

The “Administrative” Search from *Dewey* to *Burger*: Dismantling the Fourth Amendment

Introduction

As the Supreme Court has expressed, “[T]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”¹ The Court has also noted that the “basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Fourth Amendment thus gives concrete expression to a right of the people which ‘is basic to a free society.’”² Generally speaking, a search of one’s person, home, or belongings without consent³ is unconstitutional if conducted without a warrant. The Warrant Clause dictates that a warrant be issued on probable cause by a neutral magistrate and that it specifically define the scope and objects of the search.

The natural rights foundation for the warrant requirement has not protected the right from erosion, however, and various exceptions to the warrant requirement have been carved out over the years. One of these allows warrantless administrative searches of “pervasively regulated businesses” conducted pursuant to a statutory scheme.⁴ The Court has

1. *Schmerber v. California*, 384 U.S. 757 (1966), cited in 3 W. LAFAYETTE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.1(a), at 600 (1987). The Fourth Amendment provides:

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

2. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)); see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (consistent “with the aims of a free and open society,” the Fourth Amendment protects privacy and freedom, and the purpose of the amendment is “squarely to control the police”).

3. Numerous theories exist regarding what constitutes a valid consent. At one end of the spectrum is a loose standard of implied consent, see *infra* note 36; at the other is the idea that a valid consent would entail a *Miranda*-type warning. In *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), the Court ruled that consent is voluntary as long as it is free from coercion, even though the person whose premises are being searched does not know she is free to refuse entry. For a discussion of implied consent, see *infra* note 36. See also Justice Douglas’ dissent in *Biswell*, quoted *infra* at note 44.

4. According to the Court, such businesses include the liquor industry, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); the sale of firearms, *United States v. Biswell*,

justified this exception on the grounds that routine searches are necessary to make the governmental regulation effective, that they are minimally intrusive, and that in the context of a regulated business the owner/operator has a reduced expectation of privacy.⁵

In *Donovan v. Dewey*,⁶ the Court held constitutional the inspection scheme pursuant to the Federal Mine Safety and Health Act of 1975 (MSHA).⁷ In so doing it identified standards and delineated specific criteria to determine the constitutionality of warrantless searches. First, a warrantless search is reasonable only when "necessary to further a regulatory scheme";⁸ that is, when a warrant requirement would frustrate the scheme. Second, in order to justify entry without a warrant, there must be a "substantial federal interest"⁹ that outweighs the individual's privacy interest. Third, for a warrantless search to be constitutional, the statutory inspection program must provide a "constitutionally adequate substitute"¹⁰ for a warrant. The *Dewey* Court characterized such a scheme as one whereby the statute (a) specifically defines the frequency of the inspections, (b) specifically sets forth the standards for compliance with the regulations, and (c) prohibits forcible entries and provides a mechanism for accommodating any specific privacy concerns the person whose premises are to be searched might have.

The Court was recently called upon in *New York v. Burger*¹¹ to decide the constitutionality of a warrantless inspection statute that authorized the New York police to conduct warrantless searches of vehicle dismantlers and junk yards in order to uncover stolen car parts.¹² Although the Court in *Burger* purported to be applying *Dewey* standards for warrantless administrative searches, it did not; it facially applied the standards by averring that New York's need to search was "substantial" and that the statutory inspection scheme provided a "constitutionally adequate substitute" for a warrant. But the *Burger* Court failed to test the New York statute against *Dewey* criteria. This sort of "adjudication by

406 U.S. 311 (1972); mining, *Donovan v. Dewey*, 452 U.S. 593 (1981); and vehicle dismantling, *New York v. Burger*, 107 S. Ct. 2636 (1987).

5. See *New York v. Burger*, 107 S. Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

6. 452 U.S. 594 (1981).

7. 30 U.S.C. § 813 (1976 & Supp. III, 1979).

8. 452 U.S. at 600.

9. *Id.* at 602.

10. *Id.* at 603. Arguably, no such thing as a "constitutionally adequate substitute" for a warrant exists; either a search meets the fourth amendment standard of a warrant issued on probable cause or it doesn't. This Note assumes, however, that warrantless administrative inspections may be constitutional and asks what standards and criteria should be applied in such cases.

11. 107 S. Ct. 2636 (1987).

12. N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

slogan"¹³ has yielded standards that significantly dilute those applied in *Dewey*, placing in serious doubt the continued existence of protections guaranteed by the Fourth Amendment in the business context.

Burger radically departed from established limits of fourth amendment jurisprudence in two respects: first, searches under both the statute and the New York City Charter¹⁴ unabashedly crossed the line between administrative and criminal searches;¹⁵ second, searches under the New York statute were offensive from a purely administrative standpoint because New York failed to show the necessity for dispensing with a warrant requirement, the government's need to search was not sufficient by

13. Professor W. LaFave used this phrase to describe the Court's ruling in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), concerning a voluntary consent search. The Court there concluded that businesspeople in two prior cases, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), had "in effect" consented to warrantless inspections of their business premises because they knew in advance detailed information regarding the government's inspection powers. Yet, the Court found, *Barlow* (who ran an electrical and plumbing business subject to Occupational Safety and Health Act (OSHA) inspections) had *not* consented to warrantless searches under OSHA simply by conducting a business that affected interstate commerce and was thus subject to governmental regulation. 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 639-41.

14. The Charter authorizes the commissioner of the Police Department to conduct inspections of "all licensed and unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers . . . in connection with . . . any police duties [and] to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession." NEW YORK CITY CHARTER § 436 (Supp. 1985). Failure to comply with any provision of the relevant section is a crime punishable by a fine and/or imprisonment. *Id.*

15. Indeed, New York's highest court struck down both the statute and the charter as unconstitutional because

they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted 'administrative schemes' here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property. Furthermore, an otherwise invalid search of private property is not rendered reasonable merely because it is authorized by a statute, for to so hold would allow legislative bodies to override the constitutional protections against unlawful searches.

People v. Burger, 67 N.Y.2d 338, 344, 493 N.E.2d, 926, 929, 502 N.Y.S.2d 702, 705 (1986).

The United States Supreme Court reversed, rationalizing its result by ruling that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. . . .

So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

107 S. Ct. at 2649, 2651 (emphasis in original). While this aspect of the Court's holding is of supreme importance to fourth amendment jurisprudence—indeed, it carries complex and far-reaching implications for criminal procedure—it is beyond the scope of this Note, which focuses on the warrantless administrative search.

On the evolution of and differences between standards applied in administrative and criminal searches, see Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984); Kress & Iannelli, *Administrative Search and Seizure: Whither The Warrant?*, 31 VILL. L. REV. 705 (1986). See generally W. LAFAVE, *supra* note 1.

Dewey standards to outweigh the individual's privacy interest, and the regulatory scheme outlined in the statute failed to provide a constitutionally adequate substitute for a warrant.¹⁶

Part I of this note outlines the background of the administrative search and examines the warrant requirement for such searches. It also analyzes standards and tests the Court applied prior to *Dewey* in the context of warrantless administrative inspections of businesses subject to "pervasive" governmental regulation. Part II examines the Court's treatment of the warrantless administrative search in *Dewey* and its development of a "constitutionally adequate substitute" for a warrant in the administrative context. Part III analyzes the Court's treatment of the warrantless administrative search of "pervasively regulated businesses" in *New York v. Burger*. Part IV offers suggestions for future analyses to meet constitutional standards.

I. Background of the Administrative Search

The individual's privacy interest lies at the core of fourth amendment protections.¹⁷ Until 1967, however, the Fourth Amendment pro-

16. It is with this aspect of the Court's holding that this Note is concerned. Assuming, *arguendo*, that warrantless administrative searches can be constitutional and that a line can and ought to be drawn between the administrative and criminal aspects of the type of search at issue in *Burger*, that is, one pursuant to a regulatory scheme whose purpose is to deter criminal behavior, the "standards" outlined in *Burger* for warrantless administrative searches go far beyond the limits of *Dewey* and *Dewey's* predecessors.

17. *Davis v. United States*, 328 U.S. 582 (1946), held constitutional on a consent theory a warrantless inspection of locked business premises, *see infra* notes 18 & 36. Justice Frankfurter's dissent offered a brief history behind the rationale of the Fourth Amendment, which grew out of the Colonists' hatred of writs of assistance and the general warrant, pursuant to which government agents had blanket authority to search one's home or business without particularized suspicion:

Indeed, so unhappy was the experience with police search for papers and articles "in home or office," . . . that it was once maintained that no search and seizure is valid. To Lord Coke has been attributed the proposition that warrants could not be secured even for stolen property. . . . Under early English doctrine even search warrants by appropriate authority could issue only for stolen goods. Certainly warrants lacking strict particularity as to location to be searched or articles to be seized were deemed obnoxious. . . . An attempt to exceed these narrow limits called forth the enduring judgment of Lord Camden . . . in favor of freedom against police intrusions. And when appeal to the colonial courts on behalf of these requisite safeguards for the liberty of the people failed, . . . a higher tribunal resolved the issue. The familiar comment of John Adams on Otis' argument in *Paxton's Case* can never become stale: "American independence was then and there born; the seeds of patriots and heroes were then and there sown, to defend the rigorous youth, the *non sine Diis animosus infans*. Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." . . .

Madison and his collaborators . . . wrote that experience into the Fourth Amendment, not merely its words. Mention has been made of the doubt in the

tected the individual's privacy interest only against searches for evidence of crime. Few challenges to civil inspections arose, and when they did, the Court concluded that no fourth amendment violation had occurred.¹⁸

minds of English and Colonial libertarians whether searches and seizures could be sanctioned even by search warrants. It is significant that Madison deemed it necessary to put into the Fourth Amendment a qualifying permission for search and seizure by the judicial process of the search warrant—a search warrant exacting in its foundation and limited in scope. This qualification gives the key to what the framers had in mind by prohibiting “unreasonable” searches and seizures. The principle was that all seizures without judicial authority were deemed “unreasonable.” If the purpose of its framers is to be respected, the meaning of the Fourth Amendment must be distilled from contemporaneous history. The intention of the Amendment was accurately elucidated in an early Massachusetts case. The court there had before it the terms of the Massachusetts Constitution, on which . . . the Fourth Amendment was [partly] based:

“With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are ‘unreasonable,’ and the foundation of which is ‘not previously supported by oath or affirmation.’ . . .”

Beginning with the first Congress down to 1917, Congress authorized search by warrant not as a generally available resource in aid of criminal prosecution but in the most restricted way, observing with a jealous eye the recurrence of evils with which our early statesmen were intimately familiar. For each concrete situation Congress deemed it necessary to pass a separate act. . . . Not until 1917, and then only after repeated demands by the Attorney General, did Congress pass the present statute authorizing the issue of search warrants for generalized situations. . . . Even then the situations were restricted and the scope of the authority was strictly defined.

Id. at 603-06 (1946) (Frankfurter, J., dissenting) (citations omitted).

18. In *Davis* the Court upheld a warrantless entry of a gas station owner's locked office to inspect gas ration coupons that the owner was required by law to make available for inspection. Interestingly, the Court ruled that the authority for the search was not a statute, but the owner's consent, even though it was “given” only after the arresting agents attempted entry through a window. The majority concluded, “We . . . affirm the judgment below without reaching the question whether but for that consent the search and seizure incidental to the arrest were reasonable.” *Id.* at 594. As LaFave notes, “This rather curious result left unresolved the basic question of when a warrantless inspection of a business was constitutionally permissible . . .” 3 W. LAFAVE, *supra* note 1, § 10.2(a), at 631.

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Court upheld the entry into Frank's basement by a Baltimore health inspector who suspected a rat infestation. The majority concluded that since the search was regulatory rather than criminal, it “touch[ed] at most upon the periphery” of Frank's fourth amendment rights. *Id.* at 367. It also accepted the arguments that administrative inspections are “designed to make the least possible demand on the individual,” *id.*, and that the warrant process is not suited to regulatory searches, since a magistrate could only rubber-stamp administrative warrants.

Frank was expressly overruled by *Camara v. Municipal Court*, 387 U.S. 523, 531-34 (1967). See *v. City of Seattle*, 387 U.S. 541 (1967), provided at least partial answers to the questions left open in *Davis*. See *infra* notes 22-24 and accompanying text. In 1978 the Court observed unequivocally:

The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. “[T]he Fourth Amendment's commands grew in large measure out of the

A. *Camara* and *See*

In 1967 the Court decided two cases that acknowledged that the Fourth Amendment does protect the individual's privacy in the context of civil searches. In *Camara v. Municipal Court of San Francisco*,¹⁹ a case concerning a building code inspection of residential premises, the Court recognized that the Fourth Amendment protects the individual's privacy interest in the context of administrative inspections as well as criminal searches. It ruled that an apartment resident could not constitutionally be convicted for refusing entry to a building code inspector without a warrant.

The Court determined that since an administrative search was less intrusive than a search conducted to uncover evidence of a crime, the search could be conducted on less than probable cause, as long as it was *reasonable*. According to the *Camara* Court, administrative searches are reasonable when the government's need to enforce administrative regulations outweighs the limited intrusiveness of such a noncriminal search. The Court considered three factors: a long history of judicial and public acceptance of this type of search; a public interest in preventing or abating all dangerous conditions, coupled with the fact that no other effective way existed to enforce the regulatory scheme; and that the inspections were neither personal in nature nor aimed at discovery of evidence of crime.²⁰ But the Court held that the individual's privacy interest nonetheless required a warrant issued by a disinterested party.²¹ In *See v. City of Seattle*,²² a companion case to *Camara*, the Court concluded that the protection of this privacy interest also applied to commercial premises. In reversing the conviction of Mr. See for refusing to permit an officer of Seattle's Fire Department to enter his locked commercial warehouse without a warrant, the majority stated unequivocally:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman,

colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." . . . Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (quoting *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977)) (footnotes and other citations omitted).

19. 387 U.S. 523 (1967).

20. *Id.* at 537.

21. In response to the assertion in *Camara* that "public interest demands that all dangerous conditions be prevented or abated," 387 U.S. at 537, LaFave remarks:

[I]t is difficult to accept that [100 per cent enforcement can justify] a diluted probable cause test. One might as cogently argue that there is a need for universal compliance with the criminal law [I]nstead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state.

3 W. LAFAVE, *supra* note 1, § 10.1(b), at 604.

22. 387 U.S. 541 (1967).

too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by [a] warrant.²³

Thus, the general rule became that, absent consent, a warrant was constitutionally required to conduct administrative inspections.²⁴

B. Exceptions to the Administrative Warrant Requirement

Since *Camara* and *See*, an exception to the administrative warrant requirement has been recognized for inspections of businesses subject to close governmental regulation. In its struggle to find authority and articulate rationales for warrantless searches, the Court has been unsuccessful in developing and defining consistent criteria. Its decisions, neither comprehensive nor far-seeing, have dealt with cases on an ad hoc basis. Consequently, criteria have evolved as new questions have arisen, and no overriding theory or interpretation of the Fourth Amendment has emerged. Most of the cases prior to *Dewey* deal with the rationales and criteria enumerated here, however, even if they are not articulated as such.

The Court has found authority for warrantless searches in the doctrine of implied consent,²⁵ a long history of governmental supervision,²⁶ and regulatory statutes that provide for governmental inspection.²⁷ It has justified such searches on the basis of need, reasoning that when surprise or immediacy is essential, the warrant requirement would frustrate the objectives of the regulatory scheme.²⁸ The Court has also employed

23. *Id.* at 543.

24. *Camara*, 387 U.S. 523, 528-29 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); see Stewart's dissent in *Donovan v. Dewey*:

In [*Barlow's*] the Court made clear that *Colonnade* and *Biswell* were only limited exceptions to the general rule of *Camara* [that a warrantless inspection by municipal administrative officers without proper consent is unconstitutional "unless it has been authorized by a valid search warrant," 387 U.S. at 529], and that they did not signal a trend away from that rule. The Court stated that "unless some recognized exception to the warrant requirement applies," warrants for administrative inspections are mandatory.

452 U.S. 594, 610 (1979) (Stewart, J., dissenting) (quoting *Barlow's*, 436 U.S. at 313).

25. *Davis v. United States*, 328 U.S. 582 (1946); see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *infra* note 36.

26. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

27. *United States v. Biswell*, 406 U.S. 311, 317 (1979).

28. See *Biswell*, 406 U.S. at 316; *Dewey*, 452 U.S. at 603. The rationale for the notice given under these circumstances is that the inspecting agent's presence constitutes much less of an invasion of privacy if those whose places are to be searched know when the agent will inspect. Thus the administrative warrant differs from the search warrant, which issues *ex parte*, that is, without notice to or contest by any party adversely interested. Administrative warrants, however, may nonetheless be considered to issue *ex parte* in the sense that those whose premises will be searched have no opportunity to contest the issuing of the warrant or the search itself.

various balancing tests that weigh the government's interests against the individual's privacy interest. Governmental interests found to justify a warrantless search include a federal interest in protecting revenue²⁹ and an "urgent federal interest" in controlling firearms.³⁰

1. *The Colonnade-Biswell Doctrine*

In *Colonnade Catering Corp. v. United States*³¹ the Court found no constitutional violation in a warrantless search of a catering establishment licensed to serve alcoholic beverages. The Court identified a federal interest "in protecting the revenue against various types of fraud," noting that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand."³² In making this determination, the Court relied exclusively on the long tradition of regulation of the liquor industry.³³

In *United States v. Biswell*,³⁴ the Court deemed constitutional a warrantless search of a pawnshop pursuant to the Gun Control Act of 1968.³⁵ The Court noted that "[i]n the context of a regulatory inspection system of business premises . . . the legality of the search depends not on consent³⁶ but on the authority of a valid statute."³⁷ It found that "in-

29. *Colonnade*, 397 U.S. at 75.

30. *Biswell*, 406 U.S. at 317.

31. 397 U.S. 72 (1970).

32. *Id.* at 76.

33. *Id.* at 76, 77. The Court nonetheless disallowed the warrantless search in *Colonnade*, on grounds that while Congress had the power to fashion laws that would allow such a search, in this case it had provided another, exclusive remedy, one that "does not include forcible entries without a warrant," *id.* at 77. The statute provided a civil penalty of up to \$500 for refusal of the search. 26 U.S.C. § 7342 (1954).

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

35. The Act provides in pertinent part:

The Secretary [of the Treasury] may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises.

18 U.S.C. § 923(g).

36. In the context of pervasively regulated businesses and the exceptions to the warrant requirement, the Court has justified warrantless intrusions on the individual's privacy under two theories based on notice to that individual of the search.

The first of these, the implied consent theory, reasons that when a businessperson acquires a license and commences business in an industry subject to federal regulation, the owner is notified of the regulations necessitating periodic inspections; thus, in entering the business, the operator "in effect consents to" the searches inherent in the regulatory scheme. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)); see also 3 W. LAFAYE, *supra* note 1, § 10.2(c), at 639-40. The *Barlow's* majority remarked, "[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." 436 U.S. at 313. The *Barlow's* Court disallowed warrantless searches under OSHA, noting that warrantless searches of a closely regulated industry of the *Colonnade-Biswell* type are the exception, not the rule. The Court was not persuaded by the argument "that all businesses involved in inter-

spections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy,"³⁸ reasoning,

state commerce have long been subjected to close supervision of employee safety and health conditions," *id.* at 314, such that they are all subject to warrantless inspection.

The second theory posits that since the owner/operator of a pervasively regulated business knows beforehand that regulatory inspections will occur, he or she has a reduced expectation of privacy in those premises. See *Barlow's*, 436 U.S. at 313 ("Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist over the stock of such an enterprise." (citations omitted)).

Most of the pre-*Biswell* inspection cases were decided on the implied consent theory. 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 639 (citing Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341, 362 (1975)). As LaFave notes, it is a theory related to the "conditioned privilege" approach, which "rest[s] upon the proposition that the granting of the license is a privilege to which the state may constitutionally attach the prerequisite that the licensee submit to warrantless no-probable-cause inspections." 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 638.

Neither of these rationales justifies the warrantless search. First, the state may not grant a "privilege"—the privilege to do business, for example—conditioned on the citizen's giving up a right guaranteed by the federal Constitution. 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 639 (citing *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311 (1931)). As LaFave points out:

[A] particular inspection scheme is not entitled to be conclusively presumed valid under the Fourth Amendment merely because it is directed toward businesses licensed by or contracting with the government, any more than an inspection scheme directed at a business not in such a relationship is to be conclusively presumed invalid.

3 W. LAFAVE, *supra* note 1, § 10.2(c), at 639. Second, the implied consent theory is equally flawed in that "the courts imply a consent to search which was never in fact given." 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 640. This argument becomes particularly apparent in cases in which the regulatory statute authorizing warrantless searches also provides a penalty for refusing entry to inspecting agents. Such statutes include those at issue in *Camara*, 387 U.S. 523 (1967), *Colonnade*, 397 U.S. 72 (1970), *Biswell*, 406 U.S. 311 (1972), and *New York v. Burger*, 107 S. Ct. 2636 (1987). One who is required to undergo a search on pain of fine or penalty can hardly be said to have consented freely—either expressly or impliedly—to the search. See 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 639-41. See also Justice Douglas' dissent in *Biswell*, quoted *infra* at note 44.

The dissenters in *Barlow's* point out the logical inconsistency of the majority's treatment of the consent argument:

In the Court's view, . . . businesses [engaged in the liquor and firearms industry] consent to the restrictions placed upon them, while it would be fiction to conclude that a businessman subject to OSHA consented to routine safety inspections. In fact, however, consent is fictional in both contexts. Here, as well as in *Biswell*, businesses are required to be aware of and comply with regulations governing their business activities. In both situations, *the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.*

436 U.S. at 338 (emphasis added); see 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 640 (discussing the relative merits of consent arguments).

37. *Biswell*, 406 U.S. at 315.

38. *Id.* at 316.

When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task.³⁹

The Court here suggests that because the dealer has impliedly consented, the scope of the search is limited. This analysis is confusing because it fails to distinguish the discrete elements of the Warrant Clause and their respective functions. The Warrant Clause mandates criteria for both entry (probable cause) and limiting the scope of the search (the particularity requirement); it further guarantees these protections by providing that a warrant will not issue unless a neutral party has determined that these requirements have been met. Assuming that the regulatory statute provides constitutional grounds for entry (for example, a *Camara*-type "flexible" probable cause⁴⁰), this alone does not guarantee that the scope of the inspection falls within constitutional bounds. That a statute presumably informs the dealer of the purpose and limits of a search fails to guarantee that those limits are sufficiently narrow. The *Biswell* analysis falls short because it fails to make this necessary distinction, although the inspection scheme under the Gun Control Act might in fact have been sufficiently limited.⁴¹

The *Biswell* Court found the inspection reasonable and asserted that even though federal regulation of the firearms industry was "not as deeply rooted in history as is governmental control of the liquor industry, . . . close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders."⁴² The Court held that "where, as here, regulatory inspections further urgent federal interest[s], and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."⁴³

The first prong of the *Biswell* test addresses the government's need to dispense with a warrant when the federal need is urgent, but the regulatory scheme cannot meet the *Colonnade* long-history-of-supervision test.⁴⁴ The second prong addresses not only individual privacy interests,

39. *Id.* at 316. Regarding the implied consent rationale implicit in the Court's reasoning, see *supra* note 36.

40. See *infra* note 45.

41. See *infra* pp. 290-91.

42. *Id.* at 315.

43. *Id.* at 317 (emphasis added).

44. As the Court later noted in *Donovan v. Dewey*:

[I]f the length of regulation were the only criterion, absurd results would occur. Under [this] view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never

but also the particularity requirement of the Warrant Clause.⁴⁵ Of importance here is that the *Biswell* balancing test requires an *urgent* federal interest in order to overcome a threat to privacy "not of impressive dimensions."⁴⁶

The Court in *Biswell* distinguished *See v. City of Seattle*⁴⁷ by pointing out that *See* concerned building code inspections designed to correct "conditions . . . relatively difficult to conceal or to correct in a short time." Thus a warrant requirement posed "little if any threat to the effectiveness of the inspection system there at issue."⁴⁸ By contrast, the Court found that "[h]ere, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."⁴⁹ The Court did not elaborate concerning why warrantless inspections were necessary, but merely asserted that "[i]n this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."⁵⁰ Ostensibly, un-

be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

452 U.S. 594, 606 (1981).

But compare Justice Douglas' dissent in *Biswell*:

The Court legitimates this inspection scheme because of its belief that, had respondent been a dealer in liquor instead of firearms, such a search as was here undertaken would have been valid under the principles of *Colonnade*. I respectfully disagree. . . . [A]ssuming, arguendo, that the firearms industry is as appropriate a subject of pervasive governmental inspection as is the liquor industry, the Court errs. . . .

Here, the statute authorizing inspection is virtually identical to the one we considered in *Colonnade*. The conclusion necessarily follows that Congress, as in *Colonnade*, has here "selected a standard that does not include forcible entries without a warrant." . . .

In my view, a search conducted over the objection of the owner of the premises sought to be searched is "forcible," whether or not violent means are used to effect the search. . . .

[Quoting Justice Stewart in *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968)] "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

406 U.S. at 318-19 (Douglas, J., dissenting).

45. The *Biswell* Court did not address the issue of probable cause, perhaps because in relying on a *Camara*-type balancing test, the Court impliedly substituted the balancing test for probable cause as its grounds for entry. Yet a distinction worth making, and one that the Court in *Camara* did make, is that the absence of the need for traditional probable cause does not dispense with the need for a warrant and a magistrate's neutral determination.

46. 406 U.S. at 317. This two-prong test appears in a refined form in *Dewey*, 452 U.S. 594 (1981). See *infra* pp. 273-78.

47. 387 U.S. 541 (1967).

48. *Biswell*, 406 U.S. at 316.

49. *Id.*

50. *Id.* The Court here seems to confuse the *necessity* for proceeding without a warrant (when to obtain one would frustrate the regulatory scheme) with the *purpose* the warrant serves. The warrant itself is important because it provides a neutral magistrate rather than an

registered or otherwise illegal firearms could easily be disposed of if the shop owner were on notice that an inspection would be conducted. The Court here did not consider the feasibility of warrants issued *ex parte*.

The *Colonnade-Biswell* exception thus laid the foundation for an exception to the administrative warrant requirement, but it was the first—not the last—word on the subject. While *Biswell* established that the authority for a warrantless inspection was “a valid statute,” it left open the question what criteria the inspection statute had to meet to be considered constitutional under the Fourth Amendment.

C. The Constitutional Question

The question of the validity of a warrantless inspection scheme came directly before the Court when it was called upon in *Marshall v. Barlow's, Inc.*⁵¹ to decide the constitutionality of the inspection provisions of the Occupational Safety and Health Act of 1970 (OSHA).⁵² While in *Barlow's* the Court did not further develop specific criteria for constitutional warrantless administrative inspections, the Court certainly aided the development of such criteria in detailing its rationale for holding unconstitutional the OSHA scheme.

Citing *Camara* and *See*, the *Barlow's* Court reiterated that warrantless searches are presumptively unreasonable.⁵³ It also emphasized the purpose of the Fourth Amendment “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”⁵⁴

The Court rejected the Secretary of Labor's argument that OSHA inspections fell under the *Colonnade-Biswell* exception to the warrant requirement “for ‘pervasively regulated business[es]’ and for ‘closely regulated’ industries ‘long subject to close supervision and inspection.’”⁵⁵ finding that regulation under OSHA was not pervasive enough to justify a warrantless inspection.

The Court also disagreed with the Secretary of Labor's argument that the protections afforded by an administrative warrant are “marginal.”⁵⁶ On the contrary, the Court stated:

interested party to determine whether or not a particular search adheres to constitutional mandates. That neutral determination minimizes the discretion of investigating officers, thereby curtailing abuse of the system. Even in a warrantless search scheme this neutral determination function need not be sacrificed along with the warrant requirement; it may be provided for by a statutory scheme narrowly drawn so that it outlines standardized neutral criteria for the search, providing a “constitutionally adequate substitute” for a warrant. *Donovan v. Dewey*, 452 U.S. 594 (1981); *see infra* pp. 275-78.

51. 436 U.S. 307 (1978).

52. 29 U.S.C. § 657 (1970).

53. 436 U.S. at 312; *see See v. City of Seattle*, 387 U.S. 541, 543 (1967).

54. *Id.* at 311-12 (quoting *Camara*, 387 U.S. at 528).

55. *Id.* at 313 (citing *Biswell*, 406 U.S. at 316, and *Colonnade*, 397 U.S. at 74, 77).

56. *Id.* at 322.

The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.⁵⁷

The majority reasoned that the burden on the government of obtaining a warrant would not be heavy enough to justify proceeding without a warrant; nor would such a burden significantly frustrate the regulatory scheme's objectives. First, while the regulatory scheme might contemplate surprise searches because it regulates safety details "amenable to speedy alteration or disguise,"⁵⁸ most business people would consent to the searches without a warrant.⁵⁹ Second, if entry were refused, the inspecting agent might proceed by compulsory process.⁶⁰ Third, the Court noted that the element of surprise would not be lost if, even after refusal, the inspecting agent were to seek an *ex parte* warrant and "reappear on the premises without further notice."⁶¹

II. *Donovan v. Dewey*

In *Donovan v. Dewey*,⁶² the Court held constitutional the inspection scheme pursuant to the Federal Mine Safety and Health Act of 1975 (MSHA).⁶³ In so doing the Court recognized the inadequacy of the rationale underlying the *Colonnade* test.⁶⁴ Drawing heavily on *Biswell* and *Barlow's*, the *Dewey* Court distilled and refined the tests previously applied to warrantless administrative inspection schemes. The *Dewey* test acknowledged the need for warrantless inspections in situations of great risk to public health and safety while also preserving the privacy protections guaranteed by the Fourth Amendment.

A. Threshold Concerns: Authority and Need for the Search

The Court echoed *Biswell* in reiterating that the authority for a warrantless administrative inspection derived from a valid statutory scheme. It also noted that "the 'reasonableness of a warrantless search . . . will

57. *Id.* at 323.

58. *Id.* at 316.

59. The Court noted that "the great majority of businessmen can be expected in normal course to consent to inspection without [a] warrant . . ." *Id.*

60. Indeed, when Mr. Barlow refused entry to the inspecting agent, the Secretary of Labor "proceeded in federal court to enforce his right to enter and inspect, as conferred by 29 U.S.C. § 657." *Id.* at 317 n.12.

61. *Id.* at 320.

62. 452 U.S. 594 (1981).

63. 30 U.S.C. §§ 801-962 (1976 & Supp. III 1979).

64. See *supra* note 44 and accompanying text.

depend upon the specific enforcement needs and privacy guarantees of each statute' and that some statutes 'apply only to a single industry, where regulations *might* already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement *could* apply.'"⁶⁵ Thus both *Biswell* and *Dewey* emphasize that even when an industry is closely regulated, the exception to the warrant requirement will not automatically apply, but it *may* apply.

In *Dewey* the Court did not reach the frustration of the search issue because Congress had addressed it directly in designing the inspection program: "[I]n [light] of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives."⁶⁶ Thus the Act provided that "no advance notice of an inspection shall be provided to any person."⁶⁷ The Court found "no reason not to defer to this legislative determination"⁶⁸ and thus did not discuss the protections that might be afforded by an *ex parte* warrant.⁶⁹

B. The *Dewey* Two-Part Test for Constitutionality

Once the threshold concerns were met, the Court balanced the individual's privacy interest against the government's need to conduct the search. After determining that a "substantial federal interest" justified a warrantless search, the Court then inquired whether the statutory scheme provided a "constitutionally adequate substitute" for a warrant.

1. *The Balancing Test: A Substantial Federal Interest*

After finding that a warrant requirement would frustrate the MSHA inspection scheme, the Court asked in a separate inquiry whether the government's interest in conducting the search was sufficiently great to outweigh individual privacy concerns. In addressing the privacy interest at stake in administrative searches, the *Dewey* Court reasoned, "[T]he expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and . . . this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless

65. 452 U.S. at 601-02 (citing *Barlow's*, 436 U.S. at 321) (emphasis added).

66. *Id.* at 603 (citing S. REP. NO. 95-181, 95th Cong., Sess. 27, 1977 U.S. CODE CONG. & ADMIN. NEWS 3401, 3427).

67. 30 U.S.C. § 813(a) (1976 & Supp. III 1979).

68. 452 U.S. at 603.

69. This may be in part because under the regulatory scheme, a warrant would in fact have provided *fewer* protections than MSHA, which required the investigator to file a civil suit in the event entry was refused. Furthermore, because of the specificity of the statute, a determination by a neutral magistrate would have offered no more protection than was already offered under MSHA. *See infra* pp. 277-78.

inspections."⁷⁰ Citing both *Colonnade* and *Biswell*, the Court in *Dewey* concluded that "a warrant *may* not be constitutionally required when Congress has *reasonably* determined that warrantless searches are necessary to further a regulatory scheme"⁷¹ In applying this standard to warrantless searches under MSHA,⁷² the *Dewey* Court identified a "'substantial federal interest' in improving the health and safety conditions in the Nation's underground and surface mines."⁷³

While at first glance this standard may seem diluted compared with the "urgent need" standard of *Biswell*, it is by no means clear that the Court in *Dewey* either meant to or did in fact dilute the *Biswell* balancing standard. On the contrary, the Court termed the mining industry "among the most hazardous in the country" and noted that in the preamble to the Act Congress expressly referred to the "urgent need" to improve health and safety conditions in the Nation's mines "in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines."⁷⁴ The Court called mining "an inherently dangerous industrial activity" toward which the statute was "narrowly and explicitly directed."⁷⁵

2. A Constitutionally Adequate Substitute for A Warrant

Assuming that the government's need to conduct the search outweighs the individual's privacy interest and that warrantless searches are necessary to further the regulatory scheme, the inspection program as outlined in the relevant statute must provide a "constitutionally adequate substitute for a warrant."⁷⁶ The Court in *Dewey* set forth three criteria that rendered the MSHA inspection scheme constitutional. First, the "Act itself clearly notifies the operator that inspections *will* be performed on a regular basis."⁷⁷ Second,

the Act and the regulations issued pursuant to it inform the operator of what . . . standards must be met in order to be in compliance with the statute. The discretion of Government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme.⁷⁸

70. 452 U.S. at 598-99; see *Biswell*, 406 U.S. at 316. Absent consent or exigent circumstances, however, business premises may not be entered without a warrant either to conduct a search or to effect an arrest when the search is intended to uncover contraband or evidence of crime. *Dewey*, 452 U.S. at 598 n.6.

71. 452 U.S. at 600 (emphasis added).

72. 30 U.S.C. § 813 (1976 & Supp. III 1979).

73. 452 U.S. at 602.

74. *Id.* at 602 n.7 (citing 30 U.S.C. § 801 preamble).

75. *Id.*

76. *Dewey*, 452 U.S. at 603.

77. *Id.* at 605 (emphasis added).

78. *Id.*

And third, "the statute itself embodies a means by which any special Fourth Amendment interests can be accommodated."⁷⁹

a. Regular Basis Test

Regarding the first criterion, the Court observed that "the Act requires inspection of *all* mines and specifically defines the frequency of inspection."⁸⁰ "Thus," the Court concluded, "rather than leaving the frequency . . . of inspections to the unchecked discretion of Government officers, the Act establishes a *predictable* . . . federal regulatory presence."⁸¹ The Court contrasted this inspection scheme with that under OSHA in *Barlow's*, implying that one of the reasons the inspections at issue in that case were unconstitutional was that OSHA "did not require the periodic inspection of businesses . . . and instead left the decision to inspect within the broad discretion of agency officials. Thus, [under that scheme], the owner had no indication of 'why an inspection of [his] establishment was within the program.'"⁸²

As in *Biswell*, this explanation is faulty.⁸³ A mine owner's knowledge that all mining operations are subject to inspection under MSHA at certain intervals and his understanding of the purpose of the inspections—*viz.*, to insure the health and safety of mine workers as well as of the public at large—no doubt serve a worthwhile purpose. The predictability of the regulatory inspections provides a partial substitute for the probable cause element of the Warrant Clause,⁸⁴ because it is the *knowledge* that a search cannot ordinarily be conducted without probable cause—that is, arbitrarily or on an agent's mere suspicion—that provides the *security* essential to the privacy and autonomy interests protected by the Fourth Amendment.⁸⁵ Such knowledge and understanding on the

79. *Id.* The Court here referred to *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3rd Cir. 1979) (inspectors ordered to keep confidential mine's trade secrets), *cert. denied*, 444 U.S. 1015 (1980).

80. 452 U.S. at 603-04 (emphasis in original). The Court summarized the frequency specifically mandated by the Act as follows:

Representatives of the Secretary [of Labor] must inspect all surface mines at least twice annually and all underground mines at least four times annually. . . . Similarly, all mining operations that generate explosive gases must be inspected at irregular 5-, 10-, or 15-day intervals. . . . Moreover, the Secretary must conduct followup inspections of mines where violations of the Act have previously been discovered . . . and must inspect a mine immediately if notified by a miner or a miner's representative that a violation of the Act or an imminently dangerous condition exists.

Id. at 604 (citations omitted).

81. *Id.* (emphasis added).

82. *Id.* at 604 n.9 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 n.20 (1978)).

83. See *supra* notes 39-41 and accompanying text.

84. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation" U.S. CONST. amend. IV.

85. In redefining probable cause in the context of administrative searches, the Court in *Camara* noted that standards for issuing an administrative warrant

part of the mine owner, however, do nothing to guarantee that by the statute's terms the scope of warrantless searches is sufficiently limited. The *Dewey* regular basis test helps ensure constitutionality because it provides that inspections "will be performed," thus furnishing the neutrality inherent in the warrant clause protections. So under MSHA, even though the determination to search is not made by a neutral magistrate, it is commanded by a neutral statute, which requires that *all* mines be inspected with a certain frequency. In the context of an administrative search, the neutrality of such a predictable and consistent application, free from any investigator's discretion, helps provide an adequate substitute for a magistrate's neutral determination of probable cause.

b. Standards for Compliance

Addressing the discretion of inspecting agents, the *Dewey* Court held the inspection scheme under MSHA constitutional because "the standards with which a mine operator is required to comply are all *specifically* set forth in the Act or in [the] Federal Regulations. Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act."⁸⁶ This provision provides a substitute for the particularity requirement of the Warrant Clause,⁸⁷ since it specifically defines and limits the scope of the inspections and thus the discretion of the inspecting agents—a function that would normally be overseen by the neutral magistrate issuing a warrant. This provision also assures that the operator is aware of both the purposes and the limits of the inspection,⁸⁸ a function normally fulfilled by the warrant itself.

c. Specific Mechanism for Accommodating Special Privacy Concerns

As a third and final safeguard under MSHA, the statute provided a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy in-

will vary with the municipal program being enforced[; they] may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

86. *Dewey*, 452 U.S. at 604 (citing 30 U.S.C. § 811(e) (1969)).

87. "[N]o Warrants shall issue . . . [without] particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

88. 452 U.S. at 604 (citing *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

terests that the mineowner might have.⁸⁹

The *Dewey* Court concluded that given these three protections, "it is difficult to see what additional protection a warrant requirement would provide."⁹⁰

Indeed, a warrant, if issued *ex parte*, would give the mine owner/operator no notice of the inspection, so the predictability inherent in the statutory scheme that helps provide a measure of protection would be missing. Also, under a warrant system the owner/operator would have no opportunity to protect any particular privacy concerns by refusing the search, since he would necessarily have to yield entry to an inspector with a warrant. Thus under the scheme at issue in *Dewey*, if a warrant requirement were substituted for the protections offered by the statute, it would provide the mine owner/operator with fewer protections.

III. *New York v. Burger*

In *People v. Burger*⁹¹ the New York Court of Appeals held unconstitutional the statutory inspection scheme under section 415-a5 of New York's Vehicle and Traffic Law,⁹² which allowed warrantless searches of auto dismantlers' and junk yard dealers' business premises.⁹³ Citing to both *Dewey* and *Biswell*, the New York court enumerated four criteria necessary to validate a warrantless administrative inspection of commercial premises: the premises must be part of a pervasively regulated industry; the search must further an urgent state interest; the warrantless search must be essential to the administrative scheme; and the inspection must be authorized by a valid statute "carefully limited in time, place, and scope."⁹⁴

The New York court did not analyze the inspection according to these administrative criteria, however. It recognized the Supreme Court's distinction between valid administrative searches and those used to obtain evidence of crime, asserting that "an administrative search must serve an administrative purpose; when designed instead to uncover evidence of a crime the traditional requirements of the Fourth Amendment apply."⁹⁵ The court found not only that the New York statute had no administrative purpose, but also that "[t]he asserted 'administrative schemes' here are, in reality, designed simply to give the police an expedi-

89. *Id.* at 604-05 (citing 30 U.S.C. § 818(a) (1976 & Supp. III 1979)).

90. *Id.* at 605.

91. 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986).

92. N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

93. The court also deemed unconstitutional § 436 of the New York City Charter, which allowed warrantless inspection of junkyards and other businesses that stored second-hand merchandise.

94. 67 N.Y.2d at 343, 493 N.E.2d at 929, 502 N.Y.S.2d at 705.

95. *Id.* (citing *Dewey*, 452 U.S. at 598 & n.6, and *Camara*, 387 U.S. at 530, 535).

ent means of enforcing penal sanctions for possession of stolen property."⁹⁶ The court went on to observe that "an otherwise invalid search of private property is not rendered reasonable merely because it is authorized by a statute, for to so hold would allow legislative bodies to override the constitutional protections against unlawful searches."⁹⁷

The United States Supreme Court reversed,⁹⁸ finding that the statutory scheme *did* serve a legitimate administrative purpose and that the scheme was constitutionally permissible.⁹⁹

A. Threshold Concerns

Relying on the *Colonnade-Biswell* doctrine and on *Dewey*, the Court in *Burger* found an "established exception to the warrant requirement for administrative inspections in 'closely regulated' businesses."¹⁰⁰ It reasoned that if a business is closely regulated, the owner/operator has a reduced expectation of privacy, which in turn automatically allows the government to conduct a warrantless regulatory search.¹⁰¹ This interpretation clearly contravenes both the spirit and the language of *Biswell* and *Dewey*, threatening to make the warrantless search the rule rather than the exception.¹⁰²

The Court first determined that the New York regulatory scheme "reasonably serves the State's interest in eradicating automobile theft."¹⁰³ It then found warrantless inspections necessary to further the

96. *Id.* at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705.

97. *Id.* It also noted that "[s]ignificantly, in both [*Dewey* and *Biswell*] the administrative statutes authorize warrantless inspections to be conducted by agents of the regulatory agency, not police officers." *Id.* By contrast, the court noted, § 436 of the New York City Charter allowed warrantless searches "in connection with the performance of any police duties." *Id.* (emphasis in original). See *infra* notes 137-144 and accompanying text.

98. *New York v. Burger*, 107 S. Ct. 2636 (1987).

99. The *Burger* Court also concluded that such a regulatory scheme could have both an administrative and a criminal end, and that the concurrent intent of the statute to allow searches for criminal evidence did not invalidate the warrantless administrative inspection scheme. As noted earlier, however, see *supra* note 15, the criminal leg of the Court's finding is beyond the scope of this Note, which is concerned with the constitutional adequacy of § 415-a5 under *Dewey* and its predecessors.

100. 107 S. Ct. at 2644 (emphasis added). See *supra* pp. 268-72.

101. *Id.* at 2643.

102. See *supra* note 24. In his dissent in *Burger*, Justice Brennan, joined by Justices Marshall and O'Connor, pointed out that the regulations of the vehicle dismantling business in New York essentially required only that a vehicle dismantler obtain a license and keep a police book. He observed that regulatory requirements for many businesses are much more stringent. After noting the "marked contrast" between New York's regulations for vehicle dismantlers and the mine safety regulations relevant in *Dewey*, he concluded, "[I]f New York City's administrative scheme renders the vehicle-dismantling business closely regulated, few businesses will escape such a finding. Under these circumstances, the warrant requirement is the exception not the rule, and *See* has been constructively overruled." 107 S. Ct. at 2653-54 (Brennan, J., dissenting) (footnote omitted).

103. 107 S. Ct. at 2647.

scheme "[b]ecause stolen cars and parts often pass quickly through an automobile junkyard[; thus] 'frequent' and 'unannounced' inspections are necessary in order to detect them."¹⁰⁴ It is unclear what element of surprise would be lost through the mechanism of an *ex parte* warrant. The Court, citing *Biswell*, asserted that "the protections afforded by a warrant would be negligible,"¹⁰⁵ but the Court offered no support for this assertion.

The Court also determined that the expectation of privacy was "particularly attenuated" in property employed in "closely regulated businesses."¹⁰⁶ The majority reasoned that "because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements¹⁰⁷ . . . have a lessened application in this context."¹⁰⁸

Two problems emerge regarding the expectation of privacy argument in general and its application in the context of the pervasively regulated business. First, if it is the notice provided by pervasive regulation that reduces one's legitimate expectation of privacy, then any time notice is given, a person's reasonable expectation of privacy diminishes, and her fourth amendment protections evaporate. Taken to its logical extreme, this argument asserts that any time a legislature passes a statute authorizing warrantless searches, whether constitutional or not, the public is on notice that the searches will be made, and consequently has no reasonable expectation of privacy.¹⁰⁹ This is essentially the argument advanced in both *Biswell* and *Burger*.

The flaw in this logic is manifest; as one commentator has noted, according to the theory, if the government's intention is "sufficiently well publicized, [it] colors a citizen's constitutionally cognizable privacy expectations."¹¹⁰ Certainly such a situation could not constitutionally be tolerated. As LaFave has pointed out:

Were a municipality to inform its citizens that henceforth houses would be searched for narcotics without warrants, the practice would be no more proper than before the promulgation of the government's intention. The same result presumably would apply if the government limited its practice to new residents, who were informed of the government's plans before moving into the area.¹¹¹

104. *Id.* at 2648.

105. *Id.* (citing *Biswell*, 406 U.S. at 316).

106. *Id.* at 2642.

107. *See* O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

108. *Id.* at 2643.

109. *See supra* note 36.

110. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1025-26 (1973), *quoted in* 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 640.

111. 3 W. LAFAVE, *supra* note 1, § 10.2(c), at 640. *See supra* note 36.

Second, the reduced expectation of privacy argument confuses the probable cause requirement of the Fourth Amendment with the warrant requirement. The discussion of one's expectation of privacy is relative to grounds for search, rather than to whether a warrant is necessary—an important distinction. The warrant requirement allows a neutral magistrate to verify not only that the investigating officer has probable cause¹¹² to conduct a search, but also that the particularity requirement¹¹³ has been satisfied in that the scope of the search is sufficiently circumscribed.

In the context of an administrative search, however, warrants issue on less than probable cause.¹¹⁴ The question then becomes twofold: on what grounds (if not probable cause) may the search be conducted, and (as a separate determination) is a warrant necessary? Regardless of the determination concerning probable cause, an administrative warrant is necessary unless the warrant requirement would frustrate the search *and* the government's need to search is sufficiently great that it outweighs the individual's privacy interest.¹¹⁵ The warrant's most important function is to put the decision regarding whether or not to conduct a search in the hands of a neutral magistrate rather than leaving it to the discretion of the investigating officer.

B. The Constitutionality of the Inspection Scheme

In *Burger*, the Court found that New York had "a substantial interest"¹¹⁶ in conducting warrantless searches pursuant to a New York statute regulating auto dismantlers and automobile junkyards, but an analysis of the rationale behind *Burger*'s "substantial interest" reveals significant qualitative differences between it and the *Dewey* "substantial interest" on which the *Burger* Court relies.

1. *The Balancing Test: The Government's Substantial Interest*

A significant problem arises when the reduced expectation of privacy argument is applied as it was in *Burger*. There the Court found that a warrantless search may be reasonable "where the privacy interests of the owner are weakened and the government's interests in regulating particular businesses are concomitantly heightened."¹¹⁷ This language suggests the assumption that when individual privacy interests are weakened, the government's interests are *automatically* greater, which is not the case. A balancing standard demands that the competing interests

112. "[N]o Warrants shall issue but upon probable cause . . ." U.S. CONST. amend. IV.

113. "[Warrants shall] particularly describ[e] the place to be searched and the persons or things to be seized." *Id.*

114. *See Camara*, 387 U.S. 523 (1967).

115. *See id.* at 533; *Biswell*, 406 U.S. 311 (1972); *Dewey*, 452 U.S. 593 (1981).

116. *Id.* at 2646.

117. 107 S. Ct. at 2643.

be weighed by asking whether the government's interest (whatever it is) is strong enough to overcome individual privacy interests at stake (whatever they are).

The "substantial interest" in *Burger* arose "because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry."¹¹⁸ The Court termed auto theft "a significant social problem [that places] enormous economic and personal burdens" on the citizenry; these include financial losses "in excess of \$225 million" and insurance premiums "above the national average."¹¹⁹ Furthermore, the Court noted, "stolen automobiles are often used in the commission of other crimes and there is a high incidence of [auto] accidents . . . involving stolen cars."¹²⁰

Problems with this rationale abound. First, if "substantial interest" is defined by such a broad standard as "significant social problem," it places *Burger* in direct conflict with the existing standard of a warrant issued on probable cause for addressing the very significant "social problem" of crime in general, especially violent crime. In *Mincey v. Arizona*,¹²¹ for example, the Court disallowed a warrantless search of a home in which a homicide was committed, noting that such a search was not justified by the "vital public interest in the prompt investigation of the extremely serious crime of murder."¹²² A person may have a greater expectation of privacy in her home than in her business, but if, for example, the search of *Burger's* junkyard had been pursuant to a homicide rather than auto theft, a warrant would have been required. It is difficult to understand how the government's interest in uncovering information concerning stolen cars is substantial enough to justify a warrantless search, when its interest in uncovering information about murder is not.¹²³

118. *Id.*

119. *Id.* at 2647.

120. *Id.* (citing Governor's Message approving 1979 N.Y. LAWS 1826, 1827 (McKinney 1979)).

121. 437 U.S. 385 (1978).

122. *Id.* at 393. Interestingly, Justice Rehnquist, who joined the majority in *Burger*, had filed a concurring opinion in *Dewey* because he believed the warrantless inspection scheme under MSHA unconstitutional insofar as it also permitted warrantless inspection of stone quarries. He observed:

I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining.

452 U.S. at 608 (Rehnquist, J., concurring). He nonetheless concurred in the judgment because he believed such searches constitutional under the open fields doctrine. *Id.* at 608-09.

123. One might argue that the New York regulation is designed to *deter* theft, and thus pertains to future crime, whereas the officers in *Mincey* were in pursuit of information relevant

Second, the "substantial interest" in *Burger* falls far short of that in either *Dewey* or *Biswell*. There is nothing hazardous or inherently dangerous about the situation in *Burger* that would outweigh Burger's privacy interest in his business, regulated though it might be. And even a minimal privacy interest, according to *Biswell*, may only be outweighed by an "urgent [governmental] interest."¹²⁴

The specific evidence of the state's substantial need advanced by the *Burger* Court is also unconvincing. Economic losses and above-average insurance premiums certainly do not signify problems of urgency in the sense the *Dewey* Court implied by its discussion of "hazardous" conditions. In fact, the *Burger* rationale seems to be stacking the deck with these reasons.¹²⁵

The Court also suggests that New York has an interest in curtailing auto theft because stolen cars are used in the commission of other crimes. The regulatory scheme at issue in *Burger*, however, is designed to inhibit auto theft as a lucrative business by deterring auto dismantlers and junkyard dealers from trafficking in stolen cars.¹²⁶ Such regulations would likely have little if any deterrent effect on the theft of cars stolen for the purpose of committing other crimes.¹²⁷

to a crime already committed. This logic, however, is not sound. The administrative part of the officers' search in checking for Burger's license and police book may have been of deterrent value, since not producing these items exposed him to felony and misdemeanor penalties, respectively. But the investigators' search of the car parts in the yard was no different from any other search for evidence of crime already committed.

The only apparent difference between the two searches is that the junkyard search was conducted pursuant to regulation of Burger's business, whereas the search in *Mincey* was conducted pursuant to a specific criminal investigation. No magic, however, resides in the term "regulation." The regulation in question comprises laws designed to define and prescribe business conduct. Criminal laws are designed to define and prescribe social conduct. Yet after *Burger*, searches pursuant to a "regulatory" scheme may be conducted without a warrant, whether or not they concern criminal behavior, while those conducted pursuant to a purely "criminal" scheme may not.

124. 406 U.S. at 317.

125. The economic losses evidently stem from loss through theft of automobiles, and insurance premiums have ostensibly risen for the same reason. Yet if this is the case, then the public, or at least the insured public, has been compensated for its losses, except for the amount of the increased premiums. This argument also fails to take into account other possible reasons for increased insurance premiums, such as payments for personal injury claims and repairs resulting from accidents.

126. 107 S. Ct. at 2647.

127. Imagine, for example, a person who steals a vehicle to use as a getaway car in a robbery. One is hard-pressed to conceive of the would-be thief stopping to weigh the vehicle's resale potential prior to the robbery. It is much more likely that those who steal cars to commit crimes rather than to resell them would abandon the cars. That cars are abandoned is attested to by the *Burger* Court itself: "There are junkyards and abandoned cars in the streets and along the countryside that are making America ugly, not beautiful." 107 S. Ct. at 2646 (citing statement of Charles M. Haar, Chairman of the White House Conference on Natural Beauty in its Report to the President from the Panel on Automobile Junkyards).

Finally, the Court expresses its concern regarding "a high incidence of accidents" involving stolen automobiles.¹²⁸ No doubt accidents do occur in stolen automobiles, but they also occur at an alarming rate in automobiles that are not stolen. The Court does not address the question whether some causal link exists between the theft of the automobile and any accident in which it might be involved. Moreover, it is questionable whether a reduction in the number of stolen cars in New York would curtail the number of accidents that occur on that state's autoways.

It is not clear, with the possible exception of high insurance premiums, that *any* of the problems identified by the Court as contributing to New York's interest in eradicating auto theft are caused by auto theft and would be eradicated if auto theft were stopped or severely curtailed. Even in the case of high insurance premiums, a state with the population and urban centers of New York no doubt faces higher-than-average auto insurance premiums by virtue alone of its high concentration of drivers in urban areas, the question of theft aside.

Thus whether New York has even a *substantial* interest, much less an urgent one, becomes suspect. The important question, however, remains: By what criteria should the interest be measured, since the label "substantial" clearly does not dispose of the issue? *Biswell* and *Dewey* set up a balancing test that considers governmental interests defined by major public health and safety concerns, whereas the interests in *Burger* are economic.¹²⁹

2. *The Statute as a Constitutionally Adequate Substitute for a Warrant*

Citing *Dewey*, the Court in *Burger* asserts that the inspection scheme under the New York statute provides a "constitutionally adequate substitute for a warrant."¹³⁰ As applied in *Burger*, however, the *Dewey* tests for constitutionality leave the business operator completely vulnerable. The "regular basis" of section 415-a5 fails to provide neutral grounds for entry because the decision regarding which vehicle dismantlers to inspect and how often is left to the discretion of inspecting officers. The scope of inspections is so broadly defined that the statute authorizes warrantless criminal searches as well as administrative inspections. And under the New York scheme, if an operator does have legitimate special privacy

128. 107 S. Ct. at 2647.

129. Of the cases relied on in *Burger*, *Colonnade* is the only one in which, as in *Burger*, the government's interest did not concern health and safety. *Colonnade* was also decided on an economic question, but it can be distinguished on several grounds. First, *Colonnade* did not employ a balancing of the government's interest against the individual's privacy interest; it rested solely on the *power* of Congress "[to protect] the revenue against various types of fraud." 397 U.S. at 75. Second, it relied exclusively on the long tradition of close governmental regulation in the liquor industry. *Id.* Third, it held that absent consent a warrantless search was inappropriate when a civil fine was imposed for refusal. *Id.* at 74.

130. 107 S. Ct. at 2648.

concerns, he or she has no opportunity to voice them before an intrusion takes place.

a. The Regular Basis Test

First, the Court notes, "The statute informs the operator of a vehicle dismantling business that inspections *will* be made on a regular basis."¹³¹ *Burger's* "regular basis," however, is a mere label, lacking the substantive safeguards offered by the "regular basis" test of *Dewey*. To begin with, section 415-a5 provides only that the vehicle dismantler shall permit inspection "[u]pon request of an agent . . . during his regular and usual business hours"¹³² The statute thus provides no regularity: it permits inspections but does not require them; they may be conducted at any time during the dismantler's business hours. Practically speaking, the vehicle dismantler has no "real expectation that his property *will* from time to time be inspected by government officials."¹³³

In response to the allegation that section 415-a5 is unconstitutional because it fails to limit the number of searches that may be conducted of a particular business in a given time period, the Court noted that while such limitations may be a factor, they "are not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers."¹³⁴ This point is well taken. A good example of such limits is offered by the inspection scheme under MSHA, which requires inspections of *all* mines at least a given number of times in a given period.¹³⁵ While the MSHA scheme is not perfectly predictable, it passes muster because it establishes a frame of reference by setting a minimum number of searches in a given period. Even though the scheme imposes no maximum, it nonetheless limits discretion; the minimum number of searches specified by the statute provides a guideline against which any abuse might be measured. Whatever protection the predictability argument offers, however, is belied by its application in *Burger* to section 415-a5, pursuant to which the only basis for a search is an agent's request, conferring nearly unbridled discretion on the investigating officer and leaving open the potential for abuse.

b. Standards for Compliance

Echoing the *Dewey* Court regarding standards for compliance, the *Burger* Court asserted that section 415-a5 "sets forth the scope of the inspection and, accordingly, places the operator on notice as to how to

131. *Id.* (citing *Dewey*, 452 U.S. at 605) (emphasis added).

132. N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

133. *Dewey*, 452 U.S. at 599 (emphasis added); see *Barlow's*, 436 U.S. at 323.

134. 107 S. Ct. at 2648 n.21.

135. 30 U.S.C. § 813(a) (1976 & Supp. III 1979).

comply with the statute.”¹³⁶ The Court found inspections under the New York scheme constitutional because officers may conduct inspections only during regular and usual business hours, inspections can be made only of vehicle dismantling and related industries, and the permissible scope of searches is narrowly defined: officers may inspect records plus any vehicles or parts of vehicles subject to the record-keeping requirements.¹³⁷ These findings demonstrate how loosely the *Burger* Court applied the *Dewey* criteria: rather than serving as a limiting provision, section 415-a5 permits inspections of the broadest possible scope.

Limiting inspections to normal business hours does not limit the scope of the inspection, although such a provision may render the inspection less intrusive. Likewise, the limitation of inspections to the vehicle-dismantling industry does not limit the scope of inspections within the industry. On the contrary, section 415-a5 permits an “agent or police officer to examine [records] and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.”¹³⁸ This provision does not even limit the inspection to the administrative task of comparing the vehicle parts on the premises with the operator’s records; it allows “inspection” of any vehicle parts on the premises “*subject* to the record keeping requirements.” The statute thus allows the police to conduct a full-scale nonadministrative warrantless criminal search that circumvents all the requirements of the Warrant Clause. New York’s statutory scheme amounts in effect to a general warrant.¹³⁹

The argument that obtaining a license under the statute’s requirement puts the operator on notice of the standards for compliance fails to render the inspection scheme constitutional. Obtaining a license indicates neither that the operator has impliedly consented to the search nor that because he is “on notice” he has no reasonable expectation of privacy.¹⁴⁰ Moreover, on facts such as those in *Burger* when the operator has no license, notice arguments become inapplicable. And if the operator has no records, inspecting officers cannot compare vehicle parts with records to verify whether or not the operator is in compliance with the statute.

The Court found section 415-a5 constitutional in part because “it notifies the operator as to who is authorized to conduct an inspection.”¹⁴¹ Yet informing the operator of who is authorized to search and limiting that inspector’s discretion are two different tasks. Under section 415-a5

136. 107 S. Ct. at 2648.

137. *Id.*

138. N.Y. VEH. & TRAF. LAW § 415-a5(a) (McKinney 1986).

139. *See supra* note 17.

140. *See supra* note 36.

141. 107 S. Ct. at 2648.

inspections are routinely conducted by New York City police officers.¹⁴² This fact in itself would not make the inspections unconstitutional if the statute defined narrowly enough the scope of the inspections and curtailed the discretion of the inspecting officers.

Discretion is not curtailed under section 415-a5, however, since it allows searches "upon request." Furthermore, this scheme fails to restrict the searches to administrative inspections. Indeed, the New York City Charter explicitly authorizes searches to be undertaken "in connection with the performance of *any* police duties."¹⁴³ This provision encourages abuse, since police are normally interested in crime detection, and this scheme allows searches for criminal evidence on less than even a suspicion. Officers may thus circumvent the probable cause and warrant requirements for criminal searches at any time during business hours by simply asserting they are conducting an "administrative" search.¹⁴⁴

The New York inspection statute is unnecessarily and unconstitutionally broad. It allows inspections at the discretion of police officers. It also allows inspection of vehicle parts even if the operator produces neither a license nor a record book.¹⁴⁵ Under 415-a1 the failure of a vehicle dismantler to register pursuant to the statute is a felony; the failure to register by salvage pools, mobile car crushers, and itinerant vehicle collectors is a misdemeanor. Thus warrantless searches are unnecessary to achieve the statute's administrative purpose because noncompliance with the administrative regulations carries its own penalties, and nothing prevents officers from making an arrest on those grounds and returning with a warrant to continue their search for stolen vehicles or vehicle parts. If the owner were the only operator, no risk would arise that evidence would be destroyed during their absence, since the operator would be in custody. If a partner or co-worker were present, the premises could

142. *Id.* at 2634.

143. NEW YORK CITY CHARTER § 436 (Supp. 1985).

144. The dissent notes:

This case . . . does not present the more difficult question whether a state could take any criminal conduct, make it an administrative violation, and then search without probable cause for violations of the newly created administrative rule. The increasing overlap of administrative and criminal violations creates an obvious temptation for the state to do so, and plainly toleration of this type of pretextual search would allow an end-run around the protections of the Fourth Amendment.

107 S. Ct. at 2657 n.17 (Brennan, J., dissenting). Certainly this sort of temptation was present, and there is no evidence that it was not yielded to in this case.

145. Justice Brennan observed that as soon as agents learned Burger possessed neither a license nor a police book, the search became one for criminal evidence and ceased to serve any administrative purpose: "There is no administrative provision forbidding possession of stolen automobiles or automobile parts. The inspection became a search for evidence of criminal acts when all possible administrative violations had been uncovered." 107 S. Ct. at 2656 (Brennan, J., dissenting) (footnotes omitted). He noted that if Burger had been registered, an administrative sanction—revocation of his license for illegal possession of stolen vehicles or vehicle parts—would have been available. *Id.* at 2656 n.14.

be secured while officers sought a warrant. Such a requirement would not unduly burden the government. In any case, as the dissent notes, "inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement."¹⁴⁶

c. Special Privacy Concerns

The *Dewey* Court noted that under MSHA, inspecting agents were prohibited from forcing entry. The government's ensuing proceeding for an injunction against future refusals provided the mine owner with a forum for showing that a particular inspection falls outside the regulatory authority or for seeking accommodation of any special privacy interests. This is not the case with the New York inspection scheme at issue in *Burger*; no such protective mechanism is there provided. Moreover, refusal to allow the search is punishable by up to thirty days' imprisonment or a fine of up to fifty dollars or both.¹⁴⁷ Refusal to comply with the regulations or to permit a search is a felony or misdemeanor punishable by criminal penalties, loss of license, or civil fines.¹⁴⁸

Far from protecting a citizen against unwarranted governmental intrusion, the New York statute encourages it. Section 415-a5 authorizes a New York City police officer to single out a vehicle dismantler or junk yard dealer and put him out of business, either by harassing him with constant inspections or by arresting him for refusing an inspection. It authorizes police who lack probable cause to conduct warrantless searches of vehicle dismantlers at any time during business hours.¹⁴⁹ Even if the dealer legitimately believed that an officer was exceeding the authority conferred by the statute, he could not refuse the search without risking arrest or a fine.

IV. Proposed Standards

According to both *Dewey* and *Burger*, a warrantless inspection scheme must meet three tests for constitutionality: a business is pervasively regulated and a warrant requirement would frustrate the regulatory scheme, a substantial governmental interest outweighs individual privacy interests, and the statutory scheme provides a constitutionally adequate substitute for a warrant. The wide disparity of results in two cases ostensibly applying the same tests proves the need for stricter application of the standards. Courts must give more than lip service to these

146. 107 S. Ct. at 2657 (Brennan, J., dissenting) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 283 (Powell, J. concurring)).

147. NEW YORK CITY CHARTER § 436 (Supp. 1985).

148. N.Y. VEH. & TRAF. LAW § 415-a1, 5, 6 (McKinney 1986).

149. I do not suggest that a New York City police officer would choose to abuse a business operator in these ways, but to the extent the statute permits such abuse, even if it does not contemplate it, the statute exceeds constitutional bounds.

requirements to preserve the constitutional protections of the Fourth Amendment.

A. A Warrant Requirement Would Frustrate the Regulatory Scheme

If a search is not consensual,¹⁵⁰ the first question is whether the notice normally attending an administrative warrant would frustrate the regulatory scheme. If it would, because of the need for surprise inspections, then warrants issued *ex parte* ought to be considered.

Indeed, the "need to conduct frequent searches"¹⁵¹ is too broad a determination to provide either a constitutionally adequate substitute for a warrant or a reason for dispensing with it. The term "frequent," far from a specific mandate, permits the broadest interpretation. The statute at issue in *Burger*, for example, which failed to articulate the meaning of the term, conferred nearly unbridled discretion on the inspecting officers, who could search as often, or as seldom, as they chose.¹⁵²

The need under MSHA to conduct searches every five, ten, or fifteen days of mining operations that generate explosive gases might constitute the sort of frequency that would make a strong case for dispensing with a warrant. Moreover, extreme health and safety concerns lend urgency to the need for such frequency. But the simple fact that searches are to be conducted monthly, quarterly, or biannually fails to argue persuasively for warrantless inspections. It is difficult to see how the need to obtain a warrant at these latter intervals would frustrate a regulatory scheme.

In none of the cases discussed above did the Court make a persuasive argument regarding why an *ex parte* warrant would not suffice. Even if the effectiveness of an inspection scheme demands that the notice protection be sacrificed, at the very least, an administrative warrant would provide the business operator with a neutral magistrate's determination that the search was in order, thus safeguarding the protections called for in *Camara*, *See*, and *Barlow's*. Moreover, issued *ex parte*, a warrant would pose no threat to the surprise deemed necessary for effective enforcement of the regulatory scheme.

B. The Balancing Test

If a balancing test is to be substituted for probable cause, the governmental/public interest must outweigh the privacy interest at stake. This balancing should require more than allowing a court or a legislature to say that if a business is pervasively regulated, the owner/operator has no reasonable expectation of privacy. As Justice Stewart noted in his dissent in *Dewey*: "I would have supposed that the mandates of the Fourth

150. *See supra* note 3.

151. *Burger*, 107 S. Ct. at 2648.

152. Under section 415-a5 an inspection may be conducted "[u]pon request . . . during . . . regular and usual business hours . . ." N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands."¹⁵³

In both *Dewey* and *Biswell*, the government's interest in conducting the search was measured by concern for the public health and safety.¹⁵⁴ This rationale, akin to that of exigent circumstances,¹⁵⁵ allows a warrantless search only when the immediate safety of the investigating officer or the public is at stake. While the Court in *Dewey* did not use the term "exigent circumstances" in defining its balancing test, the inherent danger of the mining industry was nonetheless at the core of its reasoning, just as the danger inherent in apprehending an armed suspect gave rise to the exigent circumstances exception to the warrant requirement in the *Terry* line of cases.¹⁵⁶

The *Terry* Court, relying on *Camara's* "lesser invasion" balancing standard, first suggested that the stop-and-frisk was justified on the notion that it constituted only a "minor inconvenience and petty indignity," which was properly imposed in the interest of effective law enforcement.¹⁵⁷ At a later point in the opinion the Court did recognize a stop-and-frisk as a significant intrusion on personal privacy but found it none-

153. 452 U.S. at 612 (Stewart, J., dissenting).

154. In *Biswell* the government characterized its interest in conducting a forcible, warrantless search for illegal firearms as necessary "to prevent violent crime." 406 U.S. at 315.

155. See *Terry v. Ohio*, 392 U.S. 1 (1968), allowing a warrantless search of a criminal suspect's outer clothing to discover the existence of weapons, which would pose a significant threat to the safety of the investigating officer and others. The search is allowed when the officer is reasonably justified in believing the suspect "armed and presently dangerous."

156. Looking at the issue from an exigent circumstances standpoint, it is questionable whether the distinction between levels of probable cause necessary for administrative versus criminal searches is a valid one. In allowing administrative warrants to issue on less than probable cause, the *Camara* Court offered the rationale that administrative searches are not searches for criminal evidence and are thus minimally intrusive. Yet apropos of a criminal search, the Court in *Terry* relies on the *Camara* definition of balancing without raising the issue whether a distinction between administrative and criminal searches should be made. Certainly, the *Burger* decision leaves no doubt that the Court no longer finds this distinction compelling. See *supra* pp. 278-88.

I find no inherent logical difficulty in doing away with the distinction between civil and criminal searches; on the contrary, the Fourth Amendment makes no such distinction. Furthermore, the sort of tests applied in both *Biswell* and *Dewey* suggest that if *any* warrantless search is to be conducted, some urgent need is required to overcome the individual's privacy interest.

The problem with proceeding along the lines of *Burger*, however, is that it allows entry for nonconsensual searches on less than probable cause, in the absence of either exigent circumstances or any other bona fide exception to the warrant requirement. This significantly erodes explicit protections of the Fourth Amendment, which requires that searches be conducted pursuant to a warrant issued on probable cause. See *infra* note 169 and accompanying text.

157. *Terry* 392 U.S. at 10 (citing *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964), *cert. denied*, 379 U.S. 978 (1965)). This argument *might* be persuasive in the case of the criminal who will later face the even greater indignities of arrest, detention, and trial, but it is not convincing in the case of an innocent individual. This would no doubt be a highly intrusive and humiliating experience for one who had in fact committed

theless justified by exigent circumstances.¹⁵⁸ It is the exigent circumstances rationale, rather than the *Camara* lesser invasion theory, that would justify a warrantless search in an administrative context, because in the absence of some urgency, inspecting agents would have no reason for not obtaining a warrant.

In the interest of maintaining the integrity of such a standard, the term "urgent" rather than "substantial" would no doubt prove more effective, particularly if it were held to denote the need to prevent death or serious physical harm.¹⁵⁹ As the *Camara* Court noted, warrantless inspections have traditionally been upheld in emergency situations.¹⁶⁰ Under no circumstances should the balancing test dispense with a warrant for the government's mere convenience or, as in *Burger*, to allow agents to circumvent a warrant's requirements of probable cause, particularity, and a magistrate's neutral determination when conducting a search for criminal evidence.

C. A Constitutionally Adequate Substitute for a Warrant

If one may contemplate a constitutionally adequate substitute for a warrant, it follows that one may also contemplate a constitutionally adequate substitute for the specific protections—and each of them—covered by a warrant, namely probable cause, particularity, and the determination by a neutral magistrate that these requirements are met. In each case, whether an element of the Warrant Clause is necessary, the tests are—or ought to be—different, and the possible results of the inquiry are several: the search requires both probable cause *and* a warrant;¹⁶¹ it may be conducted on less than probable cause but requires a warrant;¹⁶² the search requires probable cause but may be conducted without a warrant;¹⁶³ or it may be conducted on less than probable cause and without a

no wrong, especially, for example, if the search were conducted in front of acquaintances or friends.

158. 392 U.S. at 26-27.

159. See Justice Brennan's dissent in *Burger*: "The Court should require a warrant for inspections in closely regulated industries unless the inspection scheme furthers an *urgent* governmental interest. See *Dewey* [and] *Biswell* . . ." 107 S. Ct. at 2654 n.7 (Brennan, J., dissenting) (emphasis in original; citations omitted).

160. These include the seizure of unwholesome food, *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); compulsory smallpox vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); health quarantine, *Compagnie Française de Navigation à Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902); summary destruction of tubercular cattle, *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929).

161. These include any search conducted not subject to a bona fide exception.

162. This is the case with typical administrative searches, such as those outlined in both *Camara*, 387 U.S. 523 (1967), and *See*, 387 U.S. 544 (1967). See *supra* pp. 266-67.

163. These include searches of automobiles. See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (if an officer has probable cause to stop a vehicle on the highway, no warrant is necessary to search the vehicle or seize items of contraband); *United States v. Ross*, 456 U.S. 798

warrant.¹⁶⁴

In all cases, whether or not a warrant is required, limits on the scope of the search must be narrowly drawn in order to satisfy the particularity requirement. To require specific substitutes for the different elements would protect the integrity of the safeguards guaranteed by the Warrant Clause and insure that any search is reasonable by constitutional standards.

1. *The Regular Basis Test: Administrative Probable Cause*

In the context of administrative searches of pervasively regulated businesses, the Court has typically attempted to provide substitutes for the particularity requirement, even though it may not have labeled them as such¹⁶⁵ and even though the “substitutes” may or may not have been constitutionally adequate. Regarding probable cause, however, the situation has been different. In cases such as *Camara* and *See* in which a warrant is required but probable cause is not, the Court has addressed the issue of a probable cause equivalent.¹⁶⁶

In the context of warrantless searches of pervasively regulated businesses the Court has typically ignored the question of probable cause or a probable cause substitute. When warrantless searches are permitted, the need for specific attention to probable cause or its equivalent—that is, grounds for entry, as opposed to the need for a warrant—is especially great in order to prevent abuse of regulatory power and should be mandated according to specific criteria.

Criteria for selecting which businesses to search and how often to search them should be “derived from neutral sources.”¹⁶⁷ This means that when a disinterested judgment regarding grounds for entry (usually probable cause) is not supplied by a neutral magistrate, the statutory scheme should be drawn specifically and narrowly enough to guarantee that these determinations will not be made arbitrarily or at the discretion of any inspecting agent. A good example of such neutral criteria is the inspection scheme under MSHA, at issue in *Dewey*, whereby *all* mines must be inspected a minimum number of times within a given period. This fixed frequency, inherent in *Dewey*'s regular basis test, supplies the neutrality that would otherwise be provided by a magistrate.

(1982) (when not targeting a specific container, agents can search anywhere in the vehicle where the object sought reasonably might be).

164. These include routine airport searches and stop-and-frisk searches such as that at issue in *Terry v. Ohio*, 392 U.S. 1 (1968). See *supra* notes 155-158 and accompanying text.

165. See *Burger*, 107 S. Ct. at 2648; *Dewey*, 452 U.S. at 604, 605; *Barlow's*, 436 U.S. at 323.

166. *Camara*, 387 U.S. at 538; *See*, 387 U.S. at 545; *Barlow's*, 436 U.S. at 320-21.

167. *Barlow's*, 436 U.S. at 321.

2. *The Scope of the Search*

It is essential with a statutory scheme that purports to substitute for the privacy protections of a warrant that the scope of inspections under the scheme be specifically and narrowly defined. Otherwise the statute becomes in effect a general warrant. An administrative statute should authorize warrantless inspections only insofar as they serve an administrative purpose, and agents should be required to obtain a warrant at any point when the inspection ceases to serve that purpose.

That the line is finely drawn between administrative and criminal searches as it is in the case of vehicle dismantlers should not prevent inspecting agents and courts from respecting the distinction. The *Burger* Court found that a state may "address a major social problem *both* by way of an administrative scheme *and* through penal sanctions."¹⁶⁸ Used to legitimate a warrantless criminal search under the umbrella of an administrative regulatory scheme, this rationale is not compelling. The Court has traditionally had no problem drawing such fine distinctions, even when the purposes of the inspection might seem logically to overlap.¹⁶⁹

3. *Special Privacy Accommodations*

Under a scheme such as that of MSHA, the need for a warrant becomes moot, since the statute provides greater protections than a warrant would by allowing a mine operator to refuse a search when he feels special privacy concerns are at stake. Since the warrant itself meets the standard of the Fourth Amendment, a scheme offering greater protection than a warrant would more than meet the constitutional standard. Such a greater-than-or-equal-to approach is necessary when considering substitutes for constitutional standards; "substitute" protections cannot by definition be constitutionally *adequate* if they offer lesser safeguards than those the Constitution dictates. The degree of protection offered by such

168. 107 S. Ct. at 2649 (emphasis in original).

169. In *Michigan v. Tyler*, 436 U.S. 499 (1978), a case involving a fire investigation, the Court held under an exigent circumstances rationale that fire fighters may enter without a warrant to battle a fire, and they may remain after the fire is out for a reasonable time to determine the cause and origin of the fire. *Id.* at 510. Thereafter, however, unless the premises are so far damaged that no privacy interest remains, entry may be gained only by consent, exigent circumstances, or a warrant based "on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." *Michigan v. Clifford*, 464 U.S. 287, 294 (1984).

In *Mincey v. Arizona*, 437 U.S. 385 (1978), after a shootout at Mincey's home, undercover agents made a warrantless entry on grounds of exigent circumstances to search for injured persons. The warrantless entry less than *ten minutes* later by homicide detectives was held unconstitutional. The Court remarked that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Id.* at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

a statutory provision, however, would depend on whether the owner/operator actually knew of his right to refuse the search.

Conclusion

The integrity of the Constitution demands that its guarantees be more than paper provisions. If the Fourth Amendment has outlived its usefulness because it impedes law enforcement to such an extent that the situation poses a serious threat to the public well-being, then this is a matter for congressional action, with the public support of the nation at large. It is certainly no task for the New York legislature. Neither is it a question for unilateral determination by the judiciary.

Such action would belie LaFave's assertion that ours is a nation "committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive police state."¹⁷⁰ It would also patently contravene "the aims of a free and open society"¹⁷¹ the Fourth Amendment was meant to preserve. Crime *is* a social evil. But the Court, in its support of law enforcement, must not yield to the temptation to eradicate crime at the expense of personal rights and freedoms.

The Fourth Amendment certainly has not outlived its usefulness. On the contrary, as governmental regulations expand, it is ever more important that the constitutional protections accorded the citizen not be diminished. The Bill of Rights and the freedoms from governmental interference it accords the individual are the foundation on which our nation was raised.

The whole notion of a substitute for any express constitutional provision is suspect because it threatens those freedoms. If, however, such a substitute is to be "constitutionally adequate," it must offer protections greater than or equal to those offered by the Constitution; it must not erode or sacrifice as negligible protections or freedoms thereby granted. The power to conduct a search like the one at issue in *Burger*—one that allows the police to conduct warrantless inspections of a person's records and merchandise on less than probable cause for the purpose of uncovering criminal evidence—is precisely the type of blanket governmental power the Revolution was fought against. This is precisely the type of arbitrary governmental interference the Fourth Amendment was formulated to prohibit.¹⁷²

*By Lynn S. Searle**

170. 3 W. LAFAVE, *supra* note 1, § 10.1(b), at 604. *See supra* note 21.

171. Amsterdam, *supra* note 2.

172. *See supra* notes 18 & 54.

* B.A., Montana State University; M.A. University of California, Davis; Member, third year class.