DETERRING ILLEGAL FIREARMS IN THE COMMUNITY: SPECIAL NEEDS, SPECIAL PROBLEMS, AND SPECIAL LIMITATIONS

Geoffrey S. Corn†

Gun violence is no longer just a crime-control problem in the United States; it is a public health crisis. This crisis is most acute in densely populated and economically challenged communities. The threat of becoming the intended or innocent victim of gun violence in these communities has become so pervasive that it only seems to make the headlines when the numbers are truly shocking to the general public. Sadly, these numbers have become the norm for the residents of these communities. Government bears a responsibility to leverage every lawful measure to mitigate this safety hazard, no differently than it does for other threats that implicate both public safety and crime control, such as the detection and deterrence of intoxicated drivers. This Article considers whether the intersection of the public health risk and government responsibility will justify invocation of the so-called special needs exception to the Fourth Amendment's individualized-suspicion requirement to develop and implement illegal firearm checkpoints (IFCPs) in areas especially impacted by this surge. While the nature of the public safety risk points in the direction of validity, the danger of the pretextual use of such checkpoints as a subterfuge to intrude upon individual liberty of the very same communities bearing the brunt of gun violence presents the most significant impediment to such a tactic. In response, this Article proposes a number of measures intended to reduce this risk and ensure any such program is carefully and narrowly tailored to the legitimate objective of detection of illegal firearm possession and deterrence of the same.

† Gary A. Kuiper Distinguished Professor of National Security Law, South Texas College of Law Houston; Lieutenant Colonel, U.S. Army (Retired), and formerly Special Assistant for Law of War Matters and Chief of the Law of War Branch, Office of the Judge Advocate General, United States Army; Chief of International Law for U.S. Army Europe; Professor of International and National Security Law at the U.S. Army Judge Advocate General's School. A special note of thanks to my research assistant, Jonathan White, South Texas College of Law Houston.

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> *At least six people have been killed and 37 wounded, including a 3-year-old boy, in shootings that erupted across Chicago over the weekend, according to police.*
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> *As of noon Sunday, Chicago police had responded to at least 35 separate shooting incidents across the city since 6:30 p.m. Friday, according to police incident reports reviewed by ABC News.*
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> —Bill Hutchinson, ABC News, September 19, 2021

INTRODUCTION

Firearm violence is increasingly viewed as not just criminal activity, but a public safety threat.[1] Indeed, CDC data have led to assertions that gun violence in America is a "public health crisis."[2] Yet, almost no issue generates more political and public polarization than the debate over how to more effectively address this problem.[3] Indeed, even the characterization as a "problem" triggers intense reaction, with gun rights advocates insisting that the "problem" is not access to firearms, but the people who use them. "[G]uns don't kill people. People kill people," is the common catchphrase invoked by advocates of this theory.[4] These advocates also reject the assertion that more laws are needed to respond to gun violence and insist that better enforcement of existing laws is a more rational response.[5]

Advocates of gun control believe that only substantially more effective legal restrictions to firearm access will effectively address the dangers of firearm violence.[6] But if there is any common ground between the extreme ends of this debate, it is that existing law must be

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1 *See* THE EDUC. FUND TO STOP GUN VIOLENCE & THE COAL. TO STOP GUN VIOLENCE, A PUBLIC HEALTH CRISIS DECADES IN THE MAKING: A REVIEW OF 2019 CDC GUN MORTALITY DATA (2021) [hereinafter DECADES IN THE MAKING], https://efsgv.org/wp-content/uploads/2019CDCdata.pdf [https://perma.cc/N6KY-Y4RF].

2 *Id.* at 4.

3 *See* TCR Staff, *Americans More Polarized on Gun Control: Gallup*, CRIME REP. (Nov. 16, 2020), https://thecrimereport.org/2020/11/16/americans-more-polarized-on-gun-control-gallup [https://perma.cc/UTA2-BD5M] ("Although Republicans have historically been in favor of the Second Amendment and Democrats in favor of increased gun regulation, the 63-point difference between the two parties is the 'highest on record' in the past 20 years, according to Gallup.").

4 James Downie, Opinion, *The NRA Is Winning the Spin Battle*, WASH. POST: POST PARTISAN (Feb. 20, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/02/20/the-nra-is-winning-the-spin-battle [https://perma.cc/74ER-6DXJ] ("These numbers encapsulate the success of the NRA's favorite empty argument: 'Guns don't kill people. People kill people.' Don't regulate guns, the NRA says, because they're not the problem. It's an appealingly simple argument that sounds sensible while also absolving the gun lobby and its supporters of any blame."); *see also* David Kyle Johnson, *"Guns Don't Kill People, People Do?,"* PSYCH. TODAY: A LOGICAL TAKE (Feb. 12, 2013), https://www.psychologytoday.com/us/blog/logical-take/201302/guns-don-t-kill-people-people-do [https://perma.cc/GAM4-ZMEF].

5 *See Why Gun Control Doesn't Work*, NRA-ILA, https://www.nraila.org/why-gun-control-doesn-t-work [https://perma.cc/G4AT-9HCU] ("The simplest solution is crime control—enforcing existing laws aimed at criminals who carry and use firearms to commit their crimes.").

6 *See* Jill Silos-Rooney, *The Top 3 Arguments for Gun Control: Why America Needs More Gun Control*, THOUGHTCO. (May 26, 2020), https://www.thoughtco.com/liberal-arguments-for-gun-control-3325528 [https://perma.cc/6BHV-XRY3].

fully enforced.[7] When considering existing laws, debate normally gravitates toward laws that regulate access to weapons, such as background checks.[8] It is, of course, axiomatic that better enforcement of access laws can only impact the opportunity to obtain possession of a firearm through lawful means. Yet existing laws also criminalize unlawful possession of firearms,[9] and for good reason. Unlawful possession of a firearm is often an initial step in the chain of events that accounts for a substantial percentage of firearm-related death and injury in this nation.[10]

Few can question the wisdom of seizing illegally possessed firearms and subjecting individuals whose possession violates the law to criminal sanction. Even the most ardent advocates of Second Amendment rights would surely agree that efforts to prevent and punish such criminal misconduct are completely consistent with their interests.[11] Indeed, if it is true that "guns don't kill people; people kill people," then the people who should be considered most dangerous are those who ignore the legal requirements for firearm possession: they demonstrate a defiance of the law, and possession of such weapons is often associated with other illegal activity.[12]

If this is a valid premise—that aggressive enforcement of existing laws prohibiting illegal firearm possession is a legitimate tool for mitigating the risk of firearm deaths and injuries—then one important component of this enforcement equation is the discovery of illegally possessed firearms. However, discovery of such firearms prior to use in criminally related violence and deterrence of illegal possession of

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7 *See* Tal Kopan, *Why Even the Gun Laws that Exist Don't Always Get Enforced*, CNN POL. (Jan. 9, 2016, 6:01 PM), https://www.cnn.com/2016/01/09/politics/obama-executive-orders-gun-control-enforcement-gap/index.html [https://perma.cc/YM7W-CGC2] ("Despite plenty of disagreement during President Barack Obama's town hall on guns, there was one point on which he and his critics agreed: There isn't enough enforcement of the laws already on the books.").

8 *See id.* ("One is simply a resource problem: The Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF, which investigates licensed gun dealers, and the National Instant Criminal Background Check System are woefully understaffed and replete with red tape, gun control supporters say.").

9 18 U.S.C. § 922.

10 *See* Dan Clark, *Is Most Gun Crime Committed by Those Who Illegally Possess Guns?*, POLITIFACT (Mar. 12, 2018), https://www.politifact.com/factchecks/2018/mar/12/john-faso/do-illegal-gun-owners-commit-most-gun-crime-rep-fa [https://perma.cc/7S7N-WZFU]; *see also* Christopher Ingraham, *New Evidence Confirms What Gun Rights Advocates Have Said for a Long Time About Crime*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/27/new-evidence-confirms-what-gun-rights-advocates-have-been-saying-for-a-long-time-about-crime [https://perma.cc/53LN-5GVV].

11 *See Why Gun Control Doesn't Work*, *supra* note 5.

12 *See* Clark, *supra* note 10.

firearms are both difficult tasks for law enforcement to accomplish.[13] Absent some cause to suspect criminal wrongdoing, law enforcement officers are limited in their ability to engage in searches to detect and deter such possession.[14]

In the wake of another deadly week, including four mass shootings in a six-hour period, twenty-seven mayors sent a letter to the Biden administration urging immediate action to curb gun violence.[15] Their plea called for the federal government to step in and address the proliferation of firearms in their cities by implementing policies that see this problem as "not just a law enforcement priority, but truly a public health imperative."[16] Some of the policies they pushed for included community outreach, common-sense–gun-control legislation, investigating illegal gun trafficking, federal funding for National Integrated Ballistic Information Network (NIBN) machines, and increased hiring for firearm examiners.[17]

While implementation of these policies would contribute to reducing gun violence, it would fall short of addressing the matter with the degree of urgency that is sought. Even if the Biden administration is able to enact these new policy proposals, this will at best plug the hole flooding our cities with illegal firearms. This Article proposes a new police tactic to aid in the discovery and removal from the streets of illegally possessed firearms, one that does not seem to have been meaningfully considered: invocation of the so-called "special needs" doctrine.[18] This doctrine permits the government to use checkpoint searches and other narrowly tailored investigatory intrusions absent any individualized suspicion.[19] The primary purpose of a special needs

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13 *See generally Fact Sheet—National Tracing Center*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 2021), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-tracing-center [https://perma.cc/36UW-SC97].

14 *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred." (first citing Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); and then citing Sibron v. New York, 392 U.S. 40, 62–66 (1968))).

15 Letter from Nan Whaley, President, U.S. Conf. of Mayors et al., to Joseph R. Biden, Jr., President, United States of America (June 15, 2021), https://www.usmayors.org/wp-content/uploads/2021/06/USCM-Mayors-letter-on-gun-violence-to-President-061521.pdf [https://perma.cc/UU2S-G4AY].

16 *Id.*

17 *Id.*

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

19 *See* Neumeyer v. Beard, 421 F.3d 210, 214 (3d Cir. 2005) ("Under this standard, the constitutionality of a particular search 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests' beyond that of typical law enforcement." (quoting Wilcher v. City of Wilmington, 139 F.3d 366, 373–74 (3d Cir. 1998))).

search must be the protection of the public, and not the general law enforcement interest of discovering evidence.[20] If the primary purpose of a checkpoint inspection was to discover illegally possessed firearms and deter such possession in order to protect the public from the immense dangers associated with firearm violence, would this doctrine be applicable? This Article focuses on this question: does the special needs doctrine, developed by the Supreme Court to allow for suspicionless seizures and searches when the primary purpose is to protect the public from a serious danger (as opposed to general crime control), provide legal justification to develop checkpoint inspections to discover illegally possessed firearms?

This might seem like an exception to the core individualized-suspicion requirement of the Fourth Amendment that swallows the rule, but it is not. The Supreme Court has been relatively vigilant in gatekeeping by rejecting asserted public safety justifications when it appears the special needs search was utilized as a subterfuge or pretext to avoid the burden of establishing individualized suspicion in order to search for evidence of criminal misconduct.[21] However, the Court has also endorsed invocation of this exception for checkpoint searches in response to credible threats of imminent terrorist attacks.[22] Such use was subsequently held to be lawful in *MacWade v. Kelly*,[23] where the Second Circuit upheld random checkpoint searches of subway patrons in New York City in response to a concern that the United States would be targeted for a subway attack following the London subway attack.[24]

It is unsurprising that the special needs exception has been invoked in response to threats of terrorist attacks. The exception arose in response to the Supreme Court's recognition that there are some threats to society that cannot be adequately addressed (i.e., prevented and deterred) without deviating from the Fourth Amendment's normal individualized-suspicion requirement.[25] As the Court noted in *City of Indianapolis v. Edmond*,

> The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such

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20 *See* Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 813–15 (2004).

21 *See, e.g.*, *Edmond*, 531 U.S. at 40–42.

22 *See id.* at 44 ("The exigencies created by [terrorism] scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.").

23 460 F.3d 260, 268–70, 275 (2d Cir. 2006).

24 *Id.*

25 *See id.* at 271–72.

> suspicion is not an "irreducible" component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply. For example, we have upheld certain regimes of suspicionless searches where the program was designed to serve "special needs, beyond the normal need for law enforcement."[26]

It is, however, precisely because this exception allows for suspicionless searches that the Court has imposed limits on its use, the most important of which is the primary purpose requirement: the government must establish objectively that responding to a legitimate public safety risk is the primary purpose of the suspicionless inspection program.[27] And this leads to the ultimate question raised herein: if, as with the threat of a terrorist attack, public safety is genuinely threatened by possession of illegal firearms, should the special needs exception permit the use of checkpoint inspections to mitigate that risk?[28]

If firearm violence is indeed a serious public safety threat, and if this threat is most significant in relation to the use of illegally possessed firearms, then it seems logical to assert that discovery and seizure of such weapons will make an important contribution to public safety. Accordingly, there is no apparent reason why the use of checkpoint inspections to discover illegally possessed firearms—what this Article will call illegal firearm checkpoints (IFCPs)—should fall outside the scope of the special needs doctrine. Furthermore, while discovery of illegally possessed firearms in the course of a special needs inspection will likely result in criminal prosecution for contraband, this would not invalidate the primary public safety purpose of the program.[29] Like DUI checkpoints, so long as the primary purpose of an IFCP is to reduce the serious public safety danger created by the proliferation of illegally possessed firearms, subsequent criminal prosecution as an incidental consequence of the program would not negate the public safety justification.[30]

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26 *Edmond*, 531 U.S. at 37 (first citing Chandler v. Miller, 520 U.S. 305, 308 (1997); then citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); then citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); then citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); and then citing Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602 (1989)).

27 *See* Gould & Stern, *supra* note 20, at 813–14.

28 *See MacWade*, 460 F.3d at 268–71.

29 *Cf.* United States v. Prichard, 645 F.2d 854, 856–57 (10th Cir. 1981).

30 *See id.* at 857 ("The purpose of the roadblock, i.e., to check drivers' licenses and car registrations, was a legitimate one. If, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes." (citing United States v. Merryman, 630 F.2d 780, 782–85 (10th Cir. 1980))); *see also* United States v. Lopez, 777 F.2d 543, 547 (10th Cir. 1985) ("The law does not require the police to ignore evidence of other crimes in conducting legitimate roadblocks, and they may look for evidence which is in plain view.").

Accordingly, this Article considers how use of such checkpoints to enhance the effectiveness of government efforts to reduce the public dangers associated with firearm violence may be justified as a valid special needs program. Part I of the Article will summarize existing statistics related to firearm violence and the relationship between firearm violence and other crimes. These statistics arguably support the conclusion that unlawful firearm possession does in fact create a genuine public safety danger, especially in urban areas with high crime rates. Part II of the Article will explain the special needs doctrine and the essential characteristics of a valid special needs program. Part III of the Article will consider how an IFCP program might be effectively managed and implemented to mitigate the risk of pretextual and abusive utilization that would amount to a pretextual search. Part IV will then propose an evidentiary gatekeeping rule derived from U.S. military practice that will create a powerful disincentive for such pretextual use of IFCPs.[31]

I. UNLAWFUL POSSESSION, GUN VIOLENCE, AND ESPECIALLY IMPACTED COMMUNITIES

In 2015, President Obama, in his hometown of Chicago, addressed the state of gun violence in America:

> About 400,000 Americans have been shot and killed by guns since 9/11—400,000. Just to give you a sense of perspective, since 9/11, fewer than 100 Americans have been murdered by terrorists on American soil—400,000 have been killed by gun violence. That's like losing the entire population of Cleveland or Minneapolis over the past 14 years.[32]

This was echoed recently by Dr. Rochelle Walensky, the Director of the CDC, who noted in an interview that while we do have some shocking statistics that show the problem we are faced with, the years of pressure from gun lobbyists like the NRA have limited the amount of research in this area.[33] Because of this, the average American does not understand the magnitude of the problem; what they see only

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31 *See* MIL. R. EVID. 313.

32 Barack Obama, President, United States of America, Remarks by the President at the 122nd Annual IACP Conference (Oct. 27, 2015), https://chicago.suntimes.com/2015/10/27/18421626/obama-s-chicago-criminal-justice-speech-transcript [https://perma.cc/KB9J-6Y2T].

33 Elizabeth Cohen, John Bonifield & Justin Lape, *"Something Has to Be Done": After Decades of Near-Silence from the CDC, the Agency's Director Is Speaking up About Gun Violence*, CNN HEALTH (Aug. 28, 2021, 11:14 PM), https://www.cnn.com/2021/08/27/health/cdc-gun-research-walensky/index.html [https://perma.cc/TZ2K-SYUS].

represents "the tip of the iceberg."[34] This is why her first initiative is to "restart" the research into firearm violence.[35] With this, she hopes to understand the scope of the problem, the cause of it, and what could be the solution.[36]

She also hopes to include gun owners in the research,[37] while assuaging their concerns about reimplementing research into firearm violence. Many American gun owners are worried that research in this area will lead to gun-control legislation.[38] But she believes we can begin a dialogue by first agreeing that "we don't want people to die," and working on finding ways to prevent that from happening.[39] She encourages gun owners to share how they keep their guns safe and to teach others how to do the same.[40]

What this Article proposes could be part of the solution. Broadly speaking, gun owners can agree that illegal firearms should be taken off the street and that those who intend to do harm with a firearm should not possess one.[41] The use of IFCPs will not infringe on the rights of gun owners and does not require any federal legislation.

A. *Gun Violence Statistics Mirror and Even Surpass Drunk Driving Already Approved in* Sitz

As further developed in Part II, the gravity of the public danger related to gun violence today is arguably analogous to, if not greater than, dangers related to drunk drivers. In 1990, the Supreme Court in *Michigan Department of State Police v. Sitz* focused on the public safety danger produced by drunk drivers to endorse the special needs exception to the individualized-suspicion requirement of the Fourth Amendment.[42] The Court concluded that in excess of 25,000 people dying from drunk driving annually rendered constitutionally reasonable the use of suspicionless checkpoints to detect and deter such

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34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*; *see also The History—and Future—of Gun Violence Research*, WBUR: HERE & NOW (Apr. 3, 2018), https://www.wbur.org/hereandnow/2018/04/02/gun-violence-research [https://perma.cc/W5AN-P5JZ] ("[T]he NRA told everybody, 'You either can do research, or you can keep your guns. But if you let the research go forward, you will all lose all of your guns.'").

39 Cohen, Bonifield & Lape, *supra* note 33.

40 *Id.*

41 *See* sources cited *supra* note 10.

42 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–55 (1990).

drivers.[43] In contrast, the CDC found that there were over 39,000 firearm deaths in 2019.[44] "[A]lmost one in ten (3,390) gun deaths in 2019 were children and teens . . . ."[45] In contrast, approximately 10,500 individuals lost their lives as the result of alcohol-related motor vehicle accidents in 2016.[46] As one author noted, these statistics indicate that, like drunk driving, gun violence is indeed a chronic public safety threat, exacerbated by ease of access and the overall lack of firearms regulation or safety protocols:

> [T]he time Americans spend using their cars is orders of magnitudes greater than the time spent using their guns. It is probable that per hour of exposure, guns are far more dangerous. Moreover, we have lots of safety regulations concerning the manufacture of motor vehicles; there are virtually no safety regulations for domestic firearms manufacture.[47]

B. *Foretelling of IFCP Viability by* Sitz *Itself*

In *Sitz*, Justice Blackmun drew a comparison between the death toll on the roads to the death toll of all of America's wars, and he was "pleased . . . that the Court is now stressing this tragic aspect of American life."[48] This comparison is equally stark in relation to gun violence, as "[m]ore Americans have died from guns in the United States since 1968 than on battlefields of all the wars in American history."[49] And, interestingly, even the *Sitz* dissent recognized the magnitude of gun violence in America, using statistics related to such violence to suggest the gun problem was far more compelling than the drunk-driving problem:

> By contrast, in 1986 there were a total of 19,257 murders and non-negligent manslaughters. Of these, approximately 11,360 were committed with a firearm, and another 3,850 were committed with some sort of knife.
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> From these statistics, it would seem to follow that someone who does not herself drive when legally intoxicated is more likely to be

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43 *Id.* at 451.

44 DECADES IN THE MAKING, *supra* note 1, at 4.

45 *Id.*

46 *Impaired Driving: Get the Facts*, CDC (Aug. 24, 2020, 12:00 AM), https://www.cdc.gov/transportationsafety/impaired_driving/impaired-drv_factsheet.html [https://perma.cc/CB23-VGGJ].

47 DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 182 (1st paperback ed. 2006).

48 *Sitz*, 496 U.S. at 455–56 (Blackmun, J., concurring).

49 Nicholas Kristof, Opinion, *Learning from 2 Murders*, N.Y. TIMES, Aug. 27, 2015, at A23.

> killed by an armed assailant than by an intoxicated driver. The threat to life from concealed weapons thus appears comparable to the threat from drunken driving.[50]

These statistical comparisons between drunk-driving danger and firearm violence in 1990 forecasted the possible justification for IFCPs. If anything, the compelling public safety concerns related to firearms have only grown since that date.

The objective public safety risk associated with gun violence seems clear: Gun violence claims 106 lives per day.[51] And according to the CDC, guns account for over *39,000* American deaths each year.[52] "In 2011, nearly half a million people were the victims of gun crime in the United States . . . ."[53] That same year, "firearms were used in 68 percent of murders, 41 percent of robbery offenses and 21 percent of aggravated assaults nationwide."[54] One commentator compared domestic firearm deaths to military deaths:

> During the ten years from 2003 to 2012, the most recent year for which data are available, 313,045 persons died from firearm-related injuries in the United States. These deaths outnumber US combat fatalities in World War II; they outnumber the combined count of combat fatalities in all other wars in the nation's history.[55]

As noted above, gun violence in the United States accounts for a shocking number of deaths.[56] And, "[m]ore Americans die in gun homicides and suicides every six months than have died in the last 25 years in every terrorist attack and the wars in Afghanistan and Iraq combined."[57]

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50 *Sitz*, 496 U.S. at 473 n.17 (Stevens, J., dissenting) (citation omitted).

51 *Gun Violence in the United States*, BRADY (2021), https://brady-static.s3.amazonaws.com/5YearGunDeathsInjuriesStats-Jan-2021.pdf [https://perma.cc/4L7S-3GW8].

52 *2019, United States Firearm Deaths and Rates per 100,000*, CDC, https://wisqars.cdc.gov/fatal-reports (select "Firearm" under "Cause or mechanism of the injury"; then select "2019 to 2019" under "Year(s) of Report"; then click "Submit Request") (last visited Mar. 26, 2022).

53 Philip J. Cook, Richard J. Harris, Jens Ludwig & Harold A. Pollack, *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717, 719 (2015) (citing *Gun Violence in America*, NAT'L INST. JUST. (Feb. 26, 2019), https://nij.ojp.gov/topics/articles/gun-violence-america [https://perma.cc/US4Z-9524]).

54 *Gun Violence in America*, *supra* note 53.

55 Garen J. Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, 36 ANN. REV. PUB. HEALTH 5, 6 (2015) (footnotes omitted).

56 *See* Kristof, *supra* note 49.

57 *Id.*

C. *Urban Areas and High-Population Areas Hit with Higher Rates of Gun Violence*

The statistics related to gun violence point to an almost undeniable conclusion: the public safety risk is most acute in urban communities.[58] According to the CDC,

> [T]he highest rate of firearm homicide in 2019 was in large central metro counties (most urban), 1.3 times higher than the national average and 1.8 times higher than large fringe metro counties (suburbs), where the homicide rate is lowest. . . . Because of their higher rates and large populations, the vast majority—89%—of firearm homicides occur in metropolitan areas . . . .[59]

Moreover, the larger the population size, the higher the rates per 1,000 persons of nonfatal firearm violence.[60] Perhaps even more compellingly, in relation to the logic of IFCPs,

> [f]rom October 2001 to October 2018, 520 people were killed in mass shootings in the United States, according to the book "Bleeding Out" by Harvard criminal justice scholar Thomas Abt. But during that same period, at least 100,000 people were killed in urban gun violence (fatal and non-fatal shootings that occur in the public spaces of cities and towns).[61]

One study also examined the source of the firearms possessed at time of offense, and its findings are critical to the IFCP proposal: 40% (the highest percentage) of the firearms possessed at the time of fatal and nonfatal incidents were from an illegal street source.[62] This number has actually increased from 1997, where the percentage from "street" or "illegal" sources was less than that from a "family or friend."[63] Moreover, "[i]n 2004, an estimated 16% of state prison inmates and 18% of federal inmates reported that they used, carried, or possessed a firearm when they committed the crime for which they were serving a

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58 *See* DECADES IN THE MAKING, *supra* note 1, at 22.

59 *Id.*

60 *See* MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 241730, FIREARM VIOLENCE, 1993–2011, at 7 (2013) ("In 2011, the rate of nonfatal firearm violence for residents in urban areas was 2.5 per 1,000, compared to 1.4 per 1,000 for suburban residents and 1.2 for rural residents.").

61 Nick Cotter, *Black Communities Are Disproportionately Hurt by Gun Violence. We Can't Ignore Them.*, PUBLICSOURCE, https://projects.publicsource.org/pittsburgh-gun-violence-1 [https://perma.cc/X4EQ-JD5S]. *See generally* THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS (2019).

62 PLANTY & TRUMAN, *supra* note 60, at 13 tbl.14.

63 *Id.*

prison sentence."[64] Again, among those state inmates who possessed a firearm during the offense, "fewer than 2% bought their firearm at a flea market or gun show, about 10% purchased it from a retail store or pawnshop, 37% obtained it from family or friends, and another 40% obtained it from an illegal source."[65] Thus, over 75% of firearms were obtained from sources other than legal purchase from a gun store or gun show.[66]

Another study conducted in Chicago surveyed ninety-nine inmates on the source of their firearms.[67] It found similar results: "Our respondents (adult offenders living in Chicago or nearby) obtain most of their guns from their social network of personal connections. Rarely is the proximate source either direct purchase from a gun store, or theft."[68] For example, forty out of the forty-eight guns sourced by the study "were obtained from family, fellow gang members, or other social connections; the fraction is still higher for secondary guns."[69] Also, "[o]nly 2 of the 70 primary guns (3%) and no secondary guns were reported as purchased directly from a gun store."[70] Moreover, "about 60% of guns . . . were obtained by purchase or trade. Other common arrangements include sharing guns and holding guns for others."[71]

More recently, a study found that a miniscule percentage of gun possession by gang members is the result of a lawful purchase:

> [V]ery few gang members buy their guns new from a dealer. Only 2% were purchased directly from [a federal firearms license] in a documented sale. Of course, that leaves the possibility of undocumented sales, but they also are a minor part of the picture: at most 5% of guns found in the hands of gang members were sold out the back door by "dirty dealers." The "gray area" in terms of the degree to which dealers are complicit in getting guns into the hands of high-risk gang members has to do with straw purchasing. We find that 15% of new guns confiscated from male gang members were first purchased by a female—one potential indication of straw purchasing.[72]

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64 *Id.* at 13.

65 *Id.*

66 *See id.*

67 Philip J. Cook, Susan T. Parker & Harold A. Pollack, *Sources of Guns to Dangerous People: What We Learn by Asking Them*, 79 PREVENTIVE MED. 28, 28 (2015).

68 *Id.*

69 Stephen Gutowski, *Study Finds that Chicago Criminals Get Guns from Friends, Family*, WASH. FREE BEACON (Sept. 3, 2015, 5:30 PM), https://freebeacon.com/issues/study-finds-that-chicago-criminals-get-guns-from-friends-family [https://perma.cc/272H-T6G8].

70 *Id.*

71 Cook, Parker & Pollack, *supra* note 67, at 28.

72 Cook, Harris, Ludwig & Pollack, *supra* note 53, at 752–53 (footnote omitted).

These facts, studies, and statistics support the conclusion that possession of illegal firearms is not only a public health and safety risk, but it is one that is unlikely to be effectively addressed through enactment of stricter gun laws focused on background checks and federal purchase authorization. The sad fact is that too few firearms are obtained through methods that would be impacted by stricter licensing and background-check laws or implementation of laws currently on the books.[73] Furthermore, these studies and statistics also (perhaps unsurprisingly) indicate that the correlation between access to and possession of illegal firearms and the danger to public safety is most acute in urban areas, as illustrated by the plight residents of Chicago continue to endure.[74]

D. *The Windy City Faced with a Gale Force of Gun Violence*

A recent focal point of national frustration related to gun violence has been the city of Chicago and the areas of that great city that confront a serious public safety threat that appears to have no end in sight. "In 2012, there were 500 murders in Chicago, more than New York City (419) or Los Angeles (299)."[75] Throughout Illinois in 2012, 86% of the homicides were with guns, compared to 69% in the United States overall.[76] More recently, in 2015 3,000 Chicagoans were shot, and the beginning of 2016 was "[h]orrific."[77] Compared to the beginning of 2015, three times as many people were shot in Chicago in the first ten days of 2016—totaling 120 shootings and nineteen deaths.[78]

The Chicago Police Department spoke on the need for a crackdown on illegal guns: "Every year Chicago Police recover more illegal guns than officers in any other city, and as more and more illegal

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73 *See generally* sources cited *supra* note 10.

74 *See* DECADES IN THE MAKING, *supra* note 1, at 22 ("When clustered by urbanization level, the highest rate of firearm homicide in 2019 was in large central metro counties (most urban), 1.3 times higher than the national average . . . .").

75 James Lindgren, *Forward: The Past and Future of Guns*, 104 J. CRIM. L. & CRIMINOLOGY 705, 711 (2015) (citing Reid Wilson, *FBI: Chicago Passes New York as Murder Capital of U.S.*, WASH. POST: GOVBEAT (Sept. 18, 2013), https://www.washingtonpost.com/blogs/govbeat/wp/2013/09/18/fbi-chicago-passes-new-york-as-murder-capital-of-u-s [https://perma.cc/39U2-LVMB]).

76 *Id.* (citing Table 20 from 2012 Database of Offenses Known to Law Enforcement, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/20tabledatadecpdf [https://perma.cc/V49M-DPSD]).

77 Samuel Lieberman, *The 2016 Gun-Violence Statistics out of Chicago Are Horrific*, N.Y. MAG.: INTELLIGENCER (Jan. 12, 2016), https://nymag.com/intelligencer/2016/01/2016-chicago-gun-violence-stats-are-horrific.html (last visited Mar. 26, 2022).

78 *Id.*

guns continue to find their way into our neighborhoods, it is clear we need stronger state and federal gun laws."[79] Existing laws seem incapable of addressing this problem. This is not because they fail to sanction unlawful firearm possession. Instead, it seems increasingly clear that the laws have failed to produce any meaningful deterrence to such possession, with enforcement generally limited to unlawful possession being discovered as an incidental consequence of investigation or apprehension for some other crime. In other words, by the time many of these guns are discovered, it is already too late.[80] This is analogous to the deterrence dilemma that led to the development of sobriety checkpoints and the special needs doctrine: the threat to public safety cannot be effectively addressed by relying on the normal criminal-investigation and sanction modalities.[81]

In 2016, the *Chicago Tribune* found "the city on course to top 500 homicides for only the second time since 2008."[82] Homicides, totaling 135, had risen 71% from the previous year's seventy-nine during the same time period—representing the "worst first quarter" since 1999.[83] Shootings had risen as well. As of March 30, 2016, 727 people had been shot in Chicago in 2016, representing a 73% jump from the previous year's 422 shootings during the same time period.[84] Sadly, 2016 was not an anomaly for rising shootings. The jump in 2016 "follow[ed] two consecutive years in which shootings rose by double digits."[85] Reverend Ira Acree spoke to the *Tribune* on the causes for rising gun violence, noting the proliferation of guns among them: "It's a crisis here in Chicago . . . . Unless something radical transpires in our city, there's

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79 *Id.*

80 *Cf. A Real Plan to Stop Gun Violence in Manhattan*, ALVIN BRAGG FOR DA, https://www.alvinbragg.com/gun-safety [https://perma.cc/K9NB-JT5R] ("Comprehensive gun-violence reduction can only be achieved through a multi-faceted approach that includes law enforcement, community intervention/improvement, and legislative change. We will not arrest or incarcerate our way out of these problems. By the time a case gets to the point of criminal prosecution, it is already too late.").

81 *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989) ("As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (citing Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 619–20 (1989))).

82 Jeremy Gorner, *Chicago PaU to Deadliest Start in Nearly Two Decades*, CHI. TRIB. (Mar. 31, 2016, 4:59 AM), https://www.chicagotribune.com/news/ct-chicago-homicides-first-quarter-met-20160330-story.html [https://perma.cc/JYH2-HFVY].

83 *Id.*

84 *Id.*

85 *Id.*

going to be a bloodbath this summer."[86] Whether radical or not, IFCPs should serve as a tool to contribute to mitigating Chicago's illegal gun problem.

The gun violence situation in Chicago is illustrative of a problem that plagues many urban and underprivileged communities.[87] Getting guns off the streets is a common objective of political leaders and police officials, and for good reason.[88] But ambition and reality seem increasingly attenuated. The people who live with the reality that illegal firearms are a ubiquitous presence in their neighborhoods and a constant threat to their lives deserve government action that leverages every lawful measure to mitigate this scourge. While IFCPs based on the special needs doctrine will undoubtedly raise concerns about pretext and abuse, it is time to consider how such programs might be used as one of these tools.

II. THE SPECIAL NEEDS DOCTRINE

If, as posited above, illegally possessed firearms pose a serious public safety hazard, the government's interest in discovering those in possession of such firearms and deterring such possession is unquestionably compelling.[89] Indeed, there is no credible objection to the validity of government investigatory efforts that result in seizure of such firearms and prosecution of those in possession pursuant to normal Fourth Amendment individualized-suspicion requirements. In fact, the public seems justifiably outraged by perceptions that the government is ignoring this danger or inept in its preventive response.[90]

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86 *Id.*

87 *See* DECADES IN THE MAKING, *supra* note 1, at 17 ("Clearly, the sheer number of firearm homicides illustrates that Cook County is in the midst of a gun violence crisis, but this crisis is not unique to Chicago; it is equally devastating in cities across the United States and among more rural counties, as well.").

88 *See, e.g.*, William Cummings, *Kamala Harris: "I Will Take Executive Action" on Gun Control if I Am Elected President*, USA TODAY (Apr. 23, 2019, 1:26 PM), https://www.usatoday.com/story/news/politics/elections/2019/04/23/kamala-harris-promises-executive-action-gun-control-elected/3548859002 [https://perma.cc/4LT2-UFVW] ("'We need universal background checks. We need to take weapons of war off our city streets,' [Elizabeth] Warren said. 'We need as a country to step up, to be more responsible, to be willing to push back against the NRA and to put some sensible gun safety laws in place.'").

89 *Cf.* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

90 *See generally* Letter from Nan Whaley et al. to Joseph R. Biden, Jr., *supra* note 15.

But is individualized suspicion an absolute requirement to justify searching for such firearms? Perhaps not.[91]

The special needs doctrine grew out of the Supreme Court's administrative-inspection jurisprudence,[92] and it permits narrowly tailored seizures and/or searches for the primary purpose of protecting the public from a serious and immediate danger.[93] The touchstone of validity for any special needs program is this primary purpose, which courts assess objectively: Only when the State is able to demonstrate that suspicionless intrusions into liberty (seizures) or privacy (searches) are necessary to produce a reasonably effective reduction of a genuine public danger will such programs be valid.[94] In contrast, these programs are invalid when general crime control is the objectively assessed primary purpose,[95] an important limitation to prevent law enforcement authorities from doing a proverbial end run around the Fourth Amendment's individualized-suspicion requirement to investigate and prosecute crime.[96]

This primary-purpose foundation does not mean, however, that a criminal sanction arising out of a special needs inspection program necessarily invalidates the program.[97] Instead, when public safety is assessed as the legitimate primary purpose, the incidental benefit of evidence discovery and criminal prosecution is a permissible

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91 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) ("Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.").

92 *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

93 *See Sitz*, 496 U.S. at 447–50.

94 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000).

95 *See id.* at 43.

96 Therefore, even though one or both of the officers may have testified to a lawful primary purpose supporting the checkpoint, the court may have viewed any potentially lawful primary purpose as a pretext for investigating drivers for criminal activity. Yet, the prosecution did argue prevention of taxi and livery carjackings and robberies as the checkpoint's lawful primary purpose. Nevertheless, the court saw no need to decide whether such a primary purpose would satisfy *Edmond*, holding simply, "this is not the occasion to decide whether, had that been the primary objective, it would meet the requirements of City of Indianapolis." This refusal by the court to consider the prosecution's asserted—and on its face arguably lawful—primary purpose suggests that the court grounded its rejection of this checkpoint not in some implied pretext finding, but rather, in the prosecution's failure to detangle the poorly prioritized mixed-bag of programmatic objectives that the checkpoint pursued. *Jackson*, therefore, may signal that a checkpoint without demonstrably prioritized purposes should fail to satisfy *Edmond* because the prosecution cannot objectively isolate its true primary programmatic purpose.

Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 317 (2006) (footnotes omitted).

97 *See* United States v. Prichard, 645 F.2d 854, 857 (10th Cir. 1981).

consequence.[98] Thus, assessing a genuine public safety motivation for such a program is critical, as almost all such programs create the likelihood of an incidental law enforcement benefit.[99] Defining the boundaries of a permissible primary purpose and an impermissible crime-control purpose is not subject to any quantification. Instead, the parameters of this assessment must be derived from relevant jurisprudence, most notably Supreme Court decisions both validating and invalidating asserted special needs.[100]

This explains why the "primary purpose" requirement for a valid special needs program often seems perplexing. How can public safety be separated from general crime control? After all, detecting intoxicated drivers, or would-be terrorists, or escaped violent felons would not only contribute to the safety of the public, but also result in crime prevention. But the "primary purpose" requirement does not focus on whether the asserted special need will produce a crime-control benefit; if that outcome nullified the special need, almost no special needs programs would survive scrutiny. Instead, the thread that runs through all Supreme Court jurisprudence is that the *asserted* primary public safety purpose must be objectively validated pursuant to judicial scrutiny.[101] This was a central focus of the *Sitz* decision, where the Court concluded that statistics objectively validated the assertion that detecting and deterring intoxicated drivers would reduce the risk of injury or death resulting from traffic accidents.[102] The Court contrasted this conclusion with its previous rejection in *Delaware v. Prouse*[103] of the assertion that detecting unlicensed drivers would produce an analogous public safety benefit.[104] Unlike in *Sitz*, in *Prouse* the State was unable to produce any empirical data to support its asserted public safety purpose.[105]

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98 *See id.*

99 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554–55 (1976).

100 *See generally* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 473 (1990) (Stevens, J., dissenting); *Martinez-Fuerte*, 428 U.S. at 555; Delaware v. Prouse, 440 U.S. 648, 666 (1979) (Rehnquist, J., dissenting); *Edmond*, 531 U.S. at 46–47; Texas v. Brown, 460 U.S. 730, 743 (1983).

101 *See, e.g.*, *Edmond*, 531 U.S. at 51–52 (Rehnquist, C.J., dissenting) ("The reasonableness of highway checkpoints, at issue here, turns on whether they effectively serve a significant state interest with minimal intrusion on motorists. The stop in *Whren* was objectively reasonable because the police officers had witnessed traffic violations; so too the roadblocks here are objectively reasonable because they serve the substantial interests of preventing drunken driving and checking for driver's licenses and vehicle registrations with minimal intrusion on motorists.").

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

103 440 U.S. 648.

104 *See Sitz*, 496 U.S. at 454–55.

105 *Compare id.* at 454, *with Prouse*, 440 U.S. at 659–60.

This judicial gatekeeping function was reinforced by the Court's decision in *City of Indianapolis v. Edmond*.[106] In that case, the city sought to justify its use of counterdrug highway checkpoints by asserting that discovery of drugs would enhance public safety.[107] The Court rejected this assertion, concluding that, unlike with intoxicated drivers, the assertion of a primary public safety purpose was objectively invalid, even while acknowledging that the "hit rate" for finding illegal drugs was higher than that for the discovery of drunk drivers in *Sitz*.[108] Specifically, the Court indicated,

> As petitioners concede, the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics. In their stipulation of facts, the parties repeatedly refer to the checkpoints as "drug checkpoints" and describe them as "being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis." In addition, the first document attached to the parties' stipulation is entitled "DRUG CHECKPOINT CONTACT OFFICER DIRECTIVES BY ORDER OF THE CHIEF OF POLICE." These directives instruct officers to "[a]dvise the citizen that they are being stopped briefly at a drug checkpoint." The second document attached to the stipulation is entitled "1998 Drug Road Blocks" and contains a statistical breakdown of information relating to the checkpoints conducted. Further, according to Sergeant DePew, the checkpoints are identified with lighted signs reading, "NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K–9 IN USE, BE PREPARED TO STOP." Finally, both the District Court and the Court of Appeals recognized that the primary purpose of the roadblocks is the interdiction of narcotics.
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> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in *Prouse* that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.[109]

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106 531 U.S. 32.

107 *Id.* at 40–42.

108 *See id.* at 34–36.

109 *Id.* at 40–42 (alteration in original) (citations omitted).

Accordingly, because the Court concluded that the objective of the program was indistinguishable from general crime control, the city had failed to establish a valid special need.[110]

Suggesting that checkpoints established to detect possession of illegal firearms will produce no law enforcement benefit would border on the absurd. Instead, it is self-evident that such a benefit would almost certainly flow from detection of these weapons. It would be equally incredible to suggest that the only law enforcement benefit to flow from such checkpoints would be evidence to support prosecution for illegal possession. As will be addressed in greater detail below,[111] use of such checkpoints will almost certainly result in the discovery and seizure of contraband completely unrelated to protection of the public from illegal firearm-related violence. However, neither of these outcomes necessarily nullifies the special need that justifies such checkpoints.[112] The asserted special need is valid so long as these law enforcement benefits are incidental to an objectively verifiable primary public safety purpose of detecting and deterring illegal firearm possession.[113] Nor must these incidental benefits be unanticipated. Nothing in the Court's special needs jurisprudence indicates that anticipating an incidental or secondary law enforcement benefit nullifies a valid primary public safety purpose.[114]

Unfortunately, absent individualized suspicion of some collateral wrongdoing, it is extremely difficult for police to detect possession of illegal firearms until after they are used.[115] This is because the individualized suspicion normally required to comply with the Fourth Amendment will rarely arise as the result of mere possession; some other criminal activity will normally be necessary to trigger an investigatory response based on such suspicion. Thus, so long as the illegal possession remains concealed, it will often be impossible for police to establish the requisite individualized suspicion to search for such weapons unless and until some other crime is committed or attempted. In such cases, while seizure of the firearm and prosecution of the wrongdoer may protect the public from future danger, it is

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110 *Id.* at 47 ("When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.").

111 *See infra* Section III.A.

112 *See* United States v. Prichard, 645 F.2d 854, 857 (10th Cir. 1981).

113 *See id.*

114 *See id.* at 856–57.

115 *See generally* Jeremy Gorner, *Chicago Police Announce New Team to Take Guns off the Street Ahead of Planned Federal Effort*, CHI. TRIB. (July 19, 2021, 3:54 PM), https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-new-gun-team-20210719-feqruwuqrrdtlpupypjkpdm62e-story.html [https://perma.cc/ENF2-2FG5].

insufficient to protect from the danger of violent acts facilitated by the illegal possession. In this sense, the danger to the public posed by the illegally possessed firearm is analogous to the dangers associated with driving while intoxicated or possession of an explosive device by a terrorist: requiring individualized suspicion to seek out and remove the danger significantly undermines the ability of the government to achieve the legitimate objective of ensuring public safety.

In most situations, difficulty or even an inability to establish individualized suspicion will not justify a search or seizure, even if it means serious crime will go undetected.[116] However, where the primary purpose of the search or seizure is to protect the public from a risk that cannot be effectively addressed while complying with the individualized-suspicion requirement, the special needs doctrine becomes relevant.[117] This exception to the normal individualized-suspicion requirement of the Fourth Amendment grew from the Supreme Court's recognition that the risk of allowing suspicionless searches or seizures might, in some very limited situations, be outweighed by the risks to the public flowing from the government's inability to detect and deter such risks.[118] Thus, the essence of the special needs doctrine is that it is not unreasonable to allow narrowly tailored searches or seizures without any individualized suspicion when the government "need" to engage in such conduct is indeed "special" in that it is not directed at general crime control but instead public safety.[119]

In *Sitz*, the Supreme Court endorsed this special needs exception to the warrant and cause requirements of the Fourth Amendment. The case involved a civil challenge to a police DUI checkpoint program.[120] The lower courts concluded that the program violated the Fourth Amendment.[121] The invalidation of the program was based on two conclusions. First, even though limited in duration, the stops at the checkpoint amounted to seizures within the meaning of the

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116 Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from "exigency"—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. Only after finding an extraordinary governmental interest of this kind do we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required.

New Jersey v. T.L.O., 469 U.S. 325, 356 (1985) (Brennan, J., concurring) (first citing United States v. Place, 462 U.S. 696, 701–02 (1983); then citing Mincey v. Arizona, 437 U.S. 385, 393–94 (1978); and then citing Johnson v. United States, 333 U.S. 10, 15 (1948)).

117 *See id.*

118 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449–50 (1990).

119 *See id.* at 449–51.

120 *Id.* at 447–48.

121 *Id.* at 448.

Amendment.[122] Second, because the checkpoint seizures were conducted without individualized suspicion and without notifying motorists that they could turn around to avoid the checkpoint, they were likely to generate subjective fear and surprise, rendering the program unreasonable.[123]

The Supreme Court agreed with the first point—the stops were indeed seizures within the meaning of the Fourth Amendment.[124] However, it also concluded that individualized suspicion is not an essential element of Fourth Amendment reasonableness.[125] Indeed, the Court emphasized that the test for reasonableness is not static or unitary.[126] Instead, what is or is not reasonable turns on an assessment of three interrelated factors: first, the individual liberty interest; second, the asserted government interest; and third, the extent of the intrusion.[127] The Court's emphasis on public safety as a requisite for a special need suggested that when the government interest is discovery of criminal activity, individualized suspicion is an essential requirement of reasonableness,[128] a suggestion that would blossom into a principle of the special needs doctrine in subsequent decisions. But when the primary government interest is protecting the public from a threat, such individualized suspicion is not essential.[129]

The Court then applied what it characterized as a three-part balancing test.[130] It noted that while the checkpoint stops at issue were brief, they nonetheless qualified as seizures subject to the reasonableness requirement of the Fourth Amendment.[131] But the Court also concluded that protecting the public from the threat of

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122 Sitz v. Mich. Dep't of State Police, 429 N.W.2d 180, 182 (Mich. Ct. App. 1988) ("Nonetheless, stopping a vehicle and detaining its occupants is a seizure within the meaning of the Fourth Amendment." (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979))), *rev'd*, 496 U.S. 444 (1990).

123 *See id.* at 184–85.

124 *Sitz*, 496 U.S. at 450.

125 *See id.* at 449–50 ("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (alteration in original) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989))); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

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

127 *See id.* at 448–50.

128 *See id.* at 449–51.

129 *See id.*

130 *See id.* at 450–55.

131 *Id.* at 448, 450.

intoxicated drivers was a compelling public safety interest.[132] Finally, the Court considered the nature of the intrusion.[133] Because the stops were narrowly tailored to address the specific public safety threat, the checkpoint program was reasonable.[134]

Several analytical veins ran through the *Sitz* decision, each of which is essential for assessing the potential reasonableness of IFCPs. First, there was a clear requirement that the program be responsive to a genuine public safety threat, and not just a general law enforcement interest cloaked in the characterization of such a threat.[135] In *Sitz*, the Court was satisfied that the public safety risk produced by intoxicated drivers was indeed significant, thereby validating the compelling government interest in detecting and deterring such drivers.[136] While the *Sitz* Court did not explicitly indicate the need for an objective assessment of the asserted public safety threat, it seemed implicit in the Court's review of statistics related to intoxicated driving.[137] Subsequent decisions by the Court, most notably *Edmond*,[138] confirm this requirement. In *Edmond*, the Court struck down a counterdrug checkpoint.[139] Other than the asserted public safety risk, the checkpoint in *Edmond* was analogous to the one considered in *Sitz*. And, as in *Sitz*, the government asserted a public safety interest in preventing the transport of illegal drugs and vehicle operation by individuals using illegal drugs.[140] Unlike *Sitz*, however, the Court did not accept the asserted public safety interest, but instead concluded that based on an objective assessment of available facts, the government had failed to establish a genuine link between possession and transport of illegal drugs and the type of direct link to a public safety concern.[141] Instead, the Court noted that while the prevention of almost all crime implicates some public safety concern, this "general" public safety interest is insufficient to justify a special need:

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132 *Id.* at 451 ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical.").

133 *Id.* at 452–53 ("The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.").

134 *Id.* at 451–53.

135 *See id.* at 449–50.

136 *Id.* at 451.

137 *See id.*

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

139 *Id.* at 36.

140 *See id.* at 40–42.

141 *See id.* at 42–43.

> Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz*. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.
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> Petitioners also liken the anticontraband agenda of the Indianapolis checkpoints to the antismuggling purpose of the checkpoints in *Martinez-Fuerte*. Petitioners cite this Court's conclusion in *Martinez-Fuerte* that the flow of traffic was too heavy to permit "particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens," and claim that this logic has even more force here. The problem with this argument is that the same logic prevails any time a vehicle is employed to conceal contraband or other evidence of a crime. This type of connection to the roadway is very different from the close connection to roadway safety that was present in *Sitz* and *Prouse*. Further, the Indianapolis checkpoints are far removed from the border context that was crucial in *Martinez-Fuerte*. While the difficulty of examining each passing car was an important factor in validating the law enforcement technique employed in *Martinez-Fuerte*, this factor alone cannot justify a regime of suspicionless searches or seizures. Rather, we must look more closely at the nature of the public interests that such a regime is designed principally to serve.[142]

Second, it was especially important for the Court that the checkpoint program in *Sitz* was designed and implemented in a manner that deprived on-scene officers' discretion in selecting the targets of the stops.[143] Instead, vehicles were stopped pursuant to a preestablished formula that, while unknown to the public, reduced or perhaps even nullified the risk of selective or discriminatory enforcement.[144] The Court contrasted the preestablished formula used for the DUI

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142 *Id.* at 43 (citations omitted) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976)).

143 *Id.* at 35 ("The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence.").

144 *Id.* ("At each checkpoint location, the police stop a predetermined number of vehicles. Approximately 30 officers are stationed at the checkpoint. Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. . . . The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence.").

checkpoints with the roving random stops it struck down in *Prouse*.[145] The Court noted that roving stops, unlike the program in *Sitz*, provided too much risk of discriminatory enforcement.[146] When one contemplates the use of IFCPs, this consideration seems especially important. This is because use of such checkpoints will almost certainly generate claims of deliberate targeting of low-income and predominately minority communities, as it is these communities that suffer the brunt of illegal firearm-related violence.

A related consideration was one addressed in *Sitz*, when the Court rejected the argument that the DUI checkpoint program was unreasonable because there were other potentially more effective techniques to detect intoxicated drivers.[147] Instead, the *Sitz* decision emphasized the limited nature of a judicial inquiry into such a program: whether the special needs program at issue is reasonably effective, not whether it is the most effective program or best allocation of finite public resources.[148] So much was inherent in the assessment of compliance with the reasonableness touchstone of the Fourth Amendment. So long as the program at issue was among the range of reasonably effective options, it was, according to the Court, reasonable within the meaning of the Fourth Amendment.[149] Whether it was the best or most efficient option was an issue for citizens to address through the political process.[150]

Third, the Court emphasized that the Fourth Amendment intrusion be responsive to the public safety risk and narrowly tailored

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145 *Id.* at 39 ("In *Prouse*, we invalidated a discretionary, suspicionless stop for a spot check of a motorist's driver's license and vehicle registration. The officer's conduct in that case was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.'" (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979))).

146 *See id.*

147 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990).

148 *See id.*

149 The actual language from *Brown* v. *Texas*, upon which the Michigan courts based their evaluation of "effectiveness," describes the balancing factor as "the degree to which the seizure advances the public interest." This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferrable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Id. (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

150 *See id.*

to address that risk.[151] In *Sitz*, the Court concluded that the scope of the seizure at the checkpoint—in that case, approximately twenty-five seconds—satisfied both these requirements.[152] Importantly, however, *Sitz* did not indicate that brevity was an essential component of reasonableness.[153] Instead, it was the relationship between the intrusion and the nature of the public safety risk that dictated reasonableness.[154] This seemed validated in *Edmond*, when the Court contrasted the invalid counternarcotics checkpoint with what it suggested would be valid special needs programs.[155] These included both counterterror checkpoints and checkpoints to *search* for escaped dangerous criminals. In both of these examples, simply stopping motorists would be insufficient to respond to the threat; a limited search would be required (in a backpack for a bomb; in a trunk for an escapee).[156] Scope, therefore, is a critical aspect of assessing the reasonableness of any special needs program, but permissible scope will turn on the nature of the public safety threat.[157]

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151 *See Edmond*, 531 U.S. at 37; *see also* MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006) ("[W]e hold that the search program is reasonable because it serves a paramount government interest and, under the circumstances, is narrowly tailored and sufficiently effective.").

152 *See Sitz*, 496 U.S. at 448, 451–53 ("During the 75-minute duration of the checkpoint's operation, 126 vehicles passed through the checkpoint. The average delay for each vehicle was approximately 25 seconds."). *See generally* United States v. Martinez-Fuerte, 428 U.S. 543, 566–67 (1976) ("[W]e hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." (footnote omitted) (first citing Terry v. Ohio, 392 U.S. 1, 24–27 (1968); and then citing United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975))); *Terry*, 392 U.S. at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (first quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring); then citing Preston v. United States, 376 U.S. 364, 367–68 (1964); and then citing Agnello v. United States, 269 U.S. 20, 30–31 (1925))); *id.* at 33 ("Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence.").

153 *See Sitz*, 496 U.S. at 451–53.

154 *See id.* at 451–52 ("The trial court and the Court of Appeals, thus, accurately gauged the 'objective' intrusion, measured by the duration of the seizure and the intensity of the investigation, as minimal." (citing Sitz v. Mich. Dep't of State Police, 429 N.W.2d 180, 184 (Mich. Ct. App. 1988), *rev'd*, 496 U.S. 444 (1990))).

155 *See Edmond*, 531 U.S. at 43 ("While the difficulty of examining each passing car was an important factor in validating the law enforcement technique employed in *Martinez-Fuerte*, this factor alone cannot justify a regime of suspicionless searches or seizures. Rather, we must look more closely at the nature of the public interests that such a regime is designed principally to serve.").

156 *See id.* at 44.

157 *See generally Martinez-Fuerte*, 428 U.S. at 566–67.

Finally, the Court did not seem to demand overwhelming evidence of effectiveness.[158] In *Sitz*, the DUI "hit rate" was actually quite low—only about 1.6% of the drivers who passed through the one checkpoint conducted prior to the issuance of an injunction manifested indicators of intoxicated driving.[159] This was sufficient for the Court to conclude the checkpoint program was a reasonably effective method for detecting *and deterring* the threat.[160] The Court contrasted this apparently low "hit rate" with the statistics considered in *Martinez-Fuerte*, where only 0.12% of vehicles subjected to random roving stops were found to have undocumented occupants.[161]

In relation to this "success rate" consideration, the Court recognized that the objective of the checkpoint at issue was not only to identify and apprehend intoxicated drivers, but also to deter such dangerous conduct.[162] The deterrence rationale ostensibly justified a finding of effectiveness with such a low "hit rate."[163] In *Prouse*, the combination of a lack of evidence that unlicensed drivers pose a serious public danger, coupled with the fact that the government was unable to offer data to support the assertion that the roving stops produced a meaningful public safety effect, led to a conclusion that the program had no meaningful deterrent effect.[164] In contrast, *Sitz* concluded that the evidence of DUI-related deaths and injuries demonstrated a genuine public danger.[165] Accordingly, deterring such misconduct by increasing

158 *See Edmond*, 531 U.S. at 47.

159 *See Sitz*, 496 U.S. at 454–55 ("[T]he detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment.").

160 *Cf.* MacWade v. Kelly, 460 F.3d 260, 266 (2d Cir. 2006) ("Because the Program deters a terrorist from planning to attack the subway in the first place, the witnesses testified, the fact that a terrorist could decline a search and leave the subway system makes little difference in assessing the Program's efficacy.").

161 *Sitz*, 496 U.S. at 455 ("By way of comparison, the record from one of the consolidated cases in *Martinez-Fuerte* showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent." (citing *Martinez-Fuerte*, 428 U.S. at 554)).

162 *See id.* at 451–55; *see also id.* at 470–71 (Stevens, J., dissenting).

163 *See id.* at 451–55 (majority opinion); *see also id.* at 470–71 (Stevens, J., dissenting).

164 Delaware v. Prouse, 440 U.S. 648, 658–61 (1979) ("Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers. If this were not so, licensing of drivers would hardly be an effective means of promoting roadway safety.").

165 *See Sitz*, 496 U.S. at 451 (majority opinion) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-

the perceived risk of detection and apprehension would reduce this risk even more effectively than apprehending intoxicated drivers.[166]

If a limited seizure of short duration were the only Fourth Amendment intrusion justified by a special need, the doctrine would provide little support for an IFCP. However, effective deterrence may, in some situations, necessitate more than a limited seizure. So much is inherent in the *Edmond* Court's discussion of counterterrorism and discovery of an escaped violent felon as valid special needs, as each of these "needs" would necessitate more than a brief seizure like the one approved in *Sitz*.[167] For example, in *MacWade v. Kelly*,[168] the Second Circuit reviewed the constitutionality of a special needs checkpoint program implemented by the New York City Police Department (NYPD). Coming soon after the terrorist subway bombing in London and the railway bombing in Madrid, the program was designed to deter would-be terrorists from entering the subway with explosive devices.[169] In order to achieve this objective, police officers were authorized to stop passengers entering the station, question them briefly, *and search* in bags large enough to conceal an explosive device.[170] Although the searches did not result in the discovery of any explosives or the apprehension of any suspected terrorists, the court concluded that the deterrent effect of the program provided the necessary evidence of effectiveness.[171]

The special needs doctrine is, accordingly, a limited source of authority for government seizures and searches targeting genuine public safety threats. As a result, the doctrine is the most logical exception to the normal Fourth Amendment warrant and probable cause requirement that might justify checkpoints established in areas with a record of high levels of violent crime in order to search for illegally possessed weapons. Of course, the initial requirement for such a program would be evidence to support the conclusion that the primary purpose of the program was to protect the public from a genuine danger—that removing illegally possessed weapons from circulation, either by seizure or by deterring possession, would significantly contribute to public safety. Absent such a conclusion, an IFCP would be invalid. If, however, the statistics above do provide

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related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical.").

166 *See id.* at 470–71 (Stevens, J., dissenting).

167 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

168 460 F.3d 260 (2d Cir. 2006).

169 *Id.* at 264.

170 *Id.*

171 *Id.* at 273–75.

sufficient objective evidence of a primary public safety purpose, the validity of such a program will turn on the remaining considerations central to *Sitz* and its progeny.

III. NECESSITY, INTRUSIVENESS, AND REASONABLENESS

A. *Special Needs and the Inherent Danger of Overbreadth*

An IFCP program would require a much more extensive intrusion into interests protected by the Fourth Amendment than a sobriety checkpoint: A brief stop with accordant questioning will do little to achieve the objective of discovering such weapons. Because it is logical to assume that those in illegal possession will not be forthcoming about this fact, such checkpoints will almost certainly necessitate an inspection into those areas where a firearm could be hidden. This more expansive suspicionless intrusion will raise concerns of overreach. Searching for an item as small as a pistol will allow something more akin to a full-blown evidence search than a brief and limited DUI checkpoint seizure. And it is not just the extent of the search that would prove controversial, but the potential consequence. Police will be permitted to seize any contraband that comes into plain view during the inspection, even if completely unrelated to illegal weapon possession.[172] As a result, the scope of an IFCP will almost inevitably lead to prosecutions for unrelated crimes, such as narcotics possession—crimes that would have gone undiscovered without the use of a special needs checkpoint inspection.[173]

Illegally possessed firearms are rarely displayed openly; instead, they are almost always concealed in various ways until the moment of use. When carried by an individual, it is logical to assume that an intrusion analogous in scope to a search for a terrorist suicide bomb would be required to address the objective of the program: discovering such weapons. However, like the bag search approved by the Second Circuit in *MacWade*,[174] it would be equally reasonable to require police to ask individuals if they were in possession of a firearm. This would reduce the intrusiveness of the program on law-abiding individuals who are in lawful possession of firearms. And, following the same tactic employed by the NYPD, police could also be required to allow

172 *See supra* note 30 and accompanying text.

173 *See supra* note 157 and accompanying text; *see also* Terry v. Ohio, 392 U.S. 1, 17–20 (1968).

174 460 F.3d at 263.

individuals the opportunity to expose the contents of bags or containers to the officer.[175]

Even if such tactics were used to limit the extent of the intrusion when conducting an IFCP, there would still be a need to conduct a cursory pat down of individuals to ensure they did not possess concealed firearms, and to require access to bags and other containers carried by the individual to observe the contents. If unjustified by the nature of the public safety threat, such inspections without individualized suspicion would be unreasonable.[176] But, as noted above, it would in fact be illogical to restrict police from employing such tactics when the threat that produces the special need is illegal firearm possession. The same logic would extend to automobiles in situations where there was empirical data to support a linkage between illegal firearm threat and possession within an automobile. Such a linkage would dictate the reasonable scope of any responsive inspection, which could extend to areas within the automobile commonly used to conceal a firearm. Like inspection of individuals, it would be reasonable to require officers to give the automobile occupant an opportunity to disclose lawful possession of a firearm prior to conducting any inspection. However, it must ultimately be the nature of the public safety threat that dictates the scope of the inspection.

A strict causal link between the nature of the public safety threat and the scope of IFCP inspections, while essential to reasonableness, is not the only requirement to ensure such a program complies with the special needs doctrine.[177] Based on special needs jurisprudence, it would also be essential to incorporate into the program other limitations on both police discretion and the overall impact on individual liberty.[178] In

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175 *See id.* at 273.

176 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) ("On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.").

177 *See supra* note 157 and accompanying text.

178 In *Brignoni-Ponce*, we recognized that Fourth Amendment analysis in this context also must take into account the overall degree of interference with legitimate traffic. We concluded there that random roving-patrol stops could not be tolerated because they "would subject the residents of . . . [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road . . . ." There also was a grave danger that such unreviewable discretion would be abused by some officers in the field.

Martinez-Fuerte, 428 U.S. at 558–59 (alterations in original) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882–83 (1975)).

order to mitigate the risk of selective discriminatory enforcement, the criteria for selecting targets of inspections must be preestablished.[179] While it is certainly logical to create a perception of random selection in order to enhance the deterrent effect of IFCPs, thereby justifying maintaining confidentiality of the selection criteria, individual on-scene officers must not be permitted to pick and choose their targets.[180] Of course, inspecting all individuals and/or cars passing through a checkpoint eliminates this risk. However, there may be situations where inspecting 100% of individuals and/or cars is not feasible or even desirable. In such situations, on-scene officers must execute preestablished selection criteria, nullifying their ability to use inspections as a subterfuge for targeting individuals for any other reason.[181]

B. *Inspections, Pretext, and a Model for Mitigating Abuse*

An example of the deterrent benefit of use of inspections in a manner that creates the appearance of random target selection is provided by military practice. Pursuant to the authority to maintain the health, welfare, and readiness of a military unit, military commanders are authorized to conduct periodic inspections.[182] These inspections include intrusions intended to validate service-member fitness for duty, the readiness of military equipment, and the safety of the military community.[183]

It is a common misconception that service members lose their Fourth Amendment rights once they commence service.[184] In fact, the Fourth Amendment continues to apply to service members, even when performing duties or living in military housing.[185] Thus, the Fourth

179 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000) ("In *Prouse*, we invalidated a discretionary, suspicionless stop for a spot check of a motorist's driver's license and vehicle registration. The officer's conduct in that case was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.'" (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979))).

180 *See supra* note 144 and accompanying text.

181 *See supra* note 144 and accompanying text.

182 *See* MIL. R. EVID. 313.

183 *See id.*

184 "People often assume that military members give up many, if not all, of their Constitutional rights upon joining the military. In reality, military members enjoy the same rights that civilians do, if not better." *Your Rights*, JAG DEF., https://jagdefense.com/your-rights [https://perma.cc/B4Q2-5FH4].

185 Aside from a limited inspection regime and the need for discipline and military readiness, a servicemember has Fourth Amendment protections in a shared barracks

Amendment would apply to bodily intrusions, such as blood tests; the mandatory provision of bodily fluids, such as a urinalysis; or the search of a service member's barracks room, wall locker, or personal items.

When a service member is suspected of engaging in criminal activity, the Uniform Code of Military Justice (UCMJ),[186] as implemented through the Rules for Courts-Martial,[187] the Military Rules of Evidence,[188] and service regulations, provides commanders with authority to order evidentiary searches. Thus, in such situations, military authorities may conduct a search or seizure of a service member in order to discover evidence for use in a criminal prosecution or other disciplinary action. When this is the motivation for the government intrusion, the normal requirements of the Fourth Amendment become applicable. Indeed, the authorities cited above establish the procedural mechanisms for implementing Fourth Amendment protections. Thus, where a military commander seeks to search a service member or an area within the service member's Fourth Amendment protection, a search authorization based on a finding of probable cause is required.[189] And, if evidence discovered during the search is later offered as evidence in a military criminal trial, the Military Rules of Evidence provide for suppression of such evidence

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> room. Undoubtedly, these military needs limit the application of some Fourth Amendment rights in the barracks. However, this Court has acknowledged that "[i]n the military context, the barracks or dormitory often serves as the servicemember's residence, his or her home." To this end, this Court has specifically held that servicemembers have some Fourth Amendment protections in a shared barracks. Indeed, a servicemember's Fourth Amendment protections are at their apex when it comes to secured personal property within the barracks.

United States v. Bowersox, 72 M.J. 71, 78 (C.A.A.F. 2013) (Stucky, J., dissenting) (alteration in original) (first citing United States v. Thatcher, 28 M.J. 20 (C.M.A. 1989); then citing United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993); then quoting United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009); then citing United States v. Conklin, 63 M.J. 333 (C.A.A.F. 2006); and then citing United States v. Middleton, 10 M.J. 123 (C.M.A. 1981)).

186 10 U.S.C. §§ 801–946a.

187 R.C.M. 301–309.

188 *See generally* MIL. R. EVID.

189 *Good Faith Execution of a Warrant or Search Authorization.* Evidence that was obtained as a result of an unlawful search or seizure may be used if:

> (A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant.

Id. 311(c)(3).

based on timely motion and a finding of violation by the military judge.[190]

Ensuring unit readiness and the health and safety of military personnel, facilities, and equipment also requires military commanders to conduct inspections.[191] Unlike crime-control–motivated searches, inspections are conducted for a primary purpose distinct from law enforcement. However, like a traditional law enforcement search, the scope of these inspections is often extremely intrusive, including the requirement of urine samples on order of a responsible commander.[192] And, following the same logic applicable to special needs programs in the civilian context, any contraband discovered during the scope of the inspection, whether related or unrelated to the motivation for the inspection, will be admissible as evidence against a service member if tried by court-martial.[193]

This admissibility rule derives from the fact that the primary purpose of military inspections is not general crime control, but instead ensuring the readiness of the military unit and the health and safety of military personnel and the military community.[194] Accordingly, the admissibility of evidence discovered during inspections is dictated by the same principles that dictate admissibility of evidence discovered during a special needs search: so long as the evidence was discovered within the legitimate scope of the inspection, it is admissible, even if completely unrelated to the interest justifying the inspection.[195] Thus, contraband discovered during a barracks inspection will be admissible even if it is unrelated to a specific safety and readiness concern.[196]

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190 *Id.* 311(a) ("*General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if: (1) the accused makes a timely motion to suppress or an objection to the evidence under this rule . . . .").

191 An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Mil. R. Evid. 312.

Id. 313(b).

192 *See* U.S. Dep't of the Army, Reg. 600-85, The Army Substance Abuse Program, § 4-5 (July 23, 2020).

193 *See* MIL. R. EVID. 316(c)(5)(C) ("Property or evidence . . . may be seized for use in evidence . . . if . . . [t]he person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.").

194 *See supra* note 191 and accompanying text.

195 *See supra* note 193 and accompanying text.

196 *See supra* note 193 and accompanying text.

Like a special needs search, there is always a risk that inspection authority will be abused as a subterfuge to avoid more demanding Fourth Amendment and UCMJ requirements to justify an evidence search. Protection against such subterfuge is actually more advanced in military practice than civilian practice. In the civilian context, suppression of evidence discovered during an asserted special needs program would require a defendant to demonstrate that the primary purpose of the asserted special need was in fact general crime control.[197] In military practice, Military Rule of Evidence 313 establishes a presumption of inadmissibility whenever an inspection is ordered immediately following the report of criminal activity, or when it is directed only at one service member.[198] In such circumstances, the prosecution must establish by clear and convincing evidence that the inspection was ordered for a legitimate non-law-enforcement purpose in order to offer evidence discovered against an accused service member.[199]

There are important lessons to derive from this longstanding military experience balancing the competing interests of individual privacy and unit readiness implicated by suspicionless searches. One, of course, is the deterrent logic of an appearance of randomness. While prior establishment of both the timing and scope of inspections is an important indicator of a legitimate primary readiness purpose, creating the perception of randomness increases the deterrent effect of inspections. This is most notable in relation to urinalysis drug screening. When service members are able to accurately predict the timing of such inspections, or perhaps the subcomponents of a unit that will be subjected to the inspection, they are armed with information necessary to avoid detection of drug use. However, when the preestablished formula for conducting such inspections is confidential, the risk equation related to the use of illegal drugs is substantially altered, as the service members cannot predict the relative opportunity to avoid detection. Another lesson to learn from military practice is the need to provide some mechanism to guard against the pretextual use of special needs inspections. This mechanism is more advanced in military practice, almost certainly because the use of inspections is far more prevalent than in broader civilian society.

The permissible scope of military inspections is, however, the most important lesson related to the use of IFCP programs proposed in this

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197 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000) ("In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.").

198 MIL. R. EVID. 313(b)(3)(B)(i)–(ii).

199 *Id.*

Article. The Rule 313 presumption of evidence inadmissibility is a direct affirmation of the principle proposed above: that intrusiveness alone is an insufficient benchmark of compliance with the special needs doctrine. Instead, the decisive question is whether the intrusiveness is objectively linked to the primary protective purpose of the program.[200] Thus, in the military context, subjecting one service member to a more intrusive inspection than his or her peers suggests that the scope of the intrusion was not in fact motivated by a legitimate non-law-enforcement primary purpose.[201] But no such presumption arises when the intrusiveness of the inspection is identical to that of other members of the unit, no matter how extensive the intrusion may be.

C. *The Essential Link Between Necessity and Intrusiveness*

When a public safety special need necessitates a more extensive intrusion than a checkpoint seizure, that level of intrusion does not undermine the objective legitimacy of the program. For example, where police are attempting to apprehend a dangerous prison escapee, it would be illogical to restrict vehicle checkpoint searches to only observation of the auto interior. Instead, allowing police to require drivers to open vehicle trunks is logically within the scope of the special need.[202] Thus, as indicated in *Sitz*, the key scope consideration is not the extensiveness of the intrusion, but instead that it is narrowly tailored to address the special need.[203]

Accordingly, any IFCP program must be based on a two-pillar foundation. The first pillar is empirical data that validates the asserted causal relationship between the dangers to public safety associated with firearm violence and illegal possession of firearms. Inherent in this relationship is a requirement that the location and timing for IFCP use is linked to a location suffering from substantial firearm violence. The second pillar is a logical causal link between the scope of the IFCP inspection and the areas where illegal firearms are routinely concealed. The first causal relationship provides the special need justifying the IFCP; the second causal relationship dictates the permissible scope of the inspections.

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200 *See id.* 313(b); *see also Edmond*, 531 U.S. at 38, 41–43.

201 *See* MIL. R. EVID. 313(b)(3)(B)(iii).

202 *See generally Edmond*, 531 U.S. at 44.

203 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990).

D. *Location, Timing, and the Elephant in the Room*

It is clear that any valid special needs inspection must be predicated on a genuine and objectively verifiable causal relationship between the targeted public safety threat and the nature of the intrusion into Fourth Amendment protections.[204] Accordingly, when assessing the validity of checkpoint inspections in response to threats such as intoxicated drivers or would-be terrorists, the location and timing of the checkpoint must bear a rational relationship to the locus of the potential threat.[205] In *MacWade*, this justified checkpoints at subway entrance points, but would arguably not have justified checkpoints on the streets with no indication that the pedestrians were planning to enter the subway.[206] Likewise with DUI checkpoints, conducting them late at night is rationally connected to the assumption that the risk of intoxicated drivers is linked to that time of the evening.[207] In contrast, it would arguably be unreasonable to use them on a Sunday morning outside of a church parking lot.

Any plausibly valid IFCP must therefore be limited to only those areas and times where data indicate a genuine risk of violence related to illegally possessed firearms. In the abstract, this consideration is a rational element of reasonableness. However, in practice, this will almost certainly implicate concerns over disparate impact on low-income urban communities with predominantly minority populations.

Of course, this might not always be the case. If crime-violence-risk statistics dictate the location and timing element of reasonableness, IFCPs could be used in any community where indications of firearm-related violence manifest a protective necessity. For example, it might be reasonable to utilize IFCPs on university campuses in response to the increasing and unfortunate phenomenon of campus firearm violence, or it might be reasonable to use IFCPs in areas of major public gatherings, such as sporting or entertainment events. But in reality, it is almost certainly police departments in urban communities with high crime rates that would be most likely to consider using IFCPs if they were viewed as an available tactic to remove illegal firearms from the street. How this would impact the legitimacy of such a tactic is a complex question.

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204 *See Edmond*, 531 U.S. at 37–38, 41.

205 *See id.* at 37–43.

206 *See* MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006).

207 *See Sitz*, 496 U.S. at 460 (Stevens, J., dissenting) ("A sobriety checkpoint is usually operated at night at an unannounced location.").

Disparate impact should not, however, standing alone, provide a sufficient basis to condemn a special needs program so long as the disparate impact is not the result of a discriminatory motive. While use of IFCPs in high-crime communities might create a perception of discriminatory motive, it is actually the special need that would objectively rebut this motive. The requirement that the special needs program result in a reasonably effective response to a genuine public safety threat would explain the location and timing for implementing IFCPs.[208] Thus, it would be the evidence of firearm-related threats to public safety that explained the use of IFCPs in high-crime communities, and not the fact that those communities may or may not be predominately minority in population.

Accordingly, the IFCPs might impact one group of citizens much more than others, but not because of any consideration related to the race of those citizens. Instead, it would be the risk that group of citizens confronted on a day-to-day basis that necessitated the imposition of the checkpoint intrusion. When the threat is intoxicated drivers, only citizens who are on the public roads at night will be impacted by the intrusion; when the risk is subway terrorist bombings, only citizens who ride the subway will be impacted; when the risk is an escaped violent felon, only citizens driving in the area of the escapee will be impacted;[209] when the risk is firearm violence associated with illegal firearms, only citizens who are in the areas at risk of that violence will be impacted by IFCPs. Indeed, allowing police to use IFCPs in other communities, perhaps in an effort to demonstrate demographic neutrality, would itself be unreasonable because it would decouple the intrusion from an objective primary public safety purpose.

Ultimately, when data such as that summarized in Part I indicates that a certain community suffers unusually high incidents of illegal firearm-related violence, that data provides the requisite empirical support for the two essential pillars that render checkpoint inspections reasonable. This data, coupled with narrowly tailored and properly managed checkpoint programs, should support the constitutionality of using IFCPs in areas plagued by high levels of life-threatening violence associated with illegally possessed firearms. In these areas, an IFCP inspection would reasonably allow cursory pat downs of pedestrians, cursory views in bags carried by pedestrians, and cursory inspection of automobiles in areas likely to conceal an illegal firearm. Preestablished programs for the use of such IFCPs would minimize the opportunity

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208 *See generally MacWade*, 460 F.3d at 264 ("In order to enhance the Program's deterrent effect, the NYPD selects the checkpoint locations 'in a deliberative manner that may appear random, undefined, and unpredictable.'").

209 *See Edmond*, 531 U.S. at 44.

for individual police officers to abuse the program in order to single out certain individuals or otherwise avoid the normal Fourth Amendment individualized-suspicion and cause requirements applicable to any search for evidence.

E. *Mitigating Intrusiveness Through Program Implementation*

Like a DUI checkpoint, it is undeniable that the majority of citizens subjected to an IFCP (or any special needs seizure or search) will be law abiding.[210] Indeed, as noted above, the very essence of the special needs exception is to permit narrowly tailored impositions on individual liberty without even a minimal quantum of individualized suspicion.[211] In the context of something like a DUI checkpoint or subway bag-check program, the burden of this imposition is spread randomly and evenly among all members of a community; no one would anticipate that only a specially impacted segment of the community would be subjected to these programs. But an IFCP would, by necessity, almost certainly produce a more disparate impact on underprivileged and/or minority citizens. This is because the rationale for the search/inspection must be linked to the locus of the firearm-violence risk to the community.[212]

Statistics indicate that while firearm violence is a pervasive and widespread problem in the United States, the deadly impact of firearm violence is most acute in urban communities, particularly in large urban areas.[213] Indeed, many Second Amendment advocates argue that the United States does not have a gun problem, but that only a few cities have a problem. They posit that extracting the pervasive violence in these areas from national statistics indicates that the risk of firearm possession is far lower than many assert.[214]

Outrage and frustration among citizens of these impacted communities certainly supports the conclusion that they

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210 *Cf. Sitz*, 496 U.S. at 455 (arguing that the advancement of the State's interest in preventing drunken driving was sufficiently shown by (a) the fact that, in the one checkpoint conducted under the program, approximately 1.6% of all the drivers stopped were arrested for drunken driving; and (b) expert testimony that experience in other states demonstrated that checkpoints resulted in the arrest of about 1% of all drivers stopped).

211 *See supra* note 26 and accompanying text.

212 *See supra* note 157 and accompanying text.

213 *See* DECADES IN THE MAKING, *supra* note 1, at 22.

214 *See, e.g.*, Samuel Stebbins, *Cities with the Most Gun Violence*, 24/7 WALL ST. (Jan. 11, 2020, 7:12 AM), https://247wallst.com/special-report/2019/08/04/cities-with-the-most-gun-violence [https://perma.cc/8WRV-J5UW] ("Of course, gun violence rates can vary substantially by city. In some of America's most violent metro areas, firearm death rates are more than double the comparable national rate. Gun violence is included in the FBI's serious crime report.").

disproportionately suffer the consequences of firearm violence in America but also understand the need for more effective governmental action to mitigate this risk.[215] This does not, of course, suggest an unlimited tolerance for police impositions on individual liberty as a tactic to enhance community safety. But it does suggest that IFCPs, if narrowly tailored and carefully implemented, might generate public support. The following proposals related to program implementation would arguably enhance the perception of balance between liberty and security and in so doing enhance the credibility of any IFCP.

1. IFCPs and "Safe Havens"

One way to promote the primary public safety purpose of an IFCP is to link it to "safe havens." Safe havens are places where people can interact with their community with a substantially reduced fear of violence, especially firearm violence. These safe havens can be established in community centers, churches, and parks.[216]

The concept of safe zones or safe havens is not a novel concept.[217] Indeed, these are increasingly recognized as a response to community violence. For example, in Los Angeles County, "the Department of Parks and Recreation (Parks) in partnership with the Los Angeles County Sheriff's Department, Chief Executive Office, Department of Public Health (DPH), and many other county and community partners" created a program called "Safe Summer Parks."[218] Safe

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215 I spent almost a decade in government lobbying for many of the strategies set out in this book, with some successes but also a few failures and frustrations. At times my recommendations have made sense but lacked public recognition and support. This book is, in essence, an effort to cut out the middleman—if I can convince you that there are solutions available to radically reduce the problem of urban violence, my hope is that policy makers and politicians will fall in line when you demand action. As you read, I will challenge you to reexamine how you think and feel about violence, crime, urban policy, and maybe even race and politics. You may be persuaded by the science or by the stories, but one way or another, my hope is that you will come to the same conclusion: more can and should be done to stop the bleeding and save lives.

ABT, *supra* note 61, at 23.

216 *See generally* KELLY N. FISCHER & STEVEN M. TEUTSCH, L.A. CNTY. DEP'T OF PUB. HEALTH, SAFE SUMMER PARKS PROGRAMS REDUCE VIOLENCE AND IMPROVE HEALTH IN LOS ANGELES COUNTY 2 (2014), https://nam.edu/wp-content/uploads/2015/06/BPH-SafeSummerParks.pdf [https://perma.cc/6APY-PG64] ("Parks have great potential to serve as community centers for underserved communities and residents of all ages, providing a convenient and neutral space to access a range of health and social services, build community networks, and provide free and low-cost opportunities for recreation, education, and outreach in a safe space.").

217 *See id.*

218 *Id.* at 2–4.

Summer Parks is a seasonal program aimed at creating safe spaces for the community to enjoy recreational and educational activities.[219] According to Los Angeles County,

> This strategy originated as part of local violence reduction initiatives and illustrates how a public health approach involving many agencies can reduce crime and may improve community health and well-being. Safe Summer Parks programs (Summer Night Lights [SNL]) began in the City of Los Angeles in 2008 as part of the mayor's Gang Reduction and Youth Development (GRYD) initiative, a comprehensive violence prevention strategy that includes prevention, intervention, and suppression strategies targeted to select communities with high rates of gang violence. Other jurisdictions in the county soon followed suit, developing their own Safe Summer Parks programs.[220]

Parks in these communities were underutilized because people in the community feared the pervasive risk associated with gangs and violence.[221] With help from the Los Angeles County Sheriff's Department, events hosted by the program were made safe.[222]

Unfortunately, the extent of these programs is limited, often to only weekends or the summer months.[223] This may be the result of the intensive law-enforcement manpower required to provide a sufficient deterrent presence. The resource costs required to produce this effect are an inherent constraint on effectiveness. Furthermore, the limited timing essentially signals to wrongdoers when it is safe for *them* to frequent these areas, undermining the overall deterrent effect of the program. IFCPs, whether periodic or permanent, would arguably substantially enhance the deterrent effect of police efforts while at the same time allowing for increased safety-measure implementation, contributing to maintaining these areas as safe havens from firearm violence.

Safe zones are intended to provide members of the community with a high degree of confidence that while in those zones the risk of

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219 *Id.* at 1 ("By keeping parks open late during summer weekend evenings, jurisdictions are providing vulnerable communities with a safe space to gather, free recreation and educational programming, and access to needed health and social service resources.").

220 *Id.* at 2–3 (citations omitted).

221 *Id.* at 2 ("[E]xisting parks are underutilized due to fear of violence and high levels of crime and gang involvement . . . .").

222 *See id.* at 3 ("Safety is a core element of PAD—sheriff's deputies patrol the events and participate in activities along with community members.").

223 *See id.* ("PAD was specifically designed for summer evening hours, when crime rates are highest and youth have fewer social and recreational opportunities.").

community violence is substantially mitigated.[224] Such zones seem especially important in urban communities where the population relies almost exclusively on public spaces for recreation and for the inherently therapeutic benefit of the natural environment.[225] Parks, community centers, and other locations where people gather for such activities are ideal locations for the creation of such safe zones.

Public safety in such areas is normally enhanced by a substantially increased law-enforcement presence.[226] However, integrating IFCPs into those law-enforcement efforts would ideally enhance the deterrent effect of that presence and the accordant public confidence in the safety of these zones. This limited locus of such checkpoints would also reduce the overall impact on individual liberty. It would also enable any citizen to avoid the checkpoint by choosing not to enter the zone, a factor that played an important role in the finding that the subway bag-check program in *MacWade* fell within the special needs doctrine.[227]

Including IFCPs as part of an integrated program for the creation of safe zones would also enhance the reality and perception that these checkpoints were implemented for a legitimate special need. In other words, unlike random placement, the close connection with the safe zone implies a genuine primary public safety purpose. Because of this, such integration may be an ideal tactic to test the efficacy and legitimacy of the IFCP.

Linking IFCPs to community safe zones will also ideally enhance program legitimacy in the eyes of the public. Unlike a randomly placed IFCP focused on vehicle inspections, linking the program to an overall community effort to enhance confidence in a limited number of safe zones will mitigate the perception that the program is nothing more than a pretext to harass community citizens based on a discriminatory motive.[228] This tactical implementation of IFCPs could provide

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224 *See id.* at 2 ("Perception of safety and high rates of crime reduce residents' willingness to gather in public space, with consequent social isolation and decreased civic engagement." (first citing LARRY COHEN, RACHEL DAVIS, VIRGINIA LEE & ERICA VALDOVINOS, PREVENTION INST., ADDRESSING THE INTERSECTION: PREVENTING VIOLENCE AND PROMOTING HEALTHY EATING AND ACTIVE LIVING (2010); and then citing Caterina G. Roman & Aaron Chalfin, *Fear of Walking Outdoors: A Multilevel Ecologic Analysis of Crime and Disorder*, 34 AM. J. PREVENTIVE MED. 306 (2008))).

225 *See id.*

226 *See id.* at 5.

227 *See* MacWade v. Kelly, 460 F.3d 260, 270 (2d Cir. 2006) ("[T]he Program's voluntary nature illuminates its purpose: that an individual may refuse the search *provided* he leaves the subway establishes that the Program seeks to prevent a terrorist, laden with concealed explosives, from boarding a subway train in the first place.").

228 But the difference between notice and surprise is only one of the important reasons for distinguishing between permanent and mobile checkpoints. With respect to the

communities most negatively impacted by firearm violence with some much-needed reprieve and spaces where they can gather with a high degree of confidence that wrongdoers will be deterred from engaging in such violence.[229]

This rationale seems to already be reflected in public tolerance of safety inspections as a condition of entering public schools.[230] Community outrage over school violence has led to implementation of such inspections, normally by using metal detectors at entry followed by more extensive inspection upon alert.[231] In this regard, it is important to consider that school administrators already have broad authority to conduct protective searches of students and their property.[232] This authority was endorsed by the Supreme Court in *New Jersey v. T.L.O.*[233] That case involved the search of a student's pocketbook.[234] As Justice Powell noted in his concurrence, the unique nature of school administration, coupled with the importance of protecting the student population from risk, justified permitting warrantless searches based on reasonable suspicion.[235] As explained by Justice White writing for the majority,

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> former, there is no room for discretion in either the timing or the location of the stop—it is a permanent part of the landscape. In the latter case, however, although the checkpoint is most frequently employed during the hours of darkness on weekends (because that is when drivers with alcohol in their blood are most apt to be found on the road), the police have extremely broad discretion in determining the exact timing and placement of the roadblock.

Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 464 (1990) (Stevens, J., dissenting).

229 Serious and violent crimes in the communities surrounding the original three parks declined 32 percent during the summer months between 2009 (the summer before the program started) and 2013, compared to an 18 percent increase in serious and violent crime during this period in similar nearby communities with parks that did not implement PAD. . . . Ninety-seven percent of respondents to a 2013 survey felt safe during PAD. Most participants (86 percent) said they felt safe from crime in their neighborhoods. However, of those who did not feel safe, 88 percent reported that they felt safe during PAD-sponsored events.

FISCHER & TEUTSCH, *supra* note 216, at 5.

230 *See In re* Latasha W., 70 Cal. Rptr. 2d 886, 887 (Ct. App. 1998) (discussing constitutionality of use of metal detectors in schools). *See generally School Metal Detectors*, NAT'L SCH. SAFETY & SEC. SERVS., https://www.schoolsecurity.org/trends/school-metal-detectors [https://perma.cc/W5GB-2SH4] (urging schools to consider limitations of and alternatives to metal detectors, despite pressure from communities and the media's desire for them).

231 *See In re Latasha W.*, 70 Cal. Rptr. 2d at 886.

232 *See* New Jersey v. T.L.O., 469 U.S. 325, 341–43 (1985).

233 *Id.*

234 *Id.* at 355 (Brennan, J., dissenting).

235 *Id.* at 350 (Powell, J., concurring) ("And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.").

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.[236]

In *Safford Unified School District #1 v. Redding*, the Court reaffirmed the basic public school exception to the warrant and probable cause requirement of the Fourth Amendment, but also indicated that, like the special needs doctrine, the nature of the intrusion must be narrowly tailored to the nature of the risk.[237] That case struck down the constitutionality of a strip search of a student based on suspicion that she was in possession of an anti-inflammatory over-the-counter drug.[238] The Court concluded that the risk that drugs might be shared could not justify the scope of the search, although it did justify searching short of that extent[239]:

> If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.
>
> Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. . . .
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> . . . .
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> . . . He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.
>
> Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear.[240]

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236 *Id.* at 339 (majority opinion) (citation omitted).

237 557 U.S. 364, 370 (2009).

238 *Id.* at 368–69, 376–77, 379.

239 *See id.* at 373–76.

240 *Id.* at 374–76.

The fact that suspicionless inspections have been implemented in many public schools—especially in high-violence areas—suggests a recognition that even the minimal standard of reasonable suspicion creates an unacceptable impediment to ensuring the safety of the school environment.[241] Nor has this tactic been limited to schools in urban areas. The sad reality of mass shootings in public schools throughout the country has led to an increasingly common use of these entry inspections.[242] This reveals a public tolerance for such measures when limited to a facility or area where confidence in public safety is at a premium. This same rationale seems equally compelling in relation to safe zones.

2. Firearm-Detection Dogs

"Contraband-detection canine" is nothing new in the lexicon of Fourth Amendment analysis.[243] It is common knowledge that police rely heavily on such dogs for a wide variety of tasks.[244] Whether the use of a canine to detect the presence of illegally possessed narcotics in a suitcase amounted to a search was addressed by the Supreme Court in *United States v. Place*.[245] In that case, the respondent was confronted by police at LaGuardia Airport in New York.[246] He was informed that they suspected him of carrying illegal narcotics in his suitcase and they asked for consent to search.[247] Following his refusal, police seized the suitcase, held it for an extended several days, and ultimately obtained a warrant to search it after a narcotics canine alerted on the bag.[248] The search uncovered cocaine.[249]

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241 *But see id.* at 377 (finding the strip search of a student unreasonable in light of the circumstances despite the "high degree of deference that courts must pay to the educator's professional judgment").

242 *See School Metal Detectors*, *supra* note 230 ("Following high-profile incidents of school violence, such as school shootings or stabbing incidents, it is not uncommon for some parents, the media and others in a school-community to call for metal detectors in response to such incidents.").

243 *See, e.g.*, United States v. Place, 462 U.S. 696, 706–07 (1983).

244 *See generally* AKC Staff, *What Do K-9 Police Dogs Do?*, AM. KENNEL CLUB (Sept. 3, 2021), https://www.akc.org/expert-advice/lifestyle/what-do-police-dogs-do [https://perma.cc/R9KH-WMVD].

245 462 U.S. at 697–98.

246 *Id.* at 698.

247 *Id.* at 699.

248 *Id.*

249 *Id.*

The Court held that the police violated the Fourth Amendment, but not because the canine detection amounted to a search.[250] Instead, the issue that doomed the government was that police retained possession of the suitcase for far longer than was reasonably necessary to confirm or negate their reasonable suspicion that it contained illegal narcotics.[251] But on the issue of the dog sniff, the Court noted that

> [t]he Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.[252]

Place raises an important question: What impact could the use of canines trained to detect the presence of firearms have on the efficacy and intrusiveness of an IFCP? If efficacy would be enhanced while at the same time reducing intrusiveness, this tactic may be the essential component of creating IFCPs that comply with the Fourth Amendment.[253]

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250 *Id.* at 707, 710.

251 *Id.* at 709–10.

252 *Id.* at 706–07 (quoting United States v. Chadwick, 433 U.S. 1, 7, 13 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991)).

253 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448–49 (1990).

But *Place*'s assessment of the effect of a canine sniff for narcotics also indicates why a combination of IFCPs *and* firearm-detection canines could prove so significant.[254] First, the officers in *Place* were justified in their initial stop of Place and seizure of his luggage.[255] This was because they acted pursuant to reasonable suspicion, which authorized them to conduct a brief investigatory seizure of both the person and property in order to confirm or negate that suspicion.[256] However, absent that suspicion they would have had no authority to initiate those seizures, no matter how briefly.[257] The entire rationale of a special needs–based IFCP is that the requirement to establish reasonable suspicion to justify even a brief seizure substantially impedes the ability of police to mitigate the risk to public safety resulting from possession of illegal firearms.

Detection by a canine trained to identify firearms would also produce a much more limited authority than detection of narcotics by a canine.[258] According to *Place*, it was the fact that the canine could only detect an *unlawful* item that led the Court to conclude the dog sniff was sui generis.[259] But not all dog sniffs fall into this category. For example, a dog used at the border to detect the presence of food items will indicate what in many cases may be a *lawfully* possessed item.[260] So too with a firearms-detection canine. Indeed, there could be no way to use an alert for the presence of a firearm as an indication of lawful versus unlawful possession. Accordingly, that alert would provide, at best, reasonable suspicion of unlawful possession, allowing the officer to further investigate. But it would not provide the probable cause necessary for a contraband search such as it justified in *Place*.[261]

Linking a firearm-detection canine to the IFCP will bridge these investigatory gaps. First, the checkpoint will allow for a brief seizure to

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254 *See Place*, 462 U.S. at 707.

255 *Id.* at 703 ("We examine first the governmental interest offered as a justification for a brief seizure of luggage from the suspect's custody for the purpose of pursuing a limited course of investigation. The Government contends that, where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial. We agree.").

256 *See id.*

257 *See id.* at 702–06.

258 *Id.* at 707 ("Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.").

259 *Id.*

260 *Cf. id.*

261 *See id.* at 699, 701.

provide the opportunity for a canine detection.[262] Second, if the canine alerts on the vehicle or individual, it will provide reasonable suspicion that justifies further questioning. Specifically, as explained below, it will permit the officer to request disclosure of lawful possession authority.[263] Finally, if the individual denies possession or refuses to provide information indicating lawful possession, then and only then will the alert justify a more extensive inspection. Importantly, this inspection will not be based on probable cause, because the *Place* rationale should not apply to a firearm-detection canine. And even if the officer has reasonable suspicion that the individual is in possession of a firearm, whether it is also reasonable to believe it is an illegal firearm likely to present an immediate danger to the officer is questionable. Without that belief, that reasonable suspicion would not justify even a cursory protective search pursuant to *Terry v. Ohio*.[264] Accordingly, a search to discover the suspected firearm must be based on some other authority, namely special needs.[265]

Training and fielding canines capable of detecting the presence of concealed firearms appears to be feasible.[266] Use of such specially trained canines would substantially mitigate the intrusiveness of IFCPs and the risk of pretextual use by contributing to the narrowly tailored scope of the intrusion. In this sense, such canines would bring IFCPs into closer alignment with the DUI checkpoints approved in *Sitz*; instead of an expansive inspection of every individual subjected to the checkpoint, like in *Sitz* there would be a short detention coupled with a targeted information-gathering tactic—in *Sitz* it was asking the motorist several questions;[267] for an IFCP it would involve allowing the canine to perform its detection action.

As already noted, a narrowly tailored degree of intrusion is a critical aspect of assessing the constitutionality of any special needs

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262 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990).

263 *See infra* note 271 and accompanying text.

264 *See* Terry v. Ohio, 392 U.S. 1, 8 (1968) ("However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, 'had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action.' Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory 'stop' and an arrest, and between a 'frisk' of the outer clothing for weapons and a full-blown search for evidence of crime." (alteration in original)).

265 *See generally* cases cited *supra* note 100.

266 *See generally Accelerant and Explosives Detection Canines*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Oct. 6, 2021), https://www.atf.gov/explosives/accelerant-and-explosives-detection-canines [https://perma.cc/FJ72-GNYE].

267 *See Sitz*, 496 U.S. at 451–52.

checkpoint.[268] Accordingly, any tactic that better aligns an IFCP with a DUI checkpoint will enhance the actual and perceived constitutionality of the program. This will also reduce citizen anxiety by contributing to the perception that only those stops resulting in some indicia of firearm possession will result in a more extensive intrusion, just as some indicator of intoxicated driving triggers the more extensive investigation in the DUI checkpoint context.[269] It is true that a canine alert or some other objective indicia of firearm possession will result in extending the duration of the seizure and a narrowly focused search. But like the DUI checkpoint, once those objective indicia arise, the officer would be independently justified to extend the seizure based on reasonable suspicion.[270]

An IFCP supported by a firearm-detection canine would play out in a similar manner to the DUI checkpoint. First, if the IFCP is targeting a vehicle, the driver would be subject to a brief seizure as a police officer inquires into the presence of a firearm in the vehicle. At this point, the driver would have an opportunity to make the officer aware of whether she is in possession, and the officer could determine whether the possession is lawful. If the driver indicated that there was no firearm in the vehicle, a canine specifically trained to detect only firearms would circle the vehicle.[271] If the canine alerted, the driver would be directed to a secondary location where she would be told to step out of the vehicle. Officers would then search the vehicle based on the probable cause created by the canine alert, pursuant to the automobile exception to the warrant requirement.[272] If the IFCP targeted pedestrians, a canine would arguably result in less intrusiveness as each individual passed through the checkpoint with the canine. A canine alert would provide

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268 *See supra* note 151 and accompanying text.

269 *See Sitz*, 496 U.S. at 447 (explaining Michigan's investigatory DUI process).

270 *See id.*

271 *See generally Accelerant and Explosives Detection Canines*, *supra* note 266 ("ATF trained explosives detection canines can detect firearms and ammunition hidden in containers and vehicles, on persons and buried underground.").

272 This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or an office would not. The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.

South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (first citing Cady v. Dombrowski, 413 U.S. 433, 439 (1973); then citing Cardwell v. Lewis, 417 U.S. 583, 589 (1974) (plurality opinion); then citing *Dombrowski*, 413 U.S. at 439–40; then citing Chambers v. Maroney, 399 U.S. 42, 48 (1970); then citing Carroll v. United States, 267 U.S. 132, 153–54 (1925); and then citing Coolidge v. New Hampshire, 403 U.S. 443, 459–60 (1971)).

reasonable suspicion to briefly seize the pedestrian to inquire about the presence of a firearm. If the pedestrian denied possession, the canine could be used to verify the suspicion. A secondary alert would then trigger a narrowly tailored search pursuant to the special needs doctrine.

It would be implausible to suggest that the use of a firearm-detection canine would negate any anxiety caused by an IFCP, an important factor in the three-part balancing test endorsed by *Sitz* for assessing the constitutionality of a special needs program.[273] However, the *Sitz* Court also emphasized that this anxiety must be assessed from the viewpoint of law-abiding citizens, not someone in violation of the law.[274] The majority determined that because there were signs indicating that a DUI checkpoint was ahead, the law-abiding citizen would be minimally surprised when they were stopped and subjected to police inquiry. Thus, the law-abiding citizen would not fear such an encounter, and because such citizen would have little fear of an adverse consequence from the brief seizure, the anxiety of such a checkpoint was deemed minimal.[275] Other tactics that would contribute to mitigating the anxiety associated with arbitrary police conduct would be the requirement for IFCP locations to be preestablished by senior law enforcement officers. Thus, while locations might seem random to the public (enhancing deterrence), the discretion to select times and locations would in fact be dictated by careful review of firearm-risk information.

In some ways, an IFCP might present fewer concerns than a DUI checkpoint. As noted by Justice Stevens in his *Sitz* dissent, even though limited in duration, the DUI checkpoint at issue vested too much discretion in the on-scene officer to escalate the brief seizure into a more extensive investigation.[276] Specifically, Stevens noted that when an officer attempts to discover whether a driver is under the influence, she has "virtually unlimited discretion to detain the driver on the basis of the slightest suspicion. A ruddy complexion, an unbuttoned shirt, bloodshot eyes, or a speech impediment may suffice to prolong the detention."[277] An IFCP—especially if supported by a firearm-detection

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273 *See Sitz*, 496 U.S. at 452.

274 *Id.* at 452–53 ("The 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop.").

275 *See id.*

276 *See id.* at 464–65 (Stevens, J., dissenting) ("There is also a significant difference between the kind of discretion that the officer exercises after the stop is made. A check for a driver's license, or for identification papers at an immigration checkpoint, is far more easily standardized than is a search for evidence of intoxication.").

277 *Id.*

canine—will not result in the same risk of arbitrary police power. Canines trained for the sole purpose of detecting firearms, rather than the on-scene officer, will provide the dispositive basis for determining which vehicles or individuals will be subject to more extensive investigation. While this method of firearm detection is not foolproof and is susceptible to false alerts induced by a handler improperly triggering the canine,[278] canines are understood to be an efficient and effective tool for law enforcement.[279]

IV. EVIDENTIARY CONSEQUENCES AND SUBTERFUGE RISK

As noted in the Introduction, the benefit of removing illegal firearms from the street is an objective that would likely garner substantial support from a wide array of Americans.[280] This will not, however, be the only consequence of IFCPs. Instead, as noted above, *any* contraband that comes into an officer's plain view during an IFCP inspection would be subject to seizure and use against the individual in a subsequent criminal prosecution.[281] These consequences raise two substantial concerns. First, it is almost inevitable that IFCP inspections will lead to prosecution for crimes completely unrelated to illegal firearm possession. Second, IFCPs will offer law enforcement a convenient tool for subjecting citizens to subterfuge searches cloaked in the appearance of special needs inspections.[282]

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278 Defendants' expert, Steven D. Nicely, submitted a written report, concluding that Rony was not reliable because his training was inadequate to correct problems with lack of motivation, responses to distractors, false alerts, and failures to detect. Nicely reviewed Rony's training and performance records, and speculated as to what would causes [sic] a drug dog to give a false alert, concluding that a canine would be motivated to give a false alert if he sought positive reinforcement. Nicely criticizes the handler's records for not indicating when the handler knew the location of the target odor and when he did not, so as to evaluate when "cues" may have been given, and the failure to use terms consistently, such as "alert" and "indicate."

United States v. Beltran-Palafox, 731 F. Supp. 2d 1126, 1156 (D. Kan. 2010).

279 *See, e.g.*, Andrews v. DuBois, 888 F. Supp. 213, 216–17 (D. Mass. 1995) ("In this regard, the canines are security equipment without which the officers' principal activities could not be performed.").

280 *See supra* note 10 and accompanying text.

281 *See supra* note 30 and accompanying text.

282 *Cf.* Dru Brenner-Beck, *Borrowing Balance, How to Keep the Special-Needs Exception Truly Special: Why a Comprehensive Approach to Evidence Admissibility Is Needed in Response to the Expansion of Suspicionless Intrusions*, 56 S. TEX. L. REV. 1, 3 (2014) ("This rule of evidence was adopted to facilitate the legitimate use of suspicionless searches to protect the safety and security of military units while simultaneously exposing the improper use of such searches as subterfuge to avoid the normal individualized suspicion requirements of the Fourth Amendment.").

Both of these concerns are inherent in the special needs doctrine itself, but neither were addressed by the Court in *Sitz*.[283] Of course, the "primary purpose" component of validity established in *Sitz* and reinforced in subsequent decisions like *Edmond* does mitigate the risk of pretext or subterfuge.[284] However, this element of special needs validity is focused on the programmatic purpose of the program, and it does not fully account for the risk that a valid special needs program might be implemented in a manner intended to achieve a pretextual outcome.[285] In other words, a program might be considered valid based on an objectively assessed primary purpose of protecting the public from an imminent risk, but then utilized as a pretext for avoiding normal Fourth Amendment requirements in order to discover evidence of unrelated criminal wrongdoing.[286]

This risk was arguably minimal in the context of DUI checkpoints, as the likelihood of discovering unrelated contraband was extremely limited by the nature of the intrusion associated with the checkpoints.[287] This would obviously not be the case with an IFCP. These special needs inspections would be more analogous to the subway bag checks approved in *MacWade*, or checkpoints to search vehicles for an escaped violent inmate.[288]

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283 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457–58 (1990) (Brennan, J., dissenting); *see also* Whren v. United States, 517 U.S. 806, 810 (1996) ("Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation.").

284 *See generally Sitz*, 496 U.S. at 454 (discussing the Court's analysis in *Delaware v. Prouse*, 440 U.S. 648 (1979), of effectiveness, discretion, and their impact on the primary purpose); City of Indianapolis v. Edmond, 531 U.S. 32, 37–38 (2000) ("In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.").

285 *See Edmond*, 531 U.S. at 45–47 ("While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." (citing Edmond v. Goldsmith, 183 F.3d 659, 665 (7th Cir. 1999), *aff'd sub nom.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000))).

286 *See* cases cited *supra* note 283.

287 Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

Sitz, 496 U.S. at 447. An IFCP would require a more thorough investigation.

288 *See* MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006); *see also Edmond*, 531 U.S. at 44.

How, if at all, should the risk of pretextual use of special needs inspections influence implementation? One argument might be that this concern is irrelevant: if the program satisfies the objectively assessed primary public safety purpose, there should be no inquiry into potentially improper subjective motives related to implementation.[289] Such an approach would be consistent with the general Fourth Amendment principle that reasonableness is assessed objectively and that pretext motives are normally irrelevant in this assessment.

In the context of inventories, however, the Supreme Court does seem to have left the door open to consideration of pretext in assessing the legality of implementation of an otherwise lawful program.[290] In *South Dakota v. Opperman*, the Court affirmed the reasonableness of conducting administrative inventories of impounded automobiles.[291] Like the special needs doctrine, the primary rationale for this exception to the warrant and probable cause requirement is that the inventory is conducted for an administrative purpose rather than a crime-control purpose.[292] However, the Court also indicated that use of the inventory authority as a pretext for conducting an otherwise unconstitutional search could violate the Fourth Amendment.[293] The Court provided the example of expanding the scope of an inventory beyond what was authorized in the established inventory policy.[294] Later, in *Florida v. Wells*,[295] the Court put teeth in this warning when it held that evidence

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289 *See* Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." (first citing United States v. Robinson, 414 U.S. 218, 236 (1973); and then citing Gustafson v. Florida, 414 U.S. 260, 266 (1973))).

290 The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. As in *Cady*, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.

South Dakota v. Opperman, 428 U.S. 364, 375–76 (1976) (citing United States v. Lawson, 487 F.2d 468, 471 (8th Cir. 1973)).

291 *Id.*

292 *See id.* at 369.

293 *See id.* at 375–76.

294 *Id.* at 374–76 ("As in *Cady*, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.").

295 495 U.S. 1, 4 (1990) ("[T]he opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in

discovered during the inventory of a locked container in an impounded vehicle was inadmissible because the applicable inventory policy did not address how to deal with locked containers.[296]

Because the scope of a special needs search—in contrast to a special needs seizure like that approved in *Sitz*—will in many ways be analogous to an inventory, these decisions suggest the need to incorporate protections against pretextual use of special needs inspections. This would be especially important for IFCPs, because of the extensive scope of the inspection that would be required to satisfy the protective purpose of the program. Thus, while extensive inspection may be objectively justifiable in order to protect the public from the risk of illegally possessed firearms, it may also be appropriate to consider measures to protect individuals from the risk of pretextual use of IFCPs as a subterfuge search to find evidence.

As noted above, addressing the risk of pretextual use of suspicionless inspection authority is a hallmark of military law. This is manifested in Military Rule of Evidence 313's rule of presumptive inadmissibility of evidence when an "examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule."[297] The rule then provides that

> [t]he prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule if a purpose of an examination is to locate weapons or contraband, and if:
>
> (i) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled;
>
> (ii) specific individuals are selected for examination; or
>
> (iii) persons examined are subjected to substantially different intrusions during the same examination.[298]

It is noteworthy that inspection to eliminate the risk of illegally possessed weapons is specifically addressed in Rule 313.[299] In the demanding military environment, where service members are required to perform difficult and often unpleasant tasks, and where young

order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory.").

296 *See id.* at 4–5.

297 MIL. R. EVID. 313(b)(2).

298 *Id.* 313(b)(3)(B).

299 *Id.* 313(b)(3)(A).

service members live in close quarters, the dangers associated with ready access to firearms while on or off duty are self-evident. One measure to protect against this risk is to place limitations on such access, normally involving the requirement that privately owned weapons be secured in the unit arms room. Another is the use of periodic inspections to ensure service members are not in unlawful possession of firearms. It is, however, the ease with which a commander might order such an inspection as a pretext for what is in fact an evidence search that justifies this rule of presumptive inadmissibility.

There is no conceptual reason why a similar evidentiary limitation could not be adopted to address contraband discovered during an IFCP (or for any special needs inspection). This would provide individuals brought to trial based on evidence seized during the course of an IFCP a dual opportunity to challenge admissibility. First, the defendant could challenge the validity of the asserted primary purpose of the program. However, once that primary purpose was validated, a rule of evidence analogous to Rule 313 would offer criminal defendants an alternate basis to challenge admissibility of evidence—one that would not turn on the programmatic primary purpose, but on assessment of pretextual subterfuge on a case-by-case basis.

Like Rule 313, evidence that an IFCP was utilized immediately following a tip of criminal activity, that the defendant was the only individual subjected to an IFCP, or that the defendant was singled out for an especially expanded inspection would trigger a presumption of inadmissibility of any evidence seized during the inspection. If such evidence suggesting subterfuge were offered, the prosecution would then bear a burden to prove that the inspection was in fact implemented for a legitimate public safety purpose. Adopting the same standard applicable in military practice—clear and convincing proof—would add an additional layer of protection against pretext. In military practice, the strongest rebuttal to the presumptive improper use in these circumstances is that the inspection was scheduled prior to any report of criminal activity, and that the scope of the inspection strictly complied with preestablished criteria. Requiring such proof to justify admissibility of evidence seized during an IFCP would substantially mitigate risk of subterfuge use, as it would limit use and execution of IFCPs to situations falling clearly within the scope of the preestablished programmatic objectives.

It is unlikely, however, that police will single out one individual for what they assert is an IFCP inspection, or even subject one individual to a substantially more intrusive inspection than others passing through an IFCP. In practice, it will be more likely that if an IFCP is used as a pretext to search for evidence, it will be either because police targeted

individuals suspected of criminal activity without sufficient information to establish probable cause, or because police just seek to reap the evidentiary benefit of conducting an IFCP. Both of these invalid motives will be difficult to expose. In the first instance, the defendant would need to uncover some record of a tip or other source of police suspicion; in the second, the defendant would have to find an officer involved in the decision-making process willing to admit the illicit motive.

Because of this, and because of the almost inevitable reality that use of IFCPs will lead to the seizure of contraband unrelated to illegal firearm possession, providing an additional layer of protection against pretextual searches would be an important check to the program: a rule of presumptive inadmissibility for evidence unrelated to the special need. Thus, whenever such unrelated evidence was offered against a defendant, the prosecution would bear the burden to prove by clear and convincing evidence that the IFCP was utilized for a legitimate public safety purpose. If the prosecution can meet this burden—a burden most easily satisfied by proof the IFCP was preplanned and conducted in strict compliance with established procedures—the evidence will be admissible; if this burden is not met, the contraband may be destroyed but may not be used as evidence.

As noted above,[300] nothing in established Fourth Amendment jurisprudence necessitates linking use of IFCPs with this type of limited-use rule of evidence. However, military practice in the use of extensive inspections indicates the wisdom of such a rule. No matter how compelling the logic of the special needs doctrine may be in response to serious public safety threats, it is impossible to implement such programs in a way that limits their impact to only those individuals who in fact pose that public threat. Indeed, the entire doctrine is premised on the necessity of impacting law-abiding individuals in order to detect and deter those who do indeed pose a threat. As noted by the dissent in *Sitz*,[301] this creates an inevitable friction with the motivation for the Fourth Amendment: to protect the people from general searches absent even minimal individualized suspicion.[302] While a military-type limiting rule cannot completely eliminate this friction, it can mitigate it, an outcome that contributes to striking a fair balance between public safety and individual liberty.

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300 *See supra* Part IV.

301 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457–58 (1990) (Brennan, J., dissenting).

302 *Id.* at 458–59.

CONCLUSION

Violence associated with illegal firearms presents a genuine and increasing public health and safety threat to especially affected areas of our nation. Notorious among these areas are low-income communities in some of our largest cities. When death and injury rates associated with firearms exceed those associated with military combat deployments, the governmental interest in taking all reasonable measures to reduce this risk need not be conceived as general crime control, but instead as a public safety imperative. Removing illegal firearms from public circulation, and deterring individuals from carrying such firearms, is a logical measure to achieve this compelling public safety interest.

The special needs doctrine evolved to strike a rational balance between the government's interest in protecting the public from a genuine threat and individual privacy protected by the Fourth Amendment. This doctrine allows for the use of programmatic seizures and searches without individualized suspicion or cause, so long as the objective primary purpose of the program is public safety and not general crime control. Where such a primary purpose exists, the scope of permissible seizures and searches must be strictly limited to the nature of the threat the program seeks to detect or deter. However, there is no requirement that the scope be minimal. Thus, while a brief traffic stop is the extent of the permissible seizure to detect or deter intoxicated drivers, more intrusive searches are justified to protect subway passengers from terrorist explosives, or to recapture an escaped violent felon.[303]

The link between firearm-related violence in high-crime areas and illegal firearm possession supports the conclusion that protecting the public from these weapons falls within the scope of this doctrine. Accordingly, police should be permitted, consistent with the Fourth Amendment, to implement programs to detect and deter possession of illegal firearms. The permissible scope of such illegal-firearm checkpoint searches must be sufficient to achieve that purpose. For the individual, this would allow a cursory pat down and observation into the contents of bags and other containers; for automobiles, police would be allowed to do a cursory inspection of those parts of the interior where firearms could easily be concealed.

Use of such checkpoint inspections does, however, raise significant concerns of police subterfuge. The necessarily expansive scope of such searches, coupled with the Fourth Amendment principle that *any*

303 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

contraband discovered within the lawful scope of a special needs intrusion is admissible even if the contraband is completely unrelated to the public safety interest, will almost certainly lead to prosecutions for crimes unrelated to the special need.

Mitigating the risk of the pretextual use of illegal-firearm checkpoints as a subterfuge to conduct otherwise unlawful suspicionless searches is, therefore, an equally compelling consideration. Because of the pervasive use of special needs inspections in military society, military practice provides a useful analogue to address this concern. Specifically, any state considering allowing the use of illegal-firearm checkpoints should consider limiting the impact of such a program by adopting an evidentiary gatekeeping rule analogous to Military Rule of Evidence 313. That rule would trigger a presumption of invalid use and accordant inadmissibility of evidence based on evidence that the checkpoint was implemented in especially dubious circumstances: immediately following a tip of a crime, directed against only the defendant, or subjecting the defendant to a substantially greater intrusion than other individuals subjected to the inspection. The protection against pretext would be further enhanced by a rule of presumptive inadmissibility for any contraband seized during the inspection unrelated to the protective special need, requiring clear and convincing evidence that the checkpoint inspection was used for a genuinely legitimate purpose.

Coupling use of illegal-firearm checkpoint inspections with a limited-use rule of evidence analogous to Rule 313 is certainly an unusual approach to a special needs program. Nothing in the Supreme Court's special needs jurisprudence suggests the need to consider or adopt such an approach to mitigate the risk of pretext. However, such a rule is certainly not impermissible, and if it contributes to ensuring a legitimate primary protective purpose not only at the programmatic level, but also at the implementation level, then it can only enhance the validity of prosecutions resulting from the seizure of contraband at such checkpoints.

Ultimately, invoking the special needs doctrine to address the public safety threat associated with firearm violence is compelling and troubling at the same time. It is compelling because it does offer what could be an effective law-enforcement tool to reduce the number of casualties produced by illegal firearms in crime-plagued communities; it is troubling because it opens the door to suspicionless searches of expansive scope that will often lead to seizure of completely unrelated contraband. But the special needs doctrine, when properly managed through programmatic implementation and judicial oversight, is intended to strike a rational balance between these two competing

interests. Pretending that the doctrine is inapplicable to this public safety threat serves no genuine interest; serious consideration of if and how the doctrine can be applied to address this threat does.