

GOVERNMENT DRAGNETS

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I

INTRODUCTION

The Fourth Amendment to the United States Constitution (and perhaps even the United States itself) exists because the American colonists abhorred the suspicionless house-to-house searches visited upon them by government officials armed with so-called “general warrants.”¹ These warrants, authorized by British-dominated legislatures, permitted fishing expeditions for evidence of sedition or nonpayment of customs taxes. They were so despised by some segments of the colonies that they are said to have been a major cause of the Revolutionary War.² The Fourth Amendment reflects the fact that, during the era when writs of assistance and other general warrants held sway, the colonists did not feel secure in their houses, persons, papers, or effects because the Crown could thoroughly search them virtually at will. Although many aspects of the history and meaning of the Fourth Amendment are in dispute, all commentators agree that the amendment’s second clause, the “Warrant Clause”—providing that search and arrest warrants be based on probable cause and describe with particularity the place to be searched and person or items to be seized—was meant to do away with general warrants.³

The general warrant is still very much with us today, however, if it is defined as the power of the executive branch, on its own or on the basis of vague legislative authorization, to engage in large-scale intrusions into the citizenry’s

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1. See generally JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31 (1966) (detailing the colonial backlash to the general searches sanctioned by writs of assistance); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937) (same).

2. As John Adams said of James Otis’ oration against the writs of assistance in 1761, “Then and there was the first scene of opposition to the arbitrary claims of Great Britain.” LASSON, *supra* note 1, at 59. Lasson concludes that this speech was the “first in the chain of events which led directly and irresistibly to revolution and independence.” *Id.* at 51.

3. The leading treatment of this issue is found in TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1968) (indicating that the drafting process of the Fourth Amendment “reinforces the conclusion that it was the warrant which was the initial and primary object of the amendment”). See also Thomas Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 583 (1999) (“No one questions that the Framers despised and sought to ban general warrants.”).

houses, persons, papers, and effects in the absence of probable cause to believe any particular person affected has done or possesses something that justifies the intrusion. Homes and businesses across the country are routinely subjected to warrantless health and safety inspections by local and state agencies. Without any individualized suspicion or judicial preclearance, criminal offenders must submit to strip searches and swabs for DNA analysis, school children must undergo drug testing, motorists are stopped at roadblocks and checkpoints, and pedestrians in our major cities are monitored by camera systems. Data mining programs covertly sweep through hundreds of thousands of records containing all sorts of personal information upon little or no showing of cause. And everyone's personal effects are uniformly scanned and searched at borders, airports, and various other major travel hubs. If we throw into the mix investigative programs designed to take advantage of pretextual searches and seizures—that is, searches and seizures avowedly based on probable cause for a minor infraction but actually designed to find evidence of a more-serious crime for which there is no cause or only an inchoate hunch—then “general warrant” actions are also quite common in connection with traffic stops, enforcement of loitering laws, and a host of other government actions.

This juxtaposition of modern, large-scale, law-enforcement techniques with the general-warrant searches that incensed the colonists is not meant to suggest that all group searches were, are, or should be considered violations of the Fourth Amendment. The colonists passed a number of laws that permitted suspicionless general inspections, and, for its part, a majority of the Supreme Court has made clear or has strongly suggested that it does not view *any* of the aforementioned government actions to be infringements of the Constitution.⁴ Even the more liberal members of the Court are willing to agree that many of these decisions are justified by legitimate law-enforcement needs.⁵

It is also apparent, however, that courts and commentators have paid insufficient attention to searches and seizures of groups, a phenomenon referred to in this article as “government dragnets” because such searches attempt to cull out bad actors through ensnaring a much larger number of individuals who are innocent of any wrongdoing. At least in part because an individualized-suspicion requirement would end any possibility of authorizing group searches, Fourth Amendment law today evaluates government-dragnet actions not under the Warrant Clause—the clause that supposedly outlaws general searches—but under the first clause of the amendment, which bars “unreasonable” searches and seizures. The Warren Court provided some discernible guideposts for making this reasonableness determination.⁶ But these

4. *See infra* II.

5. For example, see Justice Ginsburg's concurrence in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 666 (1995) (joining opinion permitting drug testing of public-school athletes), and Justice Souter's dissenting opinion in *United States v. Drayton*, 536 U.S. 194, 208 (2002) (stating that suspicionless searches of people and luggage at airports is “universally accepted”).

6. *See infra* IIA.

guideposts proved to be weakly grounded, and the post-Warren Court has pretty much ignored them in the course of approving almost every dragnet it has encountered.⁷ Recent commentary has either advocated an even more laissez-faire attitude toward dragnets or, at the other end of the spectrum, proposed schemes that would make most of them impossible.⁸

The analytical extremism of courts and commentators is understandable, since dragnets are important components of modern-day law enforcement at the same time that they pose serious threats to liberty and social stability. Nonetheless, some middle ground that does a better job sorting out the competing interests is necessary, because general-warrant-type operations are likely to increase astronomically in the near future, for at least three reasons. First, technological advances—cameras equipped with zoom and night-vision 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, or at least government officials think so. Second, concerns about national security, heightened since September 11, 2001, make such dragnets even more alluring than usual. Third, the dragnet mentality dovetails with government's infatuation with profiling, the process of statistically or pseudo-statistically categorizing people as perpetrators and potential perpetrators of crime or other antisocial acts. If a profile exists that can tell us, based on certain types of behavior or particular types of transactions, that a person poses a given risk of harm, the temptation to obtain information about everyone's behavior and transactions so that the profile can be applied becomes strong.

Parts II and III of this article describe the nature and effects of dragnet actions. They do so primarily through the prism of Supreme Court and lower-court cases, but these sections also look at law-enforcement efforts that have yet to lead to litigation and imagine future dragnet efforts as well, with a special emphasis on the role technology can play in motivating dragnets and carrying them out. Parts IV and V then summarize the Supreme Court's approach to group searches and the most significant alternative proposals for dealing with them. These sections focus in particular on the interaction of two such proposals: Richard Worf's argument that group searches should be analyzed against the backdrop of political-process theory⁹ and the proposal I have made that investigations of groups, like investigation of individuals, should be governed by proportionality and exigency considerations.¹⁰ In combination, these regulatory regimes would create a presumption that dragnets authorized

7. See *infra* IIB.

8. See *infra* IVB.

9. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93 (2007).

10. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK* 21–47 (2007) (summarizing analysis from two articles, Christopher Slobogin, *The World Without a Fourth Amendment*, 39 *UCLA L. REV.* 1 (1991), and Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 *ST. JOHN'S L. REV.* 1053 (1998)).

by narrow, nondiscriminatory legislative enactments are valid, but would also require that, on those frequent occasions when the presumption does not apply, the government demonstrate either that its “hit rate” will likely be proportionate to the intrusion visited on dragnet subjects or that the dragnet is necessary to prevent significant, specific, and imminent harm.

II

DRAGNET INVESTIGATIONS

The term “government dragnet” as used in this article refers to programmatic government efforts to investigate, detect, deter, or prevent crime or other significant harm by subjecting a group of people, most of whom are concededly innocent of wrongdoing or of plans to engage in it, to a deprivation of liberty or other significant intrusion. Dragnet cases are considered here under three categories:¹¹ those decided by the Supreme Court during Chief Justice Warren’s tenure, those decided by the Supreme Court and by lower courts during the post-Warren era, and recent or proposed manifestations of dragnets that have yet to lead to significant litigation.

A. Warren-Court Opinions

The leading case on the Fourth Amendment’s application to dragnet actions by the government is *Camara v. Municipal Court*, which dealt with area-wide health and safety inspections of residences, most of which did not pose any health or safety problems.¹² An earlier Court decision, *Frank v. Maryland*,¹³ had held that such inspections need not be authorized by warrants because they are aimed at enforcing regulatory laws rather than at obtaining “evidence of criminal action.”¹⁴ The majority in *Camara* held, instead, that warrants are required in this situation, at least when the resident refuses an inspector entry.¹⁵ Although agreeing that such entries are “a less hostile intrusion than the typical policeman’s search for the fruits and instrumentalities of crime,”¹⁶ Justice White stated for the Court that “[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”¹⁷ He added that the threat of

11. A well-known forerunner to these cases was *United States v. Korematsu*, 323 U.S. 214, 219 (1944), which authorized the detention of over 100,000 Japanese Americans during World War II because, according to the military, “immediate segregation of the disloyal from the loyal” was “impossible.”

12. 387 U.S. 523 (1967).

13. 359 U.S. 360 (1959).

14. *Id.* at 365.

15. 387 U.S. at 540.

16. *Id.* at 530.

17. *Id.*

ex ante judicial review would curb any tendency on the part of inspectors toward arbitrary home inspections.¹⁸

At the same time, the majority rejected Mr. Camara's argument that his house could not be inspected unless the government developed "probable cause" to believe that his particular home posed a health or safety risk. According to the Court, a probable-cause finding in this situation need not "depend upon specific knowledge of the condition of the particular dwelling" but rather could be based on "the passage of time, the nature of the building (for example, a multifamily apartment house), or the condition of the entire area."¹⁹ The Court gave three reasons for approving this watered-down version of probable cause. First, both before and after passage of the Constitution, colonists enacted legislation authorizing various types of inspections in the absence of individualized suspicion, despite their abhorrence of the general warrant in other contexts.²⁰ Second, the "public demands" its government prevent fires, disease, and other "dangerous" conditions traceable to poorly maintained homes, and nonindividualized inspections appeared to be the only way to accomplish this goal. As Justice White pointed out, many of these dangerous conditions, such as faulty wiring, cannot be detected from outside the home, and "[t]here is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures."²¹ Finally, because the inspections involved examination of wires, pipes, and other structural components, "they involve a relatively limited invasion of the urban citizen's privacy."²²

In short, *Camara* appeared to establish that dragnet searches of homes—the major evil that the Fourth Amendment sought to avoid—are nonetheless permissible if necessary to prevent a significant danger to a great number of people, so long as the associated intrusion is not "personal in nature"²³ and is pursuant to an objective, neutral inspection plan (as assessed by a court in those cases in which the intrusion is nonconsensual). The case also established that the Reasonableness Clause, not the Warrant Clause, is the linchpin of Fourth Amendment analysis in such cases. The Court explained "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."²⁴

18. *Id.* at 532.

19. *Id.* at 538.

20. *Id.* at 537 (citing *Frank v. Maryland*, 359 U.S. 360, 368–70 (1959) (recounting colonial statutes that permitted suspicionless or near-suspicionless searches of homes for health and safety reasons). See generally Fabio Arcila, *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1298–1310 (2010) (discussing various Revolutionary-period statutes that permitted suspicionless searches).

21. *Camara*, 387 U.S. at 535–36.

22. *Id.* at 537.

23. *Id.*

24. *Id.* at 536–37.

Davis v. Mississippi,²⁵ decided two years later, involved a very different type of dragnet but relied on similar analysis in declaring it unconstitutional. John Davis was one of twenty-four African American youth brought to the police station in Meridian, Mississippi, to be fingerprinted and questioned during a ten-day investigation of a rape. The government argued that detention for fingerprinting did not implicate the Fourth Amendment because (1) the process was not “accusatory” as to Mr. Davis (apparently precisely because so many people were fingerprinted) and (2) fingerprinting detentions are relatively unintrusive.²⁶

The Court rejected the first position because it “would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention.”²⁷ Analogous to *Camara’s* holding that the Fourth Amendment applies in civil as well as criminal actions, *Davis* stressed that the Fourth Amendment is triggered by a search or seizure regardless of whether the targets are accused or suspected of crime.²⁸

Yet in its treatment of the government’s second argument, the Court seemed to back away from a complete dismissal of dragnet detentions. Justice Brennan’s opinion stated that, because of their “unique nature,” detentions for fingerprinting “might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense,” and cited *Camara*.²⁹ The Court noted that, because such a detention does not involve the type of “probing into an individual’s private life and thoughts that marks an interrogation or search,” it could not be used as a harassment device (since only one print is needed), and further pointed out that fingerprinting is “an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions;” accordingly, larger-scale detentions for fingerprinting purposes might be permissible, at least if “authorized by a judicial officer.”³⁰ However, because no such authorization occurred in *Davis*, and because interrogation accompanied the fingerprinting, the Court did not pursue this line of reasoning further.

Camara authorized and *Davis* contemplated dragnets, but only if they (1) are subject to judicial authorization when nonconsensual, (2) are effective means of averting a significant danger or solving a crime that cannot be averted or solved through development of individualized suspicion, and (3) do not involve the types of intrusions associated with physical searches for evidence of crime or interrogations. The first two of these limitations disappeared in subsequent Court decisions, and the third may be on its way out as well.

25. 394 U.S. 721 (1969).

26. *Id.* at 726.

27. *Id.*

28. *Id.* at 726–27.

29. *Id.* at 727.

30. *Id.* at 727–28.

B. Post–Warren-Court Opinions

The abandonment of any discernible limitations on reasonableness analysis by the post–Warren Court can be traced in three different lines of cases, having to do with business inspections, roadblocks, and drug testing. In each, the Court has essentially declared that Fourth Amendment doctrine should resemble third-tier analysis in Fourteenth Amendment cases.³¹ So long as a rational basis underlies the legislative or executive decision to engage in the dragnet, it is constitutional.

1. Business Inspections

In *See v. City of Seattle*, a companion case to *Camara*, the Court imposed the same limitations on health and safety inspections of businesses that *Camara* required in the residential context.³² But in 1970, the year after Chief Justice Warren was replaced by Chief Justice Burger, the Court decided *Colonnade v. United States*. In that case the Court held, in contrast to *Camara* and *See*, that a liquor-store owner could be fined for refusing to permit warrantless entry by Internal Revenue Service inspectors, although forcible entry still required a warrant.³³ Two years later in *United States v. Biswell*, a case involving inspection of gun dealers,³⁴ the Court in effect did away with the latter caveat. Justice White, the author of *Camara*, reasoned that the process contemplated in *Camara* and *See*, whereby the inspector first asks for permission to search and then resorts to a *Camara*-type warrant only if refused, would not work in the gun-store-inspection setting, in which evidence of a violation might disappear before the inspector returns with the warrant. Thus, White opined, “unannounced, even frequent” warrantless inspections are necessary in this setting.³⁵

As an added justification for this holding, Justice White asserted that these types of inspections were not particularly intrusive, because “[w]hen 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.”³⁶ The idea that notice of inspections reduces their intrusiveness gained currency in later cases. In *Marshall v. Barlow’s Inc.*, the Court held that a *Camara*-type warrant process was required under the Occupational Safety and Health Act (OSHA) in part because many of the enterprises subject to inspection did *not* have a long,

31. *See* SLOBOGIN, *supra* note 10, at 40–41.

32. 387 U.S. 541 (1967).

33. 397 U.S. 72 (1970).

34. 406 U.S. 311 (1972).

35. *Id.* at 316 (“[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.”).

36. *Id.*

pervasive history of regulation,³⁷ while in *Donovan v. Dewey* the Court stressed the coal-mining industry's "notorious history of serious accidents and unhealthful working conditions" in concluding that *Biswell* applied to inspections under the Federal Mine Safety and Health Act.³⁸ *Dewey* also added to *Biswell's* notice and necessity requirements the stipulation that the inspection program be authorized by a statute that provided "a constitutionally adequate substitute for a warrant" consisting of rules regarding how often inspections could take place, the scope of the inspection, and how special privacy concerns could be accommodated.³⁹

In *New York v. Burger*, however, the consent-qua-notice rationale was ignored, and the adequate-warrant substitute and necessity stipulations from previous cases were also given short shrift.⁴⁰ *Burger* upheld a New York statute permitting government officials, including the police, to enter junkyards to inspect documents and to look for stolen vehicles or car parts.⁴¹ Previous regulation of junkyard owners had been nowhere near as intrusive, thus slighting the notice rationale.⁴² *Dewey's* warrant-substitute notion was also minimized, because the junkyard search could take place on a police officer's whim, so long as it occurred during business hours.⁴³ As to the necessity requirement, Justice Blackmun's opinion did at least allude to it, by asserting that, as in *Colonnade* and *Biswell*, an inspection scheme based on notice or warrants would not work in this situation because stolen parts often move "quickly" through junkyards.⁴⁴ But as Professor Clancy noted in his criticism of *Burger*, "Ease of discovery is a far cry from a demonstration that the technique is essential or indispensable."⁴⁵

After *Burger*, it is no longer necessary (if it ever really was) to show that a dragnet targeted at businesses is, in *Camara's* words, "the only effective way" of achieving the government's goal.⁴⁶ Nor need the inspection place any significant limitations on executing officials. Although business inspections must still be less intrusive than an ordinary search, apparently this need be so only in the *Biswell-Burger* sense that the business owner know that the business will be subject to some sort of regulation, a showing that presumably can be made in

37. 436 U.S. 307, 313–14 (1978). One might also note that many types of OSHA violations (having to do with unsafe working conditions) are less amenable to concealment than gun- and liquor-law violations and that, if they are corrected before the inspector returns with a warrant, the regulatory regime has accomplished its purpose.

38. 452 U.S. 594, 603 (1981).

39. *Id.*

40. 482 U.S. 691 (1987).

41. *Id.* at 708.

42. *Id.* at 721 (Brennan, J., dissenting) ("[I]f New York City's administrative scheme renders the vehicle-dismantling business closely regulated, few businesses will escape such a finding.").

43. *Id.* at 711.

44. *Id.* at 710.

45. Thomas Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEMPHIS L. REV. 483, 604 (1995).

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

virtually all business-inspection situations. Thus, the primary impact of this last requirement, as currently construed by the Court, is to prevent government from conducting dragnet searches of *residences* for evidence of crime.

Even that limitation could disappear under certain conditions. In Chicago in 1994, police conducted sweeps of every apartment unit in a public-housing project that had recently experienced repeated shootings and other crime related to gang warfare.⁴⁷ A federal district court granted a preliminary injunction enjoining future sweeps unless the government demonstrated exigency (which the court held had not justified the previous sweeps) or showed “oral or written” consent on the part of apartment occupants.⁴⁸ Within a week of the ruling, the Clinton Administration’s Department of Housing and Urban Development proposed that consent for the sweeps be obtained by making acquiescence to them a condition of each tenant’s lease, although apparently only if the residents in a given building “voted” for such a lease provision.⁴⁹ Although the proposal was never implemented, if it had been and a majority of tenants had agreed to such a condition, *Biswell–Burger* might allow dragnet sweeps of the entire housing project upon a showing that the sweeps could help reduce shootings.

2. Roadblocks

Checkpoints at the border or their effective equivalent (including international waterways and international airports) have long been sanctioned.⁵⁰ At the border, the Court has said the government’s interest in national self-protection is “at its zenith” and that privacy interests are minimal, apparently because, analogous to businesses seeking licenses, those seeking to enter the country expect and understand the need for such searches.⁵¹ Thus routine searches of persons and thorough inspections of effects, including cars,⁵² may take place at the border in the absence of suspicion.

Checkpoints in the interior have been more controversial. The Supreme Court’s first roadblock case was *United States v. Martinez-Fuerte*,⁵³ decided well after the Warren Court years. In that case, the Court upheld permanent checkpoints established up to 100 miles from the Mexican border as a means of capturing illegal immigrants. As a justification for the thousands of concededly

47. Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, N.Y. TIMES, Apr. 17, 1994, at 1.

48. *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 797 (N.D. Ill. 1994).

49. Ifill, *supra* note 47, at 1.

50. *See Carroll v. United States*, 267 U.S. 132, 154 (1925) (“Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”).

51. *See United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40 (1985).

52. *Flores-Montano*, 541 U.S. at 155–56.

53. 428 U.S. 543 (1976).

suspicionless stops made at these stations, the Court purported to rely on *Camara*, asserting that the “need to make routine checkpoint stops [to detect illegal aliens] is great,” and the “intrusion on Fourth Amendment interests quite limited.”⁵⁴ It reached the latter conclusion because the checkpoints targeted cars (as opposed to houses), the stops were brief (only a few seconds initially and three to five minutes if an officer concluded that further investigation into citizenship status was necessary), and the operation of the roadblock was “regularized.”⁵⁵ Regularity derived primarily from the facts that “the location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources” and that only those cars passing the checkpoint could be stopped in the absence of suspicion.⁵⁶ Motorists were also notified of the checkpoint through signs on the highway, thereby avoiding “surprise,” and they could see that other cars were being stopped, thus minimizing “concern” and “fright.”⁵⁷

Justice Brennan, in dissent, berated the majority for allowing “standardless seizures,” which he contrasted to *Camara’s* warrant requirement based on objective factors for nonconsensual intrusions.⁵⁸ He also argued that less discretionary options were available. Pointing out that one of the primary justifications for diverting cars to the secondary checkpoint for further investigation was the nature of the vehicle stopped, including the number of people in the car and whether any were trying to hide, he questioned why the majority so easily discarded an individualized-suspicion requirement.⁵⁹ He added:

Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today’s decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists.⁶⁰

Three years later in *Delaware v. Prouse* the Court suggested that, if the government is going to conduct dragnet seizures of motorists, it *must* do so through a regularized tactic such as a roadblock.⁶¹ The specific holding in *Prouse* was that suspicionless, random stops by individual police officers for the purpose of checking licenses are unconstitutional because they are not “sufficiently productive to qualify as a reasonable law-enforcement practice under the Fourth Amendment” and give “unbridled discretion” to individual

54. *Id.* at 557.

55. *Id.* at 559.

56. *Id.*

57. *Id.* at 558.

58. *Id.* at 568–69 (Brennan, J., dissenting).

59. *United States v. Martinez-Fuerte*, 428 U.S. 543, 576 (1976) (Brennan, J., dissenting).

60. *Id.* at 572 (Brennan, J., dissenting).

61. 440 U.S. 648 (1979).

law-enforcement officers.⁶² The majority asserted that stops based on individualized suspicion would catch many of the unlicensed (and therefore presumably less safe) drivers.⁶³ It also indicated in dictum, citing *Martinez-Fuerte*, that a license-checkpoint procedure would be permissible because it involves “less intrusion” and does not allow “the unconstrained exercise of discretion.”⁶⁴

The lone dissenter, Chief Justice Rehnquist, questioned the efficacy of the first alternative and the impact of the second. He argued against an individualized-suspicion requirement on the ground that the state’s goal in nabbing unlicensed drivers is to *prevent* unsafe driving, which is hardly achieved by waiting until the unsafe driving occurs.⁶⁵ And he wondered whether imposing inconvenience on many drivers via roadblocks rather than on a few drivers through random stops made sense; in any event, any reduction in anxiety associated with a roadblock was “an insufficient basis” for preferring the latter over the former.⁶⁶

This latter sentiment did not mean that Rehnquist had a problem with roadblocks, of course. In *Michigan Department of State Police v. Sitz*, he wrote the majority opinion upholding a sobriety checkpoint.⁶⁷ To the dissent’s argument that watching for erratic driving was a more effective way to detect and deter drunk driving, Rehnquist responded that

[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is prefer[able] as an ideal [but] for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.⁶⁸

Thus, as with business inspections, so with roadblocks: the decision as to whether to use this dragnet procedure is almost entirely up to the executive branch of the government.

The one major caveat to this rule in the roadblock context came in *Indianapolis v. Edmond*, in which the Court held that suspicionless stops at roadblocks that are established primarily “to uncover evidence of ordinary criminal wrongdoing” such as drug trafficking are not permissible.⁶⁹ According to the Court, the checkpoints in *Martinez-Fuerte*, *Prouse*, and *Sitz* were all set up for more-focused purposes: *Martinez-Fuerte* to supplement control of the border and *Prouse* and *Sitz* to promote highway safety.⁷⁰ The roadblock in

62. *Id.* at 660–61.

63. *Id.* at 659–60.

64. *Id.* at 663.

65. *Id.* at 666 (Rehnquist, J., dissenting).

66. *Id.* at 667 (Rehnquist, J., dissenting).

67. 496 U.S. 444 (1990).

68. *Id.* at 453–54.

69. 531 U.S. 32, 42 (2000).

70. *Id.* at 41–42.

Edmond, however, was clearly denominated a “Narcotics Checkpoint.”⁷¹ If such a tactic were allowed, Justice O’Connor stated for the Court, “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”⁷²

Unfortunately for this point of view, the lower courts have tended to abide by law-enforcement characterizations of the motivation for roadblocks and thus have been quite willing to permit them even when they are outfitted with drug-sniffing dogs or set up after recent crime waves, so long as their avowed purpose is traffic safety.⁷³ Lower courts have also been willing to permit dragnet actions for the purpose of detecting and deterring terrorists, even though these actions could also be said to be directed at “ordinary” criminal situations. In *Cassidy v. Chertoff*, for instance, Judge Sotomayor asserted that “[p]reventing or deterring large-scale terrorist attacks presents problems that are distinct from standard law enforcement needs and indeed go well beyond them.”⁷⁴ Relying on *MacWade v. Kelly*,⁷⁵ another Second Circuit opinion that had upheld random searches of items belonging to New York subway riders, she reasoned that, because the Coast Guard had identified the Lake Champlain ferry as a potential target and because the resulting searches of bags and car trunks were announced beforehand, lasted only a few moments, applied to everyone, and focused on finding explosives, the Fourth Amendment was not violated.⁷⁶ Citing the language from *Sitz* quoted above, Judge Sotomayor also dismissed the argument that the government should have used magnetometers to accomplish its goal in a less intrusive manner.⁷⁷

3. Drug Testing

The Supreme Court’s cases analyzing the constitutionality of drug-testing programs have looked at three now-familiar factors: the necessity for the dragnet approach, its intrusiveness, and whether it is aimed at obtaining evidence of crime or is instead motivated by some other purpose. But in this context, the Court has given the analysis a name—“special needs.” This term first appeared in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*,⁷⁸ in which he stated that “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to

71. *Id.* at 41.

72. *Id.* at 42.

73. See Brooks Holland, *The Road ‘Round Edmond: Steering Through Primary Purpose and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 298 (2006) (“[T]he weight of authority so far indicates that a secondary purpose of crime control will not upset a checkpoint with a lawful primary purpose.”)

74. 471 F.3d 67, 82 (2d Cir. 2006).

75. 460 F.3d 260 (2d Cir. 2006).

76. *Cassidy*, 471 F.3d at 78–79.

77. *Id.* at 80.

78. 469 U.S. 325 (1985) (Blackmun, J., concurring).

substitute its balancing of interests for that of the Framers.”⁷⁹ Thus, in *T.L.O.*, involving a search of a school pupil’s purse by a school official, the Court held that a warrant requirement would “unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools” and that a high-suspicion requirement would be unduly burdensome in light of “the substantial need of teachers and administrators for freedom to maintain order in the schools” and the difficulty school officials might have in understanding the “niceties of probable cause.”⁸⁰

Although *T.L.O.* itself authorized only the relaxation, not the elimination, of individualized-suspicion requirements, the special-needs rubric has served as a rationalization for a number of dragnet tactics, including group-wide drug testing. In *Skinner v. Railway Labor Executives’ Association*, the testing upheld by the Court was at least limited to railway workers who were involved in accidents or were thought to have violated safety rules.⁸¹ In *Skinner’s* companion case of *National Treasury Employees Union v. Von Raab*,⁸² however, the Court upheld warrantless drug tests of anyone who applied for or sought promotion to certain customs jobs. Warrants were not required in either *Skinner* or *Von Raab* because everyone in the designated categories was tested, and thus executive officials did not exercise any discretion in deciding whom to test.⁸³ And individualized suspicion was not required because the government’s interest in deterring and detecting drug usage outweighed employee privacy interests. The majority opinion, in each case authored by Justice Kennedy, conceded that, whether relying on blood, breath, or urine analyses, drug testing violates “bodily integrity.”⁸⁴ But it considered the employees’ privacy interest to be diminished because “operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts.”⁸⁵

The Court relied heavily on the latter reasoning in its two cases analyzing drug testing of school children, in both cases permitting such testing because of schools’ “custodial responsibility and authority.”⁸⁶ In *Vernonia School District 47J v. Acton*, it upheld drug-testing programs directed at athletes,⁸⁷ and in *Board of Education v. Earls*, it sanctioned testing of any student involved in competitive extracurricular activities, including cheerleading, band, and animal husbandry.⁸⁸ Justice Breyer, the determining vote in the latter case, emphasized

79. *Id.* at 351.

80. *Id.* at 340–41, 343.

81. 489 U.S. 602 (1989).

82. 489 U.S. 656 (1989).

83. *See Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 666–67.

84. *Skinner*, 489 U.S. at 616–17.

85. *Von Raab*, 489 U.S. at 671 (internal citation and quotation omitted).

86. *Bd. of Ed. v. Earls*, 536 U.S. 822, 831 (2002).

87. 515 U.S. 646 (1995).

88. *Earls*, 536 U.S. at 841 (Breyer, J., concurring).

that, as had occurred in *Vernonia*, the school board sought parental assent to the program, which was virtually unanimous among those who participated.⁸⁹

Of note in all of these cases is the Court's typically nonchalant analysis of the government's need to conduct the drug testing. *Skinner* at least cited some data suggesting significant substance abuse problems among railway workers.⁹⁰ And in another drug testing case, *Chandler v. Miller*,⁹¹ all but one of the justices voted to strike down a Georgia statute that required every person seeking nomination or election to a state office to undergo urinalysis, on the ground that the state was unable to point to any "concrete danger" such a program would prevent or deter.⁹² But *Von Raab's* approval of customs-officer drug testing occurred despite Justice Scalia's strong protestation that, in contrast to the railway-worker program at issue in *Skinner*, "neither frequency of use nor connection to harm is demonstrated or even likely."⁹³ And the five-member majority in *Earls* (which, it should be noted, *included* Justice Scalia), rejected the Tenth Circuit's requirement that the school demonstrate "some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."⁹⁴ Not only would that standard be too hard to administer, Justice Thomas stated for the majority, but "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program destined to deter drug use."⁹⁵ Generally, therefore, it appears that almost any colorable demonstration of government need will suffice in these cases.

Analogous to its stance in roadblock cases, however, the Court has drawn the line at testing aimed primarily at "ordinary" crime control, even when the danger is "concrete." In *Ferguson v. City of Charleston*, local city and hospital officials devised a program that not only tested pregnant mothers to see if they were on crack cocaine, but also sent positive tests to law-enforcement officials.⁹⁶ The deciding vote to uphold the testing, from Justice Kennedy, keyed in on the fact that police had been involved in devising the policy and would use it to facilitate criminal prosecutions.⁹⁷

4. Other Current and Future Dragnets

The group search and seizures that most frequently confront the courts—business inspections, roadblocks, and drug testing—do not come close to exhausting the types of dragnets that the government currently pursues.

89. *Id.*

90. 489 U.S. at 602, 607 n.1.

91. 520 U.S. 305 (1997).

92. *Id.* at 318–19.

93. *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

94. *Earls*, 536 U.S. at 828 (internal citation and quotation omitted).

95. *Id.* at 836.

96. 532 U.S. 67 (2001).

97. *Id.* at 88 (Kennedy, J., concurring).

Moreover, many of the dragnets that have been discussed could be immeasurably expanded through the use of technology. And the advent of profiling science makes dragnets even more tempting to government officials.

Two particularly wide-ranging dragnets involve public camera surveillance and data mining. Today, thanks in part to post-9/11 federal funding, many major cities and a slew of medium-size and smaller urban areas have created camera-surveillance systems that permit police to monitor large swaths of public and quasi-public areas.⁹⁸ For instance, Chicago trains more than 2200 cameras on its urban populace day and night, every day of the week, some operating openly, others covertly; all are patched into the city's \$43 million operations center so that a dispatcher can send video images from the cameras located closest to the scene of a reported incident.⁹⁹ The classic example of large-scale data mining is the Total Information Awareness (TIA) program, designed 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.¹⁰⁰ Although Congress defunded the program in 2003, since then new data-mining efforts that essentially carry out the same functions have come into existence.¹⁰¹

Litigation over these technologically enhanced dragnets has not been significant, for a number of reasons. First, neither type of program has been particularly successful at detecting criminal or terrorist activity;¹⁰² as a result, criminal cases in which the constitutionality of the program might be challenged have been close to nonexistent. Second, some camera-surveillance operations and most data-mining efforts are conducted secretly; thus, for instance, most people are still not aware of the sequels to TIA.

Perhaps the most important reason litigation over these types of dragnets has been negligible, however, is Supreme Court case law holding that the Fourth Amendment is not implicated by government surveillance of activities

98. SLOBOGIN, *supra* note 10, at 82–84.

99. Fran Spielman, *Feds Give City \$48 Million in Anti-terrorism Funds*, CHI. SUN-TIMES, Dec. 4, 2004, at 10.

100. GINA MARIE STEVENS, REPORT FOR CONGRESS: PRIVACY: TOTAL INFORMATION AWARENESS PROGRAMS AND RELATED INFORMATION ACCESS, COLLECTION, AND PROTECTION LAWS 2 (Cong. Research Serv., 2003), available at <http://www.fas.org/irp/crs/RL31730.pdf>.

101. Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 318 (2008). The federal government recently canceled its satellite-surveillance program, but only because law enforcement preferred TIA-like “fusion centers” that will create “a national suspicious activity reporting system.” Spencer S. Hsu, *Napolitano Announced End to Domestic Spy Satellite Program*, WASH. POST, June 23, 2009, at A8.

102. One meta-review of public camera-surveillance systems concluded that, on average across programs, it reduced crime four percent. BRANDON C. WELSH & DAVID P. FARRINGTON, CRIME PREVENTION EFFECTS OF CLOSE CIRCUIT TELEVISION: A SYSTEMATIC REVIEW 41 (United Kingdom Home Office Research, Dev., and Statistics Directorate 2002), available at <http://rds.homeoffice.gov.uk/rds/hors2002.html>. Although data about covert antiterrorist data-mining are hard to obtain, the New York Times reported that virtually none of the leads such programs have generated panned out. Lowell Bergman et al., *Spy Agency Data after Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A1.

carried out in public view¹⁰³ or by government efforts to obtain personal information “voluntarily” surrendered to third parties such as banks, phone companies, and accounting firms.¹⁰⁴ Because, the Court says, we assume the risk of disclosure to other parties in these situations, the people affected do not even have standing to raise a constitutional challenge.¹⁰⁵ This caselaw means that, as far as the Constitution is concerned, use of cameras, tracking devices, and other technologies to monitor our public movements, as well as use of computers to aggregate personal information to compile “digital dossiers,”¹⁰⁶ can proceed without having to check with a magistrate or provide any justification for doing so.

For similar assumption-of-risk reasons, the Court has held that the Fourth Amendment does not regulate government reliance on technology that is in “general public use.”¹⁰⁷ It has also concluded that “technology” that detects only the presence of contraband—for instance, a dog that sniffs drugs—invades no privacy interest protected by the Fourth Amendment.¹⁰⁸ With these holdings in its armamentarium, the government’s ability to exploit dragnets unfettered by the Constitution increases exponentially. Even if completely lacking in individualized suspicion, the government can monitor house interiors with binoculars, flashlights, and telescopes (assuming these various common items are “in general public use”) or with devices that detect only the presence of illicit drugs or other contraband such as weapons (where carrying a concealed weapon is a crime). The latter devices can also be used to conduct suspicionless examinations of persons and cars on the public thoroughfares, either at roadblocks set up “primarily” for some other reason, or randomly, through attachments to cameras or police cruisers.

Even with their economies, these various technologies might not normally tempt honest law-enforcement officers lacking a good-faith belief that their use is justified. But new developments are changing that calculus as well. First, of course, is the all-pervading fear of terrorist attacks, which thousands of local police have been deputized to prevent.¹⁰⁹ Although the threat of such an attack

103. See *United States v. Knotts*, 460 U.S. 276, 283–84 (1983).

104. See *Smith v. Maryland*, 442 U.S. 735 (1979) (phone companies); *United States v. Miller*, 425 U.S. 435 (1976) (banks).

105. The broadest statement to this effect comes from *Miller*—

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 443.

106. The term comes from DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 13 (2004).

107. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

108. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

109. Eric Schmitt & David Johnston, *States Chafing at U.S. Focus on Terrorism*, N.Y. TIMES, May 26, 2008, at A1 (noting that “billions of dollars have been spent linking federal law enforcement and intelligence authorities to the country’s more than 750,000 police officers, sheriffs and highway patrol

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 like the ferry and subway interdictions described earlier.

Second, government officials have become enamored with profiling as a means of detecting terrorists and other types of wrongdoers. Of course, dragnet programs of yesteryear have often featured profiles, beginning with the neutral inspection plan required in *Camara*. But today, risk scores, no-fly lists, pattern- or algorithm-based data mining, link analysis of phone calls, and various other quasi-empirical attempts to connect certain traits or behaviors to bad people provide an incentive to conduct surveillance and to accumulate information on everyone, simply to see if anyone fits the profile. Thus, we find that the progenitors of TIA wanted to increase access to counter-terrorism information “by an order of magnitude” in order to develop and apply profiles that would “automatically cue analysts based on partial pattern matches.”¹¹⁰

This type of nomothetic analysis is not confined to national-security venues. Law-enforcement agencies have also developed profiles of serial murderers, drug couriers, and drug users, all of which require acquiring information about a person’s habits, personality, and other traits in order to help police in their investigation.¹¹¹ And of course DNA profiling has become a popular method of investigating and proving crime, resulting in DNA sweeps that have occasionally involved “asking” hundreds of people if they can be swabbed for the purpose of collecting a sample.¹¹² To facilitate this type of profiling, every federal circuit addressing the issue has upheld the constitutionality of DNA-sample collection from individuals convicted of violent felonies, many reasoning that in so doing the government “is not trying to determine that a particular individual has engaged in some specific wrongdoing” and thus is involved in a special-needs situation that does not trigger the usual Fourth Amendment constraints.¹¹³ A few courts have extended this analysis to nonviolent felons,¹¹⁴ and programs aimed at arrestees are probably not far behind.¹¹⁵

officers” through fusion centers that were originally “designed to collect and analyze data to deter terrorist attacks” and now are “branching out from terrorism to focus on violent crime and natural disasters”).

110. See U.S. DEP’T OF DEFENSE, DEFENSE ADVANCED RESEARCH PROJECTS AGENCY, REPORT TO CONGRESS REGARDING THE TERRORISM INFORMATION AWARENESS PROGRAM 3–9 (May 20, 2003).

111. See, e.g., James Aaron George, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 VAND. L. REV. 221, 229 (2008) (describing profiles of offenders that include “gender, age, race or ethnicity, level of intelligence or schooling, military service status, job status, living circumstances, nature of interpersonal relationships, and even the make and color of the perpetrator’s car”).

112. Glynn Wilson, *In Louisiana, Debate Over a DNA Dragnet*, CHRISTIAN SCI. MONITOR, Feb. 21, 2003, at 3 (noting that police had obtained samples from over 800 men in southern Louisiana in an effort to catch a serial killer).

113. *E.g.*, *Nicholas v. Goord*, 430 F.3d 652, 668 (2d Cir. 2005).

114. *E.g.*, *State v. Martin*, 955 A.2d 1144 (Vt. 2008).

115. See, e.g., *United States v. Pool*, No. 09-10303, 2010 WL 3554049 (9th Cir. Sept. 14, 2010) (upholding DNA sampling as a condition of pretrial release).

III

WHY SHOULD WE CARE?

The conflict over dragnets is understandable. General searches and seizures can be extremely useful, but they can also smack of the police state. Even dragnets that appear to be ineffective can serve vital government interests. For instance, most research indicates that public camera surveillance reduces crime in urban areas by only four to six percent.¹¹⁶ But those figures represent more than a trivial amount of crime (moreover, the better-run programs may reduce crime by as much as twenty to thirty percent, taking into account displacement effects¹¹⁷). Inspection programs, roadblocks, and drug-testing programs do not catch very many violators. But that may well be because, as some members of the Supreme Court are fond of pointing out, they are effective at deterring unwanted behavior.¹¹⁸ The proposed alternatives to dragnets—better investigations of car thieves (the alternative to the statute in *Burger*), more stops of heavily loaded cars near the border (as Justice Brennan suggested in *Martinez-Fuerte*), or closer attention to drug-induced behavior by customs agents or school children (as the dissenters in *Vernonia* and *Earls* argued)—are often pipe dreams and are usually less effective, more expensive, and conceivably more intrusively stigmatizing overall. It is also difficult, in the wake of 9/11, to muster much righteous indignation over a limited bag search of New York subway riders.

Harder to grasp are the negative consequence of dragnets. We can start by asking why the Framers wanted to eliminate general-warrant searches of their homes. Principally, it was because those searches made them feel oppressed by a government that was willing to treat all of them like wrongdoers even though most of them were not.¹¹⁹ Many readers may feel perfectly secure from this kind of pressure in their lives. But imagine you are a Mexican American in Southern California who is subjected to document checks on major highways far from the border, or a student who has your blood drawn or urine checked because you want to play in the school band. Or imagine you are an inner-city resident subject to routine checkpoint stops as you walk around your own neighborhood,¹²⁰ or an Arab American who is tracked on camera or through

116. See SLOBOGIN, *supra* note 10, at 85.

117. *Id.* at 87.

118. See *supra* text accompanying notes 44, 65, 68 and 95.

119. See sources cited *supra* notes 1–2. As Patrick Henry put it, under the general warrants “any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason.” *Draper v. United States*, 359 U.S. 307, 336 (1959) (quoting JAMES MADISON, I DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326 (Jonathan Elliot ed., 2d ed. 1836)).

120. See Andrea Estes, *Anticrime Initiative Working, Police Say*, BOSTON GLOBE, Aug. 28, 2004, at B1 (noting significant, albeit contested, reduction in nonfatal shootings as a result of dragnet stop programs, but quoting the head of the local NAACP branch, who stated that young blacks who are stopped “feel they have become the victims”).

digital means, singled out at travel centers, and subject to FBI interviews because a data-mining program indicates that you fit a terrorist profile.

Admittedly, none of these law-enforcement actions involve the ransacking of homes or the custodial arrests that bothered the Framers. But research on laypeople's views about the intrusiveness of various types of government investigative techniques indicates that even dragnets that do not involve physical entry—such as public camera surveillance or data mining of the type involved in the TIA program—are viewed as far more invasive than brief seizures at a roadblock, which the Supreme Court has acknowledged implicate the Fourth Amendment.¹²¹ Moreover, if the images captured on public cameras are not immediately destroyed, study participants assign an intrusiveness rating almost equal to that of a bedroom search.¹²²

Furthermore, the fact that large numbers of people are enmeshed in such operations, which the Court has sometimes touted as a method of mitigating the sense of invasion,¹²³ could actually increase the feeling of oppression in some types of cases. As Justice O'Connor noted in *Vernonia*, group-wide programs may reduce the potential for arbitrary action and dilute its "accusatory" nature, but they can also "pose a greater threat to liberty" because so many people are affected.¹²⁴ And if dragnets are based on profiles, this threat can be exacerbated by what Bernard Harcourt has called the "ratchet effect."¹²⁵ Profiles have a tendency to become a self-fulfilling prophecy when they are the primary motivation behind law-enforcement efforts, which may mean that those who fit the profile are disproportionately affected.

A separate but equally important consideration is that, because they are so easy to justify, dragnets provide tempting opportunities for pretextual police actions. If police cannot develop individualized probable cause to enter a house, perhaps a health and safety inspection will do the trick. If they want to ferret out drug couriers in a particular neighborhood but do not know which cars are involved, maybe a license checkpoint, along with a drug-sniffing dog, will help out. The phenomenon of "mission creep" is well-known in data-mining circles: antiterrorist programs discover many more illegal immigrants than they do Al Qaeda members.¹²⁶

121. See SLOBOGIN, *supra* note 10, at 110–13 (camera surveillance results); 183–85 (data-mining results).

122. *Id.* at 112 tbl. item 18.

123. See *supra* notes 57 and 64 and accompanying text.

124. 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting) (internal citation and quotation omitted).

125. BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICY, AND PUNISHING IN AN ACTUARIAL AGE* 147 (2007).

126. See MARY DE ROSA, *CTR. FOR STRATEGIC AND INT'L STUDIES, DATA MINING AND DATA ANALYSIS FOR COUNTERTERRORISM* 16 (2004), available at www.cdt.org/security/usapatriot/20040300csis.pdf; U.S. DEP'T OF DEFENSE, *TECHNOLOGY & PRIVACY ADVISORY COMM., SAFEGUARDING PRIVACY IN THE FIGHT AGAINST TERRORISM* 39–40 (2004), available at www.cdt.org/security/usapatriot/20040300tapac.pdf.

Moreover, dragnets can be disguised as actions based on individualized suspicion. For instance, the federally funded program Operation Pipeline is *designed* to use traffic violations, which all of us commit all of the time, as means of obtaining consent or otherwise gaining authorization to search the car that is stopped,¹²⁷ and the purpose behind many antiloitering statutes is to give police authority to arrest people believed to be affiliated with gangs.¹²⁸ To the extent the targets perceive the pretextuality of any of these operations, the sense of unfairness is heightened.

The repercussions of the resentment caused by dragnets could go well beyond momentary hostility toward the authorities. The procedural-justice literature shows that compliance with the law is intimately tied to respect for those enforcing it.¹²⁹ If that respect dissipates, cooperation with law enforcement and perhaps the desire to be law-abiding itself can diminish, effects that studies of inner-city communities claim to have found.¹³⁰ Recall also that dragnets were a major cause of the Revolution.

IV

CURRENT APPROACHES TO REGULATING DRAGNETS

The Supreme Court's take on dragnets is hard to pin down, but an effort at summarization is nonetheless made here. Also described in this section and the next are several alternatives to the Court's analysis, with a focus on two alternatives that, when combined, suggest a promising way out of the morass: political-process theory and proportionality analysis. Dragnets authorized by legislation that is free of political-process defects should receive deference from the courts. When such deference is not merited, the government should have to demonstrate a success rate proportionate to the intrusion occasioned by the dragnet.

A. Summary of the Court's Current Approach

Current law on dragnets appears to be very complicated. Supreme Court and lower-court case law considers a number of factors, listed here with examples suggesting the spectrum associated with each (with the examples most supportive of dragnets listed first): (1) whether the situation involves special needs or instead is an attempt to obtain evidence of ordinary criminal

127. For a description of the program, see U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT AGENCY, INSIDE THE DEA: OPERATIONS PIPELINE AND CONVOY, *available at* <http://www.usdoj.gov/dea/programs/pipecon.htm>.

128. *See generally* Chicago v. Morales, 527 U.S. 41 (1999) (striking down a "failure to disperse" statute aimed at reducing gang-related criminal activity).

129. For a useful summary of this literature as applied to the effects of policing, see Andrew Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1114-18 (2008).

130. *See id.* (concluding that the deleterious effects of police techniques perceived as unfair can lead to an increase in crime).

wrongdoing (student drug testing v. narcotics checkpoint); (2) the significance of the government interest (prevention of terrorist acts v. detecting illegal immigrants); (3) the magnitude of the problem the government wants to address (smuggling contraband across the border v. drug use among customs agents); (4) the extent to which an individualized-suspicion requirement would prevent the government from achieving its goal (residential health and safety inspections v. drunken driving); (5) the intrusiveness of the dragnet (camera surveillance v. strip searches); (6) the degree of notice or consent (business inspections v. covert data mining); (7) the nature of *ex ante* review, if any (judicial authorization of dragnet fingerprinting v. checkpoints established by supervisors); and (8) the existence of a neutral plan that diminishes discretion (area-wide residential-inspection plans or roadblocks that accost all drivers v. random junkyard inspections for stolen parts). Different combinations of these factors have played a role in all of the Court's dragnet cases.

As the examples in parentheses suggest, however, usually only factor (1) is dispositive as far as the courts are concerned. The Fourth Amendment might prohibit a government dragnet when there is *no* evidence of concrete danger (as the Court held in *Chandler*, the politician drug-testing case) or if the dragnet is *very* unlikely to produce evidence of wrongdoing or *highly* discretionary (as the Court concluded with respect to random license checks in *Prouse*), and probably also when it is *extremely* intrusive relative to government need (for example, a general strip search of school children¹³¹). But otherwise the Court is willing to approve almost any dragnet that takes place outside of the typical criminal law-enforcement context. And because “ordinary criminal wrongdoing” is a slippery concept and, according to the courts, does not cover a wide array of government campaigns—including antiterrorist efforts, illegal-immigrant interdictions, regulatory schemes aimed at crime-infested businesses (such as junkyards), or traffic-related offenses—this latter limitation is not particularly significant. In short, the Court's dragnet jurisprudence leaves considerable room for play; virtually any government dragnet that avoids irrationality passes the Fourth Amendment.

B. Better Balancing Versus No Balancing

Many commentators have disagreed with the Court's analysis, of course. Most have called for according less weight to government interests and more weight to individual interests, and have argued that the government should have a heavy burden to show why dispensing with an individualized-suspicion requirement is necessary.¹³² But these critiques have usually not offered any

131. See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (declaring the strip search of a student based on reasonable suspicion violated the Fourth Amendment).

132. See, e.g., Clancy, *supra* note 45, at 487 (arguing that suspicionless searches and seizures should be “aberrational” and founded on “a strong showing of governmental necessity”); 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 (1988) (arguing for least drastic means analysis); Scott

concrete way of gauging government and individual interests, nor specified how one balances them in a way that avoids simply implementing one's policy preferences. Furthermore, for reasons suggested above and elaborated on below, calculating whether a dragnet is "necessary" is a chore that courts should not lightly undertake and probably should avoid altogether.

Consider Justice O'Connor's dissent in *Vernonia*, which is among the most thoughtful judicial approaches in this genre. In essence, she argued that dragnet actions should occur only when an individualized-suspicion regime would be both "ineffectual" because it would "place the government's objectives in jeopardy" and "impractical" because the situation is such that "even one undetected instance of wrongdoing could have injurious consequences for a great number of people."¹³³ But, as Justice O'Connor herself recognized with respect to her first criterion, "a suspicion-based scheme . . . may not be *as* effective as a mass, suspicionless testing regime."¹³⁴ And once that is conceded, the second part of her test is also easily met, even in the student drug-testing situation, in which she argued it was not. As Justice Thomas's majority opinion asserted:

Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab*, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner*. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.¹³⁵

Similar comments can be made about virtually any dragnet program.

Justice O'Connor's approach is in essence a variant of strict-scrutiny analysis, which in the dragnet setting would require the government to demonstrate that a dragnet is narrowly tailored to meet a compelling law enforcement need.¹³⁶ While this analytical scheme has served the courts fairly well in other contexts, in Fourth Amendment cases it places courts in the position of legislating much more conspicuously, and much less effectively, than in other settings. However competent courts may be, for instance, at assessing whether time, place, and manner restrictions on speech are necessary, they are sorely disadvantaged in analyzing which law-enforcement techniques work best.

Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 446 (1988) (arguing for a compelling state-interest-least-intrusive-means test that "unambiguously reorients fourth amendment analysis toward protection of the individual's privacy interest"); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. _ (forthcoming 2011) (arguing that dragnets should not be permitted if individualized suspicion can accomplish the government's objective).

133. 515 U.S. 646, 674–75 (1995) (O'Connor, J., dissenting).

134. *Id.* at 680 (O'Connor, J., dissenting).

135. *Id.* at 661–62.

136. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (holding that, to justify a law burdening political speech, government must show that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest").

Consider as an illustration how a court would apply strict-scrutiny analysis to a public camera system. Assume that the area in which the government wants to set up a camera system has a high crime rate and that research conducted in similar types of locations indicates that, through increased deterrence and apprehension, the presence of cameras can reduce property crime by as much as twenty-five percent and violent crime by as much as five percent (estimates based on actual studies).¹³⁷ Difficult enough is determining whether these data make the government's crime control objective "compelling." Under traditional strict-scrutiny analysis, the court would also have to inquire into whether the camera system was narrowly tailored to meet the government's objective. That inquiry raises a number of imponderables. Alternatives to a camera system could include placing more police on the scene (presumably limited to stopping people only when they have individualized suspicion), installing more street lights and greater pedestrian access to the area, and passing broader loitering laws that would allow police greater preventive authority.¹³⁸ Comparing the effectiveness, not to mention the expense, of these competing approaches is far from the typical judicial job. And although assessing the relative intrusiveness of these various techniques *is* within the usual judicial purview, balancing that assessment with these other variables and figuring out which technique most efficaciously deals with the crime problem in the least restrictive manner raises micro-managing quandaries that are even more difficult and inappropriate for courts to address.¹³⁹

Perhaps in part for that reason, a second group of commentators have called for an end to balancing and instead would always require individualized probable cause or reasonable suspicion for any search of houses, persons, papers, or effects.¹⁴⁰ But such a requirement would eliminate dragnets such as health and safety inspections that virtually everyone (probably including the Framers¹⁴¹) would want. And it cuts against the text of the Fourth Amendment,

137. See SLOBOGIN *supra* note 10, at 84–88.

138. Cf. Neal Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1092–98 (2002) (exploring how city architecture might enhance crime control); *City of Chicago v. Morales*, 527 U.S. 41, 66 (1999) (O'Connor, J., concurring) (speaking of loitering statutes that might be "reasonable alternatives" to the statute struck down by the majority).

139. Recall Justice Rehnquist's words in *Michigan Department State Police v. Sitz*, 496 U.S. 444, 453–54 (1990) that, "for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." See *supra* note 68 and accompanying text.

140. See William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J. L. REF. 551 (1984). See also Justice Douglas's dissent in *Terry v. Ohio*, 392 U.S. 1, 39 (1967) ("Until the Fourth Amendment . . . is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched[.]") and Justice Brennan's dissent in *T.L.O. v. New Jersey*, 469 U.S. 325, 360 (1985) ("If the search in question is more than a minimally intrusive *Terry* stop, the constitutional probable-cause standard determines its validity.").

141. See *supra* note 20.

which makes reasonableness, not particularized probable cause, the core of constitutional protection.

A variation of this approach is to impose the individualized probable-cause requirement only in those situations in which the government seeks evidence of crime. This approach “reflects the intuition of the Court in various cases that ‘special needs’ searches are more easily tolerated if they do not result in criminal penalties.”¹⁴² Of course, for this approach to have any impact in inspection cases and the like, the legislature would have to agree to drop any provision for criminal penalties in connection with health and safety inspections, immigration and drunk driving roadblocks, drug testing programs, and the like. Furthermore, under this approach the Fourth Amendment would provide privacy and property protection only to criminal suspects, a situation that, as *Camara* pointed out, would be “anomalous” at best.¹⁴³ It is also one that the Framers probably did not countenance, since the revenue and customs laws that led to many of the general-warrant searches they maligned were at most quasi-criminal in nature.¹⁴⁴

Furthermore, exemption of civil searches would leave the scope of the Fourth Amendment at the mercy of legislative categorizations. As *Burger* and the drug-testing programs illustrate, dragnets can be classified as administrative and still achieve crime-control purposes.¹⁴⁵ The type of traffic and loitering laws that can lead to pretextual dragnets are also often technically noncriminal.

C. Political-Process Theory

A third set of commentators has also deplored judicial balancing but has generally approved of the Court’s conclusions in the dragnet cases because the effect of the Court’s hands-off attitude is to leave the balancing up to the

142. Ricardo J. Bascuas, *Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 781 (2007).

143. See also *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (“[T]he individual’s interest in privacy and personal security ‘suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards’”).

144. See *Davies*, *supra* note 3, at 659–60 (distinguishing the “customs collections” that occasioned the general warrant from “criminal law enforcement”).

145. For this reason, Professor Simmons has proposed that when government purports to be carrying out “regulatory” searches and seizures, as the government has argued that it does in antiterrorism cases, it should be prohibited from using any evidence it garners in criminal prosecutions; that approach, he suggests, would call the government’s bluff. See Ric Simmons, *Searching for Terrorists: Why “Public Safety” is Not a Special Need*, 59 DUKE L.J. 843, 920 (2010). But this solution creates its own problems. Freed from any restrictions on its antiterrorism efforts, the executive branch might introduce numerous such programs, believing that, at the least, bombs will be discovered and terrorists identified. On the other side, a prohibition on prosecuting terrorists who are caught in an antiterrorist program would be very hard for the public to swallow. Further, this approach allows the government to carry out other suspicionless “special needs” searches and seizures as long as evidence thereby obtained is not used in a criminal court. Thus school students can be suspended, illegal immigrants deported through a civil process, and house residents subjected to civil fines based on dragnet stops and searches without violating the Fourth Amendment, despite the thousands of innocent individuals affected by drug testing, checkpoints, and health and safety inspections, respectively.

legislative branch. William Stuntz has argued that “Fourth Amendment regulation is usually unnecessary where large numbers of affected parties are involved. Citizens can protect themselves in the same way that they protect themselves against most kinds of government misconduct—they can throw the rascals out.”¹⁴⁶ Richard Worf builds on this insight by explicating why, under political-process theory, dragnets approved by legislatures should usually receive a judicial pass.¹⁴⁷

Political-process theory attempts to mediate the interbranch tension caused by challenges to legislation under indeterminate constitutional provisions like the Due Process Clause.¹⁴⁸ It does so by telling courts that such challenges should succeed only if the legislative pronouncement is the result of a significant defect in the democratic process. According to Worf, “The theory respects our society’s presumption of democratic decision making and simply holds that judicial review should always be affirmatively justified by some representation-reinforcing rationale.”¹⁴⁹

Worf ties this idea to Fourth Amendment jurisprudence by asserting that, when search and seizure of a group rather than of an individual is involved, representation of the relevant interests is often possible. If so, he argues, courts owe the results of democratic decisionmaking deference.¹⁵⁰ As Worf notes, courts have long trusted legislative balancing of government and individual interests in other important constitutional arenas involving groups. Thus, he contends, we should be equally willing to trust legislatures to balance those interests in Fourth Amendment cases involving general searches and seizure:

[T]he personal interests involved in [general] searches and seizures are often less compelling than those involved in cases where the Court already applies rational basis review. A drug test or the intrusion occasioned by being stopped on the road for a few minutes is certainly no more momentous than the values involved in the equal protection, due process, and takings cases. Those cases have involved much more than a brief intrusion on privacy. They have involved, for example, the right to equal funding of school districts . . . and the right to make decisions about when and how to end a terminally ill life¹⁵¹

Worf concludes that, “[w]here only groups are affected, very important, disputed questions can safely be left to the political process.”¹⁵² He adds that the text of the Fourth Amendment says as much, for it is framed in terms of reasonableness, an inquiry into “social welfare maximization” that judges are no better equipped to address than legislatures, at least when groups rather than individuals are involved.¹⁵³

146. William J. Stuntz, *Implicit Bargains, Government Power and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992).

147. Worf, *supra* note 9.

148. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

149. Worf, *supra* note 9, at 97.

150. *Id.* at 99.

151. *Id.* at 116–17.

152. *Id.* at 117.

153. *Id.* at 118–31.

D. When Political-Process Deference Would Not Apply

Worf also recognizes, however, that many searches and seizures cannot be said to result from even the generous concept of democratic functioning that underlies rational-basis review. He identifies three principal process defects: (1) an absence of authorizing legislation, (2) legislation that delegates too much power to the executive branch, and (3) legislation that prejudices a discrete and insular minority.¹⁵⁴ In these situations, Worf states, the Court should apply strict scrutiny rather than rational-basis review.¹⁵⁵

The first defect most obviously occurs in the run-of-the-mill search and seizure based on individualized suspicion. These actions are not authorized by legislation, but rather involve the exercise of police-officer discretion; a good example is *Prouse*, in which the Court pointed out that the officer “was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks.”¹⁵⁶ Another variant of this defect arises when some type of upper-level authorization exists, but it comes from an unelected body (Worf points to *Ferguson*, in which hospital officials and local police created the policy¹⁵⁷) or from an elected body that does not represent the affected group (as might be true of some locally approved sobriety- or license-checkpoint programs that stop drivers from outside the jurisdiction¹⁵⁸).

A second defect occurs when authorizing legislation is enacted, but it fails to impose any meaningful constraints on officer discretion, thus in effect replicating the absence-of-legislation defect. Worf suggests that this defect was present in the ordinance struck down in *Camara* (which did not require the type of “neutral” plan *Camara* required) as well as in the statute upheld in *Burger*, since both laws allowed officers to inspect whenever they chose.¹⁵⁹ As another example, assuming that the random license stops in *Prouse* had been authorized by legislation, they still would have been subject to strict scrutiny given the discretion such legislation would have vested in police officers.

The third type of process flaw that Worf identifies, well-known to all constitutional-law buffs, occurs when the law generated by democratic decisionmaking discriminates against a group that is precluded from significant participation in the political process.¹⁶⁰ Prisoners and aliens fit in this category, as would racial groups in some situations.¹⁶¹ Worf also suggests that a statute that authorized checkpoints in high-crime neighborhoods, although facially neutral, would be suspect if those neighborhoods are generally composed of

154. *Id.* at 137–38.

155. *Id.*

156. 440 U.S. 648, 650 (1979).

157. 532 U.S. 67, 88 (Kennedy, J., concurring).

158. Worf, *supra* note 9, at 138.

159. *Id.* at 149–50.

160. *Id.* at 152–58.

161. *Id.* at 153.

minorities.¹⁶² Although disparate-impact analysis has faded from other areas of constitutional law, Worf acknowledges it could have a place in Fourth Amendment jurisprudence given the history of racial profiling in policing.¹⁶³ At the least, dragnets aimed at minority or poor neighborhoods should be authorized through a democratic process that includes the residents of those neighborhoods.¹⁶⁴

Some of the dragnets discussed here manage to avoid all of these process defects. For instance, routine border searches and seizures are entitled to deference under political-process theory because they take place pursuant to federal legislation and affect everyone who enters the country at borders, international airports, and other functional equivalents of borders.¹⁶⁵ The same can be said about neutral inspection schemes of the type required by *Camara*, *Marshall*, and *Dewey*, assuming they are also authorized by the relevant legislative body. The antiterrorism program involving ferries approved by the Second Circuit is another dragnet that would probably be subject only to rational-basis review because it was established under a congressional statute that directed the Coast Guard to develop vulnerability assessments of key transportation systems, and the officers conducting the program followed a set procedure (albeit one that could vary from boat to boat).¹⁶⁶

In most of the rest of the cases discussed above, however, one or more process defects were present. Most fit in the first process-defect category, involving dragnets that are not authorized by legislation. In some of these cases, the government actions were not traceable to any policy. In addition to the random stops in *Prouse*, already mentioned, the detentions in *Davis* and the DNA-sweep scenarios (as opposed to the legislatively established prisoner-DNA collections) are examples of this phenomenon. Indeed, any dragnet aimed at solving a particular crime will always be subject to strict judicial scrutiny on this theory, given the impossibility of creating enabling legislation beforehand.

In many other cases, a policy for the dragnet existed, but it was the brainchild of unelected law-enforcement agents or government bureaucrats. Illustrative here are not only *Ferguson*, but *Sitz* and *Edmond* (in which the

162. *Id.* at 154–57.

163. *Id.*

164. See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000) (discussing the importance of community involvement in devising effective law enforcement policies that are perceived as legitimate).

165. See, e.g., 19 U.S.C. § 1582 (“[A]ll persons coming into the United States from foreign countries shall be liable to detention and search”). Other border search statutes, however, are more problematic on this score. See 19 U.S.C. §1581(a) (2006) (“Any officer of the customs may at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . and to this end may hail and stop such vessel . . . and use all necessary force to compel compliance.”). Given the broad discretion this statute grants officials, it would not, under the approach advocated here, receive judicial deference, and contrary to the Supreme Court’s assertion in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), would not, by itself, have supported the boarding in that case.

166. See *Cassidy v. Chertoff*, 471 F.3d 67, 70–72 (2d Cir. 2006).

roadblocks policies were promulgated by the local police department), *Von Raab* and the Chicago tenement-sweep program (in which the policies were developed by federal officials), and *MacWade*, the New York subway case (involving a policy devised by city bureaucrats). Although in some or all of these cases a duly constituted elected body might have developed the same policy, the point is that the groups targeted never had an opportunity to present their points of view directly or through representatives.

In other dragnet situations, enabling legislation from the appropriate body existed, but it granted field officers too much discretion; in addition to the inspections in *Burger*, the dragnets in *Colonnade*, *Biswell*, and *Skinner* (all involving inspections authorized by federal statute) provide examples of this situation. For instance, the drug-testing policy in *Skinner* was promulgated under authority of a provision in the Federal Railroad Safety Act of 1970, which simply states that the Secretary of Transportation is to “prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.”¹⁶⁷ Many of the data-mining programs authorized by federal law suffer from the same problem and also fail to make clear the type of behavior that may be targeted.¹⁶⁸

In virtually all of these cases, the defect probably could have been remedied by legislation or regulations that more clearly delineated the scope and goals of the inspection in ways that would reduce executive discretion. In some dragnet situations (such as datamining endeavors), one way of doing so is by subjecting everyone (including members of the legislative and executive branches) to the search or seizure, an approach that would also force policy-makers to think through the effects of the power they are granting law enforcement. As Justice Jackson noted, “There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”¹⁶⁹ A similar solution is to require randomized police action.¹⁷⁰ Where sufficiently discretion-constraining rules from the legislature or the executive branch do not exist, however, judicial deference is unwarranted.

The final process defect arises when legislation targets a discrete group that does not have ready access to the political process or whose voice will not be heard in the process for some other institutional reason. *Martinez-Fuerte* provides a pertinent illustration. Worf contends that the checkpoint in *Martinez-Fuerte* was constitutional because everyone who passed through it was

167. 45 U.S.C. § 431(a) (2006).

168. The legislation that defunded TIA permits the Defense Department and other agencies, after “appropriate consultation with Congress,” to pursue data mining of records on American as well as on foreign citizens for the purpose of gathering information relevant to “law enforcement activities.” 10 U.S.C. § 2241(d) (2006). For other examples, see Primus, *supra* note 132, manuscript at 28–30.

169. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

170. Cf. Tracey Meares & Bernard Harcourt, *Randomization and the Fourth Amendment* (forthcoming 2010) (arguing for randomization as a way of reducing police power).

stopped and because the checkpoint locations were chosen by politically accountable officials, who had no reason to harass individual drivers, rather than by field officers.¹⁷¹ But there are at least two problems with this conclusion, suggested by Worf's own analysis of other cases. First, the executive decisions challenged in *Martinez-Fuerte* were not just the initial stops authorized by supervisors but also the referrals to the secondary checkpoint, which were based entirely on the decisions of field officers, and concededly were not bottomed on probable cause or even reasonable suspicion.¹⁷² Second, the checkpoint's heavy and explicit focus on people of Mexican American ancestry might amount to the type of disparate impact that courts should investigate closely.

Three other situations demonstrate the third, group-exclusion defect, although all admittedly push its outer edge. First, as already mentioned, some dragnets, such as roadblocks, affect people who are not in the legislative body's jurisdiction. Characterizing such individuals as "insular minorities" is a stretch, but if the democratic value is to be taken seriously, courts should recognize this problem in analyzing dragnets.

A closely related and more important situation is when the affected group is so large and diffuse it cannot easily organize itself. Public-choice theory suggests that small groups will outperform large ones in the political process because they can better focus their lobbying efforts.¹⁷³ Some of the groups targeted by dragnets (businesses, customs officers, and politicians) should have no difficulty orchestrating efforts against dragnets that are unpopular. But other targeted groups that are large and whose members are unrelated in any way other than the dragnet (for instance, those subject to roadblocks and camera surveillance) may experience significant collective-action obstacles. In contrast, their opposition—law enforcement—is the ideal collective-action group: small and cohesive, with easy access to legislators.¹⁷⁴

Finally, some dragnets affect people who cannot vote or are otherwise effectively excluded from the political process. Prisoners, subject to a number of dragnet programs, are the most obvious example. One implication of that fact might be that DNA collection programs are permissible under political-process theory only if they are expanded beyond prisoners to include other more politically powerful groups. Another insular group is the public-high-school population targeted by drug-testing programs. Although the programs in *Vernonia* and *Earls* were approved by elected school boards and parental input was sought, students were neither eligible to vote for the board nor given a

171. Worf, *supra* note 9, at 148–49.

172. *Martinez-Fuerte*, 428 U.S. at 546.

173. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 132 (1971) (“[I]ndividuals in a large group have no incentive to organize a lobby to obtain a collective benefit.”).

174. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001) (describing why prosecutors and police are a “very powerful lobby”).

voice at the board meetings.¹⁷⁵ Close judicial scrutiny might be advisable in this situation as well, unless courts are willing to assume that parents speak for their children.¹⁷⁶ Other groups, while having formal access to the political process, may in reality also be powerless to make their views known through that process.¹⁷⁷

Thus, in many of the Court's cases involving dragnets, a process defect that should have triggered stricter scrutiny was manifestly present, and in most of the rest of those cases such a defect was at least arguably present. Ironically, in the one Supreme Court case in which there was clearly no such defect, the Court found the dragnet unconstitutional. In *Chandler*, the drug-testing program nullified by the Court was passed by the Georgia legislature and eliminated executive discretion by requiring testing of all political candidates, hardly a politically powerless group.¹⁷⁸ Although the Court's finding that there was "no concrete" proof of drug use by politicians can be equated with a finding that the legislation did not even have a rational basis, that reasoning would do violence to the notion of rationality review. As Chief Justice Rehnquist argued in his dissent, "[S]urely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism."¹⁷⁹ Perhaps the Court was simply worried that its dragnet jurisprudence was cutting too close to home.

V

A HYBRID PROPOSAL

Political-process theory has much to recommend it in the Fourth Amendment setting. While leaving courts in control of search and seizure law in individual cases, it reinforces democratic values (and avoids charges of *Lochnerism*) when the search or seizure is of a group, by presuming that legislation authorizing such actions is "reasonable." But if the legislation fails to give voice to the targeted group or grants the executive branch too much discretion, courts are authorized to act on their own, in light of their best understanding of the Fourth Amendment.

175. See *Bd. of Ed. v. Earls*, 536 U.S. 822 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

176. Compare *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."), with *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

177. For further thoughts on the capaciousness of this political-process flaw, see Andrew Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI. KENT L. REV. 277 (2010) (suggesting that legislation cannot always be trusted to represent the interests of the communities most affected by the legislation).

178. Worf suggests that candidates are a discrete and insular group. Worf, *supra* note 9, at 176–77. Although it is true that candidates from different parties might not easily cohere, the target group in *Chandler* was politicians as a group, which surely has sufficient clout in a democracy.

179. *Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, J., dissenting).

A. The Limits of Political-Process Theory

Political-process theory cannot be the entire answer to the dragnet problem, however. It fails to address at least two concerns. First, to the extent the theory requires judicial deference to dragnet legislation, it may improperly deprive courts of their power to strictly scrutinize infringement of “those fundamental rights and liberties that are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”¹⁸⁰ In other words, general searches and seizures that impinge on sacrosanct liberties may be unconstitutional even if authorized by legislation that avoids all political process flaws.

When a fundamental-liberty issue arises in due-process cases, courts can often point to specific rights recognized in colonial times or in medieval England.¹⁸¹ Analogously in the Fourth Amendment context, we know that some types of general searches and seizures—specifically, those involving the thorough search of the home required to find uncustomed goods and seditious papers¹⁸² and those that resulted in arrests¹⁸³—were anathema at the time the Constitution was drafted, and that particularized probable cause was the Framers’ solution for that problem.¹⁸⁴ History tells us then that, even if duly authorized by legislation, nonparticularized ransacking of homes and custodial arrests are unconstitutional (a position identical to that endorsed by the Warren Court’s dictum in *Davis*). Put another way, courts are obligated to invalidate such actions. However, the language and history of the Fourth Amendment are otherwise silent about general searches and seizures. Thus, most dragnets authorized by legislation that avoids process flaws are viable candidates for judicial deference.

The second question left unanswered by political-process theory is what judicial scrutiny should look like on those many occasions when the general search or seizure is something less than an arrest or a full-blown search of private quarters and process flaws *are* present. Strict scrutiny—permitting only those dragnets that are narrowly tailored to meet a compelling state interest—is one candidate. Arguably, however, strict scrutiny is not required, given that these searches and seizures are, by historical definition, outside the fundamental liberty core. Nor is strict scrutiny advisable—at least the narrow-tailoring aspect of it—given the aforementioned difficulty courts would have

180. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (describing substantive-due-process analysis)).

181. *See id.* (finding a long tradition, spanning 700 years, of prohibiting suicide and assisting it).

182. *See* sources cited *supra* note 1–3.

183. For an account of the Framers’ views on arrests, both with and without a warrant, see Thomas Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of Due Process of Law*, 77 *MISS. L.J.* 1, 171 (2007) (concluding that the Framers assumed that “due process of law” included the well-accepted probable-cause limitation on arrests).

184. *See generally* David Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 *HASTINGS CONST. L.Q.* 47 (2005) (arguing that the Fourth Amendment was meant to govern only searches of homes and arrests).

making decisions about competing law enforcement needs and resources. Indeed, even legislatures can be flummoxed by these decisions, which is why legislation often delegates to law enforcement agencies the complex determinations about when and where to implement general searches and seizures.¹⁸⁵ Some intermediate approach, between deference and strict scrutiny, is needed.¹⁸⁶

B. The Proportionality and Exigency Principles

Elsewhere I have proposed a Fourth Amendment framework that might serve this purpose.¹⁸⁷ The framework is meant to apply to all cases (not just dragnet programs) outside of those in which political-process theory mandates judicial deference. It requires adherence to two principles. The proportionality principle, recognized in *Camara*, is that “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”¹⁸⁸ The exigency principle, acknowledged (although admittedly not consistently endorsed) in a number of Supreme Court cases,¹⁸⁹ is that some sort of *ex ante* authorization is required before nonexigent searches and seizures occur.¹⁹⁰

Although the proportionality principle endorses balancing, it does so according to a specific metric: the justification required for a search program—defined in terms of the likelihood that the search or seizure will obtain evidence of wrongdoing—should be roughly proportionate to its intrusiveness. Thus, in order to determine the necessary justification, some assessment of a dragnet’s intrusiveness is necessary. Courts have tended to go with seat-of-the-pants determinations of this issue. But a better way of determining intrusiveness is by

185. See *supra* notes 167–68 and accompanying text.

186. Interestingly, administrative-law precedent, which could apply to regulations promulgated by law enforcement agencies under such statutes, reaches the same result. So-called *Chevron* deference to agency regulations only applies to rules that are based on “detailed and reasoned” considerations.” See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Lisa Schultz Bressman, *How Mead has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1492 (2005) (arguing that *Chevron* deference should be restricted “to procedures or interpretations that reflect transparency, rationality and consistency” and noting that the notice and comment procedure meets this requirement). Thus administrative-law precedent appears to call for some intermediate level of scrutiny as well. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L. J. 952, 972 (2007) (stating that as a practical matter current law “requires that agencies specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives”).

187. See SLOBOGIN, *supra* note 10, at 43.

188. *Id.* at 21.

189. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 107–08 (1998) (“It remains textbook law that [s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.”).

190. See SLOBOGIN, *supra* note 10, at 44–45.

assessing legislative or lay views on the matter.¹⁹¹ This approach is consistent not only with the Court's test focusing on "expectations of privacy *society* is prepared to recognize as reasonable,"¹⁹² but also with the democracy-enhancing thrust of political-process theory. Preliminary empirical efforts gauging societal views on intrusiveness indicate that the Court's assessments of those views are sometimes quite accurate.¹⁹³ But these studies also suggest that other conclusions of the Court, such as its holdings that public surveillance and data mining of personal information do not infringe societal expectations of privacy, are far off the mark.¹⁹⁴

Under proportionality reasoning, the intrusiveness of a government action dictates the justification necessary to carry it out. We know, given the history of the Fourth Amendment, that full-blown searches of houses and arrests require individualized probable cause. But in cases involving less intrusive searches and seizures, the proportionality principle would countenance a lesser showing. For instance, in individual cases involving frisks and stops, (which are perceived to be less intrusive than full searches and arrests) the proportionality principle might only require reasonable suspicion, a result that is consistent with the Court's decision in *Terry v. Ohio*.¹⁹⁵ And in dragnet stop and frisk situations, it would require what I call "generalized (reasonable) suspicion."¹⁹⁶

Generalized suspicion can be thought of in terms of "hit rates." Under proportionality reasoning, the more intrusive a dragnet program is, the higher its hit rate must be. Assume, for instance, that state officials, acting on their own rather than pursuant to legislation, want to search the bags of all individuals in a particular location. If such searches are considered to be somewhere between a frisk and a house search in terms of intrusiveness, officials should have to demonstrate that their procedure will obtain a hit rate approaching generalized probable cause.¹⁹⁷ Assuming probable cause is quantified at roughly a more-likely-than-not level, that threshold might amount to a showing that between one-quarter and one-half of the bags sought to be searched will contain the targeted evidence if the dragnet did not occur. If instead the government wants to set up a camera-surveillance operation in a given downtown area, a much lower hit-rate showing would be sufficient, given the lesser intrusiveness of

191. See Christopher Slobogin & Joseph 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, 742–51 (1993); SLOBOGIN, *supra* note 10, at 113–16.

192. The language comes from Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

193. See Slobogin & Schumacher, *supra* note 191, at 739.

194. *Id.* at 740; SLOBOGIN, *supra* note 10, at 111–13, 183–85.

195. See 392 U.S. 1 (1968).

196. See SLOBOGIN, *supra* note 10, at 40 (distinguishing generalized from individualized suspicion on the ground that the former is more explicitly based on profiles or statistical information).

197. A similar proposal is made by Meares & Harcourt, *supra* note 170.

camera surveillance.¹⁹⁸ It was this type of analysis that the Tenth Circuit adopted but the Supreme Court summarily rejected in *Earls*.

Assessment of hit rates might have to be speculative if a particular type of dragnet has never been attempted. But presumably a dragnet chosen in good faith by executive officials is motivated by the perception that a significant problem exists. For instance, testimony in *Skinner* revealed that a large percentage of the train accidents and safety incidents over an eight-year period were caused by drug- or alcohol-impaired employees.¹⁹⁹ In *Vernonia* (in contrast to *Earls*), evidence of student drug use and disciplinary problems associated with it was robust.²⁰⁰ In the absence of such facts, courts applying strict scrutiny should be leery of finding a dragnet is justified. In practice, adoption of proportionality analysis would probably mean that most dragnets would be disapproved (unless authorized by legislation that meets the demands of political process theory).

In contrast to the Court's balancing approach, which purports to consider numerous factors, and strict-scrutiny analysis, which looks at both the importance of the government's interest *and* the effectiveness of alternative investigatory methods, proportionality reasoning is single-mindedly focused on intrusiveness and hit rates. This difference is justifiable on both jurisprudential and pragmatic grounds. As a normative matter, the inquiry into average citizens' perceptions about intrusiveness aligns with the Supreme Court's insistence that the core value protected by the Amendment is privacy. As a practical matter, the intrusiveness notion is very familiar to the courts²⁰¹ and avoids direct reliance on problematic factors such as whether the search or seizure is "civil" or "criminal" in motivation or whether the targets of the dragnet are "on notice."²⁰² Similar jurisprudential and pragmatic advantages are associated with the justification inquiry under proportionality analysis. Hit rates are simply an explicit quantification, in the group setting, of the likelihood analysis that the probable-cause and reasonable-suspicion standards demand in evaluating individual searches and seizures—in short, they define when a state interest is compelling in the group search context.²⁰³ And because certainty levels are the Fourth Amendment's bread and butter, judges are familiar with the concept, and thus can relatively reliably ascertain when the government's

198. For a full discussion of this concept, see SLOBOGIN, *supra* note 10, at 39–44.

199. 489 U.S. 602, 606 (1989).

200. 515 U.S. 646, 662–63 (1995).

201. A survey of Supreme Court cases indicates that the word "intrusive" or "invasive" appears in over 200 majority opinions analyzing the individual interests at stake in Fourth Amendment cases. Intrusion Cases (data on file with author and *Law and Contemporary Problems*).

202. However, these types of considerations might assume importance to the extent they affect perceptions of intrusiveness. For instance, a search that is experienced as facilitative (such as a health and safety inspection) might be seen as less intrusive than a search that is seen as adversarial. See Slobogin & Schumacher, *supra* note 191, at 768–69.

203. See SLOBOGIN, *supra* note 10, at 40 (arguing that "the distinction between individualized and generalized suspicion is, in all relevant respects, meaningless" because both deal with probabilities).

interest is “compelling.” In contrast, determining whether a dragnet is “necessary” to accomplish the government’s aim of solving or deterring crime effectively or whether its costs outweigh its benefits is more competently carried out by legislatures and law enforcement agencies.

The implications of the exigency principle for dragnets can be more simply explained. Outside of emergencies, some type of *ex ante* review should be sought. The requirement that executing officers seek a second opinion curbs the temptation to act in a biased or unreasonable fashion and helps to assure that the justification required by the proportionality principle exists *ex ante*. However, this *ex ante* review need not always take the form of a warrant based on individualized probable cause found by a magistrate. As *Martinez-Fuerte* suggested, upper-level determinations by politically accountable officials may suffice,²⁰⁴ and as the Court indicated in *Davis*, even when a judge conducts the review, something other than individualized probable cause can authorize less intrusive sorts of dragnets.²⁰⁵

Further, *ex ante* review need not be sought when real exigency exists. Nor would the dictates of the proportionality principle necessarily apply in this situation. As the Supreme Court suggested in *Terry v. Ohio* in upholding frisks for weapons on less than probable cause, when a search or seizure is necessary to prevent imminent and significant harm, both *ex ante* review and justification requirements can be relaxed.²⁰⁶ In short, there should be what I call a “danger exception” to these requirements.²⁰⁷

The danger exception should not, however, permit a relaxed showing merely because a given dragnet might result in improved general deterrence, the type of justification Chief Justice Rehnquist advanced for the random stops in *Prouse*²⁰⁸ and that Justice Thomas endorsed in *Earls*.²⁰⁹ That is the type of complicated analysis that should be reserved for legislatures; courts have no business making policy decisions about whether general deterrence will be enhanced by a particular dragnet, and should not approve (or disapprove) government actions on such general grounds. Rather, the exception kicks in only when a specific harm is targeted by a dragnet, such as when a roadblock is set up to nab a terrorist or kidnapper on the loose. Various members of the Court have identified these latter situations as the type of dragnet in which neither a warrant nor probable cause is required, but they have either provided

204. 428 U.S. at 562.

205. 398 U.S. at 727; *see also* *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (“[U]nder circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.”).

206. 392 U.S. 1, 26–27 (1967) (allowing stops based on reasonable suspicion rather than probable cause in part because “a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime”).

207. *See* SLOBOGIN, *supra* note 10, at 26–28.

208. 440 U.S. at 660–61.

209. 536 U.S. at 841 (Breyer, J., concurring).

no justification for this intuition or proffered the illogical one that these situations do not involve targeting “ordinary criminal wrongdoing.”²¹⁰ The better rationale is that specific emergencies cannot be anticipated by legislatures, so that the executive branch should be able to act on its own when it perceives such an emergency, with courts playing the role of *ex post* reviewer to ensure that the emergency was real.

C. Exclusion as a Remedy for Dragnet Seizures

A last observation has to do with the remedy for illegal dragnets. Exclusion of evidence, the typical remedy for a Fourth Amendment violation, will often be inapposite in group search situations, either because the dragnet is not designed to obtain evidence of crime or because, even if it is, most people affected by it are innocent of wrongdoing and thus will have no use for exclusion. Injunctions and damages will be the preferred recourse, as evidenced by most of the cases discussed in this article.²¹¹

The exclusionary remedy can play a very important role, however, in regulating dragnets used as pretexts. Although the Supreme Court has indicated that pretext arguments will not be countenanced when individualized probable cause is present²¹²—as is often the case when stops are avowedly made because of a traffic violation, for instance—it has also held that such arguments are still justiciable when the police action is based on something *less* than probable cause—as is almost always the case with dragnets.²¹³ Furthermore, the Court has recently emphasized that exclusion is most clearly warranted when it will deter bad-faith police actions.²¹⁴ Taking the Court at its word, exclusion could be the remedy of choice when a litigant proves that evidence seized during the typical suspicionless dragnet—inspections, roadblocks, drug testing, or data mining—is not related to the supposed justification for it. This implementation of the exclusionary remedy would deter pretextual actions and also make the

210. For instance, in *Edmond*, the majority stated that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route,” *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000), but one sentence later repeated “we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.” *Id.*; see also *Illinois v. Caballes*, 543 U.S. 405, 417, 424–25 (2005) (Ginsburg, J., dissenting); *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

211. Other accountability mechanisms—such as ensuring that efficacy reviews take place and that the public be kept apprised of the dragnets—should also be instituted, and some of these protections are arguably constitutionally required. See SLOBOGIN, *supra* note 10, at 132–36.

212. *Whren v. United States*, 517 U.S. 806, 813 (1996).

213. *Id.* at 811–12 (indicating that “ulterior motives” can invalidate police action “conducted in the absence of probable cause” and citing *Burger*, *Dewey*, and car-inventory cases as examples of situations in which pretext arguments might be availing).

214. *Herring v. United States*, 129 S. Ct. 695, 702 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”).

government think more carefully about the costs and benefits of a proposed dragnet.²¹⁵

VI

CONCLUSION

Government efforts to carry out dragnets are likely to proliferate in response to a number of modern-day pressures, ranging from increased criminal and national security threats to advances in surveillance and profiling. To date, the Supreme Court has given the government considerable leeway in carrying out these general searches and seizures. Most counter-proposals, in contrast, would severely restrict their use.

This article proposes an intermediate approach. Unless arrests or full-blown house searches (both of which require individualized probable cause) are involved, courts should defer to legislatively approved dragnets that meet the dictates of political-process theory and are not clearly irrational. If the dragnet is not legislatively authorized, it should be invalidated except when it is aimed at preventing a specific, imminent, and significant threat. If the dragnet is established through legislation but the legislation grants significant discretion to the executive branch or focuses on or substantially affects an unrepresented discrete and insular minority, courts should scrutinize the dragnet's adherence to proportionality and exigency principles. Proportionality analysis would require generalized suspicion proportionate to the intrusion visited on individuals subject to the dragnet, and the exigency principle would require *ex ante* review of the dragnet, except in emergency situations. This framework may well provide the best method of reconciling democratic values with the right to be secure from government overreaching, against which the Fourth Amendment protects.

215. See *Bascuas*, *supra* note 142, at 787–90 (making a similar argument).