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Disentangling Administrative Searches

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DISENTANGLING ADMINISTRATIVE SEARCHES

*Eve Brensike Primus**

Everyone who has been screened at an international border, scanned by an airport metal detector, or drug tested for public employment has been subjected to an administrative search. Since September 11th, the government has increasingly invoked the administrative search exception to justify more checkpoints, unprecedented subway searches, and extensive wiretaps. As science and technology advance, the frequency and scope of administrative searches will only expand. Formulating the boundaries and requirements of administrative search doctrine is therefore a matter of great importance. Yet the rules governing administrative searches are notoriously unclear. This Article seeks to refocus attention on administrative searches and contends that much of the current mischief in administrative search law can be traced to the Supreme Court's conflation of two distinct types of searches within one doctrinal exception—namely “dragnet searches” of every person, place, or thing in a given area or involved in a particular activity and “special subpopulation searches” of individuals deemed to have reduced expectations of privacy. Dragnets came first, and special subpopulation searches came later. As the category of administrative searches tried to accommodate both kinds of searches, it gradually lost the ability to impose meaningful limitations on either one. To bring clarity and sense to this area of the law, this Article proposes that we disentangle these two kinds of administrative searches.

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INTRODUCTION

As a matter of black letter law, a search conducted without probable cause and a search warrant is unconstitutional except in a few unusual situations.¹ In the Supreme Court's formulation, "warrantless searches are per se unreasonable under the Fourth Amendment" unless they fall within "a few specifically established and well-delineated exceptions to that general rule."² But this picture of what is normal and what is exceptional is importantly misleading. Today, various exceptions routinely authorize the police to conduct warrantless searches of cars,³ people,⁴ and even homes⁵ without running afoul of the Fourth Amendment. As long as the government is reasonably pursuing a legitimate government interest, the warrant and probable cause requirements regularly fade away. For some time, therefore, Fourth Amendment experts have understood that warrantless searches are in practice common, even if they are officially exceptional.⁶ But the magnitude and potential scope of this trend have been greatly underestimated, in large part because of inattention to an increasingly important exception to the probable cause and warrant requirements: the administrative search.

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

1. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (following *Katz* in noting that warrantless searches, outside of "well-delineated exceptions," are unreasonable (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))); *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citing *Katz* and finding warrantless searches unreasonable, with few exceptions).

2. *Quon*, 130 S. Ct. at 2630 (quoting *Katz*, 389 U.S. at 357) (internal quotation marks omitted).

3. See, e.g., *Gant*, 129 S. Ct. at 1716 (search incident to arrest exception); *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (automobile exception); *Florida v. Wells*, 495 U.S. 1, 4 (1990) (inventory exception).

4. See, e.g., *Virginia v. Moore*, 553 U.S. 164, 176–77 (2008) (search incident to arrest exception); *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (inventory exception); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (stop and frisk exception).

5. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (exigency exception); *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (consent exception).

6. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 757 (1994) ("Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures . . . —is initially plausible but ultimately misguided."); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 *UCLA L. Rev.* 1, 18 (1992) [hereinafter *Slobogin, The World Without*] ("Lip service to the idea that warrants are preferred continues to this day."); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 *Colum. L. Rev.* 1751, 1752 (1994) [hereinafter *Sundby, Everyman's Fourth*] ("Article after article documents . . . how [the Court] has riddled the Warrant Clause with exceptions . . .").

students,⁷ government employees,⁸ and probationers⁹ are characterized as administrative, as are business inspections¹⁰ and—increasingly—wire-taps and other searches used in the gathering of national security intelligence.¹¹ 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.¹² This reasonableness balancing—which scholars often describe as a form of rational basis review¹³—is very deferential to the government, and the re-

7. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) (applying “a standard of reasonable suspicion to determine the legality of a school administrator’s search of a student”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (applying reasonableness standard to search of high school student’s purse).

8. See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (“[A] government employer’s warrantless search is reasonable if it is ‘justified at its inception’ and if ‘the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.’” (quoting *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (internal quotation marks omitted))).

9. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987) (“A State’s operation of a probation system . . . may justify departures from the usual warrant and probable-cause requirements.”); see also *Samson v. California*, 547 U.S. 843, 846 (2006) (approving search of parolee).

10. See, e.g., *New York v. Burger*, 482 U.S. 691, 703 (1987) (exempting regulatory inspections of automobile dismantling businesses from warrant and probable cause requirements); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978) (discussing other cases exempting government regulatory inspections from warrant and probable cause requirements).

11. See Memorandum from the U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 37–38 (Jan. 19, 2006), available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> (on file with the *Columbia Law Review*) (“[T]he warrant requirement [is] inapplicable . . . in circumstances in which the Government faces an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement.”); Letter from the U.S. Dep’t of Justice to U.S. Senate & House Select Comms. on Intelligence 2 (Dec. 22, 2005), available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf> (on file with the *Columbia Law Review*) (“Th[e President’s] constitutional authority includes the authority to order warrantless foreign intelligence surveillance within the United States”); see also William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 *Stan. L. Rev.* 553, 553 (1992) [hereinafter *Stuntz, Implicit Bargains*] (noting administrative search cases are growing in number).

12. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 424–25 (2004) (balancing intrusiveness of “information-seeking highway stops” against “importance of soliciting the public’s assistance”).

13. See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 *Wm. & Mary L. Rev.* 197, 199–200 (1993) (“Fourth Amendment questions are resolved using a test that approximates the rational basis standard”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 *Harv. L. Rev.* 820, 855 (1994) (“[J]udgments couched in terms of ‘reasonableness’ slide very easily into the familiar constitutional rubric of ‘rational basis’ review”); Stuntz, *Implicit Bargains*, supra note 11, at 553–54 (“The

sulting searches are almost always deemed reasonable.¹⁴ 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. In fact, scholars and courts find it difficult to even define what an administrative search is, let alone to explain what test governs the validity of such a search.¹⁵ This has been true for decades: Even when the administrative search exception underwrote far fewer searches than it does today, scholars described this area of Fourth Amendment doctrine as incoherent,¹⁶ “abysmal,”¹⁷ and “devoid of content.”¹⁸ One prominent commentator pronounced it a “conceptual and doctrinal embarrassment of the first

Supreme Court’s generalized ‘reasonableness’ standard resembles not negligence, but rational-basis constitutional review”); Sundby, *Everyman’s Fourth*, supra note 6, at 1800 (“The Court’s present approach approximates a loose rational basis standard”); see also William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 *Mich. L. Rev.* 1016, 1057–58 (1995) [hereinafter Stuntz, *Privacy’s Problem*] (“[T]he working Fourth Amendment rule seems to be something like a shock-the-conscience test: unless the government behavior was outrageous, the search is constitutionally reasonable.”).

14. See, e.g., Slobogin, *The World Without*, supra note 6, at 68, 106–07 (criticizing Court’s “willingness . . . to exaggerate the state’s interests . . . and to trivialize the individual’s interests”); Sundby, *Everyman’s Fourth*, supra note 6, at 1765 (“[T]he government’s card representing the citizenry’s ‘right’ to safety almost always will outweigh an individual’s claim of a right to privacy”).

15. Most experts agree that government searches that are conducted pursuant to a neutral policy aimed at a non-law enforcement purpose are administrative searches, but they also recognize that many searches that do not fall within this definition are administrative as well. See, e.g., Yale Kamisar et al., *Basic Criminal Procedure* 435–49 (12th ed. 2008) [hereinafter Kamisar et al., *Criminal Procedure*] (describing “rather broad range of searches and seizures” within administrative rubric); Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Investigative* 382–85 (8th ed. 2007) (noting difficulty of distinguishing “between a search done for ‘administrative’ purposes and a search that is done to obtain evidence of a criminal violation”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 *Sup. Ct. Rev.* 87, 108–09 (describing “approximate state of the law” governing administrative searches). One scholar went so far as to suggest that all intrusions taking place outside a street crime setting might be subject to an administrative search rationale. See Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 *Minn. L. Rev.* 383, 407 n.76 (1988) [hereinafter Sundby, *A Return*] (“The regulatory search characterization apparently stems from the fact that the school search was not in a street crime setting.”).

16. See Schulhofer, supra note 15, at 89 (discussing Court’s “doctrinal incoherence”).

17. Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 *St. John’s L. Rev.* 1053, 1070 (1998) [hereinafter Slobogin, *Let’s Not*].

18. Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 *Am. Crim. L. Rev.* 669, 735 (1988) [hereinafter Maclin, *Constructing*] (quoting *O’Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in the judgment)).

order.”¹⁹ So for a period of time toward the end of the last century, criminal procedure scholars tried to reform or reorganize administrative search law, whether by limiting its scope,²⁰ improving its balancing analysis,²¹ or applying different tests to different kinds of administrative searches depending on their susceptibility to adequate oversight by the political process.²² However, none of these ideas gained traction with the courts. Doctrine muddled along in an undertheorized way, no clearer than before. And, by the end of the century, serious engagement with administrative searches largely disappeared from the literature of criminal procedure.²³

19. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349, 418 (1974).

20. See, e.g., Schulhofer, *supra* note 15, at 89 (arguing administrative searches should be limited to those intrusions that “respond to pressing health and safety concerns or to the internal governance imperatives of a self-contained public activity”).

21. See, e.g., Amsterdam, *supra* note 19, at 409, 423–29 (arguing reasonableness balancing test should be interpreted in ways that would promote police rulemaking); Wayne R. LaFare, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 *Mich. L. Rev.* 442, 503–04 (1990) [hereinafter LaFare, *Controlling Discretion*] (same); Slobogin, *The World Without*, *supra* note 6, at 75–76 (arguing reasonableness balancing test should be replaced by multi-tiered proportionality analysis under which (1) very severe intrusions would have to be justified by heightened clear and convincing standard, (2) less severe intrusions by probable cause standard, (3) minor intrusions by reasonable suspicion standard, and (4) de minimis intrusions by mere relevance standard); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 *N.Y.U. L. Rev.* 1173, 1177, 1254–55 (1988) (arguing all-things-considered reasonableness should be replaced by requirement that government use least intrusive means reasonably available for substantially achieving its goals). For an updated version of Slobogin’s approach, see Christopher Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment* 21–47 (2007) [hereinafter Slobogin, *Privacy*]. In contrast, Scott Sundby proposed to do away with the reasonableness balancing test altogether. In cases where the government initiates investigatory activity in the absence of suspicious behavior, Sundby would replace reasonableness balancing with strict scrutiny. Where the government investigates in response to particularized suspicion, he would apply the warrant and probable cause requirements, subject to various exceptions. Sundby, *A Return*, *supra* note 15, at 418–25, 431.

22. See Stuntz, *Implicit Bargains*, *supra* note 11, at 555–76, 588–89 (arguing deference to government in administrative search cases featuring roadblocks and drug testing is appropriate because political process provides adequate remedy for overzealous government action, but different approach modeled on hypothetical *ex ante* contracting is more appropriate for other kinds of administrative searches); see also William J. Stuntz, *Local Policing After the Terror*, 111 *Yale L.J.* 2137, 2165–66 (2002) [hereinafter Stuntz, *Policing*] (describing how “political checks are much more likely” to constrain searches of groups than they are searches of individuals).

23. To be sure, prominent scholars continue to discuss administrative searches, but they typically do so incidentally, as part of illustrating larger Fourth Amendment theories, rather than focusing on the category of administrative searches as such. See, e.g., Christopher Slobogin, *Government Dragnets*, *Law & Contemp. Probs.*, Summer 2010, at 107, 108–10 [hereinafter Slobogin, *Dragnets*] (analyzing validity of group-focused investigation techniques and arguing Fourth Amendment doctrine should be guided by political-process theory, proportionality review, and exigency considerations); see also

At the same time, however, the government has relied increasingly on administrative search doctrine to justify its actions. When administrative searches were the exception rather than the norm, it could at least be said that the confusion in administrative search law did relatively little real-world damage. Since September 11, 2001, however, government agencies have deployed the administrative search exception to justify not just additional screening at airports,²⁴ but also more checkpoints,²⁵ unprecedented passenger searches on subways,²⁶ and infamously extensive wiretaps.²⁷ The specter of additional terrorist attacks means that we should expect the courts to confront even more government intrusions in the name of safety and security in the future.²⁸ Moreover, as scientific and technological advances make their way into the government's investigative arsenal, the frequency and scope of administrative searches will only expand.²⁹

This Article therefore seeks to refocus attention on administrative searches and to begin sorting out a mess that has become too consequential to leave alone. Specifically, my central argument is that 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. And 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

Stuntz, *Policing*, supra note 22, at 2138–39 (examining how expanding administrative power to combat terrorism has also expanded police's authority to search).

24. See Saltzburg & Capra, supra note 15, at 420–23 (noting suspicionless searches at airports are more intrusive post-9/11 and collecting cases).

25. See *id.* at 433 (describing how checkpoints have become "routine part of life" after 9/11 and noting these terrorism-related checkpoints have been upheld by lower courts (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000))).

26. See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006) (holding program of "random, suspicionless container searches" in subways "satisfies the special needs exception to the Fourth Amendment's usual requirement of individualized suspicion").

27. See sources cited supra note 11.

28. See Slobogin, *Dragnets*, supra note 23, at 109 ("[C]oncerns about national security, heightened since September 11, 2001, make such dragnets even more alluring than usual."); *id.* at 122–23 ("Although the threat of [a terrorist] attack is infinitesimal in any given area, the human and symbolic toll of even one such event has led, and will continue to lead, to a number of dragnet programs . . .").

29. See, e.g., *United States v. Weikert*, 504 F.3d 1, 6–15 (1st Cir. 2007) (discussing validity of DNA collection statutes under administrative search doctrine); *United States v. Kincade*, 379 F.3d 813, 832–40 (9th Cir. 2004) (en banc) (same); Sundby, *Everyman's Fourth*, supra note 6, at 1763 (noting Fourth Amendment lines will only continue to blur "as technological advances enable the government to invade privacy in more pervasive, but physically less intrusive, ways"). See generally Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 *Minn. L. Rev.* 1 (2008) (discussing important ways in which government is increasingly using technology to monitor citizens).

either one. To bring clarity and sense to this area of the law, therefore, we should start by disentangling the two kinds of administrative searches.

When the concept of administrative searches first entered the law in the 1960s, it was designed for what I am calling 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 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.³⁰ 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.³¹ Typical examples of dragnet intrusions included safety inspections of all homes in a neighborhood,³² checkpoint searches of all persons driving on a particular roadway,³³ and inspections of all businesses in a particular industry.³⁴

In the 1980s, the Court added what I am calling special subpopulation searches to the category of administrative searches. According to the Court, certain people (or people acting in certain capacities) had 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.³⁵ Instead, officials could conduct searches on the basis of some lower level of individualized suspicion. (That is, such a search still required a reason to suspect the particular person searched of wrongdoing, but that reason need not be strong enough to rise to the level of probable cause.) Examples of special subpopulation searches included searches of public school students,³⁶ probationers,³⁷ and government employees.³⁸

Because these two kinds of intrusions raise different issues, each was once properly limited by a different set of doctrinal safeguards. Judicial doctrine governing dragnets sought to eliminate executive discretion, whereas courts assessing special subpopulation searches embraced execu-

30. See *infra* notes 54, 60, and accompanying text (giving examples of courts' applications of "minimally intrusive" requirement).

31. See *infra* notes 68–72 and accompanying text (describing methods of limiting officers' discretion).

32. E.g., *Camara v. Mun. Court*, 387 U.S. 523, 526, 528 (1967).

33. E.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

34. E.g., *United States v. Biswell*, 406 U.S. 311, 311–13 (1972); see also Wayne R. LaFare, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Sup. Ct. Rev. 1, 1–4 [hereinafter LaFare, *Administrative Searches*] (documenting early inspection cases).

35. See *infra* Part II (describing creation of special subpopulation administrative search exception to warrant and probable cause requirements).

36. E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

37. E.g., *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987).

38. E.g., *O'Connor v. Ortega*, 480 U.S. 709, 725–26 (1987).

tive discretion as necessary for that kind of search.³⁹ Dragnets were permitted only when reliance on individualized suspicion regimes was not possible; in contrast, special subpopulation searches were based on individualized suspicion.⁴⁰ These distinctions are critical, but they did not survive the merger of the two kinds of searches. Once they were both labeled “administrative,” 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.⁴¹ The result is a doctrine that imposes few limits on government conduct and paves the way for indiscriminate searches and seizures. And even though these two kinds of administrative searches are fundamentally different, the ways in which their entanglement has affected the evolution of administrative search law seem to have gone unnoticed.

In this Article, I maintain that the first step toward developing a coherent approach to administrative searches is to distinguish between dragnets and special subpopulation searches. In Part I, I show that administrative search doctrine was originally about dragnets, and I examine the safeguards that the Supreme Court used to ensure that these dragnet intrusions would not be arbitrary or unjustified. Then, in Part II, I explain how special subpopulation searches were gradually introduced into the category of administrative searches and how the Supreme Court entangled the legal test for determining the validity of dragnet searches with the importantly different criteria for assessing the validity of special subpopulation searches.

In Part III, I analyze the subsequent evolution of administrative search doctrine, showing how the conflation of dragnet and special subpopulation searches created confusion and facilitated the removal of important doctrinal safeguards in both contexts. With these gone, arbitrary and unjustified administrative searches easily became commonplace.

Finally, Part IV situates the dilution of Fourth Amendment rights in the administrative search context within the larger story of diminishing criminal procedure rights in the decades since the Warren Court disbanded. It is well understood that the Burger and Rehnquist Courts cut back on many Fourth Amendment protections,⁴² and the growth of the

39. Compare *infra* notes 65–72 and accompanying text (describing limitations on executive discretion in dragnet context), with *infra* text accompanying note 95 (“[T]he prospect of executive discretion was much less troubling in the context of special subpopulations.”).

40. Compare *infra* notes 57–64 and accompanying text (describing requirement that, before conducting dragnet search, government demonstrate its inability to proceed on individualized suspicion), with *infra* notes 92–94 and accompanying text (describing reliance on individualized suspicion in subpopulation searches).

41. See *infra* Part III (discussing doctrinal cross-contamination).

42. See, e.g., Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 *Mich. L. Rev.* 1319, 1387–416 (1977) (“Civil libertarians . . . have expressed considerable concern over the Burger Court’s treatment of the fourth amendment.”); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The*

administrative search exception is partly one manifestation of that larger trend. But it would be a mistake to think that the development of administrative search law is fully explained by that more general pattern. The Court has altered much of criminal procedure doctrine in ways friendly to the government, but it has not done so uniformly across the board. By comparing the administrative search exception to two other exceptions to the warrant requirement—one for inventory searches and one for automobile searches—I show that a broad-brush narrative in which increased skepticism toward criminal procedure rights explains all of the post-Warren Courts' actions is not sufficiently precise. Rather, the entanglement of dragnet and special subpopulation searches made the safeguards surrounding both sets of searches vulnerable and paved the way for the confused and expansive administrative search doctrine that prevails today. To clarify and improve this area of the law, 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.

I. DRAGNETS (1967–1984)

At their inception, administrative searches were limited in scope. As a general matter, the Supreme Court read the Fourth Amendment to require government officials wishing to conduct searches to get warrants supported by individualized showings of probable cause.⁴³ The Court recognized an exception to that requirement in cases where requiring individualized showings of probable cause would prevent the government from addressing important health or safety concerns.⁴⁴ The exception was further limited in two important respects. First, the searches had to be minimally intrusive.⁴⁵ Second, the government still needed to obtain search warrants unless it could demonstrate that it had taken visible and concrete steps, in advance of the searches, to limit officials' discretion in conducting the searches.⁴⁶ In theory, these requirements were designed to protect citizens against arbitrary and unjustified government intrusions. In practice, they ensured that the only searches permissible under the administrative search exception were dragnet searches approved in advance, whether by warrant or by statute.

Burger Court (Is It Really So Prosecution-Oriented?), and *Police Investigatory Practices*, in *The Burger Court: The Counter-Revolution That Wasn't* 62, 73–82 (Vincent Blasi ed., 1983) (“The Burger Court, it has been pointed out, appears to be far more impressed than its predecessors with ‘the importance of being guilty’”); see also Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2467 n.5 (1996) (collecting other sources).

43. See 2 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.1(a), at 441–46 (4th ed. 2004) [hereinafter LaFare, *Search and Seizure*] (exploring Supreme Court doctrine regarding search warrants).

44. See *infra* notes 53, 61, and accompanying text (providing examples).

45. See *infra* notes 54, 60, and accompanying text (providing examples).

46. See *infra* notes 65–85 and accompanying text (providing examples).

A dragnet search, as I am using the term, is one in which the government searches or seizes every person, place, or thing in a specific location or involved in a specific activity based only on a showing of a generalized government interest.⁴⁷ Obviously, dragnets are not predicated on individualized showings of probable cause, nor indeed on any kind of individualized suspicion.⁴⁸ On the contrary, it is the distinguishing characteristic of a dragnet to be general, to reach everyone in a category rather than only a chosen few. A health or safety inspection of every home in a given area or every business in a particular industry is a dragnet.⁴⁹ Other common examples include checkpoints where government officials stop every car (or every third car) driving on a particular roadway⁵⁰ and drug testing programs that require every person involved in a given activity to submit to urinalysis.⁵¹ The government is aware, of course, that dragnets burden innocent people. But if the government's interest in conducting the dragnet is sufficiently strong and the burden sufficiently minimal, a dragnet search might be justified.

The Supreme Court first recognized the permissibility of a dragnet administrative search in 1967, when it suggested in *Camara v. Municipal Court* that routine government inspections of homes for housing code violations could be conducted without individualized showings of proba-

47. A program that involves stopping every third car or drug testing every fifth person involved in an activity could also be a dragnet government intrusion, because every person involved in the activity is subject to a government invasion. Over time, the idea is that each person will be subject to the government intrusion at least once.

48. See, e.g., Slobogin, *Privacy*, supra note 21, at 211–12 (noting individualized suspicion requirement cannot be honored when large groups of people are subjected to searches or seizures); Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 Ohio St. J. Crim. L. 603, 611 (2007) (same).

49. See, e.g., *New York v. Burger*, 482 U.S. 691, 712 (1987) (upholding warrantless search conducted under statute permitting search of all junkyard businesses); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (noting warrantless searches of liquor and firearms dealers pursuant to statute are permissible); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (permitting “unannounced, even frequent, inspections” of firearms dealers); See *v. City of Seattle*, 387 U.S. 541, 546 (1967) (recognizing legitimacy of business licensing and inspection programs); *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (“[W]e think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections.”).

50. See *Illinois v. Lidster*, 540 U.S. 419, 422, 427 (2004) (upholding checkpoint stop of all cars on highway where, one week earlier, fatal accident had occurred); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoint stops); *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976) (upholding checkpoint stops for illegal aliens near border).

51. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) (permitting random drug testing of students involved in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (permitting random urinalysis of student athletes); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989) (permitting urinalysis drug testing of “Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty”); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 634 (1989) (permitting drug testing of railway employees involved in train accidents and employees who violate safety rules).

ble cause.⁵² The housing inspections at issue in *Camara* 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 inspected would be in compliance with the housing codes, such that the inspections would burden many law-abiding homeowners who had done nothing to trigger any suspicion of wrongdoing. If the normal requirement of individualized probable cause were in force, therefore, any 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.⁵³ On the other side of the balance, the Court found that the homeowners' affected privacy interests were relatively minimal. In the Court's words, "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."⁵⁴ 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

52. 387 U.S. at 537–39. The Court had earlier rejected a due process challenge to a statute that fined city residents for failing to grant entry to a health inspector who had cause to suspect a nuisance in the house. *Frank v. Maryland*, 359 U.S. 360, 361, 373 (1959). *Camara*, however, was the first case to address a Fourth Amendment challenge to a government inspection regime. As will be discussed *infra*, the Court actually struck down the housing inspection program at issue in *Camara* because the government had not obtained an area warrant in advance of the inspections. However, in so doing, the Court emphasized that such inspections would be permissible with advance judicial approval. See *Camara*, 387 U.S. at 538–39 (“[P]robable cause’ to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.”).

53. *Camara*, 387 U.S. at 537 (“Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health.” (quoting *Frank*, 359 U.S. at 372)). The Court also emphasized that there had been “a long history of judicial and public acceptance” of these types of housing inspections. *Id.*

54. *Id.*

occupant himself.”⁵⁵ 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.⁵⁶

In the ten years after *Camara* was decided, the Supreme Court permitted administrative searches only for routine fire code inspections⁵⁷ and regular inspections of certain highly regulated and intuitively dangerous businesses—namely firearms dealers⁵⁸ and liquor establishments⁵⁹—to ensure compliance with statutory record-keeping requirements and licensing restrictions. As was true with the *Camara* housing inspections, the dragnet inspections in these cases involved minimally intrusive government invasions⁶⁰ conducted for important health and

55. *Id.*; see also LaFave, *Administrative Searches*, *supra* note 34, at 20 (noting “the inability to accomplish an acceptable level of code enforcement under the traditional probable cause test” was a primary factor supporting Court’s decision); Schulhofer, *supra* note 15, at 92–93 (noting Court thought “alternative procedures [were] not workable at all”).

56. See *Camara*, 387 U.S. at 538 (emphasizing such probable cause showings could be “based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling”).

57. See *v. City of Seattle*, 387 U.S. 541 (1967). In *See*, which was a companion case to *Camara*, the Court actually struck down the inspection at issue, but in *dicta* suggested that area-wide fire code inspections could be reasonable under the Fourth Amendment. See *id.* at 545 (explaining governmental access to commercial establishments “will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved”).

58. *United States v. Biswell*, 406 U.S. 311 (1972).

59. *Colonnade Catering Co. v. United States*, 397 U.S. 72 (1970).

60. See *Biswell*, 406 U.S. at 316 (noting licensing inspections pose “limited threats to the dealer’s justifiable expectations of privacy”); *Colonnade Catering*, 397 U.S. at 77 (emphasizing regulatory regime did not allow for forcible entry but only regulatory inspection); Brief for the Appellee at 16, *See*, 387 U.S. 541 (No. 180), 1967 WL 129592, at *16 (arguing there is minimal privacy intrusion attendant to fire inspection of a business). In fact, the Court in *Biswell* emphasized that dealers in firearms and ammunition are on notice when they enter the industry that they will be subject to routine government inspection. As a result, their privacy expectations are even more diminished. See *Biswell*, 406 U.S. at 316 (“When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”); see also *Colonnade Catering*, 397 U.S. at 75 (emphasizing long history of pervasive regulation of liquor industry).

safety reasons⁶¹ that could not have been adequately served by an individualized probable cause regime.⁶²

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.⁶³ 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.⁶⁴ Only when important health or safety concerns could not be protected by an individualized suspicion regime was the Court willing to approve a dragnet administrative search regime unsupported by individualized probable cause. The Court's preference for individualized suspicion regimes over dragnets was in keeping with its view that administrative searches were justified only if they were absolutely necessary. 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.

61. See *Biswell*, 406 U.S. at 315 (emphasizing that “close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders”); Brief for the Appellee at 4–5, *See*, 387 U.S. 541 (No. 180), 1967 WL 129592, at *4–*5 (noting purpose of fire code inspections was to prevent fires and explosions). The liquor inspections conducted in *Colonnade Catering* were arguably not made for health and safety reasons but rather to protect revenue. See Brief for the United States at 26, *Colonnade Catering*, 397 U.S. 72 (No. 108), 1969 WL 119887, at *26 (noting liquor inspection statutes are civil, regulatory statutes “designed to avoid the loss of sizable amounts of revenue through fraud”). However, they were clearly not made for law enforcement purposes.

62. See Brief for the United States at 15–16, *Biswell*, 406 U.S. 311 (No. 71-81), 1972 WL 137513, at *15–*16 (arguing firearms dealers can easily attempt to conceal any infractions, individualized and generalized probable cause showings would be difficult to make, and, as a result, government needs to have flexibility to conduct these inspections without having to show probable cause); Brief for the United States at 26, 28, *Colonnade Catering*, 397 U.S. 72 (No. 108), 1969 WL 119887, at *26, *28 (arguing evidence of regulatory violation can be removed easily and quickly and there are not likely to be any outward signs that would manifest need for inspection); Brief for the Appellee at 20, *See*, 387 U.S. 541 (No. 180), 1967 WL 129592, at *20 (arguing fire inspector would not be able to make probable cause showing of hazardous conditions and lay people will not be able to discern potential safety problems).

63. See Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 Mich. L. Rev. 2553, 2578–79 (1996) (collecting cases).

64. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (noting unlicensed drivers are more likely to violate restrictions and stopping vehicles based on violations of vehicle laws will more likely detect unlicensed drivers than will random stops); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (rejecting government's attempts to rely on *Camara* to justify roving automobile stops designed to detect illegal aliens near border and emphasizing availability of alternatives to random stops unsupported by reasonable suspicion); *Almeida-Sanchez v. United States*, 413 U.S. 266, 276–79 (1973) (Powell, J., concurring) (arguing government has made strong showing that no individualized suspicion regime would be effective).

In addition to ensuring that administrative searches were employed only when they were both (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, discriminatory, and harassing 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.⁶⁵ Obviously, the *ex post* alternative was inapposite for the dragnet scenario, because dragnet searches are undertaken without individualized suspicion. Accordingly, the Court would approve only dragnet intrusions that were authorized in advance, and through a mechanism designed to eliminate the danger of arbitrariness that would arise if executive officials had discretion regarding how and whom to search. As it happened, either of two mechanisms could suffice. Either an administrative search would have to be supported by a warrant,⁶⁶ or else it could be conducted only pursuant to legislative or regulatory regimes that were as effective as warrants in eliminating discretion.⁶⁷

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.⁶⁸ That was the approach the Court took in *Camara*.⁶⁹ The San Francisco Municipal Code ordinance at issue in that case 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."⁷⁰ The Court struck down the housing inspection 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

65. See, e.g., *Herring v. United States*, 129 S. Ct. 695, 698 (2009) (noting Fourth Amendment "usually requires the police to have probable cause or a warrant").

66. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323–24 (1978); See, 387 U.S. at 545; *Camara v. Mun. Court*, 387 U.S. 523, 527–28 (1967).

67. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (holding "statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant").

68. *Camara*, 387 U.S. at 538; see also *Marshall*, 436 U.S. at 320–21 (approving warrants based on "a general administrative plan" for "a given area").

69. 387 U.S. at 538.

70. *Id.* at 526 & n.1 (citing San Francisco Municipal Housing Code §§ 86(3), 503).

disinterested party warrant the need to search.”⁷¹ 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 in at least some of the houses searched.⁷² 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 fifteen 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.⁷³ This analysis was not merely pro forma. Consider, for example, the fate of the Border Patrol’s practice of stopping and searching cars near the border on the basis of officer hunches, without showings of individualized suspicion.⁷⁴ Border security is a serious governmental interest. Moreover, the Border Patrol had not been acting on a frolic of its own: A federal statute and an accompanying regulatory provision specifically authorized the policy and imposed at least some limits, including the limit that such searches could be conducted only within one hundred miles of the border.⁷⁵ Nonetheless, the Supreme Court ruled the roving stops unconstitutional, emphasizing the discretion that this administrative regime gave to border patrol officers.⁷⁶ In the Court’s view, these searches “embodied precisely the

71. *Id.* at 532–33; see also *See*, 387 U.S. at 545 (finding warrant must be issued to enter and inspect commercial premises so that “the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field”).

72. See *Camara*, 387 U.S. at 538 (emphasizing such probable cause showing could be “based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling”).

73. See, *e.g.*, *Donovan v. Dewey*, 452 U.S. 594, 604 (1981) (finding relevant act does not “leav[e] the frequency and purpose of inspections to the unchecked discretion of Government officers,” but instead “establishes a predictable and guided federal regulatory presence”); *Marshall*, 436 U.S. at 323–24 (finding Fourth Amendment violation where “authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers”); *United States v. Ortiz*, 422 U.S. 891, 896 (1975) (finding conferral authority “to search vehicles at random” violates Fourth Amendment); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (“[T]he Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.”); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (objecting to “unfettered discretion”); *See*, 387 U.S. at 545 (prohibiting “unreviewed discretion”).

74. See *Brignoni-Ponce*, 422 U.S. at 883 (requiring “reasonable suspicion for stops”); *Almeida-Sanchez*, 413 U.S. at 273 (requiring “probable cause or consent” for searches).

75. See 8 U.S.C. § 1357(a)(3) (2006) (permitting officials “to board and search for aliens any . . . vehicle” located “within a reasonable distance from any external boundary of the United States”); see also 8 C.F.R. § 287.1(a)(2) (2010) (interpreting reasonable distance to be within 100 air miles of borders).

76. See *Brignoni-Ponce*, 422 U.S. at 882 (striking down roving stops of car near border); *Almeida-Sanchez*, 413 U.S. at 283 (striking down roving patrols to search cars near border for illegal aliens).

evil the Court saw in *Camara* when it insisted that the ‘discretion of the official in the field’ be circumscribed by obtaining a warrant prior to the inspection.”⁷⁷ Similarly, the Court struck down fixed checkpoints on roads to search cars for the presence of illegal aliens.⁷⁸ To be sure, the fixed location of the checkpoints reduced the potential for arbitrary and harassing searches: An officer who can search only at a particular location has less capacity to annoy and harass than an officer who can move about. Nonetheless, because checkpoint officials had discretion to select which cars to search at their fixed location, the Court held that the potential for arbitrary searching was too great to set aside the normal requirement of individualized suspicion.⁷⁹

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. Consider the business inspection cases. In *United States v. Biswell*,⁸⁰ decided in 1972, the Court addressed its first Fourth Amendment challenge to a federal regulatory business inspection regime.⁸¹ In that case, 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.”⁸²

77. *Almeida-Sanchez*, 413 U.S. at 270 (quoting *Camara*, 387 U.S. at 532); see also *Brignoni-Ponce*, 422 U.S. at 882 (“To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of major cities like San Diego to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.”); *Almeida-Sanchez*, 413 U.S. at 283 (Powell, J., concurring) (“Nothing . . . demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time.”).

78. *Ortiz*, 422 U.S. at 896–97.

79. See *id.* at 895–96 (striking down border checkpoint searches because checkpoint officials exercise substantial degree of discretion in choosing which cars to search and noting Court has always required probable cause before allowing search of automobile).

80. 406 U.S. 311 (1972).

81. See *v. City of Seattle*, 387 U.S. 541, 546 (1967), involved a city fire code inspection program and specifically did not address the legitimacy of federal regulatory regimes. And although the statutory regulations at issue in *Colonnade Catering Co. v. United States*, 397 U.S. 72, 77 (1970), were federal business regulations, the Court resolved that case on statutory grounds rather than Fourth Amendment grounds. See also *Davis v. United States*, 328 U.S. 582, 593 (1946) (upholding business inspection of gasoline station office for ration coupons and noting existence of federal regulatory regime that provides for such inspections, but ultimately upholding inspection based on consent).

82. *Biswell*, 406 U.S. at 315. This is the only reference in *Biswell* to the need to limit the discretion of government officials. As such, *Biswell* is probably the weakest example from this time period of the Court’s emphasis on limiting government discretion. Cf. *Donovan v. Dewey*, 452 U.S. 594, 605 (1981) (noting regulatory scheme “directly curtailed” officials’ discretion); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323–24 (1978) (requiring warrants where absence of such requirement would give officials “unbridled discretion”);

Nine years later, in *Donovan v. Dewey*,⁸³ the Court discussed the substitution of statutes or regulations for warrants at somewhat greater length than it did in *Biswell*. “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.’”⁸⁴ Where Congress has made rules governing inspection procedures, however, a warrantless inspection could be upheld, but only if Congress’s 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.”⁸⁵ In short, the Court considered limits on executive discretion a necessary prerequisite for the validity of any dragnet search regime.

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.

II. 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 of administrative searches involved what I will call “special subpopulations.” Special subpopulations are groups of indi-

Camara, 387 U.S. at 532–33 (reiterating need to use warrants to circumscribe “discretion to invade private property”).

83. 452 U.S. 594.

84. *Id.* at 599 (quoting *Marshall*, 436 U.S. at 323; *Colonnade Catering*, 397 U.S. at 77) (internal quotation marks omitted); see also *Marshall*, 436 U.S. at 324 (striking down administrative regime under which agents of Secretary of Labor conducted warrantless inspections of businesses looking for violations of OSHA regulations and noting administrative warrants would be required for such inspections).

85. *Donovan*, 452 U.S. at 604.

viduals with reduced expectations of privacy, including students,⁸⁶ government employees,⁸⁷ probationers,⁸⁸ and parolees.⁸⁹ 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 of homes or businesses.⁹⁰ Housing inspectors went into homeowners' basements to look at the pipes; they did not go into their bedrooms to read their diaries. And government officials conducting inspections of highly regulated businesses only looked at those documents and inventories that business owners were on notice were subject to inspection. In contrast, special subpopulation searches often involved full-blown searches of people or personal property.⁹¹

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 requirement that individualized suspicion be shown. As noted earlier, the default Fourth Amendment regime calls for individualized showings of probable cause.⁹² Dragnet searches are exempted completely from that requirement.⁹³ In the Court's early special subpopulation cases, by contrast, the government was not exempted from an individualized showing altogether. Rather, it relied on a reduced showing of individualized reasonable suspicion instead of full-blown probable cause.⁹⁴ Special subpopulation searches were thus ini-

86. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

87. *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

88. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987).

89. *Samson v. California*, 547 U.S. 843, 847 (2006).

90. See *supra* Part I (describing dragnet searches).

91. See, e.g., *Safford*, 129 S. Ct. at 2638 (involving strip search of middle school student); *Samson*, 547 U.S. at 847 (involving search of parolee's person); *Griffin*, 483 U.S. at 871 (involving search of probationer's residence); *Ortega*, 480 U.S. at 713 (involving detailed search of government employee's personal office); *T.L.O.*, 469 U.S. at 328 (involving full search of high school student's purse).

92. See sources cited *supra* notes 43 and 65 (discussing typical Fourth Amendment requirements).

93. See *supra* Part I (describing exemption of dragnet searches from requirement of individualized suspicion).

94. See, e.g., *Ortega*, 480 U.S. at 725 (requiring government to show it has reasonable suspicion to justify search of government employee's office); *T.L.O.*, 469 U.S. at 342 (requiring same showing to justify search of public school student's purse).

tially 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. In contrast with the strict requirements for dragnet administrative searches, 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.⁹⁵

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.⁹⁶ 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,⁹⁷ who are already treated as marginal or deserving of less respect than the population as a whole.

Given all of the differences between dragnet and special subpopulation searches, the fact that the Court would lump them together as "administrative" calls for some explanation. True, both dragnet searches and special subpopulation searches were conducted in order to further important government interests independent of law enforcement—typically health and safety interests. But that similarity need not have led the Court to merge the two into a single doctrinal category. After all, the

95. *Ortega*, 480 U.S. at 725–26.

96. For example, while people certainly have full expectations of privacy in their homes, the government can nevertheless conduct dragnet area housing inspections. See *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967) (permitting housing inspections conducted pursuant to area warrants). Of course, it is possible to imagine a dragnet government intrusion that affects only members of a special subpopulation that has reduced expectations of privacy. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002) (discussing blanket drug-testing program for middle and high school students involved in extracurricular activities at public schools).

97. *Samson v. California*, 547 U.S. 843, 846 (2006) (upholding suspicionless searches of parolees); *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (upholding warrantless search of probationer).

Court had already recognized several independent exceptions to the warrant and probable cause requirements for different types of searches that were conducted for law enforcement purposes. It would have been relatively straightforward, therefore, to recognize different exceptions for different kinds of searches conducted for non-law enforcement purposes.

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.⁹⁸ 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.⁹⁹

If a dragnet search regime were in fact in place when such a person approached customs, the government could defend a search by relying on either or both of these exceptions to the warrant and probable cause requirements. That said, the government's choice of argument should prompt a court to ask different questions when assessing the legitimacy of the search. If the government argued that the search was conducted pursuant to a dragnet policy, the court should ask whether the aim of that policy could be achieved with an enforcement regime that respected the normal requirement of individualized suspicion and also whether the policy was sufficiently inoculated against the risks of excessive discretion, either through a warrant requirement or by statutory or regulatory design. If the government argued that the search was valid because its target was a member of a special subpopulation with a reduced expectation of privacy, the court should ask whether the government had in fact made a showing of the required level of individualized suspicion with respect to that person. In this respect, 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,¹⁰⁰ there may

98. Cf. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (discussing validity of dragnet border checkpoint stops).

99. Cf. *United States v. Montoya de Hernandez*, 473 U.S. 531, 532–33 (1985) (discussing validity of targeted detentions of suspects arriving at airports from abroad).

100. See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (search incident to lawful arrest exception); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (automobile exception); *Florida v. Wells*, 495 U.S. 1, 4 (1990) (inventory exception).

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 between the government and a citizen. Consider vehicle sobriety checkpoints.¹⁰¹ Cars that are stopped when approaching a sobriety checkpoint are typically stopped pursuant to a dragnet policy that requires police to stop every vehicle (or every fifth 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.¹⁰²

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 *United States v. Martinez-Fuerte*,¹⁰³ 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. After all, the Court had recognized in prior cases that people driving cars had reduced expectations of privacy due to the heightened regulation of automobiles.¹⁰⁴ But the *Martinez-Fuerte* Court failed to distinguish between the initial checkpoint where everyone was stopped and

101. See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (upholding vehicle sobriety checkpoint).

102. Courts often conduct sequential analyses of police behavior in Fourth Amendment cases. When an individual is stopped by the police and then detained for an extended period, for example, courts consider the validity of the stop at its inception and then conduct a separate analysis to see if the scope of the detention is unreasonable. See, e.g., *Florida v. Royer*, 460 U.S. 491, 501-07 (1983) (analyzing separately whether detention was unreasonable even though initial stop was "no doubt permissible").

103. 428 U.S. 543.

104. E.g., *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

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.¹⁰⁵ That is, it used the framework for justifying the initial dragnet traffic stop to legitimate both parts of the intrusion. And 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.*,¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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. Student populations have reduced expectations of privacy, the Court explained, by virtue of the ways in which they are pervasively regulated and supervised.¹⁰⁹ 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.¹¹⁰

Although the *T.L.O.* Court did not explicitly characterize the vice principal's search as an administrative search, 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

105. See *Martinez-Fuerte*, 428 U.S. at 563 (holding “no particularized reason need exist to justify [the referral to a secondary inspection area]”).

106. 469 U.S. 325 (1985).

107. *Id.* at 339–40. The Court replaced the probable cause requirement with a reasonable suspicion requirement. *Id.* at 341.

108. *Id.* at 342 n.8.

109. *Id.* at 340–41.

110. *Id.* at 339–41.

test—the “special needs” test—that the Court would use for determining the validity of administrative searches in later cases.¹¹¹ 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.”¹¹² 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 the 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 same test regardless of whether what was at issue was a dragnet or an individualized search within a special subpopulation. The next step after *T.L.O.* came two years later in *O’Connor v. Ortega*,¹¹³ a case upholding the discretionary search of an individual government employee’s office. *Ortega* relied not only on the reduced expectations of privacy of government employees, but also on the special needs test.¹¹⁴ The Court explicitly connected its special subpopulation and dragnet precedents by emphasizing that *Camara* and *T.L.O.* were both cases involving special needs.¹¹⁵

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*, 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.¹¹⁶ Since *Burger*, the Court has invoked the special needs test to assess individualized special subpopulation searches of probationers¹¹⁷ as well as dragnet drug testing procedures aimed at patients in public hospitals,¹¹⁸ government employees,¹¹⁹ and public school students.¹²⁰ 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

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

112. *Id.*

113. 480 U.S. 709 (1987).

114. *Id.* at 720, 724–25.

115. See *id.* at 720 (citing *Camara* and *T.L.O.* as examples of cases in which special needs of government would make warrant and probable cause requirements impracticable).

116. 482 U.S. 691, 702–03 (1987).

117. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

118. *Ferguson v. Charleston*, 532 U.S. 67, 78 (2001).

119. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989).

120. *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

with reduced expectations of privacy. The test was the same; the entanglement was complete.

III. 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 context. As a result, the Court frequently found itself adjudicating cases in which doctrinal safeguards previously implemented for “administrative searches” seemed out of place, and it responded by weakening or eliminating those safeguards as requirements that administrative searches must satisfy. With those checks removed, the government became free to conduct more warrantless searches unsupported by probable cause.

In Part III.A, I show how the doctrinal cross-contamination diluted protections against arbitrary searches and seizures in both contexts. In Part III.B, I discuss how the cross-contamination helped increase the incidence of unnecessary dragnet intrusions. Finally, in Part III.C, I explain how the cross-contamination helped shape the particular kind of reasonableness balancing that now marks administrative search law—a balancing that in practice fails to impose meaningful limits on government conduct.

A. *Arbitrary Government Intrusions*

It is a matter of general consensus that one purpose of the Fourth Amendment is to eliminate or at least substantially reduce governmental intrusions that are arbitrary.¹²¹ And as Anthony Amsterdam canonically observed, the key to preventing arbitrariness in the sphere of the Fourth Amendment is limiting the discretion of officials who wield executive power.¹²² That discretion is what enables them to disturb citizens’ privacy for no good reason or, in the worst case scenarios, to use the search and seizure power as a tool for discrimination and harassment.¹²³

Before they were entangled, the dragnet and special subpopulation theories relied on wholly distinct mechanisms for preventing arbitrariness. Because dragnet searches are inherently unsupported by individu-

121. See Amsterdam, *supra* note 19, at 411 (“[I]ndiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously”); see also *City of Ontario v. Quon*, 130 S. Ct. 2619, 2627 (2010) (“The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of Government” (quoting *Skinner*, 489 U.S. at 613–14)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 551, 657 (1999) (noting “the Framers intended to require that all searches and seizures be reasonable and also to forbid use of general warrants” because general warrants were “reviled as a source of arbitrary power”).

122. Amsterdam, *supra* note 19, at 411.

123. *Id.*

alized suspicion, courts assessing dragnets did not expect the government to demonstrate probable cause (or even reasonable suspicion) that any particular person had engaged in wrongdoing. But they did require some form of preclearance from another branch of government—such as an area warrant or a statutory or regulatory regime—that would set the terms of the search in a way that cabined executive discretion.¹²⁴ In contrast, searches within special subpopulations are predicated on some officials' suspicion that a particular individual is engaged in wrongdoing, and before the entanglement, courts could examine the government's showing of individualized suspicion in special subpopulation cases to assess the validity of the searches.¹²⁵ Either way, however, one mechanism or the other would ensure that the searches were not wholly arbitrary. Either a search would have to respect the terms of a discretion-limiting grant of permission, or the officials conducting the search would have to justify their actions after the fact by explaining why they searched the particular individual in question.

These alternative protections against arbitrariness dissolved when the two doctrinal strands were combined into one. Once the undifferentiated category of administrative searches included special subpopulation searches, the Court could not insist upon forms of judicial or legislative preclearance that would sharply limit executive discretion to choose whom to search. Special subpopulation searches required that the Court give executive officials the discretion necessary to pick out certain individuals for differential treatment.¹²⁶ As a result, the Court's original focus in the dragnet cases on eliminating that discretion could not survive.¹²⁷ And once it disappeared as a requirement for administrative searches in general, it ceased to function for any kind of search denominated administrative, including searches that would have previously been analyzed on the dragnet theory.¹²⁸

Conversely, the individualized suspicion requirement that was once a necessary part of special subpopulation searches is now disappearing, because it is not compatible with the logic of dragnets.¹²⁹ The dragnet theory dispensed with any requirement of individualized suspicion because some kinds of important government interests cannot reasonably be pur-

124. See *supra* Part I.

125. See *supra* Part II.

126. See sources cited *supra* note 94 and text accompanying note 95.

127. Compare *supra* text accompanying notes 65–85 (describing Supreme Court's early focus on eliminating discretion in dragnet administrative search cases), with *infra* text accompanying notes 140–152 (explaining how Supreme Court slowly diluted requirement that government limit its discretion in dragnet cases).

128. See *infra* Part III.A.1 (explaining how courts no longer require meaningful limits on executive discretion in dragnet cases).

129. See *supra* note 48 and accompanying text (explaining why individualized suspicion requirements cannot exist in dragnet cases).

sued in a system that requires such individualized showings.¹³⁰ If dragnet and special subpopulation searches are both simply thought of as administrative searches, therefore, many administrative searches should necessarily be permitted to proceed without any form of individualized suspicion. Having established that principle for administrative searches in general, the Court has begun the process of removing the individualized suspicion requirement entirely, even in the context of searches within special subpopulations with reduced expectations of privacy.¹³¹

This section documents the dilution of protections against arbitrariness within administrative search doctrine. Part III.A.1 addresses the effects on dragnet searches, and Part III.A.2 addresses the effects on special subpopulation searches.

1. *Dragnets*. — As noted above, the dragnet exception to the probable cause and warrant requirements was originally conditioned on the existence of either (1) a judicial warrant covering a specific industry or geographic area, or (2) a statutory or regulatory regime limiting executive discretion.¹³² The change brought about by incorporating special subpopulation searches into administrative search doctrine came gradually, but it was necessary if searches of individuals who were members of special subpopulations were to fit in the same category as dragnet searches. Whereas the Court in dragnet cases had focused on limiting government discretion, searches of individuals who were members of special subpopulations *required* discretion. So something had to give.

The tension was apparent as soon as the Court first suggested that discretionary searches of individuals might sometimes be categorized as administrative searches—that is, in *Martinez-Fuerte*.¹³³ As described earlier, that case involved first a dragnet stop of all cars approaching a fixed checkpoint and then a discretionary decision by border patrol officials regarding whether to refer a car for additional inspection, and if so, how to question its occupants. Although the Court failed to distinguish between the dragnet and individual intrusions as an analytic matter, it did discuss the government's justifications for its actions sequentially.

It started with the border officials' conduct during the dragnet stop of the cars at the checkpoint. Consistent with its prior dragnet cases, the Court focused on the need to eliminate executive discretion and, in upholding the checkpoints, emphasized the lack of discretion afforded to officers in the field.¹³⁴ Distinguishing these checkpoint stops from the

130. See *supra* text accompanying notes 55–62 (explaining how early dragnet cases involved important government interests that could not be pursued adequately through individualized suspicion regimes).

131. See *infra* Part III.A.2 (explaining Court's path to *Samson v. California*, 547 U.S. 843 (2006), in which it removed individualized suspicion requirement in special subpopulation case).

132. See *supra* text accompanying notes 66–67.

133. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

134. *Id.*

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.¹³⁵ The Court further noted that the checkpoint was established in accordance with a magistrate's warrant of inspection.¹³⁶ 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."¹³⁷ 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, as Justice Brennan's dissent pointed out.¹³⁸ If the two categories were to be fused together as an undifferentiated whole, something had to give.¹³⁹ Later cases reveal that the focus on eliminating discretion in dragnet intrusions was that something. As special subpopulation searches became more ingrained in the Court's administrative search doctrine, the Court's focus on eliminating government discretion in dragnets slowly began to erode.

Three years after *Martinez-Fuerte*, in *Delaware v. Prouse*,¹⁴⁰ the Court articulated a significant dilution of the requirement that administrative searches limit executive discretion. The Court in *Prouse* struck down roving vehicle stops made to check drivers' licenses and registrations, and the case is accordingly often categorized as one *buttressing* the require-

135. *Id.*

136. *Id.* at 547.

137. *Id.* at 560 n.13, 563; see also *id.* at 559, 562 n.15 ("[T]he choice of checkpoint locations is an administrative decision that must be left largely within the discretion of the Border Patrol.").

138. See *id.* at 576-77 (Brennan, J., dissenting) (noting majority argued both for and against limiting discretion).

139. See Schulhofer, *supra* note 15, at 111 (recognizing that "[t]he administrative search cases are thus plagued by unresolved tension between the virtues of systematic, neutral rules and individualized discretion").

140. 440 U.S. 648, 661 (1979).

ment that discretion be limited.¹⁴¹ And to be sure, the Court attributed its holding to the fact that the police had too much discretion in choosing which vehicles to stop. Nonetheless, the Court's language and analysis actually diluted 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*."¹⁴² 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.¹⁴³ To be fair, the *Martinez-Fuerte* Court did draw this distinction: *Martinez-Fuerte*, like *Prouse*, took the position that roving stops are more intrusive.¹⁴⁴ 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 *United States v. Villamonte-Marquez*, 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.¹⁴⁵ Yes, the Court

141. See Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. Rev. L. & Soc. Change 131, 156 (2006) ("In cases like *Delaware v. Prouse*, the Supreme Court has acknowledged the dangers of unconstrained police discretion."); Gregory Howard Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 Iowa L. Rev. 431, 437–39 (1983) (characterizing *Prouse* as limitation on police discretion).

142. *Prouse*, 440 U.S. at 661 (emphasis added).

143. *Id.* at 656–57.

144. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

145. 462 U.S. 579, 588–90 (1983). The statute did nothing to limit discretion and, as such, should not have been entitled to deference under the Supreme Court's dragnet precedents. See *supra* text accompanying notes 83–85.

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.¹⁴⁶ 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.¹⁴⁷ There was no longer a separate and distinct requirement that administrative search regimes limit government discretion.¹⁴⁸

Since *Villamonte-Marquez*, the Court has often omitted consideration of whether a challenged administrative search regime limits executive discretion.¹⁴⁹ In *Illinois v. Lidster*¹⁵⁰—the Court’s most recent dragnet decision—the word discretion does not appear at all.¹⁵¹ 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 that reached a permanent end state by the time of *Lidster*. A few dragnet cases have continued to discuss the need to limit government discretion,¹⁵² 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.

146. *Villamonte-Marquez*, 462 U.S. at 588.

147. *Id.*

148. See *id.* at 598–605 (Brennan, J., dissenting) (decrying lack of “discretion-limiting feature” in majority opinion); see also Sundby, A Return, *supra* note 15, at 427 n.139 (recognizing that degree to which administrative regime controls government discretion is now “part of the reasonableness inquiry itself”).

149. See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (focusing on balancing government’s interest against “degree of intrusion upon individual motorists”). In *Sitz*, the Supreme Court analyzed the validity of temporary sobriety checkpoints set up by the police on roadways. The majority opinion simply did not consider whether the administrative scheme limited discretion in its analysis. Justice Stevens dissented, arguing that there was reason to believe that the police had a lot of flexibility in determining where and when to set up checkpoints. *Id.* at 463–65 (Stevens, J., dissenting).

150. 540 U.S. 419 (2004).

151. Any requirement that the government limit its discretion would not pose a problem for the government in *Lidster*. In that case, the government set up a checkpoint and stopped every car driving through it in order to ask drivers whether they had any information about a fatal hit-and-run accident that had occurred on that road. *Id.* at 421. There was no exercise of discretion. But the fact that the Court does not even state that limiting discretion is a requirement demonstrates the Court’s shift in focus. In earlier cases, the Court discussed the need to limit discretion even when the answer was easily resolved in favor of the government. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (noting “checkpoint operations both appear to and actually involve less discretionary enforcement activity”).

152. E.g., *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 634 (1989). Interestingly, in the Court’s most recent drug testing dragnet, it did not discuss discretion at all. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

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*,¹⁵³ 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,¹⁵⁴ and the Court upheld the search.¹⁵⁵ *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.¹⁵⁶ In particular, the Court suggested that the existence of a statute providing for inspections is a sufficient substitute for a warrant.¹⁵⁷ 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 great deal of discretion in government officials.¹⁵⁸ 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.¹⁵⁹ The statute did not specify how many searches were to be performed,¹⁶⁰ or how frequently, or how businesses should be selected to be searched,¹⁶¹ or what "related industries" would fall under the purview of 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

153. 482 U.S. 691 (1987).

154. N.Y. Veh. & Traf. Law § 415-a5 (McKinney 1986).

155. *Burger*, 482 U.S. at 717.

156. *Id.* at 703.

157. See *id.* at 711 (noting existence of statute that "informs the operator of a vehicle dismantling business that inspections will be made on a regular basis" means "the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to a statute").

158. *Id.* at 722-23 (Brennan, J., dissenting); see also Schulhofer, *supra* note 15, at 102-03 (describing ways in which statutory regime in *Burger* vested discretion in government officials).

159. Veh. & Traf. § 415-a5.

160. There was no minimum number of inspections at all. *Burger*, 482 U.S. at 722 (Brennan, J., dissenting).

161. In fact, in *Burger*, the government could not even state why Burger's establishment had been chosen for inspection. *Id.* at 694 n.2 (majority opinion); *id.* at 723 (Brennan, J., dissenting).

business.¹⁶² All in all, then, it is hard to read the Court's analysis as embodying an actual concern with limiting discretion. The difference between this regime and the one that existed when all administrative searches were dragnets is hard to overstate.¹⁶³

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.¹⁶⁴ Consider the example of a New York nursing home that claimed to be the victim of political retaliation by the state Department of Health after it was selected for a particularly grueling inspection.¹⁶⁵ The inspection was conducted pursuant to a dragnet-style statute. The Second Circuit acknowledged that the statute did little to constrain executive discretion as to how inspections should be conducted, but the court nonetheless upheld the inspection scheme.¹⁶⁶ To be sure, we cannot know from this record whether this particular inspection was bona fide or intentionally harassing, but that uncertainty is precisely the point: Harassment is often difficult to prove, which is why the system generally limits the discretion of officials who are empowered to conduct suspicionless searches.

Nor is the Second Circuit alone in approving of dragnet search regimes rife with the potential for arbitrary, discriminatory, and harassing searches. In the wake of the entanglement of special subpopulation and dragnet searches, the Seventh Circuit approved a dragnet administrative regime to inspect facilities that breed rabbits even though the regulatory regime provided no basis for selecting which rabbitries to inspect, no limits on the number of inspections that could be conducted in a year, and no limits on the duration or timing of such inspections other than a general requirement that inspections occur during business hours.¹⁶⁷ The court noted that "the possibility of harassment through an abuse of authority by either excessive inspection or selective enforcement" gave it "some pause," but ultimately upheld the inspection regime.¹⁶⁸

162. *Id.* at 725 (Brennan, J., dissenting) (describing how police "copied the serial numbers from a wheelchair and a handicapped person's walker" even though those items "were in no way relevant to the State's enforcement of its administrative scheme").

163. See *Donovan v. Dewey*, 452 U.S. 594, 604 (1981) ("[R]ather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence."); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (criticizing searches that give "almost unbridled discretion [to] executive and administrative officers").

164. See Slobogin, *Privacy*, *supra* note 21, at 211-12 (discussing ways in which Court's "hands-off attitude" toward group searches has vastly expanded opportunities for "arbitrary and pretextual" actions by police).

165. *Blue v. Koren*, 72 F.3d 1075, 1079-80 (2d Cir. 1995).

166. *Id.* at 1081.

167. See *Lesser v. Espy*, 34 F.3d 1301, 1308-09 (7th Cir. 1994).

168. *Id.* at 1309-10.

Similarly, the Ninth Circuit upheld a customs search of merchandise in a foreign trade zone without a warrant even though it recognized that the “regulations place few limits on the discretion of searching officers.”¹⁶⁹ And the First Circuit, in the course of upholding a random documentation check and inspection of a fishing vessel, noted that the governing statute had no explicit limitations on the time, place, or people to be inspected. Nevertheless, that court relied on *New York v. Burger* to hold that “the governing statute need not in all circumstances prescribe exhaustive restrictions limiting the target, time and place of the inspection” because “[t]he lack of explicit constraints on the officers’ discretion is not determinative.”¹⁷⁰ In most cases, the mere existence of a statutory or regulatory regime is deemed sufficient regardless of the degree to which it limits discretion.

Even when the arbitrary and harassing nature of a dragnet regime is clear, modern doctrine’s relatively unconcerned attitude toward limiting discretion sometimes prevents the problem from being legally clear enough to merit Fourth Amendment relief. In one Texas case, a police department aiming to reduce gang activity set up roadblocks around an entire African American neighborhood.¹⁷¹ No standardized procedures governed the operation of the roadblocks: Police officers had complete discretion regarding whom to stop, what questions to ask, and whom to allow through the checkpoints.¹⁷² The results were both highly intrusive and highly arbitrary. Some people were not permitted to cross the roadblocks to visit elderly parents or to pick up their children after work.¹⁷³ Some people trying to return to their own homes were turned back without even being given a chance to prove that they lived on the other side of the roadblock.¹⁷⁴ Others managed to show drivers’ licenses or other evidence of residency but were turned away nonetheless.¹⁷⁵ The scheme was sufficiently egregious that a federal district court ultimately denounced the roadblocks as “arbitrary,” “capricious,” “insulting,” and “downright silly.”¹⁷⁶ In a case this extreme, the Fourth Amendment was held to be violated—but the question seemed close enough for the court

169. *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1180 (9th Cir. 2006).

170. *Tart v. Massachusetts*, 949 F.2d 490, 498–99 (1st Cir. 1991); see also LaFave, *Controlling Discretion*, *supra* note 21, at 503 (arguing that, in inspection cases, “the Court has created a hypertrophic exception to the warrant requirement and then made the worst of a bad situation by assuming that when no warrant is needed administrative regulations are likewise unnecessary”).

171. *Shankle v. Texas City*, 885 F. Supp. 996, 999 (S.D. Tex. 1995).

172. *Id.* at 999–1001.

173. *Id.* at 1001.

174. *Id.* at 999.

175. *Id.*

176. *Id.* at 1004.

to afford the responsible officials qualified immunity.¹⁷⁷ To be sure, finding a violation but also upholding a qualified immunity claim in such a case is better than not even finding a Fourth Amendment problem in the first place. But consider what the qualified immunity decision in this case signals. Fourth Amendment doctrine is sufficiently tolerant of executive discretion within dragnet searches so as to make it unclear whether officers may barricade an entire neighborhood and capriciously deny many people—who are not even suspected of wrongdoing—access to their own homes.

2. *Special Subpopulations.* — Before individualized searches of members of special subpopulations were incorporated into administrative search law, the government had to show that it had some level of individualized suspicion to justify any seizure or search targeted at an individual.¹⁷⁸ Fourth Amendment doctrine required government officials to have probable cause before searching an individual¹⁷⁹ and reasonable, articulable, particularized suspicion before seizing or detaining an individual.¹⁸⁰ The requirement of individualized suspicion was understood to be a bulwark against the arbitrary power that could flow from excessive discretion. Its logic applied whether or not the target of a search was a member of a population deemed to have a reduced expectation of privacy.¹⁸¹ But when searches of members of special subpopulations began to be analyzed as administrative searches, it paved the way for the removal of the requirement of individualized suspicion. 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 has been gradual. Not surprisingly, the story begins with *Martinez-*

177. *Id.* at 1006 (granting qualified immunity because “the law was not clearly established as to the Constitutionality of the type of roadblocks erected . . . as of the time of their occurrence”).

178. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973) (“[T]here must be probable cause for the search.”).

179. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (describing probable cause standard's history).

180. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (describing reasonable suspicion standard).

181. Specifically, in *United States v. Brignoni-Ponce*, the Court struck down roving automobile stops designed to detect illegal aliens near the borders. 422 U.S. 873, 884 (1975). It emphasized that it was unwilling to allow the Border Patrol to dispense with the reasonable, articulable, particularized suspicion requirement when it was targeting and stopping individuals—even individuals who had reduced expectations of privacy by virtue of being near the border. *Id.* at 882; see also *Almeida-Sanchez*, 413 U.S. at 273 (refusing to uphold searches at roving border checks unless they were supported by probable cause).

Fuerte.¹⁸² In that case, the government officials admitted that both the initial dragnet intrusion and the subsequent secondary inspection were made without any individualized suspicion of wrongdoing.¹⁸³ 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,¹⁸⁴ the Court cited *Camara* for the proposition that "the Fourth Amendment imposes no irreducible requirement of such suspicion."¹⁸⁵ 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.¹⁸⁶ Because the government had individualized suspicion in each of these cases,¹⁸⁷ 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.¹⁸⁸ The Court reiterated the point in both *United States v. Knights*, involving probationer searches, and *O'Connor v. Ortega*, involving searches of government employees' offices.¹⁸⁹ 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

182. 428 U.S. 543 (1976).

183. *Id.* at 547.

184. *Id.* at 557.

185. *Id.* at 561.

186. See *United States v. Knights*, 534 U.S. 112, 114 (2001) (probationer); *Griffin v. Wisconsin*, 483 U.S. 868, 870 (1987) (probationer); *O'Connor v. Ortega*, 480 U.S. 709, 711–12 (1987) (public employee); *United States v. Montoya de Hernandez*, 473 U.S. 531, 534 (1985) (international traveler); *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985) (high school student).

187. *Knights*, 534 U.S. at 122; *Griffin*, 483 U.S. at 871; *Ortega*, 480 U.S. at 726; *Montoya de Hernandez*, 473 U.S. at 542; *T.L.O.*, 469 U.S. at 342 n.8.

188. *T.L.O.*, 469 U.S. at 342 n.8.

189. *Knights*, 534 U.S. at 120 n.6; *Ortega*, 480 U.S. at 726.

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.¹⁹⁰ 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.”¹⁹¹ 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 individualized suspicion only at the level of reasonableness.¹⁹² 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*, 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.”¹⁹³ 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*, in which the Court upheld a discre-

190. See *supra* text accompanying notes 111–115. For examples of how the Court has deployed this test, see *Knights*, 534 U.S. at 122; *Griffin*, 483 U.S. at 871; *Ortega*, 480 U.S. at 726; *Montoya de Hernandez*, 473 U.S. at 542; *T.L.O.*, 469 U.S. at 342 n.8.

191. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); see also *Ortega*, 480 U.S. at 720 (reciting same language).

192. *Ortega*, 480 U.S. at 725–26; *T.L.O.*, 469 U.S. at 341.

193. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (emphasis added).

tionary, warrantless, and suspicionless search of a parolee, Justice Thomas's opinion for the majority had no apparent trouble maintaining that the Fourth Amendment imposed no requirement of individualized suspicion whatsoever.¹⁹⁴

The scope of *Samson* is not at all clear,¹⁹⁵ 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.¹⁹⁶ 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, harassing, and discriminatory government conduct will increase.¹⁹⁷ Nor is the individualized suspicion requirement a difficult burden to impose on the government in cases targeting and searching indi-

194. 547 U.S. 843, 855 n.4 (2006). The *Samson* Court did not even rely on the special needs test to hold that individualized suspicion was not a prerequisite for special subpopulation searches. Rather, it relied on *Camara* and *Martinez-Fuerte*—cases that predated Justice Blackmun's creation of the special needs test—to say that reasonableness, rather than individualized suspicion, is the touchstone of the Fourth Amendment. *Id.*

195. Compare *United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007) (applying special needs test to probationers), with *People v. Medina*, 70 Cal. Rptr. 3d 413, 419–20 (Ct. App. 2007) (contemplating application of *Samson* balancing to probationers).

196. See sources cited *supra* note 121.

197. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) (emphasizing Fourth Amendment is designed to protect citizens against police who are “engaged in the often competitive enterprise of ferreting out crime”). The Supreme Court, in its decision in *Samson*, relies on the state to ensure that parolee searches are not arbitrary, harassing, or discriminatory. Specifically, it notes that any “concern that [the] system gives officers unbridled discretion to conduct searches . . . is belied by [the State’s] prohibition on ‘arbitrary, capricious, or harassing’ searches.” *Samson*, 547 U.S. at 856. If the Fourth Amendment is to serve as a check on arbitrary searches, it should not be read in ways that make states responsible for stopping abuse. Moreover, given California’s interpretation of this provision, it is highly unlikely that it will police abusive state practices. Although the courts have stated that a search may not be conducted when the officer’s motivation is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes, as when it is driven by personal animosity toward the parolee, the cases reveal that, as long as the police officer is searching a person he knows to be a parolee, the search will be upheld. Compare *People v. Smith*, 92 Cal. Rptr. 3d 106, 116 (Ct. App. 2009) (upholding suspicionless search of parolee’s underwear based on his status as parolee), and *Medina*, 70 Cal. Rptr. 3d at 420 (upholding suspicionless search of probationer’s house based on probation status), with *In re Jaime P.*, 146 P.3d 965, 971–72 (Cal. 2006) (striking down suspicionless search because police officer was unaware of probation search condition).

viduals. As it always has, the level of individualized suspicion required will vary depending on the type of intrusion and the nature of the government interest.¹⁹⁸ For groups that have reduced expectations of privacy, the level of individualized suspicion required will often be lower than traditional probable cause. Reasonable suspicion is not a difficult standard to meet. Less than two years ago, the Court explained that a reasonable, articulable, particularized suspicion of wrongdoing requires the state to show that there is a “moderate chance” that searching a person will reveal evidence of wrongdoing.¹⁹⁹ It is not too onerous to require the government to show that there is a “moderate chance” that a search will reveal evidence of wrongdoing before allowing it to target and search an individual without a warrant. And dispensing with that individualized inquiry entirely, as the cross-contamination of dragnet and special subpopulation searches allows, is an excellent way to enable the arbitrary intrusions that the Fourth Amendment is supposed to protect against.

B. *Unnecessary Dragnets*

As just described, the entanglement of dragnet and special subpopulation searches has attenuated, if not eliminated, the individualized suspicion requirement in the context of at least some special subpopulation searches. But it has also had another effect. 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. Stated differently, once courts are willing to dilute the individualized suspicion requirement in special subpopulation search cases, suspicionless searches of entire groups seem less exceptional, and the courts’ early preference for individualized suspicion regimes over dragnet ones seems outdated. 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.

The early administrative search cases expressed a preference for individualized suspicion regimes over dragnets whenever reasonably possible.²⁰⁰ After all, an individualized suspicion regime burdens the privacy rights of far fewer people than a dragnet regime does. So if the government could pursue its interests while subject to a requirement of individ-

198. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (requiring reasonable suspicion rather than probable cause); see also Slobogin, *Let’s Not*, supra note 17, at 1082–84 (describing hierarchy of invasiveness with clear and convincing, probable cause, reasonable suspicion, and mere relevance standards); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 *Duke L.J.* 727, 737–39 (1993) (describing, as empirical matter, different levels of intrusiveness).

199. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

200. See supra Part I.

ualized suspicion, it should; dragnets were a disfavored alternative to be used only as a last resort.

When dragnets were the only known form of administrative search, the Court articulated this distaste for dragnets by saying that an administrative search should be undertaken only if an individualized approach was unworkable. But that formula ceased to be coherent once the Court began including individualized searches of members of special subpopulations within the category of administrative searches. At that point, an administrative search might itself be individualized, so it no longer made sense to ask whether an individualized approach was feasible before approving an administrative search. Rather than taking this problem as an occasion to disentangle the two kinds of searches called “administrative,” the Court just stopped asking the question.

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*,²⁰¹ state police saw Brown walk away from another man in an area known for high drug trafficking. They stopped him, asked him for identification, and arrested him when he refused to provide it. Brown challenged the legitimacy of the initial stop under the Court’s decision in *Terry v. Ohio*.²⁰² The Court struck down the stop because it was not supported by the requisite reasonable, articulable, particularized suspicion.²⁰³ Even though *Brown* was not an administrative search case, it did contain some important dicta about administrative dragnets. Specifically, 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.”²⁰⁴ 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 v. Texas* 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 reasonably 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.²⁰⁵ But most

201. 443 U.S. 47 (1979).

202. 392 U.S. 1 (1968).

203. *Brown*, 443 U.S. at 53.

204. *Id.* at 51 (emphasis added).

205. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 320 (1997) (striking down Georgia drug testing program because there is “no reason why ordinary law enforcement methods

did not.²⁰⁶ In an increasingly regular pattern, the Court approved dragnet regimes for business inspections,²⁰⁷ maritime shipping,²⁰⁸ and motorist sobriety²⁰⁹ with no discussion of whether individualized suspicion regimes might adequately serve the government's interests.²¹⁰

Perhaps the most salient example of this trend away from a preference for individualized suspicion regimes is *Michigan Department of State Police v. Sitz*.²¹¹ 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.²¹² Justice Stevens's 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 suspi-

would not suffice to apprehend . . . addicted individuals, should they appear in the limelight of a public stage"); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989) (upholding dragnet drug testing of certain customs service employees because "the traditional probable-cause standard may be unhelpful . . . where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person"); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989) (upholding dragnet drug testing of railway employees because, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion").

206. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673-74 (1995) (O'Connor, J., dissenting) (collecting cases).

207. *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981).

208. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

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

210. This is particularly noteworthy given the strenuous objections of some dissenters in these cases. See, e.g., *id.* at 457-58 (Brennan, J., dissenting) (noting "[s]ome level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action" and pointing out there has been no showing that police have difficulty under current, individualized regime identifying drunk drivers); *id.* at 469, 472 (Stevens, J., dissenting) (noting drunk driving is observable and there is "absolutely no evidence that [the checkpoint results in an] increase [in arrests] over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols"); *Villamonte-Marquez*, 462 U.S. at 608 (Brennan, J., dissenting) (arguing for reasonable suspicion requirement and noting "there is no apparent reason why random stops are really necessary for adequate law enforcement").

211. 496 U.S. 444.

212. Cf. *Burger*, 482 U.S. at 717 (upholding warrantless inspections of vehicle-dismantling businesses without considering whether individualized suspicion regime could adequately serve governmental interest in eradicating automobile theft); *Villamonte-Marquez*, 462 U.S. at 592-93 (upholding statutory regime permitting suspicionless boarding of ships without considering other, suspicion-based alternatives); *Donovan*, 452 U.S. at 596 (upholding regulatory inspections of mine quarries without considering alternative, individualized suspicion regimes).

cion.²¹³ 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.”²¹⁴

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.”²¹⁵ The government need not rely on less intrusive, individualized suspicion regimes.²¹⁶ 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.²¹⁷ 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 the government is interested in finding people who pose a safety threat to children, why should it spend time and resources on undercover agents posing as children in chat rooms when it can send a sniffer packet out over the Internet and search all files transmitted by e-mail for evidence of child pornography?²¹⁸ Why should the government tap one phone when it can tap hundreds and a machine can then scan the conversations for key words?²¹⁹ And if the government

213. *Sitz*, 496 U.S. at 461–62 (Stevens, J., dissenting).

214. *Id.* at 469–72; see also *id.* at 458 (Brennan, J., dissenting) (“That stopping every car *might* make it easier to prevent drunken driving is an insufficient justification for abandoning the requirement of individualized suspicion.” (citation omitted)).

215. *Id.* at 453–54 (majority opinion).

216. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632 (2010) (rejecting argument that public employer’s search of employee’s text messages was constitutionally unreasonable because less intrusive search could have been conducted to satisfy government’s interests); *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) (upholding school drug testing dragnet and noting “this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663–64 (1995) (upholding school drug testing dragnet and noting Court has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment”).

217. See Slobogin, *Dragnets*, *supra* note 23, at 109 (“[C]ameras equipped with zoom and nightscope capacity, computers that can process millions of records in minutes, detection equipment that can see through clothes . . . have made dragnets more efficient, effective, and economical . . .”).

218. See *id.* at 108 (discussing data mining).

219. Cf. Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. Chi. L. Rev. 317, 318 (2008) (describing “large-scale data mining by federal agencies devoted to enforcing criminal and counterterrorism laws”); Slobogin, *Dragnets*, *supra* note 23, at 121 (discussing government’s ability to use data mining

wants to create a DNA database to help identify criminals, why not collect DNA from all arrestees rather than only those who are convicted?²²⁰ 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.

To be sure, it is possible in principle that other forces would limit the use of troubling dragnet techniques. Notably, some scholars have suggested that this is an area where the political process will ensure that the government uses its power reasonably.²²¹ If the government begins drug testing the entire population and extracting DNA samples from everyone, the argument runs, people will complain and the political branches will protect citizens from abusive government practices. This argument makes sense in some contexts, but as applied to the problem of investigative dragnets it suffers from two important limitations.

First, political process correctives work best when the harms to be remedied are both visible and borne by people with political power. Unfortunately, neither of these conditions is generally true with respect to dragnets, and indeed the truth is often precisely the opposite. Many technological dragnet investigative techniques are conducted secretly, such that many people are not even aware that they are being searched.²²² Moreover, the logic of law enforcement often leads the government to focus its investigative resources both on poor, minority communities

programs “to access information from databases containing credit-card purchases, tax returns, driver’s license data, work permits, travel itineraries, and other digital sources to discover patterns predictive of terrorist activity”).

220. See *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1189–90 (N.D. Cal. 2009) (denying motion filed by arrestees in California to enjoin enforcement of statute that provided for mandatory DNA sampling of felony arrestees because there was no substantial likelihood arrestees would prevail on Fourth Amendment claim); *United States v. Pool*, 645 F. Supp. 2d 903, 906 (E.D. Cal. 2009) (upholding pretrial release condition that required person indicted for felony to provide mandatory DNA sample); see also Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 *J.L. Med. & Ethics* 102, 118 & 124 n.261 (2005) (arguing, based on Court’s precedents, that Court should invalidate statutes prescribing DNA testing of arrestees but recognizing that Court would be unlikely to do so).

221. See, e.g., Stuntz, *Implicit Bargains*, *supra* note 11, at 588–89 (arguing administrative searches involving roadblocks and drug testing programs will be checked sufficiently by political process); Stuntz, *Policing*, *supra* note 22, at 2163–64, 2169 (arguing for more group policing and arguing political process will serve as sufficient check on unreasonable government conduct); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *Touro L. Rev.* 93, 193 (2007) (arguing for rational basis review of group searches under many circumstances, because political process can provide sufficient check on unreasonable government conduct); Slobogin, *Dragnets*, *supra* note 23, at 136 (arguing political process can sometimes be relied upon to check unreasonable group searches and seizures).

222. See, e.g., Slobogin, *Dragnets*, *supra* note 23, at 121–23 (discussing secret use of technological data mining programs).

where crime rates tend to be higher, and—increasingly since 2001—on noncitizens. The political process does little to protect such communities from police abuse.²²³

Second, there is a problem of diffuse interest and collective action. Especially in the world of high technology surveillance, dragnet techniques often impose small harms on large numbers of people. Under these circumstances, significant collective action problems may complicate mounting a successful political response.²²⁴ This is likely to be particularly true when the government intrusion seems small. One might be tempted to think that if the intrusion is small, there is in the end no ground for great concern—but that inference may be too quick. Each individual intrusion may seem small, but in a world where dragnets become commonplace, the aggregate effect of regular government intrusions can significantly diminish people's sense of privacy.²²⁵ As a result, citizens powerful enough to mobilize politically against specific dragnet programs may believe it pointless to do so. How much good does it do to rein in one investigative dragnet technique in a world where dozens of other dragnet intrusions are part of everyday life?²²⁶ Consequently, as dragnet investigative tools are more routinely used, the idea that the political process furnishes protection against abuse may be illusory even as applied to relatively powerful citizens.

I do not mean to suggest that the political process will be entirely ineffectual in preventing unreasonable dragnet intrusions. Politics does check abuse to some degree, and at the largest level much of how a democratic society sets the boundaries of privacy is almost sure to be decided in that arena. But at the same time, looking to the political process cannot be a complete answer to the problems associated with the increased incidence of unnecessary searches.²²⁷ To put the point simply, one good

223. See Sundby, *Everyman's Fourth*, supra note 6, at 1807 n.223 (noting "some groups will be more effective than others at using the political process"); Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 *Miss. L.J.* 501, 546–47 (2005) ("*Ferguson's* facts highlight the difficulty of relying on 'democratic control' to control suspicionless programs . . . [because t]he women subjected to the program generally were poor patients seeking treatment at the city's public hospital, a population segment unlikely to have much of a political voice."). This is particularly true when the affected groups do not have voting power, as is the case with prisoners and school children. Slobogin, *Dragnets*, supra note 23, at 135.

224. See Slobogin, *Dragnets*, supra note 23, at 135 (discussing how collective action problems can prevent citizens from complaining about some dragnets).

225. Cf. Sundby, *A Return*, supra note 15, at 439 (arguing for consideration of cumulative effect of government intrusions on "individual's right to be left alone").

226. See, e.g., Sundby, *Everyman's Fourth*, supra note 6, at 1807 (arguing very act of conducting oppressive group searches "undermine[s] the informed and free individual participation upon which 'the cure'—the political process—is premised"); see also Slobogin, *The World Without*, supra note 6, at 5 ("[I]f the state's agents are seen by the populace as arbitrary, uncontrolled actors, the legitimacy of the government . . . may be undermined.").

227. Even those scholars who have argued that the political process can serve as a check on unreasonable dragnet searches have recognized that there are limits on the

reason for having the Fourth Amendment in the first instance is that the political process is not sufficient to prevent unnecessary government intrusions.

C. *The Reasonableness Standard*

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. Where it applies, the requirement of individualized suspicion creates a rule that the government must satisfy. Absent that requirement, the courts often do no more than balance the government's interest in conducting the search against the degree of intrusion on the individual's privacy.²²⁸ This reasonableness balancing test is plagued by all of the problems typically associated with open-ended balancing tests.²²⁹ These problems are not specific to the administrative search context, and I do not mean in this Article to take a global position on the relative merits of rules and standards. I mean instead to make a more local point. Even assuming that a standard might be appropriate for judging administrative searches, 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.²³⁰

effectiveness of political process theory. For example, while Worf argues for rational basis review when there is authorizing legislation that applies broadly to minority and majority groups, he nonetheless advocates strict scrutiny, *inter alia*, when there is no authorizing legislation, when authorizing legislation delegates too much power to the executive branch, or when legislation authorizes the search of a discrete and insular minority that does not have access to political process. Worf, *supra* note 221, at 137–58; see also Slobogin, *Dragnets*, *supra* note 23, at 132–36 (expanding on Worf's analysis and noting most of Supreme Court's cases involving dragnet searches involved situations in which political process failures were apparent).

228. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 426–27 (2004) (judging validity of checkpoint stop by weighing “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty” (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979))).

229. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 982 (1987) (“The problems that plague most balancing opinions, I believe, have severely damaged the credibility of the methodology.”); Sundby, *A Return*, *supra* note 15, at 414 (“[T]he Court has been unable to articulate a coherent and systematic view of when the reasonableness balancing test applies in relation to traditional probable cause.”); *id.* at 439–42 (documenting problems with balancing tests in Fourth Amendment context); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 *Am. Crim. L. Rev.* 257, 309 (1984) (noting Court has never “spelled out just what sort of reasonableness standard it has in mind”); see also Amsterdam, *supra* note 19, at 414–15 (arguing general standard of unreasonableness “is obviously much too amorphous either to guide or to regulate the police”).

230. See sources cited *supra* notes 13–14 (arguing balancing test is presumptively pro-government in practice).

In other words, the entire analysis of the Fourth Amendment issue is made a matter of balancing, and the balancing is conducted in a way that systematically favors the government. To put the point gently, this is a poor approach for protecting a constitutional right.

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 the example of *People v. Smith*,²³¹ a recent California case. In *Smith*, 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 legitimate 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.²³² 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

231. 92 Cal. Rptr. 3d 106 (Ct. App. 2009).

232. Cf. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (holding that strip search of middle school student was highly invasive).

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.”²³³ In short, the court downplayed the privacy invasion and read the government interest expansively in order to uphold the search.

Other courts have permitted similarly intrusive searches predicated on comparably generalized government interests. Some have allowed high school and even middle school students to be strip searched without any suspicion that drugs were hidden on their bodies. Instead, the schools’ general need to maintain order and protect students has been deemed sufficient to justify making students remove their clothes.²³⁴ 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.²³⁵ 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.²³⁶

To be sure, the entanglement of dragnet and special subpopulation searches does not completely explain why courts have permitted these

233. *Smith*, 92 Cal. Rptr. 3d at 113–14.

234. E.g., *Williams v. Ellington*, 936 F.2d 881, 882–83, 887 (6th Cir. 1991). But see *Safford*, 129 S. Ct. at 2643. In *Safford*, the Supreme Court struck down a strip search of a middle school student, but the Court also held that the school officials who conducted the search were entitled to qualified immunity because a number of lower courts had upheld strip searches of public school students, and thus the Fourth Amendment violation was not clearly established. *Id.* (citing *Williams*, 936 F.2d at 882–83, 887).

235. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) (discussing blanket drug testing program for middle and high school students involved in extracurricular activities at public schools); see also *id.* at 852 (Ginsburg, J., dissenting) (noting absence of documented problem of drug use among targeted population and arguing that, “[n]otwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of [the city], the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all”).

236. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding constitutionality of sobriety checkpoints); see also *id.* at 469 (Stevens, J., dissenting) (noting roving sobriety stops based on individualized suspicion could be equally if not more effective in stopping drunk driving and promoting government’s safety interests); *id.* at 458 (Brennan, J., dissenting) (“There has been no showing in this case that there is a . . . difficulty in detecting individuals who are driving under the influence of alcohol, nor is it intuitively obvious that such a difficulty exists.”).

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.²³⁷ 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.²³⁸ 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.

Consider, for example, the Court's decision in *O'Connor v. Ortega*.²³⁹ *Ortega* upheld a special subpopulation administrative search of a government employee's office, and the Court was correct to say in its opinion that it would be impractical to require a warrant every time a government employer wanted to open an employee's desk drawer to look for a work-related document.²⁴⁰ Unfortunately, the Court articulated this point in the rubric of the special needs test. Simply declaring that there are "special needs" in the government employment context, as administrative search doctrine now makes it natural to do, points judges away from no-

237. *New Jersey v. T.L.O.*, 469 U.S. 325, 339–41 (1985).

238. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (citing *T.L.O.* for proposition that special needs exist in public school context).

239. 480 U.S. 709 (1987).

240. *Id.* at 721–22.

ting that there may be instances in which it would be perfectly appropriate to require a government official to get a warrant before searching an employee's belongings.²⁴¹ By adopting the special needs test to cover government employment cases wholesale, rather than differentiating between different kinds of searches that might occur within the government workplace, the Court unnecessarily expanded the government's ability to search government employees' offices without any form of judicial or legislative preclearance.

Just two Terms ago, the Supreme Court seemed to come face to face with the mischief that an overly broad reasonableness standard is now working in administrative search doctrine. In *Safford Unified School District No. 1 v. Redding*, the Court confronted a situation in which school officials had strip searched a middle school student thought to have prescription-strength ibuprofen on her person.²⁴² Relying on the now-existing doctrines of administrative search law, both the district court and the Ninth Circuit panel deemed the search constitutionally reasonable.²⁴³ The Supreme Court disagreed—the facts were extreme, after all—but it also granted qualified immunity to the school officials at issue. Under the prevailing standards, it noted, school officials had not clearly violated the rights of the twelve-year-old girl whom they had strip searched looking for ibuprofen. After all, courts now read the administrative search precedents as “a series of abstractions” and “a declaration of seeming deference to the judgments of school officials,” rather than as setting forth any analysis that would allow differentiation between reasonable and unreasonable searches.²⁴⁴

The administrative search reasonableness doctrine currently rivals the old pre-*Miranda* voluntariness test both in terms of the lack of guidance from the Supreme Court and in terms of the confusion it has caused in the lower courts.²⁴⁵ If left in its current cross-contaminated

241. See *id.* at 745 (Blackmun, J., dissenting) (arguing against “dispensing with a warrant in *all* searches by the employer” and noting “[t]he warrant requirement is perfectly suited for many work-related searches”). This is particularly true given the authorities' ability in many jurisdictions to obtain warrants via telephone. See, e.g., Fed. R. Crim. P. 41(d)(3); Wis. Stat. § 968.12(3) (2009); see also Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1493 (1985) (arguing it is time to take advantage of technology to bring warrant requirement up to date); Maclin, *Constructing*, *supra* note 18, at 729 (discussing availability of telephonic warrants); Slobogin, *The World Without*, *supra* note 6, at 32–33 (same). At the very least, the employer could obtain some form of preclearance from an independent decisionmaker. See sources cited *infra* note 283 (considering this possibility).

242. 129 S. Ct. 2633, 2638 (2009).

243. *Id.*; *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 829 (9th Cir. 2007), vacated *en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009).

244. *Safford*, 129 S. Ct. at 2643–44 (quoting *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) (*en banc*)).

245. See, e.g., Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 Ohio St. J. Crim. L. 163, 168

and amorphous form, the result will be more unjustified searches like the strip search performed in *Redding*. Giving more content to the reasonableness standard, however, requires the courts to be honest about the differences between special subpopulation and dragnet intrusions. Merging these two different types of searches is a significant reason why the current law has become so difficult to apply and has so inadequately protected against government invasions of privacy.

IV. COMPARISONS

The dilution of Fourth Amendment protections in administrative search law occurred against the backdrop of a larger shift in Fourth Amendment law in particular and criminal procedure law more generally. In the 1970s, '80s, and '90s, the Burger and Rehnquist Courts repeatedly chipped away at the criminal procedure protections that the Warren Court had erected.²⁴⁶ One might wonder, therefore, whether the developments in administrative search law that this Article describes are an overdetermined phenomenon: The Supreme Court was going to reduce criminal procedure protections over these decades, and that would be true within the domain of administrative searches just as it was true everywhere else. Viewed broadly, this intuition is sensible. Even if special subpopulation searches had not been conflated with dragnets, the Court would probably have contracted the constitutional protections applicable in each context during these years. But thinking only in those broad terms can also be misleading. The particular changes that actually occurred were not inevitable, even if some change was sure to come and the general direction of change easy to predict. Indeed, upon close examination, the Court, in important respects, handled administrative search law in this period differently from how it handled other exceptions to the warrant requirement. Contrasting the development of administrative search doctrine with those other doctrinal areas indicates that the specifics of change within administrative search law were shaped by the conflation of dragnets with special subpopulation searches, rather than being wholly determined by a general trend toward less protection for privacy.

Recall three of the major changes in what is now called administrative search law: Courts no longer demand that discretion be limited in dragnet searches,²⁴⁷ no longer require a showing that an individualized

(2007) (describing voluntariness test as “too amorphous, too perplexing, too subjective and too time-consuming to administer effectively”); see also Sundby, Everyman’s Fourth, *supra* note 6, at 1803–04 (noting that, as was once true with confession and right to counsel cases, vague standards that currently exist in Fourth Amendment law “simply create[] too many opportunities for conflicting holdings and eventually [will] give[] rise to a call for more specific rules and guidance”).

246. See sources cited *supra* note 42.

247. See *supra* Part III.A.1.

regime is not possible before authorizing dragnets,²⁴⁸ and no longer require individualized suspicion in all special subpopulation searches.²⁴⁹ These developments contrast sharply with continuing doctrine governing other kinds of searches, notably inventory searches and automobile exception searches. Like administrative searches, inventory and automobile exception searches are carved off from the main body of Fourth Amendment law as exceptions to the general warrant requirement. Moreover, inventory searches are substantively much like dragnets, and automobile exception searches are substantively much like special subpopulation searches, being predicated on the reduced expectation of privacy that is imputed to drivers and passengers. But in these areas, the Court has not jettisoned its prior concern with limited discretion and individualized suspicion. On the contrary, the Court has continued to emphasize the importance of limiting discretion and the preference for individualized suspicion regimes when discussing inventory searches, and it has similarly continued to focus on the need for individualized suspicion in automobile exception searches. To be sure, the Burger and Rehnquist Courts found other ways to expand the inventory and automobile exceptions, thus chipping away at criminal procedure protections in those areas. But the Court has not reduced privacy protections in those areas in the same way as in administrative searches.

It therefore makes sense to ask what distinctive aspect of administrative searches might explain the particular (and in some respects extreme) way that privacy protections have been diminished in that context. My contention, of course, is that the entanglement of dragnet and special subpopulation searches was the key to facilitating both the removal of the focus on eliminating discretion in dragnet cases and the jettisoning of the preference for individualized suspicion. Whether the two strands of doctrine were combined on purpose so as to diminish these protections or whether they were combined unthinkingly but with important consequences is a separate question, and probably a question without a simple answer. Some Justices may have entangled the doctrines intentionally; others may not have foreseen the effects of their decisions. Regardless of the individual Justices' intentions, however, the Court's general preference for cutting back on Fourth Amendment rights since the 1970s was implemented in a distinctive manner in the administrative search context, drawing on its special subpopulation jurisprudence to dilute Fourth Amendment protections in the dragnet cases and vice versa.

Again, I am not suggesting that the post-Warren Courts would not have reduced privacy protections in administrative search cases absent the entanglement of dragnets and special subpopulation searches. I am quite certain that they would have. But the way in which they would have done so would likely have been different. The contemporary status of the

248. See *supra* Part III.B.

249. See *supra* Part III.A.2.

inventory and automobile exceptions demonstrates that the Court was not uniformly removing constraints on discretion and individualized suspicion requirements, even in contexts highly analogous to those that fell within administrative search doctrine. Rather, the cross-contamination of dragnet and special subpopulation searches invited the elimination of those requirements in the domain now called administrative searches.

A. *The Inventory Exception*

In substance, inventory searches are a special type of dragnet search, albeit not a type that is grouped doctrinally into the category of “administrative searches.” As the name suggests, these searches involve taking inventories. As a matter of widely enacted policy at the federal, state, and municipal levels, all vehicles that are towed are searched and have their contents recorded,²⁵⁰ and all persons who are arrested and booked have their belongings inventoried before they go to jail.²⁵¹ According to the Court, these searches are permissible because we want to protect officers, suspects, and the public at large from safety risks that might be posed by the presence of weapons in abandoned cars or on arrestees.²⁵² Additionally, we want to protect suspects from loss or theft and the police from claims of loss or theft.²⁵³

Inventory searches are dragnets: They are conducted on every person who is arrested and every car that is towed. Nonetheless, the inventory search exception has long been carved off from the larger body of dragnet administrative searches.²⁵⁴ Casebooks and treatises describe the inventory search exception as its own stand-alone exception to the war-

250. See *Florida v. Wells*, 495 U.S. 1, 4 (1990) (noting “policies of opening all containers” in vehicle during inventory search are “unquestionably permissible”); *Colorado v. Bertine*, 479 U.S. 367, 370 (1987) (echoing lower court’s finding that “standard procedures” for impounding vehicles required detailed inventory of car’s contents); *South Dakota v. Opperman*, 428 U.S. 364, 369, 376 (1976) (upholding “routine [police] practice of securing and inventorying [impounded] automobiles’ contents”).

251. See *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983) (“[I]t is reasonable for police to search the personal effects of a person under lawful arrest as part of routine administrative procedure at a police station house incident to booking and jailing the suspect.”).

252. E.g., *Bertine*, 479 U.S. at 373.

253. E.g., *id.*

254. When the Court first recognized the exception, it did so in the context of an automobile inventory. *Opperman*, 428 U.S. at 376. At the time, the two strands of administrative searches had not yet been entangled. Administrative searches were dragnets that had to be supported by warrants. See *v. City of Seattle*, 387 U.S. 541, 545 (1967); *Camara v. Mun. Court*, 387 U.S. 523, 540 (1967). The *Opperman* Court distanced itself from these administrative search precedents, noting that there are reduced expectations of privacy in vehicles such that the Court did not require warrants for vehicle searches related to safety. *Opperman*, 428 U.S. at 367 & n.2. Rather than rely on its administrative search precedent, the Court drew from its cases recognizing an exception to the warrant requirement under the automobile exception. *Id.* at 373; see also *infra* Part IV.B (discussing why automobile exception is not part of administrative search doctrine). Thus, from the beginning, the inventory search exception was carved off from the other

rant and probable cause requirements, not as a branch of administrative searches.²⁵⁵ And although there is sometimes a passing reference to administrative search cases in inventory search decisions, the Supreme Court does not situate the inventory search exception in the scheme of its administrative search doctrine.²⁵⁶

At its inception, the doctrine governing the inventory search exception focused on eliminating police discretion and on considering the availability of alternative individualized suspicion regimes, just as the doctrine governing other dragnets did. Consider first the requirement of limiting discretion. In its 1976 decision in *South Dakota v. Opperman*, the Court's first inventory search case, the Court repeatedly noted that the police were acting pursuant to standardized procedures ensuring that officers did not make discretionary decisions to search.²⁵⁷ Justice Powell, whose vote was necessary to make a majority, emphasized in a concurring opinion that there was "no significant discretion . . . placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope."²⁵⁸ Similarly, the Court expressly stated that an alternative regime predicated on individualized suspicion could not perform the functions of inventory searches with comparable effectiveness.²⁵⁹

The Supreme Court did not decide another inventory search case until *Colorado v. Bertine*²⁶⁰ in 1987. By that time, the cross-contamination between dragnet and special subpopulation administrative searches was complete. The Court had diluted or even eliminated its prior focus on circumscribing police discretion in administrative searches, and it had already approved numerous dragnets without considering whether individualized suspicion regimes might be effective at achieving the government's goals.²⁶¹ And yet, in the inventory context, the Court reaffirmed its earlier statements that limiting police discretion was essential and continued to examine whether an individualized suspicion regime could effectively satisfy the government's goals.²⁶²

dragnets, which allowed it to develop independent of the later cross-contamination with special subpopulation searches.

255. See, e.g., Kamisar et al., *Criminal Procedure*, supra note 15, at 393-99 (discussing *Bertine* and *Wells*); LaFave, *Search and Seizure*, supra note 43, § 5.3(a), at 148-49 (describing Court's distinct justifications for inventory searches).

256. See *Florida v. Wells*, 495 U.S. 1, 4 (1990) (considering inventory exception as its own exception rather than as part of administrative search doctrine); *Bertine*, 479 U.S. at 371 (same); *Opperman*, 428 U.S. at 364 n.2 (distinguishing automobile inspections from administrative search cases).

257. 428 U.S. at 369, 372, 376.

258. *Id.* at 384 (Powell, J., concurring).

259. *Id.* at 370 n.5 (majority opinion).

260. 479 U.S. 367.

261. See supra Part III.

262. See *Bertine*, 479 U.S. at 373-74 (considering claim that alternative to search served government's relevant interests); *id.* at 376 (Blackmun, J., concurring) ("Th[e] absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime.").

Bertine produced three different opinions, but all nine Justices agreed on the importance of limiting police discretion as a prerequisite to sustaining an inventory search under the Fourth Amendment.²⁶³ Justice Marshall, writing for himself and Justice Brennan, emphasized that “inventory searches are reasonable only if conducted according to standardized procedure” that eliminates “standardless and unconstrained discretion.”²⁶⁴ Justice Blackmun, writing for himself and Justices Powell and O’Connor, joined the Court’s opinion, but wrote separately “to underscore” that police cannot be “vested with discretion to determine the scope of the inventory search”; rather, they could open closed containers in an inventory search “only if they are following standard police procedures.”²⁶⁵ Chief Justice Rehnquist, writing for the Court, agreed that standardized criteria were necessary to limit the exercise of police discretion.²⁶⁶ Although he thought that some exercise of discretion was permissible, it had to be exercised according to standardized criteria and on the basis of something other than suspicion of criminal activity.²⁶⁷ All three opinions thus maintained a threshold requirement that inventory searches be conducted according to standardized criteria that limit police discretion. And indeed, that view had staying power for inventory searches. In *Florida v. Wells*, decided three years later, the Court again emphasized that inventory searches “forbid[] uncanalized discretion to police officers.”²⁶⁸ In keeping with the *Bertine* majority’s view, *Wells* recognized that police officers could be asked to exercise some judgment regarding when circumstances required an inventory.²⁶⁹ It also, however, reaffirmed its earlier statements that, before it will sustain an inventory search, standardized criteria must constrain police discretion.²⁷⁰

The framework set out in *Opperman*, *Bertine*, and *Wells* continues to govern inventory searches. To this day, lower courts assessing inventory

263. There was significant disagreement among the Justices about whether the procedures at issue in *Bertine* sufficiently limited discretion. The dissent pointed to facts in the case suggesting that the officers’ decision to inventory the vehicle was wholly discretionary while the majority believed that the officer acted pursuant to clear directives. However, all of the Justices agreed that whether there were sufficient limits on executive discretion inherent in the inventory plan (both on its face and as executed) was a threshold question to be asked to determine the validity of an inventory search. No such threshold question existed in the dragnet administrative search context after the entanglement with special subpopulation searches. See *supra* Part III.A.1.

264. *Bertine*, 479 U.S. at 377–78 (Marshall, J., dissenting) (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

265. *Id.* at 376–77 (Blackmun, J., concurring).

266. *Id.* at 374 n.6 (majority opinion).

267. *Id.* at 375; see also LaFave, *Controlling Discretion*, *supra* note 21, at 451–63 (discussing “standardized procedures” requirement in *Bertine*).

268. 495 U.S. 1, 4 (1990).

269. For example, the Court noted that a police regulation could provide for an inventory of “closed containers whose contents officers . . . are unable to ascertain from examining the containers’ exteriors.” *Id.*

270. *Id.*

searches rigorously analyze whether the government has standardized criteria that limit officers' discretion, and they also consider whether individualized suspicion regimes could be adequate alternatives.²⁷¹ But when assessing any form of dragnet search that became entangled in the general category of "administrative searches," courts no longer do anything of the kind. It is therefore too simple to say that the reduced privacy protections now operating in administrative search cases are merely a function of a general trend affecting all of criminal procedure doctrine. To be sure, that trend exists, and some privacy protections in administrative searches would certainly have been cut back even if the particular entanglement I describe had not occurred. But even within the subcategory of dragnet searches, the Court has not eliminated the need for reduced discretion or the preference for individualized suspicion across the board. Rather, it has only done so in the subcategory of dragnets that were subject to the cross-contamination with special subpopulation searches.

B. *The Automobile Exception*

Just as the inventory search exception to the warrant and probable cause requirements is a good benchmark for assessing the impact of the cross-contamination on dragnet searches, the automobile exception to the warrant requirement is a good benchmark for analyzing the effect on special subpopulation searches. Under the automobile exception, the government may search a vehicle without first obtaining a warrant provided that the government has probable cause to believe that the vehicle contains contraband.²⁷² Like the special subpopulation exception as it

271. See *United States v. Bulacan*, 156 F.3d 963, 971 (9th Cir. 1998) (finding that, where officers were given no objective criteria upon which to base their decision to search container, degree of discretion was too great to satisfy requirements of *Wells*); *United States v. Infante-Ruiz*, 13 F.3d 498, 504 (1st Cir. 1994) (refusing to uphold search under inventory exception because no standardized policy existed); *Jackson v. City of Pittsburgh*, 688 F. Supp. 2d 379, 390 (W.D. Pa. 2010) (noting that, before inventory search will be deemed reasonable, there must be "standard procedure for conducting the inventory search" that "limit[s] the government actor's discretion by providing *when* the inventory search may be conducted and *what* may be considered within the scope of the inventory search"); *United States v. Gomez-Vega*, 519 F. Supp. 2d 241, 263 (D.P.R. 2007) ("[T]o be permissible under the Fourth Amendment, warrantless inventory searches must be conducted according to standardized objective procedures."); *United States v. Donnelly*, 885 F. Supp. 300, 305 (D. Mass. 1995) (striking down inventory search in part because policy authorizing search lacked standardized criteria aimed at limiting officer discretion); *George v. State*, 901 N.E.2d 590, 594 (Ind. Ct. App. 2009) ("[A]n inventory search must be conducted in conformity with 'standard police procedures' that . . . 'sufficiently limit the discretion of the officer . . .'" (quoting *Wells*, 495 U.S. at 4)); *Commonwealth v. Allen*, 918 N.E.2d 475, 478 (Mass. App. Ct. 2009) (noting that, to be valid under Fourth Amendment, inventory search must be done in accordance with standard operating procedures); *People v. Gomez*, 912 N.E.2d 555, 558 (N.Y. 2009) (striking down inventory search because state failed to demonstrate that it followed standardized, written protocol that adequately controlled officer discretion).

272. E.g., *California v. Acevedo*, 500 U.S. 565, 580 (1991).

existed before the conflation of special subpopulation searches with dragnet searches, the automobile exception is an exception to the warrant requirement but not to the requirement that the government have some form of individualized suspicion before conducting a search. Also like the special subpopulation exception, the automobile exception is predicated on the belief that the relevant individuals—students or government employees in the former case, drivers and passengers in vehicles in the latter—have reduced expectations of privacy.²⁷³

The automobile exception is much older than any form of the administrative search exception: The Supreme Court first recognized an exception to the warrant requirement for automobile searches in 1925.²⁷⁴ In its official formulation, albeit not in all of its applications, the exception was articulated then in much the same way that it is articulated now: Police may conduct warrantless searches of automobiles if they have probable cause to believe that the automobiles contain contraband.²⁷⁵ From the beginning, the Court considered the probable cause requirement necessary to prevent arbitrary and unjustified searches.²⁷⁶ In recent decades, the Court has expanded the exception's practical scope in several respects. Police may now search the trunk of a vehicle as well as the passenger compartment; they may search closed containers within the vehicle; and what qualifies as a "vehicle" for purposes of the automobile exception has been expanded.²⁷⁷ But it is black letter law that the police always have to demonstrate that they had individualized suspicion—indeed, individualized suspicion at the level of probable cause—before the automobile exception will permit them to proceed without a warrant.²⁷⁸ The lower courts apply this requirement as a matter of routine.²⁷⁹

273. *California v. Carney*, 471 U.S. 386, 392 (1985). Although the automobile exception was also initially predicated on the ready mobility of cars, the Court has since eschewed mobility as a basis for the exception. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 466–67 (1999) (per curiam) (holding no exigency finding necessary where officers had probable cause).

274. *Carroll v. United States*, 267 U.S. 132, 156–57 (1925).

275. *Id.* at 149.

276. See *id.* at 153–54 (“It would be intolerable and unreasonable if a [police officer] were authorized to stop every automobile on the chance of finding [contraband] and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”).

277. See *Acevedo*, 500 U.S. at 567, 580 (permitting search of closed container located in trunk of car); *Carney*, 471 U.S. at 395 (holding motor home qualified for automobile exception).

278. *Dyson*, 527 U.S. at 467; *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Acevedo*, 500 U.S. at 579; *Carney*, 471 U.S. at 392; *United States v. Ross*, 456 U.S. 798, 799–800 (1982).

279. See *Martinez v. State*, 692 S.E.2d 766, 770–71 (Ga. Ct. App. 2010) (noting that, for warrantless search predicated on automobile exception to be valid, police must have probable cause to believe vehicle contains contraband); *State v. Flowers*, 734 N.W.2d 239, 248–50 (Minn. 2007) (finding warrantless search of vehicle was invalid under automobile exception because officers did not have probable cause to believe there would be contraband in vehicle); *State v. Dudley*, 779 N.W.2d 369, 371 (N.D. 2010) (emphasizing

In substance, automobile exception searches are a form of special subpopulation searches: They are warrantless searches of people said to have reduced expectations of privacy. But perhaps because the automobile exception was well established decades before the modern rubric of administrative searches, it was never incorporated into the general category of administrative searches and was not subject to the cross-contamination with dragnets. Having escaped that cross-contamination, it has steadily maintained its requirement that the government demonstrate individualized suspicion (and indeed probable cause) even through the decades when the Court has been trimming the reach of the Fourth Amendment. Again, the automobile exception search has not been immune from the general trend: Many searches are permitted today under this exception that would not have been permitted forty years ago. But the requirement of individualized suspicion has not been eliminated, even though that requirement has been eliminated from some of the analogous special subpopulation searches that were merged with dragnets into the category of “administrative search.”

Comparing the automobile exception with the special subpopulation searches classified as administrative thus demonstrates that the requirement of individualized suspicion need not disappear simply because the person to be searched has reduced expectations of privacy. Rather, the Supreme Court’s removal of the individualized suspicion requirement in *Samson v. California*—and the resulting potential for future removal of this requirement in other special subpopulation contexts—is likely a by-product of the entanglement of special subpopulation searches with dragnets. To be sure, special subpopulation searches would probably feature some sort of lessened protections today, relative to forty years ago, even without that particular entanglement. But the elimination of the individualized suspicion requirement—both a serious change and something of an outlier—calls for a more specific explanation than the general trend alone can provide.²⁸⁰ The history of cross-contamination with dragnets supplies much of that explanation.

that, under automobile exception, law enforcement officers may conduct warrantless searches of vehicles when probable cause exists to believe contraband will be present).

280. Some might contend that the Court’s most recent vehicle search decision substantially dilutes the probable cause requirement, but that contention is too hasty. In *Arizona v. Gant*, the Court addressed the search incident to arrest exception to the warrant requirement and held that the police may conduct a warrantless search of the passenger compartment of a car incident to a recent occupant’s arrest “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” 129 S. Ct. 1710, 1719 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). Although the “reasonable to believe” standard employed in *Gant* is a deviation from the default probable cause requirement for searches, the police still must have probable cause to support the initial arrest before they can rely on this exception. As a result, there are still two forms of individualized suspicion required before a *Gant* search incident to arrest is permissible—

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. As this Article has demonstrated, the entanglement of dragnet and special subpopulation searches has played a large role in the development of these problems.

It is possible, of course, that the present Supreme Court would have little appetite for instituting better protections for privacy within the domain of administrative searches. But even the present Court has found some lines of development in this area to be disturbing,²⁸¹ and in any event, it is worth thinking about what an improved regime would look like, both as a basis of critique today and as a matter of planning for a time when decisionmakers are more sympathetic to the need for reform. One important step toward such reform involves disentangling these two kinds of 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*,²⁸² or at least by some other form of referral to a third-party decisionmaker.²⁸³ 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 discre-

the initial probable cause to arrest a person and the subsequent individualized suspicion that evidence relevant to the suspected crime will be in the vehicle.

281. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009) (invalidating strip search of student suspected of distributing contraband because there was no “reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing”).

282. *Camara v. Mun. Court*, 387 U.S. 523, 526, 532–34 (1967).

283. See, e.g., *Slobogin, The World Without*, supra note 6, at 35–36 (“Rather than require a court officer to assess the propriety of the action, an adequately trained lay decisionmaker, located on or near the school or workplace, could perform the role.”); see also *Slobogin, Let’s Not*, supra note 17, at 1092–93 (discussing possibility of court orders rather than warrants).

tion.²⁸⁴ 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. Nothing here questions the validity of some such exceptions: For example, the exigency exception to the warrant requirement might permit the government to set up a roadblock to catch a fleeing terrorist. But the fact that the search is administrative should not exempt a dragnet from the requirement of limiting discretion.

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.²⁸⁵

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,²⁸⁶ whether some other form of preclearance might be available to protect against arbitrary government action,²⁸⁷ 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.²⁸⁸ In assessing whether to waive

284. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 604–05 (1981) (describing statute that substitutes adequate mechanisms for warrant requirement).

285. Cf. *Sundby, A Return*, *supra* note 15, at 439 (arguing for consideration of cumulative effect of government intrusions on “individual’s right to be left alone”).

286. In some jurisdictions, for example, police may obtain warrants via telephone. See sources cited *supra* note 241 (discussing effect of technology on difficulty of obtaining warrants).

287. See sources cited *supra* note 283 (discussing alternative forms of preclearance).

288. Cf. *Slobogin, The World Without*, *supra* note 6, at 29–30 (arguing government should be able to proceed without warrant or independent authorization when it believes “that violence to others, disappearance of evidence, or escape of suspect is imminent”);

the probable cause requirement, a court might consider whether the person conducting the search can be expected to understand the probable cause requirement,²⁸⁹ whether that person has a relationship to the person being searched,²⁹⁰ and whether anything else about the context indicates that a probable cause requirement would undermine an important government interest.²⁹¹ 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.²⁹² 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

Sundby, *A Return*, supra note 15, at 421–24 (explaining exigent circumstances could justify dispensing with warrant requirement).

289. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 724–25 (1987) (“It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring) (“A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause.”).

290. Cf. *Samson v. California*, 547 U.S. 843, 858–60 (2006) (Stevens, J., dissenting) (arguing special relationship of probation officer to probationer partly motivated Court to allow search of probationer without warrant supported by probable cause); Sundby, *A Return*, supra note 15, at 423 n.128 (arguing special relationship between individual and government might justify reducing level of suspicion required for search). But see Stuntz, *Privacy’s Problem*, supra note 13, at 1057–58 (describing this approach as “perverse in privacy terms” because “the privacy interest in a student’s purse does not depend on whether a school principal or a police officer is searching it”).

291. See Schulhofer, supra note 15, at 118 (arguing probable cause requirement “was not intended for, and will seldom make sense for, striking a balance between the privacy interests and internal management imperatives of parties who . . . share interdependent roles within an enterprise organized to pursue a governmental mission”); cf. *id.* at 112 (making similar argument about impracticability of requiring probable cause when pressing health and safety needs justify government intrusion).

292. Cf. Sundby, *A Return*, supra note 15, at 421–24 (arguing responsive intrusions should be governed by warrant and probable cause requirements, but noting level of individualized suspicion can be modified when there are exigent circumstances or when special relationship exists between individual and government).

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 regime, 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.²⁹³

Obviously, this is not a fully worked-out program for Fourth Amendment doctrine in the areas now lumped together as administrative searches. I have said little, for example, about what factors should be relevant to the reasonableness balancing in the dragnet context²⁹⁴ and what level of individualized suspicion should be required in each of the many different special subpopulation contexts.²⁹⁵ Fleshing out a complete doctrinal apparatus, however, is a project for another day. The purpose of this Article has been to call attention to an important set of developments in administrative search law that flow from the cross-contamination between dragnet and special subpopulation searches. At the very least, learning to think of them as distinct would help to clarify current doctrine. 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.

293. Of course, the government could also argue that it initially stopped an individual pursuant to a valid dragnet regime and, during that valid dragnet, it obtained information that gave rise to individualized suspicion about a member of a special subpopulation. In such a situation, the government would first have to demonstrate to the court that the initial stop was part of a valid dragnet. If the dragnet was valid, then the information obtained during the dragnet could be used to buttress a claim that there was sufficient individualized suspicion to justify a later special subpopulation search.

294. For a discussion of reasonableness balancing in the Fourth Amendment context more generally, see Wasserstrom, *supra* note 229, at 309–17 (discussing many alternative approaches to reasonableness balancing test); see also Amar, *supra* note 6, at 801–05 (discussing application of tort principles of reasonableness as well as constitutional principles of reasonableness to Fourth Amendment). Separating dragnet intrusions from other types of intrusions may be a helpful step toward clarifying the factors that should be relevant to this inquiry.

295. Cf. Slobogin, *Let's Not*, *supra* note 17, at 1082–84 (arguing Fourth Amendment should be interpreted to require different levels of individualized suspicion depending on degree of government intrusion).