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Holly Vance

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PROTESTORS HAVE FOURTH AMENDMENT RIGHTS, TOO: IN *GRAVES V. CITY OF COEUR D'ALENE*, THE NINTH CIRCUIT CLOUDS CLEARLY ESTABLISHED LAW GOVERNING SEARCHES

Holly Vance

Abstract: In *Graves v. City of Coeur d'Alene*, the United States Court of Appeals for the Ninth Circuit concluded that a police officer should not have arrested a protestor at an Aryan Nations parade when the protestor refused to allow the officer to search his backpack. The court held that the arrest was illegal because the officer had no probable cause to believe the protestor was carrying a weapon. However, the court also held that the arresting officer was entitled to qualified immunity and thus not liable for his violation of the protestor's rights. Qualified immunity is a privilege that shields a public official from liability in situations where the underlying substantive law is not clearly established. In *Graves*, the court held that under the circumstances surrounding the Aryan Nations parade, the standard for probable cause to search the protestor's backpack was not clearly established. This Note argues that the police officer in *Graves* searched the protestor without sufficient individualized suspicion. Instead, as a basis for the search the officer relied on a broad profile of otherwise ordinary conduct that would include a number of innocent individuals. Because the law was clearly established at the time of the search that police officers must have some individualized suspicion of a person to perform a search, and that individualized suspicion cannot be based on ordinary conduct that would include a number of innocent people, the defendant police officer was not entitled to qualified immunity.

In light of recent terrorist attacks, police officers have the critical task of maintaining public safety while protecting constitutionally guaranteed civil rights. The attacks of September 11, 2001, the Oklahoma City bombing, and the bombing at the Atlanta Olympics have caused widespread fear of terrorism.[1] At the same time, police officers have responded with increased vigilance.[2] However, there is a risk that increased security measures are at odds with this nation's history of upholding civil liberties.[3]

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1. *See* William Drozdiak, *FBI Probes Bombing as Olympic Games Continue*, WASH. POST, July 28, 1996, at A1; Pierre Thomas & George Lardner Jr., *Oklahoma Bomb Suspects Indicted*, CHI. SUN-TIMES, Aug. 11, 1995, at 3, 1995 WL 6665930.

2. *See* OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 15–16 (2002), http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf.

3. *See* Philip Shenon, *Report on U.S. Antiterrorism Law Alleges Violations of Civil Rights*, N.Y. TIMES, July 21, 2003, at A1.

One of those liberties is the right to be free of unreasonable searches.[4] That right is protected by the Fourth Amendment to the United States Constitution, which prohibits police from searching people's possessions unless there is probable cause to believe that the possessions contain "contraband or evidence of a crime."[5] To establish probable cause, police officers must have individualized suspicion of a particular person.[6] Individualized suspicion cannot be based on a broad profile of otherwise ordinary conduct that would include a number of innocent individuals.[7]

The opinion of the U.S. Court of Appeals for the Ninth Circuit in *Graves v. City of Coeur d'Alene*[8] illustrates the conflict between security concerns and Fourth Amendment rights. In *Graves*, a Coeur d'Alene police officer arrested a protestor at an Aryan Nations parade for obstructing the officer by refusing to allow the officer to search his bulky backpack.[9] The *Graves* court held that the arrest was unlawful because the officer lacked probable cause for the search, and the protestor was within his rights to refuse the search.[10] However, the court also concluded that the arresting officer was entitled to qualified immunity because the standard for probable cause for the search of a person's backpack on a public street during a demonstration had not been clearly established.[11]

This Note argues that the *Graves* court improperly granted the officer qualified immunity from civil liability because the probable cause standard governing the search of the demonstrator's backpack was clearly established. Part I of this Note outlines U.S. Supreme Court and Ninth Circuit precedent that guide police officers' determinations of probable cause and reasonable suspicion for searches and seizures. Part II reviews the doctrine of qualified immunity and examines the "clearly established" standard. Part III outlines the facts, procedural history, holding, and rationale of the *Graves* decision. Part IV argues that the Ninth Circuit erred in holding that the officer in the *Graves* case was

4. *See* U.S. CONST. amend. IV.

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

6. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

7. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

8. 339 F.3d 828 (9th Cir. 2003).

9. *Id.* at 836–37.

10. *Id.* at 844.

11. *Id.* at 847–48.

entitled to qualified immunity because in making a probable cause determination, the officer relied on a broad profile of ordinary conduct that would implicate many innocent individuals, and clearly established law prohibited the use of such a broad profile as a basis for individualized suspicion in support of probable cause.

I. POLICE MUST HAVE INDIVIDUALIZED SUSPICION FOR SEARCH OR SEIZURE OF A PARTICULAR SUSPECT

The Fourth Amendment protects "[t]he right of the people to be secure in their . . . effects, against unreasonable searches and seizures."[12] Police officers must have probable cause to search a person's effects.[13] Brief investigative stops (*Terry* stops) require reasonable suspicion—a lower level of suspicion than probable cause.[14] To establish probable cause or reasonable suspicion, officers must have "individualized suspicion" that a person has broken the law, is breaking the law, or is about to break the law.[15] Officers cannot show individualized suspicion through the use of a broad profile consisting of otherwise ordinary conduct that would implicate a number of innocent individuals.[16] Exceptions to the Court's requirement for individualized suspicion are limited to special needs programs and certain administrative searches.[17]

A. *Individualized Suspicion Is a Necessary Component of Probable Cause and Reasonable Suspicion Determinations*

The Fourth Amendment prohibits police from conducting unreasonable searches or seizures.[18] A search occurs when police invade an area, or look through a possession, in which someone has a reasonable expectation of privacy,[19] while a seizure occurs when a

12. U.S. CONST. amend. IV.

13. *See* Michigan v. Summers, 452 U.S. 692, 700 (1981).

14. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

15. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (holding that individualized suspicion is necessary for a search or seizure to be reasonable under the Fourth Amendment except for limited situations involving special needs and administrative searches); Chandler v. Miller, 520 U.S. 305, 308, 313 (1997) (same).

16. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

17. *See Edmond*, 531 U.S. at 37.

18. U.S. CONST. amend. IV.

19. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984).

person is restrained from moving by the use of physical force or submission to authority.[20] Seizures include arrests and *Terry* stops.[21] Police officers must have probable cause to conduct a legal search[22] or arrest.[23] To lawfully conduct a *Terry* stop, officers must have reasonable suspicion, which is a lower predicate than probable cause.[24]

An unreasonable search is a search based on less than probable cause.[25] The U.S. Supreme Court has held that probable cause for a search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[26] The Court has further defined probable cause as "'less than evidence which would justify condemnation' or conviction,"[27] but more than "bare suspicion."[28] A *Terry* stop is unreasonable when it is grounded on less than reasonable suspicion.[29] The reasonable suspicion standard is satisfied when police officers reasonably believe "that criminal activity may be afoot."[30]

To conduct a lawful search or *Terry* stop, police officers must base their determination of probable cause or reasonable suspicion on individualized suspicion about a particular suspect.[31] In making a determination of individualized suspicion for a search or *Terry* stop, the issue "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[32] In *Ybarra v. Illinois*,[33] the U.S. Supreme Court considered whether officers had probable cause to search Ventura Ybarra when, acting under a warrant that did not include Ybarra, the officers searched a tavern where he was a patron.[34] Officers obtained the warrant based on

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20. *See* California v. Hodari D., 499 U.S. 621, 626 (1991).

21. *See* Terry v. Ohio, 392 U.S. 1, 16–19 (1968).

22. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

23. *See* Florida v. Royer, 460 U.S. 491, 499 (1983).

24. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989); *Terry*, 392 U.S. at 30–31.

25. *See* Michigan v. Summers, 452 U.S. 692, 700 (1981).

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

27. Brinegar v. United States, 338 U.S. 160, 175 (1949) (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)).

28. *Id.*

29. *See Sokolow*, 490 U.S. at 7; *Terry*, 392 U.S. at 30–31.

30. *Terry*, 392 U.S. at 30.

31. *See* Ybarra v. Illinois, 444 U.S. 85, 90–91 (1979); Brown v. Texas, 443 U.S. 47, 52–53 (1979).

32. *Sokolow*, 490 U.S. at 10 (quoting Illinois v. Gates, 462 U.S. 213, 243–44 (1983)).

33. 444 U.S. 85 (1979).

34. *Id.* at 88.

a tip from an informant who reported seeing heroin packets in the possession of the bartender and having the heroin offered for sale to him by the bartender.[35] During the search of the tavern, officers frisked Ybarra and removed a cigarette packet that was later found to contain heroin.[36] The Court held that there was no probable cause for the officers' search of Ybarra because they did not have any basis for individualized suspicion of him.[37] Similarly, in *Terry v. Ohio*,[38] the Court held that a brief investigative stop is permissible only when officers have a reasonable suspicion based on facts particular to the individual that a person is engaged in criminal activity.[39]

Although police officers may consider the surrounding circumstances in their analysis of probable cause or reasonable suspicion, individualized suspicion of a particular suspect is always necessary for a search or *Terry* stop.[40] For example, in *Ybarra*, the Court held that regardless of the suspicious circumstances at the tavern, including known drug trafficking by the bartender and some of the patrons, officers did not have probable cause to perform a search when they had no individualized suspicion of Ybarra.[41] Likewise, in *Brown v. Texas*,[42] the Court held that officers could not base reasonable suspicion entirely on the surrounding circumstances in the context of a *Terry* stop.[43] In *Brown*, police officers stopped Zackary Brown after observing him walking away from another man in an alley that was frequently used for drug trafficking and demanded that he identify himself.[44] The Court concluded that Brown's stop was not lawful under the *Terry* standard because officers did not base their determination of reasonable suspicion on any facts that were particular to Brown.[45]

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35. *Id.* at 87–88.
36. *Id.* at 88–89.
37. *See id.* at 90–92.
38. 392 U.S. 1 (1968).
39. *See id.* at 21.
40. *See Ybarra*, 444 U.S. at 90–91; Brown v. Texas, 443 U.S. 47, 52–53 (1979).
41. *See Ybarra*, 444 U.S. at 90–91.
42. 443 U.S. 47 (1979).
43. *Id.* at 52–53.
44. *Id.* at 48–49.
45. *Id.* at 52.

B. *Individualized Suspicion Cannot Be Based on Characteristics That Would Implicate a Number of Innocent Individuals*

In the context of a *Terry* stop, police officers may not base their determination of individualized suspicion of a person on broad profiles of otherwise ordinary conduct that would implicate a number of innocent individuals.[46] In *Reid v. Georgia*,[47] the U.S. Supreme Court held that an officer from the Drug Enforcement Administration impermissibly stopped the defendant without individualized suspicion of wrongdoing.[48] The officer based the stop on the following factors, which he believed fit a typical "drug courier profile":[49] (1) the defendant had traveled from a city frequently implicated in drug trafficking; (2) he arrived early in the morning; (3) the defendant and his companion did not check any luggage; and (4) the defendant and his companion appeared to be trying to hide the fact they were traveling together.[50] The Court reasoned that only the last of these factors related to the particular conduct of the defendant.[51] It concluded that "[t]he other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[52] While the Court concluded that the fourth factor did cast some suspicion on the defendant, it determined that the defendant's conduct in relation to his traveling companion was insufficient to establish reasonable suspicion.[53] The *Reid* Court therefore held that the officer did not have sufficient individualized suspicion of the defendant to support a *Terry* stop.[54]

In a similar case, the Ninth Circuit also concluded that officers cannot ground individualized suspicion on ordinary behavior that would include many innocent individuals.[55] In *United States v. Rodriguez*,[56] border

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46. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992). There is no case law applying this principle to the probable cause standard for searches.

47. 448 U.S. 438 (1980).

48. *See id.* at 441.

49. *Id.* at 440–41.

50. *Id.*

51. *See id.* at 441.

52. *Id.*

53. *See id.*

54. *See id.*

55. *See* United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

56. 976 F.2d 592 (9th Cir. 1992).

control agents stopped Ramiro Rodriguez after observing him driving alone down the highway.[57] When the agents decided to perform a *Terry* stop of Rodriguez, they relied on the following factors: (1) the road he was driving on was a "notorious route for alien smugglers"; (2) he did not acknowledge the agents as they drove by in a marked vehicle; (3) he was driving a car the agents believed could be used for alien smuggling; (4) he looked at the agents in the rearview mirror several times; (5) the car appeared to be "heavily loaded"; and (6) Rodriguez was a Hispanic male.[58] The *Rodriguez* court held that these factors did not provide sufficient individualized suspicion of Rodriguez to justify his stop because each factor was otherwise normal behavior, and even taken together, the factors would ensnare a number of innocent people.[59] It concluded that the court "must not accept what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch."[60]

While police officers cannot base individualized suspicion wholly on otherwise ordinary conduct that would include a number of law-abiding individuals, otherwise innocent factors, when grouped together, can sometimes amount to reasonable suspicion.[61] In *United States v. Sokolow*,[62] the U.S. Supreme Court held that officers had reasonable suspicion to stop a traveler at an airport when he: (1) paid $2100 in cash for two airline tickets from a roll of twenty-dollar bills; (2) traveled under an alias; (3) listed his original destination as Miami, a city known as a source of illegal drugs; (4) stayed in Miami for only forty-eight hours even though his round-trip flight took twenty hours; (5) appeared nervous; and (6) checked no luggage.[63] The Court held that although none of these factors individually would have established reasonable suspicion, taken together, they amounted to reasonable suspicion.[64] Thus, ordinary behavior, when examined by police as a whole, may amount to individualized suspicion.[65] However, officers may not base

57. *Id.* at 593.
58. *Id.* at 594–95.
59. *See id.* at 595–96.
60. *Id.*
61. *See* United States v. Sokolow, 490 U.S. 1, 9–10 (1989).
62. 490 U.S. 1 (1989).
63. *See id.* at 3, 9–10.
64. *Id.* at 9–10.
65. *See id.*

individualized suspicion on a profile of ordinary conduct that would implicate many innocent individuals.[66]

C. *Officers May Only Conduct a Search Unsupported by Individualized Suspicion as Part of a Special Needs Program or Administrative Search*

Police officers may only conduct a search without individualized suspicion of a crime in limited circumstances.[67] The U.S. Supreme Court has upheld searches ungrounded in individualized suspicion only in cases where the searches were part of an organized special needs program or a specific administrative search.[68] A special needs program must be based on standardized criteria and cannot be founded on evidence or suspicion of criminal conduct.[69] Constitutionally permissible special needs programs include random drug testing of student athletes,[70] drug and alcohol testing of certain railway employees,[71] and road checkpoints to detect intoxicated drivers and illegal aliens.[72] Examples of allowable suspicionless administrative searches include inspections of a "closely regulated" junkyard business to uncover evidence of car theft[73] and inspections of buildings to determine the cause of a fire.[74]

Special needs programs are constitutional only if the searches are aimed at addressing a valid state objective and are based on special needs, beyond those of normal law enforcement.[75] For example, in *Michigan Department of State Police v. Sitz*,[76] the Court held that a random highway checkpoint for alcohol intoxication was not unreasonable because the state had a valid interest, beyond the normal needs of law enforcement, in preventing drunk driving.[77] However, the

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66. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

67. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

68. *Id.*

69. *See* Florida v. Wells, 495 U.S. 1, 3–4 (1990).

70. Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

71. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 634 (1989).

72. *Edmond*, 531 U.S. at 32.

73. New York v. Burger, 482 U.S. 691, 712 (1987).

74. Michigan v. Tyler, 436 U.S. 499, 509 (1978).

75. *See* Chandler v. Miller, 520 U.S. 305, 313–14 (1997); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990).

76. 496 U.S. 444 (1990).

77. *See id.* at 455.

Court reached the opposite conclusion in *City of Indianapolis v. Edmond*,[78] when it held that random road checkpoints for illegal drugs were unconstitutional.[79] The Court reasoned that because the purpose of the *Edmond* checkpoints was almost indistinguishable from general crime prevention, allowing such searches would have effectively circumvented the Court's requirement for individualized suspicion for searches related to general crime prevention.[80]

In sum, when making a determination of probable cause or reasonable suspicion, police officers may consider the circumstances surrounding the situation in addition to the factors particular to the suspect.[81] However, officers must have some individualized suspicion of a person to establish probable cause or reasonable suspicion.[82] Individualized suspicion cannot be based on a profile consisting of otherwise ordinary conduct that is likely to implicate a number of innocent individuals.[83] Absent individualized suspicion, officers may only conduct a search or seizure as part of a special needs program that advances a valid state objective extending beyond the goals of normal law enforcement or in conjunction with a valid administrative search.[84]

II. QUALIFIED IMMUNITY PROTECTS PUBLIC OFFICIALS FROM CIVIL LIABILITY IN LIMITED CIRCUMSTANCES

Qualified immunity allows public officials to avoid liability for violating a person's civil liberties.[85] The doctrine protects officials from liability in situations where the law was not clear at the time of the violation,[86] thus ensuring "that before they are subjected to suit, officers are on notice their conduct is unlawful."[87] The U.S. Supreme Court established the doctrine of qualified immunity as a means of balancing

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78. 531 U.S. 32 (2000).

79. *See id.* at 48.

80. *See id.* at 44.

81. *See* Ybarra v. Illinois, 444 U.S. 85, 90–91 (1979); Brown v. Texas, 443 U.S. 47, 52–53 (1979).

82. *See Edmond*, 531 U.S. at 37; Chandler v. Miller, 520 U.S. 305, 313 (1997).

83. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

84. *See Chandler*, 520 U.S. at 313–14; Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990).

85. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

86. *See* Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

87. Saucier v. Katz, 533 U.S. 194, 206 (2001).

the rights of citizens against the public interest in allowing public officials to function effectively.[88]

In *Saucier v. Katz*,[89] the Court announced a two-part test for determining whether an official is entitled to qualified immunity.[90] First, a plaintiff must establish that an official violated one of the plaintiff's constitutional rights.[91] When considering whether plaintiff's rights have been violated, a court must view the facts in the light most favorable to the plaintiff.[92] The court then considers whether the right was "clearly established" at the time it was violated.[93] A right is clearly established if it would be objectively clear to a reasonable official that the official's conduct was unlawful.[94]

When evaluating whether a right is clearly established, the U.S. Supreme Court has held that courts should look at precedent applying the legal rule in a similar factual situation.[95] However, the test is whether case law makes a right "apparent," not whether "the very action in question has previously been held unlawful."[96] For example, in *Mendoza v. Block*,[97] police officers used a dog to track a robbery suspect.[98] The suspect claimed that the officers' use of the dog was an excessive use of force, but the officers raised a qualified immunity defense.[99] The question before the Ninth Circuit was whether the law regarding use of a police dog was clearly established.[100] The officers claimed that it was not, because there were few cases dealing with the issue of dogs.[101] The *Mendoza* court disagreed, finding that a number of cases had clearly established the law regarding use of force in general,[102] and that a

88. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

89. 533 U.S. 194 (2001).

90. *See id.* at 201.

91. *See id.*; *see also Hope*, 536 U.S. at 736.

92. *See Katz*, 533 U.S. at 201.

93. *Id.*

94. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

95. *Id.*

96. *Id.*

97. 27 F.3d 1357 (9th Cir. 1994).

98. *Id.* at 1358–59.

99. *Id.* at 1359.

100. *See id.* at 1360–61.

101. *See id.* at 1361. The officers claimed there was no case law that addressed the use of police dogs, although the *Mendoza* court noted that there were other decisions that discussed this issue. *Id.*

102. *See id.* at 1361–62.

reasonable police officer would have known that those cases applied to any use of force, whether through "use of a baton, use of a gun, or use of a dog."[103] Thus, to clearly establish a legal principle, case law need not consider every factual scenario.[104]

III. IN *GRAVES* THE NINTH CIRCUIT HELD THAT A POLICE OFFICER WAS ENTITLED TO QUALIFIED IMMUNITY

In *Graves v. City of Coeur d'Alene*, the Ninth Circuit considered whether a police officer violated the civil liberties of a protestor at an Aryan Nations parade by arresting him when he refused to consent to a search of his backpack.[105] The court held that the officer did not have probable cause to search the backpack and the arrest was unlawful.[106] However, the court concluded that the officer was entitled to qualified immunity from civil liability because the law had not been clearly established regarding the degree of weight that the officer could assign to the surrounding circumstances of the parade when making his determination of probable cause.[107]

A. The Jury Found That Officer Dixon Did Not Violate Crowell's Civil Rights

The dispute in *Graves* arose from events occurring at an Aryan Nations parade in Coeur d'Alene, Idaho, in 1998.[108] Local police expected that several groups, including the Jewish Defense League, would protest the parade.[109] The police were worried about the potential for violence at the parade, given the reputations of both the Aryan Nations and the Jewish Defense League, and the fact that the president of the Jewish Defense League had announced that Coeur d'Alene's streets would "run red with blood."[110] Adding to the tension surrounding the parade was a report that someone had stolen ammonium nitrate, a chemical used in construction blasting, from a construction site

103. *Id.* at 1362.

104. *See id.*

105. Graves v. City of Coeur d'Alene, 339 F.3d 828, 840 (9th Cir. 2003).

106. *See id.* at 845.

107. *Id.* at 847–48.

108. *Id.* at 834–37.

109. *Id.* at 834.

110. *Id.* (internal quotations omitted).

approximately 300 miles from the city.[111] Because of their concerns about violence, police officers were searching the bags of many of the people protesting the march.[112] One of the plaintiffs in *Graves*, Jonathan Crowell, attended the parade to voice his opposition to the Aryan Nations.[113] Crowell walked along the parade route wearing a heavy backpack and carrying a sign that read, "Earth first, hatred last."[114] Officer Dixon, a member of the Coeur d'Alene Police Department, demanded that he be allowed to search Crowell's backpack.[115] Crowell refused, stating that it was his constitutional right not to consent to a search.[116] Officer Dixon then demanded to search the backpack, but Crowell continued to refuse to consent to the search.[117] Finally, Officer Dixon arrested Crowell for obstructing a police officer.[118] The one other protestor who refused to allow the officer to search his bag was also arrested.[119] After Crowell's arrest, Officer Dixon searched Crowell's backpack and discovered jars of peanut butter, jelly, and applesauce, in addition to bread, shoes, and clothes.[120] In 1999, Crowell sued Officer Dixon in the U.S. District Court for the District of Idaho for false arrest under 42 U.S.C. § 1983.[121] At the trial, Officer Dixon testified that while Crowell had definitely asserted that the search violated his civil rights, he had not verbally or physically assaulted the officer.[122] Officer Dixon also testified that he suspected Crowell's backpack contained explosives

111. *Id.*

112. Brief for Appellant at 2–3, *Graves* (No. 02-35119).

113. *Graves*, 339 F.3d at 834.

114. *Id.* at 835.

115. *Id.* at 836.

116. *Id.*

117. *Id.*

118. *Id.* at 837. Officer Dixon called his supervisor, Lieutenant Hotchkiss, by radio before arresting Crowell. Lieutenant Surplus overheard the call and replied, "[I]f he won't let us look in the pack, [you] need[ ] to arrest him." *Id.* (internal quotations omitted).

119. Brief for Appellant at 3, *Graves* (No. 02-35119).

120. *Graves*, 339 F.3d at 837. On April 14–15, 1999, Crowell was prosecuted for obstructing a police officer pursuant to Idaho Code § 18-705, which defines obstruction of an officer as conduct that "'resists, delays, or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office.'" *Id.* at 833, 840 (quoting IDAHO CODE § 18-705). The trial resulted in a hung jury. *Id.* at 833. As of June 1, 2001, Crowell was awaiting retrial. *Id.* at 833 n.1.

121. *Id.* at 833. Five protestors, Jonathan Crowell, Gary Bizek, Lori Graves, Jeffrey Kerns, and Kenneth Malone, were originally plaintiffs in the case. *Id.* at 833 n.2. All claims except those made by Crowell and Bizek were dismissed on partial summary judgment. *Id.* Crowell also named Officer Surplus as a defendant on a theory of supervisory liability. *Id.*

122. *Id.* at 836–37.

because it was "heavy" and looked like it contained "round cylindrical type objects."[123] However, he also admitted to searching the bags of approximately fourteen other protestors that day and could not remember targeting the bags of these protestors for any particular reason, such as being large or bulky.[124] Crowell alleged that the practice of police officers on the day of the parade was to search the bags of anyone who appeared to be demonstrating against the parade, and that there was no indication that police searched any of the non-protestors, such as members of the media.[125] Crowell also demonstrated at trial that a backpack identical to the one he wore on the day of the march, containing the same items, did not have any unusual bulges.[126]

The jury returned a verdict for Officer Dixon, finding that he had not falsely arrested Crowell.[127] Crowell appealed to the Ninth Circuit on the grounds that the district court erred in failing to grant his motion for judgment notwithstanding the verdict.[128] Crowell argued that he had not obstructed a police officer by refusing to consent to a search of his backpack because Officer Dixon did not have probable cause to search the backpack.[129] Officer Dixon did not raise the defense of qualified immunity on appeal.[130]

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123. *Id.* at 836 (internal quotations omitted).

124. Brief for Appellant at 11, *Graves* (No. 02-35119).

125. *Id.* at 2–3.

126. *Id.* at 11.

127. *Graves*, 339 F.3d at 837. The protestors then filed a motion for judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50 and, in the alternative, moved for a new trial under Federal Rule of Civil Procedure 59. *Id.* at 837–38. The district court denied both motions. *Id.*

128. *Id.* at 833. *Graves* presents a unique situation in that it involves a motion for judgment notwithstanding the verdict in a case where the court subsequently raised the issue of qualified immunity sua sponte. *Id.* at 846 n.23. When making a determination of qualified immunity, the court must examine the facts in the light most favorable to the plaintiff. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). However, when evaluating a motion for judgment notwithstanding the verdict, the court must look at the facts in the light most favorable to the non-moving party, which in this case is the defendant. FED. R. CIV. P. 50(a)(1); *Graves*, 339 F.3d at 846 n.24.

129. Brief for Appellant at 12–13, *Graves* (No. 02-35119).

130. *Graves*, 339 F.3d at 845 n.23.

B. *The Ninth Circuit Concluded That Officer Dixon Did Not Have Probable Cause To Search Crowell's Backpack*

In *Graves*, the Ninth Circuit held that even in light of the hostile circumstances surrounding the Aryan Nations parade,[131] Officer Dixon did not have adequate individualized suspicion of Crowell to give him probable cause to search Crowell's backpack.[132] The *Graves* court concluded that the fact that Crowell's backpack appeared to be heavy and bulging did not give Officer Dixon "substantial" individualized suspicion about Crowell because many innocent objects can make a backpack look heavy and bulging.[133] The court acknowledged that Officer Dixon had good intentions, but noted that "a good motive is not sufficient to show probable cause."[134]

C. *The Ninth Circuit Held That Officer Dixon Was Entitled to Qualified Immunity Because the Law Concerning Probable Cause Determinations Was Not Clearly Established*

The Ninth Circuit held that Officer Dixon was not liable for violating Crowell's Fourth Amendment civil liberties because he was entitled to qualified immunity.[135] The court raised the issue of qualified immunity sua sponte.[136] The *Graves* court reasoned that Officer Dixon was entitled to qualified immunity because the law had not clearly established how much weight Officer Dixon could give to the surrounding circumstances when he was deciding whether he had probable cause to search Crowell's backpack.[137] The court concluded that "a reasonable

131. *Id.* at 841–42. Factors relating to the circumstances surrounding the parade included: (1) the "hostile" circumstances surrounding the parade; (2) the Aryan Nations' violent history; (3) the Jewish Defense League president's threat; (4) the fact that cylindrical objects can contain explosives; (5) the fact that the 1996 Olympic Park bomber hid his bomb in a backpack; and (6) the fact that police were notified that explosives had been stolen from a construction site in southwestern Idaho. *Id.* at 842.

132. *Id.* at 844. Although the backpack's appearance failed to support Officer Dixon's probable cause determination, the *Graves* court noted that its appearance would have supported a *Terry* stop of Crowell. *Id.* at 843.

133. *Id.* at 844. Factors relating to Crowell specifically included the fact that: (1) Crowell was loud; (2) Crowell did not consent to the search; (3) Crowell did not give his name when Officer Dixon asked for it; and (4) Crowell's backpack was heavy and contained cylindrical objects. *Id.* at 841–42.

134. *Id.* at 844.

135. *Id.* at 847–48.

136. *Id.* at 846 n.23.

137. *Id.* at 847–48.

officer . . . could have believed that [the circumstances surrounding the parade] carried enough weight to create probable cause when there was at least some individualized suspicion."[138] The court considered Crowell's backpack to be sufficiently suspicious to make Officer Dixon's probable cause determination reasonable under the circumstances.[139]

IV. THE NINTH CIRCUIT ERRED WHEN IT HELD THAT THE OFFICER WAS ENTITLED TO QUALIFIED IMMUNITY

In *Graves*, Officer Dixon determined that there was probable cause to search Crowell's backpack based on the fact that he was a protestor carrying a heavy backpack.[140] Carrying a heavy backpack at a protest march is ordinary behavior and cannot serve as the basis for individualized suspicion. Because a reasonable police officer would have known that probable cause requires individualized suspicion[141] that cannot be based on ordinary behavior that would implicate many innocent people[142]—such as carrying a heavy backpack—Officer Dixon was not entitled to qualified immunity. If the Coeur d'Alene Police Department believed that searching the bags of people attending the Aryan Nations parade was necessary to ensure safety, the Department should have performed searches as part of an organized special needs program.

A. Individualized Suspicion of Crowell Could Not Be Based on His Backpack Because Carrying a Heavy Backpack Is Ordinary Behavior at a Protest March

The *Graves* court held that Officer Dixon had sufficient reasonable suspicion of Crowell to perform a lawful *Terry* stop based on the hostile circumstances of the parade and Crowell's heavy backpack,[143] but that Officer Dixon did not have probable cause to search Crowell's

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138. *Id.* at 847.

139. *Id.* at 847–48.

140. *Id.* at 836.

141. *See* Chandler v. Miller, 520 U.S. 305, 313 (1997).

142. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

143. *See Graves*, 339 F.3d at 843.

backpack.[144] The court erred in concluding that Officer Dixon had enough reasonable suspicion to stop Crowell because it relied too heavily on the surrounding circumstances of the parade and placed insufficient emphasis on Officer Dixon's lack of individualized suspicion of Crowell. Police officers may consider the surrounding circumstances in addition to the individualized suspicion of a particular person when making an assessment of reasonable suspicion or probable cause.[145] However, individualized suspicion is always necessary for police officers to conduct a lawful *Terry* stop or a search under the Fourth Amendment.[146] In *Graves,* the surrounding circumstances of the parade, which included the presence of two organizations known for violence and the report of stolen explosives,[147] were hostile, and thus weighed in favor of the Ninth Circuit's determination that there was enough reasonable suspicion to stop Crowell. Regardless of these circumstances police officers did not have enough individualized suspicion of Crowell to set him apart from the other parade attendees and allow officers to conduct a lawful *Terry* stop.

Crowell's backpack cannot be the basis for individualized suspicion because carrying a backpack is ordinary behavior. Officer Dixon based his individualized suspicion of Crowell on the fact that his backpack was heavy and contained cylindrical objects.[148] However, wearing a heavy, bulky backpack is not unusual behavior, especially in the context of a protest march. As the Ninth Circuit noted, wearing a backpack in general is ordinary behavior.[149] At a protest march where food and services are typically not available, people are even more likely to use a bag or backpack to carry necessities such as food, water, and clothing. Testimony from the district court proceedings in *Graves* indicates that many of the protestors at the parade in fact carried some type of bag.[150] For example, Officer Dixon testified that he alone searched the bags of approximately fourteen protestors in addition to Crowell.[151] Other

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144. *See id.* at 844.

145. *See* Ybarra v. Illinois, 444 U.S. 85, 90–91 (1979); Brown v. Texas, 443 U.S. 47, 51–53 (1979).

146. *See Ybarra*, 444 U.S. at 90–91; *Brown*, 443 U.S. at 51–53.

147. *See Graves*, 339 F.3d at 834, 836.

148. *Id.* at 836.

149. *See id.* at 844.

150. *See* Brief for Appellant at 11, *Graves* (No. 02-35119).

151. *Id.*

officers also actively searched protestors' bags,[152] further indicating that many of the people protesting at the parade carried bags. In addition, while Crowell's backpack was heavy, there was nothing particularly suspicious about Crowell's backpack as compared to other bags.[153] At trial, Crowell demonstrated that a backpack identical to the one he was wearing the day of the parade, filled with identical objects, did not have any unusual bulges.[154]

Crowell's ordinary behavior of carrying a heavy backpack falls far short of the level of individualized suspicion required by the U.S. Supreme Court to establish the requisite degree of reasonable suspicion for a lawful *Terry* stop. For example, in *Reid v. Georgia*, the Court held that officers did not have sufficient individualized suspicion to perform a *Terry* stop of the defendant based on the following factors: (1) traveling from Ft. Lauderdale; (2) arriving early in the morning; (3) not checking luggage; and (4) trying to avoid looking like he was traveling with a companion.[155] The Court concluded that many innocent travelers engage in the behavior described in the first three factors, and thus these factors were not enough for individualized suspicion of the defendant.[156] While noting that the fourth factor may provide some level of individualized suspicion of the defendant, the Court concluded that it was not enough to support reasonable suspicion.[157] As in *Reid*, Officer Dixon's basis for searching Crowell's backpack involved ordinary conduct that was likely engaged in by a number of innocent people at the parade—simply carrying a heavy, and perhaps bulky, backpack.[158] Therefore, this factor cannot support individualized suspicion of Crowell. Even if the heaviness or bulkiness of Crowell's backpack was out of the ordinary, this alone was insufficient to establish individualized suspicion. Carrying a heavy backpack is significantly less suspicious than trying to conceal that one is traveling with a companion—the unusual behavior that the *Reid* Court found insufficient to demonstrate individualized suspicion.[159]

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152. *Id.* at 2.

153. *See id.* at 11.

154. *Id.*

155. Reid v. Georgia, 448 U.S. 438, 441 (1980); *see also supra* notes 47–54 and accompanying text.

156. *Reid*, 448 U.S. at 441.

157. *Id.*

158. Graves v. City of Coeur d'Alene, 339 F.3d 828, 836 (9th Cir. 2003).

159. *Reid*, 448 U.S. at 441.

In addition, the level of suspicion that attached to Crowell's backpack is much less compelling than the evidence the U.S. Supreme Court held to be sufficient to establish individualized suspicion of an alleged drug courier in *United States v. Sokolow*. In *Sokolow*, officers performed a *Terry* stop of the defendant based on several factors that, although not illegal, were highly unusual and would be unlikely to include many innocent individuals.[160] These factors included paying for plane tickets with $2100 in twenty-dollar bills and traveling under an alias.[161] In contrast, Crowell's behavior of wearing a heavy backpack was entirely ordinary conduct that was very likely to be engaged in by a number of innocent individuals. Carrying a heavy backpack is significantly less suspicious than paying for an expensive airplane ticket with low-denomination bills and traveling under a false name. Thus, Officer Dixon's individualized suspicion of Crowell was based on ordinary behavior that would have implicated a number of innocent individuals.

The Ninth Circuit reached the correct conclusion when it held that Officer Dixon had insufficient individualized suspicion of Crowell to lawfully search his backpack. A lawful *Terry* stop requires that police officers establish reasonable suspicion,[162] while a lawful search must be based on the more exacting standard of probable cause.[163] Individualized suspicion of a particular person is a requirement of both reasonable suspicion[164] and probable cause.[165] Officer Dixon did not have enough individualized suspicion of Crowell to establish the reasonable suspicion predicate for a *Terry* stop. Therefore, he also had insufficient individualized suspicion of Crowell to meet the more stringent predicate of probable cause for a search.

B. *Officer Dixon Was Not Entitled to Qualified Immunity Because Crowell's Backpack Did Not Provide Sufficient Individualized Suspicion To Establish Probable Cause*

In *Graves*, the Ninth Circuit held that Officer Dixon was entitled to qualified immunity for unlawfully arresting Crowell. The court

160. United States v. Sokolow, 490 U.S. 1, 3, 8–9 (1989); *see also supra* notes 62–64 and accompanying text.

161. *Id.* at 8–9.

162. *See id.* at 7; Terry v. Ohio, 392 U.S. 1, 30 (1968).

163. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

164. *See* Brown v. Texas, 443 U.S. 47, 52–53 (1979).

165. *See Ybarra*, 444 U.S. at 90–91.

concluded that the law was not clearly established regarding how much weight Officer Dixon could give to the surrounding circumstances of the parade when making his determination of whether there was probable cause to search Crowell's backpack.[166] The *Graves* court erred when it held that Officer Dixon was entitled to qualified immunity because a reasonable officer would have known that regardless of the surrounding circumstances, individualized suspicion is necessary to make a determination of probable cause.[167] Furthermore, a reasonable officer would have been aware that, in the context of a *Terry* stop or a search, individualized suspicion cannot be based on ordinary factors that would implicate many innocent people,[168] such as carrying a heavy backpack.

Officer Dixon was not entitled to qualified immunity for performing a *Terry* stop of Crowell because the law was clearly established that individualized suspicion is a necessary prerequisite for a lawful *Terry* stop and Officer Dixon did not have sufficient grounds for individualized suspicion of Crowell. The U.S. Supreme Court has clearly established that a *Terry* stop must be grounded on individualized suspicion, regardless of the surrounding circumstances.[169] U.S. Supreme Court and Ninth Circuit precedent have also clearly established that, in the context of a *Terry* stop, individualized suspicion cannot be based on ordinary factors that would implicate a number of innocent individuals.[170] In *Graves*, Officer Dixon based his individualized suspicion of Crowell on the fact that Crowell carried a heavy, bulky backpack,[171] which is a factor that would implicate a large number of innocent individuals.[172] He also relied on the hostile surrounding circumstances of the parade in his assessment of reasonable suspicion.[173] Because the law was clearly established that police officers must have individualized suspicion of a particular person to establish reasonable suspicion,[174] and that individualized suspicion cannot be based on

166. *See* Graves v. City of Coeur d'Alene, 339 F.3d 828, 847–48 (9th Cir. 2003).

167. *See Ybarra*, 444 U.S. at 91.

168. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992).

169. *See Brown*, 443 U.S. at 51–53.

170. *See Reid*, 448 U.S. at 441; *Rodriguez*, 976 F.2d at 595–96.

171. *See Graves*, 339 F.3d at 836.

172. *See supra* Part IV.A.

173. *See Graves*, 339 F.3d at 836–37.

174. *See Brown*, 443 U.S. at 51–53.

ordinary factors that would implicate many innocent people,[175] a reasonable police officer should have known that Crowell's ordinary behavior of carrying a backpack was insufficient to establish reasonable suspicion of him. Although the surrounding circumstances of the parade were hostile,[176] and favored a finding of reasonable suspicion, the law was clearly established that surrounding circumstances alone are not enough to establish reasonable suspicion.[177] Thus, a reasonable police officer should have known that even under the circumstances of the parade, there was not enough individualized suspicion of Crowell to subject him to a *Terry* stop.

In addition, Officer Dixon was not entitled to qualified immunity for unlawfully arresting Crowell because a reasonable officer would have known that Crowell's ordinary behavior of carrying a backpack did not provide enough individualized suspicion of him to establish probable cause for a search. The law was clearly established that probable cause must be based on individualized suspicion, even when the surrounding circumstances weigh in favor of establishing probable cause.[178] Unlike the *Terry* stop context, there is no case law holding that, in the context of searches, individualized suspicion cannot be based on ordinary factors that would implicate many innocent people. However, case law with the same facts is not necessary for the law to be clearly established.[179] For example, in *Mendoza v. Block*, the Ninth Circuit held that the law regarding the use of excessive force was clearly established even though there was little case law dealing specifically with the use of police dogs to locate suspects because a reasonable officer would know that using a "weapon," such as a police dog, would be unlawful in some circumstances.[180] The *Mendoza* court concluded that the principle that officers cannot use excessive force was clearly established even when applied to a new situation.[181] Likewise, in *Graves,* a reasonable officer would know that the principle that individualized suspicion for a *Terry* stop cannot be based on factors that would include a number of innocent individuals also applies to a similar situation—searches. Thus, because

175. *See Reid*, 448 U.S. at 441; *Rodriguez*, 976 F.2d at 595.

176. *See Graves*, 339 F.3d at 836–37.

177. *See Brown*, 443 U.S. at 51–53.

178. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

179. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987); Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994).

180. *Mendoza*, 27 F.3d at 1362.

181. *See id.*

individualized suspicion is a requirement that is common to, and necessary for, both searches[182] and *Terry* stops,[183] it would have been apparent to a reasonable police officer from existing case law that individualized suspicion cannot be based on factors that would implicate a large number of innocent individuals in the context of a search or *Terry* stop. Furthermore, because it was clearly established that the predicate for a search requires a higher level of suspicion than the predicate for a *Terry* stop,[184] it would be apparent to a reasonable officer that the standard for individualized suspicion could not be lower for a search than for a *Terry* stop.

C. *To Protect Protestors and Participants at the Aryan Nations Parade, the Coeur d'Alene Police Should Have Searched Bags Pursuant to a Special Needs Program*

If Coeur d'Alene police officers believed that suspicionless searches were necessary to safeguard against people carrying bombs into the parade, they should have employed a system of special needs searches to detect bombs without violating the civil liberties of protestors. The U.S. Supreme Court has established that suspicionless searches are allowable as long as they are part of a special needs program.[185] To be valid under the Fourth Amendment, these programs must be based on special needs, beyond normal law enforcement goals.[186] Police officers must operate the searches based on predetermined, objective criteria, and searches cannot be grounded in suspicion of a particular individual or class of individuals.[187]

In *Graves*, the Coeur d'Alene Police Department had a valid goal, beyond normal law enforcement needs, for conducting searches of protestors at the parade—preventing violence.[188] However, the searches conducted did not qualify under the special needs standard because they

182. *See Ybarra*, 444 U.S. at 91.

183. Brown v. Texas, 443 U.S. 47, 51–53 (1979).

184. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

185. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

186. *See* Chandler v. Miller, 520 U.S. 305, 313–14 (1997); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990).

187. *See* Florida v. Wells, 495 U.S. 1, 3–4 (1990) (citing Colorado v. Bertine, 479 U.S. 367, 375 (1987)).

188. *See* Graves v. City of Coeur d'Alene, 339 F.3d 828, 834 (9th Cir. 2003).

were not based on predetermined, objective criteria.[189] In contrast to *Sitz*, where the U.S. Supreme Court upheld an organized random highway screening program for alcohol intoxication,[190] the officers in *Graves* did not determine which bags to search based on a previously established plan.[191]

In the future, police officers should establish procedures to perform special needs searches if they believe that suspicionless searches of people's effects are necessary to maintain public safety at demonstrations. By searching bags using a special needs program based on uniform, predetermined criteria, police officers can enhance safety without violating protestors' civil liberties.

V. CONCLUSION

In *Graves v. City of Coeur d'Alene*, the Ninth Circuit held that there was insufficient probable cause for the defendant police officer to search and arrest a protestor at an Aryan Nations march. However, the court invoked the doctrine of qualified immunity to protect the officer from civil liability, finding that the law regarding probable cause as applied to the facts of *Graves* was not clearly established. U.S. Supreme Court precedent requires that police officers have individualized suspicion of the suspect for a search to be lawful under the Fourth Amendment. Because the police officer in *Graves* impermissibly searched the protestor without sufficient individualized suspicion, in violation of clearly established law, the police officer was not entitled to qualified immunity. Concerns about national security cannot justify the abandonment of the constitutional right to be free from unreasonable searches. When faced with similar circumstances, other circuit courts of appeals should hold that police officers are not entitled to qualified immunity.

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189. *See id.* at 845 n.22.

190. *See Sitz*, 496 U.S. at 455.

191. *See Graves*, 339 F.3d at 845 n.22.