Louisiana Law Review

Volume 39 | Number 2
Community Property Symposium
Winter 1979

A Modern Approach to the Fourth Amendment: The Reconciliation of Individual Rights with Governmental Interests

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NOTES

A MODERN APPROACH TO THE FOURTH AMENDMENT: THE RECONCILIATION OF INDIVIDUAL RIGHTS WITH GOVERNMENTAL INTERESTS

An employer sought injunctive relief against a warrantless inspection authorized by the Occupational Safety and Health Act (OSHA). A three-judge district court held that the fourth amendment requires a warrant for the type of search permitted by the statute and that the statutory authorization for warrantless inspections is unconstitutional. The Supreme Court affirmed and *held* that the Act is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent and that the employer was entitled to an injunction prohibiting enforcement of that portion of the Act. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

According to the language of the fourth amendment, the people are protected from "unreasonable" searches and seizures, and no warrants shall issue but upon probable cause.[1] The original meaning of this language is evidenced by an explanation of the historical setting surrounding the amendment's passage. In England, general warrants had been issued authorizing the search and seizure of books and papers containing seditious libel.[2] Although such general warrants were declared illegal in England in 1765,[3] the colonial counterpart, the writs of assistance, continued to be issued, empowering customs officials to search at their will.[4] General resentment to-

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1. U.S. CONST. amend. IV. The 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. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 42 (1937). The author provides an extensive historical account of the developments surrounding the fourth amendment.

3. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765). This case involved an action in trespass for breaking and entering plaintiff's house under the authority of a general warrant specific as to the person but general as to the papers to be seized.

4. N. LASSON, *supra* note 2, at 53-54, 68-78.

ward the writs of assistance, coupled with the recognized illegality of general warrants in England, provided the necessary stimulus for revolution.[5]

After independence was achieved, the colonial struggle over the writs of assistance was reflected in the guarantees of the fourth amendment.[6] As originally drafted, the amendment constituted only a prohibition against general warrants, the use of which was characterized as an unreasonable search and seizure.[7] Although the final draft contained a general prohibition against reasonable searches and seizures, the warrant clause remained substantially independent, indicating that the prohibition against general warrants remained an essential objective of the amendment.[8] Both the historical background and the phrasing of the amendment, then, support the conclusion that the original concern was with general warrants rather than warrantless searches.[9]

During the century following the adoption of the Constitution, the Supreme Court had little opportunity to apply and develop the fourth amendment.[10] In 1886 the opportunity to do so was presented in the case of *Boyd v. United States.*[11] The

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5. *Id.* at 51.

6. E. FISHER, SEARCH AND SEIZURE § 5, at 6-7 (1970). The author states that "when our forefathers set about the business of founding these United States, it was their recent experiences with general warrants and writs of assistance that impelled them to insist upon providing, in the basic charters of state and nation, suitable guarantees against unreasonable search and seizure." *Id.* at § 4, at 6.

7. The fourth amendment as originally proposed by James Madison stated:

> The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 ANNALS OF CONG. 452 (Gales & Seaton eds. 1789).

8. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 42-43 (1969).

9. *Id.* at 41. For a discussion of the reasoning behind the present phraseology, see N. LASSON, *supra* note 2, at 103. The author concludes that the general principle of freedom from unreasonable search and seizure was stated by way of premise whereas the positive prohibition was directed toward warrants issued without probable cause.

10. T. TAYLOR, *supra* note 8, at 44.

11. 116 U.S. 616 (1886). This case involved an act of Congress which authorized a court of the United States, in customs revenue cases and on motion of the government attorney, to require the defendant to produce in court his private books, invoices and papers, or the allegations of the attorney were to be taken as confessed. The Court held the statute unconstitutional as repugnant to the fourth and fifth amendments. Significantly, the Court referred to the *Entick* decision, see note 3, *supra,* as the

Boyd opinion was a reaction to general warrants in the new form of a provision requiring the compulsory production of private books, invoices, and papers.[12] The Court admitted that certain governmental intrusions did not fall within the prohibitions of the fourth amendment.[13] The search for and seizure of a man's private books and papers for the purpose of obtaining information or using them as evidence against him, however, could not be sanctioned as within the category of allowable governmental intrusions.[14] Thus, the Court emphasized the individual's right to privacy in spite of the governmental concern with enforcing customs revenue laws, in declaring the law unconstitutional.

The Supreme Court decisions since *Boyd* which have applied the fourth amendment reveal the unending struggle between individual privacy interests and governmental needs.[15] The development of fourth amendment theory and doctrine portrays the problems inherent in any attempt to reconcile legitimate governmental interests with individual rights to privacy, problems which are receiving increased attention in the area of administrative inspections. The tension between growing administrative powers of investigation and constitutional principles concerning privacy,[16] led to a challenge to the consti-

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applicable authority in its condemnation of the invasion of "the indefeasible right of personal security, personal liberty and private property." *Id.* at 630. Both opinions expressed a concern for the right to privacy, a guarantee which the *Boyd* court found in the fourth amendment.

12. *Id.* at 620. *See* Miles, *Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio?*, 27 CATH. U.L. REV. 9, 33-34 (1977). The author emphasizes that the *Boyd* court viewed the fourth amendment as a bulwark against governmental invasion of privacy, which was to be broadly interpreted to prevent intrusive governmental practices which were never contemplated by its drafters.

13. 116 U.S. at 623-24.

14. *Id.* The Court distinguished the search in *Boyd* from a search for stolen goods or goods subject to duties. In the latter case the government is entitled to the possession of the property and in the former it is not. Also, the second type of search and seizure was authorized by common law and English statutes for two centuries and by the government of the United States from its beginning. *Id.* at 623.

15. Miles, *supra* note 12, at 73. The author analyzes the Court's fourth amendment decisions on a continuum ranging from periods of restrictive interpretation of the amendment, which give greater weight to asserted governmental interests, to periods of broad interpretation, whenever confronted with a new or increasingly aggressive form of intrusive law enforcement activity.

16. For an excellent survey and history of the early development of administrative investigation, *see* Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111 (1947).

tutionality of warrantless administrative inspections in *District of Columbia v. Little.*[17] The court of appeals, emphasizing the right of a man to privacy in his home, declared that a government official could not invade a private home unless authorized by a magistrate or impelled by an immediate major crisis.[18] The Supreme Court affirmed the result, but in so doing avoided the fourth amendment issue.[19] Ten years later, however, the Supreme Court held in *Frank v. Maryland*[20] that a search warrant was not required in a health inspection of a private dwelling.[21] The Court stressed the need for general welfare ordinances to maintain minimal standards of housing and to prevent the spread of disease; furthermore, the Court noted that these statutes could be effectively enforced only through a power to inspect unhampered by the blanket application of the safeguards necessary in the criminal law such as the warrant and probable cause requirements.[22]

With the decision of *Camara v. Municipal Court,*[23] *Frank* was overruled to the extent that it sanctioned warrantless inspections. Rather, the Court held that area inspections are

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17. 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 399 U.S. 1 (1950). Appellee refused to unlock the front door of her home at the command of a health department inspector who was without a warrant, resulting in a criminal conviction which the court of appeals reversed.

18. 178 F.2d at 17.

19. 399 U.S. 1 (1950). The Court stated:

> [A] decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions not now before us. This is therefore an appropriate case in which to apply our sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds.

Id. at 3-4. Here, the Court determined that the respondent's statements were not an "interference" within the meaning of the statute. *Id.* at 6-7.

20. 359 U.S. 360 (1959).

21. In *Frank,* a resident's refusal to allow a warrantless inspection of the basement of his home resulted in an arrest and conviction that was affirmed by the Supreme Court.

22. 359 U.S. at 371-72. *Accord,* Eaton v. Price, 364 U.S. 263 (1960) (per curiam), where a similar conviction was affirmed by a four to four decision, with one justice not present. Justice Brennan's opinion, contrary to the per curiam decision and without force as precedent, was a significant departure from the *Frank* decision. Although recognizing the public interest in the cleanliness and adequacy of dwellings, Justice Brennan interpreted the fourth amendment as requiring a warrant procedure for health inspections of the home. *Id.* at 272-73.

23. 387 U.S. 523 (1967).

reasonable and that a warrant could be obtained.[24] The Court agreed that the situation in *Frank*, a routine inspection of the physical condition of private property, was a less hostile intrusion than the typical crime-related search by a policeman.[25] However, the Court refused to characterize the fourth amendment interest at stake in such inspections as "peripheral."[26] The Court premised its analysis upon the governing principle that a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.[27] Additionally noted was the fourth amendment's requirement that warrants be based upon probable cause, the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness.[28] In applying this standard, the governmental interest in preventing even the unintentional development of conditions hazardous to the public must be balanced against the individual interest in privacy.[29] As the Court stated, "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for the inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."[30] The reasonableness of an area code enforcement inspection is supported by such factors as: 1) a long history of judicial and public acceptance, 2) the public need, and 3) the impersonal nature of the inspection.[31] If the inspection is reasonable, then there exists the probable cause which is required

24. *Id.* at 537-38.

25. *Id.* at 530. In *Camara*, the appellant had refused to permit a warrantless inspection of his residence, resulting in a criminal charge for violating the San Francisco Housing Code.

26. *Id.*

27. *Id.* at 528-29.

28. *Id.* at 534.

29. *Id.* at 534-37.

30. *Id.* at 535.

31. *Id.* at 537. The Court also stated:

> it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, 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.

Id. at 538.

under the fourth amendment.[32] Similarly, in the companion case of *See v. City of Seattle*,[33] the Supreme Court held that *Camara* applied to health inspections of commercial structures, although noting that business premises may be reasonably inspected in more situations than private homes and thus that probable cause may be more easily found.[34]

In spite of the Supreme Court's seemingly strong tendency to apply the fourth amendment governing principle that warrantless searches are unreasonable, there are carefully defined exceptions to the warrant requirement in the area of administrative searches.[35] In *Colonnade Catering Corp. v. United States*,[36] the Court held that Congress has broad authority to fashion standards of reasonableness for searches and seizures of industry long subject to close supervision and inspection—in that case the liquor industry.[37] Thus the Court recognized the possibility of a warrantless inspection procedure that does not violate the fourth amendment.[38] In *United States v. Biswell*,[39]

32. The *Camara* court supplied two standards of reasonableness. First, a warrant is required in order that a search be reasonable under the fourth amendment. *Id.* at 528-29. Secondly, the inspection must be reasonable, as determined by the above-mentioned factors, in order that it may serve as the probable cause prerequisite; it will be reasonable if there are reasonable legislative or administrative standards for conducting the area inspection. *Id.* at 538.

33. 387 U.S. 541 (1967).

34. *Id.* at 545-46. *See* Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 425 (1966), where the author notes the significant differences between business premises and dwelling houses such that it may be inaccurate to assume that fourth amendment guarantees extend equally to the two classes of locations. The Court in *See* seemed to indicate as much with its caveat as to application of the *Camara* holding to business as opposed to private home settings.

35. *See* Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 375 (1974) (dealing with a New York statute authorizing searches limited to orders, prescriptions or records relating to narcotic, depressant and stimulant drugs, which other New York statutes require to be kept on the premises); Youghiogheny and Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (allowing warrantless searches of coal mines as required by the Federal Coal Mine Health and Safety Act of 1969); United States v. Del Campo Baking Mfg.Co., 345 F. Supp. 1371 (D. Del. 1972) (concerning warrantless inspection by FDA inspectors which is valid because the business involved is engaged in interstate commerce which is pervasively regulated by Congress under the commerce clause).

36. 397 U.S. 72 (1970).

37. *Id.* at 77.

38. The *Colonnade* court compared the inspection procedure which the Internal Revenue Service uses to enforce excise taxes with the warrantless inspection laws recognized as valid in *Boyd* governing excisable or dutiable articles and stolen goods. 397 U.S. at 76.

39. 406 U.S. 311 (1972).

the Supreme Court reached a similar result by characterizing the firearms industry as subject to close scrutiny under federal regulation of interstate traffic. In the 1971 case of *Wyman v. James*,[40] the Court may have created another exception to the warrant requirement in the area of state welfare programs. Although the Court determined that the home visitation by a social worker was not a search in the traditional criminal law sense,[41] it also concluded that even if the visit could be characterized as a search, it would be reasonable under the fourth amendment. Predictably, this conclusion was reached by balancing the governmental interest against the individual's right to privacy.[42]

The Occupational Safety and Health Act,[43] which applies to any business that affects interstate commerce and has employees, also provides for warrantless administrative inspection procedures. Section 657(a) of the Act authorizes inspections to be conducted at reasonable times and without delay upon the presentation of appropriate credentials.[44] Regulations implementing the inspection procedures provide that once a Compli-

40. 400 U.S. 309 (1971).

41. *Id.* at 317.

42. *Id.* at 318. Some of the factors which the Court looked to in reaching its conclusion included: 1) the particular public interest, 2) the function of the governmental agency involved, 3) the use of public funds, 4) the emphasis of the authorizing statute, 5) the need for the visit, 6) the means employed to effectuate the visit, 7) the lack of complaint by the welfare beneficiary, 8) the type of person making the visit, and 9) the lack of criminal sanctions. *Id.* at 318-24.

43. 29 U.S.C. § 657 (1970).

44. 29 U.S.C. § 657(a) (1970). The text of this section reads:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Note that according to the legislative history of the Act, a House amendment required that an inspector's entry into a workplace be permitted "without delay," which was not specified in the Senate bill, and resulted in the bill's present form. 1970 U.S. CODE

ance Safety and Health Officer is refused entrance to the premises, the officer shall ascertain the reason for refusal and then consult with the Area Director. The regulation provides for a compulsory process by which entry may then be gained.[45]

In the instant case, *Marshall v. Barlow's, Inc.*,[46] the Supreme Court held that the above-outlined OSHA inspection procedure violates the fourth amendment.[47] At issue was an employer's refusal to allow an OSHA inspector to search the premises of his electrical and plumbing installation business without a warrant. The inspector presented his credentials and explained that he wished to conduct a search of the working area of the business because Barlow's, Inc. had been randomly chosen in the agency's selection process. Mr. Barlow refused permission and the Secretary of Labor subsequently petitioned the United States District Court for the District of Idaho to issue an order compelling Barlow to admit the inspector. Upon issuance of this order, Barlow again refused admission and sought and obtained injunctive relief against the warrantless search. The Secretary appealed, challenging the judgment granting the injunction.

The Court initially reaffirmed the principle that warrantless searches are generally unreasonable and that this rule applies to commercial premises as well as homes.[48] The Court then determined that the OSHA inspection does not fall within any recognized exception; consequently, a warrant procedure is a requisite to the statute's constitutional validity.[49] Although a warrant is necessary, probable cause in the criminal law sense

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CONG. & AD. NEWS 5177, 5232-33. This wording implies that this was not originally within the contemplation of the Act.

45. 29 C.F.R. §§ 1903, 1903.4 (1977).

46. 436 U.S. 307 (1978).

47. For the lower courts' analyses of the OSHA inspection procedure, resulting in the conclusion that such is unconstitutional, *see* Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873 (D. Mont. 1977); Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977); Barlow's Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D. N.M. 1976); Brennan v. Gibson's Products, Inc., 407 F. Supp. 154 (E.D. Tex. 1976).

48. 436 U.S. at 311-12.

49. *Id.* at 313-15. The Court distinguished closely regulated businesses subject to a long tradition of close government supervision from ordinary businesses such as presented here.

is not required. For the purposes of an administrative search, probable cause justifying the issuance of a warrant may be based on a showing that reasonable legislative or administrative standards are satisfied with respect to the particular establishment, as well as on specific evidence of an existing violation.[50] The type of administrative warrant thus required 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 neutral criteria as to specific inspection decisions.[51] Also, the warrant would specify the scope and the objects of the search, thus limiting the legal ambit of the inspection and advising the employer of its limits.[52] Insofar as the Act purports to authorize inspection without a warrant or its equivalent it is unconstitutional.[53]

In his dissenting opinion, Justice Stevens argued that the warrant clause has no application to routine, regulatory inspections of commercial premises, because such inspections are reasonable under the fourth amendment.[54] Furthermore, he viewed the necessary warrant procedure as affording little protection to the employer, since probable cause to issue the warrant is satisfied by the showing of an inspection schedule.[55]

The *Barlow's* warrant requirement, based upon a modified probable cause,[56] at first glance may appear to violate the fourth amendment guarantees as originally understood. The drafters feared the abuses inherent in a general warrant and therefore sought to abate those offenses with a probable cause prerequisite. Here, however, the warrant does not have the disabilities of a general warrant: the warrant will list the specific criteria upon which it is based and will contain limitations as to the extent of the inspection.[57] Additionally, the inspection

50. *Id.* at 320-21.

51. *Id.* at 323.

52. *Id.*

53. *Id.* at 325.

54. *Id.* at 328 (Stevens, J., dissenting, joined by Justices Blackmun and Rehnquist).

55. *Id.* at 331-32 (Stevens, J., dissenting).

56. See text at note 50, *supra.*

57. The generality of the search referred not only to the scope of the area to be searched but above all to the limitation on the occasions when the government may

must be "reasonable" to provide a basis for probable cause to justify the issuance of a warrant. It is in this respect, though, that the warrant scheme authorized by the *Barlow's* court may prove to be similar to the general warrants condemned by the drafters. Although the writs of assistance were denounced because of their interference with individual interests in privacy, they were also attacked from the standpoint of lacking a basis of authority for their issuance.[58] Under the *Barlow's* scheme the probable cause, *i.e.*, the reasonableness of a search, serves to authorize the issuance of the warrant. If, as Justice Stevens suggests, this probable cause exists where the contemplated inspection is based upon a general administrative plan for the enforcement of the Act,[59] then, despite the existence of a basis of authority for its issuance, the warrant becomes almost meaningless in terms of protecting the individual's privacy from governmental intrusion.[60]

The adoption in *Barlow's* of the *Camara* reasonableness tests[61] for business premises may afford some protection for the right to privacy originally sought in the fourth amendment guarantees. This standard of reasonableness would then serve to adapt the original understanding of the fourth amendment to modern needs.[62] By equating probable cause with reasonable legislative means or administrative standards for conducting

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search. For a description of the evils of the general warrant which the authors had foremost in mind, *see* Weinreb, *Generalities of the Fourth Amendment*, 42 U. OF CHIC. L. REV. 47, 50-51 (1974).

58. It was argued that writs of assistance could only validly be issued from the English Court of Exchequer and not from any colonial courts. Furthermore, since general warrants were no longer authorized by the common law, the writs were likewise thought to be repugnant to the Magna Carta. N. LASSON, *supra* note 2, at 59-61.

59. 439 U.S. at 331-32 (Stevens, J., dissenting).

60. *Compare* Morris v. United States Dep't of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977) *with In re* Northwest Airlines, Inc., 437 F. Supp. 533 (E.D. Wis. 1977), which considered what is necessary to satisfy the probable cause required to issue a warrant. The latter opinion requires that actual data be suppied to the magistrate while the former simply looks to the existence of the Act itself to provide, through the balancing of interests mandated in *Camara* and *See*, the probable cause to issue a warrant.

61. See text at note 32, *supra*.

62. For a discussion of the problems concomitant with modern urbanization which conflict with individual rights, *i.e.*, the necessity to vest in administrative officers broad powers of search and the submission of property rights in favor of increasing regulation designed to vindicate the expanding social interests encompassed in the present-day notions of public health, safety, morals, and welfare, *see* Schwartz, *supra* note 34, at 419-20.

an area inspection with respect to a particular dwelling,[63] the *Camara* court recognized and reconciled individual rights and administrative needs under a "reasonableness" banner.[64] *Barlow's* adopts the same standard for business premises affected by OSHA. Possibly the standard of modified probable cause can be extended to all businesses affected by administrative regulations, provided that such an extension does not fall within any of the clearly defined exceptions to the warrant requirement. Also, since probable cause may be based upon a showing of reasonable legislative or administrative standards for conducting an inspection as to *a particular establishment*,[65] the reasonableness standard should sufficiently protect premises which are both private and commercial, a situation which is possible under OSHA's broad standards of application.

The practical effects of the present decision on various other regulatory statutes containing warrantless search provisions can be measured by the language used by the Court in expressing its own views toward the various regulations. The Court stated, "In short, we base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes."[66] Admittedly, the Court did not limit its holding to OSHA, so that to the extent possible, the applicability of the warrant requirement to other administrative inspection procedures must be determined according to the guidance provided by the opinion. Given that a warrantless search is unreasonable, the primary determination is whether the inspection falls within an excep-

63. 387 U.S. at 538.

64. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973), in which Justice Powell, in his concurring opinion, suggested a similar sort of accomodation to realize modern needs yet still protect fourth amendment rights. He suggested that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause based on a number of relevant factors which serve to determine the necessary standards. *See also* Note, 2 ALA. L. REV. 314 (1950), in which the author suggests, "Granting the desirability of requiring health inspectors to obtain warrants before entering private dwellings over the owners' objections, the solution of the practical difficulties involved may lie in modifying certain provisions of search and seizure law such as that concerned with the showing of probable cause in order to permit the issuance of warrants for routine inspections." *Id.* at 320.

65. 436 U.S. at 320 (emphasis added).

66. *Id.* at 321-22.

tion to that general principle—if it does, no warrant is necessary. However, if the inspection necessitates a warrant as a prerequisite then the existence of probable cause must be established. The factors listed in *Camara* provide a guide for determining the reasonableness of an inspection for probable cause purposes.[67] The critical question, which the Court has left unanswered, is how to determine in which category a particular administrative inspection will fall: whether it will be included in an exception to the warrant requirement or whether a warrant with modified probable cause will be required. By viewing the value of the constitutionally protected interest as unchanging,[68] the key to determining the standard by which an inspection will be judged is the particular governmental interest involved. Those areas traditionally subject to extensive governmental inter regulation will fall within the exception and will require no balancing.[69] Certain governmental interests will so outweigh the individual interest that the result of the balancing process will be to create another exception to the warrant requirement.[70] When the governmental interest is health-related, the individual interest will prevail to the extent that a warrant is required based upon something other than the criminal law equivalent of probable cause. Focusing upon the governmental interest, then, the myriad of adminitrative inspection schemes can be appropriately placed within the Court's fourth amendment analysis.[71]

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67. See note 31, *supra*, and accompanying text.

68. *Barlow's* applies the *Camara* standard to commercial premises without the caveat accompanying the *See* holding, so that the individual interest in privacy is the same whether a private dwelling or a commercial premise is involved. See note 34, *supra*.

69. Both *Colonnade* and *Biswell* characterize the governmental interest such that if any balancing does occur, the outcome will inevitably favor the government as opposed to the individual. The *Boyd* court also assumed the validity of certain governmental interests.

70. Note the factors referred to in *Wyman v. James*, 400 U.S. 309 (1971). *See also* note 42, *supra*. The *Barlow's* court made reference to the existence of such exceptions with the following language: "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply." 436 U.S. at 321.

71. As evidenced by *Camara*, *See*, and *Barlow's*, the government's interest in health will not so outweigh the individual interest in privacy as to negate the warrant

Additionally left unanswered is the applicability of various fourth amendment developments to the field of administrative inspections. The use of a "modified" probable cause and the express rejection of the criminal law meaning of probable cause indicate a decision by the Court that a total incorporation of criminal law probable cause concepts in the area of administrative inspections would be inappropriate. The Court's differentiation, however, does not eliminate the possibility of a limited extension of criminal law doctrines to the area of administrative inspections.[72]

Granted that the court creates a new probable cause standard for administrative inspection warrant procedures, the question then becomes whether two different probable cause standards are permissible under the fourth amendment. Both administrative and criminal inspections may result in a penalty being imposed, whether that penalty be termed a "fine" or a "punishment,"[73] and both involve important governmental

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requirement. Presumably, the same result would apply if an OSHA inspector sought to investigate a liquor or firearms industry, since the governmental interest then becomes one of health rather than that of enforcing a federal licensing program. Of course, there may be administrative inspections in which the governmental interest is varied and the result of any balancing will be determined by the particular governmental interest most emphasized by the court.

72. *Cf.* Air Pollution Variance Bd. v. Western Alfalfa, 416 U.S. 861 (1974) (Supreme Court applied the "open fields" exception to the fourth amendment to health inspections); Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84 (5th Cir. 1975) (plain view doctrine was applied to OSHA inspections); Accu-Namics, Inc. v. Occupational Safety and Health Review Comm'n, 515 F.2d 828 (5th Cir. 1975) (the exclusionary rule was rejected regarding OSHA inspections); and *In re* Northwest Airlines, Inc., 437 F. Supp. 533 (E.D. Wis. 1977) (the court rejected the criminal law requirements of showing the reliability of the informant to establish probable cause for an OSHA inspection).

73. *See* 29 U.S.C. § 666 (1970). Section 666 provides for civil penalties in the form of fines (ranging from $1000 to $10,000) for violations of the Act. Additionally, the section lists criminal punishments which result upon conviction of violations. Thus, the distinction between criminal and civil searches becomes less definite and less reasonable as the results of those searches become indistinguishable. Note also that assuming the two different standards of probable cause satisfy the fourth amendment because of the civil-criminal distinction, the dichotomy becomes more tenuous as the likelihood of criminal punishment increases. For example, given the validity of a warrant issued under the required warrant procedure, the necessary authorization is provided for the inspection of the business premises for *unsafe working conditions*. Query whether the inspection can validly proceed beyond those means necessary to discover OSHA violations, possibly discovering criminal violations which will invoke criminal sanctions (and without the constitutionally required "criminal" probable cause).

interests and individual rights to privacy. Furthermore, once the initial determination has been made that a warrant is necessary for the search to be reasonable, the language of the fourth amendment does not support the probable cause distinction made by the Court. The result of the creation of a modified probable cause may be a dilution of the criminal law probable cause such that a criminal inspection that is reasonable and statutorily authorized will provide an adequate basis for the issuance of a warrant. Thus, the Court must be careful to distinguish between the balancing process in the administrative law area resulting in a modified probable cause and the balancing in the criminal law area where probable cause is judged by a different standard. Otherwise, a warrant requirement imposed to protect the individual's privacy would become a means to circumvent the fourth amendment guarantees.

The *Barlow's* warrant requirement, although based upon a modified probable cause, is the least objectionable of available procedures constitutionally speaking. Although this holding does not eliminate the opportunity for abuse (a rubber-stamp warrant),[74] it is better than no warrant requirement at all. The original concern for abuse of warrants is still recognized in that statutory authority and specific limits as to the areas to be searched are required for warrants to issue, yet administrative concerns are not so hampered as to frustrate legitimate governmental interests. The Supreme Court has achieved a reconciliation between individual rights to privacy and administrative needs. This present balance is based upon a modern interpretation of the fourth amendment based upon

74. Justice Brennan in *Eaton v. Price*, 364 U.S. 263 (1959) stated:

> It has been suggested that if the Fourth Amendment's requirement of a search warrant is acknowledged to be applicable here [in health inspections], the result will be a general watering-down of the standards for the issuance of search warrants. For it is said that since it is agreed that a warrant for a health and safety inspection can be made on a showing quite different in kind from that which would, for example, justify a search for narcotics, magistrates will become lax generally in issuing warrants. The suggested preventive for this laxity is a drastic one: dispense with warrants for these inspections. We cannot believe that here it is necessary thus to burn down the house to roast the pig.

Id. at 272.

values sought to be protected by the drafters. Any lessening of the present requirements will only serve to undermine fourth amendment guarantees in the name of administrative efficiency. At the least, the instant case should serve as a minimum standard by which any further balancing is to be measured.

Rebecca L. Hudsmith

ABROGATION OF THE CONTRIBUTORY NEGLIGENCE BAR IN CASES OF DISPARATE RISKS

Justifications of the doctrine of contributory negligence[1] rely upon various theories — causation, assumption of risk, deterrence, apportionability of damages, and equity.[2] Of all the rationales articulated to justify the doctrine of contributory negligence, the most fundamental is derived from public policy —the law will not protect a person who does not protect himself.[3] That is to say, the duty of care for others manifestly should be no higher than the duty of self-protection.[4] Despite the apparent soundness of this proposition, its result is sometimes a windfall of nonliability for a negligent defendant.[5]

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1. Under the doctrine of contributory negligence, a plaintiff is denied recovery when his own unreasonable conduct, combined with that of the defendant, culminated in the injury. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 233 (1908). The doctrine was first articulated in *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), in which the plaintiff ran into a pole which the defendant had negligently laid across the road. Had the plaintiff not been "riding violently," he could have avoided the injury. The court refused to grant recovery saying: "One person being in fault will not dispense with another's using ordinary care for himself." *Id.* at 927.

2. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2 (1956); W. PROSSER, LAW OF TORTS § 65 (1971); Bohlen, *supra* note 1, at 233; Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674-85 (1934).

3. Lowndes, *supra* note 2, at 681. The author describes this explanation as "the archaic assumption of the individualism of the common law, which required of every tub that it stand upon its own bottom." *Id.*

4. Bohlen, *supra* note 1, at 254. "To hold otherwise would . . . rob of self-reliance, and . . . enervate and emasculate [plaintiffs] . . . by removing from them all responsibility for their own safety." *Id.* at 254-55.

5. Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 4 (1927). Green comments that much can be said against the harshness of the contributory negligence bar, "because it throws the whole risk on the plaintiff, while it lets the defendant, also a wrongdoer, go free." *Id.* at 5.