent, but the police cannot identify the innocent parties without fully investigating the location and everyone found there. It may be important to distinguish between evidence showing that one or more guilty parties are present and the guilt of the others is uncertain, and evidence showing that one or more parties at the location of search are innocent, because courts have been less tolerant of searches whose scope includes the premises of a probably innocent party.⁷¹

When suspicion points to several persons, whether in one place or several places, courts have been reluctant to find probable cause for search or arrest. But they have not uniformly rejected that conclusion. As the following discussion demonstrates, such cases show a higher rate of dissents, both in decisions upholding findings of probable cause and in those rejecting such findings. The case law suggests that where traditional probable-cause standards apply, a search involving multiple persons, not all of whom are guilty, is at best a gray area in the doctrine of particularized suspicion. Our hypothetical, however, involves a much larger number of suspects than in any of the precedents set thus far in probable-cause challenges to multiple searches.

1. Searches of Several Places

There are several reasons why police may be unable to name a single place to search, even after identifying a prime suspect in a criminal investigation. Perhaps the evidence is just as likely to turn up in the suspect's office or car as in the home,⁷² or perhaps the suspect has several different residences.⁷³ In such cases, courts have generally upheld the

71. See *id.* § 3.2(e), at 74 n.213 (“[S]omething more [than a fifty percent likelihood of success] might be required [for probable cause to search] where one of the possible hiding places is that of a possibly innocent party.”) (citing *United States v. McNally*, 473 F.2d 934 (3d Cir. 1973)).

72. See, e.g., *Gregg v. State*, 844 P.2d 867, 876 (Okl. Crim. App. 1992). In *Gregg*, the court upheld a warrant to search the defendant's person, home, office, and two vehicles. *Id.* Although specifying multiple locations, the warrant was permissible because it did not “avow[] that specifically described property is simultaneously located at different places.” *Id.*

73. See, e.g., *State v. Ernest*, 264 N.W.2d 677, 679 (Neb. 1978). Here, the defendant had no permanent residence, but was known to stay, from time to time, at three different residences. *Id.* Search was permissible because “it was probable that the items sought would be found in one of those places.” *Id.* Many cases involve searches of both a suspect's car and residence. See, e.g., *State v. Davis*, 637 So. 2d 1012 (La. 1994) (search of car, residence, and girlfriend's residence); *State v. Frohlich*, 506 N.W.2d 729 (N.D. 1993) (search of car and apartment); *State v. Flom*, 285 N.W.2d 476 (Minn. 1979) (search of truck and home).

searches. One theory to justify such searches is that in the absence of a single place that is most likely to yield evidence, there is probable cause to search any place over which the suspect “exercised control.”⁷⁴ In embracing that principle, courts have concluded that probable cause to search in a particular place does not require a greater than fifty percent probability, but requires only that it was “reasonable” under the circumstances to search in the designated place.⁷⁵ A typical illustration may be found in *United States v. Hendershot*,⁷⁶ in which the Ninth Circuit considered the validity of a warrant authorizing police to search for evidence of a bank robbery in the getaway vehicle rather than the suspect’s home. The defendant argued that both places were equally likely to contain evidence, and so probable cause was lacking for a search of the car. The court rejected this argument: “[T]he ‘more-likely-than-not’ standard is improper. It is only necessary that the affidavit enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated by the affidavit.”⁷⁷

Notably, while the kind of probability required by probable cause is at issue in *Hendershot* and the other cases involving searches of multiple locations, these cases raise no question about the particularized-suspicion

74. See *State v. Towne*, 615 A.2d 484 (Vt. 1992). The court rejected defendant’s argument that “it was not ‘more likely than not’ that the murder weapon would be found in the foundation of his house.” *Id.* at 487. It explained that

[i]n determining probable cause, the magistrate may consider the strength of the nexus between the defendant and the crime, and where that connection is strong, the link between the place to be searched and the evidence sought need not be as strong, if the place is one over which defendant exercises control.

Id. at 489 (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(e), at 598–99, 600 (2d ed. 1987)).

75. The Supreme Court has taken this position, but not in a case involving searches of more than one place. See *Texas v. Brown*, 460 U.S. 730, 742 (1983) (stating that the probable-cause standard requires a reasonable belief that the search will disclose the evidence being sought, but “does not demand any showing that such a belief be correct or more likely true than false”).

76. *United States v. Hendershot*, 614 F.2d 648 (9th Cir. 1980).

77. *Id.* at 654. See also *Samos Imex Corp. v. Nextel Communications, Inc.*, 194 F.3d 301, 303 (1st Cir. 1999) (“[A]rrests . . . can be justified as based on probable cause by showing a reasonable basis for belief that a suspect committed a crime; in many cases such a basis exists without a 50 percent-plus likelihood that the suspect is guilty.”) (citations omitted); *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) (“[T]he requisite ‘fair probability’ is something more than a bare suspicion, but need not reach the fifty percent mark.”); *United States v. Travisano*, 724 F.2d 341, 346 (2d Cir. 1983) (upholding a search of the suspect’s residence and car because “the standard of probable cause cannot imply ‘more probable than not’ . . . where many locations were available to the guilty parties to secrete the stolen goods,” and stating that all that is required is “a fair probability that the premises will yield the objects specified in the search warrant”); *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979) (rejecting the bomb suspect’s argument that “probable cause” can be “define[d] . . . mathematically to mean ‘more likely than not,’” and stating that “[t]he phrase is less stringent than that. . . . [R]easonable cause’ [is] perhaps closer to what is meant”).

requirement. Where suspicion is already focused on a single suspect, the court need only decide whether to uphold a search for evidence in several different places. In such cases, the courts have generally agreed that “probable” cause requires only that the search be “reasonable” under the circumstances.⁷⁸ That standard would not necessarily limit the search to four or five different places, even though that is the uppermost limit offered by the case law. Any search of multiple places might be considered reasonable, so long as there is a fair probability that the evidence may be found at any one of them, and so long as the police have no basis for viewing some of them as more promising than others.

Although no court has gone so far, in theory this rationale might arguably be extended to a modified version of our hypothetical, in which a single suspect has been identified and the location of the bomb has been narrowed to 100 homes where the suspect may be hiding or may have concealed the bomb. If reasonableness is the guiding post, one might argue that it would be reasonable to search 100 homes, assuming that police had probable cause to believe that the bomb was in one of the homes. But whether or not the multiple-search case precedents would permit this outcome, in the case of a single suspect it is clear (at a minimum) that a warrant may permissibly describe several places. The Fourth Amendment, which provides that a search warrant must “particularly describ[e] the place to be searched,” does not in fact limit the warrant to a single place.

2. Searches of Several Persons

The problem becomes more difficult when there is evidence that a criminal is at a particular location, but the evidence does not show which person there is the culprit. A useful summation of the problem and the various responses it has provoked may be found by reviewing the cases on the validity of warrants authorizing search of “all persons” at the specified premises. The majority rule is that all-persons warrants are valid only if there is probable cause to believe that every person on the premises is associated with the crime or is likely to yield evidence of the crime when searched.⁷⁹ In a few jurisdictions, warrants for all-persons searches are

78. See, e.g., *Samos Imex*, 194 F.3d at 303; *Hendershot*, 614 F.2d at 654; *Melvin*, 596 F.2d at 495.

79. See, e.g., *Marks v. Clarke*, 102 F.3d 1012, 1029 (9th Cir. 1996) (“[A] warrant to search ‘all persons present’ for evidence of a crime may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity.”); *State v. Vandiver*, 891 P.2d 350, 351 (Kan. 1995) (stating that an “all persons” warrant is permissible only if supporting facts show that “every person within the orbit of the search possesses the items sought by the warrant”); *Morton v.*

viewed as necessarily lacking individualized suspicion and, therefore, are treated as unconstitutional general warrants.⁸⁰ But two jurisdictions have considered that such warrants may be upheld even without individualized suspicion.

In a case of judicial vacillation that underscores the controversial nature of such warrants, the Pennsylvania Superior Court revised its views twice in the course of six years. In 1987, the court adopted the majority rule.⁸¹ Two years later, in a case involving a warrant to search the home of a suspected cocaine dealer, the court changed its mind, ruling that while it is

possible, even probable, that innocent third parties who happen to be at the wrong place at the wrong time may be subjected to searches under such warrants, the nexus between the person to be searched and the nature and seriousness of the criminal conduct suspected on probable cause, nonetheless, renders the *probability* of their culpable participation in the crime suspected sufficient to warrant a search of their person.⁸²

Commonwealth, 434 S.E.2d 890, 895 (Va. Ct. App. 1993) (upholding an all-persons warrant because “probable cause existed to search all of the persons found inside the apartment when the warrant was executed”); *State v. Sims*, 382 A.2d 638, 642, 646 (N.J. 1978) (rejecting an all-persons warrant as “an unconstitutional general warrant” where supporting facts did not create “probable cause to believe that all persons who might be found on the premises . . . were engaged in illegal gambling activities”); *Commonwealth v. Smith*, 348 N.E.2d 101, 102, 106 (Mass. 1976) (upholding an all-persons warrant to search for heroin because facts made it “probable that any person in the apartment was a participant in the trafficking in heroin there”). For further discussion, see Wayne R. LaFave, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255, 271–73; Richard D. Avil, Jr., Comment, *The “Search All Persons” Power—Does Presence Really Equal Probable Cause?*, 58 CORNELL L. REV. 614, 618–19 (1973).

80. See, e.g., *United States v. Johnson*, 475 F.2d 977, 979 n.5 (D.C. Cir. 1973) (“To obtain a warrant permitting the search of anyone found on the premises would[] . . . appear to be unsupported as lacking the particularity constitutionally required.”); *People v. Tenney*, 25 Cal. App. 3d 16, 20–21 (Ct. App. 1972) (finding that the warrant lacked “reasonable particularity” when it authorized search of specific premises and specific persons there, and “other unidentified persons”), *overruled on other grounds* by *People v. Leib*, 548 P.2d 1105, 1108 (Cal. 1976); *State v. Wise*, 284 A.2d 292, 294 (Del. Super. Ct. 1971) (holding that the warrant authorizing search of “any occupant or occupants” found on the specified premises “[did] not meet the requirement of specificity”).

81. *Commonwealth v. Heidelberg*, 535 A.2d 611, 612 (Pa. Super. Ct. 1987), *aff’d by an equally divided court*, 560 A.2d 140 (Pa. 1989) (per curiam).

There are two approaches in analyzing the constitutionality of “all persons present” warrants. One is to strike such warrants as general warrants repugnant to the fourth amendment’s specificity requirement. We believe the better-reasoned approach, and the one adopted by the majority of other jurisdictions, is found in the cases which analyze each such warrant individually in order to determine whether an “all persons present” warrant was justified under the particular circumstances present when the warrant issued.

Id. (footnotes and citation omitted).

82. *Commonwealth v. Graciani*, 554 A.2d 560, 562–63 (Pa. Super. Ct. 1989).

Four years after that, however, the court returned to its earlier rule, announcing that “‘all persons present warrants’ are not favored” and may be upheld only when there is “probable cause . . . to justify a search of everyone found on the premises.”⁸³ Wisconsin is currently the only jurisdiction to embrace the “nexus” rationale: In 1995, the Wisconsin Court of Appeals quoted the now-rejected Pennsylvania view to uphold a warrant to search “all occupants” at the apartment of a suspected cocaine dealer.⁸⁴ The court added that “[t]he test is not whether innocent persons might be present on the premises, but rather whether the presence of likely guilty persons is demonstrated to a reasonable probability.”⁸⁵ Of course, there is no way to tell whether that view will persist. What is notable is that in taking this view, the court made no mention of the individualized-suspicion requirement, which, indeed, would seem to be directly controverted by a test that asks about the likely presence of guilty persons without considering innocent persons. Similarly, in its opinion adopting the nexus test, the Pennsylvania Superior Court brushed that requirement aside without analysis, but referred to it expressly in both of the opinions permitting all-persons warrants only if there is probable cause to search everyone at the premises.⁸⁶ The obvious conclusion is that courts cannot easily reconcile the individualized-suspicion requirement with a rule that permits searches of multiple persons, particularly when their total number is unknown.

The issue of probability is framed more precisely, of course, when courts are considering a search of a group of identifiable persons. A few examples will show how the courts have struggled with that problem. Last year in *Maryland v. Pringle*,⁸⁷ the Supreme Court upheld a warrantless arrest of three persons in a car after the driver consented to a search that yielded evidence of cocaine. When the cocaine was found, all three persons in the car, perhaps not surprisingly, denied knowing anything about it. Some hours after the arrest, Pringle waived his *Miranda* rights and

83. *Commonwealth v. Wilson*, 631 A.2d 1356, 1358 (Pa. Super. Ct. 1993).

84. *State v. Hayes*, 540 N.W.2d 1, 2, 4 (Wis. Ct. App. 1995).

85. *Id.* at 4 (citation omitted).

86. *Compare Heidelberg*, 535 A.2d at 612 (“We must . . . determine whether a search warrant authorizing a search of ‘all the occupants’ at a given location violates the fourth amendment’s particularity requirement.”), and *Wilson*, 631 A.2d at 1357 (“Because Pennsylvania law requires that every search warrant ‘name with particularity the person or place to be searched,’ . . . ‘all persons present warrants’ are not favored.”), with *Graciani*, 554 A.2d at 560 (reciting that “[a]ppellant’s sole contention on appeal is that the search warrant [unconstitutionally failed to] require a particularization of the identities of those persons to be searched,” and finding “no merit in the contention,” but not otherwise addressing that requirement).

87. *Maryland v. Pringle*, 124 S. Ct. 795 (2003).

confessed that the cocaine belonged to him. At trial, however, he sought to suppress the cocaine as the fruit of an illegal search. The trial court denied that motion and was affirmed on appeal to the Court of Special Appeals of Maryland, which in turn was reversed on appeal to the Court of Appeals of Maryland. The U.S. Supreme Court reversed again in a unanimous opinion. Citing the particularized-suspicion requirement and emphasizing that “the substance of all the definitions of probable cause is a reasonable ground for belief of guilt,”⁸⁸ the Court concluded that “it [is] an entirely reasonable inference . . . that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.”⁸⁹

Although the Court repeated that the search was “reasonable,”⁹⁰ the particularized-suspicion requirement was addressed only implicitly through the observation that “any or all three of the occupants” might have had control of the drugs. Where there is reason to think that the suspects are acting jointly, suspicion is necessarily directed at each person individually; and where all three persons in a car deny knowledge of contraband that is found there, they may certainly be suspected of conspiring together. But it may be doubted whether the Court would have taken the same view if the case had involved three suspects who, though found near each other, could not have been acting jointly.⁹¹ The Maryland Court of Appeals, which did not entertain a conspiracy theory, seems to have concluded that the arrests flunked the particularized-suspicion test. The court asked “whether the police officer had probable cause to make a warrantless arrest of a particular individual for that specific offense,”⁹² and in holding that probable cause was lacking, the court explained that a contrary result would permit mass arrests:

Under [the state’s] reasoning, if contraband was found in a twelve-passenger van, or perhaps a bus or other kind of vehicle, or even a place, *i.e.*, a movie theater, the police would be permitted to place everyone in such a vehicle or place under arrest until some person confessed to being in possession of the contraband. Simply stated, a policy of arresting everyone until somebody confesses is constitutionally unacceptable.⁹³

88. *Id.* at 800.

89. *Id.*

90. *Id.* at 800–01 (“[A] reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.”).

91. Much less could the Court’s opinion be read to endorse a search of 100 homes, one of which was likely to contain destructive contraband.

92. *Pringle v. State*, 805 A.2d 1016, 1029 (Md. 2002).

93. *Id.* at 1027 n.12.

In reversing the Maryland court, the Supreme Court made no reference to this argument, perhaps because the comparison moves progressively further away from circumstances that would justify a conspiracy theory. While *Pringle* holds, on its face, that there was probable cause to suspect “any . . . of the occupants,” even absent a conspiracy theory, courts are not likely to agree that in general, a one out of three probability is sufficient to satisfy the probable-cause requirement. As we show later, that point applies particularly where the three suspects are in different places. But we first consider other cases involving searches of several persons in the same place.

In *Filmon v. State*,⁹⁴ the Florida Supreme Court upheld a search of five persons on the reasonableness theory of the multiple-place cases, such as *Hendershot*. The defendant in *Filmon* had three passengers in his car when he collided with a car carrying two persons. All six were hospitalized, and by the time the police arrived at the hospital, the driver of the other car had died and the five survivors were unconscious. The police officers were uncertain who had been driving Filmon’s vehicle, and they administered blood-alcohol tests to all five of the survivors. It was discovered that Filmon had been the driver, and at trial for manslaughter, he argued that the search involved an unconstitutional “dragnet technique.”⁹⁵ The majority rejected that characterization, explaining that “[t]he officer had reasonable cause to believe that one or more of that limited group of five individuals had been driving a motor vehicle . . . while under the influence of alcoholic beverages.”⁹⁶ The dissent, however, argued that “probable cause to arrest means something more than a one in three (or two in six) chance of success.”⁹⁷ The dissent focused on a traditional view of probable cause, questioning whether odds of “one out of three” can show probability of guilt. Though not framed expressly in terms of particularized suspicion, the dissent’s argument appears to have been based on that requirement.

A similar problem was raised in *United States v. Fisher*, but the Second Circuit reached the opposite conclusion.⁹⁸ In *Fisher*, circumstantial evidence led police to spy on a home where suspected bank robbers were gathered on the front porch. The police had been told that there were three robbers, all African American men. There were “three or four” African

94. *Filmon v. State*, 336 So. 2d 586 (Fla. 1976).

95. *Id.* at 591.

96. *Id.*

97. *Id.* (Hatchett, J., dissenting).

98. *United States v. Fisher*, 702 F.2d 372 (2d Cir. 1973).

American men on the porch, and some but not all of them corresponded to the descriptions of the robbers that the police had received.⁹⁹ Fisher left the porch and was arrested by an officer whose vantage point did not allow him to see where Fisher had come from. The majority concluded that Fisher was arrested without probable cause, first because “there was little basis for inferring that he had come from the pertinent porch,” and second because he did not match any of the particular descriptions available to the police.¹⁰⁰ And “where the information possessed by the officers could have applied to any of a number of persons and did not reasonably single out from that group the person arrested, the arrest was not made with probable cause.”¹⁰¹ Moreover, the court noted, the police officers were repeatedly told that “three or four” persons were on the porch, and

[i]f there were four, at least one of them was not one of the robbers. In those circumstances, even if it were known that all three robbers were on the porch, and if Fisher was one of four people on the porch, there would have been no legitimate inference that Fisher was one of the robbers.¹⁰²

While this last argument was not the fulcrum of the court’s analysis—and is perhaps best regarded as dicta given the court’s reasoning—it is noteworthy because of its implicit reliance on the particularized-suspicion requirement that was absent from *Filmon*. Formulated in statistical terms, this argument suggests that a seventy-five percent probability of apprehending a suspect is insufficient for probable cause where such an arrest would include the detention of an innocent person along with the suspects. It might be argued that *Fisher* supports the view that the probability of apprehending a suspect is irrelevant unless there is particularized suspicion for each person arrested.¹⁰³ *Filmon* and *Fisher* both featured searches involving several persons at the same location, and the two cases show how courts take differing approaches, either stressing the reasonable cause to suspect guilt of one or more persons within a group in order to justify search, or instead stressing the likelihood of innocence of someone within the group in order to reject the search.

99. *Id.* at 373, 377–78.

100. *Id.* at 377.

101. *Id.* at 375.

102. *Id.* at 378.

103. The majority’s stress on the “possibility” of innocence as a factor defeating probable cause evoked a strong protest from the dissent. Judge Henry Friendly urged that the majority opinion “sets the standard of probable cause for arrest too high” by requiring that police “thoroughly consider circumstances that might show the suspect’s probable innocence.” Instead, focusing on the defendant’s conduct, Judge Friendly stressed that there were “sufficient indicia of probable cause of guilt.” *Id.* at 379 (Friendly, J., dissenting).

The question of probable cause becomes even more difficult when the police want to search several persons at several places. In one case, for example, in which an informant told police that illegal drugs could be found at his “neighbors,” a search of the two adjacent residential units was upheld not under the reasonableness theory, but under the theory that probable cause existed to search both units because the informant might have meant “that the marijuana was located at both of his neighbors[‘].”¹⁰⁴ The transparency of the legal fiction adopted here reveals the court’s uncertainty about upholding the search under any of the established precedents on probable cause.¹⁰⁵ In a similar case, after tracking a burglar’s footprints in the snow to a duplex with a common door for both units, police obtained a warrant to search both units.¹⁰⁶ The South Dakota Supreme Court upheld the search, reasoning that “[t]he possible intrusion upon the privacy of the occupants of both units was . . . reasonable within any fair interpretation of the Fourth Amendment.”¹⁰⁷ In a sharp dissent, one judge argued that “the search warrant failed to describe the place to be searched with particularity in that it failed to designate which apartment was to be searched.”¹⁰⁸ On that view, the absence of particularized suspicion for each unit rendered the warrant unconstitutional.¹⁰⁹

104. United States v. Olt, 492 F.2d 910, 912 (6th Cir. 1974). As LaFave notes,

While the court tries to make it appear that there was probable cause that marijuana was stored in two locations, there really is nothing in the facts of the case that so indicate. Rather, a search of two separate residential units is being permitted merely because it is probable that marijuana is to be found in one of them and the police presently have no information as to which one it is.

2 LAFAVE, *supra* note 12, § 3.2(e), at 79.

105. The history of jurisprudence shows frequent use by courts of legal fictions to justify results perhaps demanded by the times in a way that reconciles a decision to prior precedent without purporting to alter or modify it. For an interesting historical discussion of the use of legal fiction as seen by a celebrated 19th-century legal historian and commentator, see H.S. MAINE, ANCIENT LAW 19–38 (new ed., John Murray 1930).

106. State v. Smith, 344 N.W.2d 505, 507 (S.D. 1984).

107. *Id.* at 509.

108. *Id.* (Henderson, J., dissenting).

109. The most expansive ruling we have found involving a search of multiple suspects in several places is the decision of the Third Circuit in *Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974). Led to a certain address in search of five robbery and murder suspects, police found three buildings clustered together. Police demanded that the residents of all buildings exit, and three of the five persons named in the warrant emerged. Police then searched all three buildings for the remaining two suspects, who were found and arrested. At trial, the last two suspects argued that probable cause was lacking for the search that resulted in their arrest. The Third Circuit upheld the search of the three buildings, holding that to meet the probable-cause standard, “less than a certainty is required, and probable cause may exist to believe that a suspect or object is in more than one location.” *Id.* at 929. *Gereau* is only tangential to our analysis because, while it might technically be viewed as a case involving searches of several persons at different locations, the only persons actually disclosed by the search were those named in the search warrant. Apparently, no others were present, and so the individualized-suspicion requirement was not offended.

That problem also figured prominently in *United States v. Winsor*,¹¹⁰ in which the Ninth Circuit, sitting en banc, held that no probable cause existed to search for a felon at a residential hotel, and that evidence yielded by the search had to be suppressed. The police, pursuing a bank robber, saw him disappear into a two-story residential hotel near the bank. The police went door to door searching for the thief, and “[a]fter checking all the rooms on the first floor and some of the rooms on the second floor (approximately fifteen to twenty-five rooms),” they recognized him when he opened the door.¹¹¹ They arrested him and his brother and then searched the room. The thief’s brother was charged with possessing proceeds taken in a bank robbery, and the trial court denied his suppression motion.¹¹² On appeal, the three-judge panel held that the police “lacked probable cause to believe that [the thief] was in any particular room,” but that, under the circumstances, a “reasonable suspicion” was sufficient to permit the search.¹¹³ The panel explained,

The odds on discovering the suspect in the first room upon whose door the police knocked were high enough to amount to founded suspicion. The odds favoring discovery increase as rooms are searched. At some point, perhaps at the last two or three unsearched rooms, probable cause may be said to exist.¹¹⁴

The panel reasoned that, because only a minimally intrusive search was effected by inspecting the room after Winsor opened the door, and because of the “grave public interest in safely apprehending potentially violent criminals,”¹¹⁵ it was permissible to search on reasonable suspicion rather than probable cause. The en banc panel reversed. The panel accepted, without further discussion, the original panel’s view that probable cause was lacking, but rejected this use of a “balancing test.”¹¹⁶ In dissent, however, one judge argued that the panel had no basis for concluding that there had been a “search,”¹¹⁷ while another judge argued that “where law enforcement officers have probable cause to believe that a suspect has committed a felony, they may enter a residential building without a warrant if they have pursued the suspect from the scene of the crime.”¹¹⁸ The

110. *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc).

111. *Id.* at 1571.

112. *United States v. Winsor*, 816 F.2d 1394, 1395 (9th Cir. 1987).

113. *Id.* at 1397–98.

114. *Id.* at 1398.

115. *Id.* at 1399.

116. *Winsor*, 846 F.2d at 1575.

117. *Id.* at 1579 (Farris, J., dissenting).

118. *Id.* at 1582 (Alarcon, J., dissenting).

original three-judge panel and the two dissenters on the en banc panel all gave different rationales for admitting the evidence. This variety of opinion again shows how difficult it is for courts to agree about the permissibility of a search when there is a high likelihood of finding the suspect, but not a likelihood as to each particular search.

These cases suggest some predictive observations about how courts may apply the traditional probable-cause standard:¹¹⁹ First, while searches of more than one place may be acceptable based on a good reason to suspect contraband or evidence of crime at more than one place, thus far in settled cases the number of places that may be searched based on a showing that one or more of them holds relevant evidence has not been very high. Second, in cases of search of multiple persons, there may be sharply divergent views and probable dissent because courts recognize that these are very difficult cases, no matter the outcome. Third, exigent need for quick action may be a relevant factor in a close case where courts want to protect the public. But upholding probable cause where the target of search may be in one or more of three locations cannot rationally be stretched to justify search of 100 persons at different locations in the hope of intercepting and preventing deployment of a weapon of mass destruction at one location.

We conclude that, under traditional probable-cause standards, law enforcement cannot search 100 homes for a weapon reasonably believed to be in one of them. If the proposed search is to be deemed permissible, it must be justified, if at all, under a theory that extends or goes beyond traditional probable-cause standards.¹²⁰

119. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

120. In lieu of a traditional probable-cause assessment, one might ask whether the hypothetical search might be sustainable under the emergency-aid doctrine. See, e.g., *Martin v. City of Oceanside*, 360 F.3d 1078 (9th Cir. 2004); *United States v. Cervantes*, 219 F.3d 882 (9th Cir. 2000); *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973); *People v. Mitchell*, 347 N.E.2d 607 (N.Y. 1976). *Cervantes* identified three elements for an “emergency search”:

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Cervantes, 219 F.3d at 888 (citation omitted). Because the third element incorporates a probable-cause test in assessing whether the emergency search is likely to yield the object of the search in the area searched, we do not think this doctrine alters the probable-cause analysis. Instead, it seems more likely that the emergency-search doctrine may be used when the object of the search is to protect the public, even when there may not be grounds to think a crime has been committed.

So well established and respected are the traditional probable-cause doctrines that one may search through decades of case law without finding a serious gripe, or even an unjustified cavil, about their propriety. The idea that government may not lightly intrude on the individual's home, body, or papers is sacrosanct. The idea that such intrusion requires a prior showing of probable cause is a premise of civilized liberty. The idea that probable cause must be based on particularized suspicion has been called an "essential checkpoint between the Government and the citizen."¹²¹ But perhaps the standard of probable cause conjoined with individualized suspicion has become an overly rigid formulation. As we view the Constitution for the long haul, it would be well to remember the caveat posed by Justice Oliver Wendell Holmes that "[g]eneral maxims are oftener an excuse for the want of accurate analysis than a help."¹²² When constitutional principles become rigidly encrusted in long-repeated phrases, their animating ideas may lose the capacity to improve our analysis. The contest of ideas that created a verbal formulation may be forgotten when the words become stale. The sturdy maxim that searches require individualized suspicion and probable cause is surely and generally correct and beneficial to society, but its specific application in extraordinary settings, just as surely, may be proven by consequences to be incorrect and a danger to society, unless all the interests at stake are accommodated in certain extraordinary cases. Yet if the requirements of probable cause and individualized suspicion are not sufficient to compass all modern circumstances prompting searches to protect the public—that is, if those requirements would prevent some searches that may be needed for the government to fulfill its long-term compact with society—then our law may reveal a striking discontinuity between stated constitutional ideal and genuine societal need.

III. DOCTRINAL BASES FOR UPHOLDING THE SEARCH

Having rejected a traditional probable-cause analysis, we ask whether there are established doctrines that provide a satisfactory basis for upholding a search for catastrophic weapons. While we can identify theories under which the search might be justified, we believe that all of them involve serious difficulties in application to the hypothetical, and that none of them can sustain the search, at least absent a modification or

121. *Malley v. Briggs*, 475 U.S. 335, 352 (1986) (Powell, J., dissenting) (citation and internal quotation marks omitted).

122. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 194 (1899).

extension of established doctrine. These theories include (1) an exception based on the need to protect public health and safety, (2) a “national security” exception, (3) a theory permitting a sliding scale requiring less cause to search for evidence of crimes of greater gravity, (4) a theory that homeowners have no expectation of privacy against search for a weapon of mass destruction, and (5) a theory that the Supreme Court’s special-needs doctrine could be applied to sustain the search. After surveying these possibilities, we conclude that none can be applied without change to sustain the search.

A. ADMINISTRATIVE SEARCH

Because of the danger posed by an atomic bomb, it might be thought that a search without probable cause could be undertaken by authorities charged with protecting the public against dangers to public health and safety. That power, upheld under the “administrative search” doctrine of *Camara v. Municipal Court of San Francisco*,¹²³ has been used to ensure compliance with local housing and health regulations and has been permitted because such searches normally involve only a minimal invasion of privacy.¹²⁴ Administrative searches have been described generally as a means of ensuring compliance with such matters as occupancy permits and proper wiring standards.¹²⁵ By contrast, our hypothetical involves a sudden need to conduct a wide-ranging and probably invasive search of the homes in a particular area for a dangerous weapon. In some contexts, administrative searches to protect public health may be quite intrusive on individual homeowners. For example, in *Frank v. Maryland*,¹²⁶ the Court upheld a search of a home that the health inspector believed was infested with rats. The Court emphasized that the search did not have the potential to yield evidence for a criminal prosecution, and that the timing and scope of the search were “strictly limited” according to the circumstances giving rise to the search.¹²⁷ Thus, it might be argued by analogy to *Frank* that homeowners must necessarily submit to a search for a weapon of mass destruction that may be secreted on their premises. This argument might have some force if the search procedures were necessarily as constrained as those in the Maryland health case and if the objects were only interdiction

123. *Camara v. Municipal Court of S.F.*, 387 U.S. 523 (1967).

124. *Id.* at 537 (“[T]he inspections . . . involve a relatively limited invasion of the urban citizen’s privacy.”).

125. *Id.* at 526, 537.

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

127. *Id.* at 366.

and removal to ensure safety so that no criminal charge could follow. But, of course, these conditions do not necessarily follow from our hypothetical. The time and manner of search for a weapon of mass destruction could not be restricted to daylight hours. Nor could it be assumed that no criminal prosecution would follow if such a weapon were found. A prosecution perhaps would not occur if the weapon had been hidden in the home of an innocent; but if the homeowner were culpable, or potentially so, a prosecution would likely follow.

To be sure, if a city were devastated by a thermonuclear weapon, or even a dirty bomb spreading dangerous radiation, the health risks beyond death would be severe. Nonetheless, such a circumstance cannot fairly be characterized as an administrative search on health grounds. Administrative searches more often arise in a narrowly defined administrative context. Rather than likening a search for an atomic bomb to a building code or health inspection, we agree with those commentators who think it more probable that a search designed to protect the public from an outbreak of an infectious disease would be analyzed as a special-needs case.¹²⁸ And so we conclude that there is little prospect that a search of the homes in our hypothetical for atomic weapons would be sustained as an administrative search.

B. NATIONAL SECURITY

While a national-security exception might seem a good candidate for upholding the search, so far that theory has been used only to uphold wiretap searches. The Supreme Court has never yet created a general national-security exception to the probable-cause requirement. In *United States v. U.S. District Court*,¹²⁹ which involved a challenge to a warrantless wiretap of conspirators plotting to bomb an office of the Central Intelligence Agency, the Court rejected the argument that “the special circumstances applicable to domestic security surveillances necessitate a[n] . . . exception to the warrant requirement,”¹³⁰ and instead reaffirmed “the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.”¹³¹ The Court limited its holding to “the domestic aspects of national security,” however, and declined to “express [any] opinion as to[] the issues which may be involved with

128. See, e.g., Guido S. Weber, *Unresolved Issues in Controlling the Tuberculosis Epidemic Among the Foreign-Born in the United States*, 22 AM. J.L. & MED. 503, 534-35 (1996).

129. *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972).

130. *Id.* at 318.

131. *Id.* at 321.

respect to activities of foreign powers or their agents.”¹³² In *United States v. Butenko*,¹³³ the Third Circuit upheld a warrantless wiretap to gather intelligence on foreign operatives, requiring only that the wiretap be “reasonable”;¹³⁴ however, the court emphasized the “limited” invasion of privacy effected by a wiretap.¹³⁵ That characterization would not apply to a search for atomic weaponry; to be effective, the search for the bomb would necessarily have to be invasive. Further, under current regulations, a wiretap for purposes of foreign intelligence must be supported by probable cause to believe that the target is a foreign agent.¹³⁶ Hence, while the particularized-suspicion requirement is relaxed, it is nonetheless preserved to a degree that would be inconsistent with the conditions of the search in our hypothetical.¹³⁷

C. VARIABLE PROBABLE-CAUSE STANDARD

Some commentators have suggested that the standard for probable cause might be lower in cases of extremely grave threats, but that theory has not been embraced by the Supreme Court. Justice Robert Jackson was perhaps the most famous exponent of this approach. In his dissent in *Brinegar*, he argued that “judicial exceptions to the Fourth Amendment . . .

132. *Id.* at 321–22. In *Katz v. United States*, too, the Court expressly declined to rule on a “national security” exception, stating that “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.” *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967).

133. *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974). *See also* *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (“[T]he needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would[] . . . unduly frustrate the President in carrying out his foreign affairs responsibilities.”) (citations and internal quotation marks omitted); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) (“Foreign security wiretaps are a recognized exception to the general warrant requirement.”); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (“[T]he President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.”).

134. *Butenko*, 494 F.2d at 606.

135. *Id.*

136. *See* 50 U.S.C. § 1805 (a)(3) (2000) (requiring that an application to conduct electronic surveillance be supported by facts creating “probable cause to believe that . . . the target of the electronic surveillance is a foreign power or agent of a foreign power”). *See also* 18 U.S.C. §§ 2516(1)(a), 2518(3) (2000) (requiring that wiretaps to intercept communications that may provide evidence of a wide array of federal offenses, including those related to sabotage, be supported by “probable cause for belief that particular communications concerning that offense will be obtained through such interception”).

137. It makes sense that some element of particularized suspicion is required before a wiretap can be authorized, because, otherwise, the mere invocation of the phrase “national security,” without more, would be sufficient to do away with jealously protected constitutional rights.

should depend somewhat upon the gravity of the offense.”¹³⁸ While some have endorsed this “sliding scale” approach,¹³⁹ many have criticized it because of the uncertainty it would create by requiring law-enforcement officers to gauge the gravity of each offense they investigate and to predict whether they have sufficient cause to search.¹⁴⁰ As William J. Stuntz has noted, the standards governing probable-cause analysis are not variable but “transsubstantive”: “Whether the police suspect a house shelters a murder weapon or a stash of marijuana, the [probable-cause] standard is the same.”¹⁴¹

It might be argued that, though never adopting the approach suggested by Justice Jackson, neither has the Supreme Court ever taken it up and examined it fully in a context where it was critical for decision. And perhaps some refinement of the “gravity of offense” theory might be incorporated into probable-cause doctrine if that approach were favored by the Supreme Court in some novel setting.¹⁴² But the opportunity for

138. *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). Justice Jackson’s hypothetical did not involve a bomb but a kidnapping:

If . . . a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

Id.

139. See, e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

140. See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 416–17 (1988).

141. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001). Stuntz, however, is a critic of the “transsubstantive” approach. He notes, “Reasonableness here [in the Fourth Amendment context], as elsewhere in law, requires a balance of gains and losses, benefits and costs.” *Id.* He also comments that different benefits make for different balances, *id.*, and that “[d]ifferent crimes give rise to different government interests, which in turn should lead to different Fourth Amendment standards.” *Id.* at 849. He further stresses, “Reasonableness involves a balance of individual interest against government need. A large factor in government need—perhaps the largest—is the crime the government is investigating. Any decent balance would take that factor into account.” *Id.* at 870.

142. Indeed, at least in dictum, the Court has suggested the possibility of adopting a variable standard depending on the gravity of the offense. In *Florida v. J.L.*, 529 U.S. 266 (2000), while holding unreasonable a frisk of an individual that yielded a firearm, the Court explicitly distinguished the case of a more extreme threat:

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

Id. at 273–74.

sanctioning this doctrine under this theory also poses significant risks. If the search for an atomic bomb were approved under a gravity theory, it would be hard to draw a line avoiding differential treatment for other serious offenses. Such a standard, if broadly applied, would be wholly unworkable for police in the field in the first instance and for magistrates issuing warrants and for reviewing courts.¹⁴³ Based on these considerations, we see little reason to think that courts would uphold the search for atomic weapons based on Justice Jackson's theory in his *Brinegar* dissent.

D. NO EXPECTATION OF PRIVACY

It might be argued that a search for an atomic bomb could be upheld under the rule of *Katz v. United States*,¹⁴⁴ that the Fourth Amendment protects "a reasonable expectation of privacy."¹⁴⁵ No one, the argument would run, has a reasonable expectation of privacy sufficient to preclude the government from searching his or her home for a weapon that could destroy an entire city. A homeowner's privacy interest, it could be argued, depends not only on the resident's relation to the home, but also on the uses society would reasonably permit or prohibit others from making of it. Further, an individual's expectation of privacy depends on context, and so it could be argued that the relevant considerations involve not only the location of the search and the homeowner's relation to that place, but also the object of the search.

This argument, however, appears to be precluded by the Supreme Court's decision in *Kyllo v. United States*.¹⁴⁶ *Kyllo* involved a police scan using thermal-imaging technology to detect an indoor marijuana-growing operation. In refusing to uphold the search, the Court said that "in the case of the search of the interior of homes—the prototypical and hence most

143. A related approach would be to use a balancing test to weigh the need for search, under the circumstances, against the homeowners' privacy interests. The Supreme Court has explicitly disavowed the use of a balancing test to determine probable cause, however, in part because of the uncertainty and potential for inconsistency that would result. In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court stated that it is inappropriate to use a "multifactor balancing test" in an assessment of probable cause because "the protections intended by the Framers would all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers." *Id.* at 213.

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

145. *Id.* at 360 (Harlan, J., concurring). Justice Potter Stewart, in his majority opinion, said that the government's conduct "violated the privacy upon which [Katz] justifiably relied." *Id.* at 353. This may be understood to correspond to Justice Harlan's view that "a person [must] have exhibited an actual (subjective) expectation of privacy." *Id.* at 361 (Harlan, J., concurring).

146. *Kyllo v. United States*, 533 U.S. 27 (2001).

commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.”¹⁴⁷ *Kyllo* also appears to have rejected the idea that the object of search might affect the analysis: “The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”¹⁴⁸

Notwithstanding *Kyllo*, the Court might choose, when considering a search for weapons of mass destruction, to rely on the elastic phrase from Justice John Marshall Harlan’s *Katz* concurrence as a means of liberalizing the requirements for search and assessing whether any of us has a “reasonable expectation of privacy” against a government search for weapons that could be broadly destructive of society. But while the marijuana-growing operation in *Kyllo* can be distinguished from the search for an atomic weapon, the *Katz* argument proves too much. To say that no reasonable privacy interest protects against the search is to say that police officers have complete discretion to conduct the search as they like. Unlike the *Brinegar* sliding-scale analysis, the existence of a reasonable expectation of privacy is an all-or-nothing assessment. Without a privacy interest, no Fourth Amendment protections apply—not even those involving a reasonableness standard, rather than the higher standard of probable cause. That result would open the door to the possibility of police harassment of unpopular groups, without any restrictions on the process for choosing whom to investigate and where to search. Further, were this analysis used to justify a search for atomic weapons, it would seem that the government could search one million homes with virtually no cause related to any particular home, rather than 100 homes with some quantum of cause less than traditional probable cause. We reject the idea that the search might be justified on the ground that homeowners cannot reasonably expect their doors to remain closed in the face of a grave and massive threat. To permit the search under this theory would ultimately undermine the very foundations of the Fourth Amendment.

147. *Id.* at 34.

148. *Id.* at 37 (citations omitted). *See also* *Groh v. Ramirez*, 124 S. Ct. 1284 (2004). In *Groh*, the Court stated,

Because the right of a man [or woman] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion stands [a]t the very core of the Fourth Amendment . . . our cases have firmly established the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable

Groh, 124 S. Ct. at 1290 (third alteration in original) (citations and internal quotation marks omitted).

E. SPECIAL NEEDS

The last doctrinal possibility that we consider for upholding the search for an atomic bomb is the special-needs exception. The doctrine was introduced in 1985 in *New Jersey v. T.L.O.*,¹⁴⁹ which involved a high-school principal's search of a student's purse for evidence of drug use on individualized suspicion less than probable cause. The Court explained that such a search was permissible where it was "supported by a reasonable suspicion" that it would yield "evidence of an infraction of school disciplinary rules or a violation of the law."¹⁵⁰ In holding that probable cause was not required to conduct the search, the Court reasoned that "the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause."¹⁵¹ That standard, the Court explained, was one of reasonableness, which is to be evaluated by means of a balancing test¹⁵²—a tool that would be excluded if the standard turned on probable cause.¹⁵³ In a concurrence that has often been quoted in later special-needs cases, Justice Harry Blackmun expanded on the Court's rationale, explaining that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."¹⁵⁴

Though *T.L.O.* itself did not involve a suspicionless search, the special-needs doctrine has been used most often to permit suspicionless searches, particularly to uphold routine drug tests of students,¹⁵⁵ government employees,¹⁵⁶ and railway employees.¹⁵⁷ The doctrine has also

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

150. *Id.* at 332 n.2 (citations omitted).

151. *Id.*

152. *Id.* at 337 ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'") (quoting *Camara v. Municipal Court of S.F.*, 387 U.S. 523, 536-37 (1967)).

153. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("[T]he standard of probable cause 'applies to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.'") (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979)).

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

155. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes).

156. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug tests for Customs employees seeking transfer or promotion to certain positions).

157. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to have violated certain safety regulations).

been used to uphold searches, based on individualized suspicion less than probable cause, of probationers' homes¹⁵⁸ and government employees' offices.¹⁵⁹ One justification that has been offered for special-needs searches is the importance of preventing harm to the public. Because the special-needs rationale has been used to permit a search of the home, and given that protecting the public is one of the concerns allowing such searches, it might appear that our hypothetical search, aimed at protecting homes in an entire urban area, fits neatly within this exception. Moreover, because special-needs searches are evaluated under the reasonableness standard, a search based on this doctrine would not have such broad implications as the *Katz* theory.

However, several important barriers would prevent the special-needs doctrine, in its current form, from applying. First, the Supreme Court has stressed that special-needs searches are not permissible for criminal law enforcement. While we have stressed interdiction as the immediate goal of the hypothetical search, it can hardly be doubted that any evidence found would next be used for criminal prosecution as a matter of course.¹⁶⁰ Second, although the special-needs doctrine has been used to uphold searches of probationers' homes, those precedents cannot be automatically extended to a large-scale home-to-home search for an atomic bomb. Probationers have been regarded as having a lower expectation of privacy in their homes because of the conditions of supervised release. Similarly, a probation officer's authority over, and responsibility for, a probationer has been compared to a principal's relation to the students in a high school.¹⁶¹

158. *United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

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

160. Moreover, the distinction between the aims of interdiction and criminal prosecution cannot easily be maintained. Every criminal prosecution, if it succeeds, and perhaps even if it does not, has a deterrent effect on the person prosecuted. A successful prosecution of a serial burglar, rapist, or killer, when it results in a conviction, will close down the ongoing criminal operation. The same is true of any conspiracy prosecution. Thus, the prosecutorial aim is indirectly an effort at interdiction of future crime as well. Yet there is a difference in the hypothetical we pose and these examples. The indirect interdiction of criminals from committing future crimes is inchoate in each prosecution, but it is not the main point. In contrast, in the hypothetical search for the atomic bomb, the main point is to prevent detonation and destruction, and concerns about culpability, punishment, and deterrence of wrongdoers are secondary, even if also of great importance.

161. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

[A]lthough a "probationer's home, like anyone else's, is protected by the Fourth Amendment," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." . . . Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Id. (citation omitted).

By contrast, all citizens have a broad and cherished expectation of privacy in their homes and have no relation to the police that would give the latter any right to intrude on the home. In the one Supreme Court case that has mused on the possible use of the special-needs doctrine to prevent a terrorist act, the Court's hypothetical supporting its reasoning carefully placed the threat in public rather than in the home.¹⁶²

These barriers show that in its current form, the special-needs doctrine does not provide a basis for upholding a search for catastrophic weapons. However, as we explain in Part IV, with a few modifications, the doctrine can be adapted to create a new exception that would permit search under the circumstances of our hypothetical. To that end, we look more carefully at the doctrine's development, we examine the elements that would require modification, and we consider the arguments that would justify the doctrine's extension to permit a search designed to prevent a catastrophic disaster.

IV. A REEXAMINATION AND PROPOSAL ON THE SPECIAL-NEEDS CASES

A. DEVELOPMENT OF THE SPECIAL-NEEDS DOCTRINE

The contours of the special-needs doctrine are still being defined, and it is difficult to predict how broadly this doctrine will be applied if the Court continues to develop it. Thus far, the doctrine has been applied primarily to condone random searches of persons in a particular place undertaken to achieve a goal outside the usual ambit of law enforcement. The doctrine has never yet been invoked by the Court to justify searches of an isolated subset of persons in their homes for some overriding security purpose.¹⁶³

In its early applications, the special-needs doctrine was used to uphold searches on individualized suspicion less than probable cause.¹⁶⁴ More recently, the cases following this approach have permitted searches without any showing of individualized suspicion.¹⁶⁵ To date, however, none of the

162. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). For a fuller discussion, see *infra* text accompanying notes 191–96.

163. However, two recent cases—one decided by the Supreme Court and one decided by the Foreign Intelligence Surveillance Act Court of Review—have raised the possibility that the special-needs doctrine might have some application in dealing with catastrophic threats. See *infra* text accompanying notes 191–204.

164. See *supra* text accompanying note 149; *infra* text accompanying notes 166–74.

165. See *infra* text accompanying notes 182–83.

cases has involved catastrophic threats. Rather, they have involved needs “outside the usual ambit of law enforcement” because of the place where the search was conducted, the individuals subject to search, or the goal of the search.¹⁶⁶

Two years after *T.L.O.*, in *O’Connor v. Ortega*,¹⁶⁷ the Supreme Court extended the special-needs doctrine to permit searches of government employees’ offices. *O’Connor* involved a search for evidence of alleged improprieties by a doctor at a state hospital. Hospital officials searched his office and seized some personal items. In rejecting the doctor’s contention that the warrantless search was unlawful, the Court quoted Justice Blackmun’s view that the warrant and probable-cause requirements do not apply to “special needs[] beyond the normal need for law enforcement.”¹⁶⁸ And the Court added that to require a warrant in this case could cause a delay that would harm the public interest:

[A] probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. 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, and ultimately to the public interest.¹⁶⁹

Where the employer had a responsibility to protect the public, and where the warrant process would have interfered with the employer’s ability to meet that obligation, reasonable suspicion was sufficient to justify the search.

While *T.L.O.* and *O’Connor* involved searches conducted in public areas, the Court used the special-needs doctrine to uphold a search of a

166. See, e.g., *O’Connor v. Ortega*, 480 U.S. 709, 724 (1987).

In contrast to law enforcement officials . . . public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers.

Id.; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (“A search unsupported by probable cause can be constitutional . . . ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *New Jersey v. T.L.O.*, 469 U.S. 325, 349–50 (1985) (“The special relationship between teacher and student . . . distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. . . . Rarely does this type of adversarial relationship exist between school authorities and pupils.”) (footnote omitted).

167. *O’Connor*, 480 U.S. at 709.

168. *Id.* at 720.

169. *Id.* at 724 (citation omitted).

probationer's home in *Griffin v. Wisconsin*.¹⁷⁰ Police had received a tip that Griffin, who was on probation, had guns in his apartment. A warrantless search revealed a handgun, and Griffin was convicted of possession of a firearm by a convicted felon. He challenged the search as an unlawful violation of his privacy, but the Court held that “[a] State’s operation of a probation system, like its operation of a school, government office or prison[] . . . presents special needs.”¹⁷¹ The concerns justifying the state’s use of the probation system, the Court explained, include “assur[ing] that . . . the community is not harmed by the probationer’s being at large.”¹⁷² A warrant requirement would prevent the probation agency from “interven[ing] before a probationer does damage to himself [or herself] or society.”¹⁷³ *O’Connor* had offered, among the justifications permitting search of a government employee’s office, the fact that there was only a “limited” invasion of privacy.¹⁷⁴ By contrast, *Griffin* held that, because supervision of probationers involves a “special need,” it “permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large.”¹⁷⁵ Because of the probationer’s status, and because of the need to protect the community from harm, an invasive search of Griffin’s apartment was permissible even though the tip about his possession of guns did not amount to probable cause.

The other cases in the special-needs line have emphasized two main themes: First, when authorities who seek to respond to special needs develop a search program, such as a drug-testing protocol for students or employees, it must involve neutral procedures that leave little discretion in the hands of the implementing authorities. Second, to be valid, the search program must arise in response to an actual need and not a merely hypothetical one. The neutrality requirement ensures that the search protocol will not be implemented in a discriminatory way. The plan must be applied in the same manner to all within the scope of search to prevent arbitrary decisionmaking at the discretion of the searchers—a problem, as we noted earlier, that could arise if our hypothetical search were upheld under the *Katz* theory (i.e., no reasonable expectation of privacy).¹⁷⁶

170. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

171. *Id.* at 873–74 (internal quotation marks omitted).

172. *Id.* at 875.

173. *Id.* at 879.

174. *O’Connor*, 480 U.S. at 725.

175. *Griffin*, 483 U.S. at 875.

176. *See supra* Part III.D.

The neutrality requirement was first raised in *New York v. Burger*,¹⁷⁷ which upheld a warrantless search of an automobile junkyard on the theory that, because of the highly developed regulatory framework governing his operations, the owner of the junkyard had a reduced expectation of privacy.¹⁷⁸ In *Burger*, the regulatory framework itself was the source of the procedures limiting the implementing authorities' discretion. Under the precedents creating an exception to the warrant requirement for administrative inspections of pervasively regulated industries, the search was permissible only if "the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant."¹⁷⁹ That requirement was satisfied, *Burger* explained, if the statute "limit[s] the discretion of the inspecting officers"; and to do so, the statute must be "carefully limited in time, place, and scope."¹⁸⁰ The Court reasoned that the inspections were not discretionary because the statute provided that they would be "made on a regular basis," and it set out the permissible times when inspections could be performed and the materials subject to inspection.¹⁸¹

In more recent special-needs cases, though not analyzed under the "closely regulated" business doctrine, the Court has repeated that warrantless searches are not excused from ignoring the fact that "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents."¹⁸² Thus, when upholding drug-testing programs in *Skinner v. Railway Labor Executives' Ass'n*,¹⁸³ *National Treasury Employees Union v. Von Raab*,¹⁸⁴ and *Vernonia School District 47J v. Acton*,¹⁸⁵ the Court examined the search protocol to ensure, first, that the tests were administered randomly or that all persons were tested, and second, that authorities had no discretion about

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

178. *See id.* at 707.

179. *Id.* at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1980)).

180. *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

181. *Id.* at 711.

182. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621–22 (1989). *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667, 672 n.2 (1989) (finding that the challenged protocol did not give authorities discretion to decide whom to search, nor did the procedures allow for "arbitrary and oppressive interference with [employees'] privacy") (citation and internal quotation marks omitted). *See also Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *Cf. Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting); *id.* at 242 (Jackson, J., dissenting).

183. *Skinner*, 489 U.S. at 602.

184. *Von Raab*, 489 U.S. at 656.

185. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

how to administer the tests. As we discuss below, those concerns would be important in analyzing the search in our hypothetical.

Besides the requirement of neutral administration, a special-needs search is justified only in response to a concrete problem. In describing the nature of a problem that gives rise to a special-needs search, the Court has said that, while no “minimum quantum of governmental concern”¹⁸⁶ is required to justify such a search, “the proffered special need . . . must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”¹⁸⁷ The significance of this requirement was apparent in *Chandler v. Miller*, which struck down as failing to meet a “special need” a Georgia statute requiring that candidates for state office pass a drug test.¹⁸⁸ In refusing to uphold the statute, the Court observed that there was no evidence in the record of a drug-abuse problem among Georgia’s elected officials or political candidates. The Court explained that there can be no “special need” without a pressing problem, “a concrete danger demanding departure from the Fourth Amendment’s main rule.”¹⁸⁹ In other words, the hazards sought to be prevented must be “real and not simply hypothetical.”¹⁹⁰

One of the Supreme Court’s most recent special-needs cases, *City of Indianapolis v. Edmond*,¹⁹¹ is the first to mention the potential application of the doctrine to prevent terrorist threats. *Edmond* involved a roadblock procedure designed to prevent illegal drug traffic. The procedure required police to select highway checkpoints on the basis of considerations such as area crime statistics and traffic flow, and to stop a predetermined number of vehicles, with no discretion to stop any vehicle out of sequence. An officer, accompanied by a drug-sniffing dog, would approach a car, ask to see a license and registration, look for signs of impairment, and conduct an open-view examination of the car from outside. No search could take place

186. *Id.* at 661.

187. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

188. *Id.* at 318–19.

189. *Id.* at 319.

190. *Id.* That distinction was also important in two other challenges to drug tests. Justices Antonin Scalia and Stevens joined the majority in *Skinner*, upholding the drug testing of railway employees, but found no evidence of an actual drug-abuse problem in *Von Raab*, which was decided on the same day. In his dissent, Justice Scalia wrote that “[t]he Court’s opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667, 681 (1989) (Scalia, J., dissenting).

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

without either the driver's consent or the appropriate quantum of particularized suspicion.¹⁹² These procedures ensured that the searches would satisfy the neutrality requirement.

Justice Sandra Day O'Connor, writing for the majority, held that this procedure could not be justified under the special-needs exception, and that it violated the individualized-suspicion requirement. The special-needs exception, Justice O'Connor explained, had never been used to justify a "program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."¹⁹³ She reasoned that even the "magnitude" of the "social harms" resulting from narcotics traffic could not justify the search procedure used by law-enforcement officers in this case.¹⁹⁴ Echoing, but departing from, Justice Jackson's *Brinegar* dissent, Justice O'Connor explained that

the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.¹⁹⁵

In explaining why the drug interdiction program could not pass constitutional muster, Justice O'Connor raised several considerations concerning the individualized-suspicion requirement. First, in holding that "the gravity of the threat alone cannot be dispositive" in selecting a method of search, Justice O'Connor raised the possibility that the gravity of the threat may be relevant, even if it cannot be the sole basis for resolving the issue. Second, Justice O'Connor pointed to "the nature of the interests threatened" by the activity sought to be prohibited, and she concluded that in the case of a search for drugs, those interests are routine law-enforcement interests that do not justify departure from traditional Fourth Amendment norms. The interests threatened by a weapon of catastrophic proportions, on the other hand, are not within routine law-enforcement functions, and so this consideration could allow the search for an atomic bomb to be analyzed under the special-needs doctrine. Last, Justice O'Connor pointed to the connection between the interests threatened and

192. *Id.* at 42–43.

193. *Id.* at 38.

194. *Id.* at 42.

195. *Id.* at 42–43.

the law-enforcement practices at issue. Whereas regular law-enforcement concerns must be resolved through regular practices that satisfy traditional norms of search, extreme threats may require extreme measures. If this nexus test requires, in effect, that the method of interdiction or prevention be narrowly tailored to meet the threat, then the search we have described, with the appropriately imposed limits, may be the most narrowly tailored means of conducting an effective preventative search under the circumstances.

Edmond leaves open the question of whether the special-needs exception could be applied when the goal involves an unusually dangerous threat rather than general law-enforcement concerns. The majority opinion raised that possibility directly, noting that

there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. . . . The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.¹⁹⁶

The opinion did not explain how to determine whether a roadblock designed to prevent an imminent terrorist attack is “appropriately tailored,” but the Court’s holdings on the neutrality of procedures for administrative searches, which we discuss below, offer some insight on that issue.

Since *Edmond*, the most important contribution to an analysis of special needs as applied to catastrophic threats is *In re Sealed Case*,¹⁹⁷ in which the Foreign Intelligence Surveillance Act Court of Review, in its first opinion, evaluated the constitutionality of certain restrictions on wiretap surveillance of suspected terrorists authorized by the Foreign Intelligence Surveillance Act (“FISA”). *In re Sealed Case* took up *Edmond*’s invitation to consider whether “the Fourth Amendment

196. *Id.* at 44 (citation omitted). This passage might suggest that “gravity of the offense” has at last been acknowledged, if only implicitly, as a valid consideration in assessing standards of cause to stop and search a suspect. But *Edmond* involved an assessment of cause for a roadblock, not for searches of homes, and so the passage’s concession remains closer to the special-needs cases than to the hypothetical we present. For a discussion analyzing applicable probable-cause standards in the case of a roadblock search designed to intercept a terrorist bomb, see Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth-Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1425, 1441–50 (2000).

197. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

would . . . permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack,” and whether it would permit searches without probable cause in such a case. The court quoted extensively from *Edmond*, emphasizing the distinctions between “ordinary criminal prosecutions and extraordinary situations”¹⁹⁸ and between “general crime control programs and those that have another particular purpose, such as protection of citizens against special hazards or protection of our borders.”¹⁹⁹ The court added that “the nature of an ‘emergency,’ which is simply another word for threat, takes the matter out of the realm of ordinary crime control.”²⁰⁰ Considering the intrusiveness of a wiretap authorized under the FISA, as compared with the intrusiveness of the searches that have been permitted under the special-needs doctrine, the court observed that the cases in the latter set

involve random stops (seizures) not electronic surveillance. In one sense, [the scenarios involving special needs] can be thought of as a greater encroachment into personal privacy because they are not based on any particular suspicion. On the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning.²⁰¹

The comparison involves, on the one hand, a search lacking individualized suspicion but limited to a *Terry*-type stop with questioning, and, on the other hand, a more intrusive search that is based on particular suspicion.²⁰² The court, which itself was upholding a wiretap, observed that, because of the difficulty of comparing these two scenarios, “the constitutional question presented by this case . . . has no definitive jurisprudential answer.”²⁰³

Finally, while the reasoning in *In re Sealed Case* did not embrace a sliding-scale analysis, the decision did lend support to such an analysis, holding that the seriousness of the harm is an important consideration in the probable-cause assessment: “Although the Court in *City of Indianapolis*

198. *Id.* at 745.

199. *Id.* at 745–46.

200. *Id.* at 746 (footnote omitted).

201. *Id.*

202. An application to conduct electronic surveillance of a suspected foreign operative must be supported by “probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and that “each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” *Id.* at 722 (quoting 50 U.S.C. § 1805(a)(3) (2000)). See also *supra* note 136 and accompanying text.

203. *Id.* at 746.

cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. Our case may well involve the most serious threat our country faces.”²⁰⁴

B. EXTENSION AND APPLICATION OF THE SPECIAL-NEEDS EXCEPTION

As we have noted, the special-needs doctrine does not apply under previously stated standards to uphold the search in our hypothetical. Our review of the cases, however, suggests that the doctrine could be adapted to fit this case. The approach we propose to permit the search may be stated as follows: Warrantless and suspicionless searches to prevent catastrophic harm, even when the searches have collateral criminal consequences, are permissible when (1) the searches are justified by special needs that go beyond routine police functions; (2) the program for the search is reasonably designed to be as effective as is practical with the aim to prevent or minimize harm to the public; (3) the program for search will give law enforcement only constrained discretion in executing the search once it has been designed to effectuate the object of the search, and the search may not be discriminatory in application; and (4) considering the totality of the circumstances, the importance of the governmental and societal need to search, weighed against the infringed-upon privacy of the individuals, favors search. We examine each of these elements in further detail.

1. Can the Hypothetical Search Be Made Without Warrant?

We begin with the threshold question of whether the search for an atomic bomb may proceed without a warrant.²⁰⁵ This appears to be reasonable (and necessary) in view of the Fourth Amendment’s text.²⁰⁶

204. *Id.*

205. It is ironic that while the public might have more protection from a warrant procedure in special-needs cases, in order to constrain discretion and aid uniformity, the express terms of the Fourth Amendment may permit special-needs searches without warrant on less than probable cause. But because of the literal language of the Fourth Amendment, if those terms are honored, it does not permit searches on warrant on less than probable cause. Because this requirement is explicit in our Constitution, we assume the Supreme Court would require law enforcement to show probable cause for any search preceded by a warrant.

206. *See supra* note 25. Although the literal text of the amendment might permit a search on less than probable cause without a warrant, if the search were reasonable, more complicated issues would be posed as to whether our hypothetical search would best proceed with or without a warrant. Arguments of some force can be seen arrayed on each side. On the one hand, a prior warrant approved by a neutral official adds protection against abuse. It also adds the possibility that even if probable cause were later held to be deficient, there might be a “good faith” exception permitting introduction of evidence under *United States v. Leon*, 468 U.S. 897 (1984). On the other hand, there is the grave urgency to interdict

When time is of the essence, any delay may be fatal. And arguably, it would be unreasonable to delay a law-enforcement search for a weapon of mass destruction to seek prior approval on the method of search design.²⁰⁷

2. Is Search Justified by Special Needs Outside Normal Police Functions?

To date, the “special needs” deemed by the Supreme Court to fall outside normal police functions have usually been needs of organizations with respect to their members and to the public. These have included the needs of employers and school authorities to ensure a drug-free environment, the needs of a hospital administration to guard against employee misconduct, and the needs of probation officers to ensure compliance by parolees with the terms of conditional release. While the offenses to be prevented by these programs may in some cases be criminal in nature, the programs of search themselves are not designed as criminal law-enforcement measures.²⁰⁸ This feature distinguishes the search in our hypothetical from those that have been upheld so far under the special-needs exception, for any evidence of a catastrophic weapon would almost certainly be used for a criminal prosecution. Nonetheless, we do not think this distinction, based on a secondary purpose of a search aimed in the first instance at prevention, necessarily makes the doctrine inapplicable. We urge that the need to prevent against a catastrophic threat falls outside of routine police functions, and the doctrine sensibly can be extended in this manner. The question, as we see it, is whether routine police measures can appropriately be implemented to resolve the problem effectively. If not, it is proper to classify the problem as a “special need.” We contend that the hypothetical case falls within this category.²⁰⁹

We stress that the hypothetical search would be designed primarily for interdiction of future harm. Stopping a nuclear bomb from exploding is possibly a more dominant priority, and it certainly is a more immediate

deployment of any weapon of mass destruction, which, if loosed, would forfeit thousands of lives. In these circumstances, time is of the essence, and prevention is a more important goal than prosecution. We think these exigent circumstances would not ordinarily counsel for delay to obtain a warrant.

207. Perhaps law-enforcement and executive-branch officials could establish protocols for executive-branch approval of a search method in such a case, and perhaps even have done so already.

208. Nevertheless, the implementation of the program may have criminal consequences. The fact that the search was not designed to enforce criminal law does not preclude such enforcement once evidence of criminal activity has been disclosed. For example, the defendant in *Griffin* was prosecuted for being a felon in possession of a firearm. *Griffin v. Wisconsin*, 483 U.S. 868, 870-73 (1987). See also *Camara v. Municipal Court of S.F.*, 387 U.S. 523, 530-31 (1967) (detailing criminal consequences that may follow from an administrative search).

209. Under this view, the search likely would not be justified if it were undertaken only to find the wrongdoers after the device had been detonated.

priority, than apprehension of those responsible for the bomb. Not only has the Court emphasized that there cannot be a special need without an actual danger, but *Von Raab* offers support for the view that the special-needs doctrine applies with particular force when the government seeks to prevent future harm:

Our cases teach . . . that the probable-cause standard “is peculiarly related to criminal investigations.” . . . In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions . . . especially 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.²¹⁰

On the one hand, *Von Raab* stresses the reasonableness of searching, even without probable cause, to “prevent” a nascent harm by detecting hazards before the harm occurs. On the other hand, *Von Raab* suggests that searches without probable cause cannot be undertaken to enforce criminal law. The hypothetical search for an atomic bomb housed in someone’s home can be seen to have elements of both of these strains of thought. The primary purpose of the search is to prevent harm, to find the bomb, to interdict catastrophe. But, as noted, if a bomb is found, then the government’s machinery of criminal law enforcement can be expected to do everything possible to punish the responsible persons.

We tend to think that *Von Raab* is inconclusive on the issue of the hypothetical search in light of its collateral criminal-law consequences. But because of the dominant aim of the hypothetical search—to prevent grave and catastrophic harm—the Court would probably sustain it, given the Court’s more recent interpretation of *Von Raab* in *Chandler v. Miller*. As the Court stressed in *Chandler*,

Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as “reasonable”—for example, searches now routine at airports and at entrances to courts and other official buildings. . . . But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.²¹¹

Our hypothetical presents an imminent, concrete, and substantial risk to the public. While the search could have consequences for criminal law-

210. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (citations omitted).

211. Chandler v. Miller, 520 U.S. 305, 323 (1997) (citing *Von Raab*, 489 U.S. at 674, 675 & n.3, 676).

enforcement purposes as well as for interdiction, we believe the hypothetical search is justified by special needs that fall outside normal law-enforcement functions, and the doctrine could be extended to uphold the search.

3. Is the Search Designed Reasonably to Be Effective?

An additional element of our test is that the program of search must be designed to be as effective as is practical in seeking to prevent harm. Given the extraordinary sacrifice of personal right to societal need, the requirement of efficacy is important to ensure that individual rights are not sacrificed for nothing. When addressing the student-athlete drug-testing program in *Vernonia*, the Court said that an evaluation must include “the nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it.”²¹² The Court’s examination of that question shows that the search program must be reasonably effective, but need not be minimally intrusive:

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the “role model” effect of athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a “less intrusive means to the same end” was available, namely, “drug testing on suspicion of drug use.” . . . We have repeatedly refused to declare that only the “least intrusive” search practicable can be reasonable under the Fourth Amendment.²¹³

Vernonia considered efficacy by comparing a randomized drug-testing program against a program based on individualized suspicion. Because *Vernonia* found that the program in question was reasonably efficient, the opinion said little about standards for assessing efficacy and, hence, it offers little basis for determining when a search program fails for lack of efficacy.

The Court has discussed the “effectiveness” requirement at somewhat greater length in *Brown v. Texas* and *Michigan Dep’t of State Police v. Sitz*, which were not analyzed as special-needs cases, but which did uphold

212. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995). See also *Von Raab*, 489 U.S. at 670 (“The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 650 (1989) (criticizing the majority for “erroneously deriding as ‘minimal’ the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the . . . testing program”) (Scalia, J., dissenting).

213. *Vernonia Sch. Dist. 47J*, 515 U.S. at 663 (citations omitted).

searches without probable cause. In *Brown*, the Court held that “[c]onsideration of the constitutionality of . . . seizures [that are less intrusive than an arrest on probable cause] involves a weighing of the gravity of the public concerns served by the seizure, *the degree to which the seizure advances the public interest*, and the severity of the interference with individual liberty.”²¹⁴ Later cases have described the second consideration on this list as “the ‘effectiveness’ part of the [*Brown*] test.”²¹⁵

Sitz revisited the question, evaluating a roadblock that was implemented under the standards set out in *Brown*. *Sitz* emphasized that a generalized, suspicionless search program should not be upheld merely because it offers some slight advantage in catching offenders or in ease of administration; rather, a court should undertake “searching examination of [the] ‘effectiveness’ [of a search program].”²¹⁶ *Sitz* also reasoned that the effectiveness requirement does not “transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger,” because, when evaluating effectiveness “for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.”²¹⁷ Law enforcement, then, should have flexibility in choosing between effective options in designing the search, but the courts should scrutinize those choices to ensure that the search can be effective.

Where the search stands very little chance of yielding evidence or interdicting the contraband, a large-scale and thoroughgoing search of

214. *Brown v. Texas*, 443 U.S. 47, 50–51 (1979) (emphasis added). See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (“The constitutionality of . . . checkpoint programs . . . depends on a balancing of the competing interests at stake and the effectiveness of the program.”).

215. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

216. *Id.* at 453–54. For examples of such “searching examination” in cases involving suspicionless searches, see *Norwood v. Bain*, 143 F.3d 843, 854 (4th Cir. 1998) (rejecting a checkpoint search of persons entering a motorcycle rally because, “as designed and administered, this procedure was more a sieve than an essentially fool-proof scheme . . . for preventing entry of any weapons or explosives into a threatened area,” since “only those who sought to ride their motorcycles into the fairgrounds were subjected to the search procedure” and “the checkpoint searches made were not in fact blanket searches even of those who entered the checkpoint,” but were made “as a matter of discretionary judgment of those operating the checkpoint”), and *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998) (holding that a drug-testing program for all high-school students in all extracurricular activities was not effective because, inter alia, unlike in *Vernonia*, the school’s drug problem was not “fueled by the role model effect of the students who fell within the Policy’s purview”) (footnote omitted).

217. *Sitz*, 496 U.S. at 454.

residents' homes is less likely to be justified. Whether a search can be effective may depend on factors beyond our knowledge, but, presumably, the effectiveness of any search will be affected by the available information, the characteristics of the area to be searched, the object of the search, the technology for conducting the search, the time likely available for interdiction, and the quality of intelligence guiding the search method and object. In the hypothetical, we set the number of homes to be searched at 100. That number removes the hypothetical search from the range in which it could be upheld under a traditional probable-cause test, but the number is not so high as to make it unlikely that the search could be conducted effectively and that the weapon would be found.²¹⁸ Where the scope of search could not be limited in this fashion, questions would arise about whether any search could be conducted effectively.²¹⁹

4. Is the Search Neutral and Nondiscriminatory?

As for the neutrality requirement, we believe that issue could be addressed by designing a comprehensive but flexible search plan that designates the areas or objects to be searched, with limitations to ensure that the search does not extend to places unlikely to yield evidence about the bomb. In a search of this importance, it would be expected that law enforcement would search thoroughly any place likely to yield information. Such a search would necessarily be invasive, but could be undertaken neutrally so long as all places were searched intensively according to the same procedures, based on neutral protocols, and so long as no person or place was singled out for exceptional scrutiny, unless specific information justified such differential treatment.

218. If intelligence on weapon location is less precise, at some point the range would become so large as to make an effective search unlikely. And the prospects for the efficacy of a search will likely diminish if intelligence gives a short deadline, but increase if an extended period is expected before a monstrous and catastrophic threat is unleashed. For example, a home-to-home search for a weapon anywhere in a million homes in and around Washington, D.C. would be extremely invasive of the privacy of persons throughout an entire city and perhaps would lead to a general and destructive panic, without the payoff of being likely to yield the weapon sought. We do not express a view as to the upper limit of persons to be searched within estimated time constraints beyond which a search could not be considered to be likely effective.

219. It would be idle to speculate about how many homes would have to be targeted for search to render the search apparently ineffective, because that conclusion turns not only on the number of places to be searched, but also on the other considerations we have listed, and those details will be different in each case. It is enough to acknowledge that at some numerical point, the information would be too vague or the scope of search too wide to permit a search that could reasonably be expected to decrease the risk of harm.

Some of the cases falling under the special-needs doctrine, such as *Edmond*, *Skinner*, *Von Raab*, and *Vernonia*, have involved comparatively large-scale programs of search designed well in advance of the program's implementation. These cases show that when a search involves testing all persons in some subset of the populace, or randomly interceding to do the same, it is easy to implement the search program on a wholly neutral basis so as not to single out unfairly any particular subset of the population. Yet the cases offer little express guidance on what constitutes a sufficiently neutral and nondiscriminatory program of search such that an investigation of selected targets based on intelligence and justified by special needs, but lacking traditional probable cause, may be deemed constitutionally permissible.²²⁰ As we have framed the hypothetical, however, there is an equally urgent need to search all homes in the 100 selected for search. Any use of different standards or processes for searching a particular home would have to be supported by some articulable reason.

5. On Balance, Do Special Needs for Search to Prevent Harm Outweigh Intrusion on Privacy Interests?

Finally, in assessing the balance between the need to search and the privacy of the homeowners to be searched, reasonableness is the hallmark, and several considerations are important. The question here is whether search of the 100 homes, as opposed to the more limited searches that have been upheld in most of the prior special-needs cases, is reasonable. We have recognized that *Kyllo* emphasized the sanctity of the home against a thermal-imaging search for marijuana harvesting.²²¹ The only special-needs case permitting search of a home is *Griffin*, which held that a probationer had a lesser expectation of privacy in his home than did others because of his consent to the terms of supervised release. While some special-needs cases have permitted search without any individualized suspicion, and while *Griffin* permitted search of a home, no case to date has permitted suspicionless search of a home. We contend, however, that a

220. For example, in *Vernonia*, all students participating in an extracurricular sport were tested at the beginning of the season for their sport. Once a week during the season, ten percent of the students were selected for drug testing by having their names drawn randomly from the entire pool. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995). In *Edmond*, as noted above, the highway checkpoints were selected on the basis of factors such as area crime statistics, but the search protocol itself required the police to stop every one of a predetermined number of cars, so that there was no discretion in the implementation of the search plan. While these examples illustrate nondiscriminatory search procedures in their specific settings, they offer little or no aid in analyzing an appropriate search protocol in the case of our hypothetical, where the police must necessarily search every home in the defined area until the weapon is found.

221. See *supra* text accompanying notes 146–48.

search of the residents' homes for an atomic bomb would be regarded by most courts as reasonable if it were unlikely that the bomb could be stopped by any other method than an invasive home-to-home search. Whether the search can be considered reasonable is tied to the efficacy of the search. If a search cannot effectively decrease the risk, then the search must be deemed unreasonable, because it involves infringing on privacy without realistic hope of achieving anything thereby. But given the magnitude of the threatened harm, where there is any genuine hope of preventing disaster, even an invasive and suspicionless search would probably be viewed as reasonable. While this requires an extension of the special-needs doctrine, we think it necessary and appropriate.

We note as a caveat that we reach this conclusion in what we have designed as a most extreme and catastrophic case. To accommodate the public's need for the search posed by the hypothetical does not necessarily lead to a slippery slope permitting search on less than traditional probable cause on all serious crime. Even more importantly, the extension and application of special-needs doctrine to search for weapons posing catastrophic risk will not jeopardize the right of individuals to be protected against discriminatory or baseless searches.

V. CONCLUSION

It is no easy task to balance traditional concepts of privacy against novel threats of devastation. And courts as well as citizens must be mindful to avoid the risk, if possible, that a solution designed to prevent wholesale destruction of life and property does not destroy the basic values that undergird our civic life. When all facts and competing interests are weighed, our Constitution requires, in the face of any constitutional challenge, that the courts decide whether or not the search is reasonable. In catastrophic-threat cases, as in all search cases, privacy interests compete with governmental and societal need. When the courts decide that it is reasonable to accommodate an overriding government interest, the courts may necessarily have to tolerate some intrusion on personal privacy rights.

We have offered a preliminary analysis of the Fourth Amendment issues that may be raised if law-enforcement officers had a concrete need to search for weapons of mass destruction in an American city without particularized evidence that the weapons will probably be found in a particular locale. Our readers will presumably have no difficulty in recognizing issues that support, contradict, or transcend our analysis. Doubtless any reader who has come this far can pose questions not treated

by us that would be raised upon relatively minor changes to our hypothetical. Our subject matter and the unfamiliar terrain require us to recognize that analysis will benefit from broader perspectives. We do not suggest that our theory offers anything definitive, but we venture some tentative suggestions:

First, the standard test for probable cause as a condition precedent to a reasonable search is inadequate in itself to confront the potential need to search for weapons of mass destruction believed to be in one of a defined set of locations where the evidence cannot pinpoint a single location.

Second, though doubtless the Supreme Court could dust off any doctrine that we have mentioned (and perhaps some that we have not) and expand it to apply to the case we present, we do not think that the case is likely to be analyzed as an administrative search. Nor do we think it likely to be upheld under a broad national-security exception to warrant requirements.

Third, to hold that no person has a reasonable expectation of privacy against search for a weapon of mass destruction in any place would go too far, eliminating all consideration of privacy interests and giving the government a blank check to search all homes for such weapons, even without any individualized cause. We do not believe that is the correct answer.

Fourth, the Supreme Court's special-needs jurisprudence does not precisely fit the hypothetical setting. The special-needs doctrine was not designed to address the risks posed by a catastrophic threat to human life. The formulations of the doctrine in prior Supreme Court precedent are not necessarily an absolute constraint to expansion of the doctrine, and the Court's reasoning can guide the extension of special needs to the hypothetical. Yet the variety of cases being analyzed under special-needs doctrine and their similarity to the hypothetical posed, insofar as they address society's response to grave and unusual risks, makes this doctrine a good candidate for analysis and possible application.

Fifth, if there is a fair probability of preventing a massive loss of life by searching a set of locations, the law will be well-advised to recognize the case of justifiable, but not probable, cause permitting a search for an extreme hazard. Though some other doctrine might be expanded or created to fit this case, we think that the special-needs doctrine can be most sensibly extended to test and prescribe the permissible limits of such searches, including elements of special need, efficacy, and neutrality. Building on the special-needs cases would provide continuity of precedent

and greater protection of individual privacy than would the construction of an entirely new and ad hoc catastrophic-threat or national-security exception to probable-cause requirements.

Sixth, in the intense concern to prevent grave harm, responsible officials should not lose sight of the equally intense concern to do what is right. That means that even searches for the most deadly and destructive of weapons, while they may gain some accommodation on the level of probability needed to search a place, should not be allowed to proceed in a way that is intentionally discriminatory. Nor should such a search be permitted.

Seventh, in another sense, our hypothetical question does not call for a hypothetical answer, but a practical one that may have to be tailored under fire in a particular case. And yet, because law-enforcement and government officials may not wish to act in violation of their own established guidelines or protocols, it would be well if the government tackled the problem in advance, and if protocols were designed and defined that were both effective and reasonably likely to pass constitutional muster.²²²

If the search we have described for a weapon of mass destruction should be permitted, then scholars and courts soon may grapple with how to define “catastrophic” threats so serious as to warrant a departure from traditional probable-cause analysis. If the search of 100 homes for an atomic bomb is permissible, then how about a search of 100 homes of biochemists for an anthrax terrorist? How about a search of ten homes for a shoulder-held missile capable of destroying a commercial airliner with its hundreds of passengers? How about a search for a serial killer among a likely subset of suspects? Routine reports of crimes or terrorist acts point to the relevance of the primary and extreme case we pose. We offer no view on where to draw the line defining a catastrophic threat that permits

222. Doubtless Congress, with its ability to canvass a broad range of potential circumstances involving the risks of terrorist acts within the United States, and with its ability to assess relevant secret information, could play an important role (if it chooses to do so) in establishing procedures to address the problem we pose. Although the judicial branch is the ultimate interpreter of the Constitution, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in the sphere under discussion, the Supreme Court likely would give some deference to a deliberate choice made by an informed Congress. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 416 (1976) (finding that it was lawful for a federal postal inspector to arrest a suspect without a warrant, in part because of the “strong presumption of constitutionality due to an Act of Congress [authorizing the arrest], especially when it turns on what is reasonable,” and given that presumption, “obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional”) (internal quotation marks omitted).

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search on justifiable cause rather than probable cause. We mention these issues to acknowledge that our views, if accepted, soon would be tested in other contexts. Military or law-enforcement officials may encounter another kind of potentially catastrophic threat, short of a threatened detonation of an atomic bomb. Whenever circumstances require executive- or legislative-branch officials to consider such issues, it will not be long before the issues must in due course be reconsidered by the courts.²²³

It is difficult to grapple with the concept of the limits of permissible search for weapons capable of causing mass destruction. And it may be hoped that none in law enforcement or the courts is faced with this dilemma in a concrete case. But if the unthinkable case is presented, this issue will require debate, discussion, and analysis for an optimum solution to be found, consistent with efficacy and enduring constitutional values.

223. "There is hardly ever a political question in the United States which does not sooner or later turn into a judicial one." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248 (J.P. Moyer & Max Lerner eds., Harper & Row 1996) (1832).

