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Bringing Clarity to Administrative Search Doctrine: Distinguishing Dragnets from Special Subpopulation Searches

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Bringing Clarity to Administrative Search Doctrine: Distinguishing Dragnets from Special Subpopulation Searches*

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Introduction

Anyone who has been stopped at a sobriety checkpoint, screened at an international border, scanned by a metal detector at an airport or government building, or drug tested for public employment has been subjected to an administrative search or seizure. Searches of public school students, government employees, and probationers are characterized as administrative, as are business inspections and—increasingly—wiretaps and other searches used in the gathering of national security intelligence. In other words, the government conducts thousands of administrative searches every day. None of these searches requires either probable cause or a search warrant. Instead, courts evaluating administrative searches need only balance the government's interest in conducting the search against the degree of intrusion on the affected individual's privacy to determine whether the search is reasonable. This reasonableness balancing is very deferential to the government, and the resulting searches are almost always deemed reasonable. As a result, the administrative search exception functions as an enormously broad license for the government to conduct searches free from constitutional limitation.

Formulating the boundaries and requirements of administrative search doctrine is therefore a matter of great importance, and yet the rules governing administrative searches are notoriously unclear. Much of the mischief in administrative search law can be traced to the Supreme Court's conflation of two distinct types of searches within one doctrinal exception. For ease of reference, I will call them "dragnet searches" and "special subpopulation searches." Dragnets came first, and special subpopulation searches came later, but without any clear understanding that something new was afoot. As the category of administrative searches tried to accommodate both kinds of searches as if they were the same thing, it gradually lost the ability to impose meaningful limitations on either one.

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When the concept of administrative searches first entered the law in the 1960s, it was designed for dragnet intrusions—searches or seizures of every person, place, or thing in a specific location or involved in a specific activity. Such intrusions were permissible if

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Search and Seizure Law Report

TABLE OF CONTENTS

they involved only minimally intrusive government actions necessary to protect important health or safety interests that an individualized probable cause regime could not sufficiently protect. Before the Court would approve a dragnet, the government had to demonstrate that it was acting pursuant to either a warrant or a statutory regime that imposed clear limits on executive discretion. Typical examples of dragnet intrusions included safety inspections of all homes in a neighborhood, checkpoint searches of all persons driving on a particular roadway, and inspections of all businesses in a particular industry.

In the 1980s, the Court added special subpopulation searches to the category of administrative searches. According to the Court, certain people (or people acting in certain capacities) have reduced expectations of privacy relative to the public at large, such that public officials need not satisfy the traditional warrant and probable cause requirements before searching them. Instead, officials can conduct searches on the basis of some lower level of individualized suspicion. Examples of special subpopulation searches included searches of public school students, probationers, and government employees.

Because these two kinds of intrusions raise different issues, each was once properly limited by a different set of doctrinal safeguards. Once they were both labeled "administrative," however, they were regarded as making up a single category, and the safeguards surrounding each kind of administrative search faded away as judges applied inapposite lessons from one kind of search to the other. The result is a doctrine that imposes few limits on government conduct and paves the way for indiscriminate searches and seizures. To clarify and improve this area of the law, I argue that we should disentangle the two strands of administrative search doctrine and restore the Fourth Amendment safeguards that existed in each context before the cross-contamination.

Dragnets (1967–1984)

The Supreme Court first recognized the permissibility of dragnet administrative searches in *Camara v. Municipal Court*, 387 U.S. 523 (1967), when it suggested that routine government inspections of homes for housing code violations could be conducted without individualized showings of probable cause. The housing inspections at issue were not conducted on the basis of any particularized reason to believe that a given house was in violation of the housing code. Rather, government officials executed a general plan of inspecting every home in a given geographic area. The government fully expected that many or even most of the homes would be in compliance with the housing codes, such that the inspections would burden many law-abiding homeowners. If the normal requirement of individualized probable cause were in force, therefore, such inspections would violate the Fourth Amendment.

Rather than categorically rejecting dragnet searches, however, the Court carved out an exception. In stating that generalized housing inspection programs can pass muster, the Court emphasized the importance of the government's interest in protecting community health by ensuring that homes are up to code. On the other side of the balance, the Court noted that "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." That said, the importance of the government's interest and the minimally intrusive nature of the search were only necessary conditions, not sufficient ones, for exempting the housing inspection program from the default rule requiring individualized suspicion. As the Court emphasized, dispensing with individualized showings of probable cause was appropriate only because the government's important health and safety interests could not be served effectively through individualized canvassing techniques. The Court noted that many housing conditions raising health and safety issues, such as faulty wiring, "are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself." As a result, the Court concluded, the government need not have individualized probable cause before conducting a housing inspection. Rather, it could rely on area-wide probable cause that searches in a particular neighborhood would reveal housing code violations.

In the 10 years after *Camara* was decided, the Supreme Court permitted administrative searches only for routine fire code inspections and regular inspections of certain highly regulated and intuitively dangerous businesses—namely firearms dealers and liquor establishments—to ensure compliance with statutory record-keeping requirements and licensing restrictions. *See U.S. v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Co. v. U.S.*, 397 U.S. 72 (1970); *See v. City of Seattle*, 387 U.S. 541 (1967). As was true with the *Camara* housing inspections, the dragnet inspections in these cases involved minimally intrusive government invasions conducted for important health and safety reasons that could not have been adequately served by an individualized probable cause regime.

During that same time period, the Court struck down many proposed administrative searches—even minimally intrusive ones—because alternative regimes predicated on individualized suspicion could reasonably serve the government's interests. For example, the Court rejected various government attempts to employ roving vehicle stops, noting the availability of alternative, individualized suspicion regimes that could be equally effective in serving the government's stated interests. *See Delaware v. Prouse*, 440 U.S. 648 (1979); *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973) (Powell, J., concurring). If the government could labor under the individualized suspicion requirement and still successfully abate hazardous conditions, then there was no good reason to expose large numbers of innocent people to unnecessary dragnets.

In addition to ensuring that administrative searches were employed only when they were (1) justified in light of the balance of interests and (2) necessary because a regime of individualized suspicion could not effectively serve the government's interest, the Court was careful to limit the conduct of such searches in order to protect citizens against arbitrariness. After all, even if administrative searches are limited as described above, there remains a danger that government officials will use them in arbitrary, discriminatory, or harassing ways. The normal method of protecting citizens against arbitrary searches is to limit the discretion of executive officials, either by requiring that a neutral decisionmaker issue a warrant before a government intrusion occurs or by requiring the government to justify an intrusion after the fact by pointing to facts establishing a required level of individualized suspicion. Obviously, the ex post alternative was inapposite for the dragnet scenario, because dragnets are undertaken without individualized suspicion. Accordingly, the Court would approve only dragnet intrusions that were authorized in advance through a mechanism designed to eliminate the danger of arbitrariness that would arise if executive officials had discretion regarding how and whom to search.

The most common method of eliminating executive discretion in administrative searches during this early period was requiring the government to obtain a warrant for an "area inspection" before conducting a dragnet search. The San Francisco Municipal Code ordinance at issue in *Camara* authorized housing officials to inspect apartment buildings "at least once a year and as often thereafter as may be deemed necessary" so long as the inspections were conducted "at reasonable times." The Court struck down the program, noting that "[t]he practical effect of this system is to leave the occupant subject to the discretion of the officer in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." The Court emphasized that the warrant need not be a traditional individualized warrant; it could be a warrant to search the apartment homes in a given area, supported by probable cause that an area search would reveal housing code violations. But the Court recognized that some form of oversight was necessary in order to protect homeowners from arbitrary government intrusions conducted under the cover of the dragnet exception.

For the next 15 years, when the Court confronted the question of a dragnet's legitimacy under the Fourth Amendment, it examined the degree to which the regime authorizing the dragnet search limited the discretion of the officials conducting the search. The Su-

preme Court struck down the Border Patrol's practice of stopping and searching cars near the border without reasonable suspicion of criminal activity because of the discretion that the program gave to border patrol officers. *See U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973). Even fixed checkpoints near the border were impermissible if checkpoint officials had discretion to select which cars to search at the fixed locations. *See U.S. v. Ortiz*, 422 U.S. 891 (1975).

When the Court did depart from the warrant requirement as a means of circumscribing government discretion during this time period, it substituted other requirements designed to limit government discretion. In *U.S. v. Biswell*, 406 U.S. 311 (1972), the Court upheld the warrantless search of a pawn shop pursuant to a statutory inspection regime targeted at businesses selling guns and ammunition. Although the Court did not dwell on the need to limit government discretion, it specifically noted that the regulatory scheme ensured that inspections were "carefully limited in time, place, and scope."

Nine years later, in *Donovan v. Dewey*, 452 U.S. 594 (1981), the Court discussed the substitution of statutes or regulations for warrants at somewhat greater length. "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow," the Court explained that a warrant would be necessary "to protect the owner from the 'unbridled discretion [of] executive and administrative officers.'" Where Congress has made rules governing inspection procedures, however, a warrantless inspection could be upheld, but only if Congress' regime "establishes a predictable and guided federal regulatory presence" that does not "leav[e] the frequency and purpose of inspections to the unchecked discretion of Government officers."

In the first phase of administrative search doctrine, then, the Court dispensed with the Fourth Amendment's requirement of individualized suspicion only for dragnet searches that complied with three basic values of the Fourth Amendment. First, the searches had to be justified in terms of the balance between the importance of the government's interest and the degree of intrusion upon individuals. That the searches at issue aimed to serve health and safety needs was an important fact on both sides of this balance: The health and safety needs at issue were considered serious, but the fact that the search did not threaten the citizen with the normal apparatus of law enforcement helped the intrusion on privacy seem relatively minimal. Second, dispensing with the requirement of individualized suspicion had to be necessary in order to advance the governmental interest at stake. Third, the searches had to be cabined in ways that limited the discretion of executive officials, lest permission to conduct searches without individualized suspicion become a license to engage in arbitrary or harassing behavior.

Special subpopulations (1976–1987)

In the 1980s, the Court expanded the administrative search exception and allowed the government to escape the Fourth Amendment's warrant and individualized probable cause requirements in a second type of case. The new category involved what I will call "special subpopulations." Special subpopulations are groups of individuals with reduced expectations of privacy, including students, government employees, probationers, and parolees. Beginning at this time, the Court began permitting warrantless searches of members of these special subpopulations based on mere reasonable suspicion of wrongdoing, rather than probable cause. As was true of dragnets, these special subpopulation searches were predicated on an asserted government need that was independent of law enforcement. But along all three of the dimensions identified above as essential for permissible dragnets, special subpopulation searches were different.

The first difference concerned the balance between the government's interest and the degree of intrusion on privacy. In general, special subpopulation searches are more intrusive than the early dragnets were. Dragnets typically involved cursory inspections of relatively nonprivate areas. Housing inspectors went into basements to look at pipes; they did not go into bedrooms to read diaries. In contrast, special subpopulation searches often involved full-blown searches of people or personal property.

Second, special subpopulation searches featured a reduction in the degree of individualized suspicion required to authorize a search, rather than a complete elimination of the individualized suspicion requirement. Special subpopulation searches were thus initially created as an exception to the probable cause requirement but not necessarily to individualized suspicion altogether.

Third, the prospect of executive discretion was much less troubling to the Court in the context of special subpopulations. Government officials did not need to obtain warrants or rely on preexisting statutory or regulatory regimes before performing a special subpopulation administrative search. Rather, to cabin executive discretion, the Court relied on a post hoc analysis of the reasonableness of the government's showing of individualized suspicion.

In addition, the two kinds of searches raise different issues simply on the basis of the different background assumptions, in each case, about the people who are

searched. Dragnets involve blanket intrusions on entire populations with the knowledge that many or even most of those searched will be innocent. In contrast, special subpopulation searches are targeted. They focus on specific individuals, much as routine investigative practices do. In one sense, this difference makes special subpopulation searches less troubling than dragnet searches as a constitutional matter: They burden people whom the Court has already designated as having reduced expectations of privacy, whereas dragnets routinely invade the privacy interests of individuals who have full expectations of privacy. On the other hand, special subpopulation searches are more likely to carry the stigmatic burdens associated with the suspicion of wrongdoing. Indeed, these burdens on the people searched are aggravated in the special subpopulation context precisely because such searches often target people, such as probationers and parolees, who are already treated as marginal or deserving of less respect than the population as a whole.

The entanglement of dragnet and special subpopulation searches was gradual. It occurred at least in part because there are a number of factual scenarios in which either rationale could justify a government search. Imagine, for example, that the government stops a traveler going through customs at an international airport. The stop could be conducted pursuant to a dragnet policy under which people who enter the country are automatically stopped and questioned. Alternatively, if the traveler was acting suspiciously when he approached customs, the stop might also be justified within the special subpopulation framework: People who cross the border have reduced expectations of privacy, and this individual's conduct created reasonable suspicion, even if not probable cause. Thus, it may be helpful to think of the dragnet and special subpopulation variants of administrative search doctrine as different theories with which the government can justify a given search rather than as describing different factual scenarios in which searches occur. Just as there are different exceptions to the warrant and probable cause requirements that might justify a car search in a given case, there may be alternative ways that the government could justify an administrative search.

The two administrative search rationales can appear in tandem for other reasons as well. For example, even if the two arguments might not justify exactly the same intrusion on privacy, they might be germane at different moments within the same litigated encounter. Consider vehicle sobriety checkpoints. Cars that are stopped when approaching a sobriety checkpoint are typically stopped pursuant to a dragnet policy that requires police to stop every vehicle that passes through the checkpoint. The decision regarding whom to refer to a secondary inspection area, however, is an individualized decision to further scrutinize a person who has a reduced expectation of privacy. In a case challenging a search conducted at a sobriety checkpoint, therefore, both kinds of administrative search arguments might be in play.

Given the overlapping and sequential ways in which these two doctrines can apply, it is perhaps not surprising that the Supreme Court was not always clear about where one rationale ended and the other began. Indeed, the Court took its first step toward entangling dragnet and special subpopulation searches in a case involving both a dragnet *and* an individualized intrusion. In *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), border patrol officials looking for illegal aliens stopped the respondents' cars as part of fixed dragnet immigration checkpoints near the Mexican border and then referred some cars to secondary inspection areas where the drivers and passengers were questioned. The initial stop was a dragnet seizure of all cars that drove through the checkpoint, and it was conducted pursuant to a magistrate's warrant. The decision regarding whom to refer to a secondary inspection area, however, was an individualized decision left to the discretion of the border patrol official.

Had the Court focused clearly on the two different phases of the encounter, it might have evaluated the initial stop as administrative in the dragnet sense and then evaluated the secondary and individualized questioning as an intrusion upon persons with a reduced expectation of privacy. But the *Martinez-Fuerte* Court failed to distinguish between the initial checkpoint where everyone was stopped and the secondary detention where border patrol officials selectively subjected a chosen few to additional scrutiny. Rather, the Court characterized the entire exchange as one form of legitimate administrative search that need not be supported by any showing of reasonable or articulable suspicion. It used the framework for justifying the initial dragnet traffic stop to legitimate both parts of the intrusion. In so doing, it for the first time upheld an individualized search or seizure—the secondary questioning—on an administrative search rationale.

The *Martinez-Fuerte* Court's importation of special subpopulation searches into the administrative search exception was not explicit. The Court never actually stated that individualized intrusions could be upheld as administrative searches. Rather, it glossed over the individualized nature of the intrusion by lumping it together with the initial dragnet stop. It was not until 1985 that the Court explicitly incorporated special subpopulation searches into the administrative search category.

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court upheld a vice principal's warrantless, discretionary decision to search an individual high school student's purse without probable cause. Relying

on its decision in *Camara*, the *T.L.O.* Court found that there was an important non-law enforcement need to maintain order in the schools and that this need justified dispensing with the warrant and probable cause requirements, just as the need to maintain housing safety had done earlier. The Court further cited *Martinez-Fuerte* to support the idea that a warrant supported by individualized probable cause is not an indispensable requirement of the Fourth Amendment. That is, the Court drew on two dragnet administrative search cases to establish the propriety of relaxing the Fourth Amendment's privacy protections in a case involving no nondiscretionary dragnet at all, but instead a targeted search of a person within a special subpopulation having a reduced expectation of privacy. Because the government's interest in safety and order was sufficiently important, the Court held that warrantless searches of students by school officials need only be justified under a reasonable suspicion standard.

Although the *T.L.O.* Court did not explicitly characterize the vice principal's search as administrative, the precedents on which it drew squarely situated the decision in the line of administrative search cases. Moreover, Justice Blackmun's concurring opinion articulated a test—the "special needs" test—that the Court would use for determining the validity of administrative searches in later cases. Under the special needs test, a court may dispense with the warrant and probable cause requirements "[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." If the government can demonstrate that it has such a special need, then the court will balance the government's interest against the degree of intrusion to determine whether a search is reasonable. If there is no special need, then the government needs to satisfy the requirements of the Warrant Clause before it may search.

The rise of the special needs test helped complete the conflation of the two different rationales for administrative searches, as the Court came to use the special needs test regardless of which type of search was at issue. Two years after *T.L.O.*, the Court upheld the discretionary search of an individual government employee's office by relying on the special needs test. *See O'Connor v. Ortega*, 480 U.S. 709 (1987). In so doing, the Court explicitly connected its special subpopulation and dragnet precedents by emphasizing that *Camara* and *T.L.O.* were both cases involving special needs.

Later that term, the Court officially imported the special needs test into the dragnet context. Writing for a majority of the Court in *New York v. Burger*, 482 U.S. 691 (1987), Justice Blackmun used his special needs test to uphold the dragnet search of a junkyard pursuant to a state statute authorizing periodic inspections of vehicle-dismantling industries. Since *Burger*, the Court has invoked the special needs test to assess individualized special subpopulation searches of probationers as well as dragnet drug testing procedures aimed at patients in public hospitals, government employees, and public school students. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987). By the late 1980s, it ceased to matter whether an administrative search was a dragnet or a discretionary search of an individual who was a member of a special subpopulation with reduced expectations of privacy. The test was the same; the entanglement was complete.

The effects of entanglement

Once dragnet and special subpopulation searches were lumped together, administrative search doctrine evolved in response to the conflation. Many of the safeguards that the Supreme Court had implemented to protect citizens against arbitrary and unnecessary government intrusions in each context were fundamentally inapposite to the other. As a result, the Court frequently found itself adjudicating cases in which doctrinal safeguards previously implemented for "administrative searches" seemed out of place. It responded by weakening or eliminating those safeguards, and, in so doing, created an administrative search doctrine that permits arbitrary, unnecessary, and highly-intrusive government intrusions.

Arbitrary government intrusions

Dragnets. Whereas the Court had focused on limiting government discretion in dragnet cases in order to prevent arbitrary intrusions, searches of individuals who were members of special subpopulations *required* discretion. Something had to give. The tension was apparent in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976). In discussing the border officials' conduct during the initial dragnet stop of the cars at the checkpoint, the Court focused on the need to eliminate executive discretion. Distinguishing the fixed checkpoint in *Martinez-Fuerte* from the roving stops that it had struck down in the past, the Court noted that these officers lacked discretion to determine where to locate a checkpoint and which cars to detain, thus reducing the risk of abusive or harassing stops. The Court further noted that the checkpoint was established in accordance with a magistrate's warrant of inspection. But when the Court began to analyze the border officials' actions in referring the respondents to the secondary inspection areas,

its attitude toward discretion changed entirely. Rather than ask whether the officers had only limited discretion with respect to secondary inspections, the Court embraced government discretion as a necessary feature of secondary stops. Indeed, it specifically declared that border patrol officials must have "wide discretion" in selecting which motorists should be subjected to further scrutiny and that many incidents of checkpoint operation must be "committed to the discretion of such officials." Thus, the discretion that was a primary evil to be avoided in dragnet searches was not only permissible but embraced as important and necessary when the intrusion at issue was individualized.

Had the *Martinez-Fuerte* majority cleanly distinguished between the two types of intrusions at issue, it might have made the sensible point that executive discretion should be eliminated for one phase of the encounter but not for the other. But because the Court failed to foreground (or perhaps even to notice) that distinction, its discussion of discretion simply seemed muddled and self-contradictory.

Three years later, in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court struck down roving vehicle stops to check drivers' licenses, because the police had too much discretion in choosing which vehicles to stop. At first blush, *Prouse* appears to support limits on government discretion, but the Court's language and analysis actually dilute the requirement that administrative regimes limit government discretion. Shortly after stating that the roving stops at issue involved standardless and unconstrained discretion, the Court wrote that its previous cases had "insisted that the discretion of the official in the field be circumscribed, *at least to some extent.*" This qualifying language was new, and it represented a substantial weakening of the Court's prior language about the need to limit government discretion.

Similarly, the *Prouse* Court read *Martinez-Fuerte* in a way that downplayed that prior decision's focus on eliminating discretion during the first phase of the roadblock search—that is, the portion sensibly analyzed as a dragnet. As noted above, the Court in *Martinez-Fuerte* had emphasized that roving-stop regimes involve greater executive discretion than checkpoint regimes. *Prouse* omitted that portion of *Martinez-Fuerte*'s analysis entirely, instead describing the crucial difference between the roving stops that it had struck down and the checkpoints upheld in *Martinez-Fuerte* as a difference in degree of intrusion. That is, it rested the distinction on the proposition that roving stops are more subjectively intrusive than checkpoint stops, a consideration that sounds in the balance between government and individual interests rather than in the need to limit governmental discretion. To be fair, the *Martinez-Fuerte* Court did draw this distinction: *Martinez-Fuerte*, like *Prouse*, took the position that roving stops are more intrusive. But *Martinez-Fuerte* also called attention to the problem of governmental discretion, and *Prouse* omitted that concern entirely.

Four years later, the Court took the further step of transforming the requirement of limited governmental discretion into a mere factor that the Court may or may not consider as part of a reasonableness balancing test. In *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Supreme Court approved a statutory regime that allowed for completely discretionary decisions by customs officials to stop and board any ship in United States waters for the purpose of inspecting the ship's documentation. Yes, the Court said, *Prouse* had discussed the interest in limiting discretion, and people certainly had the right to travel without purely discretionary intrusions from law enforcement officers. But the overall focus in administrative search law, the *Villamonte-Marquez* Court maintained, was on whether a law enforcement practice was "reasonable"—a matter to be judged by balancing the practice's intrusion on the individual's privacy interests against the government's interests. There was no longer a separate and distinct requirement that administrative search regimes limit government discretion.

Since *Villamonte-Marquez*, the Court routinely fails to consider whether a challenged administrative search regime limits executive discretion. To be sure, the decreasing concern with discretion in this line of cases should be understood as a general trend rather than a steady and constant pattern. A few dragnet cases have continued to discuss the need to limit government discretion, and perhaps others will in the future. But such discussions are now the exception rather than the norm. What was once a robust requirement in dragnet search cases is now a mere factor that a court might or might not consider.

Moreover, when the Court does refer to the need to limit government discretion in dragnet regimes, its analysis often fails to engage seriously with the question of whether the administrative regime in question actually limits discretion. Consider *New York v. Burger*, 482 U.S. 691 (1987), which remains the Court's leading decision on business inspections. In that case, the police searched a junkyard pursuant to a state statute authorizing periodic inspections of vehicle-dismantling industries, and the Court upheld the search. *Burger* was decided only five years after *Villamonte-Marquez*, and the *Burger* Court identified the elimination of executive discretion as one of the factors that courts should analyze in determining whether a business inspection scheme is constitutionally reasonable even without a warrant requirement. In particular, the Court suggested that the existence of a statute providing for inspections

is a sufficient substitute for a warrant. But apparently the Court meant this suggestion in the broadest possible sense: The mere existence of a statute did the trick, rendering it unnecessary to ask whether the statute's provisions actually limited discretion or, indeed, whether the officers conducting the search complied with whatever the statute did require.

In *Burger* itself, the statute authorizing the search vested a lot of discretion in government officials. The statute's only limitations were that inspections must occur in the daytime, that the businesses subject to inspection must be in the vehicle-dismantling industry "and related industries," and that the inspectors must limit their examinations to vehicles, vehicle parts, and records. The statute did not specify how many searches were to be performed, or how frequently, or how businesses should be selected to be searched, or what "related industries" would fall under the statute. More egregiously, the Court never examined whether the police who inspected Burger's business actually followed this statutory scheme. In Burger's case, the police did not limit their search to the vehicle, vehicle parts, and records in Burger's business. All in all, then, it is hard to read the Court's analysis as embodying an actual concern with limiting discretion. By creating a merged category of administrative searches in which dragnets can be approved even without limits on executive discretion, the Court has invited precisely the results that consensus arguments for limiting discretion always warn about: arbitrary, capricious, and harassing intrusions.

Special subpopulations. Administrative search doctrine had been shaped by the dragnet model, and dragnets are by definition exceptional searches that do not require individualized suspicion. If special subpopulation searches were to be measured by the same criteria as dragnets, the requirement of individualized suspicion would naturally disappear. As was true of the Court's growing tolerance for discretion in dragnets, the process of removing the individualized suspicion requirement for special subpopulation searches has been gradual.

In *Martinez-Fuerte*, the government officials admitted that both the initial dragnet intrusion and the subsequent secondary inspection were made without any individualized suspicion of wrongdoing. The absence of individualized suspicion was not a problem for the Court, however, because the Court analyzed the entire regime as a dragnet. In accordance with its precedents on dragnets, the Court considered whether an individualized suspicion regime could reasonably satisfy the government's interest in detecting the entry of illegal aliens into the country. Finding that it could not, the Court cited *Camara* for the proposition that "the Fourth Amendment imposes no irreducible requirement of such suspicion." That was true for dragnet searches, which were the only recognized administrative searches before *Martinez-Fuerte*. But *Martinez-Fuerte* failed to distinguish between the dragnet and the individualized parts of the scheme it upheld, and later cases read the statement as applicable to both parts of the scenario. Accordingly, *Martinez-Fuerte* came to suggest that the government can make discretionary decisions to search or seize members of special subpopulations without individualized suspicion.

Between 1976 and 2006, the Supreme Court decided five administrative search cases involving special subpopulations rather than dragnets. *See U.S. v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Because the government had individualized suspicion in each of these cases, none of the cases presented the question of whether individualized suspicion was a prerequisite in special subpopulation searches. That said, the cases did furnish opportunities for important dicta on the question. In *T.L.O.*, for example, the Court cited *Martinez-Fuerte* and *Camara* for the proposition that individualized suspicion is not an irreducible requirement of the Fourth Amendment. The Court reiterated the point in both *Knights*, involving probationer searches, and *Ortega*, involving searches of government employees' offices. In short, the idea that the Fourth Amendment could be satisfied without individualized suspicion became a regularly articulated proposition even outside the exceptional context of dragnets.

A contemporaneous development in administrative search law helped push that idea to its logical conclusion. While the idea that the Fourth Amendment could tolerate searches without individualized suspicion was migrating from the dragnet context to that of special subpopulation searches, another doctrine—the special needs test—was being extended from the special subpopulation context to that of dragnets. As discussed above, the special needs test originated in the context of searches of members of special subpopulations, where it functioned as a test of whether the government could justify a search with a showing of mere reasonable suspicion rather than probable cause. Under the special needs test as classically articulated, the question for a court to answer was whether a case presented "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable." When the Court began using this formula in dragnet cases, however, it began understanding its language in a different way.

In the special subpopulation context, departing from the probable cause requirement meant analyzing indi-

vidualized suspicion only at the level of reasonableness. But the normal question about dragnet searches is whether serving a particular government interest justifies eliminating the requirement of individualized suspicion entirely. For the special needs test to work in the dragnet context, the language about the impracticability of the probable cause requirement had to be understood as authorizing an exception to the individualized suspicion requirement more generally, not merely the heightened form of individualized suspicion called probable cause. Eventually, the Court slightly modified the wording of the special needs test to reflect this changed understanding: In his opinion for the Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), a case involving a drug testing dragnet, Justice Kennedy wrote that "[w]here a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant *or some level of individualized suspicion* in the particular context." The transformation was complete. Having been passed through the filter of dragnet doctrine, the primary test used to analyze special subpopulation searches now authorizes an explicit exception to *any* individualized suspicion requirement, rather than merely reducing the level of individualized suspicion that the government is required to show. And so in the more recent case of *Samson v. California*, 547 U.S. 843 (2006), in which the Court upheld a discretionary, warrantless, and suspicionless search of a parolee, Justice Thomas' opinion for the majority had no apparent trouble maintaining that the Fourth Amendment imposed no requirement of individualized suspicion whatsoever.

The scope of *Samson* is not clear, but its potential reach is quite expansive. Straightforward application of *Samson* would permit discretionary and suspicionless searches of members of other special subpopulations with reduced expectations of privacy. But this state of the doctrine is built upon a failure to recognize critical differences between dragnet and individualized searches. Unlike in the dragnet context, there is no demonstrated need in these special subpopulation searches for the government to proceed without showing some quantum of individualized suspicion. And indeed, if special subpopulation searches are considered on their own, the argument for eliminating the individualized suspicion requirement seems weak. More or less everyone agrees that the Fourth Amendment is supposed to protect citizens from arbitrary, harassing, or discriminatory government conduct. It is a similarly commonsense proposition that if the police are permitted to search individuals without warrants and without any individualized suspicion, the amount of arbitrary and discriminatory government conduct will increase.

Unnecessary dragnets

Once it seems reasonable to conduct discretionary searches without individualized suspicion, it can also seem less important to limit suspicionless dragnets to exceptional circumstances where they are truly necessary. Administrative search doctrine has accordingly seen the removal of the traditional preference for individualized suspicion regimes over dragnets, which has increased the incidence of unnecessary dragnets.

Just three years after *Martinez-Fuerte* implicitly opened the door to regarding individualized searches as administrative, the Court took its first step toward eliminating the preference for individualized suspicion regimes over dragnets. In *Brown v. Texas*, 443 U.S. 47, 51 (1979), the Court noted that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Although not immediately apparent at the time, the Court's use of the disjunctive here reflected its new attitude toward searches. In its later cases, the Court relied on *Brown* to emphasize that searches could be predicated on either individualized suspicion *or* a neutral plan, but it no longer asked whether the goals of a neutral plan might be accomplished through an alternative individualized suspicion regime.

As with the other lines of fallout from the cross-contamination, this change was neither immediate nor clean: A few dragnet cases after *Brown v. Texas* did examine whether alternatives predicated on individualized suspicion would adequately satisfy the government's goals. But most did not. In an increasingly regular pattern, the Court approved dragnet regimes for business inspections, maritime shipping, and motorist sobriety with no discussion of whether individualized suspicion regimes might adequately serve the government's interests. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *New York v. Burger*, 482 U.S. 691 (1987); *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Donovan v. Dewey*, 452 U.S. 594 (1981).

Perhaps the most salient example of this trend away from a preference for individualized suspicion regimes is *Michigan Department of State Police v. Sitz*. In that case, the Court relied on *Brown v. Texas* to uphold a temporary sobriety checkpoint designed to stop drunk driving. At no point in its decision did the Court consider whether an individualized suspicion regime might effectively serve the state's interest in preventing drunk

driving. Justice Stevens' dissent underscored the ineffectiveness of the sobriety checkpoint and emphasized that a higher arrest rate might have occurred if the police had relied on the conventional Fourth Amendment investigative techniques that required individualized suspicion. In discussing the number of arrests that the police made at the checkpoint, Justice Stevens noted that "there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. . . . Drunken driving, unlike [alien] smuggling, may thus be detected absent any checkpoints."

However, a majority of the Court approved of the dragnet administrative search regime, emphasizing that "the choice among such reasonable alternatives remains with the governmental officials." The government need not rely on less intrusive, individualized suspicion regimes. Rather, in the Court's present view, the government has the latitude to choose among reasonable alternatives, and a dragnet search can be just one more reasonable alternative, rather than a disfavored last resort.

As science and technology advance, dragnet investigative tools will become cheaper, more readily available, and easier to use. Now that administrative search doctrine no longer requires the government to show that an individualized search regime is inadequate or unavailable, there is nothing to stop executive officials from employing more and more dragnet investigative techniques. We have, in fact, already seen evidence of this trend. If dragnets lose their legally disfavored status at the same time as they become more technologically feasible, they will become routine. As a result, many more innocent individuals will be subjected to unnecessary government intrusions.

Highly-intrusive searches

One consequence of the elimination of the individualized suspicion requirement from administrative search doctrine is that the permissibility of searches is often governed only by an all-things-considered reasonableness standard. The reasonableness standard currently in use is unnecessarily broad and too deferential to the government. Courts define the governmental interests broadly and the privacy interests narrowly, such that in practice the balancing test operates as a form of rational basis review under which the government presumptively wins.

The entanglement of dragnet and special subpopulation searches is partly to blame for this overly broad and highly deferential reasonableness standard. Dragnet searches prototypically involve generalized government health or safety interests and concrete, but minimal, privacy intrusions. Area housing inspections are a good example. The government interest in safety is broadly stated, but the inspection is cursory and represents a minimal privacy intrusion. In contrast, special subpopulation searches typically involve much greater privacy intrusions and more concrete government interests. A search of a student's purse is personal and invasive, but it can be justified by the concrete suspicion that the student is violating the school's drug use policies. When the two categories were fused into one, however, the result was a body of case law including both precedents upholding searches based on generalized government interests (from the dragnet cases) and precedents upholding invasive privacy intrusions (from the special subpopulation cases). Not surprisingly, government lawyers charged with defending searches in court drew from both sets of cases. The courts have not regarded any of this as out of bounds: After all, the government lawyers are citing cases setting forth both the kinds of interests that justify "administrative searches" and the kinds of privacy invasions that "administrative searches" may validly involve. The result is a doctrine characterized by large privacy intrusions predicated on generalized government interests.

Consider *People v. Smith*, 92 Cal. Rptr. 3d 106 (Ct. App. 2009), in which the government successfully relied on its generalized interest in preventing recidivism to justify the warrantless, suspicionless inspection of a parolee's genitalia. The case arose when a police officer saw Smith, a known parolee, in a car in the back parking lot of a hotel. The officer stopped Smith, patted him down, and searched his car, but he did not find any contraband. Relying on Smith's status as a parolee, the police officer then removed Smith's belt, pulled his pants away from his body, and visually inspected Smith's genitalia. One might imagine that this conduct would be deemed unreasonable on a general balancing test or that the question would at least be a close one. After all, a state's interest in reducing recidivism might justify *some* extra supervision of parolees, but if anything is a serious invasion of privacy, being forced to expose one's private parts to the police would seem to qualify. Moreover, the officer had already patted Smith down and searched the car and had not found any contraband. Nonetheless, the California Court of Appeal upheld the search, relying on *Samson* for the general proposition that the state has an interest in reducing recidivism and reintegrating former prisoners into society. When addressing the highly invasive nature of the search, the court stated that, because his "belt was the only item of clothing removed, his private parts were not exposed, and [he was not] touched[,] . . . [t]he intrusion . . . did not constitute a broad invasion of his

privacy and dignity rights." In short, the court downplayed the privacy invasion and read the government interest expansively in order to uphold the search.

Perhaps a bit less inflammatorily—but similarly illustrative of the propensity to let generalized government interests "outweigh" concrete individual privacy concerns—the Supreme Court has allowed school officials to conduct regular drug testing of middle school students—without a warrant, and without any suspicion of a drug problem among that population—on the grounds that the students participate in extracurricular activities such as choir and marching band. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002). And drivers are now routinely stopped and detained at sobriety checkpoints without any judicial or legislative preclearance, even when data suggests that stops based on individualized suspicion might be more effective at deterring drunk driving. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

To be sure, the entanglement of dragnet and special subpopulation searches does not completely explain why courts have permitted these intrusions. But it does so in part. Specifically, the courts' use of generalized statements about government interests and their lack of differentiation between different levels of privacy intrusion are, in some respects, outgrowths of their using the same "special needs" test for both dragnet and special subpopulation searches, irrespective of the different issues that the two kinds of searches raise. When the *T.L.O.* Court created the special needs test for determining when reasonableness balancing should displace the warrant and probable cause requirements, it carefully delineated the reasons why the requirements were impracticable under the circumstances of that case. But when the Court imported the special needs test into the dragnet context, those same arguments carried less weight. A school can easily seek a warrant before implementing a dragnet drug testing policy, even if it is cumbersome to get a warrant before searching a student's backpack after a teacher observes what he thinks is a violation of the school's drug policies. Conversely, the teacher who wants to search that backpack should have no problem meeting a threshold requirement of individualized suspicion, even though it might defeat the purpose of a dragnet drug testing policy to require the school to show individualized suspicion before testing any particular student.

To recognize these differences, however, would require recognizing that dragnet searches are different from special subpopulation searches. Having merged them together, the Court now uses the same special needs test in all public school cases, as if "special needs" were a condition that attaches to the public school setting rather than a way of assessing whether some feature of the search justifies dispensing with the warrant and individualized suspicion requirements. This is confused. Whether there are special needs that justify dispensing with those requirements is not simply a function of where the search is performed. But, as presently configured, administrative search doctrine can be used to justify warrantless and suspicionless searches even under circumstances compatible with requiring warrants or showings of individualized suspicion. The result is more unnecessary intrusions, both in dragnet and in targeted form.

Conclusion

In its current form, administrative search doctrine does little to check arbitrary, unnecessary, or harassing searches. The problem will only become worse as technology expands the government's investigative arsenal. Dragnet searches are on the rise, and current doctrine has no means of ensuring that they will be employed only when necessary, nor that officials' discretion will be appropriately limited when dragnets are used. Moreover, the Supreme Court has begun to approve wholly suspicionless and highly invasive searches of individuals who belong to groups considered to have reduced expectations of privacy. One important step toward reform involves disentangling dragnet and special subpopulation searches and measuring each by criteria that better fit the issues that each kind raises.

One important step toward reform involves disentangling dragnet and special subpopulation searches and measuring each by criteria that better fit the issues that each kind raises.

For dragnet intrusions, the courts should restore the two threshold requirements that existed before the cross-contamination. First, before a court engages in reasonableness balancing, it should ask whether the government has taken steps to effectively limit the discretion of the officials executing the dragnet so as to prevent arbitrary, discriminatory, and harassing intrusions. One means of satisfying this requirement would be by requiring a warrant issued by a neutral and detached magistrate, as contemplated in *Camara*, or at least by some other form of referral to a third-party decisionmaker. Another is to proceed pursuant to a statute that clearly defines when and how the government should perform an administrative intrusion with sufficient limitations

on government discretion. But if the government has not taken any such steps to limit discretion, then the dragnet should only be upheld if the government can rely on some other exception to the warrant and probable cause requirements to justify its actions.

Second, the courts should consider dragnets to be a disfavored method of investigation—permissible only when individualized suspicion cannot be required—rather than as one of several reasonable ways of proceeding. If an individualized suspicion regime could adequately advance the government's interests, then a dragnet should be deemed constitutionally unreasonable. After all, dragnets always invade the privacy and security interests of innocent citizens, and such invasions should be tolerated only when they are necessary. Otherwise, as science and technology advance, government intrusions are likely to become both more invasive and more routine. And the effects of such intrusions on individual privacy need to be considered not individually but in the aggregate. A world in which the government routinely searches everyone is not one with significant regard for privacy as we understand it, nor is it one where privacy can be restored by correcting a few of the most visible or objectionable intrusions.

On the special subpopulation side, one important step would be to avoid the one-size-permits-everything reasoning that now accompanies the special needs test. Rather than declaring that special needs exist in certain reduced-expectation-of-privacy contexts such that no searches conducted in those contexts need satisfy the Warrant Clause, courts should ask whether complying with the warrant and probable cause requirements is actually impractical in a given kind of case. In determining whether to waive the warrant requirement, a court could consider how easy it is to obtain a warrant in the jurisdiction, whether some other form of preclearance might be available to protect against arbitrary government action, and whether exigent circumstances make even small delays untenable, as when a suspect might escape or do violence before the warrant process could be completed. In assessing whether to waive the probable cause requirement, a court might consider whether the person conducting the search can be expected to understand the probable cause requirement, whether that person has a relationship to the person being searched, and whether anything else about the context indicates that a probable cause requirement would undermine an important government interest. When a probable cause requirement is not appropriate, however, the government should still be required to show some reduced form of individualized suspicion to justify its intrusion. Authorizing suspicionless searches merely because the probable cause requirement seems too strict borrows inappropriately from the example of dragnets, where we accept that people will be searched even though they are not individually suspected of wrongdoing. Special subpopulation searches involve discretionary decisions to target particular individuals or groups of individuals, and the government should have to explain why it selected those individuals to bear the burdens of being searched. Wholly suspicionless searches, like the one upheld in *Samson*, should be impermissible.

Finally, there is the question of how courts should address scenarios in which the search at issue is a dragnet search of members of special subpopulations that have reduced expectations of privacy. When both the dragnet and special subpopulation rationales might apply, the court should require the government to articulate which it is relying on and, depending on the answer, apply different doctrinal tests to determine the search's validity. If the government claims that the reduced expectations of privacy of a special subpopulation member justify its actions, it should have to demonstrate why the warrant and probable cause requirements are impractical *in that situation*. And even if it is unrealistic to require probable cause, the government should have to demonstrate that there was some level of individualized suspicion to justify targeting the person searched (although the quantum of individualized suspicion required will vary depending on the situation). Alternatively, if the government contends that it should be exempted from the individualized suspicion requirement altogether because it is relying on a dragnet search, it should have to demonstrate, as a threshold matter, that there are limitations on the exercise of executive discretion and that an individualized suspicion regime would not be equally effective in achieving its goals. Once it satisfies those requirements, it still must pass muster under the reasonableness balancing test.

Disentangling dragnets from special subpopulation searches will bring some much-needed clarity to administrative search law. Such clarification might or might not persuade decisionmakers to restore appropriate threshold requirements about discretion and individualized suspicion. If it did, so much the better. And even if not, it would help make plain the extent of the costs to privacy under present administrative search law.