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# THE IMPLICATIONS OF DISENTANGLEMENT

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*Response to: Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254 (2011).*

Scholars have long used the term "administrative search cases" to refer to judicial decisions dealing with searches carried out by officials other than the police and designed to implement prohibitions that are as much regulatory as criminal. These searches include health and safety inspections, roadblocks, drug testing, and searches of school children and public employees for evidence of rule violations. In her article Disentangling Administrative Searches,[1] Professor Eve Brensike Primus makes three distinct claims about the Supreme Court's decisions on this subject.

Her first and most important argument is that, contrary to the usual view, these cases are not all linked jurisprudentially but rather encompass two distinct lines of decisions. The first line of cases is focused on "dragnets" that involve area or group searches aimed at addressing a specific problem (health and safety inspections, roadblocks, group drug testing). The second deals with searches of people belonging to "special subpopulations" associated with a lesser expectation of privacy (students, employees, probationers).[2]

On Brensike Primus's account, dragnets have traditionally been permissible only upon statutory or judicial authorization that limits executive discretion, combined with a demonstration that the traditional individualized suspicion requirement would be difficult to implement.[3] In contrast, special subpopulation searches have traditionally required individualized suspicion, albeit at something below the probable cause level given the targets' lesser privacy expectations and the government

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1. Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254 (2011).

2. Id. at 260.

3. Id. at 270.

interests involved.[4] Brensike Primus claims that in the Court's more recent cases the most government-friendly aspects of these two lines of cases have merged, so that now neither dragnets nor special subpopulation searches require either a serious limitation on executive discretion or meaningful individualized suspicion.[5] Thus, she points out, some lower courts, reading between the lines of Supreme Court decisions, have been sympathetic to dragnet roadblocks set up in inner cities with no preauthorization or constraints on executive discretion,[6] and the Court itself has held that the special subpopulation of probationers can be searched virtually at will.[7]

This entanglement claim is correct at its core and, to my knowledge, new in the legal literature. Most scholars, including me, have tended to lump all of these decisions together under a "regulatory search" or "administrative search" rubric.[8] Brensike Primus has thus provided a valuable analytical insight regarding administrative search doctrine.

Her elaboration of this insight is overstated, however. For instance, the Supreme Court, as distinct from the lower courts, is still hostile to many types of dragnets; in decisions like *Indianapolis v. Edmond*[9] and *Ferguson v. City of Charleston*[10] it has insisted on individualized suspicion in such cases. At the same time, even in its early cases the Court often did not require significant limitations on dragnets. For instance, as Brensike Primus acknowledges,[11] the Court's 1972 decision in *United States v. Biswell* upheld warrantless searches of gun stores under a statute that imposed very few limitations on executive discretion.[12] With respect to searches of individuals belonging to special subpopulations, despite the Court's modern inroads on its traditional doctrine, today the only groups that are unprotected by an individualized suspicion requirement are probationers and parolees,[13] both of which still have more privacy than they would have in prison, where they might remain if relatively intrusive governmental monitoring were not allowed. Searches of public school

4. Id. at 270–72.

5. Id. at 272–77.

6. Id. at 285 (describing holding of Texas district court that police officers who set up such a roadblock were entitled to qualified immunity).

7. See id. at 288–89 (discussing Samson v. California, 547 U.S. 843, 855–57 (2006)).

8. See Wayne R. LaFave et al., Criminal Procedure § 3.9 (5th ed. 2009) (containing section entitled "Inspections and Regulatory Searches"); Charles Whitebread & Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts 315–53 (5th ed. 2008) (containing chapter entitled "Regulatory Inspections and Searches").

9. 531 U.S. 32, 44 (2000) (requiring individualized suspicion for roadblocks set up to further "general interest in crime control" or for "ordinary" law enforcement purposes).

10. 532 U.S. 67, 73–76 (2001) (requiring individualized suspicion for program set up in conjunction with police authorizing blood tests of pregnant woman for purpose of detecting cocaine use).

11. Brensike Primus, supra note 1, at 269 n.82.

12. 406 U.S. 311, 311–13 (1972); see also Colonnade Catering Corp. v. United States, 397 U.S. 72, 73–74, 77 (1970) (permitting warrantless entry of liquor stores under statute which apparently imposed few limitations on inspectors).

13. See Samson v. California, 547 U.S. 843, 855–57 (2006).

children and government employees continue to require reasonable suspicion, unless a dragnet is involved.[14]

With these caveats, Brensike Primus is right that the overall sense of the Court's cases is that the old limitations are fading. Today, the Fourth Amendment is not much of a barrier to suspicionless searches of large groups and, as Brensike Primus points out, the rise of terrorism and the development of technology that makes these dragnets easier will only increase the pressure to use them.[15] Similarly, one gets the impression that the Court is eager to apply its special subpopulation exception to the warrant and probable cause requirements whenever the government's goal can be characterized as regulatory rather than criminal, as well as when a criminal investigation focuses on a group that is already under some type of government control.

The second claim made in the article is that this entangling of dragnets and special subpopulation searches is due to analytical sloppiness and myopia on the part of the Court rather than its well-recognized tendency to favor the government in criminal procedure matters.[16] This claim is not implausible, but it too may be overstated. The observation made above that searches of school children and employees require suspicion unless a dragnet is involved suggests why conflation of the two situations might occur even among the most conscientious thinkers: Is a school system-wide drug testing program a dragnet or a search of a special subpopulation? Moreover, it is unlikely that the Justices who endorsed this conflation were unaware of what they were doing; as Brensike Primus notes throughout her article, the dissenters in these cases often lambasted the majority precisely because it ignored precedent.[17]

Brensike Primus discounts the alternative explanation for the sorry content of current administrative search law—again, the idea that the Court is unwilling to impose significant restrictions on law enforcement—by arguing that other exceptions to the warrant and probable cause requirements were not similarly decimated during the post-Warren years.[18] Specifically, she contends, inventory searches of impounded cars must still adhere to serious restrictions, and field searches of cars,

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14. O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987) (government employees); New Jersey v. T.L.O., 469 U.S. 325, 333–37 (1985) (students).

15. Brensike Primus, supra note 1, at 259.

16. Id. at 296–97.

17. The three watershed cases in the administrative search area are probably *Samson*, 547 U.S. at 855–56 (allowing suspicionless searches of parolees), *T.L.O.*, 469 U.S. at 340–42 (adopting special needs analysis), and United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (allowing prolonged checkpoint stops based on little or no suspicion). In all three there were vigorous dissents. See *Samson*, 547 U.S. at 860 (Stevens, J., dissenting) (noting, in contrast to majority's decision, Camara v. Municipal Court, 387 U.S. 523, 534 (1967), required limits on government discretion); *T.L.O.*, 469 U.S. at 753 (Brennan, J., dissenting) (noting *Camara* involved a less intrusive search than the search of the purse involved in *T.L.O.*); *Martinez-Fuerte*, 428 U.S. at 569–70 (Brennan, J., dissenting) (noting earlier cases had required "articulable suspicion" for seizures).

18. Brensike Primus, supra note 1, at 301–08.

although not requiring a warrant, still require probable cause.[19] But, in fact, the Court's inventory cases are as vacuous as its recent dragnet cases—the Court has made clear that *any* inventory policy meets Fourth Amendment requirements.[20] And the Court has now recognized so many alternative ways of searching cars without probable cause—including inventories of cars in the field[21] and searches incident to arrest, which can be carried out when it is "reasonable to believe" the car contains evidence[22]—that even in that context the crime control perspective is well on its way to winning out.

The third claim in the article is that the Court should explicitly recognize the existence of the two lines of cases Brensike Primus has identified and return doctrine to its original position, with perhaps a few tweaks.[23] Brensike Primus admits that this part of the article is suggestive, with more work to be done in the future.[24] But she is right to call for more careful thinking in these areas. Particularly useful is her suggestion that where a search could be classified as either a dragnet or a special subpopulation search (as in the student drug testing example above), litigators and courts should identify which theory they are addressing and stick to the relevant criteria.[25]

The question remains as to what those criteria should be. I part ways with Brensike Primus in both categories. With respect to dragnets, Brensike Primus prefers a presumption against suspicionless searches, meaning that dragnets are not permitted if an "individualized suspicion regime could adequately advance the government's interests."[26] Even if that condition is met, she suggests, dragnets should not be permitted unless there is "preclearance," via statute or court order, that significantly limits executive discretion.[27] I have recently argued, in contrast, that

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19. Id. at 306–08.

20. See Florida v. Wells, 495 U.S. 1, 4 (1990) (permitting policies allowing law enforcement officers to open all containers, no containers, or containers whose contents cannot be ascertained); Colorado v. Bertine, 479 U.S. 367, 379–81 (1987) (Marshall, J., dissenting) (arguing against majority's approval of an inventory by noting "the record indicates that *no* standardized criteria limit a Boulder police officer's discretion").

21. See Florida v. Meyers, 466 U.S. 380, 382–83 (1984) (upholding in-field search of car justified as inventory search); Michigan v. Thomas, 458 U.S. 259, 261–62 (1982) (same).

22. See Arizona v. Gant, 129 S.Ct. 1710, 1721 (2009) (permitting warrantless search of a car when "it is reasonable to believe the vehicle contains evidence of the offense of arrest"). Although Brensike Primus notes that *Gant* requires probable cause to arrest, Brensike Primus, supra note 1, at 308 n.280, that limitation is illusory. See Seth Stoughton, *Arizona v. Gant*: The Illusory Restriction of Vehicle Searches Incident to Arrest, 97 Va. L. Rev. (forthcoming 2011) (manuscript at 20–37) (on file with the *Columbia Law Review*) (describing *Gant*'s preclusion of vehicle searches incident to arrests for traffic violations as an insignificant limitation on law enforcement because such arrests are uncommon).

23. Brensike Primus, supra note 1, at 290–301.

24. Id. at 312 (noting her discussion is not a "fully worked-out program for Fourth Amendment doctrine in the areas now lumped together as administrative searches").

25. See id. at 311–12 ("When both the dragnet and special subpopulation rationales might apply, the court should require the government to articulate which it is relying on and . . . apply different doctrinal tests to determine the search's validity.").

26. Id. at 310.

27. Id. at 309–10.

large-scale searches that are admittedly suspicionless are in the first instance more fruitfully analyzed under political process theory, which would permit such searches if they are authorized by legislation that limits executive discretion and if the affected group has adequate access to the political process.[28]

Under both this scheme and Brensike Primus's, courts would have to determine whether the authorizing law sufficiently limits executive discretion by, for instance, applying its dictates to the entire group or randomly selected subsets of it.[29] But the judicial inquiry under these two approaches would diverge when determining whether the authorizing law is legitimate in the first instance. Under political process theory, courts would need to ascertain whether the affected group has an "adequate" voice in the political process. A court would have to consider, for instance, the political power of drivers stopped at sobriety checkpoints, students who are tested for drugs, residents of (black) neighborhoods subjected to entry checkpoints, prisoners required to provide DNA samples, and individuals affected by border and airport stops.[30] Under Brensike Primus's approach, in contrast, courts would need to determine whether the government's interests can be achieved "adequately" if individualized suspicion is required.[31] Thus, applying her approach to the foregoing examples, a court would have to assess whether the government could accomplish its goals by looking for weaving drivers, drugged-up students, drug dealers/illegal guns in the ghetto, dangerous prisoners, and terrorists or drug couriers at the international border or at airports.

Both inquiries are difficult. In the aforementioned paper I argued that, in a multi-branch democracy, courts more appropriately engage in the first analysis rather than the second. I refer readers to that paper for elaboration of that point, and for a discussion of how dragnets should be handled in the many situations (if the Court's cases are any guide) in which the political process fails.[32]

With respect to special subpopulation searches, Brensike Primus argues for a nuanced approach to the decision about whether to dispense with the warrant and probable cause requirements.[33] Factors to be

28. Christopher Slobogin, Government Dragnets, Law & Contemp. Probs., Summer 2010, at 107, 126 [hereinafter Slobogin, Government Dragnets].

29. See id. at 143 ("If the dragnet is established through legislation but the legislation grants significant discretion to the executive branch or focuses on . . . an unrepresented discrete and insular minority, courts should scrutinize the dragnet's adherence to proportionality and exigency principles.").

30. See id. at 132–36 (suggesting political process deference should not apply when legislation "prejudices a discrete and insular minority").

31. See Brensike Primus, supra note 1, at 310 ("If an individualized suspicion regime could adequately advance the government's interests, then a dragnet should be deemed constitutionally unreasonable.").

32. See Slobogin, Government Dragnets, supra note 28, at 126–36 (comparing political process analysis to other approaches to administrative searches).

33. See Brensike Primus, supra note 1, at 310–11 ("On the special subpopulation side, one important step would be to avoid the one-size-permits-everything reasoning that now accompanies the special needs test.").

considered are the ability of the relevant government officials to obtain warrants and master probable cause, and the nature of the "relationship" between the government actor and the person searched.[34] But she would insist on some quantum of individualized suspicion in these cases.[35]

Where dragnets are not involved my preference is different. As I have written elsewhere, the decision as to whether a warrant is necessary should depend on whether there is time to get one (the exigency principle), and the decision as to whether probable cause or some lesser suspicion is required should depend on the intrusion associated with the search (the proportionality principle).[36] Neither of these inquiries is directly dependent upon the nature of the targeted population, its relationship to government actors, or whether the government is investigating regulatory rather than criminal violations.[37] As with dragnets, the protection of security, privacy, dignity, and autonomy afforded by the Fourth Amendment to "special subpopulations" should not be reduced simply because the government can make a plausible case that obtaining preclearance is difficult or a particular quantum of suspicion is hard to muster.

Because her comments on this subject are only suggestive, Brensike Primus may ultimately agree with these prescriptions. In any event, I look forward to her subsequent attempts to develop the last part of her paper. In the meantime, her disentanglement of the administrative/special needs search cases is a major step forward in analyzing this difficult and important area of Fourth Amendment law.

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34. See id. at 311 (suggesting court's decision to waive probable cause requirement should take into account "whether person conducting the search can be expected to understand the probable cause requirement, [and] whether that person has a relationship to the person being searched").

35. See id. ("When a probable cause requirement is not appropriate, however, the government should still be required to show some reduced form of individualized suspicion to justify its intrusion.").

36. I first made this argument in Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. Rev. 1 (1991) [hereinafter Slobogin, The World Without a Fourth Amendment]. It is developed further in various pieces culminating in Christopher Slobogin, Privacy at Risk: The New Government Surveillance and the Fourth Amendment (2007).

37. As Brensike Primus notes, however, I do suggest that ex ante review in the administrative context might consist of alternatives to the judicial warrant and that the intrusiveness of a search may be diminished if it is facilitative. Brensike Primus, supra note 1, at 310 n.288 (citing Slobogin, The World Without a Fourth Amendment, supra note 36, at 29–30); id. at 312 n.295 (citing Christopher Slobogin, Let's Not Bury *Terry*: A Call for Rejuvenation of the Proportionality Principle, 72 St. John's L. Rev. 1053, 1082–84 (1998)).