

SYMPOSIUM: PANDEMICS AND THE CONSTITUTION

**WHY THE SPECIAL NEEDS DOCTRINE IS THE MOST
APPROPRIATE FOURTH AMENDMENT THEORY FOR
JUSTIFYING POLICE STOPS TO ENFORCE COVID-19
STAY-AT-HOME ORDERS**

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To a large extent, the COVID-19 pandemic has brought the United States into uncharted territory on a number of fronts. Despite the fact that the steps the federal and state governments take to curtail the spread of the viral infection are presumably taken in the best interest of public health, governmental actions and actors must comply with the U.S. Constitution. Some public health measures, such as stay-at-home orders, restrict the exercise of personal freedoms ranging from the rights to travel and freely associate to the ability to gather in places of worship for religious services. Enforcement of these public health orders falls to police. But police authority to stop and question people—even during a pandemic—must nonetheless comply with the requirements of the Fourth Amendment. Given the compelling governmental interest in limiting the spread of COVID-19, reasonable police actions to enforce public health orders are likely constitutional under several theories, even if stops are made without particularized suspicion. Of those, however, the special needs doctrine is best suited for this purpose because it is the approach most likely to safeguard civil liberties after the pandemic ends.

The U.S. Supreme Court has only rarely addressed the extent to which the police power of the state outweighs individual rights and liberties in the context of governmental efforts to stop the spread of

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infectious diseases. The most instructive case, *Jacobson v. Massachusetts*, dates back to the smallpox epidemic at the dawn of the twentieth century.¹ In overruling a pastor's claim that a mandatory smallpox vaccination violated his constitutional rights, the Court carefully stated that individual liberties "may at times, under the pressure of great dangers, be subjected to [restraints] . . . by reasonable regulations, as the safety of the general public may demand."² This precedent, now 115 years old, predates laws and judicial opinions aimed at maximizing religious freedoms under which the outcome in *Jacobson* might differ today.³ But whether religious freedoms may be significantly curtailed during a pandemic under public health orders designed to save human lives is not the only open question from a constitutional perspective. For example, to what degree does due process restrain the power of the state to quarantine people merely suspected of being infected with the disease?⁴ To what extent may the government conduct surveillance for "contact tracing" purposes (such as tracking movements via cell phones) and, in doing so, invade people's privacy?⁵ Does the power of eminent domain allow the government to seize private facilities for quarantine purposes and, if so, must compensation be provided?⁶ And, most relevant to this Article, to what extent does the Fourth Amendment restrain the power of law enforcement to stop people who are out of their homes when a public health order has directed people to shelter-in-place during a pandemic?

1. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

2. *Id.* at 29.

3. *E.g.*, ARIZ. REV. STAT. § 41-1493 (2020); FLA. STAT. ch. 761.01-.05 (2020); *see also* *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating an ordinance banning animal sacrifice as part of religious ceremonies on the grounds that the law targeted practitioners of Santeria); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (holding that because a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability, states may prohibit sacramental peyote use and, accordingly, may also deny unemployment benefits to persons who were fired for such use); *cf.* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, § 2, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. § 2000cc *et seq.*).

4. For an analysis, see Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391 (2018).

5. See Simon Chandler, *Coronavirus Could Infect Privacy and Civil Liberties Forever*, FORBES (Mar. 23, 2020), <https://www.forbes.com/sites/simonchandler/2020/03/23/coronavirus-could-infect-privacy-and-civil-liberties-forever/#71aa2b64365d> [<https://perma.cc/DFU5-9X6F>].

6. David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837 (2001).

I. SOURCES OF AUTHORITY FOR PUBLIC HEALTH ORDERS

The Commerce Clause grants the federal government limited legal authority to take measures to prevent the spread of diseases from foreign countries and between states.⁷ Pursuant to that constitutional provision, Congress enacted the Public Health Service Act in 1944.⁸ The U.S. Department of Health and Human Services, which houses the Centers for Disease Control and Prevention (“CDC”), has enacted, and periodically amended, various regulations under the authority of that legislation.⁹ Collectively, these federal laws permit the U.S. government to issue isolation and quarantine orders to persons arriving in the United States and traveling between states.¹⁰ Thus, federal authority is somewhat limited in this arena.¹¹ By contrast, the police powers of the states—the authority to impose restrictions on private rights for the sake of public welfare, order, and security which is enshrined in state constitutions under the authority reserved to the states by the Tenth Amendment to the U.S. Constitution—vests primary authority to state and local governments to order people into isolation or quarantine for public health purposes.¹²

Although state laws governing the exercise of police powers for health emergencies vary significantly,¹³ most states’ laws vest public health directors or similar officials the authority to issue public health orders designed to stop the spread of contagious diseases. But these orders are allowed only under limited circumstances that not only involve certain types of danger to the public health, but also that could not be controlled

7. U.S. CONST. art. 1, § 8, cl. 3; *see also* JARED P. COLE, CONG. RESEARCH SERV. RL33201 FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY 1 (2014), <https://fas.org/sgp/crs/misc/RL33201.pdf> [<https://perma.cc/BMD7-3XRF>].

8. Public Health Service Act, Pub. L. No. 78-410, § 361, 58 Stat. 703 (1944) (codified as amended at 42 U.S.C. §§ 264–72).

9. *See* 42 C.F.R. §§ 70–71 (2020).

10. *Isolation* “separates sick people with a quarantinable communicable disease from people who are not sick,” whereas *quarantine* “separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.” *Legal Authorities for Isolation and Quarantine*, CDC.GOV (Feb. 24, 2020), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> [<https://perma.cc/R4ZS-AYL4>].

11. COLE, *supra* note 7, at 6 (“While the federal government has authority to authorize quarantine and isolation under certain circumstances, the primary authority for quarantine and isolation exists at the state level as an exercise of the state’s police power.”)

12. *Id.*; *see also* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 24 (2003) (“The Supreme Court has made clear that states have a deep reservoir of public health powers, conceiving of state police powers as an ‘immense mass of legislation in which inspection laws, quarantine laws, and health laws of every description . . . are components of this mass’”) (quoting *Gibbons v. Ogden*, 22 U.S. at 203 (internal alterations omitted)).

13. COLE, *supra* note 7, at 6.

through less restrictive alternatives.¹⁴ Stay-at-home orders and shelter-in-place orders (SaHOs/SiPOs) can be considered as variations of state isolation and quarantine authority to stop the spread of disease. Alternatively, SaHOs/SiPOs may be viewed as stemming from broader executive powers during emergencies,¹⁵ especially in the more than forty states that have adopted some variation of the Model State Emergency Health Powers Act, drafted by the CDC in 2001 after the September 11th attacks.¹⁶ Either way, the “en masse” lockdowns attendant to SaHOs/SiPOs impinge on so many constitutional rights that they will likely be challenged on a variety of grounds, although most experts agree most such challenges will fail.¹⁷

State laws provide either civil or criminal punishments for violation of public health orders that range from fines to terms of imprisonment.¹⁸ Most jurisdictions, however, use criminal penalties only as a last resort. As a spokesperson for the San Francisco Police Department states, “We are not interested in using a criminal justice approach for a public health challenge. . . . This is about educating the public about voluntary compliance.”¹⁹ As Houston Police Chief Art Acevedo noted, police departments across the United States have largely been taking a similar approach because it is essential that police–community relationships be

14. Nat’l Conf. of State Leg., *State Quarantine and Isolation Statutes* (2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx> [<https://perma.cc/BZ22-M8XH>] [hereinafter “NCSL, *Quarantine Statutes*”].

15. For example, the emergency management statute in Tennessee grants the governor the authority to suspend state business; order evacuations; set quarantine areas; limit the sale of certain goods; use the national guard to distribute “supplies, equipment, and materials”; “commandeer . . . private property . . . necessary to cope with the emergency”; and “take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic . . . [and] the calling of public meetings and gatherings” TENN. CODE § 58-2-107 (2020).

16. For an in-depth discussion of that model statute by its primary author, see Gostin, *supra* note 12, *passim*.

17. Arizona State University law professor James Hodge opined that in light of the broad governmental authority during a public health crisis, such challenges would only succeed as applied to some “truly egregious practice.” Debra Cassens Weiss, *Lawsuits over Coronavirus Quarantines Are Unlikely to Succeed, Experts Say*, ABA J. (Mar. 18, 2020), <https://www.abajournal.com/news/article/suits-over-coronavirus-quarantines-unlikely-to-succeed-experts-say> [<https://perma.cc/P5QY-7PWM>]. But Georgetown University law professor Lawrence Gostin cautioned that there are dramatic distinctions between isolation and quarantine of infected and suspected infected persons and widespread SaHOs/SiPOs. *Id.*

18. NCSL, *Quarantine Statutes*, *supra* note 14.

19. Betsy Pearl, Lea Hunter, Kenny Lo, Ed Chung, *The Enforcement of COVID-19 Stay-at-Home Orders*, CNTR. AM. PROGRESS (Apr. 2, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-COVID-19-stay-home-orders/> [<https://perma.cc/BH8M-D5QG>].

strong at this critical time.²⁰ Nonetheless, when people flout SaHOs/SiPOs, police have little choice but to exercise their law enforcement authority.

II. POLICE ENFORCEMENT OF PUBLIC HEALTH ORDERS

Public health orders such as SaHOs/SiPOs are incredibly tricky to enforce. This is especially true in the United States during the COVID-19 pandemic for two reasons.

First and foremost, some jurisdictions have not issued legally-binding orders to stay inside. Rather some state and local governments have issued guidelines that rely on the public's voluntary cooperation.²¹ In such locales, formal legal orders are not issued "unless a person breaks that initial request."²² But even when legally-enforceable orders are in place, as professor of law and global health Polly Price explained, enforcement of these orders often falls on "the honor system."²³

Second, public health officials cannot arrest people or force them to stay in a particular location. Thus, enforcing SaHOs/SiPOs falls to the police. Law enforcement around the globe struggle with how far they should go in enforcing such orders as applied to everyday, ordinary behaviors.²⁴ Unlike in other countries where police can respond to emergency legislation that empowers them to enforce lockdown orders aggressively,²⁵ in the United States, enforcement of public health orders is complicated by the Fourth Amendment since that constitutional provision limits police authority to stop, question, frisk, or arrest people absent certain quanta of proof.²⁶

20. Kevin Johnson & Richard Wolf, *Enforcing the Shutdown: Law enforcement grapples with policing stay-at-home orders, social distancing, quarantines*, USA TODAY (Apr. 2, 2020), <https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-police-fines-jail-breaking-stay-home-orders/5104704002/> [<https://perma.cc/JW98-LTZ2>].

21. Talal Ansari & Brianna Abbott, *U.S. Considers How to Enforce Coronavirus Quarantines*, WALL ST. J. (Mar. 13, 2020), <https://www.wsj.com/articles/us-considers-how-to-enforce-coronavirus-quarantines-11583963653> [<https://perma.cc/9BFJ-Z8XP>].

22. *Id.*

23. *Id.*

24. Damien Cave & Abdi Latif Dahir, *How Far Should Police Go in Enforcing Coronavirus Lockdowns?* N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/world/australia/coronavirus-police-lockdowns.html> [<https://perma.cc/AY6M-DGWB>].

25. *Id.*

26. See generally MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* (2016).

III. THE FOURTH AMENDMENT

The Fourth Amendment prohibits unreasonable searches and seizures.²⁷

There is no formula for determining reasonableness; rather, reasonableness is an inherently flexible standard that takes into account all of the circumstances surrounding the actions of law enforcement officials. Generally, though, absent abusive conduct or behavior that “shocks the conscience” . . . , the reasonableness of search or seizure will turn, in large part, on three factors: (1) whether law enforcement officers trespassed against a defendant’s property rights; (2) whether law enforcement officers violated the defendant’s reasonable expectations of privacy; and (3) whether the actions of law enforcement complied with the requirements of the Warrants Clause.²⁸

But the Supreme Court has recognized numerous exceptions to requirements of probable cause and warrants in the ground of the “reasonableness” of police actions, usually by “weighing the utility of a particular kind of search or seizure in serving some ‘special law enforcement interest’ against the degree of intrusiveness entailed in the particular technique.”²⁹

When people voluntarily consent to isolation, monitoring, and treatment, the usual strictures of the Fourth Amendment are not implicated.³⁰ But when people do not comply with public health orders, or if there are bona-fide questions as to whether they are in compliance with the exceptions to such orders, police are called upon to act in ways that are designed to stop the spread of contagious diseases. In such circumstances, law enforcement officers may need to stop and question people in ways that would otherwise be impermissible under the Fourth Amendment—namely without any individualized suspicion as normally

27. U.S. CONST. amend IV.

28. STEPHEN S. OWEN, HENRY F. FRADELLA, TOD W. BURKE, & JERRY JOPLIN, FOUNDATIONS OF CRIMINAL JUSTICE 243 (3d ed. 2020) (internal citations omitted); *see also* United States v. Jones, 565 U.S. 400, 406–07 (2012) (holding that a search occurs for Fourth Amendment purposes when law enforcement physically intrude on a constitutionally protected area); *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that even in the absence of a physical trespass, a search occurs for Fourth Amendment purposes when law enforcement violates a person’s reasonable expectation of privacy); *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that police conduct that “shocks the conscience” violates due process).

29. Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1648 (1998).

30. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (noting that the prohibition on warrantless searches and seizures does not apply “to situations in which voluntary consent has been obtained”).

required for police stops.³¹ Given the compelling governmental interest in limiting the spread of COVID-19, reasonable police actions to enforce SaHOs/SiPOs are likely constitutional under several theories, but several of these approaches might expand police authority in ways that have the potential to encroach on civil liberties after the pandemic ends.

A. *Terry and Reasonable Suspicion in Light of Asymptomatic Persons*

Although probable cause is usually necessary to conduct a search, seize evidence, or make an arrest, the Supreme Court has created several notable exceptions to this rule. The one most relevant to the enforcement of SaHOs/SiPOs allows police to *stop* people based on *reasonable suspicion* of criminal activity—a lower standard of proof than probable cause.³² Stops are not the same as arrests; they are brief, limited investigative detentions that do not ordinarily involve any intention to arrest a person, whereas formal arrests require that law enforcement officers intend to take someone into custody.³³ Still, to comply with the requirements of *Terry v. Ohio*, should law enforcement have reasonable suspicion that someone is violating a public health order before stopping them?

Relying on various studies or statements from public health officials, news sources typically report that between 25% and 50% of people who contract COVID-19 are asymptomatic and, therefore, might have no idea that they are spreading the disease by being “out and about.”³⁴ A review of twenty-one research reports conducted by The Centre for Evidence-Based Medicine at Oxford University reported that although “between 5% and 80% of people testing positive” for COVID-19 may be asymptomatic, there is “not a single reliable study to determine the number of asymptotics.”³⁵

31. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (recognizing that warrantless stops may occur upon reasonable, articulable suspicion); *see also* WHITE & FRADELLA, *supra* note 26, at 43–79.

32. *Terry*, 392 U.S. at 21.

33. *E.g.*, *Bartlett v. State*, 249 S.W.3d 658, 668 (Tex. Ct. App. 2008); *see generally* Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129 (2003) (analyzing the differences between arrests and other type of detentions).

34. Roz Plater, *As Many as 50 Percent of People with COVID-19 Aren’t Aware They Have the Virus*, HEALTHLINE (Apr. 8, 2020), <https://www.healthline.com/health-news/50-percent-of-people-with-COVID19-not-aware-have-virus> [<https://perma.cc/443W-FAZA>]; Aylin Woodward, *It’s Estimated 1 in 4 Coronavirus Carriers Could Be Asymptomatic. Here’s What We Know*, SCIENCE ALERT (Apr. 3, 2020), <https://www.sciencealert.com/here-s-what-we-know-so-far-about-those-who-can-pass-corona-without-symptoms> [<https://perma.cc/QMY7-JXAZ>].

35. Carl Heneghan, Jon Brassey, & Tom Jefferson, *COVID-19: What Proportion Are Asymptomatic?*, CEBM (Apr. 6, 2020), <https://www.cebm.net/COVID-19/COVID-19-what-proportion-are-asymptomatic/> [<https://perma.cc/8WWP-QSW5>].

Given that so many people may be infected with the novel coronavirus and be completely asymptomatic, it may be “reasonable” to assume that everyone could be infected with it. Indeed, public health officials like Oklahoma Medical Research Foundation President Stephen Prescott have warned people to “[a]ssume you’re contagious, even if you feel fine.”³⁶ Put differently, there might be reasonable suspicion to justify stops of all persons who are outside their homes when SaHOs/SiPOs are in effect. Such an approach is arguably consistent with *Terry v. Ohio*, provided that the stop is brief and limited in scope to investigating whether a person is in transit for a permitted purpose, such as for medical reasons, to buy groceries, and to work in essential services.³⁷ Admittedly, this interpretation of *Terry* would expand law enforcement authority in ways that significantly encroach on Fourth Amendment liberties. To prevent what economist Robert Higgs refers to as a “ratchet effect” to explain expanding governmental authority during crises in ways that not only exceed preexisting norms,³⁸ but also tend to remain as the “new normal” after the crisis subsides,³⁹ SaHOs/SiPOs should be justified using Fourth Amendment doctrines other than trying to fit such enforcement within the *Terry* framework. Indeed, there are a number of doctrines that may justify suspicionless stops from a constitutional perspective.

B. *Exigent Circumstances*

A narrow range of circumstances that permit warrantless searches and seizures for criminal investigatory purposes, such as to prevent the imminent destruction of evidence or to apprehend a dangerous fleeing felon during hot pursuit.⁴⁰ But true emergencies can also justify actions

36. K. Butcher, “Assume you’re contagious, even if you feel fine,” *Health experts urging Oklahomans to be cautious for sake of others*, KFOR.COM (Mar. 19, 2020), <https://kfor.com/health/coronavirus/assume-youre-contagious-even-if-you-feel-fine-health-experts-urging-oklahomans-to-be-cautious-for-sake-of-others/> [<https://perma.cc/R3Q2-DDJG>].

37. California Executive Order N-33-20. (Mar. 19, 2020), <https://COVID19.ca.gov/img/Executive-Order-N-33-20.pdf>. [<https://perma.cc/A6HN-D77Z>].

38. ROBERT HIGGS, *THE POLITICAL ECONOMY OF CRISIS OPPORTUNISM* 3–4 (Mercatus Pol’y Series Primer No. 11, 2009), https://www.mercatus.org/system/files/Mercatus_Policy_Series-HIGGS.pdf [<https://perma.cc/YW2M-CXNB>].

39. *E.g.*, David S. Damato, *Civil liberties under attack during COVID-19*, THE HILL (Apr. 8, 2020), <https://thehill.com/opinion/civil-rights/491731-civil-liberties-under-attack-during-COVID-19> [<https://perma.cc/X8T5-P3XQ>]; David French, Lata Nott, & Jeffrey Rosen, *Civil Liberties and COVID-19*, WE THE PEOPLE PODCAST (Apr. 2, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/civil-liberties-and-COVID-19> [<https://perma.cc/8NNL-DDQV>].

40. JOHN N. FERDICO, HENRY F. FRADELLA, & CHRISTOPHER D. TOTTEN, *CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL* 254–57 (12th ed. 2015); *see also* Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

that would otherwise violate the Fourth Amendment in response to threats to safety. For example, first responders are permitted to enter a burning building to fight the fire and rescue persons who may be trapped inside.⁴¹ Police may forcibly enter a private home without a warrant in response to situations “when they reasonably believe that a person within is in need of immediate aid.”⁴² And although the U.S. Supreme Court held that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by Fourth Amendment and, therefore, require a warrant, the Court was careful to say that exigent circumstances such as the seizure of tainted food, preventing exposure to smallpox, and destroying tubercular cattle would allow warrantless entry for an emergency inspection.⁴³

Lower courts have expanded the exigent circumstances exception in threats to safety context to a variety of circumstances including responding to calls for emergency medical treatment, searching for missing persons (especially in response to reported kidnappings), stopping an assault or burglary in progress, responding to gunfire, and responding to information concerning the whereabouts of an explosive device or volatile chemicals.⁴⁴ In such contexts, aiding people in objectively reasonable emergency situations distinguishes such actions from warrantless stops, entries, and searches conducted law enforcement/criminal investigatory purposes.

The COVID-19 pandemic no doubt presents exigent circumstances on a social level. But whether people being outside their home after the issuance of SaHOs/SiPOs, however, qualifies as an exigent circumstance for Fourth Amendment purposes is doubtful. It is unlikely that courts would find the exigent circumstances exception applicable in the contagious disease context for at least three reasons. First, courts tend to interpret the exigent circumstances exception to the Fourth Amendment quite narrowly.⁴⁵ Second, other than situations in which police, firefighters, and paramedics are responding to calls for emergency medical treatment, courts generally require police to have probable cause that some underlying criminal activity is transpiring when applying the

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

42. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978).

43. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 539 (1967).

44. For a review, see John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433 (1999).

45. *Welsh*, 466 U.S. at 749–50 (“Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are ‘few in number and carefully delineated,’”); see also Decker, *supra* note 44.

exigent circumstances doctrine.⁴⁶ Indeed, in *Welsh v. Wisconsin*, the Supreme Court specifically noted its “hesitation in finding exigent circumstances” even when probable cause existed to arrest someone for a relative minor offense.⁴⁷ Thus, whether the doctrine would ultimately be held to justify stops made without any particularized suspicion seems dubious. Finally, even when violations of SaHOs/SiPOs constitute criminal offenses and, therefore, being out of the home might arguably establish reasonable suspicion or probable cause, unlike in many of the emergency situations previously discussed, the prevention of viral transmission presents a more speculative type of harm than those presented by burning buildings, active gunfire, or assaults in progress. Accordingly, a different doctrine might be better suited to underpin the constitutionality of police stops to enforce SaHOs/SiPOs during the COVID-19 pandemic.

C. *Individuals in Transit*

A strong argument can be made that law enforcement officers are permitted to stop people while traveling in order to enforce public health orders. The clearest example of such authority is at international borders or their functional equivalents, such as international airline terminals, cruise ship terminals, or some other place where someone may be stopped for the first time upon entering the country. “Border searches are not only a part of maintaining the sovereignty of the country by controlling the flow of both people and articles into or out of the country but also play a vital role in maintaining national security.”⁴⁸ As a result, “routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion”⁴⁹

Of course, the reasons supporting suspicionless searches at international borders is not directly applicable when police stop persons on foot, bicycles, or in cars already within the United States. Federal regulations specifically authorize the “apprehension” of people if the “individual is reasonably believed to be infected with a quarantinable communicable disease” when such person is moving between states.⁵⁰ But just because someone is moving across state lines does not give law enforcement reasonable grounds to believe that the person is infected.

46. *Welsh*, 466 U.S. at 750.

47. *Id.*

48. FERDICO ET AL., *supra* note 40, at 232.

49. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985)).

50. 42 C.F.R. § 70.6(A)(1) (2020).

Thus, a different legal doctrine that is not dependent on particularized, reasonable suspicion may be needed to justify such actions when people are engaged in interstate travel. Moreover, that doctrine would also need to apply to stops of persons engaged in travel within a state or locality. The special needs doctrine seems best suited for such circumstances.

D. *Special Needs*

There are certain types of searches that, when conducted for a special need unrelated to the detection of criminal activity, not only excuse the usual requirement of a warrant, but also can occur without probable cause. Under the special needs doctrine, such searches are evaluated under the reasonableness standard of the Fourth Amendment. The applicability of this exception to normal Fourth Amendment standards depending on whether there is a “special need that involves a real and significant problem ‘beyond the normal need for law enforcement’ to detect crime.”⁵¹ Under this doctrine, the U.S. Supreme Court has sanctioned searches of public employees’ workspaces by their supervisors to detect work-related misconduct;⁵² random drug testing of certain types of governmental employees to promote public safety;⁵³ and searches of persons entering correctional institutions to prevent the entry of contraband.⁵⁴

Importantly, the Supreme Court has even relied on the special needs doctrine to allow searches and seizures that are not even supported by reasonable suspicion, the reduced level of proof that is normally required to conduct a stop-and-frisk pursuant to *Terry v. Ohio* and its progeny.⁵⁵

51. FERDICO ET AL., *supra* note 40, at 218; *see also* Chandler v. Miller, 520 U.S. 305, 313 (1997).

52. O’Connor v. Ortega, 480 U.S. 709, 725–26 (1987); City of Ontario v. Quon, 560 U.S. 746, 757 (2010) (reasoning that when a public employee “has a legitimate privacy expectation, an employer’s intrusion on that expectation ‘for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.’”) (quoting *O’Connor v. Ortega*, 480 U.S. at 725–26).

53. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 671–72 (1989) (holding that the drug testing of armed law enforcement agents involved in drug interdiction efforts presents a special need that justifies suspicionless urinalyses); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 620 (1989) (“The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, ‘likewise presents “special needs” beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.’”) (internal citations omitted).

54. Florence v. Board of Chosen Freeholders of the County of Burlington, 566 U.S. 318, 330–40 (2012) (reasoning that correctional security needs justify searches of arrestees for whom there is no reasonable suspicion of possession of concealed weapon or other contraband).

55. *See* WHITE & FRADELLA, *supra* note 26, at 43–79.

For example, in *Michigan Department of State Police v. Sitz*,⁵⁶ the Court upheld a program that established roadside sobriety checkpoints without a warrant or any particularized suspicion. “Key to the Court’s reasoning was the fact that a significant public safety need met by these motor vehicle stops outweighed the minimal intrusions such stops caused to drivers’ privacy rights.”⁵⁷ The Court also upheld mandatory drug testing of student athletes in *Vernonia School District 47J v. Acton*,⁵⁸ finding no violation of students’ Fourth Amendment rights in spite of the suspicionless nature of such testing because it served the goal of preventing teenage drug use. The Court even extended this line of reasoning in *Board of Education of Independent School District No. 92 v. Earls* to permit the random, suspicionless drug testing of all students who engaged extracurricular after-school activities.⁵⁹

The U.S. Supreme Court has never confronted the issue of police authority to conduct suspicionless stops in the context of disease prevention. But in light of the aforementioned rulings applying the special needs doctrine, there is high likelihood that the compelling public health goal of preventing of the spread of a potentially lethal contagious disease would qualify as a special need justifying warrantless and suspicionless stops of people who are “out and about” when SaHOs/SiPOs are in effect. Still, to comply with the Fourth Amendment, law enforcement officers need to execute such stops reasonably.

CONCLUSION

In the wake of concerns about the Ebola virus, the United States took steps to update many public health protocols, especially those concerning isolation and quarantine. In reviewing the substantive and procedural due process concerns raised by these laws and regulations, law and public health professors Michael R. Ulrich and Wendy K. Mariner wrote the following:

There is no evidence that the public is reluctant to cooperate with public health officials, especially in the midst of an outbreak, as long as the public has confidence in official recommendations. But public officials must earn that trust. This requires public health officials to obtain accurate information, communicate honestly with the public, and ensure that

56. 496 U.S. 444, 454–55 (1990).

57. FERDICO ET AL., *supra* note 40, at 221.

58. 515 U.S. 646, 660–65 (1995).

59. 536 U.S. 822, 830–32 (2002).

the public has the resources necessary to cooperate with reasonable recommendations.⁶⁰

Sadly, public trust in governmental communications during the COVID-19 pandemic may be justifiably low in light of the conflicting information that citizens have received from public health officials, who sounded the alarm over the novel coronavirus, and President Trump, who repeatedly downplayed the severity of the outbreak.⁶¹ The confusion that results from such mixed messages compounds the difficulties that police face as first responders during an international health emergency. Thus, in addition to citizens voluntarily cooperating with SaHOs/SiPOs for their own good and that of their families and community members, it is essential that the messaging from federal authorities, ranging from the CDC to the White House, communicate accurate information.

It is equally important that people be respectful of police at this difficult time. Law enforcement officers are on the front lines of the pandemic. Police put their lives on the line each day. As with other first responders, the current threats to police officers' lives are particularly palpable since an invisible viral infection threatens their safety above and beyond those they face in ordinary times. Shortages of personal protective equipment compound the health dangers officers face right now. Rather than challenging police who stop pedestrians or drivers to inquire about compliance with SaHOs/SiPOs, people should do their best to thank officers who are looking out for our safety, health, and welfare during particularly challenging times.

That being said, police must be careful to honor people's constitutional rights during the COVID-19 pandemic. Indeed, this is a particularly important time for putting the best community policing strategies into practice. Officers need to communicate the importance of compliance with SaHOs/SiPOs, especially to people who may not understand how asymptomatic people can nonetheless transmit the novel coronavirus.

Finally, criminal court personnel should consider the long-term consequences of challenging, defending, or upholding stops to investigate

60. Ulrich & Mariner, *supra* note 4, at 429.

61. Brad Brooks, *Like the flu? Trump's coronavirus messaging confuses public, pandemic researchers say*, REUTERS (Mar. 13, 2020), <https://www.reuters.com/article/us-health-coronavirus-mixed-messages/like-the-flu-trumps-coronavirus-messaging-confuses-public-pandemic-researchers-say-idUSKBN2102GY> [<https://perma.cc/6KNW-7FAT>]; *Intelbrief: COVID-19 Exposes Fault Lines in U.S. Public Trust and Government*, THE SOUFAN CENTER (Apr. 3, 2020) <https://thesoufancenter.org/intelbrief-COVID-19-exposes-fault-lines-in-u-s-public-trust-and-government/> [<https://perma.cc/24U5-595F>].

compliance with SaHOs/SiPOs using Fourth Amendment doctrines that have the potential to erode constitutional rights in the future. The special needs doctrine is the approach least likely to do so. Accordingly, that approach to upholding police enforcement of public health orders ought to be the preferred one during this time of pandemic.