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SECURE IN THEIR HOUSES? FOURTH AMENDMENT RIGHTS AT PUBLIC HOUSING PROJECTS

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> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.[1]

I. INTRODUCTION

At a public housing project in Chicago, several gang members carrying guns step outside an apartment building and open fire on a car as it passes by.[2] A twenty-seven year old mother of four riding inside the car is killed.[3] The police can find no motive for the shooting.[4] At the Brownsville Houses in New York City, a mother is shot to death as she shields her two daughters from a shoot-out between rival drug gangs.[5]

Every few months newspaper headlines such as these dramatize the problem of crime and violence in public housing projects. These stories illustrate the climate of fear that operates on a daily basis within the nation's housing projects.[6] This fear has been largely attributed to drug and gang-related violence.[7] The situation at Chicago's Robert Taylor Homes, the largest housing project in the city,[8] is similar to that at other

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1. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

2. *See* Phillip J. O'Connor, *Gang Ambush Leaves Mother of Four Dead*, CHI. SUN-TIMES, Nov. 15, 1995, at 12.

3. *See id.*

4. *See id.*

5. *See, e.g.*, David Friedman, *The Ville: No Place to Be Somebody; Writer Greg Donaldson Revisits the Mean Streets of Brownsville, Where Guns and Drugs, Kids and Cops, and Life and Death Go Hand in Hand*, N.Y. NEWSDAY, Nov. 1, 1993, at 48.

6. *See, e.g.*, Jorge Casuso & Robert Blau, *Fear Lives In CHA's Taylor Homes*, CHI. TRIB., June 18, 1989, at 1 (describing the detrimental effects of crime and gang violence on life in Chicago housing projects).

7. *See id.*; *see also* HENRY CISNEROS, U.S. DEP'T OF HOUS. AND URBAN DEV., REP. TO THE PRESIDENT: COMBATTING VIOLENT CRIME IN CHICAGO PUB. HOUS. (1994) (outlining efforts to be undertaken by the federal government to combat gang warfare in Chicago housing projects).

8. *See, e.g.*, Rob Polner, *Project Lives: Bullets May Bring No-Warrant Search to Chicago Houses*, N.Y. NEWSDAY, May 1, 1994, at A14.

projects in large cities.[9] Mothers put their children to bed in bathtubs to protect them from stray gunfire.[10] Children are forced to play along terraces, screened with chain link fencing, because they are afraid to play on the broken down playgrounds,[11] while gang members openly deal drugs from the building lobbies.[12]

In 1988, the Chicago Housing Authority (CHA) began conducting warrantless "sweeps" of public housing apartments around the city in an effort to stem the rising tide of violence, illegal weapons, and drugs.[13] This policy, dubbed "Operation Clean Sweep," involved searching each residential unit within a targeted building regardless of whether the tenant consented or was home.[14] The searches were not predicated on the belief that any one apartment contained contraband, but rather, on a general belief that illegal items had been brought into the building.[15] The extensive searches included looking through tenants' closets, drawers, refrigerators, cabinets and personal effects.[16]

"Operation Clean Sweep" immediately gained attention in the media, and was met with a good deal of community support as well as opposition.[17] Soon after the sweeps began, the American Civil Liberties Union (ACLU) filed a class action suit on behalf of the residents, alleging that the searches violated their Fourth Amendment rights.[18] In April of 1994, a federal district court found that there was a substantial likelihood

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9. *See, e.g.*, Rick Bragg, *I'm Afraid . . . Afraid of the Young Ones; Children Armed to the Teeth, Terrorize New Orleans Housing Project Dwellers*, HOUS. CHRON., Dec. 2, 1994, at A19 (describing how young gang members and criminals have ravaged life in New Orleans housing projects); Lynne Tuohy, *Father Panik Village, Where Dreams Turn To Dust; The Last Days Of 'Panik'*, HARTFORD COURANT, Aug. 7, 1994, at A1 (describing the decay of a housing project in Bridgeport, Conn.).

10. *See* Polner, *supra* note 8.

11. *See id.*

12. *See id.*

13. *See, e.g.*, William E. Schmidt, *Chicago's Housing Raids Challenged*, N.Y. TIMES, Dec. 17, 1988, at 8 (describing the lawsuit filed by the American Civil Liberties Union in response to the CHA sweeps).

14. *See, e.g.*, Bruce Fein, *Salvage Public Housing With a New Broom?*, WASH. TIMES, May 4, 1994, at A21 (describing sweeps in the context of suggesting an alternative plan wherein all unit leases would contain weapon-free clauses. Only evidence of this type of lease violation would justify police searches.).

15. *Id.*

16. *See id.*

17. *See* Schmidt, *supra* note 13 (discussing positive and negative reactions to the sweeps).

18. *See id.*

that the CHA's warrantless searches of tenants' apartments violated the Fourth Amendment[19] and issued a preliminary injunction barring any further warrantless searches.[20] In August of 1995, the same judge who issued the preliminary injunction converted it into a final order, permanently banning the sweeps.[21]

The CHA's "Operation Clean Sweep" represents the sort of aggressive tactics that have been advocated by President Clinton[22] and are being considered at other housing projects around the nation.[23] Proponents of such tactics have hailed them as an attempt to restore the right of public housing tenants to be safe in their homes.[24] Others have stated that CHA-type policies represent the next step in the loss of civil rights accompanying the "war on drugs" that is being fought in this country. [25]

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19. U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

20. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994).

21. *See Injunction Forbids Sweeps by CHA*, CHI. TRIB., Aug. 17, 1995, at 3.

22. *See, e.g.*, Kevin G. Salwen, *White House Proposal Allows Searches Without Warrants in Public Housing*, WALL ST. J., Apr. 18, 1994, at A16 (describing a White House plan that purports to address the interests of both housing authorities and citizens whose civil rights may be affected by increased police action in public housing).

23. *See* Patricia Alex, *Debate Sweeping Public Housing: Privacy vs. Safety, Some Welcome Surprise Inspections*, BERGEN REC., Sept. 6, 1994, at B1 (describing how sweeps are gaining support with public housing administrators around the country).

24. *See, e.g.*, President Clinton's Saturday Radio Address (Radio broadcast, Apr. 16, 1994). President Clinton has described tough crime fighting measures as being necessary to take back

> the right to go out to the playground, and the right to sit by an open window, the right to walk to the corner without fear of gunfire, the right to go to school safely in the morning and the right to celebrate your 10th birthday without coming home to bloodshed and terror.

Id. See also Amitai Etzioni, *Balancing Act; Don't Sacrifice the Common Good to Personal Rights*, CHI. TRIB., May 16, 1994, at 11 (stating that warrantless sweeps are necessary to ensure civil liberties of public housing residents).

25. *See, e.g.*, Seth Mydans, *Powerful Arms of Drug War Arousing Concern for Rights*, N.Y. TIMES, Oct. 16, 1989, at A1 (describing various police programs, including "Operation Clean Sweep," which have been accused of compromising civil rights). Other programs besides "Operation Clean Sweep" which have been implemented to combat the "war on drugs," and which have raised constitutional concerns include: evictions of family members of suspected drug dealers; curfews and anti-loitering laws

This note will analyze the constitutionality of "Operation Clean Sweep" and other similar policies. Part II will review the incidents leading up to the injunction barring any further warrantless searches.[26] Part III will look at the reasoning the district court used in issuing that injunction, as well as what questions the decision left open.[27] Part IV will analyze alternative legal theories that might justify the warrantless searches.[28] Part V will consider the constitutionality of alternative search policies that have been suggested since the district court decision came down.[29] Finally, Part VI will attempt to draw conclusions as to what appropriate steps might be taken legally to solve the crisis in America's housing projects.[30]

II. BACKGROUND

A detailed examination of the causes of the problems beleaguering public housing in cities around the country is beyond the scope of this note.[31] However, some contextual information regarding the history of

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that allow police to cordon off areas; suspension of medicaid and food stamps from people arrested, but not convicted, on drug charges; and forfeiture of cash and property suspected to be involved in drug activity. *Id. See also* Carol Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994) (questioning the constitutionality of forfeiture program operated by a Florida county police department); Dean P. Cazenave, Comment; *Congress Steps Up War On Drugs In Public Housing: Has It Gone One Step Too Far?* 36 LOY. L. REV. 137 (1990) (criticizing provisions of the Anti-Drug Abuse Act of 1988 which authorizes eviction of public housing tenants for drug-related activity); Richard Lacayo, *Civil Liberties Could be a Casualty of Bush's War on Drugs*, TIME, Sept. 18, 1989, at 28 (describing possible constitutional pitfalls of President George Bush's then newly proposed antidrug strategy); Lynne Tuohy, *Court Blocks Eviction Based on Relationship With Drug Suspect*, HARTFORD COURANT, June 2, 1993, at C1 (discussing Supreme Court of Connecticut's recent holding that housing authorities may not evict those who share an apartment with drug dealers without providing them with an opportunity to prove that they had no knowledge of the illegal activity).

26. *See infra* text accompanying notes 31-73.

27. *See infra* text accompanying notes 74-128.

28. *See infra* text accompanying notes 129-242.

29. *See infra* text accompanying notes 243-316.

30. *See infra* text accompanying notes 317-22.

31. Numerous books and articles have been written on this subject. *See, e.g.*, Alex Kotlowitz, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (Doubleday, 1991); Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497 (1993) (discussing the history of public housing and reforms aimed at correcting its ills); Martha Mahoney, Note: *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251 (1990) (discussing the history of housing projects, focusing on

public housing is useful to an analysis of the policing practices being employed by the CHA.

In an effort to overcome the housing shortage after World War II, Congress passed the Housing Act of 1949.[32] The Act authorized the construction of 135,000 apartments per year from 1949 to 1954, for a total of 810,000 new housing units.[33] The idea was that inner-city slums would be cleared, and in their places integrated low-income housing would be built.[34] However, it was not until 1972 that all of these apartments were finished.[35]

By the time the apartments were completed, the goals of the Act had already failed.[36] Physically, the projects were flawed in both construction and design.[37] The projects became economically and racially isolated, largely populated by welfare recipients and the unemployed.[38] Violence became a prevalent aspect of everyday life within the projects.[39] By 1989, it was necessary for Congress to establish a commission charged with designing a plan to eradicate severely physically and economically distressed public housing by the end of the century.[40]

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blacks in New Orleans); Nicholas Lemann, *Four Generations in the Projects*, N.Y. TIMES, Jan. 13, 1991, § 6, at 17.

32. The 1949 Housing Act, Pub. L. No. 81-171, 63 Stat. 413 (1949).

33. *Id.*

34. *See id.*

35. *See* Schill, *supra* note 31, at 500.

36. *See* Lemann, *supra* note 31. Lemann describes the sequence of events regarding Chicago's housing projects as follows: In 1950, Robert Taylor, the first chairman of the CHA, proposed building the new apartments funded by the Federal Housing Act in neighborhoods that would allow for racial integration. Instead, the City Council rejected these sites and the projects were built on top of the poorest tenement neighborhoods in Chicago. In 1969, tenants' rents were fixed at a percentage of their salaries, driving away the employed whose income could get them better deals in the private market. In the late 1960s and early 1970s, firemen, policemen and other social service providers became reluctant to enter the projects as crime escalated. Between 1970 and 1980, better-off residents from neighborhoods surrounding the projects began moving out, leaving only the poor living in what the article describes as "social isolation." *Id.*

37. *See* Schill, *supra* note 31, at 503.

38. *See id.*

39. *See id.*

40. *See* Dep't of Hous. and Urban Dev. Reform Act of 1989, Pub. L. No. 101-235, 501-07, 103 Stat. 1987, 2048-52 (1989).

By the end of the 1980s, the Chicago Housing Authority, administrator of the second largest public housing system in the country,[41] was reeling from the effects of these problems.[42] In June of 1988, Vincent Lane was appointed chairman of the CHA, promising to get tough on public housing crime.[43]

In late September of 1988, the CHA conducted a surprise raid at its Rockwell Gardens development, and "Operation Clean Sweep" was born.[44] Less than three months after the first search, the ACLU filed suit on behalf of Chicago's 150,000 public housing residents, alleging that the raids violated the tenants' civil rights.[45] In its complaint, the ACLU alleged that the CHA did not have the right to bring police into tenants' apartments without search warrants.[46] Also, the complaint contended that some of the new regulations imposed by the CHA were illegal.[47]

In the following months, the ACLU and the CHA conducted a series of negotiations regarding the sweeps.[48] Despite this resistance to "Operation Clean Sweep," the Bush administration fully supported the CHA's efforts.[49] Moreover, President Bush's Housing Secretary, Jack

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41. *See* Edward Walsh, *U.S. to Take Control of Troubled Chicago Public Housing Authority*, WASH. POST, May 28, 1995, at A25.

42. *See* Emily Gurnon & Patrick T. Reardon, *CHA Concedes it Has Problems*, CHI. TRIB., Apr. 8, 1995, at 1 (describing troubles at CHA projects).

43. *See CHA Finally Gets Tough With Gangs*, CHI. TRIB., Sept. 25, 1988, at 2.

44. *See* John Camper, *23 Arrested In Second CHA Sweep*, CHI. TRIB., Dec. 3, 1988, at 5. The police made only one arrest during the first operation. *See id.* In December of 1988, CHA conducted its second raid, this time making twenty-three arrests and confiscating seven illegal weapons. *See id.*

45. *See* Schmidt, *supra* note 13.

46. *See id.*

47. *See id.* Specifically, the complaint objected to the ban on overnight guests and the requirement that residents show photo identification cards to obtain access to the buildings. *See id.*

48. *See* Edward Walsh, *In Chicago, a Battle Over Rights Reignites; Crime Fighting 'Sweeps' Have Public Housing Officials Under Challenge Anew By ACLU*, WASH. POST, Dec. 19, 1993, at A3.

49. *See, e.g.*, Jack Kemp, *Drug-Free Housing for the Nation's Poor*, WASH. POST, Apr. 17, 1989, at A19 (commentary by Jack Kemp, supporting the aggressive tactics taken by the Chicago Housing Authority); George E. Curry, *U.S. Antidrug Plan Modeled After CHA Program*, CHI. TRIB., Apr. 10, 1989, at 3 (describing Kemp's national program for removing drug dealers from pubic housing).

Kemp, proposed a national program for warrantless searches at public housing projects modeled after the CHA sweeps.[50]

By August of 1989, the ACLU and the CHA had entered into a consent decree approved by a federal judge.[51] Under the terms of the decree, tenants were to be given two days notice prior to an inspection, unless the CHA executive director determined that an "emergency" existed.[52] Moreover, the inspections were to be conducted by CHA personnel, not the police.[53] Also, the decree made access to apartments less restrictive.[54]

From August of 1989 until October of 1992, the CHA conducted inspections of apartments under the terms of the consent decree.[55] However, events in late 1992 and 1993 caused the legal battle to re-erupt.[56]

First, in October 1992, a seven year old boy was shot and killed by random sniper fire as he walked to school with his mother from his apartment at the Cabrini-Greens complex.[57] The CHA responded to this incident by conducting a number of sweeps that the ACLU alleged violated the consent decree.[58] Following the sweeps, the CHA requested that the consent decree be modified to allow metal detectors installed at the entrance to apartment buildings, and to require residents to produce photo identification prior to being admitted into the buildings.[59]

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50. *See* Curry, *supra* note 49, at 3. President Clinton and his Housing Secretary, Henry Cisneros, have also been strong supporters of CHA's tactics. *See infra* notes 67 & 243-45 and accompanying text.

51. *See* Walsh, *supra* note 48.

52. *See id.*

53. *Id.* Under the decree, Chicago police may accompany CHA personnel, but may only enter to conduct a search if the illegal contraband is discovered in plain sight, if the tenant invites them in, or if the apartment is not leased to the occupants. *Id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*; Rosalind Rossi, *Cabrini Residents Protest Security Sweeps*, CHI. SUN-TIMES, Dec. 3, 1992, at 7.

59. *See* Rossi, *supra* note 58. Following this request, a hearing was held in federal court. Six tenants appeared to protest the security procedures. *Id.* In the sweeps following the sniper incident, resident Mark Pratt alleged that he was body-searched seven times within one hour. *Id.* Another resident claims that he was subjected to nine searches, and that his daughter began having repeated nightmares following the sweeps. *Id.*

Then, during the summer of 1993, a number of incidents occurred in which children died after they accidentally fell out of windows.[60] CHA chairman Lane dispatched emergency maintenance crews to install window guards.[61] However, gang members fired on the crews, driving them away.[62] This incident prompted Lane to abandon the consent decree and adopt a policy of conducting warrantless sweeps whenever there were incidents involving random gunfire.[63]

The ACLU responded by filing suit in federal court challenging the constitutionality of the searches.[64] This suit produced a preliminary injunction barring any further warrantless searches.[65] After the injunction was issued the legal battle over the sweeps continued.[66] Moreover, following the injunction, President Clinton, a strong supporter of "Operation Clean Sweep," ordered Housing Secretary Henry Cisneros and Attorney General Janet Reno to come up with guidelines that would allow for maximum policing of public housing projects, without violating the Constitution.[67] The most controversial proposal that resulted from this order would have involved having residents of public housing apartments sign waivers consenting to warrantless searches of their homes.[68]

Following issuance of the preliminary injunction, overall conditions in Chicago's public housing projects continued to deteriorate. In May of 1995, the Federal government took control of the distressed CHA, ousting

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60. *See* Walsh, *supra* note 48.

61. *See id.*

62. *See id.*

63. *See id.* In July and August of 1993, CHA conducted full warrantless searches of over 1000 apartments in twelve buildings. *See* Harvey Grossman, *Toward Increased Security For Public Housing Residents*, CHI. DAILY L. BULL., Apr. 23, 1994, at 22.

64. *See* Walsh, *supra* note 48.

65. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994).

66. Telephone Interview with Valerie Phillips, Public Information Director, ACLU of Illinois (Mar. 6, 1995) (stating that at that time the litigation between the ACLU and the CHA was ongoing). The week following the *Pratt* decision, the same court decertified the class representing the tenants, based on a motion by tenant intervenors who supported the sweeps. *See* Pratt v. Chicago Hous. Auth., 155 F.R.D. 177 (N.D. Ill. 1994).

67. *See* President Clinton's Saturday Radio Address (Radio broadcast, Apr. 9, 1994).

68. *See, e.g.*, Ronald A. Taylor, *ACLU Challenges Searches in Projects; Calls Clinton Proposal Unconstitutional*, WASH. TIMES, Apr. 19, 1994, at 4 (describing initial reaction to the proposal, and stating that it was vulnerable to a legal challenge). See *infra* notes 243-316 and accompanying text for a discussion of this proposal.

Chairman Lane.[69] Over one year after the preliminary injunction was issued, a permanent injunction was ordered barring future warrantless searches.[70] That order came after the ACLU and the CHA failed to agree on the terms of a consent decree aimed at resolving the controversy.[71] The CHA, however, agreed not to appeal the court's decision.[72] Taking up the proposal of Attorney General Janet Reno and Housing Secretary Henry Cisneros, the CHA replaced warrantless sweeps with a policy of requesting that residents sign waivers consenting to weapons searches of their apartments.[73]

III. THE *Pratt v. Chicago Housing Authority* DECISION

In *Pratt*,[74] the plaintiffs sought to convert a temporary restraining order, obtained in earlier litigation,[75] which prohibited any warrantless searches by the CHA, into a preliminary injunction.[76] In order to do so, the plaintiffs had to establish that they had a "reasonable likelihood of success" on the merits of their case.[77] The district court held that the plaintiffs had made such a showing, and granted the injunction.[78] In finding for the plaintiffs, the court based its opinion in the traditional requirement that all non-consensual searches of a home be based on probable cause, and be made pursuant to a warrant, unless exigent circumstances are shown to exist.[79]

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69. *See* Edward Walsh, *U.S. to Take Over Control of Troubled Chicago Housing Authority*, WASH. POST, May 28, 1995, at A25.

70. *See Injunction Forbids Sweeps by CHA*, *supra* note 21.

71. *See* John F. Rooney, *CHA to Back Down on Warrantless Searches*, CHI. DAILY L. BULL., Aug. 3, 1995, at 1. According to the ACLU, the CHA rejected a proposed consent decree containing terms similar to the preliminary injunction.

72. *See id.*

73. *See id.*

74. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994). Four named plaintiffs represented the tenants and legal residents in the class action suit. *Id.* at 793. The suit was brought under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 2201. *Id.*

75. *See id.* at 793 (stating that the court issued a temporary restraining order on Feb. 14, 1994).

76. *Pratt*, 848 F. Supp. at 793.

77. *Id.* at 794.

78. *Id.* at 796.

79. *Id.* at 795.

In drawing this conclusion, the court relied on a line of cases, including the seminal case of *Payton v. New York*.[80] In *Payton*, the defendants challenged New York statutes which authorized the police to enter the home of a suspected felon, without a warrant, in order to make an arrest.[81] In finding the statutes unconstitutional, the Court stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[82] The Court went on to hold that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[83]

Based on this reasoning, the *Pratt* court found that the CHA's warrantless entry into tenants' apartments was presumptively a violation of the Fourth Amendment.[84] In order to overcome this presumption, the CHA had to establish both the existence of exigent circumstances for the sweeps, as well as probable cause to search each apartment.[85] The CHA failed both prongs of this analysis.[86] First, the court noted that the searches took place anywhere from 48 hours to a few days after the shooting incidents which the CHA claimed authorized the searches.[87] The court concluded that this extended time span between the incidents prompting the searches and the actual searches themselves precluded any claim of exigency.[88] Next, the court found that even if the CHA had been able to establish the existence of exigent circumstances, the policy of searching every single apartment within a targeted building, regardless of

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80. 445 U.S. 573 (1980). The Court also relied on United States v. Berkowitz, 927 F.2d 1376 (1991), *aff'd*, 972 F.2d 352 (7th Cir. 1992) (stating that evidence found in defendant's home would have to be suppressed if IRS agents followed defendant into his home prior to placing him under arrest); and on Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987) (stating that police may not enter a person's home absent exigent circumstances). *Pratt*, 848 F. Supp. at 795.

81. *Payton*, 445 U.S. at 574.

82. *Id.* at 585 (quoting United States v. United States Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297, 313).

83. *Id.* at 586 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

84. *Pratt*, 848 F. Supp. at 795.

85. *Id.*

86. *Id.* at 795-96.

87. *Id.* at 795.

88. *Id.*

suspicion that any individual apartment contained contraband, negated the existence of probable cause.[89]

The *Pratt* decision leaves open a number of questions. First, the decision notes that the CHA may still conduct "searches in response to an existing emergency or clear and present danger when there is probable cause to believe that a crime has been committed."[90] The court gives as an example of this, police observing members of a gang, engaged in a shoot-out, entering a building.[91] Under these circumstances, if the police promptly surround the building, they would be authorized to conduct warrantless door to door searches of apartments in that building.[92] The court does not give any definition of "promptly,"[93] therefore, if the CHA were to improve upon its response time to gang-related shootings, arguably, it might be able to conduct building sweeps under the court's holding.[94] However, as the court stated, the reason that the sweeps were delayed for two or more days was because of the practical requirements of rounding up enough personnel to secure the perimeters of a targeted building.[95] Consequently, the logistics involved in organizing a building sweep would seem to preclude any significantly quicker action by the CHA.[96]

More important, however, is the question of how the *Pratt* decision might be viewed by an appellate court, or courts in other jurisdictions. Although the CHA agreed not to appeal the order granting the permanent injunction, that does not mean that the agency agrees that sweeps are

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89. *Id.* at 796. In drawing this conclusion, the Court relied on United States v. Dorsey, 591 F.2d 922 (D.C. Cir. 1979) (stating that police may not search individual units within an apartment building unless there is probable cause to believe that relevant evidence is located within the unit), and on United States v. Higgins, 428 F.2d 232 (7th Cir. 1970) (holding that warrant authorizing a search of a basement apartment in a building with three basement apartments did not allow police to search all three apartments).

90. *Pratt*, 898 F. Supp. at 797.

91. *Id.* at n.2.

92. *Id.*

93. *See id.*

94. *See, e.g.*, Etzioni, *supra* note 24 (noting that the *Pratt* decision might not apply if searches occurred closer to shootings).

95. *Pratt*, 848 F. Supp. at 793.

96. *See* Pratt v. Chicago Hous. Auth., 155 F.R.D. 177 (N.D. Ill. 1994) (stating that logistical problems prevented the CHA from conducting searches any sooner).

unconstitutional.[97] The possibility always remains that should circumstances change, the CHA might implement a search policy similar to "Operation Clean Sweep" based on a slightly different justification.[98] Further, given the dire circumstances in other housing projects around the nation, another housing agency might seek to implement an expansive warrantless search policy. Bearing this in mind, a closer examination of the case is in order.

The Fourth Amendment has long been interpreted as requiring that, except under carefully delineated circumstances, searches be conducted pursuant to a warrant issued on no less than probable cause.[99] In *Johnson v. United States*,[100] the Supreme Court described the importance of the warrant as follows

> [t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[101]

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97. Telephone Interview with Steve Laduzinsky, Assistant General Counsel, CHA (Dec. 1, 1995) (stating that the CHA chose not to appeal the decision because it felt that it could "live with the injunction").

98. Telephone Interview with Valeria J. Phillips, Public Information Director, ACLU of Illinios (Dec. 1, 1995) (stating that the ACLU thought that the first consent decree entered into in 1989 would have precluded further warrantless searches, however, the CHA began conducting more sweeps in 1993, this time calling them gun searches).

99. *See generally* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 385-90 (1988) (reviewing history of Supreme Court's presumption that Fourth Amendment requires searches be conducted pursuant to warrants issued on probable cause). Although the Fourth Amendment has been interpreted as requiring a warrant in most circumstances, it is also contended that the Fourth Amendment is governed by the "reasonableness clause." *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (stating that the Supreme Court has wavered between reading the Fourth Amendment as being governed by the "warrant clause" and the "reasonableness clause"); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that the Fourth Amendment only requires that government act reasonably); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (arguing that modern law enforcement practices require that the Fourth Amendment be governed by the "warrant clause").

100. 333 U.S. 10 (1948) (holding that even though police officers clearly smelled opium in hallway of hotel, warrant issued by magistrate was required to enter room).

101. *Id.* at 14.

However, even in *Johnson*, the Court recognized that exigent circumstances provide an exception to the warrant requirement of the Fourth Amendment.[102] The exigency exception continues to be recognized by courts.[103] The premise of the exception is that sometimes the need for effective law enforcement requires dispensing with the warrant requirement when the "compelling need for official action" makes obtaining a warrant impracticable.[104]

Despite general agreement that the presence of exigent circumstances allows for a warrantless search, courts are not in agreement as to what constitutes exigency.[105] Numerous tests have been applied to determine whether or not exigent circumstances exist.[106] In *Payton v. New York*,[107] the Court noted that the presence of exigent circumstances would justify a warrantless entry into a home; however, the Court declined to define exactly what sort of emergencies comprise exigency.[108] Five years later, in *Welsh v. Wisconsin*,[109] the Supreme Court acknowledged that it had left the definition of exigent circumstances to the lower courts, but noted that exceptions to the Fourth Amendment's

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102. *Id.* at 14-15.

103. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978) (recognizing exigent circumstances exception, but holding that it does not apply to murder investigation); Michigan v. Tyler, 436 U.S. 499 (1978) (holding that exigent circumstances allowed firefighters to make a warrantless entry into burning building, but not to conduct a four day investigation); United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990) (holding that exigent circumstances were established to make warrantless entry into room where narcotics were being sold).

104. *Tyler*, 436 U.S. at 499. *See generally* Comment: Jacqueline Bryks, *Exigent Circumstances and Warrantless Home Entries: United States v. MacDonald*, 57 BROOK. L. REV. 307 (1991) (comment on narrowing Fourth Amendment by expanding notion of exigent circumstances for narcotics); Amy B. Beller, Comment: *United States v. MacDonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 HOFSTRA L. REV. 407 (1991) (analysis of cases focusing on exigent circumstances).

105. *See generally* Beller, *supra* note 104, at 410-14 (describing different tests applied to determine exigent circumstances).

106. *See, e.g.*, United States v. Dorman, 435 F.2d 385 (D.C. Cir. 1970) (en banc) (factors to be considered in determining exigency include: gravity of offense; whether suspect is reasonably believed to be armed; probable cause to believe that suspect has committed the crime; strong reason to believe suspect is on the premises; likelihood of escape; and peaceful circumstances of the entry).

107. 445 U.S. 573 (1979).

108. *Id.* at 583.

109. 466 U.S. 740 (1984) (holding that warrantless arrest of defendant in his home for driving while intoxicated was not justified by exigent circumstances).

warrant requirement, "are few in number and carefully delineated."[110] Further, the Court stated that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."[111] The *Welsh* Court went on to list the examples of exigencies which it has recognized: hot pursuit of a felon, destruction of evidence, and an ongoing fire.[112] Moreover, the Court noted that only "hot pursuit" has allowed warrantless arrests in the home.[113]

More recently, in *Minnesota v. Olsen*,[114] the Supreme Court held that the Minnesota Supreme Court applied "essentially the correct standard" in determining that exigent circumstances did not justify a warrantless entry into a home to arrest a defendant suspected of driving the getaway car used in a robbery-murder.[115] Under the Minnesota test, a warrantless search may be justified by the exigency of hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.[116] The Minnesota court also noted that, absent hot pursuit, there must be at least probable cause to believe that one of the other factors justifying the entrance was present.[117] Although the Supreme Court approved of the Minnesota court's findings, it limited its holding to the specific facts of the case and chose not to announce a bright line exigent circumstances test.[118] Alternatively, the Seventh Circuit, of which the district court in *Pratt* is a part, has defined the test for exigent circumstances as "whether the exceedingly strong privacy interest in one's residence is outweighed by the risk that delay will engender injury, destruction of evidence, or escape."[119]

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110. *Id.* at 749 (quoting United States v. United States Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297 (1972)).

111. *Id.* at 749-50.

112. *Id.*

113. *Id.*

114. 495 U.S. 91 (1990).

115. *Id.* at 100-01.

116. *See id.* at 100.

117. *See id.*

118. *Id.* The Court limited its holding by stating, "[w]e are not inclined to disagree with this fact-specific application of the proper legal standard." *Id.*

119. *See* United States v. Diaz, 814 F.2d 454, 458 (7th Cir.) (holding that exigent circumstances did not justify police's warrantless entry into hotel room of suspected drug dealer), *cert. denied*, 484 U.S. 857 (1987); United States v. Acevedo, 627 F.2d 68, 71 (7th Cir.) (holding that attempting to prevent drug dealer from escaping justified warrantless entry of apartment), *cert. denied*, 449 U.S. 1021 (1980).

Both the *Olsen* test and the test previously applied by the Seventh Circuit seem to stress imminence versus privacy as the crucial factors to be weighed in determining whether or not exigent circumstances exist. Further, both the Supreme Court and the Seventh Circuit have stated that the government bears the burden of proving the presence of exigent circumstances.[120] Although the *Pratt* court did not explicitly state what the appropriate test is for determining exigency, it is unlikely that the CHA or another housing agency with a similar policy, could prove that exigent circumstances justified the sweeps. The CHA purported to base its search policy on exigency.[121] The exigent circumstances which the CHA put forth as preconditions to a sweep were: random gunfire from buildings; intimidation at gunpoint; or shootings if guns are taken inside CHA buildings.[122] Under these conditions, the CHA stated that if police can not determine which apartment the weapons are taken into, a sweep may be authorized.[123] However, the sweeps took at least two days before they began.[124] Under the circumstances, the CHA could not claim that the sweeps fall under the heading "hot pursuit"[125] or risk of danger to the public. Further, the CHA has not offered any reason to believe that weapons, once brought into a building, are then taken inside apartments where they remain during the time it takes to organize a sweep. In fact, comparisons of the numbers of weapons seized from common areas to the number of weapons seized in apartments indicate that weapons are not brought into tenants' apartments.[126] This would seem to negate the claim that the searches are necessary to prevent the imminent destruction of evidence and the presence of probable cause to search any one apartment.

Additionally, the CHA has not offered any reason why it could not obtain a warrant at the same time that it instigates procedures to conduct a sweep. The district court specifically noted that even under emergency circumstances that would justify a warrantless door to door search, once the search is under way, a warrant issued by a detached magistrate should

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120. *See Welsh*, 466 U.S. at 750; *Diaz*, 814 F.2d at 458.

121. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 795 (N.D. Ill. 1994).

122. *See id.* at 794.

123. *See id.*

124. *See id.* at 793.

125. *See* United States v. Santana, 427 U.S. 38, 43 (1976) (stating that "hot pursuit" involves some sort of an actual chase).

126. *See, e.g.*, Harvey Grossman, *Toward Increased Security For Public Housing Residents*, CHI. DAILY L. BULL., Apr. 23, 1994, at 22 (stating that after four days of sweeps, the CHA only recovered 23 weapons, while a few days of CHA police patrolling common areas resulted in 24 weapons being recovered).

be sought.[127] Consequently, under the traditional requirement that warrantless searches of homes should be limited to carefully delineated circumstances,[128] it is likely that the CHA-type sweeps will be found to violate the Fourth Amendment.

IV. ALTERNATIVE THEORIES

Despite the fact that the Supreme Court has purported to hold warrantless searches presumptively unconstitutional,[129] numerous exceptions to the warrant requirement have been established over the years.[130] Critics have noted that as the Supreme Court has shifted from a bright line rule to a "reasonableness" analysis of Fourth Amendment questions, the warrant requirement has become more and more the exception rather than the rule.[131] Although the *Pratt* court found that there was a reasonable likelihood that under the traditional warrant and probable cause analysis, "Operation Clean Sweep" violated the Fourth Amendment,[132] alternative exceptions resulting from the Court's reasonableness approach have been advocated as sanctioning the search

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127. *See Pratt*, 848 F. Supp. at 797 n.2.

128. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (holding that an important consideration in determining whether exigency exists is the gravity of the underlying offense for which the arrest is being made).

129. *See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1979) (holding that the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine arrest).

130. *See* Amar, *supra* note 99 (noting the many exceptions to the warrant rule); Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("plain view" exception); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest exception); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" exception); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

131. *See* Maryland v. Buie, 494 U.S. 325, 340 (1990) (Brennan, J. dissenting) (noting the "'emerging tendency on the part of the Court to convert the *Terry* decision' from a narrow exception into one that 'swallows the general rule that searches are 'reasonable' only if based upon probable cause'") (quoting United States v. Place, 462 U.S. 696, 714 (1983) (Brennan, J., concurring in result); *see generally* Amar, *supra* note 99; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (discussing use and purpose of Fourth Amendment and its viability in today's society); Steiker, *supra* note 99; Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988) (discussing the Court's inappropriate treatment of the Fourth Amendment's warrant clause in *Camara* and *Terry*).

132. *See Pratt*, 848 F. Supp. at 794.

policy.[133] Specifically, the "special needs" doctrine[134] has been offered as justifying expanded authority to conduct otherwise impermissible searches.[135] Under the "special needs" doctrine, probable cause gives way and in its place the court determines if the government's "special need for flexibility"[136] in carrying out the particular job in question outweighs an individual's expectation of privacy.[137]

Accordingly, CHA-type warrantless sweep policies might be justified as necessary to carrying out a housing authority's responsibility of providing a safe living environment for its tenants.[138] In order to evaluate the likelihood of success of this argument it is necessary to review the evolution of Fourth Amendment jurisprudence upon which the "special needs" doctrine is based.

For much of this nation's history, the Fourth Amendment has been interpreted by the courts as requiring searches to be made pursuant to a warrant, issued upon nothing less than probable cause.[139] However, two cases from the late 1960s, *Camara v. Municipal Court*[140] and *Terry v. Ohio*,[141] set the stage for a relaxation of that requirement.[142] First, in

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133. *See* Steven Yarosh, *Is Operation Clean Sweep Sweeping Away the Fourth Amendment*, 86 NW. U. L. REV. 1103 (1992) (concluding that the "special needs" exception to the Fourth Amendment justifies warrantless searches); Edward Felsenthal, *High Court May Back Some Gun Sweeps*, WALL ST. J., Apr. 21, 1994, at B12 (speculating that Supreme Court may find that extreme conditions at public housing justifies warrantless searches).

134. The "special needs" doctrine was first acknowledged by the Supreme Court by Justice Blackmun in a dissenting opinion to a 1983 case. *See* Florida v. Royer, 460 U.S. 491 (1983) (Blackmun, J., dissenting). In *Royer*, the majority held that a drug enforcement agent exceeded his authority in detaining a suspect. Justice Blackmun would have allowed the detention based on the special needs of the government in uncovering drug couriers. *Id.* Although Justice Blackmun's view did not prevail in that case, just two years later the "special needs" doctrine gained acceptance in New Jersey v. T.L.O., 469 U.S. 325 (1985).

135. *See* Yarosh, *supra* note 133; Felsenthal, *supra* note 133.

136. *T.L.O.*, 469 U.S. 325.

137. *Id.*

138. *See, e.g.*, Robert Teir, *Are Warrantless Searches for Guns in Public Housing Projects Justified? Yes: Living Without Fear is the Most Important Right*, A.B.A. J., July, 1994, at 40 (arguing that the dire conditions at Chicago's public housing projects demonstrate a "special need" and the goal of the sweeps is to make the buildings safe for the residents).

139. *See* Maclin, *supra* note 99, at 204-05.

140. 387 U.S. 523 (1967).

141. 392 U.S. 1 (1968).

Camara, the Supreme Court held that probable cause could be established based on the reasonableness of the government's goals.[143] In *Camara*, the defendant challenged the right of a housing inspector to conduct a warrantless inspection of his premises.[144] Upon review, the Supreme Court held that the Fourth Amendment did apply to housing inspections and that a warrant was required.[145] However, the Court went on to state that in issuing such a warrant, the housing inspector need not show probable cause that any individual dwelling violated the housing codes.[146] Instead, the Court held that probable cause must be evaluated in terms of reasonableness, and reasonableness, in turn, is determined by weighing the government's need to search against the invasion which the search entails.[147]

Although the Court held that a search must be conducted based on probable cause, the *Camara* decision changed the definition of probable cause.[148] Prior to *Camara*, a search was reasonable if it was based on probable cause, while after *Camara*, probable cause would be found if the proposed search was reasonable.[149]

This weakening of the probable cause requirement was taken one step further in *Terry v. Ohio*. In *Terry*, the defendant moved to suppress two revolvers offered in evidence by the prosecution.[150] The weapons had been discovered during a pat-down search by a police officer who had become suspicious of the defendant who was loitering in front a store.[151] At trial, the officer testified that he stopped the defendant based on his thirty-five years of experience as a detective.[152]

The trial court rejected the prosecution's argument that the officer had probable cause to arrest the defendant.[153] The trial court, nevertheless, denied the defendant's motion and held that, based on the officer's

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142. *See generally* Sundby, *supra* note 99 (extensive discussion of *Camara* and *Terry*).

143. *Camara*, 387 U.S. at 535.

144. *Id.* at 525.

145. *Id.* at 534.

146. *Id.* at 538.

147. *Id.* at 536-37.

148. *See* Sundby, *supra* note 99.

149. *See* Gerald S. Reamy, *When Special Needs Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992); Sundby, *supra* note 99.

150. *Terry*, 392 U.S. at 5.

151. *Id.* at 6-7.

152. *Id.*

153. *Id.* at 7-8.

experience, he had reasonable cause to conduct an interrogation.[154] The defendant's conviction was subsequently affirmed by the Supreme Court of Ohio.[155]

Upon review, the Supreme Court acknowledged that the defendant had been subjected to a search for purposes of the Fourth Amendment.[156] However, the Court rejected the requirement that all police searches be conducted based on probable cause, holding that the officer's actions must be judged against a standard of reasonableness.[157] The Court, relying on *Camara*, went on to hold that the test for determining the reasonableness of a search requires a balancing of the police's need to search against the intrusion involved in the search.[158]

The effect of *Camara* and *Terry* was that challenges to particular government practices brought under the Fourth Amendment would now be assessed by conducting a balancing test weighing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.[159] In the years following *Camara* and *Terry*, numerous cases were decided under this balancing test.

In 1985, the Supreme Court expanded on this balancing test to conclude that certain administrative needs of the government require modifying "the level of illicit activity needed to justify a search."[160] In *New Jersey v. T.L.O.*,[161] a high school freshman was caught smoking in a school bathroom.[162] Subsequently, the school's Vice Principal opened the student's purse, in which he discovered some marijuana.[163] The student moved to have the marijuana suppressed as evidence on the grounds that the search of her purse violated her Fourth Amendment rights.[164]

Upon review, the Supreme Court held that school officials did not need a warrant before searching students subject to the school's authority.[165] Justice White, writing for the majority, began by noting

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154. *Id.* at 8.

155. *Id.*

156. *Id.* at 9.

157. *Id.* at 20.

158. *Id.* at 20-21.

159. *See* Sundby, *supra* note 99, at 395-97.

160. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

161. *Id.*

162. *Id.* at 328.

163. *Id.*

164. *Id.* at 329.

165. *Id.* at 340.

that the Fourth Amendment did apply to searches of students by public school officials.[166] However, relying on *Camara*, Justice White stated that the reasonableness of a search depended on a balancing of interests, and that balance would be affected by the context within which the search took place.[167] In finding in favor of the government's interests the Court relied on a number of factors: the substantial interest of school administrators in maintaining discipline on school grounds; the difficulty of maintaining order within a school environment; and the value of preserving the informality of the student-teacher relationship.[168] The totality of these factors, Justice White reasoned, required a "certain degree of flexibility in school disciplinary procedures," and merited easing search restrictions.[169]

In a separate concurrence, Justice Blackmun expounded on why the balance favored upholding the search, in what has become the standard analysis of the "special needs" doctrine.[170] He wrote, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable is a court entitled to substitute its balancing of interests of that of the Framers."[171] Justice Blackmun's opinion makes clear that it is factors beyond regular law enforcement that justify loosening the Fourth Amendment restrictions. Accordingly, in *T.L.O.*, it was not apprehending illicit drug users that justified the warrantless search, but rather it was the need to maintain a safe environment conducive to learning.[172] Given the frequency with which problems threatening such an environment come up, it would not be practical for a teacher to obtain a warrant before searching a student.[173]

The "special needs" doctrine was further expanded to apply to the warrantless search of a home in the case of *Griffin v. Wisconsin*.[174] In *Griffin*, the defendant, who had been on probation, was convicted of violating a state weapons law after a gun was discovered in his home

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166. *Id.* at 333.

167. *Id.* at 337.

168. *Id.* at 339-40.

169. *Id.* at 351 (Blackmun, J., concurring).

170. *See, e.g.*, Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285 (1991) (attributing Justice Blackmun's concurrence as being the definition of the "special needs" doctrine).

171. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

172. *Id.* at 352 (Blackmun, J., concurring).

173. *Id.*

174. 483 U.S. 868 (1987).

during a warrantless search of the premises.[175] The search was conducted pursuant to a regulation of the Wisconsin State Department of Health and Social Services, which authorized probation officers to search a probationer's home without a warrant if reasonable grounds existed to believe that contraband was present.[176] At trial, the defendant's motion to have the evidence seized during the search suppressed was dismissed.[177] The Wisconsin Supreme Court affirmed the conviction, holding that probation diminishes a probationer's reasonable expectation of privacy.[178] Accordingly, the court held that *any* search of a probationer's home would be constitutional so long as it was based on reasonable grounds.[179]

While affirming the Wisconsin Supreme Court's decision, the Supreme Court chose not to adopt the broad holding that any search of a probationer's home based on reasonable grounds would satisfy the Fourth Amendment.[180] Instead, the Court, while acknowledging that a probationer's home is protected by the Fourth Amendment, affirmed the decision by relying on the "special needs" line of cases.[181]

The Court reasoned that, like schools and other governmental agencies, there were special needs beyond normal law enforcement involved in operating a state probation system.[182] Specifically, the Court relied on the fact that probationers only enjoy conditional liberty and are subject to special restrictions.[183] One of the chief restrictions of a probation system is that probationers be closely supervised.[184]

It was this special need for supervision that the Court held justified replacing the warrant and probable cause standard of the Fourth Amendment with the reasonableness standard.[185] A warrant requirement would interfere with the ability of a probation officer to respond to the need to supervise probationers, thereby reducing effectiveness of the state's probation system.[186] The Court also noted that a probation

175. *Id.* at 872.
176. *Id.* at 870-71.
177. *Id.* at 872.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 873.
182. *Id.* at 873-74.
183. *Id.* at 874.
184. *Id.* at 875.
185. *Id.* at 876.
186. *Id.*

officer is not a police officer, but rather an employee of the state, operating with the welfare of the probationer in mind.[187] Therefore, dispensing with the warrant requirement within this limited context would not subject the probationer to warrantless investigatory searches.[188]

The next major expansion of the "special needs" doctrine came in the case of *National Treasury Employees Union v. Von Raab*.[189] In that case, the Supreme Court allowed blanket drug testing for Customs Service employees directly involved in drug interdiction, as well as employees required to carry firearms.[190] The Court allowed such testing, despite the lack of individual suspicion that any employee was using drugs.[191] Again, the Court's holding was based on the "special needs" doctrine.[192]

The Court began by noting that drug testing did constitute a search for Fourth Amendment purposes.[193] However, the Court found that the Customs Service's drug testing program was not directed at ordinary law enforcement.[194] In fact, the program prohibited criminal prosecution of an employee found to be using drugs without the employee's consent.[195] Instead, the program was designed to detect and deter drug use among employees holding or applying for sensitive positions within the Customs Service.[196] The Court held that under these circumstances, requiring an individual warrant would not be practical and would interfere with the pressing mission of the Customs Service.[197]

The Court, in weighing the government's interests involved in conducting the tests noted that the national security interests which the Customs Service serves "could be irreparably damaged" if drug use

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187. *Id.*

188. *Id.*

189. 489 U.S. 656 (1989).

190. *Id.* at 664-65. The Court remanded for further proceedings a requirement that employees with access to "classified" material be subjected to warrantless drug testing. *Id.* at 679.

191. *Id.* at 668. In fact the Commissioner of the Customs Service acknowledged that there was very little drug use by employees in the Customs Service. *Id.* at 660.

192. *Id.* at 665. In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, decided the same day as *Von Raab*, the Court also relied on the "special needs" doctrine to uphold a policy established by the Federal Railroad Administration of conducting warrantless alcohol and drug testing of railroad employees involved in accidents. *Id.*

193. *Id.*

194. *Id.* at 666.

195. *Id.*

196. *Id.*

197. *Id.* at 667.

affected the employee's job performance.[198] The Court further stated that despite the potential for substantial interference of privacy involved in drug testing, the "operational realities of the workplace" made reasonable certain intrusions that would be unreasonable in another context.[199] Therefore, due to the sensitive nature of the Customs Service, the employees had a diminished expectation of privacy that could not outweigh the government's need to conduct the tests.[200]

Finally, the most recent development in the "special needs" doctrine came in the case of *Michigan Department of State Police v. Sitz*,[201] where the Supreme Court held that stopping all vehicles at a sobriety checkpoint did not violate the Fourth Amendment.[202] This was so, even though the purpose of the stops was to conduct a regular law enforcement activity—arresting drunk drivers.[203]

Citing *Von Raab*, the plaintiffs in *Sitz* argued that, since the sobriety checks were not serving a special need beyond the normal needs of law enforcement, the "special needs" doctrine did not apply and, therefore, balancing was inappropriate.[204] However, Chief Justice Rehnquist, writing for the majority, held that nothing in *Von Raab* or other "special needs" cases was intended to repudiate earlier cases involving police stops of motorists on public highways.[205] Chief Justice Rehnquist, therefore, held that the appropriate test was to balance the state's interest in preventing accidents caused by drunken driving, the effectiveness of sobriety checkpoints in doing so, and the intrusion on individual privacy rights.[206] The Court held that under this test, the state's interest in preventing accidents outweighed the motorists' privacy interests.[207] First, the Court noted the magnitude of the problem of drunken driving in the United States.[208] Then the Court went on to assess the intrusion on motorists incurred by the checkpoints.[209] Chief Justice Rehnquist found

198. *Id.* at 670.
199. *Id.* at 671.
200. *Id.* at 672.
201. 496 U.S. 444 (1990).
202. *Id.* at 455.
203. *Id.* at 449-50.
204. *Id.*
205. *Id.*
206. *Id.* at 450-55.
207. *Id.* at 455.
208. *Id.* at 451.
209. *Id.* at 451-52.

that the stops were brief, imposing the sort of minimum intrusion on motorists which had previously been held constitutional.[210]

Finally, the Court addressed the effectiveness of the sobriety checkpoints in apprehending drunk drivers.[211] Chief Justice Rehnquist stated that in evaluating effectiveness, it was not the Court's job to decide which among a number of reasonable law enforcement techniques should be employed to deal with a serious public danger.[212] Therefore, even though the number of drunk drivers that were arrested at the checkpoints was very low, the Court would not find that the program was ineffective.[213] Based on this balancing of factors, the Court held that the sobriety checkpoints did not violate the Fourth Amendment.[214]

An analysis of the "special needs" doctrine establishes that the traditional warrant and probable cause requirements have been severely eroded.[215] As the Supreme Court has embraced a reasonableness approach to Fourth Amendment challenges, it has allowed for warrantless searches of schools,[216] homes,[217] the workplace[218] and cars.[219] Further, the Court has, in certain instances, waived the requirement that probable cause requires individualized suspicion.[220] Based on these cases, the possibility exists for further expansion of the "special needs" doctrine.[221]

However, "Operation Clean Sweep" is distinguishable from "special needs" cases in a number of ways. First, the key to the doctrine remains "special needs" beyond the normal need for law enforcement.[222] However, there is no indication that the CHA owes its tenants any more

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210. *Id.*

211. *Id.* at 453-55.

212. *Id.* at 453.

213. *Id.* at 455.

214. *Id.*

215. *See* Reamey, *supra* note 149; Strossen, *supra* note 170, at 348.

216. *See* New Jersey v. T.L.O., 469 U.S. 325 (1984).

217. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).

218. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

219. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

220. *See Von Raab*, 489 U.S. 656; *Sitz*, 496 U.S. 444.

221. *See generally* Strossen, *supra* note 170 (discussing how *Sitz* line of cases has eroded the Fourth Amendment).

222. *See T.L.O.*, 469 at 351 (Blackmun, J., concurring).

of a duty of safety than any other landlord.[223] Courts have held that government agencies may have an affirmative duty of protection under a "state-created-danger" or "enhancement of risk" theory.[224] Under these theories, the government is liable for injuries that it helped create or enhanced the risk of occurring.[225] Arguably, public housing authority policies have created the danger at housing projects around the nation.[226] However, even if that is the case, it should not justify allowing housing authorities to abrogate constitutional rights to correct the situation that they created.[227]

Further, the time gap between the circumstances justifying the searches and the searches themselves indicates that the CHA is not acting pursuant to an exigency theory, but rather, it is merely conducting a regular law enforcement activity[228] by searching for contraband following the commission of a crime.[229] In fact, the sweeps have been described in the media as being a crime fighting measure, not an administrative regulation.[230] As the Supreme Court stated in *Camara v.*

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223. *See* Karen M. Blum, *Deshaney: Custody, Creation of Danger & Culpability*, 27 LOY. L.A. L. REV. 435, 457-59 (1994) (stating that unlike public schools, courts have held that there is no affirmative duty for administrators of public housing authorities to protect public housing residents); B.A. Glesner, *Landlords as Cops*, 42 CASE W. RES. L. REV. 679 (1992) (describing how, although limited exceptions have developed, landlords are not traditionally responsible for criminal acts perpetrated on their property); *see also* Dawson v. Milwaukee Hous. Auth., 930 F.2d 1283 (7th Cir. 1991) (holding that Milwaukee housing authority was not liable to public housing resident plaintiff who was shot by another public housing resident, even though plaintiff requested to be moved to another location).

224. *Dawson*, 930 F.2d at 1284.

225. *Id.*

226. *See* Schill, *supra* note 31 (stating that in the 1970s, police and firemen became a scarce sight at public housing projects); *see also* Emily Gurnon & Patrick T. Reardon, *CHA Concedes it Has Problems*, CHI. TRIB., Apr. 8, 1994, at 1 (describing how poorly designed and constructed CHA buildings have further deteriorated due to neglect by CHA administrators).

227. *See* Strossen, *supra* note 170 (arguing that expediency should not be considered a "special need").

228. It is important to note that CHA sweeps were carried out by CHA police, which have the same authority as city police. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 793 (N.D. Ill. 1994).

229. *See* Plaintiff's Class Action Complaint for Declarator and Injunctive Relief at 1-2, Pratt v. Chicago Housing Authority, 848 F. Supp. 792 (N.D. Ill. 1994) (No. 93-C-6985) (stating that sweeps are conducted primarily for law enforcement purposes).

230. *See* Carlos Sanchez, *Fulwood Sworn In as Chief, Asks Community for Help*, WASH. POST, Aug. 5, 1989, at B1.

Municipal Court,[231] "in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But . . . [doing so] would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found."[232]

Further, unlike *Griffin* and *Von Raab*, public housing residents do not have a diminished expectation of privacy in their apartments.[233] Given the Supreme Court's acknowledgement that the "physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed,"[234] even under a reasonableness analysis, the tenants' interest in privacy weighs strongly in favor of finding the sweeps unreasonable.

Finally, it is important to note that although the purpose of the roadblocks in *Sitz* was to apprehend drunk drivers, a relatively normal law enforcement activity,[235] the Court's holding was based specifically on the fact that the searches involved were of cars.[236] As such, the majority distinguished the roadblocks in question from other "special needs" cases,[237] and justified its holding on a line of cases involving automobiles and public highways.[238] Further, the Court relied on the fact that the searches involved only minimal intrusion and only took a few seconds.[239]

In contrast, the CHA sweeps took place in residents' homes and involved extensive searching by the police.[240] Based on these differences, any attempt to extend the reasoning of *Sitz* to justify warrantless searches of public housing residents' apartments is likely to be rejected by a court.[241] To apply the holding of *Sitz* and other "special needs" cases to warrantless searches of the home conducted to uncover

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231. 387 U.S. 523 (1967).

232. *Id.* at 535.

233. *See, e.g.*, Richmond Tenants Org. v. Kemp, 956 F.2d 1300 (4th Cir. 1992) (discussing the reasonable expectation of privacy in a home and applying that expectation to a public housing apartment).

234. Payton v. New York, 445 U.S. 573, 585 (1979) (quoting United States v United States Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297, 313 (1972)).

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

236. *Id.*

237. *Id.* at 451.

238. *Id.*

239. *Id.* at 452.

240. *Pratt*, 848 F. Supp. at 793.

241. *See, e.g.*, Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1114 n.4 (N.D. Ga. 1990) (distinguishing *Sitz* as only applying to highway checkpoints and not other more intrusive searches).

evidence of criminal activity would mean the end of both the warrant and the probable cause requirement of the Fourth Amendment.[242]

V. ALTERNATIVE SEARCH POLICIES

Two days after the *Pratt* decision came down, President Clinton, who had supported the CHA's warrantless search policy, ordered Attorney General Janet Reno and Secretary of Housing and Urban Development Henry Cisneros to come up with guidelines that would allow for maximum policing of public housing while still comporting with the Constitution.[243]

In a letter to the President dated April 14, 1994, Attorney General Reno and Secretary Cisneros offered a proposed set of guidelines regarding policing practices to be employed at housing projects around the nation.[244] One of the main proposals offered in that letter is that residents of public housing sign forms, appended to their leases, consenting to warrantless searches of their apartments when "crime conditions in the housing development make unit-by-unit inspections essential."[245]

The Department of Justice and the Department of Housing and Urban Development subsequently put forth a pamphlet outlining their proposals.[246] These proposals were endorsed in a resolution by the United States Senate.[247] More recently, however, due to public criticism of the proposal, the Clinton administration has backed off on its endorsement of consent forms authorizing warrantless searches.[248] Nevertheless, the CHA has adopted a policy of requesting that residents

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242. *See* Strossen, *supra* note 170 at 347 (stating that after *Sitz*, the Fourth Amendment would be completely eviscerated if the requirements that "special needs" searches be unintrusive and brief and be conducted for "special, non-criminal law enforcement purposes" were to be eliminated).

243. *See* President Clinton's Saturday Radio Address (Radio broadcast, Apr. 9, 1994).

244. Letter from Janet Reno, Att'y Gen., and Henry Cisneros, Secretary of Hous. and Urban Dev., to President Clinton (Apr. 14, 1994).

245. *Id.* at 2.

246. U.S. DEP'T OF JUST. AND U.S. DEP'T OF HOUS. AND URBAN DEV., GUIDANCE ON PUB. HOUS. SEC. (1994) [hereinafter GUIDANCE ON PUB. HOUS. SEC.].

247. *See* S. Res. 540, 103rd Cong., 2d Sess. (1994).

248. *See, e.g.*, Kathleen Best, *Gun-Search Plan Loses Luster; Cisneros, With Housing Officials, Hedges On Proposals*, ST. LOUIS POST-DISPATCH, May 5, 1994, at 7A (detailing the hesitancy of HUD to authorize implementation of public housing leases containing advance-consent clauses allowing police searches).

sign a voluntary search consent form at the time they sign their lease.[249] Also, such a proposal has been offered elsewhere, and remains a possibility for the future.[250] In discussing the use of consent clauses in public housing leases in their letter to President Clinton, Attorney General Reno and Secretary Cisneros left it unclear whether such clauses could be made a mandatory condition to obtaining public housing.[251]

A. *Mandatory Consent*

The Department of Justice and Department of Housing and Urban Development have acknowledged that any attempt to make consent to gun searches a mandatory provision of public housing leases raises serious constitutional issues.[252] Moreover, the Senate, in approving the guidelines that would include consent clauses, specifically stated that its approval was conditioned on the clauses being optional.[253] Additionally, the possibility of mandatory consent clauses raised an immediate outcry from the ACLU.[254]

The reason for this concern over mandatory consent forms is that, under the doctrine of "unconstitutional conditions," the government may not grant a benefit on the condition that the beneficiary give up a constitutional right, even though the government is under no obligation to grant the benefit at all.[255]

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249. *See* Rooney, *supra* note 71.

250. *See, e.g.*, Edward J. Boyer, *Security Plan Draws Fire; Safety: Public Housing Residents Pan the Proposal for Metal Detectors and Gun Searches at L.A. Projects*, L.A. TIMES, April 19, 1994, at B1 (criticizing the proposal for warrantless searches in Los Angeles projects); Jerry Demarco, *The Newest Way to Fight Crime; Patterson Launches Sweep at Housing Project*, BERGEN REC., Dec. 7, 1994, at B1 (describing how Patterson, New Jersey is using consent clauses to conduct sweeps modeled after "Operation Clean Sweep").

251. Letter from Janet Reno and Henry Cisneros to President Clinton, *supra* note 244, at 2-3.

252. See U.S. DEP'T OF JUST., *supra* note 246, at 3.

253. *See* S. Res. 540, *supra* note 247.

254. *See* Taylor, *supra* note 68; *see also* Memorandum from Loren Siegel, Director of ACLU Dep't of Pub. Educ. to Affiliate ACLU Directors (Apr. 18, 1994) (informing ACLU personnel of its objection to consent forms).

255. *See* Lynn A. Baker, *The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

The doctrine of "unconstitutional conditions" was recognized by the Supreme Court as early as 1877 in the case of *Barron v. Burnside*.[256] The purpose of the doctrine is to ensure that the government cannot indirectly deny constitutional rights that it could not directly deny.[257]

Despite the seemingly straight-forward purpose of the doctrine and its age, critics have noted that it is difficult to predict when a challenge based on unconstitutional conditions will be successful, and that in recent years, the Supreme Court has limited its application.[258]

One theory regarding the doctrine is that the Supreme Court has applied it in cases where unconstitutional conditions have a coercive effect on individual rights.[259] An example of this is *Speiser v. Randall*,[260] where the Court held that it was a violation of the First Amendment to require veterans to take a loyalty oath in order to receive a veteran's tax exemption.[261] The majority reasoned that to do so was to penalize those veterans who exercised their First Amendment rights by refusing to take the oath.[262]

Five years later in *Sherbert v. Verner*,[263] the Court reversed a ruling denying unemployment benefits to a woman who, for religious reasons, refused to accept a job that required her to work on Saturdays.[264] Again, the Court reasoned that to do so was tantamount to punishing the woman for exercising her rights to religious freedom.[265]

The thrust of these cases seems to be that the government actions in question had a deterrent effect on individual exercise of constitutional rights.[266] However, the Court has rejected challenges based on unconstitutional conditions when it has found that the deterrent effect is

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256. 121 U.S. 186 (1877). *See generally* Sullivan, *supra* note 255, for a history of the doctrine.

257. *See* Sullivan, *supra* note 255.

258. *See generally id. See also* Lyng v. International Union, UAW, 485 U.S. 360 (1988) (unconstitutional conditions doctrine held not to apply to federal act which prohibited food stamps from being distributed to any family while members of the family were on strike); Regan v. Taxation With Representation, 461 U.S. 540 (1983) (unconstitutional conditions doctrine did not invalidate federal income tax law barring nonprofit organizations from using tax-deductible contributions for lobbying activity).

259. *See* Sullivan, *supra* note 255, at 1428-56.

260. 357 U.S. 513 (1958).

261. *Id.* at 529.

262. *Id.* at 518.

263. 374 U.S. 398 (1963).

264. *Id.* at 401-02.

265. *Id.* at 404.

266. *See* Sullivan, *supra* note 255, at 1433-37.

minimal.[267] For example, in *Wyman v. James*,[268] a woman sought an injunction barring a New York State welfare program (Aid to Families with Dependant Children) from conditioning the receipt of aid on allowing caseworkers to make warrantless inspections of her home.[269] In rejecting the challenge, the Court held that the visits did not constitute a search within the meaning of the Fourth Amendment.[270] Moreover, the Court stated the plaintiff acted with free will in choosing to submit to, or not to submit to, the visits.[271] Consequently, the Court implied that the coercive effect was not great enough to rise to the level of an unconstitutional condition.[272]

Similarly, the Supreme Court has rejected challenges based on unconstitutional conditions by distinguishing between a penalty being imposed by the government as opposed to a refusal to subsidize an activity.[273] In *Rust v. Sullivan*,[274] the Supreme Court held that the "unconstitutional conditions" doctrine did not apply to a federal program which granted money to health clinics to be used for family planning, while prohibiting the doctors at the clinics from using the money to conduct abortion counseling.[275] The Court noted that a clinic, by accepting this funding, was still free to conduct abortion counseling using other funding.[276] Therefore, the Court held that the program did not require that the clinics give up their First Amendment right to abortion-related speech.[277]

While these cases indicate that the Supreme Court has only applied the "unconstitutional conditions" doctrine in select situations,[278] mandatory waivers of Fourth Amendment rights would seem to meet the requirements of the doctrine. Unlike *Wyman*, sweeps are undisputedly searches within the meaning of the Fourth Amendment.[279] Further, a court has already

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267. *See id.* at 1433.

268. 400 U.S. 309 (1971).

269. *Id.* at 310-11.

270. *Id.* at 317.

271. *Id.* at 324.

272. *Id.*

273. *See* Sullivan, *supra* note 255, at 1439.

274. 500 U.S. 173 (1991).

275. *Id.* at 196-99.

276. *Id.* at 196.

277. *Id.* at 198-99.

278. Sullivan, *supra* note 255, at 1416.

279. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994).

found that such sweeps likely violate the Fourth Amendment.[280] Consequently, the purpose of the consent forms is to avoid any constitutional violations caused by warrantless searches and to sidestep the *Pratt* decision.[281]

Additionally, the current legal mainstream interpretation of the "unconstitutional conditions" doctrine suggests that it will be applied when the government penalizes, as opposed refusing to subsidize, an activity.[282] Moreover, the Supreme Court seems most willing to apply the doctrine when fundamental rights, such as those enunciated in the First Amendment, are involved.[283] Bearing this in mind, mandatory waivers are unlikely to pass constitutional muster. First, unlike the situation in *Rust*, where the Court found that the clinics could still exercise their First Amendment rights,[284] once the tenants sign the forms, they have given up their constitutional rights to be free from warrantless searches.[285] Therefore, the forms are not like denial of a subsidy, which would only limit the context in which tenants could exercise their constitutional rights. Rather, they constitute a penalty for those tenants who wish to exercise their Fourth Amendment rights.[286]

Also, like the First Amendment, the Fourth Amendment is one of the central guarantees of the Bill of Rights. Further, Fourth Amendment rights are strongest within the confines of the home.[287] Therefore, requiring public housing tenants to sign a waiver giving away their Fourth

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280. *Id.*

281. *See, e.g.*, Letter from Janet Reno & Henry Cisneros, *supra* note 244; *Projects and Police Raids*, WASH. POST, Apr. 19, 1994, at A14 (editorial) (stating that President Clinton's proposals are implicit criticisms of the *Pratt* decision); *Safety-for-Rights a Bad Trade*, CHI. TRIB., Apr. 19, 1994, at 22 (editorial) (stating that as a practical matter, mandatory consent clauses defy the holding of the *Pratt* decision).

282. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U.L. REV. 593, 601 (stating that every Supreme Court Justice has adopted a position similar to the penalty/subsidy distinction of the doctrine).

283. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) ("modern decisions invoking the doctrine have most frequently involved First Amendment liberties") (Stevens, J., dissenting).

284. Rust v. Sullivan, 500 U.S. 173, 196 (1991).

285. *See, e.g.*, Taylor, *supra* note 68, at A4 (quoting Harvey Gross, legal director of the Chicago ACLU as saying that the waivers require tenants to give up their right to refuse searches).

286. *See, e.g., id.* (stating that constitutional law experts have concluded that the waivers are vulnerable to a legal challenge because they would constitute the withholding of a public benefit).

287. Payton v. New York, 445 U.S. 573 (1980).

Amendment rights is likely to be found overly coercive and a violation of the doctrine of "unconstitutional conditions."

B. *Voluntary Waivers*

The Department of Justice and the Department of Housing and Urban Development have suggested that any constitutional challenges based on mandatory consent forms could be avoided by making these clauses optional, and by providing for the tenant's right to revoke consent when police arrive for the search.[288] However, even if the government only requests that public housing residents sign forms consenting to searches of their apartments, in order for the consent to be valid it must be voluntary in fact, and not the product of coercion.[289] Moreover, in any criminal proceedings that might arise out of a sweep, the prosecution bears the burden of proving that the tenant's consent was not coerced.[290] Consequently, while non-mandatory consent forms might solve the problem of a challenge to the overall policy, they would not prevent individual tenants who sign the forms from later claiming that their consent was coerced.[291]

In *Schneckloth v. Bustamonte*,[292] the Supreme Court held that whether consent to a search is given voluntarily is a question of fact to be determined from the totality of the circumstances.[293] Under a totality of the circumstances test, no one fact is dispositive.[294] Accordingly, in *Schneckloth*, even though the defendant consented to a search of his car without being advised that he could refuse consent, the Court held that the consent was valid.[295] In reaching its conclusion, the Court stated that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would

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288. *See* GUIDANCE ON PUB. HOUS. SEC., *supra* note 246.

289. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

290. *See* Florida v. Royer, 460 U.S. 491, 497 (1983); Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968).

291. Telephone Interview with Valerie J. Phillips, Public Information Director, ACLU of Illinois (Mar. 6, 1995) (stating that the ACLU remains concerned that any allegedly voluntary consent form used by the CHA is truly voluntary).

292. 412 U.S. 218 (1973).

293. *Id.* at 227.

294. *Id.*

295. *Id.*

> be no more than a pretext for the unjustified intrusion against which the Fourth Amendment is directed.[296]

Applying the same reasoning, courts have held that even when an individual consents to a search after being told of her right to refuse consent, and even after signing a form stating that she gives consent, the consent may still be found to have been coerced.[297]

Therefore, even if a resident signs a "voluntary" consent form, that fact alone is not determinative as to the voluntariness of the consent.[298] Consideration of the socio-economic factors that affect public housing residents' lives might establish that their consent was coerced.[299] Issues such as whether residents understand that they can refuse consent or withdraw their consent later, as well as residents' fears that they may lose their housing or become the subject of a criminal investigation if they do not sign the consent form could result in a determination that consent is actually the product of coercion.[300]

That such fears might be realistic is substantiated by the fact that recently the CHA were found to have retaliated against tenants for opposing CHA policies.[301] In *Herring v. Chicago Housing Authority*, Beverly Herring was a tenant of a CHA building that was subjected to a "lockdown" in conjunction with "Operation Clean Sweep."[302] Following the "lockdown," Ms. Herring became involved with groups organized to protest the CHA's search policies.[303] In May of 1990, the

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296. *Id.* at 228.

297. *See, e.g.*, United States v. Maez, 872 F.2d 1444, 1456 (10th Cir. 1989) (consent to search house found to be involuntary even though homeowner was advised of her right to refuse consent, both orally and in writing, and even though she signed a consent form); United States v. Recalde, 761 F.2d 1448, 1454 (10th Cir. 1985) (consent to search car found to be involuntary, even though defendant signed consent form stating that he had the right to refuse consent).

298. *See Schneckloth*, 412 U.S. at 227.

299. *See* Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"* 36 HOW. L.J. 239 (1993) (arguing that factors such as race and poverty affect the ability to voluntarily consent to police encounters).

300. *See id.* The Council of Large Public Housing Authorities voiced concern, following announcement of the new proposals, that public housing tenants might feel pressured to sign any consent clauses inserted into a public housing lease. *See* Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, N.Y. TIMES, Apr. 17, 1994, at 1.

301. *See* Herring v. Chicago Hous. Auth., 850 F. Supp. 694, 703 (N.D. Ill. 1994).

302. *Id.* at 696.

303. *Id.* at 697.

CHA began eviction proceedings against Ms. Herring, ostensibly for having violated the CHA "visitation policy."[304]

Upon review, the district court held that the CHA had actually sought to evict Ms. Herring in retaliation for her protest activity and her association with protestors of the CHA's search policies.[305] Accordingly, the CHA had violated Ms. Herring's First Amendment rights.[306] The *Herring* case illustrates how it can be risky to oppose the CHA.[307]

In addition to fear of unauthorized reprisal by the CHA for failing to sign a waiver, it has also been suggested that public housing authorities might separate residents according to whether or not they have signed a consent form.[308] The fear of being placed in a "non-consent" building might also have an effect on residents which a court might find coercive. Given the desperate situation many public housing residents are in,[309] and given the Supreme Court's concern with the effect coercion can have on consent,[310] "voluntary" consent forms seem vulnerable to a court challenge.

Provisions for allowing tenants to revoke their consent when the police arrive are also vulnerable to claims of coercion. In considering whether a police encounter is consensual, the Supreme Court has suggested that factors such as whether there was the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, and the use of language or tone that compliance might be required are to be considered.[311] Given the description of how

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304. *Id.*

305. *Id.* at 700-01.

306. *Id.* at 703.

307. *See* Jane Juffer, *Clean Sweep's Dirty Secret*, CHI. READER, Oct. 5, 1990, at 1 (describing how the CHA has harassed and attempted to isolate those who have voiced opposition to their security policies). In another case, a district court found that the CHA had conducted searches of a tenant's apartment in retaliation for the tenant having brought a suit protesting the CHA policy of evicting residents because of crimes committed by their relatives outside of CHA property. *See* Turner v. Chicago Hous. Auth., No. 89 C 5801, 1990 WL 104113 (N.D. Ill. July 3, 1990).

308. *See* GUIDANCE ON PUB. HOUS. SEC., *supra* note 246, at 4.

309. *See, e.g.*, Robert Davis & Kevin Johnson, *In Projects, it's 'Pop' vs. Privacy*, USA TODAY, Apr. 18, 1994, at 3A (describing CHA tenants' desperation for something to make their homes safer).

310. *See supra* notes 291-97 and accompanying text.

311. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

the sweeps have been conducted in the past, all of these factors are arguably present.[312]

A sweep of a public housing apartment building involves a massive show of authority. Multiple officers are dispatched to search an apartment.[313] The searches can be intrusive, involving not only rifling through possessions, but also frisking tenants and looking into their undergarments.[314] During the searches, the buildings are sealed off and access is restricted, sometimes for days.[315] Tenants can be ordered out of their apartments or ordered to restrict their actions within their apartments.[316] Under these circumstances, it is easy to see how an individual might not feel free to tell a police officer that they are no longer interested in consenting to a search.

VI. CONCLUSION

Under either a traditional Fourth Amendment analysis requiring that searches be conducted pursuant to a warrant issued based on probable cause, or the "special needs" doctrine, warrantless search policies such as "Operation Clean Sweep" are unconstitutional. Moreover, the suggested consent forms, either mandatory or voluntary, raise serious constitutional questions.

The problems in our nation's housing projects are dire. However, the solution should not be to sacrifice public housing residents' constitutional rights. Such action only weakens the general public's constitutional rights, while breeding contempt for the law by those whose rights have been abdicated.[317]

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312. *See* Ben Joravsky, *Don't Sweep on Me: Unheard Voices of the CHA*, CHI. READER, Apr. 22, 1994, at 3 (quoting Mark Pratt as saying that he didn't dare say anything to the police as they searched him during a sweep).

313. *See* Juffer, *supra* note 307.

314. *See* Joravsky, *supra* note 312. The intrusiveness of the searches gives rise to questions which the guidelines do not answer regarding the extent of what would be permitted under a consent clause. *See* GUIDANCE ON PUB. HOUS. SEC., *supra* note 246. Generally, a consent search may not exceed the scope of the consent given by the individual. *See* United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990) (consent to open door panels is not normally included in consent to search automobile).

315. *See* Plaintiff's Complaint at 8, Summeries v. Chicago Hous. Auth. (No. 88-C-10566) (stating that following the search of a building, it is closed to all visitors for 48 hours).

316. *See* Juffer, *supra* note 307.

317. *Id.* As Judge Anderson stated in *Pratt*, "[t]he erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us." Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 797 (N.D. Ill.1994).

Alternative solutions to the problems at public housing projects must be sought out. Former CHA chairman Lane proposed dispersing public housing residents into middle income communities.[318] Around the nation, large inner-city public housing apartment buildings are being bulldozed and in their place smaller, more humane forms of public housing are being erected.[319] Such innovative ideas should be pursued.

In the meantime, public housing projects must be made secure. Vacancies at public housing projects have been identified as being a major contributor to the danger.[320] Vacant apartments must be rented, or securely sealed off to prevent gang members from taking them over. Physical decay is also a major contributor to the problem at public housing projects.[321] Public housing apartment buildings must be repaired and properly maintained. Also, ongoing regular police presence within the public housing community, as well as searches of public areas and vacant apartments can contribute significantly to the safety of public housing projects.[322] The answer to public housing security lies in these sorts of measures, not in the sacrifice of constitutional rights by a group of people so desperate for help they may be willing to agree to anything.

Charles Hellman

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318. *See, e.g.*, William A. Sampson, *Revive the City by Re-Creating Community*, CHI. TRIB., May 9, 1994, at 11 (suggesting that revitalization of communities can best occur by creating incentives for middle-class people to move into poor neighborhoods).

319. *See, e.g.*, *Symbols of Policy Ills, Public High Rises Fall*, N.Y. TIMES, Apr. 3, 1995, at B5 (describing Newark Housing Authority's destruction of two high rises that are going to be replaced by 300 town houses). In fact, the CHA has already razed some of the apartment complexes subjected to "Operation Clean Sweep." *See* Edward Walsh, *Chicago Tries to Replace 'Castle' With Community; Cabrini-Green Residents Eye Experiment Cautiously*, WASH. POST, Oct. 28, 1995, at A3.

320. *See* Robert A. Davis, *CHA Vacancies Create Trouble Spots*, CHI. SUN-TIMES, Oct. 17, 1995, at 4.

321. *See, e.g.*, Schill, *supra* note 31. *See also* Mark Pratt, *Instead of Sweeps, CHA Should Clean Up Its Act*, CHI. SUN-TIMES, Mar. 31, 1994, at 32 (editorial) (describing the inefficacy of the sweeps and the sense of humiliation they create in CHA's Cabrini-Green's residents).

322. *See, e.g.*, Grossman, *supra* note 63 (discussing the success of lawful "vertical patrols" of CHA buildings by police).