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Protecting the Citizen Whilst He is Quiet: Suspicionless Searches, Special Needs and General Warrants

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PROTECTING THE CITIZEN "WHILST HE IS QUIET": SUSPICIONLESS SEARCHES, "SPECIAL NEEDS" AND GENERAL WARRANTS

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I. INTRODUCTION

Certain government searches are likely to get anyone's Fourth Amendment adrenalin pumping: political leaders using government agents to ferret out dissidents and silence their criticisms; the police battering down an innocent citizen's door based upon only the flimsiest of tips; officers indiscriminately rounding up citizens for questioning merely because their race matches a victim's vague description; the soccer mom dragged off in handcuffs by an overzealous cop for an offense that at most could result in a fine.[1] These are classic government-citizen encounters that raise our Fourth Amendment ire because they touch a deep republican chord in the American conscience and harken back to the colonists' struggles against oppression and overreaching government officials. Moreover, these moments are easily visualized as if they were an episode of COPS. We can feel a rush of angry indignation if we imagine ourselves being pushed into the back of a police cruiser as our toddlers look on, or we can sense the dread of those who have opposed tyrants over the centuries and heard the heavy footsteps down the hallway foretelling of the "midnight knock" of government agents.

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[1] Although many find this last example alarming, the Supreme Court found it constitutional in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

What are often labeled "regulatory" or "administrative" or "special needs" searches, on the other hand, are far less likely to rally the citizenry to the Fourth Amendment barricades. These searches would be more the material of a show called CLERKS rather than COPS, as the citizen hands over a urine sample to the employee of a drug testing firm or opens the door to a thickly bespectacled housing inspector wanting to check for faulty wiring. Moreover, such searches often are instituted in the name of a powerful public good, such as regaining control of our nation's schools from the grip of drugs or protecting innocent babies from being born addicted to crack.

Compared to administrative searches, "checkpoints" that require an individual to submit to someone in a police uniform are more likely to excite Fourth Amendment sensibilities, but they still are unlikely to cause much public uproar. They tend to be brief encounters that, at least in theory, apply to everyone, sparing the individual the indignation of being singled out by the police as a wrongdoer. And like administrative searches, the image of a checkpoint tends to not have much imaginative or visual punch as the line of cars wends its way through a sobriety or immigration roadblock. By contrast, the public good that the checkpoint is trying to accomplish—removing drunken drivers from the roads or catching drug pushers—immediately resonates as desirable.

For those who believe that administrative searches and checkpoints are constitutionally worrisome, therefore, the difficulty is to explain why, even if these types of searches might not make good reality television, something important is at stake. The Court's explanation traditionally has been primarily rooted in the idea of privacy. In *Camara v. Municipal Court of San Francisco*,[2] when the Court first brought administrative searches within the Fourth Amendment fold by holding that housing inspections were subject to the Amendment, the majority explained that while a housing inspection might not be a "hostile intrusion," the individual still "has a very tangible interest in limiting the circumstances

[2] 387 U.S. 523 (1967).

under which the sanctity of his home may be broken by official authority . . . ."[3]

Given the context of *Camara*, the Court's use of privacy as the core rationale for assessing administrative searches made sense. Because the Court had previously found that housing inspections were only at the peripherary of the Amendment,[4] the *Camara* Court needed a means of bringing the inspections more fully within the Amendment's protections. The idea of protecting the "sanctity of the home" provided such a means because the inspections required entering an individual's house even if the inspector was only looking for faulty wiring.[5] Moreover, the Court that same term in *Katz v. United States*[6] was in the process of making "reasonable expectations of privacy" the centerpiece of the Amendment's protections.[7] Consequently, the now familiar *Camara* formula of "flexible probable cause" as requiring the weighing of the government's need for the intrusion against the severity of the intrusion on the individual's privacy interest made logical sense.[8] Privacy soon became the Fourth Amendment gold standard in discussing the constitutionality of inspections, regulatory searches and checkpoints.

But while privacy might have provided a substantial counterweight in the context of an intrusion inside the home, it proved to be much more of a makeweight when the Court addressed inspections and regulatory searches in other settings. A brief stop at a checkpoint might impinge upon one's privacy, but the impingement simply is not of the magnitude of an agent of the government entering one's home, even if the agent is only a housing inspector wearing a pocket protector

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[3] *Camara*, 387 U.S. at 530-31.

[4] *See* Frank v. Maryland, 359 U.S. 360, 367 (1959).

[5] *Camara*, 387 U.S. at 531 (noting also that housing inspections were enforced by criminal processes).

[6] 389 U.S. 347 (1967).

[7] *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

[8] *Camara*, 387 U.S. at 536-37. This is not to say that the *Camara* formulation properly calibrated the scales when it came to determining how the government's interest should be weighed against the individual's privacy interest. *See generally* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing The Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988).

and armed with a clipboard. A dialogue centered on privacy might seem more relevant when the "search" involves urine samples because of the great privacy we want when we perform our bodily functions, but the usefulness of privacy for defining the Fourth Amendment stakes becomes far less helpful if the sample is given without observation. As the Court's cases involving random urine testing illustrate, the privacy imagery then becomes more of providing a urine sample at the doctor's office to check on one's health than of the police entering one's front door.[9]

If regulatory searches and checkpoints are thought of primarily in terms of physical privacy, therefore, they often appear as essentially *de minimis* constitutional violations, especially when conducted outside of the home. One might attempt to overcome this *de minimis* appearance by using an analogy to the Court's reasoning in *Wickard v. Filburn*[10] where it was held that a single farmer's use of wheat affected interstate commerce.[11] An argument could be made, for example, that just like the effect of the consumption of wheat by a single farmer from his field must be thought of as multiplied by thousands of farmers harvesting wheat from their fields, the privacy interest at stake with one sample of urine must also be thought of in the aggregate of thousands being forced to give urine samples. But not only is the image of multiplying urine samples somewhat disconcerting, it does not really do much to raise the public's Fourth Amendment dander.

Yet clearly some Fourth Amendment instinct is at play in these cases. Not only have cases involving checkpoints and drug testing commanded the Supreme Court's attention, they often have provoked strongly worded opinions. Justice Scalia, for example, direly warned when the Court upheld suspicionless drug testing of Customs Service employees that "[t]hose who lose because of the lack of understanding that

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[9] *See generally* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

[10] 317 U.S. 111 (1942).

[11] *Wickard*, 317 U.S. at 127-28 (holding that while a single farmer's use of wheat may be insignificant, if "taken together with that of many others similarly situated, [it] is far from trivial").

begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content . . . ."[12]

But if the language of privacy does not adequately capture the values that are in jeopardy through suspicionless searches and checkpoints, how might we better frame the issues to address what is at stake? Various alternative ways of thinking about the Fourth Amendment have been proposed. For example, it is argued that we ought to recast our analysis to account for the role of trust between the citizen and government,[13] to focus on the importance of individual respect,[14] or to see police coercion as the primary problem under the Fourth Amendment in today's world.[15] While these differing formulations offer fruitful insights, the Supreme Court itself, in two fairly recent opinions, may have offered the analytical stepping stone to how these types of searches might best be looked at under the Fourth Amendment. Without specifically mentioning general warrants, the Court's decisions in *City of Indianapolis v. Edmond*[16] and *Ferguson v. City of Charleston*[17] raise themes that directly cast back to the concern over general warrants that served as the impetus for the Fourth Amendment. It may be that this historical concern provides the key to dealing with modern phenomena like government drug testing and an expanding law enforcement presence with the capability of conducting widespread searches and checkpoints.

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[12] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).

[13] *See generally* Sundby, *supra* note 9.

[14] *See generally* Andrew Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003).

[15] *See generally* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

[16] 531 U.S. 32 (2000).

[17] 532 U.S. 67 (2001).

II. SETTING THE STAGE FOR A REVIVAL OF THE GENERAL WARRANTS DOCTRINE

The general warrant and the excessive amount of discretion that it placed in the hands of the government agents conducting the search stands as the primary evil at which the Fourth Amendment was directed.[18] The Fourth Amendment's concerns with general warrants echo directly back to two famous English cases that addressed the legality of general warrants during the time when the United States was still a British colony. In the *Wilkes* case, the British Secretary of State, Lord Halifax, issued a warrant authorizing four messengers to search for the printers and publishers of the "seditious" publication *The North Briton*, No. 45.[19] Apart from lacking statutory authority, the warrant did not specify the places to be searched or identify the persons to be seized.[20] By the end of the search, more than twenty-four people had been arrested,[21] some with no connection to *The North Briton*, and "quantities" of private papers had been seized.[22] The English court found the warrant to be "hopelessly defective," with no "offenders' names" specified, no inventory of things taken away, and a broad discretion given to the messengers that was "totally subversive of the liberty of the subject."[23]

Afterwards, the *Entick* case was decided, in which Lord

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[18] *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

[19] Wilkes v. Wood, 98 Eng. Rep. 489 (C.D. 1763).

[20] *Wilkes*, 98 Eng. Rep. at 498.

[21] In addition to Wilkes, who was the publisher of *The North Briton*, various other printers who had been arrested and later released when it appeared they had not printed Number 45 also sued, with juries returning "heavy verdicts" for the plaintiffs. TELFORD TAYLOR, *Search, Seizure, and Surveillance*, *in* TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19, 30-31 (1969).

[22] *Id.* at 30.

[23] *Id.* at 31. After the jury returned a verdict for £1,000, the messengers took exception to the verdicts, which brought the cases before Lord Mansfiled, who affirmed the judgment on the narrow ground that the principle plaintiff, Dryden Leach, was in fact not the printer of the targeted publication, and therefore the warrant could not justify the trespass. *Id.* at 31-32. But in the course of arguments, Mansfield gave the opinion that the Halifax warrant was too "general" because no person was named or described in it. *Id.* at 32.

Halifax had issued a warrant "for arrest of the person and seizure of the books and papers of John Entick," who also was suspected of seditious writings.[24] Entick was arrested and his papers seized; after his release he sued the messengers in trespass, and the jury returned a verdict of £300.[25] On appeal, Lord Camden ruled in favor of Entick because the messengers failed to obey the directions of the warrant and because the statutory authority to search for libelous papers had expired.[26] In addition, Camden noted that the warrant in question was deficient because it "did not authorize merely the seizure of Entick's libellous papers, but all of them, libellous or not. Furthermore, the warrant had other flaws: no oath of probable cause had been given, and no record was made of what had been seized."[27]

Within the colonies, the *Wilkes* and *Entick* cases received attention both through English and colonial newspaper accounts and pamphlets that were written about the cases and circulated.[28] The colonies also were focused on general warrants because they faced their own form of general warrants through the writs of assistance that authorized customs officials to search for untaxed imported goods. The writs became the focus of James Otis' famous argument against the legality of writs of assistance in 1761.[29] Although Otis's argument failed and the issue of writs was reauthorized by the Townshend Act of 1767, the reauthorization itself sparked widespread discontent and gave rise to a number of legal challenges to the writs, with colonial judges often refusing to issue the writs as contrary to law.[30]

The concern with general warrants and writs of assistance

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[24] *Id.*

[25] Entick v. Carrington, 95 Eng. Rep. 807, 807-08 (C.B. 1765).

[26] TAYLOR, *supra* note 21, at 33. The directions called for the messengers to be accompanied by a constable and to bring Entick before Halifax himself, but the messengers failed to bring a constable with them and brought Entick before Halifax's assistant. *Id.*

[27] *Id.* at 33-34.

[28] Davies, *supra* note 18, at 563-65.

[29] For an excerpt of this argument, see *infra* note 183 and accompanying text.

[30] Davies, *supra* note 18, at 561-67. Otis's argument is discussed in more detail at *infra* notes 176-94 and accompanying text.

thus forms a rich historical backdrop to the Fourth Amendment's development and has continued to play an important role in shaping the ongoing debate over whether the "reasonableness" or the "warrant" clause should have primacy in interpreting how the Fourth Amendment should be applied. Those advocating that a general reasonableness standard should prevail have used the historical dislike of general warrants as one way of arguing that the Framers would have preferred warrantless searches over an approach that favors warrants. Supporters of the warrant-preference view, on the other hand, have drawn upon the abuses underlying the use of the general warrant—"searches conducted outside the judicial process, without prior approval by judge or magistrate"—to justify requiring the judicial issuance of warrants as the Fourth Amendment norm.[31] Although the Court recently has given increasing credence to the reasonableness approach,[32] the Court through most of the twentieth-century has used a warrant-preference approach and has relied upon the idea that the Framers preferred specific warrants because it curtailed the discretion of law enforcement agents to act without judicial approval: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[33]

But while the Framers' concern over general warrants has played and continues to play an important role in how we interpret the Fourth Amendment, as a day-to-day matter the colonial concern over general warrants has largely faded into the background. True, the Court occasionally will use the problem of general warrants to elucidate a particular aspect of the Fourth Amendment, such as what constitutes a "neutral or detached magistrate" or what is a sufficiently particularized search warrant. In *Lo-Ji Sales v New York*,[34] for instance, the

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[31] Katz v. United States, 389 U.S. 347, 357 (1967).
[32] *See generally* Sundby, *supra* note 9, at 1765-71.
[33] *Katz*, 389 U.S. at 357.
[34] 442 U.S. 319 (1999).

Court held a search that uncovered pornographic materials was unconstitutional because the town justice who issued the search warrant had stepped outside of his role as a "neutral and detached" judicial officer.[35] The Court justified its ruling by recognizing that the neutrality of the magistrate is critical to avoid moving towards general warrants, observing that "[o]ur society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era . . . ."[36] In similar fashion, the Court made reference to the "hated" writs of assistance in *Stanford v. Texas*[37] when explaining its decision that a search warrant had not been sufficiently particularized because it was issued broadly "for the purpose of searching for and seizing any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of" a statute specifically targeting the Communist Party of Texas.[38]

As a practical matter, though, and despite the rhetorical homage that the Court has paid to the role that the struggle against general warrants played in the formation of the Fourth Amendment, relatively few cases actually have run afoul of the prohibition against general warrants. The concern over general warrants for most of the twentieth century, therefore, has been to supply a theoretical and historical underpinning for the Supreme Court's warrant-preference approach; as a specific tool for enforcing the Fourth Amendment, however, its scope has been fairly limited. This was not because the aversion to general warrants had lessened, but simply because by making the warrant clause the first step in Fourth Amendment analysis, the Court had largely preempted the possibility of general warrants in the historical

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[35] *Lo-Ji Sales*, 442 U.S. at 326.

[36] *Id.* at 329.

[37] 379 U.S. 476 (1965).

[38] *Stanford*, 379 U.S. at 477. The state was not helped by the fact that in executing the warrant, the agents rounded up books "by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and MR. JUSTICE HUGO L. BLACK." *Id.* at 479-80.

sense. That is, because the prevailing norm was now that a government search required a judicially issued warrant particularized in its description, executive or legislatively authorized searches without judicial oversight were the exception rather than the rule. Consequently, the aversion to the abuses of general warrants had become more of an inspirational background value than a day-to-day tool for enforcing the Fourth Amendment.

Developments over the past several decades, however, may slowly have moved Fourth Amendment analysis to the point where the general warrants doctrine may soon be taken out of the "holy constitutional relics" category and given a far more active role in interpreting the Fourth Amendment. Several factors in particular have set the stage for a possible renaissance of the general warrants doctrine.

The first is the rise of technology that enabled the government to undertake widespread surveillance in a manner that simply was not possible before. Prior to the development of such technology, individualized suspicion not only made good Fourth Amendment sense, it also made good economic sense in that finite law enforcement resources were best allocated in pursuit of those about whom suspicion already existed. The 1980's, however, saw the advent of extensive drug testing in the workplace that soon spread over into the government sphere. The ability to quickly determine whether a group of individuals was taking drugs through a simple test allowed the government to learn information that before would have taken around-the-clock surveillance by a legion of law enforcement spies. Now that the government could gain the same information through laboratory testing of easily obtained samples, the capacity to engage in blanket testing rather than ferreting out offenders on an individual basis became far more feasible and tempting.

But while improved economic and technological feasibility made it possible to engage in these types of suspicionless intrusions, the government could not, of course, use these methods unless the Fourth Amendment was interpreted as allowing them. And, it has been the Court's gradual move towards a view that embraces the Reasonableness Clause as

the primary fulcrum for Fourth Amendment analysis that has made this allowance possible.

Considerable scholarly attention has been devoted to charting the Court's movement away from a warrant-preference model of the Fourth Amendment toward a conceptualization of the Fourth Amendment universe that has the Reasonableness Clause at its center. In particular, the movement gained momentum once the Court announced that if the government could show "special needs" other than crime detection, then suspicionless searches would be permissible if the government's justification outweighed the intrusion on the privacy interest. At a dizzying pace for the world of constitutional law, the Court in a six-year period between 1989 and 1995 used a reasonableness-based analysis to approve of suspicionless searches in a variety of settings, ranging from sobriety checkpoints to the drug testing of student-athletes.[39] It soon became a familiar Fourth Amendment sight to see courts finding "special needs" based upon safety or the nature of one's employment, pulling out the reasonableness balancing scales, and then placing the government's interest on one side and the individual's privacy interest on the other side.

Not surprisingly, the Court's growing receptivity to the idea that a search or seizure can be "reasonable" outside the traditional requirements of the Warrant Clause has had important ramifications. For our purposes of thinking about a rebirth of concern over general warrants, two side-effects are particularly significant.

First, because the generalized-reasonableness approach does not view probable cause as an essential prerequisite, the role of individualized suspicion lost some of its Fourth Amendment swagger. This effect is important because one of the virtues of requiring individualized suspicion is that it gives the citizen the power to control the government's ability to in-

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[39] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990); Skinner v. Ry. Labor Executive Ass'n, 489 U.S. 602 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

trude. If a person does not act in a manner giving rise to probable cause (or reasonable suspicion for a *Terry* stop), the government has no discretion under the Fourth Amendment to engage in a search or seizure. Once suspicionless searches are recognized as a permissible subset of Fourth Amendment searches, however, the citizen can be subjected to intrusions simply for undertaking innocent activities such as wanting to play the trumpet in the school marching band[40] or applying for a government job.[41] The government's discretion, in other words, no longer is limited by the citizen's actions but can now extend to conducting intrusions so long as the government can show that its desire to intrude is "reasonable," a situation which begins to touch upon one of the underlying core concerns with general warrants—expansive government discretion in conducting searches.

The second side-effect was to alter the nature of the Court's decision-making role under the Fourth Amendment. Under the classic warrant-preference model, the role of the judiciary is primarily one of a fact finder. A magistrate who is requested to issue a warrant will engage in an inquiry that is tied to the central question of whether sufficient facts exist to constitute probable cause. Even in the review of the constitutionality of a warrantless search that has already taken place, a court will focus on questions of historical fact (for example, whether exigent circumstances existed that excused obtaining a warrant). In these contexts, the judiciary is overseeing executive- and legislative-authorized intrusions through fact-finding that is then measured against Fourth Amendment benchmarks such as probable cause and exigency. A court, in other words, is not being asked to independently determine as a policy matter whether a search is "reasonable" (for example, whether the search of the individual's house was a sound policy decision); rather, the judiciary is determining the search's legitimacy by finding the historical facts that preceded the intrusion (for example, whether probable cause of drugs in the house existed that allowed the judge to issue the war-

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[40] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[41] *See Von Raab*, 489 U.S. at 656.

rant to search the individual's house).

By contrast, once courts are asked to start assessing the "reasonableness" of intrusions like sobriety checkpoints or drug tests, the judiciary is placed in the position of having to engage in a policy inquiry fashioned as a balancing test of the government's need for the program against the level of intrusion on the citizen. This new role is particularly important because it no longer centers around historical facts, but requires the Court to decide how much independence it should exercise in assessing whether an executive or legislative search is reasonable. And in its early cases using the reasonablenss balancing test, the Court adopted what appeared to be a fairly deferential approach.[42] In his opinion for the Court upholding sobriety checkpoints, for example, Justice Rehnquist expressly stated that "for purposes of Fourth Amendment analysis, the choice among . . . reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources . . . ."[43]

This deferential approach was particularly evident in the early "special needs" case of *Von Raab*. In justifying suspicionless drug testing of Customs Service employees, the Court was presented a record with scant evidence of drug use by the employees who were to be tested.[44] While the government suggested that Customs Services agents using drugs might be susceptible to blackmail or could be dangerous if carrying guns, it was unable to present evidence that such problems were occurring.[45] The majority finessed the problem by starting with the assumption that "the traditional-probable cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the

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[42] A major complaint of the dissents in the "special needs" cases was that the majority was deferring to the government's assessment of the program's need and efficacy. *See, e.g., Skinner*, 489 U.S. at 652 (Marshall, J., dissenting) (criticizing the majority's "blind acceptance of the Government's assertion [that the program would deter substance abuse by workers]").

[43] *Sitz*, 496 U.S. at 453-54.

[44] *Von Raab*, 489 U.S. at 673.

[45] *Id.* at 674.

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."[46] This assumption allowed the majority to gloss over the absence of any showing that the Customs Service was actually facing a problem with drug use and to instead give the government the power to infer a potential problem based merely on the fact that a drug problem exists in society generally: "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context."[47]

Justice Scalia in his dissent highlighted the lack of any evidence, pointing out 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."[48] Justice Scalia found the lack of a supporting record particularly disturbing because it led him to conclude that the government's real purpose was merely a symbolic one of proving that the Service was "clean," a purpose that Scalia thought it "obvious . . . is unacceptable."[49] Justice Scalia's objection, therefore, was that the Court was not vigorously testing the government's justifications, but was allowing the government to rely upon generalizations rather than demonstrating that a problem existed.[50] He concluded that "if such a generalization suffices . . . the Fourth Amendment has become a frail protec-

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[46] *Id.* at 668 (citations omitted).

[47] *Id.* at 675 n.3.

[48] *Id.* at 681 (Scalia, J., dissenting).

[49] *Id.* at 686-87 (Scalia, J., dissenting) ("I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court."). Justice Scalia's belief that a purely symbolic purpose would not support a Fourth Amendment "special needs" finding appears to have been vindicated in the later case of *Chandler v. Miller*, 520 U.S. 305, 323 (1995) (holding requirement of drug testing of candidates for state office invalid); *see infra* notes 52-63 and accompanying text.

[50] *Von Raab*, 489 U.S. at 685-87 (Scalia, J., dissenting); *see also* Skinner v. Ry. Labor Executive Ass'n, 489 U.S. 602, 653 (1989) (Marshall, J., dissenting) ("The majority's credulous acceptance of the [Federal Railway Administration]'s deterrence rationale is made all the more suspect by the agency's failure to introduce, in an otherwise ample administrative record, *any* studies explaining or supporting its theory of accident deterrence.").

tion indeed."[51]

One effect of the Court's movement to a reasonableness test when coupled with a deferential approach, therefore, was to grant the legislature and executive branches greater discretion under the Fourth Amendment. The Court did not completely abdicate the Fourth Amendment's concern with controlling discretion in these early "special need" cases, but tended to focus on guarding against "standardless and unconstrained discretion" being granted to the officer in the field rather than on scrutinizing the policy judgment of the need for the search in the first place.[52] As a result, the general warrant's potential vice of the searches being conducted without meaningful judicial oversight appeared to be gaining a foothold. While still a far cry from government officials ransacking homes on a random basis, the specter of government intrusions without individualized suspicion based upon a bureaucrat or government official's determination that a "special need" for such an intrusion existed began to take shape.

III. *CHANDLER, EDMOND* AND *FERGUSON*: THE EMERGING ROLE OF THE COURT AS "POLICY MAGISTRATE"

The Court's sensitivity to the possibility that the "special needs" category of cases might quickly expand and swallow up the Amendment surfaced in *Chandler v. Miller*.[53] In *Chandler*, the Georgia state legislature had passed a statute requiring that before a candidate could be placed on the ballot the candidate must within thirty days of qualifying for the election or nomination present a certificate from a state-approved laboratory stating that the candidate had submitted to a urinalysis drug test and tested negative.[54] The statute applied to state offices ranging from the position of Governor to the

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[51] *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting). Justice Scalia recognized that in certain contexts, such as a nuclear power plant, a potential disaster might justify the inability to demonstrate a problem at the moment. *Id.* (Scalia, J., dissenting).

[52] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990) (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).

[53] 520 U.S. 305 (1995).

[54] *Chandler*, 520 U.S. at 309.

Commissioner of Agriculture.[55] All judicial candidates also were subject to the drug testing requirement.[56] The Libertarian Party nominees for state offices challenged the state statute in federal court as violating the Fourth Amendment.[57]

The lower federal courts had upheld the drug testing requirement despite a lack of evidence that Georgia's elected officials were involved with drug abuse.[58] In particular, the lower courts relied upon the Supreme Court's approval in *Van Raab* of drug testing based on the mere potential for blackmail if a Customs employee in a sensitive position should develop a drug problem, rather than because of any evidence of an actual drug problem in the Customs Service.[59] Not unreasonably, the Eleventh Circuit majority had found similar considerations applied to individuals holding state elected offices and understood the Supreme Court's prior cases as not applying a particularly strict concept of what constituted a "special need" so long as it served interests other than the ordinary needs of law enforcement.[60]

Justice Ginsburg, writing for the majority in an 8-1 decision, however, attempted to cabin the earlier decisions upholding suspicionless searches as belonging to a "closely guarded category" of cases "involving limited circumstances."[61] In making her characterization of these prior cases, Justice Ginsburg stressed those parts of their holdings that made mention of qualities such as "surpassing safety interests,"[62] "grave safety threats,"[63] "high risk positions,"[64] and "immediate crisis."[65] Judged against these types of government needs and with the State of Georgia conceding during oral argument that no evidence existed of drug abuse by public

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[55] *Id.* at 309-10.
[56] *Id.* at 310.
[57] *Id.*
[58] *Id.* at 311.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 308-09.
[62] *Id.* at 315 (describing *Skinner* and drug testing of railroad workers).
[63] *Id.* at 316 (describing *Von Raab* and testing of Customs Service employees).
[64] *Id.*
[65] *Id.* (describing *Vernonia* and testing of student athletes).

office holders,[66] the majority opinion was able to conclude that "notably lacking . . . is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule [of individualized suspicion]."[67] Justice Ginsburg also noted that the statute was not "well designed" to effectuate its purpose of catching drug users running for public office because of the ease of scheduling the test to avoid testing positive (the candidate knew the date that he or she would be tested); the state, therefore, "ha[d] offered no reason why ordinary law enforcement methods would not suffice . . . ."[68]

The *Chandler* Court thus made a strenuous effort to characterize its prior "special needs" cases as the exception rather than the rule. The Court especially went out of its way to try and limit the effects of *Von Raab*'s approval of drug testing despite the absence of any evidence of drug abuse, a void which Justice Scalia's dissent in *Von Raab* had made a central feature of his argument that the Court was approving drug testing as a mere symbolic gesture.[69] The *Chandler* majority argued that *Von Raab* was "[h]ardly a decision opening broad vistas for suspicionless searches [and] must be read in its unique context [of employees involved in drug interdiction and not subject to day-to-day scruntiny]."[70] Consequently, the majority concluded, the lack of evidence of drug abuse by public officials relegated Georgia's justification for drug testing merely to one of "the image [that] the State seeks to project," meaning that "the need revealed, in short, is symbolic, not 'special'" and, therefore, must fail.[71]

Chandler's rhetoric presented a very strong statement limiting suspicionless searches, with the Court engaging in some tough constitutional talk warning that its prior cases

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[66] During oral argument the state's attorney remarked, "[T]here is no such evidence [and] to be frank, there is no such problem as we sit here today." *Id.* at 319.

[67] *Id.*

[68] *Id.* at 320.

[69] *See supra* notes 47-50 and accompanying text.

[70] *Chandler*, 520 U.S. at 321.

[71] *Id.* at 321-22.

should not be misunderstood.[72] Individualized suspicion was still the norm and, the Court admonished, any departure had better be justified by a "special" need and not merely a "symbolic" one.[73] The *Chandler* decision also ended what had started to become a steady march of victories by the government in defending programs of suspicionless searches. The Court, therefore, appeared to be retaking some of the Fourth Amendment ground that it arguably had conceded to the legislative and executive branches in cases like *Von Raab*.

At the time *Chandler* was decided, though, it was difficult to ascertain how seriously to take the Court's flexing of its Fourth Amendment muscle when it came to suspicionless searches. The Court in other areas of criminal procedure has sometimes used relatively easy cases to make an emphatic point about the constitutional issue at stake, but then has failed to provide meaningful follow-through in more difficult cases.[74] And *Chandler* was an easy case in many ways. The state of Georgia candidly admitted at oral argument that it had made no effort to develop a record supporting the need for drug testing elected officials and that little likelihood existed of actually screening out a marijuana-smoking or cocaine-snorting individual anxious to become Commissioner of Agriculture or Governor. Indeed, at points the oral argument slipped into jocularity, with Mr. Chandler at one point suggesting to laughter in the courtroom that one might be able to "argue that drug users would [not] be any worse than [what] the General Assembly Georgia has now," adding that "there's an old saying down in Georgia that no man's liberty or property is safe as long as [the Legislature is] in session."[75] In short, unlike in *Von Raab*, the state made no effort to act as if the drug testing statute was anything other than a symbolic gesture, allowing the Court to strike down a purely symbolic use of suspicionless drug testing without having to proceed

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[72] *Id.* at 315-21.

[73] *Id.* at 322.

[74] *See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002).

[75] Oral argument at 54-55, Chandler v. Miller, 520 U.S. 305 (1997) (No. 96-126) (argued Jan. 14, 1997).

beyond the state's proffered justification or having to scrutinize the state's arguments about efficacy.

What might happen in a more difficult case still remained to be seen. Justice Ginsburg had written strong words about the "closely guarded" class of suspicionless searches, but other cases like *Skinner*, *Von Raab* and *Vernonia* all contained reasoning that lent themselves to a less restrictive reading calling for a more deferential stance towards the legislative and executive branches' judgment that a suspicionless search was necessary. This was the reading that the Eleventh Circuit majority had adopted below[76] and that Chief Justice Rehnquist put forward as the lone dissenter in *Chandler*.[77] The Chief Justice argued that the notion of a "special need" had been "used in *Skinner* and *Von Raab* . . . in a quite different way than it is used by the Court today,"[78] and emphasized that the Court's touchstone for assessing a search under the Fourth Amendment was that it need only be "reasonable."[79] The Chief Justice maintained, therefore, that "[u]nder our precedents, if there was a proper governmental purpose other than law enforcement, there was a 'special need'" and the Court should defer to the legislative policy judgment so long as it was "reasonable."[80] Using this far more deferential viewpoint, Chief Justice Rehnquist argued that Georgia's lack of any factual finding of pot smoking in the Governor's mansion was not troubling under the Fourth Amendment because the legislature is free to enact prophylactic measures to prevent the problem from ever arising.[81] This was true, he maintained, even if the measures might strike some as over the top: "[n]othing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court."[82]

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[76] *Chandler*, 520 U.S. at 311-12.
[77] *Id.* at 325-28 (Rehnquist, C.J., dissenting).
[78] *Id.* at 325 (Rehnquist, C.J., dissenting).
[79] *Id.* (Rehnquist, C.J., dissenting).
[80] *Id.* at 325, 328 (Rehnquist, C.J., dissenting).
[81] *Id.* at 324 (Rehnquist, C.J., dissenting).
[82] *Id.* at 328 (Rehnquist, C.J., dissenting).

Perhaps sensing, though, that *Chandler*'s facts provided an easy target for the Court to declare the importance of individualized suspicion without facing much constitutional fallout, the Chief Justice's dissent sounded almost sanguine despite his disagreement with the majority's result. In ending his dissent, the Chief Justice seemed to suggest that the majority's strong stance was a bluff, stating, "Lest readers expect the holding of this case to be extended to any other case, the Court notes that the drug test here is not a part of a medical examination designed to provide certification of a candidate's general health."[83] His dissent appeared to predict, therefore, that if the state in the future more carefully crafted its "special need"—for example, presenting drug testing as part of a required health examination for a candidate—that the Court would move back to a more deferential stance.[84] From this perspective, then, the *Chandler* case could be seen as a Fourth Amendment outlier where, despite the Court's broad pronouncements, all it really was holding was that suspicionless searches for an admittedly symbolic purpose would not pass constitutional muster.

But if *Chandler* presented itself at the fringes of what constituted a "special need," the subsequent cases of *Edmond* and *Ferguson* fit far more comfortably within the mainstream of the Court's prior special need cases: *Edmond*'s utilization of narcotic checkpoints[85] seemed a close cousin to the sobriety checkpoints approved in *Sitz*,[86] and *Ferguson*'s drug testing of pregnant mothers to help prevent the birth of crack-addicted babies[87] appeared a classic "special need." Yet the Court struck down both programs[88] and in the process provided interesting insights and raised interesting questions about the future of suspicionless searches under the Fourth Amendment.

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[83] *Id.* at 327 (Rehnquist, C.J., dissenting).
[84] *See id.* (Rehnquist, C.J., dissenting).
[85] City of Indianapolis v. Edmond, 531 U.S. 32, 34 (2000).
[86] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
[87] Ferguson v. City of Charleston, 532 U.S. 67, 70 n.1 (2001).
[88] *See Ferguson*, 532 U.S. at 86; *Edmond*, 531 U.S. at 48.

A. City of Indianapolis v. Edmond

As a physical intrusion, the narcotics checkpoint in *Edmond* was well within the norm of prior checkpoints and far more impressive when judged by efficacy.[89] The Indianapolis Police Department had conducted six checkpoints between August and November 1998 that alerted drivers as they approached that a narcotics checkpoint was located a certain distance ahead at which a "naroctics K-9" would be in use.[90] The checkpoints' design reflected earlier Supreme Court warnings on the need to control field officer discretion, with written directives specifying how the officers stationed at each checkpoint should conduct the stops.[91] The instructions detailed that a certain number of cars were to be stopped in a particular sequence and that each stop was to be limited to under five minutes during which the officer would ask for a license and registration while a narcotics-detecting dog walked around the stopped vehicle.[92] To highlight the checkpoint's relative physical non-intrusiveness, Judge Easterbrook described the checkpoints in his Seventh Circuit dissenting opinion as "a five-minute wait with man's best friend outside."[93]

The six checkpoints that had been conducted stopped 1161 cars and resulted in the arrest of 104 motorists for an arrest rate of 9.4% (approximately half of the arrests were for drug-related offenses and half were for other offenses).[94] The nearly one out of ten arrest rate was far more efficient compared to the approximately one out of one thousand success rate for immigration checkpoints or one out of a hundred for sobriety checkpoints, a contrast that led Judge Easterbrook to deem the narcotics checkpoint as "spectacularly successful" by comparison to earlier checkpoints approved by the Supreme Court.[95] Therefore, judged by the criteria of physical intru-

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[89] *See Edmond*, 531 U.S. at 34-36.
[90] *Id.*
[91] *Id.* at 35-36.
[92] Edmond v. Goldsmith, 183 F.3d 659, 661 (7th Cir. 1999).
[93] *Edmond*, 183 F. 3d at 671 (Easterbook, J., dissenting).
[94] *Id.* at 661.
[95] *Id.* at 666 (Easterbrook, J., dissenting). The actual success rate was .12%

siveness, limits on the discretion of the field officers, and efficiency, the Indianapolis Police Department had appeared to do everything by the Fourth Amendment book based upon prior Supreme Court rulings.

Yet, the Supreme Court struck down the checkpoints by a six to three margin[96] and, in fact, the tally of Justices disapproving of the checkpoints was even higher.[97] Although Justice Thomas was one of the three dissenters, he dissented only because he believed that the checkpoints were valid based upon *Sitz* and *Martinez-Fuerte*'s holdings.[98] But after expressing this view, Justice Thomas invited reconsideration of *Sitz* and *Martinez-Fuerte* as he expressed his "doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."[99] Seven Justices thus thought the narcotics checkpoint ran afoul of the Fourth Amendment either because the program did not satisfy *Sitz* or because *Sitz* itself was flawed.

To someone who had not followed the rise of the reasonableness test and the Court's approval of suspicionless searches and seizures in the first cases it heard, *Edmond* perhaps would not seem particularly remarkable. In many ways, Justice O'Connor's *Edmond* opinion reads like a cut-and-paste application of the Fourth Amendment principles that Justice Ginsburg laid out in *Chandler*. The *Edmond* analysis began with the proposition that "ordinarily" individualized suspicion can be dispensed with only in "limited circumstances" where a "program was designed to serve 'special needs' beyond the normal need for law enforcement."[100] Justice O'Connor then proceeded to note that, "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence

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for the immigration checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and 1.6% for the sobriety checkponts at issue in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

[96] *Edmond*, 531 U.S. at 33.

[97] *See id.* at 56 (Thomas, J., dissenting).

[98] *Id.* (Thomas, J., dissenting).

[99] *Id.* (Thomas, J., dissenting).

[100] *Id.* at 37.

of ordinary criminal wrongdoing,"[101] an observation that was to take on a mantra-like quality as the opinion repeated the essence of this statement six more times before the opinion ended.[102]

What makes *Edmond* worth noticing, and arguably marks a new phase of Fourth Amendment decision making, was the majority's willingness to step into the record and scrutinize the state's justification.[103] Recall that in *Chandler* judicial examination of the legislative justification was unnecessary because the state made little effort to adorn their reasons for engaging in drug testing as anything other than a symbolic gesture.[104] In *Edmond*, on the other hand, the City of Indianapolis argued that it was within the realm of "special needs" cases even if part of its purpose was to detect evidence of ordinary criminal wrongdoing.[105] As the City pointed out, previous checkpoint cases had been approved in *Sitz* and *Martinez-Fuertes* where the underlying offenses also had led to criminal prosecution for DUI and smuggling.[106] The City maintained, therefore, that because the narcotics checkpoints could be seen as having the dual purpose and clearly approved "special need" of highway safety in addition to uncovering drug possession, the checkpoints should be approved.[107]

The majority's response was strikingly emphatic in rejecting the City's arguments.[108] Even more important than the majority's factual limitation of *Sitz*'s import to where "society [is] confronted with . . . immediate, vehicle-bound threat to life and limb"[109] and of *Martinez-Fuerte* to that of a specialized border control case,[110] was the majority's willingness to "look more closely at the nature of the public interests that

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[101] *Id.* at 41.
[102] *See id.* at 41-44, 47-48.
[103] *See id.* at 40-45.
[104] *Chandler*, 520 U.S. at 321-22.
[105] *Edmond*, 531 U.S. at 46-47.
[106] *Id.* at 34, 38-39, 47.
[107] *Id.* at 46.
[108] *Id.* at 46-47.
[109] *Id.* at 43.
[110] *Id.* at 41.

such a regime is designed principally to serve."[111] Indeed, the Court not only rejected the City's argument that "where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid,"[112] the majority identified an active role for the judiciary of "examin[ing] the available evidence to determine the primary purpose of the checkpoint program."[113]

Once subjected to such scrutiny, the majority found that the narcotics checkpoint failed because the program "unquestionably has the primary purpose of interdicting illegal narcotics."[114] In invalidating the narcotics checkpoints, the Court demonstrated a sensitivity to the possibility that if it allowed a general nexus to suffice between general law enforcement purposes and a broadly proposed "special need," then, "at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose."[115] Unlike cases based upon probable cause where "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"[116] the Court put the executive and legislative branches on notice that it would analyze suspicionless searches to ensure that the government's primary purpose was not a "ruse" offered in "bad faith" or as a "pretext" for "gathering evidence of violations of the penal laws."[117] The Court warned that without meaningful review to ensure that the primary purpose was not general crime detection camouflaged by a "special needs" veneer, "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."[118]

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[111] *Id.* at 43.

[112] *Id.* at 45 (quoting Brief for Petitioners).

[113] *Id.* at 46.

[114] *Id.* at 40.

[115] *Id.* at 42.

[116] *Id.* at 45 (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).

[117] *Id.* at 45 (summarizing why the Court had approved inventory searches and administrative inspections in previous cases).

[118] *Id.* at 46.

After *Edmond*, the Court's vision of the judiciary's role in evaluating programs of suspicionless searches included a need to look behind the government's stated justifications and examine the actual factual basis for the search. Indeed, the image of the *Edmond* Court moving through the City's proffered justifications and rejecting them based upon the factual record was in many ways that of a magistrate at a suppression hearing evaluating the state's case to determine whether factual probable cause had existed to justify a search.

By taking on this active role, the Court became what we might call a "policy magistrate." That is, the Court undertook an analysis that paralleled that of a magistrate looking for traditional probable cause, only it was searching the record for whether the government's true primary purpose justified the checkpoint rather than for whether an informant's tip had given sufficient suspicion of wrongdoing. The Court in *Edmond* seemed to recognize more than ever before that with intrusions that operated without the constraint of individualized suspicion, the judiciary either had to actively oversee the government's policy justifications or else effectively cede the Fourth Amendment over to the legislative and executive branches. Unwilling to do this, the majority placed the judiciary into the pivotal role of determiner of probable cause, albeit the "flexible probable cause" of weighing the government interest against the citizen's privacy interest.[119] As the Court stepped into the role of "policy magistrate," the majority acknowledged "the challenges inherent in a purpose inquiry" but found the inquiry to be a necessary "means of sifting abusive governmental conduct from that which is lawful."[120]

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[119] The role of "policy magistrate" actually calls back to the language of the case that first released the reasonableness- balancing-test genie. In *Camara*, the Court, while wanting to still fit within the warrant-preference view of the Fourth Amendment but not wanting to require individualized suspicion for housing inspections, referred to its newly minted reasonableness balancing test as a determination of "probable cause," *see* Camara v. Mun. Court, 387 U.S. 523, 538-39 (1967). *See also* Sundby, *supra* note 8, at 399-401.

[120] *Edmond*, 531 U.S. at 46-47. The majority also saw the need for a judicial inquiry into the government's purpose for suspicionless searches as fitting within a broader "constitutional jurisprudence." *Id.*

B. Ferguson v. City of Charleston

Even after *Edmond*, a Fourth Amendment skeptic might have suggested that although the Court had assumed the role of "policy magistrate" for suspicionless programs, it had not proven that it would take the role seriously. The city's mistake in *Edmond* arguably was that it had been too open about its purpose in declaring "NARCOTICS CHECKPOINT (5) MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP."[121] What if instead the city set up a sobriety checkpoint like the Court approved of in *Sitz* and during the checkpoint had a narcotics K-9 sniff around the car? Given that the Court has held that a dog sniff is not a "search"[122] and that sobriety checkpoints have the Court's Fourth Amendment seal of approval,[123] might not the dog sniff now be permissible even though the checkpoint experience from the motorist's viewpoint would be almost identical? The majority noted the possibility of a checkpoint with a "secondary purpose of interdicting narcotics" and stated that it need not decide the case, offering only a "*cf.*" cite to *New Jersey v. T.L.O.* with a parenthetical noting that a "search must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'"[124] Such an answer seemed rather tepid after its earlier and bolder warnings in the opinion against ruses and pretexts. Might *Edmond* then end up being all Fourth Amendment sound and no fury?[125]

The Court did not answer the question directly in *Ferguson*, but its approach indicated that it viewed its emerging role of "policy magistrate" as more than a rubber stamp. *Ferguson* arose out of a civil lawsuit filed by women who had

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[121] *Id.* at 35-36 (quoting Appeal to Petition for Certiorari 57).

[122] United States v. Place, 462 U.S. 696, 707 (1983).

[123] *Sitz*, 496 U.S. at 451-55.

[124] *Edmond*, 531 U.S. at 47 n.2 (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[125] Professor LaFave has sarcastically suggested that if the Court should adopt such a formalistic reading that it should appear on a David Letterman segment of "Stupid Supreme Court Tricks." Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 274 (2001).

received obstetrical care at the Medical University of South Carolina (MUSC) in Charleston, South Carolina.[126] The plaintiffs had been arrested as part of a MUSC program that tested for the presence of cocaine in the urine of patients who were pregnant or who had just given birth.[127] If a woman under the program tested positive, she could be charged with an offense ranging from simple possession to distribution depending upon the stage of her pregnancy.[128] The plaintiffs appealed an adverse finding by a jury that they had consented to the testing.[129] The Fourth Circuit in affirming, however, did not even reach the issue of consent because it held that, regardless of consent, the drug testing was a reasonable "special needs" program "conducted . . . for medical purposes wholly independent of an intent to aid law enforcement efforts."[130]

The Fourth Circuit's finding of a special need "wholly independent" of law enforcement presented to the Court a more difficult case than *Edmond* in defining the judiciary's proper role as a "policy magistrate" under the Fourth Amendment. While the *Edmond* Court had stated that it would examine the record for the government's primary purpose and not simply accept any proffered purpose, the majority in *Edmond* had not been forced to turn over too many evidentiary stones in looking for the city's primary purpose. The checkpoint signs themselves had declared the checkpoints to be for narcotics and the City had conceded that the "checkpoint program unquestionably ha[d] the primary purpose of interdicting illegal narcotics."[131] In *Ferguson*, on the other hand, the government had put forward the undeniably legitimate medical purpose of testing expecting mothers for use of narcotics as a means of "'protect[ing] both the mother and unborn child.'"[132]

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[126] *Ferguson*, 532 U.S. at 70, 73.

[127] *Id.* at 73.

[128] *Id.* at 72. Under the first version of the program the woman was arrested immediately. *Id.* Under a later modified version, the woman was first given the chance to undergo a treatment plan. *Id.*

[129] *Id.* at 74.

[130] Ferguson v. City of Charleston, 186 F.3d 469, 477 (4th Cir. 1999).

[131] *Edmond*, 531 U.S. at 40.

[132] *Ferguson*, 532 U.S. at 98 (Scalia, J., dissenting) (quoting district court's

If the Court were to find a Fourth Amendment problem, therefore, it would have to scrutinize the underlying record and develop its own judgment of whether the drug testing satisfied its developing "special needs" jurisprudence.

Justice Stevens in writing for a majority of five Justices made clear that the Court was not bound by the city's "beneficent" purpose but was obligated under *Chandler* and *Edmond* to engage in a "close review" of the program to see if its purpose was "'ultimately indistinguishable from the general interest in crime control.'"[133] Stevens described *Edmond*'s holding as obligating the Court to "*consider all the available evidence* in order to determine the relevant primary purpose,"[134] and the majority proceeded to consider the evidence in detail.

Particularly noticeable was the majority's extensive description of the origins of MUSC's policy beginning with how Nurse Shirley Brown, the case manager of the hospital's obstetrics department, had heard a news story about police in another city arresting pregnant users of cocaine on a theory of child abuse.[135] As the majority unfolded the sequence of events, Brown raised the idea with the hospital's attorney who, in turn, contacted the city's prosecutor's office.[136] A joint task force with law enforcement and hospital personnel was formed and eventually a policy was formulated whereby a pregnant patient was tested for cocaine use if she met certain broad criteria.[137] After an initial positive test, the patient was arrested if she tested positive a second time or failed to attend a substance abuse program (when the policy was first implemented, a positive drug test led to an immediate arrest).[138]

In striking down the program, the majority concluded that

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findings).

[133] *Id.* at 81 (quoting *Edmond*, 531 U.S. at 48).

[134] *Id.* (emphasis added).

[135] *Id.* at 70.

[136] *Id.* at 70-71.

[137] The nine criteria covered a wide range of factors such as "[i]ncomplete prenatal care" and did not constitute suspicious behavior of drug use. *Id.* at 71 n.4, 77 n.10.

[138] *Id.* at 72.

what distinguished MUSC's policy from the drug testing that the Court had approved of in *Von Raab*, *Skinner*, and *Acton* was that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[139] As the *Ferguson* majority pointed out, in all of the other programs the role of law enforcement was either non-existent or minimized.[140] The minimal role of law enforcement in the previous cases stood in stark contrast to the formulation and execution of MUSC's policy where "throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy."[141] The intertwining of the police and hospital personnel went so far as to have the police tutoring hospital laboratory personnel on how to preserve a chain of custody.[142]

The majority concluded, therefore, that even if the city's ultimate goal was to protect maternal and fetal health, "the immediate objective of the searches was to generate evidence *for law enforcement purposes.*"[143] In reaching this conclusion, the *Ferguson* majority echoed the *Edmond* Court's concern that if the government simply could invoke a broad non-law enforcement goal to justify its proposed law enforcement action, then essentially all law enforcement actions would become a "special needs" search under the Fourth Amendment.[144] As the *Ferguson* majority observed: "Because law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."[145] Finding that

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[139] *Id.* at 80; *see id.* at 80 n.16 (noting the Court's decisions in *Von Raab*, *Skinner* and *Acton*).

[140] *Id.* at 80 n.16.

[141] *Id.* at 82.

[142] *Id.* at 82 n.19.

[143] *Id.* at 83.

[144] *Id.* at 83 nn.20-21.

[145] *Id.* at 84.

the immediate primary purpose of MUSC's drug testing was "*for the specific purpose of incriminating those patients,*"[146] the majority found that the proffered "special need" of medical health could not excuse the extensive entanglement of law enforcement and prosecution.[147]

The *Ferguson* majority thus took the Court's role as "policy magistrate" presiding over a determination of "flexible probable cause" in suspicionless searches to a new and greater level of inquiry. Unlike *Edmond* where the "special need" of highway safety was fairly characterized as a secondary rather than primary purpose based upon the City of Indianapolis's own admissions,[148] in *Ferguson* it was clear that a primary purpose *was* the protection of fetal health in response to a perceived epidemic of "crack babies."[149] Indeed, MUSC's testing program at first had been instituted without referrals to law enforcement, and it was only after the level of cocaine use among expectant mothers did not seem to abate that the threat of arrest became part of the program's effort to curtail cocaine use by expectant mothers.[150] In a way, then, the Court's objection in *Ferguson* was quite different from its objection in *Edmond*. Its concern was not that the city's special need was a pretext or a ruse to gain greater law enforcement powers—even the majority did not seem to doubt that the program was instituted out of a genuine concern over crack babies—but rather that it did not believe that the special need could support such a heavy involvement of law enforcement in its pursuit.[151] In arriving at this conclusion, the

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[146] *Id.* at 85.

[147] *Id.* at 84-86.

[148] *Edmond*, 531 U.S. at 46-47.

[149] *Ferguson*, 532 U.S. at 70 n.1.

[150] *Id.* at 70; *see also id.* at 99-100 (Scalia, J., dissenting).

[151] Justice Scalia in his dissent suggested that the majority's reasoning essentially was that "the purported medical rationale was merely a pretext; there was no special need." *Id.* at 98 (Scalia, J., dissenting). While the majority may have expressed doubts about the medical rationale, *see infra* note 153 and accompanying text, it did not appear to view it as a pretext. Rather, as will be argued below, the majority's objection appears to be that the city tried to achieve those means by obtaining incriminating evidence. *See infra* notes 169-71 and accompanying text.

Court demonstrated a fairly far-seeking view of its duty as magistrate to "consider all the available evidence"[152] in making its "flexible probable cause" determination of whether the program justified a heavy law enforcement involvement. The majority even questioned in a footnote the wisdom of MUSC's judgment that threatening prosecution would curtail drug use among expectant mothers:

> It is especially difficult to argue that the program here was designed simply to save lives. *Amici* claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health."[153]

The *Ferguson* majority thus took review of the government's "special needs" justification a step further than either *Chandler* or *Edmond*. *Chandler* had found the state's symbolic special need wanting as a justification under the Fourth Amendment,[154] and *Edmond* had found that the city's primary purpose of narcotics interdiction could not be saved by a secondary justification of highway safety that was too far removed from the checkpoint's primary purpose.[155] In *Ferguson*, on the other hand, the Court scrutinized an admittedly valid "special need" outside that of general law enforcement, the need to protect maternal and fetal health, but objected to *the means* that MUSC was using to achieve the special

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[152] *Ferguson*, 532 U.S. at 86.

[153] *Id.* at 84 n.23. At oral argument, one of the Justices when questioning the city's attorney noted that "all the material in the amicus briefs and all the studies . . . suggest that this type of program does not help . . . the fetus. Rather [because drug-using mothers may forego prenatal treatment if tested] . . . this kind of program . . . probably hurts more fetuses than it helps." Oral Argument at 45-46, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936) (argued Oct. 4, 2000). The same Justice a little later noted "I've tried to look up a little independently, where I've come to is the conclusion—I'm not a doctor or epidemiologist, but it seems to me that the studies on cocaine abuse are pretty inconclusive and—as to how they affect the fetus, and even if they aren't, they're pretty one-sided, the studies, that this kind of thing hurts the fetus because mothers don't come in." *Id.* at 46.

[154] *See Chandler*, 520 U.S. at 322.

[155] *See Edmond*, 531 U.S. at 46-47.

need. The majority did not speak of an invalid primary purpose as it had in *Edmond* but of an invalid "immediate objective"of gathering evidence for law enforcement as a way of accomplishing the primary and "ultimate goal" of trying to reduce the incidence of crack babies.[156] To make this determination, the majority delved into the record to trace the policy's origins, to determine how the policy was implemented, and even to raise questions over the wisdom of such a policy.

Despite the *Ferguson* majority's broad view of the Court's role as "policy magistrate," however, the holding did not necessarily secure a long-term role for the Court in closely reviewing the government's means of implementing suspicionless intrusions. While the majority condemned the use of law enforcement for the "immediate objective" of gathering evidence, a residual tension exists between *Ferguson* and previous cases in which the Court did approve of heavy law enforcement involvement in the "immediate" gathering of evidence: the sobriety checkpoint in *Sitz* which led to the immediate arrest of individuals driving under the influence,[157] an "administrative search" in *New York v. Burger* which resulted in the defendant being arrested and charged with five counts of possession of stolen automobile parts,[158] and a "special needs" search of a probationer's home in *Griffin v. Wisconsin* by police and the defendant's probation officer for a weapon.[159]

The *Ferguson* majority worked hard to distinguish these cases. *Sitz* was seen as a "checkpoint case" and not a "special needs" case (even though in *Edmond* the majority had, over the dissent's objection, relied upon the "special needs" cases to strike down the narcotics checkpoint).[160] The discovery of the stolen auto parts in *Burger* was optimistically characterized as "merely incidental to the purposes of the administrative search" even though carried out by uniformed police officers.[161] *Griffin*

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[156] *See Ferguson*, 532 U.S. at 82-83.

[157] *Sitz*, 496 U.S. at 448.

[158] New York v. Burger, 482 U.S. 691, 695 (1987).

[159] Griffin v. Wisconsin, 483 U.S. 868, 870 (1987).

[160] *Ferguson*, 532 U.S. at 83 n.21. The majority also suggested that the "checkpoint" cases involved a less severe intrusion than one going to "the body or home." *Id.*

[161] *Id.* Justice Brennan in his *Burger* dissent makes a rather convincing case

was seen as limited to the context of probationers who "have a lesser expectation of privacy."[162]

While each of these distinctions is defensible, the labor necessary to distinguish these prior cases highlights the difficulty and potential confusion of using a Fourth Amendment dividing line that turns upon whether the "immediate objective" was the gathering of evidence. Anticipating the possible confusion, Justice Kennedy in his concurrence specifically rejected the idea that a court should look at the immediate purpose of collecting the evidence as part of the "special needs" analysis rather than focusing on the ultimate goal to see if a "special need" existed.[163]

Moreover, the immediate objective/ultimate goal distinction, much like the primary/secondary purpose distinction used by the majority in *Edmond*, arguably only encourages the government to engage in Fourth Amendment game playing. If the Fourth Amendment problem in *Ferguson* simply is that the evidence-gathering for criminal prosecution occurred as part of the *immediate* objective, might not a program instead simply allow the legitimate medical testing for drugs to go forward first, and *then* require the hospital to turn over positive results through mandatory child abuse reporting laws? Both the concurring and dissenting opinions in *Ferguson* thought such a formal rearranging of the steps of the process would be valid under the majority's analysis,[164] creating what Justice Kennedy saw as "[o]ne of the ironies of the case . . . that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system [of prosecution]."[165]

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that the discovery of criminal evidence via an administrative search carried out by uniformed police officers was anything but incidental. *Burger*, 482 U.S. at 718, 723-29 (Brennan, J., dissenting); *see* Sundby, *supra* note 8, at 408-11.

[162] *Ferguson*, 532 U.S. at 79 n.15.

[163] *Id.* at 87-88 (Kennedy, J., concurring). Justice Kennedy suggested that if applied rigorously, the majority's focus on the "immediate objective" instead of the "ultimate goal" would call into question all of the Court's prior "special needs" cases because "[b]y very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence." *Id.* at 87 (Kennedy, J., concurring).

[164] *Id.* at 90 (Kennedy, J., concurring); *see id.* at 102-03 (Scalia, J., dissenting).

[165] *Id.* at 90 (Kennedy, J., concurring).

If the concurring and dissenting opinions are correct that the only part of the program that the city got wrong in *Ferguson* was the order in which it took the steps of drug testing and police involvement, *Ferguson*'s holding would be reduced to more form than substance. The ultimate message would amount to no more than a bureaucratic admonishment from the Court to the legislative and executive branches to more carefully maintain the appearance of their programs: use of evidence from suspicionless drug testing programs in criminal prosecutions is permissible, but the program must be designed so that it does not appear to have a law enforcement component upfront, even if significant penal consequences may follow later. As Justice Scalia sarcastically noted in his dissent, the City of Charleston's Fourth Amendment misstep, therefore, was "that . . . the police took the lesser step of initially *threatening* prosecution rather than bringing it [after the patient tested positive]."[166]

The majority opinion leaves open the possibility of this weak reading of *Ferguson*'s holding. Sensitive to what it termed the dissent's "hyperbole" that the majority must see reporting requirements as "clearly bad,"[167] the majority expressly "distinguishe[d] . . . circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements," a situation "which no one has challenged here."[168] This language, therefore, would not rule out a program instituted with an "immediate objective" of drug testing through "medical procedures" upon which a reporting requirement could later piggyback requiring that the results be turned over to the police.

A stronger reading of *Ferguson*'s holding, however, also is possible. While the majority did not reject outright the concurring and dissenting opinions' suggestion that merely re-ordering the medical testing so that it took place before police in-

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[166] *Id.* at 103 (Scalia, J., dissenting).
[167] *Id.* at 81 n.18.
[168] *Id.* at 80-81.

volvement might satisfy the Fourth Amendment, the majority also stated that the issue was not properly before the Court.[169] And how might a stronger reading of *Ferguson* move beyond mere formalism? The key lies in the *Ferguson* majority's careful wording of how a different case might be presented if the evidence of drug use was discovered *"in the course of ordinary medical procedures aimed at helping the patient herself."*[170] In a similar fashion, the majority later referred to the difference between a duty to disclose "evidence of criminal conduct that they *inadvertently* acquire in the course of *routine treatment*"[171] and criminal evidence obtained, as in *Ferguson* itself, *"for the specific purpose of incriminating those patients."*[172]

Words such as "ordinary," "helping," "inadvertently" and "routine" strongly indicate that the Court as "policy magistrate" would be obligated to examine the record for evidence to assure itself that any two-step testing/reporting program actually was adopted for the "special need" of the patient's benefit and not with an eye towards law enforcement. Such an inquiry would necessarily push the Court even further into an active role of a magistrate who is to "consider all the available evidence in order to determine the relevant primary purpose."[173] The inquiry might even necessitate a consideration of whether such a testing policy could be justified as a matter of medical judgment, because the medical community's judgment would be probative evidence of whether the testing program was truly adopted to "help[] the patient" so that discovery of any incriminating evidence would be an "inadvertent[]" byproduct,[174]or whether the program instead was instituted as part and parcel of a larger law enforcement plan against drug use.

The *Ferguson* holding, therefore, can be read in a non-for-

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[169] *Id.* at 85 n.24. The majority stated: "We decline to accept the dissent's invitation to make a foray into dicta and address other situations not before us." *Id.*

[170] *Id.* at 80-81 (emphasis added).

[171] *Id.* at 84-85 (emphasis added).

[172] *Id.* at 85.

[173] *Id.* at 81.

[174] *See supra* notes 170-72 and accompanying text.

malistic way that would allow the Court to pierce the veil of an administrative program that might appear to have a "primary purpose" or "immediate objective" that is not directed at gathering evidence of ordinary criminal wrongdoing, but in reality is intertwined with a general law enforcement program. Whether the Court is willing to envision its role of magistrate as justifying such an active inquiry into the record to ferret out the true "primary purpose" may very well turn upon how its role is justified. Undoubtedly, the more deeply the Court examines the record to ensure that "special needs" cases are a "closely guarded category" and works to divine the true "primary purpose" of any suspicionless search programs, the more the Court will be subjected to criticism for "taking yet another social judgment . . . out of democratic control, and confiding it to the uncontrolled judgment of th[e] Court . . . ." [175] The question then becomes whether a deep-seated Fourth Amendment value might justify the Court's emerging role of "policy magistrate" in testing the government's proffered "special need" against the evidence in the record.

IV. THE GENERAL WARRANTS DOCTRINE MEETS THE TWENTY-FIRST CENTURY

While the colonists' concerns over general warrants and writs of assistance have played an important role in the development of the Fourth Amendment during much of the twentieth century, the idea of a writ of assistance actually being issued seemed as likely an event as citizens being forced to quarter soldiers. As we have seen, the Court occasionally invoked the general warrant doctrine to object that a search warrant was not drafted with sufficient particularity, but these were judicially issued warrants that were still a far cry from

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[175] *Ferguson*, 532 U.S. at 96 (Scalia, J., dissenting). Imagine, for example, if the Court did strike down a reconstituted two-step drug testing program and in part relied upon a finding that the medical community's judgment was that drug testing of pregnant mothers is not medically sound (and, therefore, not part of a "routine" exam aimed at "helping the patient"). Such an examination of the record undoubtedly would spark pointed comments that the Court was assuming the role of a medical review board and going far beyond the bounds of legitimate judicial inquiry.

the eighteenth century episodes that epitomized the evils of general warrants. The abhorrence of general warrants was an important underlying value but did not enter everyday Fourth Amendment discourse because searches and seizures had for the most part been brought within the purview of judicial oversight through the warrant-preference model of the Amendment.

However, as suggested earlier, the rise of the reasonableness view of the Fourth Amendment coupled with the government's growing ability to engage in suspicionless searches has created the possibility of government intrusions that directly raise the concerns underlying general warrant searches. Indeed, the Court's emerging role as a "policy magistrate" in *Chandler*, *Edmond*, and *Ferguson* can be understood as a recognition by the Court that the dangers of general warrants lurk in suspicionless programs such as drug testing and narcotic checkpoints. To understand how these concerns underlie the Court's recent holdings and why they have gained a new resonance in today's world of expanding surveillance techniques and law enforcement powers, it is helpful to recall exactly why the Framers objected to general warrants.

Few captured the Framers' objections to general warrants as eloquently as the fiery James Otis in his argument presented to a court in Boston in February 1761 in opposition to the writs of assistance.[176] The writs were a form of a general warrant that authorized custom officers to search for goods that had been imported into the colonies in violation of England's tax laws.[177] The writs empowered the customs agents to search any place that they desired for smuggled goods and to order subjects of the Crown to assist in the search.[178] The writs thus bestowed a blanket power upon the customs agents that was in continuous effect for the life of the sovereign.[179] Because the writs were so wide ranging in scope and were in continual effect, the colonists grew to despise them as oppres-

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[176] *See infra* note 183 and accompanying text.

[177] Davies, *supra* note 18, at 561.

[178] POLYVIOS G. POLYVIOU, SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW 10 (1982).

[179] *Id.*

sive instruments.

The opportunity to challenge the writs presented itself when King George II died in 1760. His death meant that the writs issued during his reign would soon expire, and the writs would only continue if a new grant of power was given. A group of Boston merchants hired James Otis to argue against the new issuance of the "hated" writs.[180] While Otis did not win the case and new writs of assistance eventually were granted, his argument that the writs were contrary to fundamental principles of constitutional law not only gave the court pause,[181] but according to John Adams, who witnessed Otis's argument, it "was the first scene . . . of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free."[182] The full rhetorical power of Otis's argument can only be appreciated if read in its entirety (and is a speech that every student of criminal procedure should be exposed to at least once):

> *May it please your honours*: I was desired by one of the court to look into the [law] books, and consider the question now before the court, concerning Writs of Assistance. I have accordingly considered it, and now appear not only in obedience to your order, but also in behalf of the inhabitants of this town, who have presented another petition, and out of regard to the liberties of the subject. And I take this opportunity to declare that, whether under a fee or not, (for in such a cause as this I despise a fee) I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainly on the other, as this writ of assistance is. It appears to me (may it please your honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an Eng-

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[180] *Id.* (quoting Stanford v. Texas, 379 U.S. 476, 481 (1965)).

[181] *Id.* at 11. After Otis's argument, the court asked for further information from England and heard further argument after the information was received before finally allowing new writs to issue. *Id.*

[182] *Id.* (quoting CHARLES FRANCIS ADAMS, LIFE AND WORKS OF JOHN ADAMS 248 (Boston, Little, Brown & Co. 1856). In fact, most of what is known about Otis's argument is due to Adam's description of what he witnessed. *Id.* at 10 n.4.

lish law-book. I must therefore beg your honours patience and attention to the whole range of an argument, that may perhaps appear uncommon in many things, as well as points of learning, that are more remote and unusual, that the whole tendency of my design may the more easily be perceived, the conclusions better . . . [discerned . . .], and the force of them better felt.

I shall not think much of my pains in this cause, as I engaged in it from principle. I was sollicited to engage on the other side. I was sollicited to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion from my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure, as it is in favour of British liberty, at a time, when we hear the greatest monarch upon earth declaring from his throne, that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown. And as it is in opposition to a kind of power, the exercise of which in former periods of English history, cost one King of England his head and another his crown. I have taken more pains in this cause, than I ever will take again: Although my engaging in this and another popular cause has raised much resentment; but I think I can sincerely declare, that I cheerfully submit myself to every odious name for conscience sake; and from my soul I despise all those whose guilt, malice or folly has made my foes. Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy a gentleman, or a man are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make good citizens, in public life, the patriot and the hero—I do not say, when brought to the test, I shall be invincible; I pray GOD I may never be brought to the melancholy trial; but if ever I should, it will then be known, how far I can reduce to practice principles I know founded in truth—In the mean time, I will proceed to the subject of the writ. In the first, may it please your Honours, I will admit, that writs of one kind, may be legal, that is, *special writs, directed to special officers*, and to search *certain houses, &c. especially set forth in the writ*, may be granted by the Court of Exchequer at home, *upon oath made*

before the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH. The Act 14th Car. II, which Mr. Gridley [the lawyer arguing for the legality of the writs] mentions proves this. And in this light the writ appears like a warrant from a justice of the peace to search for stolen goods. Your Honours will find in the old book, concerning the office of a justice of the peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn that he suspects his goods are concealed; and you will find it adjudged *that special warrants only are legal.* In the same manner I rely on it, that the writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer. I say I admit that *special* writs of assistance to search *special* houses, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself before I proceed to other Acts of Parliament.

In the first place the writ is UNIVERSAL, being directed "to all and singular justices, sheriffs, constables and all other officers and subjects &c." so that in short it is directed to every subject in the king's dominions; every one with this writ may be a tyrant: IF this commission is legal, a tyrant may, in a legal manner, also, controul, imprison or murder any one within the realm.

In the next place, IT IS PERPETUAL; there's no return, a man is accountable to no person for his doings, every man may reign secure in his petty tyranny, and spread terror and desolation around him until the trump of the arch-angel shall excite different emotions in his soul.

In the third place, a person with this writ, IN THE DAY-TIME, may enter all houses, shops, &c. AT WILL, and command all.

Fourthly, by this not only deputies &c. but even THEIR MENIAL SERVANTS, ARE ALLOWED TO LORD IT OVER US—What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of GOD's creation?—Now one of the most essential branches of English liberty is the freedom of one's house. A

man's house is his castle; and [whilst] he is quiet, he is as well guarded as a prince in his castle—This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. This wanton exercise of this power is no chimerical suggestion of a heated Brain—I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware, so that THESE WRITS ARE NEGOTIABLE from one officer to another, and so your Honours have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this.—Mr. Justice Wally had called this same Mr. Ware before him by a constable, to answer for a breach of the Sabbath-day acts, or that of profane swearing. As soon as he had done, Mr. Ware asked him if he had done, he replied, yes. Well, then, says he, "I will [show] you a little of my power—I command you to permit me to search your house for uncustomed goods; and went on to search the house from the garret to the cellar, and then served the constable in the same manner. But to [show] another absurdity in this writ, if it should be established, I insist upon it EVERY PERSON, by 14th of Car. II., HAS THIS POWER as well as the Custom-house officers; the words are, "it shall be lawful for any person or persons authorized, &c." What a scene does this open! Every man prompted by revenge, ill-humor or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance; Others will ask it from self defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.—Again, these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ. Let us see what authority there is for it. No more than one instance can be found of it in all our law books, and that was in the zenith of arbitrary power, viz. In the reign of [Charles II], when star-chamber powers were pushed to extremity by some ignorant clerk of

> the Exchequer.—But had this writ been in any book whatever, it would have been illegal. ALL PRECEDENTS ARE UNDER THE CONTROL OF THE PRINCIPLES OF LAW. Lord Talbot [the Earl of Shrewsbury, an English peer of the era of William and Mary] says, it is better to observe these than any precedents though in the House of Lords the last resort of the subject.—No Acts of Parliament can establish such a writ: Though it should be made in the very words of the petition it would be void. Vid. Viner. "AN ACT AGAINST THE CONSTITUTION IS VOID." But these prove no more than what I before observed, that *special* writs may be granted *on oath* and *probable suspicion*. The Act of 7th and 8th of William III. that the officers of the plantations shall have the same powers, &c., is confined to this sense that an officer should show probable grounds, should take his oath on it, should do this before a magistrate, and that such magistrate, if he think proper should issue a *special warrant* to a constable to search the places. That of 6th of Anne can prove no more.[183]

Otis's colorful and passionate argument highlights several important themes concerning general warrants and writs. It is striking that Otis begins by specifically singling out "special writs" as valid, praising them as a comparison to the general writ, because special writs are particular "like a warrant . . . to search for stolen goods" that allow only the search of houses, specially named, in which the complainant has sworn that he suspects his goods are concealed.[184] Particularly important to Otis was that under the special writ, it is the citizen who controls one's own security: "A man's house is his castle—*and [whilst] he is quiet*, he is as well guarded as a prince in his castle."[185]

And it is this image of the citizen controlling his own fate that then becomes "annihilated" by the general writ that grants uncontrolled discretion where "bare suspicion without oath is sufficient."[186] Without judicial review or findings before a par-

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[183] James Otis, *Against the Writs of Assistance* (1761), *reprinted in* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 548-55 (1978).

[184] *Id.* at 552-53.

[185] *Id.* at 554 (emphasis added).

[186] *Id.*

ticular search is authorized, the general writ makes it so that "everyone with this writ may be a tyrant."[187] And unlike special writs which, "when the purposes for which they are issued are answered, they exist no more,"[188] the general writ "live[s] forever, no one can be called to account"[189] because they are not triggered by a specific suspicion which will either be proved or disproved. In the argument's most famous line, Otis booms that ultimately the general writ "is a power [that] places the liberty of every man in the hands of every petty officer."[190] He offers as an illustration the story of Mr. Ware who, upset with Mr. Justice Wally for having ordered a constable to bring Ware before the court for profane swearing, retaliates by saying, "I will show you a little of my power. I command you to permit me to search your house [using his general writ power]."[191] Ware then carried out a search "from the garret to the cellar."[192] Ware followed up the search of Wally's home by next conducting a retaliatory search upon the constable.[193] Otis uses the example to demonstrate how the general writ's unconstrained power can be prompted by "revenge, ill-humor or wantoness."[194]

V. THINKING ABOUT *EDMOND* AND *FERGUSON* AS GENERAL WARRANT CASES

The danger of using Otis's argument to frame the dangers of general warrants is that his fervent oratory might be easily dismissed as painting a picture of events unlikely to happen today. But while Otis's apocalyptic scene of "one arbitrary exertion [of the general writ] will provoke another, until society be involved in tumult and blood!" might be a bit over the top,[195]

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 553.
[191] *Id.* at 554.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] He reaches this bloody conclusion after postulating that the statute authorizing general writs in facts extends the power to "every person," so that anyone

his vignette of Mr. Ware's abuse of the writ is not so far fetched. In fact, the full record of the *Ferguson* case suggests that MUSC's drug testing policy was designed and implemented in a manner that Otis likely would have felt quite comfortable incorporating into his impassioned attack upon general writs.

Nurse Shirley Brown made several appearances in the *Ferguson* majority's opinion. She was the nurse who heard the news report about another county prosecuting pregnant users of cocaine and brought it to the attention of the hospital attorney.[196] She kept the files of those patients who tested positive and was the hospital staff member who coordinated the arrests of the patients.[197] Nurse Brown was also the one hospital member outside the laboratory who received police training on how to maintain a chain of custody.[198] One already senses from the majority's opinion, therefore, that Nurse Brown played a major role in the drug testing program, but an examination of the plaintiffs' evidence at trial provides a fuller context from which Nurse Brown arguably emerges as a larger-than-life crusader.

As the case manager of obstetrics at MUSC, Nurse Brown had been involved in overseeing a voluntary substance abuse treatment program for pregnant patients.[199] Convinced that the voluntary substance abuse treatment was not working,[200] Nurse Brown heard the news report about criminal prosecutions and called it to the attention of the hospital's attorney, who then contacted the prosecutor's office.[201] After a joint task force met and the law enforcement members of the task force drew up the program's protocol, Nurse Brown became the key figure at the hospital for implementing the policy.[202] She

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could conduct a search of another person's home.

[196] *Ferguson*, 532 U.S. at 70-71.

[197] *Id.* at 71.

[198] *Id.* at 82 & n.19.

[199] Petitioner's Brief at *2, Ferguson v. City of Charleston, 532 U.S. 67 (2000) (No. 99-936), *available at* 2000 WL 728149.

[200] *Id.* at *2 & *18 n.13 (stating that no empirical basis existed for Nurse Brown's perception since no systematic tracking system was in place).

[201] *Id.* at *2-3.

[202] *Id.* at *3.

kept a Rolodex in her office of patients who tested positive[203] and was the person who would "call the police, file a complaint, inform [the police] when a patient who had tested positive was about to leave the hospital, and help coordinate the woman's in-hospital arrest."[204]

Not surprisingly, then, Nurse Brown figured prominently in the patients' descriptions of their arrests: telling a patient that she was to be discharged, when in fact the police were about to enter and remove her in handcuffs to a waiting police car; arranging for the arrest of a patient still bleeding from childbirth, who was handcuffed while still in her hospital gown and taken away despite her pleas to Nurse Brown of "please, what could I do to stop this or could you help me," pleas to which Nurse Brown merely replied, "[you will] be locked up;" refusing a patient's request to arrange for child-care for her son before entering the drug treatment program, saying that the only choice was to enter the treatment program immediately or be arrested.[205] The plaintiffs' testimony established a picture of patients being dragged off in handcuffs, many still bleeding or vomiting and denied the chance to contact their families.

Moreover, these arrests were taking place in a context with disturbing racial overtones. MUSC was the only city hospital with a predominantly African-American population and was the only hospital subject to the drug testing program that ultimately was devised with the cooperation of the prosecutor's office and the police. Of the thirty women arrested under the policy, twenty-nine were African-American.[206] Evidence at trial indicated that these results were not simply a result of African-American patients using drugs at a higher rate, but from selective testing of the types of drugs and the patients.[207]

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[203] *Id.* at *14.

[204] *Id.* at *16.

[205] *Id.* at *7-10.

[206] *Id.* at *12-13. Some dispute existed as to whether one of the women was to be considered African-American, in which case the result would be twenty-eight of thirty arrests were of African-American women. *Id.* at *13 n.9. Importantly, however, Nurse Brown considered the patient to be African-American. *Id.*

[207] *Id.* at *12. The trial court found that the statistical analysis demonstrated a prima facie showing of disparate impact discrimination based on the testing for

Both Nurse Brown's own testimony and the plaintiffs' testimony also raised the question of whether the program's considerable discretion was being exercised even-handedly between African-American and white patients: Nurse Brown, for instance, called the prosecutor's office to ask for a second-chance for a white patient who otherwise should have been arrested under the program's protocol;[208] a witness testified that Brown raised the option of sterilization with African-American patients who tested positive and not with white women in the same position;[209] and Brown noted on white patients' charts if their partners were black (Nurse Brown stated at trial that she believed interracial relationships were "against God's way").[210]

In short, the plaintiffs' case could be used to make an argument that the program placed Nurse Brown more in the role of Nurse Ratched than Nurse Nightingale as she conducted the drug testing program, and that the story of MUSC's drug testing program was a classic vignette of the evils of a general warrant that Otis so vividly described. Nor to make this case, does one have to posit that Nurse Brown had a sinister motive in how she conducted the program—she very well may have been motivated purely by the desire to fight the problem of "crack babies"—but it was her ability to implement the policy as she saw fit that allegedly allowed the situation to become one of unbridled discretion gone awry. Justice Brandeis's words in his famous *Olmstead* dissent seem almost tailor-made to the plaintiffs' case: "The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning, but without understanding."[211]

Importantly, too, *Ferguson*'s facts highlight the difficulty of

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cocaine rather than for drug use generally. *Id.* The percentage of African-American pregnant patients testing positive for all drug use (68%) was considerably less than for those testing positive only for cocaine (90%). *Id.*; *see also* Ferguson v. City of Charleston, 186 F.3d 469, 481 (1999).

[208] Petitioner's Brief, *supra* note 199, at *12.

[209] *Id.* at *13 n.10.

[210] *Id.* at *13

[211] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

relying upon "democratic control" to control suspicionless programs like MUSC's drug testing program.[212] The women subjected to the program generally were poor patients seeking treatment at the city's public hospital, a population segment unlikely to have much of a political voice. Moreover, the program did not originate from a legislative mandate or gubernatorial task force established by a systematic policy-making process, but from a determined hospital nurse who was able to engage the attention of the local police and prosecutor's department. Even once devised, their policy underwent no type of legislative or state-level executive review, let alone judicial review, but essentially was a local crusade using law enforcement resources, without oversight, against what they perceived to be a burning social need. The bottom line, in other words, was that no matter how well-meaning Nurse Brown and the police were, unless the judiciary was willing to review the program as a "policy magistrate," the patients subjected to the program had no meaningful way to raise their Fourth Amendment concerns and to test the policy's implementation on a day-to-day basis.

While *Edmond*'s record does not raise the immediate concerns that were present in *Ferguson* over how it was being implemented in the field,[213] the narcotics checkpoints still resonate with Otis's criticisms of general warrants. One of Otis's primary concerns was that general warrants "live forever" because "it is perpetual; there is no return" and because no suspicion exists to prove or disprove.[214] The citizen, therefore, loses his ability to keep the government from stopping him "whilst he is quiet," because the government can substitute its own judgment for the need to stop the "quiet" citizen rather than having to show individualized suspicion of wrongdoing.[215]

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[212] *Ferguson*, 532 U.S. at 96 (Scalia, J., dissenting) (objecting to the Court creating "a Fourth Amendment jurisprudence" in this context immune from "democratic control").

[213] The drivers who filed a class action lawsuit challenging their stops claimed that the limits in the police directives had not been followed, but they agreed to stipulate that the checkpoints were operated according to the directives for the purposes of the preliminary injunction decision. *Edmond*, 531 U.S. at 35.

[214] Otis, *supra* note 183, at 553-54.

[215] The Supreme Judicial Court of Massachusetts in holding narcotics check-

Judge Posner, in the lower court opinion striking down the narcotics checkpoints, noted the danger that if a general law enforcement purpose could satisfy the Fourth Amendment, "[i]n high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations."[216] Posner even posited that if the narcotics checkpoints were upheld, the same principle could allow "the government [to] set up a metal detector outside each person's home and require[] the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit."[217] As we have seen, Justice O'Connor's opinion in *Edmond* likewise stated that no meaningful limit could be articulated "to prevent such intrusions from becoming a routine part of American life" if a general law enforcement purpose was allowed to suffice.[218]

Perhaps most importantly, the Court in *Edmond* clearly took the decision of what constituted a "special need" and placed it firmly within the judiciary's control. Unlike *Ferguson*, where those subjected to the search were politically weak and the political mechanisms for overseeing the hospital's drug testing uncertain, the checkpoint in *Edmond* arguably would have been subject to overview at the ballot box. After all, the aggrieved populace in *Edmond* was the entire driving citizenry. A plausible argument could be made, therefore, that if roadblocks were an affront to the citizenry, "the people may throw out of office those who adopted it."[219]

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points invalid under the state constitution drew an analogy to the writs of assistance, arguing that, "Roadblocks established for the purpose of interdicting drugs and other contraband essentially give to the police the same powers with respect to individuals in their automobiles as the writs of assistance granted to the British officials with respect to individuals in their homes." Commonwealth v. Rodriguez, 722 N.E.2d 429, 435 (Mass. 2000).

[216] Edmond v. Goldsmith, 183 F.3d 659, 662 (7th Cir. 1999).

[217] *Id.* at 664. Judge Easterbrook in his dissent, on the other hand, believed that automobile checkpoints under the Supreme Court's cases constituted a separate genre of Fourth Amendment analysis and could be distinguished from the metal detector example on that basis. *Id.* at 669 (Easterbrook, J., dissenting).

[218] *Edmond*, 531 U.S. at 42; *see also supra* note 114 and accompanying text.

[219] *Edmond*, 183 F.3d at 671 (Easterbrook, J., dissenting). Judge Easterbrook also made the argument that roadblocks might actually promote privacy and less intrusive government actions by making unnecessary more offensive tactics for

By insisting in *Edmond* that the Fourth Amendment norm truly was one of individualized suspicion and could only be deviated from in situations directly implicating special needs (like immediate highway safety concerns), the Court insulated the individual's right to be free from government intrusion "whilst he is quiet" from democratic override (just as a legislature, for example, could not vote to dispense with the warrant requirement for searches of homes of suspected drug dealers). In doing so, the Court moved suspicionless programs away from executive and legislative discretion granted to "petty officers" and towards a Fourth Amendment that constrains discretion by the need to either show suspicion of wrongdoing or by demonstrating the existence of a compelling justification for dispensing with individualized suspicion. Moreover, and most importantly for dealing with the concerns that James Otis voiced in 1761, the *Edmond* Court gave support to the principle that the judiciary as "policy magistrate" would scrutinize the government's evidence to decide whether the "special need" actually existed to justify departure from the Fourth Amendment's norm of traditional probable cause.[220]

VI. CONCLUSION

The Court's impulse in *Camara* to bring administrative searches like housing inspections within the Fourth Amendment's protection was a noble one very much in accord with the Amendment's original concerns about general warrants. Justice White explained that, "the basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials . . . . 'When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.'"[221] The idea that even a

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detecting narcotics use that are clearly permissible under the Fourth Amendment, such as the use of informers or searching one's trash. *Id.* (Easterbrook, J., dissenting).

[220] *Edmond*, 531 U.S. at 46-47.

[221] *Camara*, 387 U.S. at 528-29 (quoting Johnson v. United States, 333 U.S.

housing inspector's entry into the home must be subjected to judicial oversight was a concept, therefore, that comfortably fit within the Fourth Amendment's historical concern with general warrants.

As *Camara*'s reasonableness balancing test spawned the later "special needs" cases, however, the holding appeared to have opened the door to unintended mischief. Rather than bringing government intrusions within the Fourth Amendment and subjecting them to rigorous judicial review, the reasonableness balancing test seemed headed in the direction of giving the government leeway to engage in suspicionless searches based on policy judgments that the courts were hesitant to scrutinize. The initial string of cases in which the Court approved the government's justification for checkpoints and "special needs" or "administrative" searches—cases like *Skinner*, *Von Raab*, *Acton*, *Burger* and *Sitz*—created consternation that the Court was giving the government considerable latitude to engage in suspicionless programs even where significant criminal consequences often followed. The Court's language in these cases spoke comfortingly of "closely guarded" exceptions to individualized suspicion, but the scant record supporting the government's justification in cases like *Von Raab* seemed to indicate that the Fourth Amendment's "special needs" determination was largely one of the judiciary deferring to the other branches' judgment.

Chandler gave some hope that the Court would in fact live up to its promises, but it was not until *Edmond* and *Ferguson* that the Court embraced the role of "policy magistrate." In both cases, the majority showed a willingness to require the government to justify its "special need" as a need outside the realm of general law enforcement, and the Court actively tested the justification against the evidence. Like a magistrate deciding whether to issue a search warrant, the Court asked questions and probed the record for answers before deciding whether the government had met its burden of proving why it should not be required to show individualized wrongdoing.

The question for the future is whether the Court will con-

10, 14 (1948)).

tinue in its role as an active "policy magistrate" or whether *Edmond* and *Ferguson* merely will become cautionary tales to the government. Both cases hold the possibility that clever government tinkering with labels and the ordering of events in a suspicionless search program could satisfy a formalistic reading of their holdings. When these cases arise, they are likely to be even more challenging because they will require the Court in its role as magistrate to go even further in its fact finding and enter the uncomfortable terrain of labeling government actions a "ruse" or a "pretext."[222]

In looking for the constitutional courage to take that step, the Court should recall that the role of judicial oversight harks back to the concerns over general warrants that gave rise to the Fourth Amendment. The Framers feared discretionary authority, the ability of government agents to decide on their own to disturb a citizen "whilst he is quiet." Today, the government's ability to disturb the citizen's "quiet" has grown in technological and manpower terms far beyond what the Framers ever imagined. Undoubtedly, the challenges of a post-9/11 world will force society to confront difficult questions of how to adapt law enforcement resources to meet new problems, but in confronting those questions, we also must not forget the

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[222] The Court's decision in Illinois v. Lidster, 124 S. Ct. 885 (2004), does not necessarily demonstrate a retreat from the principles of *Edmond* and *Ferguson*. The *Lidster* majority upheld an "information-seeking highway stop" at which police stopped motorists and handed out flyers asking for information about a hit-and-run accident that had left a 70 year-old bicyclist dead. *Lidster*, 124 S. Ct. at 888. The majority's basic distinction of *Edmond* was a reasonable one—that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask . . . for their help . . . ."—and on that basis would not undercut *Edmond*'s holding. *Id.* at 889. The majority opinion, however, also contained some worrisome language that may suggest that the Court is retreating from treating checkpoints as requiring rigorous Fourth Amendment scrutiny. At various points, for instance, the majority stated that "[t]he Fourth Amendment does not treat a motorist's car as his castle" and minimized the intrusion involved with stopping a car. *Id.* Certainly, the concurring opinion's call for remanding the case to the state court to better develop the record as to how the police decided where to place the information stop and what alternatives were considered was more consistent with the Court's oversight responsibilities under *Edmond* and *Ferguson*. *See id.* at 891 (Stevens, J., dissenting).

historical wisdom of those who learned from living in a world of general warrants.