Constitutional Double Standards: The Unintended Consequences of Reducing Police Presence

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Abstract

In the wake of massive protests in the summer of 2020, many municipalities began to experiment with different ways to respond to 911 calls, while a number of school districts reversed a decades-long trend and began to take police officers out of their schools. The main purpose of these changes is to decrease the footprint of the police in the community, and hopefully de-escalate situations that might otherwise escalate into violence. Nevertheless, such interactions will result in a significant number of situations in which an alternate responder observes criminal activity or asks questions that—intentionally or unintentionally—elicit admissions of criminal activity. When alternate responders perform these actions, courts often apply conflicting—and generally quite lenient—standards in evaluating their constitutionality. Thus, one of the unintended consequences of reducing the police presence in our communities will likely be a significant reduction in individual constitutional protections.

This Article demonstrates that alternate responders are usually held to a lower constitutional standard than their law enforcement counterparts. Fourth and Fifth Amendment protections have largely been linked to the proximity between the government action and criminal prosecution. Others have already noted this link in the remedy context, but this Article demonstrates that our rights against intrusive searches and coercive interrogations is intertwined with the criminal justice system on a much more fundamental level. Simply put, when the government is not investigating crimes, Fourth and Fifth Amendment protections are weak or nonexistent. The Article then proposes reforms that could be made to eliminate this double standard and ensure that constitutional protections are consistent regardless of the status of the government agent who is interacting with the suspect.

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Introduction

In the wake of massive protests in the summer of 2020, cities began to rethink the role of their police forces. Many municipalities began to experiment with different ways to respond to 911 calls, while a number of school districts reversed a decades-long trend and began to take police officers out of their schools.[1] The main purpose of these changes is to decrease the footprint of the police in the community, and hopefully de-escalate situations that might otherwise escalate into violence.[2] The changes also reflect a growing recognition that many of the situations to which police respond do not involve criminal activity, and so do not require a law enforcement officer with powers of arrest.[3]

These reforms will mean that thousands, if not millions, of interactions that formerly took place between civilians and police will be replaced by interactions between civilians and alternate responders—social workers, health specialists, teachers, and other non-law enforce-

1 *See After Weeks of Protest, a Look at Policy Changes in U.S. Policing,* Vera Inst. of Just. (July 22, 2020) [hereinafter Vera Inst. of Just.], https://www.vera.org/policy-changes-in-us-policing [https://perma.cc/XWM5-RSHN].

2 *See id.*

3 Nationwide, police respond to over 240 million 911 calls a year. *See id.* They also engage in tens of millions of other interactions on the street, in traffic stops, and in schools and housing projects. *See id.* By one estimate, however, serious violent crimes make up only about five percent of the arrests that police make and a far smaller percentage of the total interactions that they have with civilians. *Id.*

ment government actors.[4] Many of these interactions will not lead to criminal charges—indeed, one of the purposes of transitioning from police to alternate responders is to decrease the number of interactions that may lead to criminal charges.[5] Nevertheless, such interactions will result in a significant number of situations in which an alternate responder observes criminal activity or asks questions that—intentionally or unintentionally—elicit admissions of criminal activity. When law enforcement personnel perform these actions, courts call it "engaging in surveillance" and "interrogating suspects" and evaluate the constitutionality of these actions accordingly.[6] But when alternate responders perform these actions, courts often apply conflicting—and generally more lenient—standards in evaluating their constitutionality. Thus, one of the unintended consequences of these reforms will likely be a significant reduction in individual constitutional protections.

For decades, courts have applied the state action doctrine to determine whether standard constitutional protections apply in a criminal case. On its face, the state action doctrine divides all evidence gathering into two categories based on the status of the individual conducting the investigation: the Fourth and Fifth Amendments apply if the investigating party was a "state actor," and they do not apply if the investigating party was a private individual.[7] Determining the status of an individual can get complicated on the margins, such as whether a private party becomes a state actor when the government

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4 Community groups advocating for defunding or even disbanding the police argue that first responders should not be "strangers armed with guns" but rather "mental health providers, social workers, victim advocates and other community members in less visible roles." Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/VXP2-6FE7].

Throughout this Article, I will use the term "alternate responders" to refer to the many different types of non-law enforcement government agents that will be replacing the police in these interactions. The term is imperfect because in some scenarios the non-law enforcement government agents will not be "responding"—school administrators, for example, may decide to conduct a search of all student lockers, or a medical professional may hear a patient talk about criminal activity when she is asking questions pertinent to treatment. However, the term accurately conveys the purpose behind the transition from police to other types of government agents, and it is simpler to use consistent terminology.

5 *See* VERA INST. OF JUST., *supra* note 1.

6 *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2217–20 (2018) (referring frequently to different forms of law enforcement surveillance); Miranda v. Arizona, 384 U.S. 436, 439–58 (1966) (referring frequently to police interrogation of suspects).

7 *See* Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989). A "state actor" is either a government employee or a private party who is acting at the behest of the government. *See id.*

encourages the private party to conduct a search (generally no),[8] or whether a regulation which induces companies to drug test their employees transforms the companies into a state actor (yes, under certain circumstances).[9] But for the most part, the state action doctrine presents courts with a binary question: was the investigator working for the state—either actually or constructively—or not?

The Supreme Court has reinforced this dichotomy with its rhetoric. Nearly forty years ago, when it held that the Fourth Amendment applies to a public high school vice principal, the Court stated:

> [W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire, are all subject to the restraints imposed by the Fourth Amendment. As we observed . . . "[t]he 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."[10]

Upon closer examination, however, the doctrinal picture becomes more complicated. Notwithstanding the Supreme Court's broad pronouncements, not all state actors face the same level of constitutional scrutiny.[11] In between the full constitutional protections that apply when law enforcement officials investigate a crime and the absence of constitutional protection when non-state actors interact with civilians, there exists a vast doctrinal middle ground that applies when non-law enforcement government agents uncover evidence of criminal behavior.

This Article will demonstrate that alternate responders are usually held to a lower constitutional standard than their law enforcement counterparts. In the surveillance and search realm, actions by alternate responders will almost always qualify as "special needs" searches,

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8 *See* George v. Edholm, 752 F.3d 1206, 1216 (9th Cir. 2014).

9 *See Skinner*, 489 U.S. at 614; *cf. Ex parte* Kennedy, 486 So. 2d 493, 495 (Ala. 1986) (off-duty police officer working as an exterminator is a state actor when he collects evidence for law enforcement purposes). *But cf.* United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997) (mall security guard who searched and seized defendant before turning him over to the police was not a state actor even if he acted solely to assist law enforcement because the government did not know or acquiesce in his action).

10 New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (last alteration in original) (citations omitted) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

11 Indeed, some government employees, such as medical personnel at county hospitals who conduct tests for legitimate medical purposes, fall outside the state action doctrine altogether. *See* United States v. Attson, 900 F.2d 1427, 1429, 1433 (9th Cir. 1990).

which are not subject to the usual warrant requirements of the Fourth Amendment.[12] In the interrogation context, alternate responders rarely have the authority to place suspects in custody, so *Miranda*[13] protections almost never apply to statements that suspects may make to them.[14] Even if a suspect happens to be in custody, courts will often determine that the interview was not conducted for law enforcement purposes and so hold that *Miranda* does not apply.[15] Of course, neither of these factors are unique to alternate responders—there are plenty of cases in which courts have held that a police search falls under the special needs doctrine[16] or that a suspect the police are questioning is not in custody.[17] But a review of the case law indicates that the identity of the government agent conducting the investigation is a critically important factor in determining the level of constitutional protections given to an individual. Fourth and Fifth Amendment protections have largely been linked to the proximity between the government action and criminal prosecution. Others have already noted this link in the remedy context, since the primary remedy for Fourth Amendment violations is the exclusionary rule, which only applies if the subject of the search faces criminal charges.[18] This Article demonstrates that our rights against intrusive searches and coercive interrogations are linked to the criminal justice system on a much more fundamental level—simply put, when the government is not investigating crimes, Fourth and Fifth Amendment protections are weak or nonexistent. This means that, as society reduces police presence and shifts to alternate responders, it will have to choose between a system with less criminalization and fewer constitutional protections or a system that maintains our current level of constitutional protections but continues to focus on crime control as the primary method of maintaining public safety.

Part I of this Article will examine the different ways that municipalities are replacing police with non-law enforcement government agents such as social workers, "crisis response teams," and school ad-

12 *See infra* Part II.

13 Miranda v. Arizona, 384 U.S. 436 (1966).

14 *See infra* notes 126–28 and accompanying text.

15 *See infra* notes 33–37 and accompanying text.

16 *See, e.g.*, New York v. Burger, 482 U.S. 691, 702 (1987) (special needs doctrine applies to police searching junkyards for stolen vehicles).

17 *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (routine traffic stop does not constitute "custody" for *Miranda* purposes).

18 *See, e.g.*, Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 770 (1994).

ministrators. Part II reviews how the application of the special needs doctrine results in a weaker version of the Fourth Amendment when alternate responders conduct searches. Part III describes how the Fifth Amendment's *Miranda* protections will almost never apply in situations where law enforcement officers are not present. Part IV considers possible reforms to enhance constitutional protections for interactions with alternate responders.

I. Shifting Priorities: The Rise of Alternate Responders

Since the widespread Black Lives Matter protests in the summer of 2020, many municipalities have sought to shift resources away from the police and into non-law enforcement alternatives.[19] Protestors called for reducing the size of police departments and changing communities' response systems so that police are not always the first responders to 911 calls.[20] Instead, advocates have sought to enhance the role of alternate responders, such as social workers and medical or mental health providers, based on the theory that they can de-escalate situations and resolve problems without arrests or confrontations.[21] Proponents of this change point out that the vast majority of calls that police traditionally respond to do not require the expertise or even the presence of a law enforcement officer: only around four percent of the calls that police respond to involve serious violent crime, while about a third of their time is spent responding to noncriminal calls and another fifteen to twenty percent of time is spent on traffic cases.[22]

This movement to decrease police budgets was met with some initial success—in the year 2020, municipalities across the country reduced over $840 million from their police departments.[23] In the 2021 fiscal year, cities like New York, Seattle, Denver, and Minneapolis all reduced their spending on police budgets by ten percent or more,

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19 *See* Sam Levin, *These US Cities Defunded Police: "We're Transferring Money to the Community*," The Guardian (March 11, 2022, 11:03 AM), https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community [https://perma.cc/76EQ-52WG].

20 Vera Inst. of Just., *supra* note 1.

21 *See id.*

22 *See* Jeff Asher and Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html [https://perma.cc/7YLQ-NHLU] (noting that in the police departments in the study, police officers spend only four percent of their time responding to violent crime, and only one percent of their calls for service involve serious violent crime).

23 *See* Levin, *supra* note 19. Some advocates noted that $840 million in cuts is a small percentage of the approximately $100 billion that the nation spends on police every year, but it reverses a trend in which police spending has increased 300% over the last four decades. *Id.*

while dozens of others cut funding to a lesser extent.[24] The defunding process has been slower than advocates would have liked; some cities have restored or increased their police budgets after initial cuts,[25] while others that have cut police budgets have not reinvested the money in alternative methods of emergency response.[26] However, many large and medium-sized cities have repurposed some of their law enforcement budget to create new teams of alternate responders, with some intended as experimental pilot programs and others intended to take a significant share of the 911 responses of the community.[27]

As the next Part shows, municipalities have always relied on nonpolice state actors to some degree for maintaining public safety. Social workers investigate conditions that may lead to criminal charges, especially with respect to child abuse,[28] while teachers and school administrators often investigate and report criminal activity in their school.[29] Hospital employees,[30] EMS personnel,[31] and a wide

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24 *See* Fola Akinnibi, Sarah Holder & Christopher Cannon, *Cities Say they Want to Defund the Police. Their Budgets Say Otherwise*, BLOOMBERG (Jan. 12, 2021), https://www.bloomberg.com/graphics/2021-city-budget-police-funding/ [https://perma.cc/G5SE-4A5T].

25 *See* Zusha Elinson, Dan Frosch & Joshua Jamerson, *Cities Reverse Defunding the Police Amid Rising Crime*, WALL ST. J. (May 26, 2021, 5:58 PM), https://www.wsj.com/articles/cities-reverse-defunding-the-police-amid-rising-crime-11622066307# [https://perma.cc/H7Y9-9DJQ] (noting that in response to higher rates of homicide and other serious crimes, "[i]n the nation's 20 largest local law-enforcement agencies, city and county leaders want funding increases for nine of the 12 departments where next year's budgets already have been proposed"); J.D. Capelouto, *Atlanta Almost Withheld $73M in Police Funding Last Year. What's Changed Since Then?*, THE ATLANTA J.-CONST., (June 21, 2021), https://www.ajc.com/news/atlanta-news/atlanta-almost-withheld-73m-in-police-funding-last-year-whats-changed-since-then/FEZOTN3G7NFCDFAMAI5BBBTVYY/ [https://perma.cc/97V6-9ELY] (noting that in 2020, the Atlanta City Council came within one vote of cutting the police budget by $73 million, and in 2021, this same council unanimously increased the budget by $15 million in response to higher rates of violent crime); *As Violent Crime Leaps, Liberal Cities Rethink Cutting Police Budgets*, THE ECONOMIST (Jan. 15, 2022), https://www.economist.com/united-states/2022/01/15/as-violent-crime-leaps-liberal-cities-rethink-cutting-police-budgets [https://perma.cc/BT8X-3648] (noting that although the mayor of Los Angeles called for a cut of up to $150 million to the police budget in 2020, the Los Angeles Police Department will get a 12% increase in funding in 2022).

26 *See* Akinnibi et al., *supra* note 24; Levin, *supra* note 19. A majority of the fifty cities surveyed by the article actually increased their police budgets in fiscal year 2021. Akinnibi et al., *supra* note 24. Also, some of the money has been diverted not into alternate responders but rather into programs that are likely to lower the crime rate in the long run, such as workforce development, services for the homeless, and improving the public parks. *See id.*

27 *See* Levin, *supra* note 19.

28 *See, e.g.*, United States v. D.F., 63 F.3d 671, 682–83 (7th Cir. 1995); Jackson v. Conway, 763 F.3d 115, 138 (2d Cir. 2014); *see also infra* Section III.A.

29 *See, e.g.*, Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982); *see also infra* Section III.B.

30 *See, e.g.*, United States v. Borchardt, 809 F.2d 1115, 1117–18 (5th Cir. 1987); *D.F.*, 63 F.3d at 673; *see also infra* Part III.C.

range of city, county, and state workers often report on criminal activity in the course of their duties. The current movement to defund police and repurpose their funding seeks to expand the role of these alternate responders. For example, San Francisco created "crisis response teams" made up of paramedics, behavioral health clinicians, and peer specialists that will respond to many of the nonviolent 911 calls that the city receives.[32] The city expects these teams to eventually respond to approximately 17,000 calls a year.[33] In St. Petersburg, Florida, the city diverted $3.8 million from their police budget and combined the funds with $3.1 million in federal grant money to create a "Community Assistance Liaison program."[34] The unarmed social workers employed in this program respond to reports of people who are intoxicated, overdosing, homeless, or involved in neighbor disputes.[35] Albuquerque created a new department called Albuquerque Community Safety, which will act as a "third branch" of first responders, along with the police and firefighters, and send social workers and violence prevention experts to respond to nonviolent 911 calls.[36]

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31 *See, e.g.*, Rinert v. Larkins, 379 F.3d 76, 79 (3d Cir. 2004); *see also infra* Part III.C.

32 Marisa Kendall, *San Francisco Launches New Police-Alternative Program*, THE MERCURY NEWS (Nov. 30, 2020, 3:46 PM), https://www.mercurynews.com/2020/11/30/san-francisco-launches-new-police-alternative-program/ [https://perma.cc/WNU8-7FYH].

33 *Id.* Across the bay, Oakland cut its police funding by five percent and began funding the Mobile Assistance Community Responders of Oakland, who will replace police in responding to calls regarding mental health and homelessness. *Id.*

34 VERA INST. OF JUST., *supra* note 1.

35 Josh Solomon, *Police in St. Petersburg to Step Back from Nonviolent Emergency Calls*, TAMPA BAY TIMES (July 9, 2020), https://www.tampabay.com/news/2020/07/09/police-in-st-petersburg-could-step-back-from-nonviolent-emergency-calls/ [https://perma.cc/M9UP-7B7Y].

36 Press Release, Tim Keller, Mayor of Albuquerque, Mayor Tim Keller to Refocus Millions in Public Safety Resources with First-of-Its-Kind Civilian Response Department, (June 15, 2020), https://www.cabq.gov/mayor/news/mayor-tim-keller-to-refocus-millions-in-public-safety-resources-with-first-of-its-kind-civilian-response-department [https://perma.cc/8MTU-8LRX].

Other cities have implemented similar programs. Portland is spending $5 million on the Portland Street Response, which will provide services to the homeless. VERA INST. OF JUST., *supra* note 1. Oakland is spending $1.35 million on a Mobile Assistance Crisis Responders initiative, a pilot program that diverts 911 calls for mental health emergencies away from police. *Id.* Newark will divert $11.4 million away from the police and into an Office of Violence Prevention, which will involve social workers responding to 911 calls involving mental health, homelessness, or drug use. *Id.* Smaller cities are also experimenting: in Asheville, North Carolina, the city council cut the police budget by three percent and is looking into creating a new program that will respond to mental health, drug use, homelessness, and domestic violence calls. Mackenzie Wicker, *Asheville "Defund Police" Vote: City Reallocates $770,000 from APD Budget*, CITIZEN TIMES (Sept. 23, 2020, 8:51 AM), https://www.citizen-times.com/story/news/local/2020/09/22/defunding-police-asheville-cuts-department-budget-3/5865674002/ [https://perma.cc/X2AS-HH3R].

Most of these new programs seek to respond to broad categories of 911 calls with alternate responders, who will only call for police backup on the rare occasions where they believe it is necessary.[37] Other programs are adding nonpolice responders to police responders, so that the expanded team is able to deal with the diverse types of encounters that may arise. Denver, for example, has created a co-responder program known as Support Team Assisted Response, in which law enforcement officers are paired with behavioral health specialists to respond to certain calls.[38]

One of the primary purposes of creating or expanding these alternative responses to 911 calls is to make it less likely that the call will result in an escalation that could lead to criminal charges.[39] Eugene, Oregon already had a robust alternative response program in place before the protests in 2020, known as the Crisis Assistance Helping out on the Streets ("CAHOOTS") program.[40] In 2019, CAHOOTS responded to 24,000 911 calls, approximately twenty percent of the total.[41] In the vast majority of these cases, CAHOOTS was able to respond to the situation without involving the criminal justice system; CAHOOTS called the police for backup in fewer than one percent of their interactions.[42]

A similar shift is beginning to occur in the public school systems. Over the past two years, Minneapolis, Portland, Denver, Milwaukee, Oakland, and many other jurisdictions have voted to remove police from their schools, reversing a trend that has seen police presence in-

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37 *See supra* notes 32–36.

38 Tori Mason, *Denver Aims to Expand Behavioral Services in STAR Program*, CBS COLO. (August 24, 2020, 10:58 PM), https://denver.cbslocal.com/2020/08/24/denver-star-program-expand/ [https://perma.cc/497A-5QDN]. Over fifty-five law enforcement agencies in Colorado have similar co-responder programs. *Id.* In Dallas, the Right Care program consists of a specially trained police officer responding to mental health calls with a team of medical professionals. Kent Kalthoff, *Dallas Budget Plan Juggles Public Safety and Calls for Defunding Police*, NBC DFW (August 7, 2020, 8:21 PM), https://www.nbcdfw.com/news/local/dallas-budget-plan-juggles-public-safety-and-calls-for-defunding-police/2422298/ [https://perma.cc/D9R6-HYBQ].

39 The City of Portland, Oregon, noted that half of its 911 calls in 2017 were made about homeless individuals. *Response to Homelessness*, CITY OF PORTLAND, Summer 2019, at 5. In reviewing their response to these calls, they noted that "[t]hese calls clog up the emergency response system, have little effect on the core issue of houselessness, and further criminalize people for simply existing." *Id.* Thus, Portland has begun the "Portland Street Response," which will respond to some of these calls with a team of paramedics and mental health professionals who are trained in de-escalation. *Id.*

40 Jackson Beck, Melissa Reuland & Leah Pope*, Case Study: CAHOOTS*, VERA INST. OF JUST. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives/cahoots [https://perma.cc/4NYJ-A4DW].

41 *Id.*

42 *Id.*

creasing in schools since the 1990s.[43] In Oakland, for example, the city council voted to remove all sixty-seven police officers from their school system and repurpose the $4 million to hire more counselors, social workers, and restorative justice coordinators.[44] As with the shift to nonpolice 911 responders, the purpose of the change is to focus on de-escalation and alternative responses to disruptive behavior, which will theoretically lead to fewer arrests in school and less student involvement with the criminal justice system.[45]

There is good reason to believe that these programs will be successful in shrinking the criminal justice footprint in their communities. These alternate responders—social workers, paramedics, mental health professionals, and so on—are not seeking to gather evidence of criminal activity when they are dispatched into the community. However, even if alternate responders are not intending to gather evidence, there will undoubtedly be some number of instances in which alternate responders observe criminal activity, or in which the individuals with whom they interact admit to criminal activity. The overall number of these cases will almost certainly increase as the number of alternate responders increases. And as more alternate responders are successfully utilized for calls that used to go to police officers, the proportion of their interactions that could involve criminal activity may also increase. Much of the criminal activity that alternate responders will observe will be relatively petty, such as drug use, trespass on city property, and disorderly conduct, and alternate responders will likely overlook these minor crimes, as is consistent with their mission. But when they are confronted with more serious types of criminal activity—such as child abuse, acts of violence, or firearms violations—they may believe that the actions require a response from the criminal justice system. As a result, greater numbers of alternate responders will be called to testify in criminal cases, where their evidence will be subject to challenges under the Fourth and Fifth Amendments. Even in cases in which criminal charges are never brought, alternate respond-

43 *See* VERA INST. OF JUST., *supra* note 1; Levin, *supra* note 23. In the 1990s, concerns over school shootings and student drug abuse led many school districts to hire police officers to permanently patrol their schools. By 2013–2014, sixty-six percent of high schoolers and forty-five percent of middle schoolers attended a school with an assigned police officer. Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (October 28, 2021), https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html [https://perma.cc/345E-R7GA].

44 Theresa Harrington, *Oakland School Board Unanimously Agrees to Eliminate Its Police Force*, EDSOURCE (June 25, 2020), https://edsource.org/2020/oakland-school-board-unanimously-agrees-to-eliminate-its-police-force/634544 [https://perma.cc/6DEM-ETYM].

45 *See* VERA INST. OF JUST., *supra* note 1.

ers will be entering homes and conducting other types of surveillance, and so more of them will be sued in § 1983[46] actions for alleged violations of constitutional rights. Courts will face an increasing number of cases in which they will be called upon to enforce constitutional restrictions against alternate responders. The next two Parts examine how courts are likely to handle these cases, based on the existing case law involving non-law enforcement government officials.

II. Special Needs and Searches Without Police

Under Fourth Amendment doctrine, searches can be divided into two different categories: searches made for the purpose of investigating crime and special needs searches. The first category of searches requires some level of individualized suspicion—whether probable cause or reasonable suspicion.[47] In many cases, courts also require judicial preclearance, in the form of a warrant, before the government agent can conduct the search.[48] In other contexts, such as searching an automobile or conducting a *Terry*[49] stop and frisk, a government agent need only demonstrate after the fact that the appropriate level of individualized suspicion existed.[50]

In contrast, special needs searches are evaluated under a broader, vaguer " reasonableness" requirement.[51] Special needs searches do not require any level of individualized suspicion.[52] As long as the search is "reasonable," a government agent does not need to demonstrate probable cause or reasonable suspicion to conduct the search, and usually does not need to obtain a warrant.[53]

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46 42 U.S.C. § 1983.

47 *See* Chandler v. Miller, 520 U.S. 305, 308 (1997).

48 *See* Birchfield v. North Dakota, 579 U.S. 438, 480–81 (2016) (Sotomayor, J., concurring).

49 Terry v. Ohio, 392 U.S. 1 (1968).

50 *See id.* at 27.

51 Originally these searches were called "administrative searches." *See* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534 (1967). This category of searches also includes searches, such as DNA tests of individuals who were arrested for serious offenses, which are technically not "special needs" searches, but which are still analyzed under the reasonableness requirement. *See, e.g.*, Maryland v. King, 569 U.S. 435, 462–63 (2013).

52 *See Miller*, 520 U.S. at 313–14.

53 The original administrative searches, involving regulatory inspections of mines and liquor stores, did require a warrant, but government agents did not need to prove probable cause to get the warrant, only that "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" and thus that a "reasonable governmental interest" is satisfied. *Camara*, 387 U.S. at 538–39; *see also* Donovan v. Dewey, 452 U.S. 594, 606 (1981) (applied to mines); Colonade Catering Corp. v. United States, 397 U.S. 72, 76–77 (1970) (applied to liquor stores); *infra* notes 78–81 and accompanying text. The Supreme

The primary justification for this lower, more flexible standard is that special needs searches are designed for a goal other than law enforcement—that is, they are primarily intended to address a government interest other than detecting criminal activity, such as maintaining a school environment conducive for learning,[54] protecting public safety,[55] or protecting the integrity of the country's borders.[56] The Supreme Court has occasionally cited two additional justifications for allowing special needs searches—first, a lower expectation of privacy for the individuals being searched[57] and second, that it is impractical to expect a non-law enforcement government official—such as a public school administrator or a health inspector—to navigate the legal and practical complexities of determining whether probable cause exists.[58]

It is the first justification of special needs searches that causes the most confusion and creates the most controversy, because the results of these searches can be used in a subsequent criminal case as long as the search was initially conducted for a non-law enforcement purpose. Moreover, courts have broadened "non-law enforcement purposes" to encompass searches that are practically indistinguishable from law enforcement searches: ensuring that junkyards are not taking possession of stolen cars,[59] deterring drug use by school children,[60] preventing

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Court dropped the warrant requirement when the doctrine spread to other types of searches and seizures, such as searches of high school students for drugs, *see* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985), or roadblocks to detect drunk drivers, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

54 *See T.L.O.*, 469 U.S. at 339.

55 *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620–21 (1989).

56 *See* Carroll v. United States, 267 U.S. 132, 154 (1925); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976).

57 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–57, 661 (1995) (upholding mandatory drug testing of school athletes for the non-law enforcement purpose of "[d]eterring drug use by our Nation's schoolchildren" because school children have a lower expectation of privacy than the general population and school athletes have an even lower expectation of privacy than most school children); *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (also noting that schoolchildren have a lower expectation of privacy); *Sitz*, 496 U.S. at 449–52 (drivers); United States v. Biswell, 406 U.S. 311, 315–16 (1972) (heavily regulated industries); Maryland v. King, 569 U.S. 435, 462 (2013) (arrestees); Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (probationers).

58 *See, e.g.,* O'Connor v. Ortega, 480 U.S. 709, 720, 722, 724–25 (1987) (upholding the search of a public hospital employee's desk because the purpose of the search was "the government's need for supervision, control, and the efficient operation of the workplace" and because the supervisors were hospital administrators who were "hardly in the business of investigating the violation of criminal laws" and therefore could not be expected to understand or comply with "unwieldy warrant procedures" or "the subtleties of the probable cause standard").

59 New York v. Burger, 482 U.S. 691, 713–14 (1987).

60 *Vernonia*, 515 U.S. at 661.

drunk driving,[61] catching terrorists,[62] and determining whether an arrestee has an outstanding warrant.[63]

From a practical standpoint, the blurry line between a special needs purpose and a law enforcement purpose is problematic because it can be difficult for courts—and police—to determine the true purpose of a given search. The Supreme Court has held that courts should disregard the subjective intent of the *individual* state actor in determining the constitutionality of the search.[64] For example, the Court permits police officers to pull over a car as long as there is probable cause to believe the driver committed a traffic violation, even if the police officer has other motivations for conducting the search;[65] allows police lawfully in a home to look anywhere that may conceal a suspect or weapon, even if they are actually looking for something else;[66] and allows searches incident to an arrest because officers could be looking for weapons or evidence of a crime, regardless of the true reason for the search.[67]

Instead, the Supreme Court has held that determining whether a search is being conducted for law enforcement purposes requires determining the general purpose of the search regime—what is sometimes referred to as the "programmatic purpose" of the search.[68] For example, a roadblock set up to identify and apprehend drunk drivers has a programmatic purpose of keeping the roadways safe;[69] a roadblock set up to detect narcotics traffickers has a programmatic purpose of crime control.[70]

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61 *Sitz*, 496 U.S. at 455.

62 United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (airline passengers); MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006) (subway passengers).

63 Maryland v. King, 569 U.S. 435, 461 (2013).

64 *See, e.g.*, Whren v. United States, 517 U.S. 806, 814 (1996).

65 *Id.* at 819.

66 *See* Warden v. Hayden, 387 U.S. 294, 297–98 (1967).

67 *See* Chimel v. California, 395 U.S. 752, 762–63 (1969); United States v. Robinson, 414 U.S. 218, 235 (1973); *see also* Horton v. California, 496 U.S. 128, 141–42 (1990) (warrant is valid as long as the police have probable cause to believe some contraband is present, even if the police are actually looking for something else); Steagald v. United States, 451 U.S. 204, 220–21 (1981) (police may not enter a home to effectuate an arrest against a third party, even if their only purpose is to execute the warrant).

68 Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000).

69 Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

70 *Edmond*, 531 U.S. at 44. Likewise, drug tests in schools have a programmatic purpose of maintaining a school environment conducive to learning, but drug tests of pregnant women whose results must be turned over to law enforcement have a programmatic purpose of crime control. *Compare* New Jersey v. T.L.O., 469 U.S. 325, 353 (1985), *with* Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001).

Given the barely visible line between the two types of searches, courts are eager to look for any factor that can simplify this inquiry. Up until now, one relatively straightforward factor was the type of government agent conducting the search.[71] To put it simply, law enforcement officers who conduct a search are almost always presumed to be doing so for a law enforcement purpose, while non-law enforcement government agents will always be found to have a special needs purpose, unless they are working closely with law enforcement.[72]

The Supreme Court has consistently cited the identity of the government agent as a significant factor in determining whether a search is covered by the special needs doctrine. In *New Jersey v. T.L.O.*,[73] the Court reasoned that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools,"[74] and later held:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[75]

Later, in *O'Connor v. Ortega*,[76] the Court held that the special needs doctrine applies when a government-employed supervisor searches the desk of an employee in a public hospital, and the Court's analysis relied heavily on the identity of the searching party in determining the purpose of the search:

> While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceed-

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71 *See T.L.O.*, 469 U.S. at 340.

72 The only Supreme Court case in which a non-law enforcement official was not found to be conducting a special needs search was *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), where the government employee was working so closely with the police that even if the search had been undertaken by a private party, the state action doctrine would probably have applied. *See id.* at 70–72, 85 (program that reported pregnant women with a positive drug test to police had the "pervasive involvement of law enforcement," was designed by the city solicitor general, and organized by a task force that included police officers); *see also* Doe v. Woodard, 912 F.3d 1278, 1291 (10th Cir. 2019) (summarizing *Ferguson* by saying that the Supreme Court held that the drug tests were not special needs searches because they were "coordinated with the police").

73 469 U.S. 325 (1984).

74 *Id.* at 340.

75 *Id.* at 341–42 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

76 480 U.S. 709 (1987).

> ings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is away from the office. Or, as is alleged to have been the case here, employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance.[77]

The Court also held that the identity of the government agent conducting the search is relevant for one of the secondary justifications for special needs searches—specifically, whether it is feasible to require the searching party to understand the complexities of Fourth Amendment procedures:

> Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency.[78]

Even when the Supreme Court requires warrants for non-law enforcement government agents, it often allows the agent to conduct the search with only an administrative warrant, which can be obtained with a much lower standard than a criminal warrant.[79] Courts will approve administrative warrants without any showing of individualized suspicion as long as "reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection are satis-

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77 *Id.* at 721–22.

78 *Id.* at 722.

79 *See* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534–40 (1967). Criminal warrants require the government to demonstrate probable cause to believe that evidence of a crime can be found in the location sought to be searched, and to state with particularity the locations to be searched or the items to be seized, U.S. CONST. amend. IV, while administrative warrants do not require any individualized suspicion that the target of the search is in violation of the law. *See Camara,* 387 U.S. at 539 (allowing health inspectors to enter private property after obtaining an administrative warrant); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 736–37 (2011) (same for building code inspectors).

fied."[80] The Supreme Court has approved this lower standard because inspection programs by government regulators have "a long history of judicial and public acceptance" and "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[81]

As the footprint of law enforcement officers in communities shrinks in response to reforms, more alternate responders will give evidence in criminal cases, and they will bring a lower Fourth Amendment standard along with them. Specifically, two types of alternate responders will become more common in criminal law cases: social workers, who will often be dispatched to respond to nonviolent 911 calls,[82] and teachers or school administrators, who will handle more student disciplinary issues as police are removed from schools.

A. Social Workers

The only Supreme Court case to apply the Fourth Amendment to a social worker's actions is *Wyman v. James*,[83] in which the plaintiff challenged a New York state law that conditioned welfare payments on a social worker's warrantless and suspicionless entry and inspection of the recipient's home. Rather astonishingly, the Court held that this entry and inspection of a home by a government social worker was not even a "*search*" under the Fourth Amendment because it was more "*rehabilitative*" than "*investigative*."[84] The Court then went on to say that even if the social worker's home entry was held to be a search, the action was reasonable.[85] The Court cited eleven different reasons supporting this conclusion,[86] one of which was that it was a social worker, not a police officer, conducting the search, and the social worker is "not a sleuth but rather, we trust, is a friend to one in need."[87]

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80 Michigan v. Clifford, 464 U.S. 287, 294 n.5 (1984) (recognizing that fire inspectors can enter a home with an administrative warrant).

81 *Camara*, 387 U.S. at 537.

82 *See supra* notes 34–38 and accompanying text.

83 400 U.S. 309 (1971).

84 *See id.* at 317–18 (emphasis added).

85 *Id.* at 318.

86 *Id.* at 318–24. The other factors included the importance of protecting children, the principle that the government gets to set conditions before paying money to recipients, the reasonableness of the means of the search, the importance of the visit in determining the eligibility of the recipient, and the inapplicability of a warrant under these conditions. *Id.*

87 *Id.* at 323. Consistent with its special needs cases, the Court conceded that the social worker's warrantless search of the home could reveal evidence of a crime but held that this

Wyman's holding that a home entry does not constitute a search has been met with a distinct lack of enthusiasm by the lower courts.[88] Lower court judges have also been reluctant to apply its precedent to cases where social workers conduct home visits after allegations of child abuse, with some courts holding that there is no constitutional difference between a home entry by a police officer and an entry by a social worker.[89] However, almost all of the cases to date involve home visits in which the social worker is accompanied by a police officer.[90] Many of these cases have explicitly cited the presence of a police officer as the reason for the court's deviation from *Wyman*. For example, in *United States v. Grey*,[91] a building inspector obtained an administrative warrant rather than a criminal warrant to inspect the defendant's property for code violations.[92] After the search turned up illegal firearms, the defendant argued that the government's action violated the Fourth Amendment.[93] The Ninth Circuit rejected the government's reliance on *Wyman*, noting that the *Wyman* search was carried out by a caseworker alone, while the search in *Grey* was carried out by sheriffs in conjunction with the building inspectors.[94]

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possibility was "a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.*

88 *See* Zweibon v. Mitchell, 516 F.2d 594, 632 n.94 (D.C. Cir. 1975) (describing *Wyman* as a "seemingly anomalous case" and opining that the Supreme Court meant to limit *Wyman* to "its particular factual context"); Blackwelder v. Safnauer, 689 F. Supp. 106, 140 (N.D.N.Y. 1988) ("[T]he Court's decision in *Wyman* on the issue of the reasonableness of home visits by social services case workers seems inconsistent with prevailing fourth amendment analysis, and the precedential effect of *Wyman* probably should be limited to the specific facts of that case."); Reyes v. Edmunds, 472 F. Supp. 1218, 1224 (D. Minn. 1979) (holding that the "majority opinion in *Wyman v. James* is not without conceptual problems," and therefore the holding should be "restricted to the boundaries imposed by the facts to avoid glaring inconsistency with prior search and seizure cases").

89 *See, e.g.*, Calabretta v. Floyd, 189 F.3d 808, 813–14 (9th Cir. 1999) ("Appellants urge that [prior precedent] speaks only to police, not social workers. That is an invalid distinction. In the case at bar, the social worker used a police officer to intimidate the mother into opening the door. Also, there is no reason why [prior precedent] would be limited to one particular kind of government official. The Fourth Amendment preserves the 'right of the people to be secure in their persons, houses . . . .' without limiting that right to one kind of government official.") (alteration in original). Note that this statement in *Calabretta* was dictum, since in *Calabretta* the social worker was accompanied by a police officer. *See also* Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 374–75, 374 n.151 (2010) (listing cases).

90 *See Calabretta*, 189 F.3d at 813. Cases in which a police officer conducts mandatory home visits without a social worker are also, unsurprisingly, subjected to the higher standard of probable cause. *See* White v. Pierce Cnty., 797 F.2d 812, 815 (9th Cir. 1986).

91 959 F.3d 1166 (9th Cir. 2020).

92 *Id.* at 1173–74.

93 *See id.* at 1176.

94 *See id.* at 1181. The court held that "where, as here, law enforcement officers are asked

Even though some circuit courts have sought to distinguish or limit the reach of *Wyman*, it remains the only Supreme Court precedent applying the Fourth Amendment to the actions of social workers. When reviewing home visits in the absence of specific criminal allegations, lower courts have not only followed *Wyman* but have expanded its doctrine to apply to a much broader range of cases.[95] Professor Jordan C. Budd notes that the analysis in *Wyman* emphasizes the "rehabilitative" aspect of the social worker's purpose in the New York state welfare program and points out that "the supportive function of the visiting social worker played a central and arguably predominant role in the Court's conclusion that the challenged practice was constitutional."[96] But in the ensuing decades, lower courts have applied *Wyman*'s holding to mandatory home-visit programs that were purely investigative in nature, "ignor[ing] *Wyman*'s specific emphasis on the concrete rehabilitative relationship established between caseworkers and the aid recipients to whom they purportedly serve as 'a friend to one in need.'"[97] As social workers displace police in responding to 911 calls, they will more frequently be investigating strangers rather than working to help an individual with whom they have ongoing relationships—under this broader reading of *Wyman*, these "investigative" social workers will still be held to the lower special needs standard.

Meanwhile, although the Supreme Court has not yet applied the Fourth Amendment to the search of a *person* conducted by a social worker, numerous circuit courts have done so. In *Darryl H. v. Coler*,[98] the state of Illinois promulgated a policy that allowed social workers from the Department of Children and Family Services ("DFCS") to enter a child's home, interview the child and their caretaker, and conduct a physical examination of a child, all without obtaining a warrant

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to assist in the execution of an administrative warrant authorizing the inspection of a private residence, they violate the Fourth Amendment when their 'primary purpose' in executing the warrant is to gather evidence in support of a criminal investigation rather than to assist the inspectors." *Id.* at 1169.

95 *See, e.g.*, Sanchez v. Cnty. of San Diego, 464 F.3d 916, 916–17, 920, 923 (9th Cir. 2006) (permitting a San Diego policy in which welfare aid recipients were required to submit to a home inspection by investigators whose only purpose was to detect fraud); S.L. v. Whitburn, 67 F.3d 1299, 1308 (7th Cir. 1995) (upholding a similar welfare fraud detection program in Milwaukee); Smith v. L.A. Cnty. Bd. of Supervisors, 128 Cal. Rptr. 2d 700, 703–05 (Cal. Ct. App. 2002) (upholding a program in Los Angeles in which social workers made unscheduled searches of homes for the dual purpose of detecting fraud and providing assistance).

96 Budd, *supra* note 89, at 387.

97 *See id.* at 388 (citations omitted).

98 801 F.2d 893 (7th Cir. 1986).

or demonstrating probable cause.[99] Eight families challenged this policy under the Fourth Amendment, including one whose ten-year-old son was required to remove his clothing and have his body inspected at school after an anonymous report of abuse.[100] In denying the request for an injunction, the Seventh Circuit cited *T.L.O.* and applied the special needs test, holding that the possibility of a criminal prosecution was of "secondary importance" to the DCFS social worker, whose primary objective was "the safety of the child, and the stabilization of the home environment."[101]

This holding contrasts with the Tenth Circuit's decision in *Franz v. Lytle*,[102] in which a police officer received a report that a two-year-old daughter was suffering from extreme diaper rash caused by neglect.[103] The officer responded to the call to find the child playing in the neighbor's home.[104] After interviewing the neighbor, the officer asked the neighbor to remove the child's diaper so he could observe the child's vaginal area.[105] The officer later returned with another police officer and conducted another strip search of the child in which he checked for soreness and swelling in order to investigate the possibility of physical abuse.[106] The child's parents later sued the police officer for violating their daughter's Fourth Amendment rights.[107] The defendant police officer argued that while investigating a child abuse and neglect claim he should be treated the same as social workers, since he, like the social worker in *Darryl H.*, conducted his search with the primary objective of ensuring the safety of the child.[108]

The *Franz* court rejected the police officer's argument and distinguished the case from *Darryl H.*:

> [*Darryl H.*] involved state social service caseworkers, often in consultation with school personnel, individuals who deal with children regularly in their professional settings. As such,

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99 *See id.* at 896. The policy allowed social workers to conduct this investigation as long as a child was harmed or in danger of being harmed, a specific incident of abuse was identified, and the caretaker was the alleged perpetrator of the neglect or abuse. *Id.* at 895.

100 *Id.* at 896–97.

101 *Id.* at 902.

102 997 F.2d 784 (10th Cir. 1993).

103 The complainant had initially called the children and family services department to report the neglect, but they told her to call the police because they did not have a caseworker available. *Id.* at 785 n.1.

104 *Id.* at 785.

105 *Id.*

106 *Id.*

107 *See id.* at 786.

108 *Id.* at 786, 788.

> they relied on the training of their professional disciplines, in particular, the social services policy/procedure manual, to respond to specific allegations of the possibility of abuse. . . . [Here, the] defendant's focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation. In contrast, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not a part of the social worker's cachet. This distinction of focus justifies a more liberal view of the amount of probable cause that would support an administrative search.[109]

The court also noted that the police officer in *Franz* followed standard police procedure in his investigation of the child neglect and abuse allegations, but the social worker in *Darryl H.* followed, and had their discretion circumscribed by, the DCFS child abuse guidelines.[110] The *Franz* court also held that standard probable cause and warrant requirements are well known to police officers, but that "[j]ust as school officials' efforts to enforce school discipline might be hampered by careful adherence to Fourth Amendment strictures, so too would DCFS caseworkers be hindered in their investigations of alleged child abuse by a warrant or probable cause requirement."[111]

B. Teachers and School Administrators

In contrast with the sparse case law applying the Fourth Amendment to social workers, searches by school officials have been analyzed by numerous Supreme Court cases,[112] hundreds of circuit court cases,[113] and countless law review articles.[114]

New Jersey v. T.L.O. was the first of four Supreme Court cases to apply the Fourth Amendment in a school setting.[115] The Court held that the standard probable cause and warrant requirements are inap-

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109 *Id.* at 790–91. The court also noted that the police officer in *Franz* photographed and then touched the child, but the social worker in *Darryl H.* only conducted a strip search. *Id.* at 790.

110 *Id.* at 790.

111 *Id.* at 789.

112 *See* New Jersey v. T.L.O, 469 U.S. 325 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009).

113 The *T.L.O.* case alone has been cited by over 350 circuit court cases.

114 A Westlaw search for secondary sources that cite *New Jersey v. T.L.O.* five times or more returns over 650 results.

115 *See* cases cited *supra* note 112.

plicable when a teacher or school administrator conducts the search, even if they are looking for evidence of criminal activity.[116] Instead, a search by school officials is constitutional under the Fourth Amendment when (1) "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school,"[117] (2) the search bears a reasonable relationship to find evidence of this infraction, and (3) the search is not "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[118] The Court applied this rule to approve of a search of a student's purse for a marijuana cigarette by a vice principal after rolling papers were found inside the purse.[119] The Court later applied the same test to disallow a strip search by a school nurse and an administrative assistant who were looking for contraband prescription medication with little evidence that the student actually possessed the contraband.[120]

T.L.O. involved a search by a school administrator, not a police officer. This is unsurprising, since the incident occurred in 1980, long before police officers became a regular fixture in our public schools.[121] The *T.L.O* Court expressly deferred the question of the appropriate test to apply when a student search is conducted by a police officer instead of a school administrator,[122] and the Supreme Court has never

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116 *T.L.O*, 469 U.S. at 341–42.

117 *Id.* at 342.

118 *Id.*

119 *Id.* at 347.

120 Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375–77 (2009) ("In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable."). Interestingly, one of the reasons that the *Redding* Court found the search to be unreasonable was the relatively harmless nature of the contraband being sought—it was "nondangerous school contraband" and there was no "danger to the students from the power of the drugs or their quantity." *Id.* at 376. This implies that a search for stronger drugs—those that are actually illegal—would be more likely to be reasonable and therefore constitutional. On one level this makes sense—the greater the severity of the danger to the child and her classmates, the more intrusive a search can be. But on another it is tension with the rationale of the special needs doctrine, since weapons and stronger drugs are more likely to be illegal, and so a search for that type of contraband feels more like—and has the same likely result (arrest) as—a search by a law enforcement official.

The Supreme Court has also applied this standard to uphold mandatory drug testing for student athletes, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995), and for students who participate in extracurricular activities, Bd. of Educ. v. Earls, 536 U.S. 822, 825 (2002).

121 The movement to permanently place police officers in public schools became widespread in the mid-1990s. *See supra* note 43.

122 *T.L.O.*, 469 U.S. at 341 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of

returned to the issue to resolve this question. As police searches of students have become more common, lower courts struggle with what standard to apply to such searches.[123] Some courts have applied *T.L.O*'s low "reasonable grounds standard" for searches of students in schools, even when the person conducting the search is a police officer,[124] although others have applied the stricter probable cause standard.[125] Lower courts generally look to two factors in determining which standard to apply: first, whether the officer is employed by the school and therefore "ultimately responsible to the school district" as distinguished from being a police department employee;[126] and second, whether the officer's purpose in conducting the search is to determine whether the student has violated a school rule or a criminal law.[127] As summarized by the Wisconsin Supreme Court:

> We agree that there are inherent differences between the roles of police officers and school officials which make the reasonable grounds standard inapplicable to searches conducted by police officers acting independently of school officials. A police investigation that includes the search of a public school student, when the search is initiated by police and conducted by police, usually lacks the "commonality of interests" existing between teachers and students. But when school officials, who are responsible for the welfare and education of all of the students within the campus, initiate an investigation and conduct it on school grounds in conjunc-

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the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.").

123 *See* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1098 (2003).

124 *See, e.g.*, People v. Dilworth, 661 N.E.2d 310, 320 (Ill. 1996) (holding that a liaison police officer at the school was "properly considered to be a school official" and thus the reasonable suspicion standard should apply).

125 *See, e.g.*, State v. Twayne H., 933 P.2d 251, 254 (N.M. Ct. App. 1997) (holding that *T.L.O.*'s lower standard of suspicion does not apply if the student search is conducted by a police officer).

126 5 WAYNE R. LEFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 511–12 (4th ed. 2004).

127 *See* Pinard, *supra* note 123, at 1082–90. Professor Pinard also identifies a number of other, related factors: whether the police officer was acting alone or in conjunction with school officials; the level of participation by the police officer (including whether the officer initiated the search); whether the officer was reacting to safety concerns; and whether law enforcement officers provided information to school officials even if they did not personally participate in the search. *Id.*

> tion with police, the school has brought the police into the school-student relationship.[128]

Thus, when police officers are employed by the school district and conduct an investigation into a violation of school rules, courts often treat the police as school administrators for the purposes of the Fourth Amendment and evaluate their searches under the lower standard.[129] However, in other cases, the fact that a search is carried out by a police officer will lead a court to apply the higher probable cause standard to the search.[130] There is no case in which courts apply the probable cause standard when teachers or school administrators conduct the search; *T.L.O.* and its progeny ensure that such searches are evaluated under the weaker reasonable grounds standard. Given this lower standard, the diminished privacy rights of students, and the need to ensure a school environment conducive to learning, it is relatively rare for a student search conducted by a school administrator to be deemed unconstitutional absent particularly egregious actions by the administrator.[131]

Thus, for both social workers and school administrators, courts will routinely apply the special needs doctrine and hold that if a search is conducted for a reason other than crime control, it is constitutional as long as it is reasonable. As the next Part shows, Fifth Amendment rights are even less likely in the absence of law enforcement officers. In the vast majority of such cases, the Fifth Amendment will not apply at all because the defendant will not be considered "in custody" for *Miranda* purposes. But even if the defendant is in custody, courts will usually hold that *Miranda* does not apply unless the interviewer was aware of the chance that the statements could be used in a criminal proceeding.

III. *Miranda*'s Custody Requirement

As alternate responders replace police on the streets and in the schools, not only will they see more evidence of criminal activity, they

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128 *In re* Angelia D.B., 564 N.W.2d 682, 688 (Wis. 1997) (citations omitted).

129 *See id.*

130 *See, e.g.*, Shade v. City of Farmington, 309 F.3d 1054, 1060 (8th Cir. 2002) (reviewing the case law and concluding that "*T.L.O.*'s reasonableness standard applies when school officials initiate the search or when officers are only minimally involved in the search"); LeFave, *supra* note 126, at 511 ("Lower courts have held or suggested that the usual probable cause test obtains if the police are involved in the search in a significant way.") (footnotes omitted).

131 *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 376–77, 379 (2009) (finding unconstitutional a strip search of a student conducted to find contraband prescription medication).

will also interact with more individuals who may later become suspects in a criminal case. These potential suspects will make statements to them, and some of these statements will be incriminating. When individuals make incriminating statements to police officers, courts have constructed a sophisticated test to determine when and under what conditions those statements can be used against the individual at trial. As the Article shows below, this test is not designed for statements made to alternate responders, primarily because alternate responders are legally unable to generate the level of coercion necessary to trigger Fifth Amendment protections.

Prior to 1966, the Due Process Clause of the Fifth Amendment[132] only precluded statements if they were "involuntary"—that is, if the suspect's "will was overborne" by their interrogator.[133] Such cases tended to involve egregious conduct on the part of the police, such as physical abuse or torture[134] or sleep deprivation and relentless police questioning.[135] In 1966, *Miranda* broadened Fifth Amendment protections by creating a rule that precluded all statements made during a custodial interrogation unless a suspect understands and waives his rights.[136] The *Miranda* Court held that even in the absence of physical or psychological abuse, police interrogations "contain[] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[137] In order to reduce this level of coercion to acceptable levels, the Court held that a suspect has to be informed of their rights under the Constitution.[138]

However, courts have concluded that these compelling pressures only rise to a level that requires *Miranda* warnings if the suspect is "in custody" (that is, if their freedom of movement is deprived in a significant way),[139] and if they are being interrogated (if the police use "words or actions . . . that they *should have known* were reasonably

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132 The Fifth Amendment provides, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

133 *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963).

134 *See* Brown v. Mississippi, 297 U.S. 278, 281–82 (1936) (statements obtained after suspects were whipped with a belt until they confessed).

135 *See* Chambers v. Florida, 309 U.S. 227, 231 (1940) (statements obtained after round-the-clock questioning of suspects without sleep).

136 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

137 *Id.* at 467.

138 *Id.* at 444–45.

139 *See* Yarborough v. Alvarado, 541 U.S. 652, 663 (2004).

likely to elicit an incriminating response").[140] The in-custody requirement has largely prevented *Miranda* from applying to many categories of police-civilian encounters; the Supreme Court has held that even traffic stops and *Terry* stops do not usually constitute being "in custody" for *Miranda* purposes,[141] since such "minor" restrictions on liberty generally do not exert sufficient pressure on a detained person that they would be unable to freely exercise their privilege against self-incrimination.[142] It is no surprise that if the restriction on liberty is created by a state actor other than law enforcement, the courts rarely consider the suspect to be in custody. For example, a probation officer requiring a probationer to appear at scheduled meetings does not satisfy the Court's custodial test, even though failure to appear could result in revocation of probation and incarceration.[143]

The in-custody requirement means that *Miranda* protections will almost certainly not apply to the vast majority of interviews conducted by alternate responders. Social workers rarely interview their clients under custodial circumstances; thus, *Miranda* issues almost never arise when a social worker later testifies about their clients' statements in court. In the future, as social workers become alternate responders to 911 calls—perhaps to de-escalate a situation involving a family dispute, help a homeless individual, or assist a person who is mentally ill—they will still not have the authority to seize the suspect or restrict their liberty to a degree sufficient to trigger *Miranda* protections. Although social workers often have the power to remove a suspect's children or restrict government benefits, courts have never held that this type of power could create a sufficiently coercive atmosphere to trigger *Miranda* warnings.[144]

On the rare occasions when a suspect is already in law enforcement custody and is subsequently interviewed by a non-law enforce-

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140 Rhode Island v. Innis, 446 U.S. 291, 302 (1980).

141 Maryland v. Shatzer, 559 U.S. 98, 113 (2010); Berkemer v. McCarty, 468 U.S. 420 (1984).

142 *See Berkemer*, 468 U.S. at 437.

143 *See* Minnesota v. Murphy, 465 U.S. 420, 433 (1984).

144 *See, e.g.*, United States v. Moreno, 36 M.J. 107, 112 (C.M.A. 1992). In *Moreno*, the defendant was interviewed by a caseworker from the Texas Department of Human Services regarding allegations of sexual abuse. *Id.* at 115. The United States Court of Military Appeals noted that the defendant knew that "by cooperating with DHS he risked the possibility that his statements would be discovered by prosecutorial forces and used against him at a trial," but "[i]f he did not cooperate with DHS . . . the risk of losing his children was presumably increased and the risk of criminal prosecution remained—without the benefit of significant DHS influence." *Id.* at 112. The court held that these pressures did not trigger the need for *Miranda* warnings. *Id.* at 117.

ment state actor, courts have failed to reach a consensus on when (if ever) *Miranda* warning should apply. This doctrinal confusion begins with the Supreme Court, which has decided only two cases in this area, and later effectively disavowed the holding in one of them.

The Supreme Court first addressed this issue two years after handing down *Miranda*. In *Mathis v. United States*,[145] an IRS agent interviewed a prisoner who was in state custody on unrelated charges, and a prosecutor subsequently used these non-*Mirandized* statements against the prisoner in a federal tax prosecution.[146] The government argued that the initial interview was not conducted for the purposes of gathering evidence for a criminal case, since the IRS agent was merely conducting a "routine tax investigation," which could have resulted in criminal charges, civil actions, or no action at all.[147] The Supreme Court disagreed, holding that *Miranda* protections applied because the IRS agent was always aware that the investigation *could* result in criminal charges:

> [T]ax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And, as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.[148]

The Supreme Court revisited this issue in a very different context fifteen years later. In *Estelle v. Smith*,[149] a court-appointed psychiatrist interviewed a prisoner in order to ascertain his competency to stand trial.[150] Even though no law enforcement officers participated in the interview, and even though the purpose of the interview was unrelated to gathering evidence for the defendant's prosecution, the Supreme Court ruled that the government violated *Miranda* by admitting the defendant's statements from the interview during the defendant's sentencing hearing.[151] The Court implied that *Miranda* warnings were required any time the government used the statements from a custodial interrogation in a future prosecution:

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145 391 U.S. 1 (1968).

146 *Id.* at 3 (1968).

147 *Id.* at 4.

148 *Id.*

149 451 U.S. 454 (1981).

150 *Id.* at 465.

151 *Id.*

> The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.[152]

Although *Estelle* is the Court's most recent holding on the issue, it is an outlier in its facts and its holding, and no other case has applied *Miranda* so broadly. The Supreme Court itself has distanced itself from *Estelle*'s reasoning, emphasizing that its holding was limited to the "distinct circumstances" presented in the case[153] and later pointing out that the Court has "never extended *Estelle*'s Fifth Amendment holding beyond its particular facts."[154]

Faced with this inconsistent guidance, lower courts have failed to reach a consensus about when *Miranda* should apply to custodial interviews conducted by non-law enforcement agents. A few general principles apply: on one end of the spectrum, if there is no possibility of criminal prosecution, courts agree that *Miranda* warnings are not required for custodial interviews.[155] On the other end of the spectrum, if the police are present or are the instigators of the interview, courts agree that *Miranda* does apply.[156] In between these two extremes, lower courts generally follow one of two possible paths. Most courts

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152 *Id.* (citation omitted).

153 *Id.* at 466; *see* Penry v. Johnson, 532 U.S. 782, 795 (2001).

154 *Penry*, 532 U.S. at 795; *see also* Buchanan v. Kentucky, 483 U.S. 402, 421–24 (1987). In *Buchanan,* the Supreme Court noted that if the defendant had requested the psychiatric evaluation, rather than the judge ordering it sua sponte, the defendant would have no Fifth Amendment right in the statements made during the evaluation. *Id.* at 422–23.

155 *See, e.g.*, United States v. Eide, 875 F.2d 1429, 1434 (9th Cir. 1989) (questioning by pharmacist's supervisor at the Veteran's Administration about potential criminal activity did not require *Miranda* warnings because the local police had already waived any prosecutorial interest in the case and so the supervisor was not acting as part of a criminal investigation).

156 *See, e.g.*, United States v. Diaz, 427 F.2d 636, 638–39 (1st Cir. 1970) (*Miranda* warnings required when defendant was questioned by a draft board supervisor while in custody and in the presence of police about his failure to register for the selective service act); Commonwealth v. A Juvenile, 521 N.E.2d 1368, 1370 (Mass. 1988) (*Miranda* warnings required when assistant direc-

apply the *Mathis* test, holding that *Miranda* protections are required as long as the interviewer knew that the statements might be used in a future criminal prosecution.[157] Other courts have applied a slightly narrower test, holding that *Miranda* should only apply if the court determines that the purpose of the interrogation was—at least in part—to gather evidence for a criminal case.[158]

A. Social Workers

In cases where social workers conduct the custodial interview, courts are likely to follow the *Mathis* principle and apply *Miranda* if the interviewer is aware of the possibility that the statements could be used in a future criminal prosecution. In *Jackson v. Conway*,[159] for example, the defendant had been arrested for multiple counts of rape but asserted his Fifth Amendment rights when police officers attempted to question him.[160] Since one of the rape charges involved a child victim, the county Child Protective Services ("CPS") contacted the police and asked if a caseworker could interview him.[161] During the interview, in which no *Miranda* rights were given or waived, the defendant made incriminating statements to the caseworker, who later testified to the statements at the defendant's criminal trial.[162] The trial judge admitted the statements, holding that *Miranda* did not apply because the CPS worker "was not engaged in law enforcement activities" when she conducted the interview.[163] The Second Circuit disagreed, citing *Mathis* and holding that since the social worker was aware of the possibility that the custodial interrogation would lead to a criminal prosecution, *Miranda* protections applied.[164]

B. Teachers and School Administrators

When a student is suspected of wrongdoing, school administrators or police officers often interrogate the student about the infraction to determine the appropriate consequences. The test for whether *Miranda* rights apply to these interviews is relatively straightforward.

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tor of a state-run home for troubled adolescents questioned defendant after the director had consulted with the police and was "convinced" that the defendant had committed a crime).

157 Mathis v. United States, 391 U.S. 1 (1968); *see supra* notes 145–48.

158 United States v. D.F., 63 F.3d 671 (7th Cir. 1995); *see infra* notes 184–89 and accompanying text.

159 763 F.3d 115 (2nd Cir. 2014).

160 *Id.* at 122.

161 *Id.*

162 *Id.* at 123, 127.

163 *Id.* at 138.

164 *Id.* at 135, 139.

If a police officer is present during the interview, courts have held that the student was in custody and, absent evidence to the contrary, conclude that that the purpose of the interrogation was to gather evidence for a criminal investigation. If no police officer is present, courts will rarely apply the *Miranda* protections, either because the court will conclude that the student was not legally in custody, or because the court will determine that the interrogation was conducted for a purpose other than criminal investigation.[165]

The only Supreme Court case to discuss the application of *Miranda* in custodial interviews in schools is *J.D.B. v. North Carolina*,[166] in which police had reason to believe that a seventh grader committed a series of thefts from homes in the neighborhood.[167] A police detective contacted the uniformed police officer assigned to the student's school, and the officer pulled the student out of class and escorted him to a school conference room.[168] In the conference room, the student was interviewed by the detective, the police officer, and two school administrators.[169] The student eventually confessed to the burglaries, and the confession was used against him in his subsequent juvenile delinquency hearing.[170] The Supreme Court held that *Miranda* applied to the interrogation and that the child's age should be a factor in determining whether he was "in custody" during the questioning.[171]

Like *Jackson v. Conway, J.D.B.* is a case on the extreme end of the spectrum, and so it does not provide much guidance for more typical cases. In *J.D.B.*, the interrogation was initiated by the police department for the purpose of investigating a crime for prosecution, and the questioning was carried out—at least in part—by two police of-

165 *See* Boynton v. Casey, 543 F. Supp. 995, 997 (D. Me. 1982) (student was not entitled to hear *Miranda* warnings when he was questioned by school officials because he was being questioned for a noncriminal proceeding); Bhombal v. Irving Indep. Sch. Dist., No. 3:17-CV-2583-B, 2018 U.S. Dist. LEXIS 77997, at *9–10 (N.D. Tex. May 9, 2018) (no right to *Miranda* warnings because no law enforcement officials were present when school staff questioned the student); K.A. v. Abington Heights Sch. Dist., 28 F. Supp. 3d 356, 364–68 (M.D. Pa. 2014) (no *Miranda* warning requirement when school officials questioned the student without law enforcement officers present); S.E. v. Grant Cnty. Bd. of Educ., 544 F.3d 633, 641 (6th Cir. 2008) (no *Miranda* warnings required when questioning was conducted by assistant principle outside the presence of law enforcement officers).

166 564 U.S. 261 (2011).

167 *Id.* at 265.

168 *Id.*

169 *Id.* at 266.

170 *See id.* at 267.

171 *Id.* at 269–72. The Supreme Court remanded the case to determine whether the suspect was in custody at the time of the interrogation, directing the lower court to consider the child's age as a factor in making the determination. *Id.* at 281.

ficers.[172] Courts have consistently applied *Miranda* if a police officer conducts an interrogation.[173] As a District Court noted: "in the school context, courts have drawn distinctions between a student being questioned by only a school official at school and a student being questioned by a law enforcement officer at school."[174]

Lower courts have broadened *J.D.B.* to require *Miranda* warnings in most cases in which a police officer is present, even if a school administrator carries out the questioning and even if the student is not aware that they may be facing criminal charges. In *N.C. v. Commonwealth*,[175] a school police officer removed the student from class, escorted him to the assistant principal's office, and sat down next to him while the assistant principal conducted the interrogation.[176] The Kentucky Supreme Court held that the student deserved *Miranda* warnings:

> Because the assistant principal was acting in concert with the [school police officer], and they had established a process for cases involving interrogations of this kind, this conduct and the [officer's] presence make this state action by law enforcement for Miranda purposes . . . even if the confession came in response to questions from the assistant principal rather than the SRO.[177]

The presence of a police officer is a necessary but not sufficient precondition to triggering *Miranda* protections. In some cases students have been found not to be "in custody," even if a police officer is present, thus rendering *Miranda* warnings unnecessary.[178] Also, if criminal charges are never brought against the student, *Miranda* warnings are not required because the rights do not apply in school discipli-

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172 *See id.* at 265–66.

173 *See In re.* R.H., 791 A.2d 331, 334 (Pa. 2002) (student was entitled to be read his *Miranda* rights before school police officers questioned him); B.A. v. State, 100 N.E.3d 225, 232–34 (Ind. 2018) (student deserved *Miranda* warnings when a uniformed officer escorted him to the office, stayed at all times inside the office during the interrogation, and made some comments during the interrogation); Husband v. Turner, No. 7-CV-391, 2008 WL 2002737, at *3 (W.D. Wis. May 6, 2008) (student was entitled to *Miranda* warnings when he was questioned by police officers in a closed room at school).

174 C.S. v. Couch, 843 F. Supp. 2d 894, 918 (N.D. Ind. 2011).

175 396 S.W.3d 852 (Ky. 2013).

176 *See id.* at 862.

177 *Id.* at 863.

178 *See, e.g.*, People v. N.A.S., 329 P.3d 285, 287–88 (Colo. 2014) (student was not "in custody" and thus *Miranda* rights not triggered when the principal summoned the student to his office, non-law enforcement personnel were allowed to remain in the office, and the officer spoke calmly and in a normal tone of voice when he asked the student about the allegations).

nary proceedings.[179] And if there are no officers present, the school officials have no requirement to provide *Miranda* warnings, even if the statements are later used in a criminal proceeding.[180]

C. Medical Professionals

In the medical context, courts apply a rule similar to the rule for school personnel: in determining whether *Miranda* applies to an interview between a suspect and a medical professional, courts look to whether the interview was conducted for the purpose of providing medical treatment or with an eye to a future prosecution. In the vast majority of cases, courts determine that the interactions between the medical professionals and the defendants are conducted for the purposes of medical treatment,[181] but there are some exceptions to this rule. The Article already discussed the *Estelle* case, in which a psychiatrist was assigned by a court to interview a defendant in custody to determine whether he was competent to stand trial.[182] Given the motivation for the interview, the Supreme Court held that the psychiatrist was aware of the strong likelihood that the statements being made could be used against the defendant in the upcoming criminal trial.[183]

Another exceptional case is *United States v. D.F.*,[184] a Seventh Circuit case involving statements that a defendant made while undergoing treatment in a state facility.[185] During the months preceding the statement, the defendant was committed to a mental hospital, isolated from her friends and family; the hospital's staff had complete control

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179 *See, e.g.*, Bills v. Homer Consol. Sch. Dist., 967 F. Supp. 1063, 1067 (N.D. III. 1997) (student's statements were used against him in a school expulsion hearing, which does not implicate the right against self-incrimination); S.E. v. Grant Cnty. Bd. of Educ., 544 F.3d 633, 636 (6th Cir. 2008) (student admitted to committing a crime, but participated in a pretrial diversion program and so was never tried for the infraction).

180 *See supra* note 165.

181 *See, e.g.*, United States v. Borchardt, 809 F.2d 1115, 1118 (1987); United States v. Webb, 755 F.2d 382, 391–92 (5th Cir. 1985); Commonwealth v. Allen, 395 Mass. 448, 455–58 (1985); State v. Jones, 386 So. 2d 1363, 1366 (La. 1980); State v. Hall, 600 P.2d 1180, 1182 (Mont. 1979); People v. Hagen, 74 Cal. Rptr., 678 (Cal. Ct. App. 1969).

182 Estelle v. Smith, 451 U.S. 454, 465 (1981); *see also supra* notes 149–51 and accompanying text.

183 *Estelle*, 451 U.S. at 467 (alterations in original) (citation omitted) ("During the psychiatric evaluation, respondent assuredly was 'faced with a phase of the adversary system' and was 'not in the presence of [a] perso[n] acting solely in his interest.' Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.").

184 63 F.3d 671 (7th Cir. 1995).

185 *Id.*

of her life, engaged in strip searches and "degrading disciplinary techniques," and asked her direct questions about whether she abused or injured children.[186] The government argued, somewhat formalistically, that since no law enforcement officer was involved in restricting the patient's liberty or in asking her questions, *Miranda* should not apply.[187] The court found that these actions would trigger *Miranda* protections if they were conducted by law enforcement personnel and then rejected the government's formalist argument that *Miranda* only applies if the questioner is a law enforcement officer or working directly for a law enforcement officer.[188] Instead, the court held that

> it is not the particular job title that determines whether the government employee's questioning implicates the Fifth Amendment, but whether the prosecution of the defendant being questioned is among the purposes, definite or contingent, for which the information is elicited. . . . Therefore, although a government employee need not be a law enforcement official for his questioning to implicate the strictures of the Fifth Amendment, his questioning must be of a nature that reasonably contemplates the possibility of criminal prosecution.[189]

Such holdings are rare, however. A more typical example can be found in *United States v. Webb*,[190] in which a defendant who was suspected of killing his son fled from military police and hid in a communications tower on the base, where he threatened suicide.[191] The Army sent a psychiatrist to talk to him, and over the course of the communication, the defendant admitted to the murder.[192] The prosecution then used the defendant's statements against him in a subsequent prosecution.[193] The Fifth Circuit held that these un-*Mirandized* statements were admissible because the psychiatrist—though a government employee—was not a law enforcement officer and was not acting on behalf of law enforcement.[194] His only purpose in talking to the

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186 *Id.* at 679.

187 *Id.*

188 *Id.* at 680.

189 *Id.* at 682–83 (footnote omitted).

190 755 F.2d 382 (5th Cir. 1985).

191 *See id.* at 385.

192 *Id.*

193 *Id.* at 386–87.

194 *Id.* at 391.

defendant was "to prevent his suicide and to talk him down from the tower."[195]

In another typical case from the Fifth Circuit, a federal prisoner was taken under guard by an ambulance to a municipal hospital with an apparent heroin overdose.[196] When the nurse asked him the cause of his condition, the prisoner refused to speak while the two corrections officers were present.[197] After the nurse sent them away, the prisoner admitted to the nurse that he had ingested large quantities of heroin.[198] The nurse later testified about these statements at the subsequent criminal trial (along with the corrections officers, who had remained within earshot).[199] The Fifth Circuit confirmed that *Miranda* did not apply to these statements, noting that "[w]here such a professional seeks information solely for diagnosis and treatment of a patient, he acts not as an agent of law enforcement authorities . . . but instead acts on behalf of the patient."[200]

In summary, Fifth Amendment rights are even more closely tied to criminal prosecution than Fourth Amendment rights. Courts have generally held that *Miranda* rights only apply if the person making the statement is being detained by police officers, and even then, the purpose of the interrogation usually must be related to a criminal prosecution. As alternate responders replace police on the streets and in the schools, the statements they hear will almost never be eligible for Fifth Amendment protection.

IV. Applying the Fourth And Fifth Amendments to Alternate Responders

As this brief review has demonstrated, the law applying the Fourth and Fifth Amendments to alternate responders is inconsistent. This is not surprising: the case law applying these rights to police officers has evolved through countless cases, although cases involving

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195 *Id.* at 392. The court did acknowledge that there were contexts in which statements to a psychiatrist—even a private psychiatrist—could be subject to *Miranda* protections:

> For example, this is not a case where law enforcement officials have sent a private citizen into contact with the defendant for the purpose of eliciting incriminating information. Nor is it a case where a psychiatrist, appointed by the court to determine whether the defendant is competent to stand trial, later testifies against the defendant.

Id.

196 *See* United States v. Borchardt, 809 F.2d 1115, 1116 (5th Cir. 1987).

197 *Id.*

198 *Id.*

199 *Id.* at 1118.

200 *Id.*

alternate responders are relatively rare. However, a common theme does emerge: in general, courts only apply the full, robust version of these constitutional rights if the purpose of the search or the interview was, at least in part, to gather evidence for a criminal investigation. In applying this rule, courts look to a number of different factors, depending on the context, but the most significant factor by far—and the dispositive factor—is whether a police officer is present during the interaction. But this general description obscures a number of important distinctions. In the Fourth Amendment context, courts apply the "criminal investigative purpose" test to determine whether to apply the traditional, robust probable cause and warrant requirement or the less stringent special needs "reasonableness" test. In the Fifth Amendment context, the purpose of the interview determines whether *Miranda* rights apply at all. Furthermore, *Miranda*'s "in custody" requirement means that statements made to alternate responders will almost never be eligible for *Miranda*'s protections. In short, individuals interacting with alternate responders will have far narrower rights than they do in traditional police-civilian encounters.

Given the motivation and rhetoric behind the movements to defund the police and replace them with alternate responders in many contexts, this narrowing of rights is likely an unintended—and undesired—consequence of reducing the law enforcement footprint in our communities. This does not mean that this shifting of resources is bad policy—reducing law enforcement's footprint in society will likely result in fewer violent confrontations between civilians and state actors.[201] There will also be substantial informal benefits, such as reduced tensions between police and the communities they serve, and improving the atmosphere inside public schools, where many students (especially students of color) can feel uncomfortable or even unsafe as a result of the constant police presence.[202] And if one of the objectives

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201 There may, of course, be significant costs in terms of an increase in crime and a lowering of public safety. Most of the reformers argue that, if done appropriately, municipalities can reduce the number of police and the role of law enforcement generally without impacting the crime rate or public safety. *See* Howard Henderson & Ben Yisrael, *7 Myths About "Defunding the Police" Debunked*, BROOKINGS INST. (May 19, 2021), https://www.brookings.edu/blog/how-we-rise/2021/05/19/7-myths-about-defunding-the-police-debunked/ [https://perma.cc/3EQB-MG3H].

202 *See* Goldstein, *supra* note 43 ("The presence of officers in hallways has a profound impact on students of color and those with disabilities, who, according to several analyses and studies, are more likely to be harshly punished for ordinary misbehavior."); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864 (2012) ("[T]he use of law enforcement in schools has a negative impact on educational outcomes, not only for the investigated youth, but also for the larger student body.") A greater police presence in schools also contributes to the

of the reformers is to lower the number of arrests for minor crimes, such as drug possession and trespass, the shift to alternate responders will almost certainly accomplish this goal. This in turn may lead to fewer searches of private individuals. Alternate responders will likely act differently than law enforcement officers when they respond to 911 calls, treat patients, or investigate potentially disruptive activity in schools. Since they are not seeking to gather evidence for a future criminal prosecution, they may be less likely than police to act in ways that infringe on an individual's privacy.

However, there is no doubt that alternate responders will conduct some number of intrusive searches, whether to further their rehabilitative goals or because they believe a more serious crime may be occurring. Even if they do not ultimately turn over any evidence to a prosecutor for a future criminal case, the privacy violation will still have occurred. When a city official enters a person's home without consent and looks around, or when a school administrator searches a student's locker, the privacy of the homeowner or student is violated regardless of whether the fruits of the search are used in a later prosecution. More to the point, the privacy violation is the same whether the person doing the search is a police officer, a social worker, or a school administrator. Yet in the latter two circumstances, the Fourth Amendment protections are so weak that those who are subjected to a search will usually have no recourse.[203]

In the Fifth Amendment context, the analysis is somewhat different. Unlike Fourth Amendment violations, which occur at the time of the search, state actors do not violate the Fifth Amendment unless and until the compelled statements are used in a criminal case against the speaker.[204] Thus, even though alternate responders will be hearing

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"school to prison pipeline" by responding to student misbehavior with criminal charges rather than school discipline. MARTHA MINNOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 28 (2010).

203 When police officers conduct an illegal search but do not find incriminating evidence, the subject of the search can at least in theory bring a section 1983 claim for the Fourth Amendment violation. *See, e.g.*, Amar, *supra* note 18. Such claims are relatively rare, since the monetary damages from one illegal search are minimal and qualified immunity often precludes the suit unless the officer violates clearly established law. Pearson v. Callahan, 555 U.S. 223 (2009). Nonetheless, section 1983 claims still provide some recourse when a police officer violates an individual's Fourth Amendment rights.

204 Interrogation techniques that "shock the conscience," such as the use of torture, can be a constitutional violation at the time they occur even if the statements are not used in a subsequent proceeding because such conduct is prohibited by the Due Process Clause of the Fourteenth Amendment, not the Self-Incrimination Clause. Chavez v. Martinez, 538 U.S. 760, 773–74 (2003). At any rate, it is extremely unlikely that an alternate responder would engage in conduct that would shock the conscience.

a much larger number of incriminating statements as police presence is curtailed, soliciting these statements will not raise constitutional issues. However, if criminal charges are ultimately brought, almost all of the statements elicited by alternate responders can be used against their speakers in a future criminal trial.

The scarcity of case law in this area combined with the increased use of alternate responders in new contexts creates an opportunity for courts to take a fresh look at these question in the coming years. This Part charts out some possible paths for courts in reevaluating the application of the Fourth and Fifth Amendment to alternate responders.

A. Fourth Amendment

Currently, the special needs doctrine governs the conduct of alternate responders. As noted above,[205] the Supreme Court justifies this lower standard in three ways: (1) the searches are primarily intended to meet a government interest other than detecting criminal activity, (2) the individuals or premises being searched often have a lower expectation of privacy, and (3) it is impractical to expect a non-law enforcement government agent to understand the legal definition of probable cause or the logistical requirements of obtaining a warrant. Although these justifications make sense in theory, in practice their application has led to a significant diminution of Fourth Amendment rights. This disunion will only become more widespread as alternate responders—whose searches almost always fall into the special needs category—increase their interactions with the public in the wake of a shrinking police presence.

There are three potential paths for reform. The first is to abolish the special needs doctrine altogether and evaluate all searches by any government agent under the same standard. The second is to keep the special needs doctrine but to amend it to enhance the Fourth Amendment rights of the individuals being searched. Finally, courts could maintain the special needs doctrine as it is, but to clarify its application to alternate responders.

1. Abolish the Special Needs Doctrine

The most dramatic—and least likely—solution would be for the Supreme Court to abolish the special needs doctrine altogether and apply the traditional Fourth Amendment standards to any search by a state actor. This would require social workers seeking to enter a home

205 *See supra* Part II.

to obtain a warrant based on probable cause or meet the requirement of one of the warrant requirements, such as exigent circumstances. The same rule would apply to teachers or school administrators who seek to search a student or a locker.

The special needs doctrine has come under increasing criticism from commentators[206] because it allows law enforcement officers to avoid the individualized suspicion requirement, even in situations (such as detecting drunk drivers or apprehending terrorists) which are indistinguishable from crime control. In the Court's very first special needs case, involving a warrantless inspection by a city inspector to investigate violations of the housing code, the Court held that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[207] However, the Court went on in the same case to hold the exact opposite, creating a second-class set of Fourth Amendment protections for an individual who is not suspected of criminal behavior.[208] In the ensuing fifty-five years, the Court has shown no signs that it is willing to reverse this decision; in fact, it has extended the special needs doctrine to many other contexts, including emergency aid,[209] border checkpoints,[210] and drunk driving checkpoints.[211] Furthermore, the original rationale for the special needs doctrine still exists for the truly regulatory searches that are both necessary and routine in the modern world—it would make no sense, for example, to require a city inspector to show probable cause before inspecting a business for violations to the electrical code. Thus,

206 *See* Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 920–21 (2010) (proposing that any evidence that is recovered from a special needs search be barred from use in a criminal trial); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259, 261 (2011) (arguing that the special needs doctrine improperly combines two different types of searches: "dragnet" searches and "special subpopulation" searches and that this conflation has "created confusion and facilitated the removal of important doctrinal safeguards" leading to widespread "arbitrary and unjustified administrative searches"); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 109–13 (2016) (pointing out that the Supreme Court has sent "conflicting signals" in every aspect of its special needs jurisprudence, including the distinction between crime control and "regulatory" searches; the reason why regulatory searches are subject to a lower standard than criminal investigative searches; and the factors used in determining whether a special needs search is "reasonable").

207 Camara v. Mun. Ct. of S.F., 387 U.S. 523, 530 (1967).

208 *See id.* at 538–40.

209 *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

210 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

211 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 50 (2000).

the special needs test—in at least some form—appears to be firmly ingrained in the Supreme Court's jurisprudence.

2. *Reform the Special Needs Doctrine*

There is no shortage of proposals to change the special needs doctrine.[212] A number of years ago this author proposed that the information obtained through special needs searches be inadmissible in a criminal trial, under the theory that the search had only been authorized because the government was conducting the search for a non-law enforcement purpose.[213] As long as searches are reasonable, this compromise would allow alternate responders leeway to inspect homes to see if state intervention is required and search people for weapons in order to defuse a dangerous situation, and it would allow school administrators to maintain order and keep drugs out of their schools. Since the primary purpose of these searches is unrelated to criminal prosecution, the inadmissibility of any contraband that is found would not lessen the effectiveness of the search.

Professor Eve Brensike Primus has proposed a different sort of reform for special needs searches, based on a different diagnosis of the problem.[214] In her view, courts have conflated two types of searches under the special needs umbrella. The first are "dragnet searches," in which government officials search everyone in a specific place or everyone who is engaging in a certain activity—such as health or safety inspections or drunk driving checkpoints.[215] Dragnet searches do not require any level of individualized suspicion, but they must be "minimally intrusive" and strict limits should be placed on the discretion of the individual carrying out the search, either in the form of an administrative warrant or through legislative or regulatory controls.[216] The second are searches of "special subpopulations" who have reduced expectations of privacy, such as students, government em-

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212 *See, e.g.*, Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 131–37 (2007) (arguing that suspicionless searches should be seen as reasonable and thus constitutional if they have been approved by a representative legislative body, because the legislative process will correct any overreaching by law enforcement); Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 777 (2004) (asserting that "traditional Fourth Amendment search-and-seizure doctrine was fine for an age of flintlocks" but that "large-scale searches undertaken to prevent horrific potential harms may be constitutionally sound").

213 *See* Simmons, *supra* note 206, at 915–26.

214 *See* Primus, *supra* note 206.

215 *Id.* at 263.

216 *Id.* at 262. Professor Primus also argues that these searches were originally only permitted if they supported an important government interest. *Id.* at 263.

ployees, or probationers.[217] These searches require some level of individualized suspicion (though less than probable cause), but there is no need to limit the discretion of the government actor carrying out the search.[218] In Professor Primus's view, the problem with the special needs search doctrine is that the courts do not distinguish between these two types of searches, and so they have removed the restrictions that applied to each of them, paving the way for suspicionless searches without limits on the discretion of the government actor.[219] Thus, her solution is to "disentangle" the two types of searches and restore the limits on discretion and the minimally intrusive requirement for dragnet searches along with the individualized suspicion requirements for searches of special subpopulations.[220]

In the context of searches by nongovernment officials, this disentanglement would mean different things in different contexts. Alternate responders who respond to 911 calls would likely fall into the dragnet category of searches. Thus, cities would probably have to promulgate guidelines limiting the discretion of these responders based on the specific purpose of the interaction. The Tenth Circuit already laid the groundwork for this kind of requirement when it distinguished between searches by police officers and searches by social workers because the latter were governed by the specific guidelines of the family services department.[221] School searches, on the other hand, would fall under the "special subpopulations" category of searches.[222] Thus, school administrators would always need to meet some standard of individualized suspicion before conducting a search of a specific student's locker, bag, or person.[223]

Other scholars have gone even further than Professor Primus by arguing that searches which rely on the "reasonableness" clause of the Fourth Amendment—including special needs searches—should face strict scrutiny; that is, they should only be approved if they are the least intrusive means to fulfill a compelling government interest.[224]

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217 *Id.* at 270–71.

218 *Id.* at 270–72.

219 *Id.* at 273–77. Professor Primus sees this as a gradual merging, beginning in areas such as border crossings and school searches. *Id.*

220 *See id.*

221 *See* Franz v. Lytle, 997 F.3d 784, 790 (10th Cir. 1993).

222 *See, e.g.*, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 655–57 (1995).

223 *See, e.g.*, Safford Unified School District #1 v. Redding, 557 U.S. 364, 370 (2009).

224 *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 432–33 (1988). Professor Sundby advocates for a "composite model" of the Fourth Amendment in which "the warrant and reasonableness clauses have independent purposes but work in tandem to achieve the fourth amendment's broader

This theory accepts the rationale that government searches for non-law enforcement purposes cannot be subjected to the traditional probable cause/warrant paradigm that applies to criminal investigations. But since the intrusion is identical to searches pursuant to criminal investigations, courts should apply a test that "best approximates the probable cause requirement in terms of stringency," which is strict scrutiny.[225] This would allow the government to continue to utilize certain special needs searches, such as screening airline passengers for weapons[226] or searching a home or a child for evidence of child abuse, since those are compelling state interests and there is no alternative less intrusive search that can satisfy that interest. But many other searches by alternate responders, such as indiscriminate searches of school lockers or home entries to search for drugs, would not survive this level of scrutiny, since they would likely not be narrowly tailored or serving a compelling government interest. Other types of searches, such as an alternate responder deciding to frisk an individual when facing a potentially dangerous interaction, will have to be evaluated on a case-by-case basis.[227]

3. Apply the Existing Doctrine More Consistently

Any of the changes discussed in the previous section—use restrictions, disentangling different forms of special needs searches, or conducting strict scrutiny analysis—would clarify the search powers of nonpolice government agents. They would also—to different degrees

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purposes." *Id.* at 417–18. Other scholars have argued for a similar tightening of the special needs standard, though usually not going as far as strict scrutiny. *See, e.g.*, Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures,* 25 U. MEM. L. REV. 483, 487 (1995) (proposing that searches without individualized suspicion should require a "strong showing of government necessity"); *see also* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1176–77 (1988) (proposing a "least intrusive alternative" requirement).

225 Sundby, *supra* note 224, at 435–36.

226 *See id.* at 445.

227 This is one of the weaknesses of the strict scrutiny proposal. As Professor Christopher Slobogin argues:

> Even with the thumb on the scale implied by the word "compelling," the inquiry into the strength of the government's objectives sends judges into a morass. Courts are understandably loathe to say that the state does not have a strong interest in stifling illegal immigration, drunk driving, and safety code violations, much less terrorism.

Slobogin, *supra* note 206, at 114. Professor Slobogin then argues that this will require courts who try to apply the strict scrutiny standard to evaluate the "least restrictive" requirement, which they are "ill-equipped" to do because it forces them to compare "the impact of a given panvasive program compared to its suspicion-based alternative." *Id.* at 115.

and in different ways—protect the Fourth Amendment rights of the individuals with whom the agents interact. So far, however, the Supreme Court has not given any signals that it is ready to make any dramatic change to the special needs doctrine. But even if the special needs doctrine remains unchanged, courts could apply a more rigorous analysis in the context of alternate responders in order to limit its application.

Under current law, the special needs doctrine applies if the search primarily serves a special need beyond law enforcement[228]—as long as law enforcement is not the "immediate objective"[229] or "primary purpose"[230] of the search. But as our brief review of the case law has revealed, courts have oversimplified this analysis when applying the special needs doctrine to alternate responders. Instead of inquiring into the individual or even the programmatic purpose of the search, courts will merely look to whether a police officer is present. This reductionist analysis is carried to the extreme in cases involving home searches for welfare benefits. For example, the Ninth Circuit applied the special needs test to a home search by an investigator from the District Attorney's office even when the only purpose of the search was to detected fraud in the welfare applications, and even though the investigator would refer any evidence of fraud (or of contraband or child abuse) for a criminal investigation.[231] Similarly, the Seventh Circuit applied the special needs test to social workers who conducted strip searches of children when the sole purpose of the search was to detect child abuse,[232] whereas when an identical search was conducted by police officers, a court required probable cause.[233] Presence of law enforcement is an even more critical factor in the school context,

228 *See* New Jersey v. T.L.O., 469 U.S. 325, 361 (1985) (Brennan, J., concurring in part and dissenting in part) (noting that a special needs search may not be solely "aimed at the discovery of evidence of crime" (quoting Camara v. Mun. Ct. of S.F., 387 U.S. 523, 537 (1967)); City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000) (search must fulfill a purpose other than "general crime control").

229 Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001).

230 *Edmond*, 531 U.S. at 41–42.

231 Sanchez v. County of San Diego, 464 F.3d 916, 918 (9th Cir. 2006). The court first followed the Supreme Court's holding that the home visit was not a "search" at all, *see* Wyman v. James, 400 U.S. 309, 322 (1971), and then went on to argue that even if it were a search, the special needs doctrine would apply, and the search would be reasonable. *Sanchez*, 464 F.3d at 923–25.

232 Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986); *see also supra* notes 98–101 and accompanying text.

233 *See, e.g.*, Franz v. Lytle, 997 F.3d 784 (10th Cir.1993); *see also supra* notes 102–11 and accompanying text.

where the absence of a police officer ensures that courts will apply the special needs doctrine.[234]

If courts continue with this simplified analysis, searches by alternate responders will all fall under the special needs test. However, courts could also use the current expanding role of alternate responders to take a fresh look at how the special needs doctrine should apply in these cases. Much of the existing precedent involves social workers investigating allegations of child abuse, and protecting the welfare of children is a legitimate special needs purpose. In our new reality, social workers—or some type of social worker or public safety officer hybrids—will be sent out to a much broader range of calls, with a far less focused mandate. These new alternate responders will be faced with domestic disputes, a mentally ill person who is acting erratically or violently, or a neighbor who has vandalized someone's property. In such contexts, it will be less clear whether the purpose of the surveillance serves a law enforcement purpose or a different purpose.

It is possible that courts will continue to apply the special needs doctrine to almost all searches conducted by alternate responders. After all, the underlying goal of dispatching alternate responders rather than police officers is to discourage treating the calls as criminal cases—or, in the words of *Wyman*, to provide a "rehabilitative" rather than "investigative" response.[235] These alternate responders have been trained to respond according to certain guidelines and protocols that are distinct (and less focused in crime control) from how police officers are trained to respond—much like the social workers in *Darryl H.* were trained and regulated differently from the police officers in *Franz*. But evaluating the true purpose of these searches should involve a thoughtful analysis of the true purpose of these alternate responders, and this analysis is only possible if courts move past the formalism of using the absence of a police officer as a proxy for a noncriminal purpose.

Even if the courts determine that the responders are acting with a purpose other than crime control, courts can still be more critical in determining whether the searches are "reasonable." Again, almost all the existing cases involving social workers involve searches to detect and prevent child abuse or neglect. In concluding that the social worker searches are "reasonable" under that standard, the courts cite the fact that protecting children is one of the strongest of the govern-

234 *See supra* notes 122–31 and accompanying text.

235 *Wyman*, 400 U.S. at 317; *see also supra* text accompanying note 83.

ment interests, thus justifying a relatively intrusive search.[236] As alternate responders conduct different types of searches in different scenarios, courts should be less likely to find the surveillance to be "reasonable" under the special needs doctrine.

B. Fifth Amendment

Options to enhance Fifth Amendment rights for interactions with non-law enforcement government agents are far more limited, since the entire justification for *Miranda* rights rests on the highly coercive atmosphere created by being in custody. Since it is nearly impossible for a someone other than a police officer to place an individual in custody, statements made to these individuals will almost never be subjected to *Miranda*'s requirements.

As noted above, there may be a few instances in which alternate responders interrogate a person who is in custody—either the individual is already in custody, and a social worker or medical professional is brought in to ask about a noncriminal matter or, in the school context, a police officer is present during the questioning. In these situations, courts have three possible paths. The simplest and most rights-enhancing rule would be to hold that *Miranda* applies to any custodial interrogation, regardless of the identity of the person conducting the interrogation or the purpose of the interrogation. So far, no court has adopted this rule. In the other extreme, courts could hold that *Miranda* only applies to custodial interrogations that are conducted by law enforcement officers. This rule finds some support in the language of the *Miranda* decision itself, in which the Court stated that "custodial interrogation . . . mean[s] questioning initiated *by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[237] Some of *Miranda*'s progeny have also supported this principle: in *Colorado v. Connelly*,[238] in which a suspect was "compelled" to confess due to his mental illness, the Court held that "[a]bsent *police conduct* causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[239]

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236 *See, e.g.*, *Wyman*, 400 U.S. at 318 ("The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.").

237 Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

238 479 U.S. 157 (1986).

239 *Id.* at 164 (emphasis added). The *Connelly* Court also noted that "coercive *police activ-*

But lower courts—and subsequent Supreme Court cases—have instead found a middle ground. The Court's most-cited case on the issue, *Mathis v. United States*, held that as long as the government agent is aware that the questioning could possibly result in criminal charges, *Miranda* protections will apply.[240] Other lower courts have held that *Miranda* will not apply if the sole purpose of the interview is unrelated to a criminal case.[241] This latter rule—which looks to the purpose of the questioning—is consistent with the public safety exception to *Miranda*, which holds that *Miranda* warnings are not required if the purpose of the questioning is to protect public safety, even if the questioning is undertaken by a police officer.[242] Focusing on the purpose of the questioning is also consistent with the justification behind the special needs doctrine in the Fourth Amendment context. And in the rare Supreme Court cases that have applied *Miranda* to nonstate actors, *Estelle*, *Mathis*, and *J.D.B.*, the Court engages in a detailed factual analysis of the motivations of the specific state actor who engages in the interview.

Until and unless the Supreme Court changes the in-custody requirement, however, none of this will affect the cases in which alternate responders conduct interviews. And as noted earlier, the very purpose of replacing police officers with alternate responders is to divert a potential criminal case in a noncriminal direction; thus, even under the *Mathis* or *J.D.B.* standards, these interviews will almost certainly be found to be conducted for a purpose other than law enforcement.

Conclusion

Under current law, Fourth and Fifth Amendment rights are closely tied to the presence of police officers. The absence of police officers implies a noncriminal purpose for the search (thus weakening the standard for evaluating the search under the Fourth Amendment's special needs doctrine) and effectively removes the possibility of the suspect being in custody (thus negating the Fifth Amendment's protections under *Miranda*). Thus, one of the unintended consequences of reducing police presence on our streets and in our schools will be to

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ity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167 (emphasis added).

240 *See* 391 U.S. 1, 4 (1968); *see also supra* notes 145–48 and accompanying text.

241 *See supra* note 158 and accompanying text.

242 *See* New York v. Quarles, 467 U.S. 649, 657–58 (1984).

lessen the constitutional rights of the individuals who interact with alternate responders in quasi-criminal settings.

Because the justification of the *Miranda* rule stems from the in-custody requirement, there is no feasible way for courts to expand these protections to interviews conducted by nonpolice officials. But a rethinking of the special needs doctrine could enhance Fourth Amendment rights in the nonpolice context. This could be a significant reform that applies to all government personnel who conduct surveillance, including police officers (which is long overdue), or it could be a more minor reform that only affects how the doctrine applies to nonpolice government agents.

A shift away from police searches and interrogations will conceivably affect constitutional rights in two other ways, both of which favor the government. First, an increase in the number of alternate responders will likely increase the number of consent searches that are carried out. A government agent does not need any level of individualized suspicion to conduct even the most invasive search if the subject of the search freely and voluntarily gives consent.[243] When police officers conduct a consent search, the legality of the search turns on whether the subject was coerced into consenting—that is, was the suspect's will overborne by the manner and circumstances of the request.[244] Although the burden of proof rests with the government to prove that the subject's will was *not* overborne,[245] courts have been reluctant to hold that consent was coerced[246] unless the police issue an explicit command[247] or brandish a weapon.[248] As difficult as such challenges are when police conduct consent searches, there would be no way to challenge a search as coercive without a police presence. An alternate responder—unarmed, in civilian clothes, and without the power to make an arrest—will never be able to overbear the will of the subject of the search. The lack of coercion is a direct result of the intentional removal of the confrontational power imbalance that is one of the goals of the movement to defund the police—but, as in the *Miranda*

243 Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

244 *Id.*

245 United States v. Matlock, 415 U.S. 164, 171–22 (1974).

246 *See, e.g.*, *Schneckloth*, 412 U.S. at 227 (three uniformed offices asking to search a car late at night was not coercive); United States v. Drayton, 536 U.S. 194, 206–07 (2002) (no coercion when three officers boarded a Greyhound bus, blocking the exits and asking for consent while standing right next to suspect).

247 Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

248 Florida v. Royer, 460 U.S. 491, 508 (1983).

context, removing this power imbalance also removes a legal tool that could be used to challenge the search.[249]

Second, the paucity of case law on the powers of non-law enforcement agents (especially outside the school context) means that much of the law in this area is not clearly defined. This means that even if the courts do begin to expand constitutional protections in this context, the qualified immunity doctrine will continue to exempt newly unconstitutional searches and interrogations for years. Under the qualified immunity doctrine, a "government official[] performing [a] discretionary function[] [is] shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known."[250] For example, in *Safford United School District No. 1 v. Redding*, the Supreme Court determined that a strip search of a middle school student to look for contraband prescription medication violated the Fourth Amendment.[251] However, the school administrators who conducted the search received qualified immunity because a sufficient number of "well-reasoned" opinions in lower courts had approved of similar strip searches when applying the *T.L.O.* standard.[252] Therefore, even if courts do decide to reform or limit the application of the special needs doctrine, change will be slow and incremental.

Of course, the Constitution is not the only way to regulate the conduct of government officials. Police departments have been infamously resistant to the administrative oversight that is routine for every other agency in the executive branch.[253] But social workers,

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249 *See* Miranda v. Arizona, 384 U.S. 436, 445 (1966).

250 Landstrom v. Ill. Dep't of Child. & Fam. Servs., 892 F.2d 670, 674–75 (7th Cir. 1990).

251 557 U.S. 364, 376–77 (2009).

252 *Id.* at 378–79; *see also Landstrom*, 892 F.2d at 671, 675 (school nurse and state social worker conducted an unconstitutional strip search of a six-year old in school after she complained of soreness in her buttocks, but defendants received qualified immunity because no prior precedent clearly established that this conduct was illegal).

253 The legislative branch has had some role in regulating police surveillance since at least 1934, *see* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (limiting the police power to conduct wiretaps), and in recent years the trend has accelerated as courts have struggled to keep up with advances in surveillance technology, *see* Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. § 10101 (1968) (updating the restrictions on wiretapping phones in response to *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967)); Foreign Intelligence Surveillance Act, 50 U.S.C §§ 1801–1871 (1978); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.) (regulating the monitoring of electronic communications, the searching of stored communications, and the obtaining of certain metadata by means of a pen register); USA Freedom Act, Pub. L. No. 114-23, 129 Stat. 268 (codified as amended in scattered sections of 50 U.S.C.) (2015) (limiting various aspects of surveillance, including bulk data collec-

medical professionals, school administrators, and other public workers have long been subjected to various regulatory schemes, and if these public officials are going to increase their interactions with potential criminal suspects, it would seem sensible to adjust those regulations to include protections against searches and self-incrimination.

These are still early days for reform. It is still not clear the extent to which police will be replaced by alternate responders, nor how the alternate responders will interact with the individuals they encounter. One concern is that over time the alternate responders will perform less of a rehabilitative and therapeutic role and more of a law enforcement role—that is, they will behave less like social workers and school administrators and more like police without uniforms and guns. Although this will accomplish the goal of reducing violent confrontations, it would not accomplish the goal of reducing the footprint of the criminal justice system on our communities—particularly our inner cities and our schools. The current case law's linking of constitutional rights to the criminal justice system may be indirectly encouraging alternate responders to act more like police, since communities will effectively have to choose between a law enforcement template that protects constitutional rights and a therapeutic template that delivers weaker constitutional rights. It is only by decoupling constitutional rights from prosecution—by eliminating the constitutional double standard—that society can achieve a goal of less criminalization while maintaining the same level of constitutional protections.

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tion programs). However, the vast majority of policing is unregulated by statute. Most of the policies regulating police conduct are promulgated by the police department itself, and the basic rules of judicial review that apply to other administration agencies (such as requirements for rulemaking and adjudication and judicial oversight to ensure these requirements are met) do not apply to the police. *See* Slobogin, *supra* note 206, at 123–27.

This may be starting to change—over the past twenty years there has been a growing movement among Fourth Amendment scholars to enhance the nonconstitutional restrictions on the government's search and seizure powers. *See, e.g.*, Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution,* 102 MICH. L. REV. 801, 801–06 (2004); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 205–06 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1067–129 (2016); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2059 (2016); Slobogin, *supra* note 206, at 123–27.