

CRIMINAL LAW — FOURTH AMENDMENT — SECOND CIRCUIT
HOLDS NEW YORK CITY SUBWAY SEARCHES CONSTITUTIONAL
UNDER SPECIAL NEEDS DOCTRINE. — *MacWade v. Kelly*, 460 F.3d
260 (2d Cir. 2006).

Just over two decades ago, Justice Brennan lamented of the special needs doctrine that its “Rorschach-like ‘balancing test’ . . . portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens.”¹ Under the special needs doctrine — an exception to the Fourth Amendment’s general prohibition against warrantless, suspicionless searches² — when a search serves a goal other than general law enforcement, a court may balance private and public interests to determine whether the search meets the constitutional requirement of reasonableness.³ Though a finding of diminished privacy expectations has traditionally been a linchpin of special needs analysis,⁴ the Supreme Court has suggested that the doctrine’s requirements might be relaxed in the face of an impending terrorist attack.⁵ Recently, in *MacWade v. Kelly*,⁶ the Second Circuit upheld New York City’s subway search program — a program designed to guard against possible terrorist attacks — under the special needs doctrine despite finding that the subjects of the program’s searches en-

¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 358 (1985) (Brennan, J., dissenting); see also *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 640–41 (1989) (Brennan, J., dissenting) (describing the special needs analysis as “a manipulable balancing inquiry under which, upon the mere assertion of a ‘special need,’ even the deepest dignitary and privacy interests become vulnerable to governmental incursion”).

² See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

³ Before considering a search under the special needs framework, a court must establish that the search “serve[s] as [its] immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation.” *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006) (quoting *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005) (second alteration in original)). If the search satisfies this threshold requirement, the court will engage in a balancing test to determine reasonableness, considering “the weight and immediacy of the government interest” as well as “the nature of the privacy interest” that the search allegedly compromised, the character of the intrusion, and “the efficacy of the search in advancing the government interest.” *Id.* at 269 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 830, 832, 834 (2002)); see also *Edmond*, 531 U.S. at 37–40 (describing cases in which the Supreme Court found searches reasonable based on special needs analysis). For an overview of the development of the special needs doctrine, see Gerald S. Reamey, *When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of the Law*, 19 HASTINGS CONST. L.Q. 295 (1992).

⁴ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–57, 666 (1995) (finding searches of students under school’s supervision constitutional based on determination that students have diminished privacy expectations); *Skinner*, 489 U.S. at 620–21, 633 (applying special needs doctrine to allow post-accident drug tests of railway employees, who do not enjoy full privacy expectations due to industry regulation).

⁵ See *Edmond*, 531 U.S. at 44 (“[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.”).

⁶ 460 F.3d 260.

joyed a full expectation of privacy.⁷ In doing so, the court downgraded the role of privacy expectations in the special needs analysis, thereby expanding the scope of warrantless, suspicionless searches that may be found constitutional.

In the wake of a series of terrorist attacks on transportation systems in Spain, Russia, and the United Kingdom, New York City officials set out to protect the city's extensive subway system from terrorist threats.⁸ In the summer of 2005, the New York City Police Department announced a subway search program "designed . . . chiefly to deter terrorists from carrying concealed explosives onto the subway system and, to a lesser extent, to uncover any such attempt."⁹ The police set up checkpoints at selected subway stations and systematically searched the bags of some subway riders.¹⁰ The officers provided notice of the searches through large posters displayed near their search tables and used bullhorns to notify passengers that if they did not wish to be searched, they should leave the station.¹¹ The officers exercised virtually no discretion in executing searches, searching passengers according to a fixed search rate established anew each day by the supervising sergeant at each location.¹² Each search was limited in scope and duration "to what [was] minimally necessary to ensure that the item [did] not contain an explosive device."¹³ Officers were not allowed to read any material inside the containers and were prohibited from searching for nonexplosive contraband.¹⁴

Approximately two weeks after the program commenced, Brendan MacWade and several other subway riders¹⁵ filed a complaint against Commissioner of the New York City Police Department Raymond Kelly, as well as New York City.¹⁶ Seeking both declaratory judgment and preliminary and permanent injunctive relief, they alleged that the

⁷ *Id.* at 273.

⁸ *See id.* at 264. Running twenty-four hours a day and transporting approximately 1.4 billion riders annually, New York's twenty-six-line subway system is crucial to the city's economic and social welfare. It is therefore considered a prime target for a terrorist attack. *Id.*

⁹ *Id.*

¹⁰ *Id.* at 264–65.

¹¹ *Id.*

¹² *Id.* at 265.

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *Id.* These features, the *MacWade* court found, supported the conclusion that the search program was not aimed at regular evidence gathering. *Id.*

¹⁵ All of the plaintiffs were among those subway riders who had been selected to be searched. Some of the plaintiffs had submitted to the searches, which they then complained at trial were intrusive and violative; others had refused to be searched and had instead left the subway station. *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573, at *8 (S.D.N.Y. Dec. 7, 2005).

¹⁶ *See id.* at *1.

search program violated the Fourth and Fourteenth Amendments to the United States Constitution.¹⁷

The United States District Court for the Southern District of New York denied the application for an injunction, finding the search program constitutional.¹⁸ The district court concluded that the program served a special need: reducing the risk of a terrorist attack on the subway.¹⁹ The court based its conclusion on the “vitaly important” governmental interest in preventing a terrorist attack on the subway, the program’s effectiveness in deterring an attack, and the “minimal intrusion” resulting from the searches.²⁰

The Second Circuit affirmed. Before analyzing the facts of the search program, Judge Straub²¹ examined the special needs doctrine and its development.²² The court then concluded that, although most special needs cases have involved subjects with diminished privacy interests, “the Supreme Court never has implied — much less actually held — that a reduced privacy expectation is a *sine qua non* of special needs analysis.”²³ Judge Straub added that this view was consistent with Second Circuit jurisprudence.²⁴

Turning to an analysis of the subway search program, the court agreed with the district court’s “conclusion that the Program aims to prevent a terrorist attack on the subway” rather than “merely to gather evidence for the purpose of enforcing the criminal law.”²⁵ Having found the threshold requirement satisfied, the court then looked at four specific factors relevant to the special needs balancing test. First, the court concluded that the governmental interest in deterring terrorists from planning and executing attacks on New York City’s subway system was “immediate and substantial,”²⁶ especially “[g]iven the ‘enormous dangers to life and property from terrorists’ bombing the

¹⁷ *Id.*

¹⁸ *Id.* at *20.

¹⁹ *Id.* at *17.

²⁰ *Id.* at *20.

²¹ Circuit Judge Newman and District Judge Brieant, sitting by designation, joined the unanimous opinion.

²² *MacWade*, 460 F.3d at 268–69.

²³ *Id.* To support this contention, Judge Straub described the holding in *Ferguson v. Charleston*, 532 U.S. 67 (2001), in which the Court applied special needs analysis but deemed that the subjects’ full privacy expectation was not dispositive because the facts failed the threshold test of showing that the search served a purpose distinct from general law enforcement. *MacWade*, 460 F.3d at 269. Because the issue deemed “critical” was the threshold question of whether the search served a purpose other than general law enforcement, diminished expectations were, by Judge Straub’s reasoning, “not critical.” *Id.*

²⁴ *MacWade*, 460 F.3d at 270.

²⁵ *Id.*

²⁶ *Id.* at 271.

subway.”²⁷ Second, Judge Straub concluded that subway riders enjoy both an objectively and a subjectively reasonable “full expectation of privacy in [their] containers.”²⁸ Third, the court found that the subway search program entailed only a minimal intrusion into this full expectation of privacy; the narrow scope and short duration of the searches, combined with the notice given to riders and the public nature of the searches, supported this conclusion.²⁹ Fourth, Judge Straub determined, based on the testimony of various experts, that the program was a reasonable means of effectively deterring and detecting a subway terrorist attack.³⁰ Weighing the full expectation of privacy against the other three factors, the court concluded that the subway search program was “reasonable, and therefore constitutional.”³¹

The Second Circuit’s decision diminished the role of privacy expectations in special needs analysis. The Supreme Court and the Second Circuit have consistently placed great emphasis on search subjects’ diminished privacy interests when justifying a search based on the special needs doctrine.³² *MacWade*’s express rejection of treating diminished expectations as a threshold requirement, however, leaves the government one fewer hurdle to overcome when arguing that a warrantless, suspicionless search is constitutional. The Supreme Court in *City of Indianapolis v. Edmond*³³ hinted at an expansion of the special needs exception by suggesting that certain otherwise impermissible police activities might be deemed reasonable in the face of a terrorist threat.³⁴ But it is unlikely that the Court intended by this suggestion to weaken Fourth Amendment protections.³⁵

²⁷ *Id.* (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)); *see also id.* at 272 (“In light of the thwarted plots to bomb New York City’s subway system, its continued desirability as a target, and the recent bombings of public transportation systems in Madrid, Moscow, and London, the risk to public safety is substantial and real.”).

²⁸ *Id.* at 272–73. Judge Straub explained that subway riders manifest their expectation of privacy when they carry “closed, opaque bag[s]” and keep their belongings “from plain view.” *Id.* This full expectation of privacy, the court acknowledged, weighed in favor of the plaintiffs. *Id.* at 273.

²⁹ *Id.* at 273.

³⁰ *Id.* at 273–75.

³¹ *Id.* at 275.

³² *See, e.g.,* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–50 (1990); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 627–28 (1989); *Palmieri v. Lynch*, 392 F.3d 73, 79 (2d Cir. 2004); *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004) (“[T]hose subject to [a] search [for which a special need is alleged] must enjoy a diminished expectation of privacy, partly occasioned by the special nature of their situation, and partly derived from the fact that they are notified in advance of the search policy.”).

³³ 531 U.S. 32 (2000).

³⁴ *See id.* at 44.

³⁵ Some courts have explicitly warned against using the threat of terrorist attacks as an excuse to relax Fourth Amendment requirements. *See, e.g.,* *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004) (“While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people.”).

MacWade was correct in asserting that previous cases had not explicitly treated diminished expectations of privacy as a threshold requirement in special needs analysis.³⁶ What *MacWade* ignored, however, was that prior cases' emphases on diminished expectations may amount to an *implicit* threshold requirement. In developing and applying the special needs doctrine, the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n*³⁷ highlighted the importance of privacy interests:

In limited circumstances, where the privacy interests implicated by the search are minimal, *and* where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.³⁸

The conjunctive wording of this passage suggests that a special needs justification is possible only if the search implicates minimal privacy interests.

To establish that the privacy interests are minimal, both the Supreme Court and the Second Circuit have implied that two factors must be present at once: low privacy expectations on the part of subjects and minimally invasive searches. When applying the special needs framework, the *Skinner* Court emphasized both the minimal intrusiveness of the search³⁹ *and* the search subjects' reduced privacy expectations,⁴⁰ suggesting that the combination of these two factors is what led the Court to find the searches constitutional. Similarly, the Second Circuit has treated the nature of the privacy interest as distinct from the character of the intrusion, suggesting that a minimal invasion is not necessarily enough to outweigh a full expectation of privacy.⁴¹ Even in *MacWade*, the court lists the intrusiveness of the search and the privacy interest "compromised" as two separate factors.⁴²

³⁶ See *MacWade*, 460 F.3d at 269–70.

³⁷ 489 U.S. 602 (1989).

³⁸ *Id.* at 624 (emphasis added).

³⁹ *Id.* at 624–27 (finding that the urine, blood, and breath tests utilized by the railroad were minimally invasive).

⁴⁰ *Id.* at 627 ("More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." (emphasis added)). The Court explained that its holding was dependent upon its finding of diminished expectations of privacy:

In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, *and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees*, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired.

Id. at 634 (emphasis added).

⁴¹ See *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004).

⁴² *MacWade*, 360 F.3d at 269.

Other cases have similarly illustrated the crucial role that privacy expectations play in special needs analysis. In his *New Jersey v. T.L.O.*⁴³ concurrence, which is often described as the genesis of special needs analysis in Supreme Court jurisprudence,⁴⁴ Justice Powell argued that the special needs doctrine authorizes a search for students' concealed objects because "[i]n any realistic sense, students within the school environment have a *lesser expectation of privacy* than members of the population generally."⁴⁵ Likewise, in *Vernonia School District 47J v. Acton*,⁴⁶ the Court devoted nearly four full pages to explaining that schoolchildren possess diminished expectations of privacy because of the custodial and supervisory nature of the school setting.⁴⁷

The areas in which special needs searches have most often been found permissible are those in which expectations of privacy are already diminished. For example, drug testing in the employment context has been upheld as constitutional largely because employees do not enjoy full privacy expectations while at work.⁴⁸ Public school drug testing has also qualified for special needs analysis based on the notion that school supervision reduces students' expectation of privacy.⁴⁹ Courts have similarly upheld special needs searches of individuals under government control or supervision, such as probationers and parolees.⁵⁰

By finding the search program constitutional even after determining that subjects of the searches enjoy a full expectation of privacy, *MacWade* diminished the role of the privacy interest factor in special needs analysis. Though *MacWade* purported to limit its holding to cases in which the governmental interest strongly outweighs the full

⁴³ 469 U.S. 325 (1985).

⁴⁴ See, e.g., *MacWade*, 460 F.3d at 268.

⁴⁵ *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (emphasis added).

⁴⁶ 515 U.S. 646 (1995).

⁴⁷ *Id.* at 654–57. The Second Circuit has similarly emphasized the importance of diminished expectations of privacy within the special needs doctrine. Indeed, *United States v. Lifshitz* includes diminished expectations of privacy as one of the “three principal criteria in assessing whether a ‘special need’ justifies a search.” 369 F.3d 173, 186 (2d Cir. 2004) (finding that the special needs doctrine could justify conditioning probation on probationer’s agreement to submit to monitoring of computer use, in part because people do not have a legitimate expectation of privacy in many of their computer-based transactions, such as Internet searches and e-mail). In *Palmieri v. Lynch*, the Second Circuit described diminished expectations as central to the special needs doctrine: “Warrantless searches have regularly been allowed when they were conducted pursuant to some legislated regulatory scheme *in situations in which there was found to exist a diminished expectation of privacy.*” 392 F.3d 73, 79 (2d Cir. 2004) (emphasis added).

⁴⁸ E.g., *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (noting that government employees are typically subject to a great deal of supervision).

⁴⁹ E.g., *Vernonia Sch. Dist.*, 515 U.S. at 654–57; *Miller v. Wilkes*, 172 F.3d 574, 579 (8th Cir. 1999); *Todd v. Rush County Sch.*, 133 F.3d 984, 986 (7th Cir. 1998).

⁵⁰ E.g., *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975); *United States ex rel. Santos v. New York State Bd. of Parole*, 441 F.2d 1216, 1218 (2d Cir. 1971).

expectation of privacy,⁵¹ future courts may not take this limitation as seriously as *MacWade* may have intended. The result is that courts are likely to construe a broader range of governmental interests as sufficiently important to outweigh full privacy expectations, even when the governmental purpose is not as “vitally important” as preventing a terrorist attack on New York City’s sprawling subway system. Thus, *MacWade* makes it easier for later courts to find suspicionless, warrantless searches and seizures constitutional based on the special needs doctrine.

For example, other cities with less extensive subway systems may find justification in *MacWade* for establishing their own search programs. Indeed, when Massachusetts Governor Mitt Romney announced a Boston program similar to New York’s, the announcement noted the *MacWade* ruling and emphasized that the Boston program incorporated many of the New York program’s features, such as random scheduling and on-site notice.⁵² Despite the differences between the two cities’ subway systems,⁵³ Romney understood *MacWade* as rubberstamping a structurally similar search program in Boston. Because of *MacWade*, Boston has compromised its subway riders’ privacy interests, and it is not difficult to imagine smaller cities and smaller transportation systems following suit. The special needs doctrine was not intended to authorize such sweeping measures.

Moreover, the consequences of the *MacWade* decision could extend beyond programs aimed at preventing terrorist attacks. For example, while every state presently requires certain convicted felons to provide genetic materials to a DNA databank,⁵⁴ relaxing the requirement of diminished expectations may permit states to require more citizens to provide genetic material to state databanks. DNA databanks in nearly every state have thus far been limited to the DNA of prison inmates,

⁵¹ See *MacWade*, 460 F.3d at 271–72.

⁵² Press Release, Executive Dep’t, Commonwealth of Mass., Romney Implements Bag Inspections on the MBTA (Oct. 5, 2006), available at http://www.mass.gov/?pageID=pressreleases&agId=Agov2&prModName=gov2pressrelease&prFile=gov_pr_061006_bag_inspectons.xml. The press release’s subheading reveals the importance of *MacWade* to Boston’s decision to create a search program: “Court Victory in New York Prompts Enhanced Transit Security.” *Id.*

⁵³ New York’s subway carries nearly five million riders daily, while Boston’s carries less than one million; the New York subway system runs twenty-four hours a day, while Boston’s shuts down for several hours every night; New York’s system boasts twenty-six lines while Boston’s has only five. See *MacWade*, 460 F.3d at 264 (reciting New York City statistics); Boston Subway Schedule, http://www.mbtta.com/traveling_t/pdf/subway/subway.pdf (last visited Nov. 12, 2006); Massachusetts Bay Transportation System Ridership, http://www.mbtta.com/insidethet/taag_ridership.asp (last visited Nov. 12, 2006) (providing Boston ridership statistics and line information). The smaller scale of Boston’s subway system makes it a less appealing target and therefore reduces the governmental interest in a search program.

⁵⁴ See Tania Simoncelli & Barry Steinhardt, *California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 34 J.L. MED. & ETHICS 199, 202 (2006).

parolees, and other conditionally released former prisoners, based on the notion that such persons, as charges of the State, enjoy a diminished expectation of privacy.⁵⁵ Applying the reasoning in *MacWade*, however, a court could easily construe the goal of identifying criminals who have committed horrific offenses as sufficiently important to outweigh even the full privacy expectations of many citizens. Responding to California's recent decision to include former arrestees in its data-banks,⁵⁶ commentators argue that such inclusion likely would be found unconstitutional under (pre-*MacWade*) special needs analysis because of the privacy expectations enjoyed by now-released former arrestees.⁵⁷ However, courts are more likely to reach the opposite conclusion under the Second Circuit's weakened special needs approach, threatening the privacy interests of a large number of citizens in their own genetic material.⁵⁸

The implicit requirement of diminished privacy expectations in special needs analysis serves as a valuable shield against unreasonable intrusions into citizens' privacy, as it limits the situations in which the government may conduct warrantless, suspicionless searches.⁵⁹ The Second Circuit has itself proclaimed the importance of applying the special needs analysis cautiously, partially because of its consequences for compromising privacy interests.⁶⁰ *MacWade*'s broad construction of the special needs doctrine threatens the privacy that the Fourth Amendment was designed to protect.⁶¹ Although preventing a terrorist attack is certainly a worthwhile goal, safeguarding the privacy of American citizens is also an objective that our judicial system should vigorously seek to achieve.

⁵⁵ See Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 181 (2006).

⁵⁶ See CAL. GOV'T CODE § 76104.6 (West 2006); Simoncelli & Steinhardt, *supra* note 54.

⁵⁷ See, e.g., Maclin, *supra* note 55.

⁵⁸ See Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153 (2006).

⁵⁹ See, e.g., Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1230 (2004) ("The Court . . . has sought to mitigate . . . deficiencies in the special needs cases by considering factors protecting against governmental overreaching. These factors include whether the individual has diminished privacy interests in the context presented . . ." (footnotes omitted)).

⁶⁰ See *Palmieri v. Lynch*, 392 F.3d 73, 80 (2d Cir. 2004).

⁶¹ See Meg Penrose, *Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 NEV. L.J. 411 (2002/2003) (arguing that privacy rights of all students are threatened by the broadening of the special needs exception in the school context); Reamey, *supra* note 3, at 317-21.