Rationalizing Administrative Searches

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NOTES

Rationalizing Administrative Searches

In announcing the decision of *Marshall v. Barlow's, Inc.* last year,¹ the Supreme Court laid another brick in the skewed edifice of administrative searches under the fourth amendment. By a five to three vote,² the Court held that warrantless, nonconsensual inspections under the Occupational Safety and Health Act of 1970³ (OSHA) violate the fourth amendment's prohibition of unreasonable searches and seizures.⁴ In requiring that an OSHA inspector obtain a warrant, the Court noted that “[p]robable cause in the criminal law sense is not required.”⁵ Instead, it reiterated the doctrine of *Camara v. Municipal Court⁶* and *See v. City of Seattle⁷* that a lesser showing of suspected reason for a search, here referred to as administrative probable cause, satisfies the warrant requirement for searches by regulatory bodies.

Unfortunately, the Supreme Court has not consistently approached the fundamental problems that administrative searches present. In first confronting the issue, the Court held that administrative searches required no warrants at all.⁸ Eight years later, *Camara* and *See* overruled that decision, and for a fragile instant the law seemed deceptively clear. But then, in the early 1970s, the Court resurrected some of the old arguments against search warrants and established an exception to the administrative probable cause requirement.⁹ Now, *Barlow's* takes us back the other way, limiting the exception and restoring the *Camara-See* rule to

². Justice Brennan did not participate in the decision.
⁴. 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 person or things to be seized.
⁷. 387 U.S. 541 (1967).

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preeminence in fourth amendment jurisprudence.

The Court's inconsistent reasoning in this case stems from the dilemma that administrative search warrants present: how to extend fourth amendment protections to subjects of administrative searches while preserving the effectiveness of administrative inspections. Its attempts to resolve the problem have been so riddled with exceptions that no simple rule can explain them all. Not surprisingly, they have provoked a wealth of legal commentary and criticism.

At the outset, this Note examines the major decisions concerning administrative searches. Specifically, it traces the development of a warrant requirement and of the corresponding lower standard of probable cause announced in the Camara and See decisions. Subsequent modifications of that seemingly absolute rule are then analyzed. To develop a framework for evaluating administrative search cases, Section II groups those principal Supreme Court cases, along with pertinent lower court opinions, into three tiers of fourth amendment protection: administrative

10. Although the same problem afflicts almost all administrative searches, it is particularly acute in the case of municipal housing code violations:

   The basic flaw in the fourth amendment approach is that the established standard of probable cause required for the issuance of a warrant would have to be greatly diluted to accommodate the municipal need — particularly in nascent or existing slum areas — for general periodic inspections. . . . Were a showing of probable cause, in the traditional sense, required to secure authorization for these inspections, municipal health and housing authorities would necessarily have to wait until it might well be too late to prevent a health hazard from causing disease or a neighborhood from becoming a slum. Relaxation of the standard of probable cause would be compelled by the need to avoid these consequences. But once the standard were relaxed, the routine issuance of warrants would compromise any effective protection against improper searches and perhaps undermine the existing practice of delaying searches at the request of the individual homeowner.

Note, Administrative Inspections and the Fourth Amendment — A Rationale, 65 COLUM. L. REV. 288, 291 (1965) (footnote omitted) [hereinafter cited as Administrative Inspections].

searches that require a warrant based on a traditional criminal standard of probable cause; administrative searches that require a warrant based on administrative probable cause; and administrative searches that require no warrant at all. It critically assesses the theory courts have used to determine what degree of protection the subject of a search deserves.

The Note concludes by suggesting that courts implicitly have recognized a distinction between commercial property and private dwellings in deciding whether to apply the traditional probable cause test or the administrative probable cause test. It then recommends a recategorization of searches within the three-tiered framework consistent with such a distinction.

I. THE SUPREME COURT AND ADMINISTRATIVE SEARCHES

A. The Era of Frank v. Maryland: Warrantless Administrative Inspections

In Frank v. Maryland, the Supreme Court first addressed the issue of whether the fourth amendment required a city official enforcing a health and sanitation ordinance to obtain a warrant. Responding to a complaint that there were rats in the 4300 block of Reisterstown Road, an inspector of the Baltimore City Health Department conducted an investigation. The inspector knocked on the door of Aaron Frank. Receiving no answer, the inspector


Although commercial speech is no longer excepted from first amendment protection, the degree of first amendment protection afforded commercial speech is still less than that afforded other forms of speech. See 425 U.S. at 771 n.24. The Virginia Board of Pharmacy case merely held that commercial speech deserved some degree of first amendment protection and that therefore the exception should no longer exist. But in the process, the Court recognized that the public need for the regulation of commercial speech justified a commercial-noncommercial distinction in the first amendment. 425 U.S. at 772. It is this sort of distinction which is analogous to the one proposed with respect to the fourth amendment.

13. While the Supreme Court has twice rejected (in See and Barlow's) the argument that businesses do not deserve the protection of warrants, it has not said that businesses deserve fourth amendment protection identical to that afforded private dwellings. See See v. City of Seattle, 387 U.S. 541, 545 (1967). Indeed, the Court implied just the opposite in the See case. See text at note 176 infra.

the area immediately surrounding the house. He found the house dilapidated and the surrounding area filled with "approximately half a ton" of trash and rodent feces. During the inspection, Frank approached the inspector and asked for an explanation. The inspector told Frank of his findings and asked permission to search the basement of Frank's house. Frank refused. The next day the agent returned with two police officers, and after again being refused admittance, swore out a warrant for Frank's arrest. No search warrant was ever obtained. Appealing his conviction, Frank challenged the validity of the Baltimore city ordinance, asserting that inspection of his home without a warrant violated the fourth amendment.

A deeply divided Court upheld Frank's conviction. The majority, speaking through Justice Frankfurter, analyzed the history of the fourth amendment and concluded that the framers intended the warrant requirement to apply only to searches for criminal evidence, and not to regulatory inspections promoting "minimum community standards of health and well-being." The Court found that the lack of potential criminal liability from the search, coupled with the growing need of cities to maintain minimum standards of housing and sanitation, rendered the warrant requirement superfluous. Since the search was regulatory

15. 359 U.S. at 361.
16. 359 U.S. at 361.
17. Frank was charged with a violation of § 120 of article 12 of the Baltimore City Code:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

Quoted in 359 U.S. at 361.
19. Frank v. Maryland was a five-to-four decision.
21. One of the most intriguing facets of the Frank decision is how Justice Frankfurter stressed the interrelationship between the fourth and fifth amendments:

[T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officers of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. Thus, evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant.
and not criminal (one supposes Frank's arrest and fine, although punitive, were not "criminal" sanctions), the fourth amendment did not apply. 22

Justice Douglas, joined by three other dissenting Justices, vigorously rejected the majority's premise that the fourth amendment was not meant to apply to searches enforcing a noncriminal regulatory code. 23 For the Frank dissenters the fourth amendment preserves a citizen's privacy, which may be threatened equally by an administrative or a criminal search. 24

Just one year after Frank, the Supreme Court again confronted the alleged need for a warrant to perform an administrative search in Ohio ex rel. Eaton v. Price. 25 As in Frank, the appellant had refused to allow local inspectors to enter his home without a warrant. Weakly echoing the result in Frank, an evenly divided Court allowed his conviction to stand. 26 Justice Brennan, however, submitted a separate opinion and renewed Justice Douglas's assault upon the distinction between civil and criminal searches:

The public interest in the cleanliness and adequacy of the dwellings of the people is great. So too is the public interest that the tools of counterfeiting and the paraphernalia of the illicit narcotics traffic not remain active. On an adequate and appropriate showing in particular cases, the privacy of the home must bow before these interests of the public. But none of these interests provides an open sesame to those who enforce them. The Fourth Amendment's procedure established the way in which these general public interests are to be brought into specific focus to require the individual householder to open his door. 27

Notwithstanding the pointed prose of Douglas and Brennan, it remained abundantly clear until 1967 that no official performing

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23. 359 U.S. at 366.
25. 359 U.S. at 374 (Douglas, J., dissenting).
27. Justice Stewart took no part in the Eaton case.
28. 364 U.S. at 272-73 (emphasis in original). The Chief Justice, Justice Black, and Justice Douglas joined Brennan's separate opinion. Not surprisingly, this block was identical to the dissenting faction in Frank.
a search for health and safety code violations needed to trouble himself to obtain a search warrant.

B. **Camara and See: Warrant Protection for Administrative Inspections**

The companion decisions of *Camara v. Municipal Court* and *See v. City of Seattle* vindicated the arguments of the Frank dissenter. *Camara* challenged an annual warrantless housing inspection authorized by the San Francisco Municipal Code. After the appellant three times refused to allow inspectors to enter his ground floor apartment without a warrant, he was arrested. The state court denied Camara's petition for a writ of prohibition, but on appeal, the Supreme Court ordered that the writ be issued, holding that Camara "had a constitutional right to insist that the inspectors obtain a warrant to search" and that he "may not constitutionally be convicted for refusing to consent to the inspection."

In overruling *Frank v. Maryland*, the majority first attacked that case's distinction between criminal and civil searches:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

The Court concluded that in administrative inspections, as in criminal ones, the fourth amendment requires an independent

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31. Section 503 of the San Francisco Municipal Code, quoted in 387 U.S. at 526: Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.
32. Camara was charged with violating § 507 of the Municipal Code, which provided for a $500 fine or imprisonment for not more than six months. 387 U.S. at 527 n.2.
33. 387 U.S. at 540.
34. 387 U.S. at 540.
35. 387 U.S. at 530-31 (footnote omitted). The Court also pointed out that even if the civil-criminal distinction were valid, it would frequently be irrelevant, as regulatory inspections are typically enforced by criminal sanctions such as fines and imprisonment. 387 U.S. at 591.
magistrate’s review before a governmental official may intrude upon a citizen’s privacy;36 “[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”37

Having decided that administrative searches do require warrants, the Court then had to face squarely the dilemma posed at the outset of this Note: How can regulatory inspection schemes be adequately enforced if inspectors must always obtain a search warrant? Such inspections typically are random spot checks, preventive in nature, based upon such factors as “passage of time, the nature of the building . . . , or the condition of the entire area,”38 rather than upon a reasonable belief that any violation exists.

The Supreme Court’s rather innovative solution to this problem was to create a new standard of probable cause for administrative search warrants. Recognizing that periodic inspections are often the only effective means to gain compliance with the requirements of municipal codes, the Court held that a reasonableness test determines probable cause in an administrative search,39 “balancing the need to search against the invasion which the search entails.”40 In short, “[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue

36. 387 U.S. at 532-33.
37. 387 U.S. at 528-29. The Court refused to except administrative searches from the warrant requirement:
We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.
387 U.S. at 533. As this passage demonstrates, even though the Court purported to reject the civil-criminal distinction, it reverted to that distinction to support its arguments. The distinction appears to be one that refuses to die. It results from an overlap of the fourth and fifth amendments that apparently exists in the minds of lawyers and judges. See note 111 infra.
38. 387 U.S. at 538.
39. 387 U.S. at 535-36. This test does not appear consistent with the wording of the fourth amendment. The fourth amendment requires “probable cause” to show that an otherwise unreasonable search is constitutionally acceptable. The Camara Court took what had been an independent standard — probable cause — and made it depend on the reasonableness of the search. The new test is at best circular (a search is reasonable if there is probable cause, and probable cause exists if it is reasonable) and at worst self-contradictory (an unreasonable search requires probable cause, yet probable cause exists if the search is reasonable). This seemingly untenable standard is the inconsistency pointed out by the dissents of Justice Clark in See, 387 U.S. at 546, and Justice Stevens in Barlow’s, 436 U.S. at 325.
40. 387 U.S. at 537.
a suitably restricted search warrant.”

The Supreme Court presented three reasons justifying the less stringent probable cause requirement for administrative search warrants. First, the public and the judiciary had long accepted such code enforcement inspections. Second, given the unconstitutionality of warrantless searches, the new standard provided the only means of effective enforcement. Finally, such inspections were “neither personal in nature nor aimed at the discovery of crime” and therefore “involved a relatively limited invasion of the urban citizen’s privacy.”

On the same day as Camara, the Court also decided See v. City of Seattle and extended its new administrative probable cause standard to commercial inspections. The appellant in See had refused to allow Seattle fire inspectors to enter his commercial warehouse without a warrant and without probable cause to believe that any violation existed. The Supreme Court reversed the appellant’s conviction under the Seattle Fire Code, holding that Camara’s warrant requirement for administrative inspections protected commercial premises as well as homes.

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41. 387 U.S. at 539. This flexible probable cause standard starkly contrasts with the rigid probable cause standard of criminal search warrants. There must be sufficient evidence to warrant a person of reasonable caution to believe that an offense has been or is in the process of being committed, and that the premises contain legally seizable material. Henry v. United States, 361 U.S. 98 (1959). See text at notes 87-94 infra.

42. Camara v. Municipal Court, 387 U.S. at 537.

43. 387 U.S. at 537. Ironically, the Court, in its effort to support the lower standard of probable cause for administrative search warrants, adopted practically the same arguments that had been used to justify warrantless inspections in Frank. As a result, several commentators have questioned whether Camara really offers any significant increase in fourth amendment protection. See, e.g., LaFave, supra note 11, at 27.

44. 387 U.S. at 541 (1967).

45. Section 8.01.050 of the Seattle Fire Code, quoted in 387 U.S. at 541:

It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

46. The Court expressed this notion twice in the See opinion:

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, 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. 387 U.S. at 543.

We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be com-
Together, \textit{Camara} and \textit{See} signalled two significant changes in the Supreme Court’s fourth amendment philosophy. First, the Court recognized the warrant requirement as the primary safeguard of fourth amendment rights. In other words, the reasonableness of a search under the first clause of the fourth amendment depends largely upon whether the warrant requirement in the amendment’s second clause is met.\footnote{This is not a necessary interpretation of the fourth amendment. The dissents of Justice Clark in \textit{See}, 387 U.S. at 546, and Justice Stevens in \textit{Barlow’s}, 436 U.S. at 325, persuasively argued that if a search meets the reasonableness test in the first clause of the amendment, no warrant should be required for the search. Their approach to the fourth amendment also asserts that the probable cause standard for warrants in the second clause of the amendment is an inflexible one that cannot be diluted by increased governmental interest in the inspection.} Second, the Court in \textit{Camara} and \textit{See} adopted a balancing test to assess inspections and searches that do not involve the exigent circumstances normally associated with exceptions to the warrant requirement.\footnote{387 U.S. at 534-35.} Significantly, that balancing test led the Court to modify the warrant mechanism rather than to fashion another exception,\footnote{See Greenberg, supra note 11, at 1012.} and thus it created a new standard of administrative probable cause.

\textbf{C. \textit{Colonnade} and \textit{Biswell: The “Pervasively Regulated” Exception}}

The Court had hinted in \textit{See} that businesses might not in all circumstances enjoy the same fourth amendment protection as private dwellings.\footnote{See note 172 infra and accompanying text.} In \textit{Colonnade Catering Corp. v. United States}, the Court fulfilled that prophecy. The defendant in \textit{Colonnade}, a licensed liquor dealer, challenged the admissibility of untaxed liquor that federal agents had seized during a warrantless forcible search of his dealership. The district court granted the dealer’s motion to suppress the evidence, but the court of appeals reversed, holding that the search was reasonable under the fourth amendment.\footnote{397 U.S. 72 (1970).} The Supreme Court reversed the court of appeals and ordered the evidence suppressed, but only because the forcible nature of the seizure violated the federal statute that pelled through prosecution or physical force within the framework of a warrant procedure.

\begin{footnotesize}
\footnotetext{387 U.S. at 545 (footnote omitted).}
\footnotetext{48.} This is not a necessary interpretation of the fourth amendment. The dissents of Justice Clark in \textit{See}, 387 U.S. at 546, and Justice Stevens in \textit{Barlow’s}, 436 U.S. at 325, persuasively argued that if a search meets the reasonableness test in the first clause of the amendment, no warrant should be required for the search. Their approach to the fourth amendment also asserts that the probable cause standard for warrants in the second clause of the amendment is an inflexible one that cannot be diluted by increased governmental interest in the inspection.
\footnotetext{49.} 387 U.S. at 534-35.
\footnotetext{50.} See Greenberg, supra note 11, at 1012.
\footnotetext{51.} See note 172 infra and accompanying text.
\footnotetext{52.} 397 U.S. 72 (1970).
\end{footnotesize}
authorized the search.\textsuperscript{54} The Court, through Justice Douglas, held that Congress had determined by statute that searches, if carried out as prescribed in the provisions of the act, were per se reasonable under the fourth amendment and required no warrant.\textsuperscript{56} But since the statute did not authorize forcible entry of the kind in this case, the search did not fall within the class of congressionally established reasonable searches, and therefore required a warrant.\textsuperscript{56}

The Court emphasized the liquor industry's long history of legislative regulation, a history that predated the drafting of the Constitution.\textsuperscript{57} The Court used that history to justify Congress's power to legislate the reasonableness of searches of regulated liquor dealers\textsuperscript{58} (and hence the applicability of the fourth amendment's warrant requirements). The \textit{Colonnade} decision thus excepted the liquor industry from the warrant requirement of \textit{Camara} and \textit{See}.

One might think that, due to the unique history of liquor regulation, the exception would have stopped there. However, two years later, the \textit{Colonnade} exception assumed a much broader scope in \textit{United States v. Biswell}.\textsuperscript{59} A federal treasury agent visited Biswell, a pawnshop operator federally licensed to sell sporting weapons. The agent inspected Biswell's books and then requested to see the locked gun storeroom. Biswell asked the agent if he had a search warrant. The agent replied that none was necessary as the inspection was authorized by section 923(g) of the Gun Control Act of 1968,\textsuperscript{60} and gave Biswell a copy of the relevant portion of the statute. Biswell then admitted the agent to the storeroom, and the ensuing search uncovered two untaxed and illegal sawed-off shotguns.\textsuperscript{61} Biswell unsuccessfully attempted to have the evidence excluded from his trial and was convicted of violating the Gun Control Act.

\textsuperscript{55} 397 U.S. at 77.
\textsuperscript{56} 397 U.S. at 77.
\textsuperscript{57} For interesting descriptions of liquor industry regulation from colonial times through Prohibition, see R. Childs, Making \textit{Repeal} Work (1947); J. Pollard, The \textit{Road to Repeal} (1932); G. Thomann, \textit{Colonial Liquor Laws} (1887).
\textsuperscript{58} 397 U.S. at 77.
\textsuperscript{59} 406 U.S. 311 (1972).
\textsuperscript{60} 18 U.S.C. §§ 921-928 (1976).
\textsuperscript{61} 406 U.S. at 312.
The conviction was reversed by the court of appeals which was, in turn, reversed by the Supreme Court. The Court held that the treasury agent had not violated the fourth amendment. Unlike the agents in Colonnade, this one conducted the search in a manner fully authorized by the statute; as a result, the search, according to the reasoning of Colonnade, was *per se* reasonable without a warrant.

In holding that searches of gun dealers under the Gun Control Act require no warrant, the Court drew an analogy to federal regulation of liquor. It distinguished *See* with the comment that while periodic inspections adequately enforce most municipal housing and fire codes, effective gun control necessitates “unannounced, even frequent, inspections.” A warrant requirement for such searches would either frustrate enforcement of the Act or so dilute the probable cause requirement as to neutralize any of the protection normally associated with a warrant.

In effect, the *Biswell* Court held that, in certain situations, Congress can statutorily define a reasonable search and thus waive the fourth amendment’s warrant requirement. The legality of such searches depends not upon the authority of a valid warrant, but upon “the authority of a valid statute.” The Court apparently did not find that the newly created warrant exception posed any significant threat to privacy in the limited context of its decision.

The decisions in *Colonnade* and *Biswell* spawned a series of lower court decisions that greatly expanded the exception for pervasively regulated industries. Indeed, the exception threatened to engulf the rule. By reasoning similar to that of *Biswell*, courts found businesses inspected by the Food and Drug Administration to be pervasively regulated and thus not subject to any warrant.

63. 406 U.S. at 314.
64. The Court deemphasized the unique historical status of the liquor industry, which seemed so vital to the *Colonnade* decision. Instead, it stressed the compelling need to regulate firearms:
   Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as in governmental control of the liquor industry, but 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.
65. 406 U.S. at 315.
66. 406 U.S. at 316.
67. 406 U.S. at 315.
68. 406 U.S. at 317.
requirement. The exception also spread to searches and inspections by the Bureau of Narcotics and Dangerous Drugs as well as those enforcing the Coal Mine Health and Safety Act of 1969.

D. Marshall v. Barlow’s, Inc.: The Pendulum Swings

During that period of exceptional expansion, the constitutionality of inspections under the Occupational Safety and Health Act of 1970 (OSHA) came under challenge. One court held that OSHA inspections lie within the Colonnade-Biswell exception and that no warrant is necessary. Other district courts required a warrant for OSHA inspections but preserved the constitutionality of the Act by finding a mandate of warrants based upon administrative probable cause within the statute’s vague language.

The district court in Barlow’s, Inc. v. Usery took still a third approach to OSHA inspections. Bill Barlow, president and general manager of an electrical and plumbing business, received a visit from an OSHA inspector in September 1975. Barlow asked the inspector if he had received a complaint about his company. When the inspector answered no, Barlow asked him if he had a search warrant. After receiving a second no, Barlow refused to admit the inspector. Three months later, the Secretary of Labor obtained an order compelling Barlow to admit the inspector. Undaunted, Barlow

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again refused access and sought injunctive relief against OSHA's warrantless search demand. The district court concluded that a warrant must accompany any OSHA inspection; it refused, however, to interpret OSHA so broadly as to include a warrant mechanism and therefore held section 657(a) of the Act unconstitutional under the fourth amendment. The Supreme Court noted probable jurisdiction to resolve the conflicting interpretations of OSHA and to clarify the scope of the Colonnade-Biswell exception.

The Supreme Court affirmed the district court panel. Initially, it observed that the fourth amendment was "intended to shield places of business as well as of residence." Camara and See were thus controlling. The Court distinguished Colonnade and Biswell, saying they should truly be the exception and not the rule:

The element that distinguishes [the liquor and gun industries] from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware.

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76. 424 F. Supp. at 442.
77. 430 U.S. 964 (1976).
78. 436 U.S. 307 (1978) (five-to-three decision). Justice Brennan did not participate in the decision.
79. 436 U.S. at 312. Justice White's majority opinion reached this conclusion by analyzing the historical circumstances of the fourth amendment's adoption:
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. 436 U.S. at 311 (footnotes omitted).

Justice White's history lesson, however, became the foundation for a counterargument in Justice Stevens's dissent. If the colonists feared the general warrant, then the fourth amendment arguably was intended to prevent not warrantless searches but searches with warrants that provided little or no protection:
The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the Fourth Amendment. . . . Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. 436 U.S. at 327-28. Justice White solved the administrative search dilemma by requiring administrative probable cause for OSHA warrants. However, warrants issued upon that lesser standard come perilously close to being the "general" warrants that the fourth amendment was designed to eliminate.
80. 436 U.S. at 313.
81. 436 U.S. at 313.
OSHA, unlike federal liquor and gun control laws, regulates not a single, discrete industry but rather the whole of American business. And the Court flatly refused to find that all interstate commerce fell under the rubric of "pervasively regulated":

Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce . . . .

. . . . The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. 82

Recognizing the need to balance a business's fourth amendment rights against the need for effective enforcement through periodic, random inspections not based on suspected violations, the Court turned to the lesser standard of probable cause announced in Camara and See. 83 It rejected the argument that the lower standard of administrative probable cause would result in rubber stamp warrants providing only illusory protection to the target of the inspection. 84 Having determined that the Constitution requires a warrant for OSHA searches, and carefully limiting itself to the "specific enforcement needs and privacy guarantees" relevant to searches under that particular statute, 85 the Court held the Act unconstitutional. 86

II. WHAT THE COURT HATH WROUGHT — A THREE-TIERED FOURTH AMENDMENT

Though the route is tortuous, the Supreme Court's administrative search decisions in the past decade chart a course between privacy rights and administrative needs. The cases culminating in Barlow's suggest three distinct degrees of fourth amendment protection: (1) warrants issued on traditional probable cause; (2) warrants issued on administrative probable cause; and (3) warrantless exceptions.

82. 436 U.S. at 314-15.
83. 436 U.S. at 320. The evidence necessary to establish administrative probable cause is discussed in text at notes 115-30 infra.
84. 436 U.S. at 322-24.
85. 436 U.S. at 323.
86. 436 U.S. at 325.
A. Traditional Probable Cause

The fourth amendment specifies that "no Warrants shall issue, but upon probable cause." While all authorities agree that probable cause is a prerequisite to the issuance of a warrant, what quantum of evidence constitutes probable cause and whether that quantum should be fixed or flexible remain in dispute.

In criminal law, the articulated standard of probable cause is relatively settled: "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Evidence showing a mere probability of criminal activity satisfies this standard: the evidence need not be sufficient to convict or even amount to a prima facie showing of an offense. In fact, hearsay evidence, although inadmissible at trial, may support a warrant "so long as there [is] a substantial basis for crediting the hearsay.

An affidavit supporting a warrant based on traditional probable cause must, however, contain more than mere conclusory statements by the affiant. It must present some evidence of the "underlying circumstances" upon which either the affiant's conclusions or those of his informant were based. If the affiant relied on an informant, his affidavit must also support the informant's credibility.

Factual evidence supporting the affiant's conclusions enables the magistrate — the central figure in the warrant procedure — to assess the reasonableness of the proposed search in-
dependently. The magistrate stands as a buffer between the government and the private individual. Weighing the interests of privacy and of efficient law enforcement that inevitably clash in any search or inspection, he determines whether the facts justify the search.\(^94\)

**B. Administrative Probable Cause**

The most notable aspect of the *Camara* and *See* decisions is the determination that the term “probable cause” in the fourth amendment need not mean the same thing for all government searches. The standard of administrative probable cause established in those cases does not require any evidence of a violation of the law, nor must the warrant specify the articles to be seized or the area to be searched.\(^95\) Instead, the government need show only that the inspection is necessary to further the legitimate goals of the authorizing statute.\(^96\) Moreover, the affidavit supporting the warrant need not allege conditions then existing on the premises that are the subject of the search.\(^97\) The magistrate conducts a balancing test, weighing the need for the search against the invasion of privacy that it entails.\(^98\)

Some legal theorists object to the reduced standard of probable cause. They suggest that traditional probable cause should be

\(^{94}\) See United States v. Chadwick, 433 U.S. 1, 9 (1977); Terry v. Ohio, 392 U.S. 1, 21, 22 (1968); McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948).

\(^{95}\) See McManis & McManis, *supra* note 11, at 960; *OSHA Searches*, *supra* note 11, at 110.

\(^{96}\) See *OSHA Searches*, *supra* note 11, at 110.

\(^{97}\) Id.


Unfortunately, the balance in most applications for administrative warrants is inherently one-sided. The warrant proceeding before a magistrate is almost always ex parte, and the citizen never has the opportunity to present facts to bolster the privacy-interest side of the scale. See *LaFave*, *supra* note 11, at 30. As a result, the privacy interest in the balance almost never receives specific attention; instead, the warrant hearing concentrates on the government’s claims of statutory authority. Professor LaFave suggests a remedy to this problem: Notify owners of premises that the government proposes to search and allow them to contest the warrant proceeding. *LaFave*, *supra* note 11, at 31. Of course, such a mechanism could cause considerable delay and frustrate the enforcement of valid regulatory schemes, a result that the Court in *Camara* and *See* struggled to avoid.
the exclusive fourth amendment standard. Professor LaFave
takes a less extreme view, but he cautions:

Although [the fact that the traditional probable cause standard
greatly hinders enforcement] would undoubtedly lead many to the
conclusion that a different sort of probable cause should be re­
quired for administrative inspections, this result should not be
lightly reached. To say that the probable cause required by the
Fourth Amendment is not a fixed test, but instead involves a sort

99. See note 48 supra and accompanying text. See also Greenberg, supra note 11, at
1014.

At one time the Supreme Court appeared to adopt this view: “This [fourth amend­
ment] prevents the issue of warrants on loose, vague or doubtful bases of fact. It empha­
sizes the purpose to protect against all general searches . . . . The Amendment is to be
liberally construed.” Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)
(evidence obtained from search pursuant to warrant containing no particulars of alleged
violation of National Prohibition Act excluded; defendant’s conviction overturned).

In Frank v. Maryland, 359 U.S. 360, 372-73 (1959), Justice Frankfurter declared that
it was better to create a complete exception to the probable cause standard than to give
flexibility to the probable cause standard:

If a search warrant be constitutionally required, the requirement cannot be flexibly
interpreted to dispense with the rigorous constitutional restrictions for its issue. A
loose basis for granting a search warrant for the situation before us is to enter by
way of the back door to a recognition of the fact that by reason of their intrinsic
elements, their historic sanctions, and their safeguards, the Maryland proceedings
requesting permission to make a search without intruding when permission is de­
nied, do not offend the protection of the Fourteenth Amendment.

The fear was that administrative probable cause would provide no genuine protection for
the subject of the search; the issuance of an administrative warrant might become nothing
more than a “rubber stamp process” with the magistrate deferring to the expertise of the
agency seeking the warrant. LaFave, supra note 11, at 27.

However, the dual probable cause standard is not without constitutional backing. The
standard was perhaps most eloquently defended by Justice Douglas in his dissent in
Frank:

Where considerations of health and safety are involved, the facts that would justify
an inference of “probable cause” to make an inspection are clearly different from
those that would justify such an inference where a criminal investigation has been
undertaken. Experience may show the need for periodic inspections of certain facili­
ties, without a further showing of cause to believe that substandard conditions
dangerous to the public are being maintained. The passage of a certain period
without inspection might of itself be sufficient in a given situation to justify the
issuance of a warrant. The test of “probable cause” required by the Fourth Amend­
ment can take into account the nature of the search that is being sought. That is
not to sanction synthetic search warrants but to recognize that the showing of
probable cause in a health case may have quite different requirements than the one
required in graver situations.

359 U.S. at 383. Since the Court explicitly recognized the constitutionality of the dual
probable cause standard in Camara, See, and Barlow’s, continued attack on it might well
be dismissed as a pointless academic exercise. Nonetheless, such exercise does underscore
a constitutional necessity: Whatever probable cause standard the Constitution requires
for a particular search, it must provide genuine protection and not become an empty
ritual.
of calculus incorporating all the surrounding circumstances of the intended search, constitutes a major departure from existing constitutional doctrine. And it could well be a departure with a multitude of consequences.\footnote{100. LaFave, \textit{supra} note 11, at 12-13 (footnotes omitted).}

The argument for the single probable cause standard stresses the possibility that a search under a less stringent standard might uncover evidence of a crime.\footnote{101. The basic argument is that the defendant should not be subjected to criminal liability upon evidence that could have been obtained only through an administrative warrant because insufficient evidence existed for a criminal warrant: But evidence seized under the administrative search exception is not limited to administrative proceedings. It may well be found that the continued existence of standards for administrative “inspections” less strict than those for criminal searches, notwithstanding the greater degree of culpability associated with criminal activity, represents a severe diminution of those constitutional safeguards formerly provided by the fourth amendment. The constriction will continue unabated only at an exorbitant price. \textit{Beyond the Fourth Amendment}, \textit{supra} note 11, at 122.} A solution offered by at least one commentator is to issue warrants on administrative probable cause, but to exclude evidence gained in that search from any subsequent criminal prosecution.\footnote{102. Administrative Inspections, \textit{supra} note 10, at 292-95.} The trouble with that solution is that nearly all administrative and regulatory inspection schemes provide some sort of criminal sanctions, albeit minor ones.\footnote{103. \textit{See, e.g.}, United States v. Blanchard, 495 F.2d 1329 (1st Cir. 1974).} Furthermore, it is a solution the courts do not seem prepared to accept. Several have already upheld criminal convictions based on evidence seized during searches justified by administrative probable cause.\footnote{104. \textit{See, e.g.}, United States v. Blanchard, 495 F.2d 1329 (1st Cir. 1974) (conviction on federal liquor law violation based upon See-type standard upheld); United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972), \textit{affd.}, 480 F.2d 918 (3d Cir. 1973) (seizure of illegal guns during administrative narcotics search upheld); United States v. Ciaccio, 356 F. Supp. 1373 (D. Md. 1972) (illegal firearm seized in administrative search under federal liquor law admitted as evidence).}

So how did the Supreme Court justify the lesser standard of probable cause for administrative searches? The \textit{Camara} Court first argued that administrative inspections had “a long history of judicial and public acceptance.”\footnote{105. \textit{Camara} v. Municipal Court, 387 U.S. at 537.} Professor LaFave points out that this argument is historically inaccurate and logically unsound: Cases reviewing periodic and area inspections are rare, and “acquiescence” may more accurately describe the public’s attitude toward the searches than “acceptance.”\footnote{106. LaFave, \textit{supra} note 11, at 14.} Moreover, the Court has seldom felt restrained by even substantial histories of
judicial and public acceptance when convinced that accepted practice was unconstitutional. 107

The Camara Court also felt that the compelling need for enforcement of public safety regulations demanded that such administrative inspections be liberated from a traditional probable cause test. 108 Unfortunately, that argument begs the question; the real issue is whether the Constitution mandates traditional probable cause for all governmental intrusions. If so, the competing public need must be subordinated to the mandates of the fourth amendment. Otherwise — if the public interest in efficient enforcement of health and safety regulations were truly controlling — the same reasoning would dictate a lower probable cause standard for criminal searches as well:

Although others have also asserted a need for 100 percent enforcement of these ordinances, it is difficult to accept that as a justification for a diluted probable cause test. One might as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. It is certainly not a novel observation that in the field of criminal law this argument has not prevailed, and that instead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state. If there is a greater public interest in total enforcement of housing codes than of the criminal law, the Camara opinion does not explain why. 109

107. Id.
108. 387 U.S. at 535-36.
109. LaFave, supra note 11, at 14 (footnotes omitted). LaFave does not, however, advocate the elimination of administrative probable cause. In lieu of the three arguments offered by the majority in Camara, he proposes two justifications for the lower standard of probable cause. One is "the inability to accomplish an acceptable level of code enforcement under the traditional probable cause test." Id. at 20. Unlike the criminal law, where the public nature of most crimes permits effective enforcement notwithstanding the stiffer traditional probable cause requirement, enforcement of health and safety regulatory schemes is frustrated by traditional probable cause because of the inherent difficulty of detecting code violations at their incipient stages. Id. at 16.

LaFave's second contention supporting the administrative probable cause test closely tracks the Court's third line of reasoning in Camara: Periodic and area inspection programs for code enforcement involve a "relatively minor invasion of personal privacy and dignity." Id. at 20. LaFave argues that inspecting plumbing fixtures and electric wiring does not intrude upon personal privacy and dignity as much as rummaging through desk drawers and personal belongings.

Yet that argument overlooks two points. Frequently, administrative inspections do involve more than a survey of physical fixtures. See, e.g., Wyman v. James, 400 U.S. 309 (1971). This is particularly true of inspections of business premises, which often require inspection of business papers. See Mancusi v. DeForte, 392 U.S. 364 (1968); United States ex rel. Terraciano v. Montanye, 493 F. 2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974);
The *Camara* Court attempted to distinguish such an overextension of its reasoning with a third argument: regulatory health and safety inspections do not involve as significant an invasion of the citizen's privacy as a criminal search.¹⁰ This view is clearly a remnant of the distinction between criminal and civil searches that undergirded the early *Frank* case.¹¹ Yet it conflicts with the United States v. Habig, 474 F.2d 57 (7th Cir.), cert. denied, 411 U.S. 972 (1973); United States v. Crespo, 281 F. Supp. 928 (D. Md. 1968); People v. Curco Drugs, Inc., 76 Misc. 2d 222, 350 N.Y.S.2d 74 (1973).

Moreover, even if such inspections scan only the physical facilities, it is questionable, at least in the home, whether the citizen suffers a lesser intrusion upon privacy. One can hardly imagine a clearer illustration of an invasion of personal privacy than a government code inspector checking the wiring and light switches in one's bedroom, or examining the plumbing fixtures in the bathroom. Indeed, as Judge Perryman sagely remarked in *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), aff'd., 339 U.S. 1 (1950), “even if the front door of the house is no longer protected by the Constitution, surely it had been thought until now that the bathroom is.” 178 F.2d at 18. Thus, LaFave's notion that such inspections present a lesser intrusion of privacy must originate in the much-maligned yet persistent distinction between criminal searches and civil-code enforcement inspections. See notes 21 & 37 supra.

¹⁰ 387 U.S. at 537.

¹¹ The civil-criminal distinction should be laid to rest. It has survived only by feeding on a fundamental misunderstanding of the fourth amendment. The fifth amendment protects against self-incrimination. The fourth amendment, in contrast, guards personal privacy. See LaFave, supra note 11, at 7. The relationship that may exist between these two distinct amendments was first recognized in *Boyd v. United States*, 116 U.S. 616 (1886). However, that relationship regretfully was blurred by an intermingling of the two amendments as a single “law of searches and seizures” in *Davis v. United States*, 328 U.S. 582, 587 (1946), and *Frank v. Maryland*, 359 U.S. 360 (1959). For fully twelve years since *Camara* and *See*, the Supreme Court has attempted to dispel this constitutional misinterpretation, but the notion remains. The relatively early case of *District of Columbia v. Little* forcefully refuted the basic error of the civil-criminal distinction:

It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. . . . The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home. . . . It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.


reasoning in *Camara* that compelled the overruling of *Frank*. In the words of Professor Beaney:

The most disturbing aspect of the *Frank* and *Eaton* decisions is the rationale of Justice Frankfurter that the Fourth Amendment means less when invoked to protect privacy than it does when used to restrict official searches for evidence. One justification for the application of the Fourth that [has been] set forth on numerous occasions is that sheltering the guilty in many cases provides the only effective way of protecting the innocent. But when the privacy of the innocent is invaded, the Court found the right to be insignificant.112

History as well rejects the distinction between civil and criminal searches: the fourth amendment largely reflects the colonists’ dread of the British writs of assistance, which permitted regulatory, not criminal, searches.113 The sanctity of the home and of private property was the intended object of fourth amendment protection. A government agent who invades private property without permission imperils that sanctity, whether in the course of a criminal or an administrative search.

Yet we have passed the point of no return on the path to multiple probable cause standards. *Camara* and *See* will never be overturned; *Frank* will never be revived. In 1979, the surest means of preserving the interests of subjects of administrative searches is to elucidate a clear, easily applied definition of the adolescent standard of administrative probable cause. Not until recently, however, have courts even begun to wrestle with the question of what specific evidence is necessary to demonstrate administrative probable cause. The issue in most lower court cases following *Camara* and *See* was whether the search required a warrant at all, and, if so, which probable cause standard should apply.114 Unfortunately, the *Camara* decision provided little, if any, guidance as

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to what an application for an administrative search warrant must contain.\textsuperscript{115}

In \textit{Barlow's}, the Court did elaborate on the requirements of administrative probable cause, but its vague guidelines were by way of example only:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.\textsuperscript{116}

As a result of this limited guidance, lower courts have struggled alone to establish the standards for an administrative warrant.

Perhaps the most informative opinion on the topic is that of Judge Turk in \textit{Reynolds Metals Co. v. Secretary of Labor}.\textsuperscript{117} In \textit{Reynolds}, the plaintiff plant owner moved to quash an OSHA inspection warrant issued by a United States magistrate contending that it contained no facts demonstrating probable cause to believe that specific violations existed on the premises.\textsuperscript{118} In reply, the government argued that administrative probable cause re-

\begin{itemize}
  \item \textsuperscript{115} See text at notes 39-41 supra.
  \item \textsuperscript{117} 442 F. Supp. 195 (W.D. Va. 1977).
  \item \textsuperscript{118} The affidavit in support of the warrant presented to the magistrate included, \textit{inter alia}, the following facts:
    \begin{enumerate}
      \item Computer printout information at the local OSHA field office revealed that the plaintiff's plant had never been inspected.
      \item At the time the inspector sought the warrant, no "immediate danger situations, fatalities or catastrophes, complaints, or follow-up inspections" were on his agenda.
      \item The "Worst-First" list, data compiled by the Bureau of Labor Statistics which ranks industries by frequency of accidents and injuries, was used by OSHA as a planning guide for general schedule inspections in order to insure that limited OSHA resources were most efficiently allocated to the inspection of industries where the likelihood of employee injury is greatest.
      \item Consultation of the "Worst-First" list revealed the plaintiff's industry to be one of the most hazardous, ranking twentieth on the list.
      \item Up to the time immediately prior to the application for the warrant, all but one of the nineteen industries preceding the plaintiff's on the "Worst-First" list had already been inspected by agents of the local OSHA field office (the one not inspected was performing government contract work for the Navy).
      \item The time, place, and scope of the inspection was specified in accordance with the appropriate sections of the OSH Act.
      \item The inspector agreed to make a return to the court upon completion of the inspection.
    \end{enumerate}
\end{itemize}

442 F. Supp. at 196-97.
quires only a showing that the inspection “is part of a rational plan prepared and approved by the agency in an attempt to effectuate the enforcement of the act.” Furthermore, it offered two independent justifications for the warrant: (1) the mere passage of time between inspections, and (2) the agency’s inspection plan that relied upon a “Worst-First” ranking of industries by safety records.

The district court upheld the administrative warrant, relying most heavily upon the “Worst-First” inspection plan. In dictum, it mentioned other potential methods of demonstrating administrative probable cause, such as a “history of past violations” and “current complaints from employees regarding work conditions.” The court concluded that since OSHA had proposed the inspection pursuant to an apparently rational and non-discriminatory plan, the agency had satisfied the requirements of administrative probable cause. Thus, under the Reynolds standard, the only fundamental protection afforded by administrative probable cause is freedom from government harassment through arbitrary and capricious searches.

On the other hand, the court in Marshall v. Weyerhaeuser Co. found an OSHA affidavit insufficient for an administrative search warrant. In constrast to the detailed justifications outlined in Reynolds, the Weyerhaeuser affidavit stated only that an inspection three years earlier had uncovered a violation, which the firm had since corrected, and that the entire industry held an “occupational [hazard] rate of 19.1.” The court found neither fact in the affidavit sufficient to establish administrative probable cause. Listing the industry’s injury rate without more does not give the judge any information about how that industry ranks with other industries or whether the more dangerous industries...

119. 442 F. Supp. at 198.
120. 442 F. Supp. at 200.
121. 442 F. Supp. at 200-01.
122. 442 F. Supp. at 200.
123. The court’s holding permits future refinement of the standard: Although the court notes OSHA might have selected any one of several methods to determine which industries and plants would be inspected, the instant plan appears rational and non-discriminatory, and as such is sufficient to establish probable cause for the inspection warrant.
442 F. Supp. at 200 (emphasis added).
124. 442 F. Supp. at 201. This conclusion regarding the limited protection provided by administrative warrants has interesting and crucial implications when applied to searches of the home. See text at notes 139-46 infra.
126. 466 F. Supp. at 478.
have already been inspected. The court flatly rejected the contention that mere passage of time can serve as a "reasonable, discernible administrative standard" for probable cause. Finally, the court refused to find that a violation which had been previously discovered and since corrected constituted probable cause to inspect again. This reasoning recognizes the inherent dangers of harassment and arbitrary searches that could result if prior violations, although corrected, could establish administrative probable cause.

Overall, defining administrative probable cause at this time is perhaps a futile task, as the courts only now are beginning to address the subject with any degree of specificity. The next few

127. There is no indication of [the plant's] ranking on the list and there is no explanation of the hazard rate . . . . Above all, there is no indication of why [this plant], or even [this industry group], was being chosen for inspection . . . . Without comparable information [to the Reynolds case] in this affidavit to describe the administrative standards being followed, there can be no meaningful judicial review of the discretion being exercised by OSHA officials. Approval of a search warrant based on this affidavit would amount to a "rubber-stamp" such as was impliedly rejected by the Barlow's Court.

128. 456 F. Supp. at 483.

129. 456 F. Supp. at 482-83.

130. The Reynolds and Weyerhaeuser decisions may actually raise more questions than they answer. The two cases appear to conflict: while Weyerhaeuser holds that neither mere passage of time nor past violations by the business are proper evidence of administrative probable cause, 456 F. Supp. at 482-83, Reynolds indicates that a history of past violations may suffice. 442 F. Supp. at 200.

Moreover, Weyerhaeuser's wording suggests that an administrative warrant requires proof of a rational plan enforcing a valid regulatory statute. Yet such a requirement contravenes the Reynolds court's holding that administrative probable cause may be established without a plan by conduct of the business to be searched or evidence gained from informants such as employees. See 442 F. Supp. at 200. It would seem anomalous to hold that conduct or evidence from informants cannot establish administrative probable cause when these are the only means to establish the more stringent traditional probable cause.

But if informants or past conduct can satisfy the administrative probable cause standard, perhaps an employee complaint that fails to reach traditional probable cause standards may nevertheless constitute administrative probable cause. Such a conclusion would require the courts to approach administrative probable cause as a less onerous but analogous variant of criminal probable cause and would raise numerous questions. For example, could an employee complaint in one department of a plant establish probable cause to inspect the entire facility? The resultant process of defining administrative probable cause could prove as lengthy and tedious as that of defining traditional probable cause, a process that continues today. See text at notes 87-104 supra.

Furthermore, Weyerhaeuser and Reynolds deal only with OSHA inspections. Courts have yet to analyze administrative probable cause for other government inspections. Perhaps most importantly, the rather vague standard of administrative probable cause for code enforcement inspections of the home has yet to be refined.
years should see a series of cases developing the contours of this emerging standard.

C. No Warrant Required: The "Pervasively Regulated" Exception

For the "pervasively regulated" (or Colonnade-Biswell) exception:

131. Exceptions to the warrant requirement have been categorized in other ways. See, e.g., McManis & McManis, supra note 11; Rothstein & Rothstein, supra note 11; Administrative Search Warrants, supra note 11. Besides the usual criminal search exceptions, see note 111 supra, the literature frequently mentions the open fields exception and the welfare search exception. However, each of these exceptions appears to exist exclusively in the case that originated it: the former in Air Pollution Variance Bd. v. Western Alfalfa Corp., 415 U.S. 881 (1974), the latter in Wyman v. James, 400 U.S. 309 (1971).

132. What has become known as the "pervasively regulated" exception to the warrant requirement has, at various stages in its development, gone under the rubric of the "licensing exception," doctrine of implied consent, and finally the "pervasively regulated" (or Colonnade-Biswell) exception.

The exception finds its modern roots in Davis v. United States, 328 U.S. 582 (1946). Federal agents, without a warrant, searched the defendant's gas station and determined that the proper number of gas coupons were not on hand. The Supreme Court affirmed the conviction on the grounds that, since the coupons were government property and not private documents, the defendant was only the custodian of government property (the coupons) and had to consent to the search.

The licensing exception bloomed in Peeples v. United States, 341 F.2d 60 (5th Cir.), cert. denied, 380 U.S. 988 (1965), which upheld the warrantless search of a federally licensed liquor dealer on the grounds that fourth amendment proscriptions do not apply as stringently where the search consists of an inspection of public documents that the federal licensee is required to keep. Many courts agreed, sanctioning warrantless searches "merely because the subject of a search was a licensee." Beyond the Fourth Amendment, supra note 11, at 96.

The weakness of the licensing exception was dramatized in United States v. Hart, 359 F. Supp. 835 (D. Del. 1973). In that case, the defendant gun dealer was convicted of a violation of federal gun control laws and, as a result, lost his license. Before going to prison, the defendant attempted to liquidate his remaining stock of weapons through an advertised sale. A federal agent noticed the advertisement and conducted a warrantless search of the defendant's premises. The district court granted the defendant's motion to suppress, holding that the warrantless exception applied only to licensed dealers. Since the defendant's license had been revoked, the government could no longer search the dealership without a warrant, even though the defendant was conducting an advertised sale of firearms after revocation of his license. Evidently, those dealers who have lost their license merit greater protection than those who have acted lawfully!

The court had earlier noted this inconsistency in United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972), by upholding a warrantless FDA inspection even though the FDA had not have licensing procedures. The test for reasonableness of the search examined the statutorily authorized degree of regulation over the particular industry; it was not dependent upon the presence or absence of a piece of paper called a license. 345 F. Supp. at 1377. Except for a few aberrant cases such as Hart, Del Campo signalled the demise of the licensing exception rationale.

Some courts relied on implied consent to justify warrantless inspections of regulated commercial enterprises. This approach was especially popular among state courts that upheld warrantless inspections enforcing state regulatory and licensing schemes. See, e.g.,
ception to apply, three conditions must be met: (1) the enterprise in question must be engaged in a “pervasively regulated business”; (2) warrantless inspection must be necessary to further an “urgent federal interest” expressed in authorizing legislation; and (3) that legislation must limit the time, place, and scope of authorized inspections.\textsuperscript{133} The definition of what industries fall within the “pervasively regulated” exception remains vague, but as previously noted, courts have so characterized several industries.\textsuperscript{134} In each of these industries the regulating statute addresses a fairly discrete, definable segment of commerce and is not applicable to business in interstate commerce generally.\textsuperscript{135}

The exception has been a target of scholarly criticism. Some claim that the exception is unnecessary and illogical. Since an administrative warrant is relatively easy to obtain and typically may be acquired through an ex parte hearing, the inspecting officer really has “no excuse for not obtaining one as a matter of

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\begin{enumerate}

Although one commentator suggests that the Colonnade and Biswell decisions and their progeny can be explained in terms of the implied consent doctrine, Beyond the Fourth Amendment, supra note 11, at 105, the cases more accurately reflect a refinement of the “pervasively regulated” exception:

Prior to Biswell, the validity of an administrative search was often resolved by reference to an “implied consent” theory: by entering the business, the citizen was presumed to have consented to governmental intrusions. “Implied consent” is, of course, a fiction, a catchphrase with no real content; the courts imply a consent to search which was never in fact given. Biswell applied a different analysis: where a dealer is provided in advance with detailed information concerning his obligations and the government’s inspection powers, the inspection program presents only a “limited” threat to the dealer’s “justifiable expectations of privacy.” This reasoning is more responsive to the fourth amendment concerns under a balancing theory than the “implied consent” rationale.

Greenberg, supra note 11, at 1025-26 (footnotes omitted).


134. See notes 69-71 supra and accompanying text.

\end{enumerate}
\end{footnotesize}
course or at least as a safety precaution when other validation factors such as consent are questionable. Moreover, no factors peculiar to pervasively regulated industries demand such unique treatment. It is difficult to see why an agent of the Division of Alcohol, Tobacco, and Firearms need not obtain a warrant to inspect a registered alcohol dealer, but an agent of the Federal Drug Enforcement Agency must do so to inspect a registered pharmacy. The fourth amendment appears neither to contain nor to condone such fine, indeed arbitrary, distinctions.

One especially troubling aspect of the “pervasively regulated” exception is the Court’s contention in *Biswell* that Congress’s expression of an urgent federal interest in the authorizing statute may justify an exception to the fourth amendment warrant requirement. The reasoning behind this argument threatens the entire fabric of the fourth amendment:

The obvious implication is that it is within the discretion of Congress to apply or not apply the fourth amendment, a postulate wholly inconsistent with the balance of interests theory of *Camara*—See *Terry*. Once there is a governmental intrusion the fourth amendment “applies”; a fourth amendment issue has at least been raised, and the proper inquiry is how it is to be resolved considering governmental needs and the protections due the citizens.

138. Greenberg, *supra* note 11, at 1018-19. The compelling interest argument for warrantless municipal code inspections of private dwellings has also been attacked:

> When the Constitution prohibits unreasonable searches, it, of course, by implication, permits reasonable searches. But *reasonableness without a warrant* is *adjudged solely by the extremity of the circumstances of the moment and not by any general characteristic of the officer or his mission*. If an officer is pursuing a felon who runs into a house and hides, the officer may follow and arrest him. But this is because under the exigencies of circumstances the law of pursuit supersedes the rule as to search. There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not. Moreover, except for the most urgent of necessities, the question of reasonableness is for a magistrate and not the enforcement officer.


The interpretation of the fourth amendment in *Little* is an exceedingly literal one, reminiscent of the stance taken by the majority in *Frank v. Maryland* and the dissenters in *See and Barlow’s*. Such an interpretation would require administrative authorities to find means other than area and periodic inspections of private dwellings to enforce code provisions. It would permit warrantless searches only where emergency conditions preclude obtaining a warrant; it would reject the *Camara*-See argument that requirement of a traditional probable cause warrant would frustrate enforcement. Although this interpretation may be an artifact that has been effectively displaced by subsequent decisions, the argument remains persuasive. Citizens’ constitutional privacy interests should not suffer because they impede law enforcement. The former are clearly paramount. Rather, the
The danger of this exception is that it sees only the government's interest in the search and not the threatened privacy of the subject of the search. This myopia contributed to the Supreme Court's decision in *Wyman v. James* where the Court allowed a warrantless administrative inspection of a welfare recipient's home. The appellee, an Aid to Families with Dependent Children recipient, refused to permit a caseworker to enter her home even after several days' advance notice of the visit. The New York aid program required home visits by caseworkers as a condition for continued assistance. Threatened with loss of her benefits, James sought injunctive and declaratory relief, arguing that such visits, lacking consent or a warrant supported by probable cause, violated the fourth and fourteenth amendments.

Although a three-judge district court panel allowed James's claim, the Supreme Court reversed and upheld the state visitation program. The Court's two-pronged opinion first suggested that the visitation program was not a fourth amendment search at all, noting that the state neither "forced" nor "compelled" the search and that there were no criminal sanctions for refusal to submit; if the recipient had withheld consent, there would have been no search. That argument is hardly overwhelming. Perhaps sensing the weakness of its first contention, the Court introduced a second argument, one more interesting for the purpose of this Note: Even if the visits were fourth amendment searches, they were reasonable ones and required no warrant. The Court reasoned analogously to *Colonnade* and *Biswell*, holding

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solution lies in more thoughtful and innovative drafting of legislation with new, constitutionally legitimate ways to enforce such code provisions. See note 174 infra.

140. 400 U.S. at 311-12 & nn. 2-4.
143. 400 U.S. at 317.
144. It is difficult to believe that such a visitation could not be considered a fourth amendment search. A government worker entered the home to see that the parent provided a suitable environment for the child and that welfare benefits were not misused. The intrusion necessary to determine these facts can hardly be minimal. Moreover, the assertion that the beneficiary has the right to refuse the visit without threat of government sanctions is both inaccurate and naive. The welfare recipient has no greater freedom to refuse the visit and forfeit future benefits than a businessman has to refuse entry to OSHA inspectors and shut down his business. In both situations, economic realities remove all elements of choice. This is especially true for the welfare recipient, who presumably applies for benefits out of necessity and must be practically destitute to qualify. Further, to deny a child support funds because of a mother's refusal to consent to a visit is contrary to the goals of the aid program.
that warrantless searches were the only effective way to carry out the statutory purpose, and that the public's enforcement interest outweighed James's privacy interest.\textsuperscript{145} This argument, too, has faced considerable criticism,\textsuperscript{146} as it inherits many of the faults inherent in the Colonnade-Biswell exception. The majority opinion appears to have cast aside fourth amendment guarantees merely because an "urgent federal interest" was at stake. But surely federal or state government may not remove a search from the purview of the fourth amendment simply by labeling it "urgent." Second, in asserting that a welfare search is less intrusive than a criminal one, the Court reverted to the ill-conceived distinction between civil and criminal searches that it rejected in Camara and See. Noncriminal searches triggered fourth amendment protection in those cases; home investigations by a welfare caseworker in Wyman, however, did not.

Regrettably, the Wyman Court too easily extended the "pervasively regulated" exception from businesses into the home. Although the government's interest arguably may be as important in Wyman as in Colonnade or Biswell, the privacy interests of the subject of the search are quite different. Yet by emphasizing the government's, and not the citizen's interests, the Court denied warrant protection in both situations.

Thus, basic difficulties remain in the Supreme Court's administrative search decisions. Establishing administrative probable cause in Camara, the Court inadequately anticipated several inconsistencies of a dual fourth amendment standard. Deficiencies in fourth amendment protection, most notably those caused by the "pervasively regulated" exception, will persist under any approach that weighs the government's enforcement interest more heavily than the citizen's privacy interest. Most disturbingly, however, the Wyman Court permitted a variant of that exception to creep into a private residence, denying the home fourth amendment protection that was deemed so vital in Camara and See.

\textsuperscript{145} The principal argument is threefold. First, the Court used a public trust rationale: The government, in fulfilling an important social goal, should have the power to see that the allocated public funds are spent properly by the recipient. See 400 U.S. at 318-19. Second, the Court distinguished the visit on the grounds that it was not a criminal type of search. 400 U.S. at 321-23. Finally, the Court asserted that a warrant requirement, to allow efficient enforcement, would have to be so diluted that it would provide little or no protection. 400 U.S. at 323-24.

III. A SUGGESTED APPROACH TO ADMINISTRATIVE INSPECTIONS: A COMMERCIAL-PRIVATE DWELLING DISTINCTION

Whatever the merits or demerits of the administrative probable cause standard, it is apt to remain. A dramatic shift in the Supreme Court’s thinking, aligning with the dissents’ rationale in *See* and *Barlow’s*, seems unlikely. Therefore, the real issue is not whether a dual standard of probable cause should exist, but to what situations the administrative standard, as opposed to traditional probable cause, should apply.

While commentators suggest several solutions, the Supreme Court has taken an ad hoc approach — determining whether a warrant is necessary for each inspection program as cases arise, formulating exceptions as needed. Yet, because fourth amendment protections are vital, some coherent doctrine of government searches should be developed. Such a coherent doctrine needs a reference point — a focus around which new refinements may reliably and consistently revolve. It has become clear that the *Camara-See* balancing approach fails to provide that reference point: the decisions have been unpredictable and inequitable. And yet a workable reference point has already been at least implicitly suggested. In fact, it practically leaps out of the fourth amendment. The fulcrum over which the choice between standards should balance is the potential intrusiveness of

147. Among the better suggestions is LaFave’s proposed dual requirements of notice and adversary proceedings before instigation of the inspection. See note 98 supra. Most likely, the Court has not taken this approach because it could undercut code enforcement in many areas where surprise checks are vital to ensure compliance. See, e.g., *See v. City of Seattle*, 387 U.S. 541, 545 n.6 (1967); *United States v. Biswell*, 406 U.S. 311, 316 (1972).

Another proposal would require administrative probable cause for “routine” searches and traditional probable cause for “non-routine” searches. *Administrative Search Warrants*, supra note 11, at 641-43. A routine inspection is described as one that is part of “a systematic program of inspection [that] naturally includes the property in question.” *Id.* at 641. Thus, a nonroutine inspection is one that is directed at a particular citizen or business upon suspicion of a violation. The author concludes that “when an inspection begins to approximate a traditional criminal investigation a warrant should never be issued in the absence of traditional probable cause.” *Id.* at 642.

Beyond the obvious problems for judges in refining this proposal’s distinction for application to borderline cases, the separation of routine and nonroutine searches suffers from the same pitfalls as the civil-criminal distinction. While not based upon the threat of potential criminal liability, the proposal still provides warrant protection for those particular individuals who are suspected of civil violations (by definition, these are subjects of nonroutine inspections) while providing no warrant protection for those suspected of no violations (the subjects of routine searches). The weaknesses of such an approach are discussed at notes 21, 37, and 111 supra.

148. See notes 79 & 87 supra.

149. See *Administrative Search Warrants*, supra note 11, at 621.
the search. The doctrine chosen must provide different levels of probable cause that principally reflect not the urgency of the government interest to be advanced, but rather the threat to citizens' privacy.

Traditional probable cause secures the right to privacy in its broadest sense: the right to be free from any government intrusion unless there is reason to suspect a violation of the law on the premises.\textsuperscript{150} Traditional probable cause thus can be seen as a device that guards the "indefeasible right to personal security, personal liberty, and private property."\textsuperscript{151} The interest was probably best described by Justice Brandeis: "the right to be let alone . . . the right most valued by civilized men."\textsuperscript{152}

Administrative probable cause, in contrast, provides little protection for privacy in that traditional sense.\textsuperscript{153} It does, however, supply a significant measure of fourth amendment protection. The magistrate in an administrative probable cause hearing reduces the threat that administrative inspections, through arbitrary or discriminatory application, will become a tool for harassment.\textsuperscript{154} Thus, although administrative probable cause may be established without suspicion of a specific violation, it protects the citizen's privacy from the capricious whim of the inspector.

So how is a court to know when a privacy interest is strong enough to justify the more stringent traditional standard, and when it is only strong enough to justify the weaker administrative standard? This Note contends that the answer lies in the most fundamental societal structure of privacy: the home.

A. Searches and Inspections of the Home: Traditional Probable Cause

If in one place a citizen's privacy interest is overpowering, it is in the home.\textsuperscript{155} In an era of pervasive government regulation

\textsuperscript{150} See text at notes 88-94 supra.
\textsuperscript{151} Boyd v. United States, 116 U.S. 616, 630 (1886).
\textsuperscript{152} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\textsuperscript{153} See Administrative Search Warrants, supra note 11, at 643; LaFave, supra note 11, at 37.
\textsuperscript{154} See text at note 84 supra.
\textsuperscript{155} In Wyman v. James, the Court observed:

When a case involves a home and some type of official intrusion into that home . . . an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home. . . . And over the years the Court has consistently been most protective of the privacy of the dwelling.
and control, the home stands as the last enclave against governmental scrutiny:

The values of the home protected by the Fourth Amendment are not peculiar to capitalism as we have known it; they are equally relevant to the new form of socialism which we are entering. Moreover, as the numbers of functionaries and inspectors multiply, the need for protection of the individual becomes indeed more essential if the values of a free society are to remain.

The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It prises more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassment of modern life. Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the home is such . . . .

The Supreme Court's treatment of pornography and its use in the home reflects that sanctity. In *Stanley v. Georgia*, the defendant appealed a conviction for possession of obscene material that police had found in his bedroom under authority of a warrant. Although the Court struck down the statute primarily

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400 U.S. at 316. This unique sanctity of the home has roots almost as old as civilization:

The peculiar immunity that the law has thrown around the dwelling house of man, pithily expressed in the maxim, "a man's house is his castle," was not an invention of English jurisprudence. Even in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection.

*N. Lasson*, supra note 113, at 13. Based upon this firm historical foundation, the English common law bestowed greater protection upon the "sanctity of an individual's home" than it did to the "privacy of his person." *Beaney*, supra note 111, at 235. The privacy interest in the home is nowhere better illustrated than in the famous words of William Pitt before Parliament in 1766:

*The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.*

*Quoted in N. Lasson*, supra note 113, at 49-50.

The principle of the home as a haven from government intrusion travelled across the Atlantic and is now embedded in American jurisprudence. Indeed, the sanctity of the home has been described as a "core value" of the fourth amendment:

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

*Silverman v. United States*, 365 U.S. 505, 511 (1961). It was in part that right to privacy in the home which led the Supreme Court to support the marital privacy right in the contraceptive cases. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

*156. Wyman v. James*, 400 U.S. at 335 (Douglas, J., dissenting) (emphasis original) (footnote omitted).

on first amendment grounds, the decision stressed that the search took place in the home:

[The appellant] is asserting the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.\textsuperscript{154}

Privacy in the home holds paramount respect in criminal search cases,\textsuperscript{159} and courts narrowly construe statutes that authorize home searches. In \textit{United States v. Consuelo-Gonzalez},\textsuperscript{160} for example, police discovered heroin during a warrantless search of a federal probationer's residence. One condition of her probation required that she submit to a search of her person or property at any time. The government argued that the Federal Probation Act of 1948\textsuperscript{161} authorized such a condition. The Ninth Circuit, however, refused to interpret the Act so broadly, invalidating the condition on the grounds that the Act did not authorize searches that failed to meet fourth amendment standards.\textsuperscript{162} No federal statute could force the probationer to surrender her right of privacy in the home as a condition for release.

Courts respect the home privacy interest for administrative searches as well. In \textit{District of Columbia v. Little},\textsuperscript{163} the defendant was convicted of interfering with a health inspector's duties

\textsuperscript{153} 394 U.S. at 565 (emphasis added). The Court also stated:

Moreover, in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right [to receive information and ideas, regardless of their social worth] takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. 394 U.S. at 564.

This implied "added dimension" has definite fourth amendment overtones. Although the Court's opinion relied primarily on the first amendment, it did not deny a possible fourth amendment violation; it simply did not reach the issue, although the opinion certainly borrows from fourth amendment rationale. Indeed, three Justices concurred in a separate opinion and specifically found a fourth amendment violation. 394 U.S. at 572. Had the search been warrantless or based upon less than traditional probable cause, it seems likely the entire Court would have reached that conclusion.

\textsuperscript{154} See \textit{McDonald v. United States}, 335 U.S. 451 (1949); \textit{Agnello v. United States}, 269 U.S. 20 (1925).

\textsuperscript{155} 394 U.S. at 565 (emphasis added).

\textsuperscript{156} See \textit{Latta v. Fitzharris}, 521 F.2d 246 (9th Cir.), cert. denied, 423 U.S. 897 (1975) (warrantless search of parolee's house by parole officers, as opposed to law enforcement officers in \textit{Consuelo-Gonzalez}, upheld).

after she refused to unlock her door at his command. The inspector had no warrant. The District of Columbia Circuit overturned the conviction, holding that the fourth amendment protected her from a warrantless search. Privacy in the home was a critical concern:

Even for the most important laws and even for the wisest and most benign officials, a search warrant must be had.

We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite. 164

The second Justice Harlan reached a similar conclusion about governmental searches of any kind involving the home:

I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. 165

This significant privacy interest demands greater protection than the ex parte administrative probable cause standard of

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164. 178 F.2d at 17.
165. Poe v. Ullman, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting) (emphasis added). In Poe, the Court refused to rule on the constitutionality of a Connecticut statute prohibiting the use or the dispensing of information about birth control devices because of lack of justiciability: the statute was seldom, if ever, enforced and the complainants were seeking declaratory judgment on a statute which the Court saw no reasonable probability of ever being prosecuted. The same statute was successfully attacked later in Griswold v. Connecticut, 381 U.S. 479 (1965).

Justice Harlan's dissent is also noteworthy because of its discussion of the unique nature of privacy in the home and how it may be threatened by the birth control statute:

[Here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights.

367 U.S. at 551-52 (emphasis added).

This final statement — that the privacy of the home is based upon more than property rights — supports the theory that the privacy interests surrounding the home are somehow different than the more property-oriented privacy interests of the business enterprise. See text at notes 179-83 infra.
Some argue that an administrative search is less intrusive upon personal privacy than a criminal search. But rationalizing that there is a lesser invasion of privacy in an inspection for electrical, fire, sanitation, or welfare violations than in a search for criminal evidence constitutes a very arbitrary definition of the right to privacy in the home. Under the present standard, the suspected criminal’s home receives a greater degree of protection than that of the citizen with falling ceiling tile. The only way to ensure privacy in the home is to require that warrants for home inspections be issued only upon showing of traditional probable cause.

Opponents of this stringent probable cause standard may argue that its use would emasculate municipal code enforcement. However, rational study of the problem alleviates many fears. First, voluntary consent removes the need for traditional probable cause, and occupants usually consent if the inspector is not unreasonable. The relative dearth of administrative warrant cases involving home searches, compared with the multitude involving commercial searches, supports this contention. In addition, most municipal health and safety inspections benefit principally the owners or occupants; they are the persons most likely to suffer because of dangerous conditions within the dwelling. Accordingly, the occupant’s opposition to an inspection weakens its justification.

Moreover, to the extent that traditional probable cause interferes with code enforcement, analogies to other areas of the law exist. We do not practice preventive criminal law enforcement by searching people at random to uncover evidence of an impending criminal act; rather, our constitutional system demands a trade-off between universal law enforcement and civil liberties. Likewise, the government does not compel the use of safety belts in cars or forbid the smoking of cigarettes even though a citizen’s decision in these matters may be foolhardy. We tolerate these situations because the values of privacy and independence outweigh the suffering that may result from an individual’s un-

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166. See Administrative Search Warrants, supra note 11, at 643; LaFave, supra note 11, at 37.
167. LaFave, supra note 11, at 19.
168. See note 109 supra.
169. See note 111 supra.
171. See 387 U.S. at 539.
wise decision. Such should be our valuation of a citizen's right to the utmost privacy in his home.\textsuperscript{173}

Although dangerous conditions in one house or apartment could harm surrounding neighbors, those concerns do not justify a lower standard of probable cause. If the fears of neighbors or fellow tenants are aroused by evidence of a code violation, they can report their observations and suspicions to appropriate authorities. If the evidence is convincing, it will provide traditional probable cause for a warrant. If, on the other hand, there is no outwardly observable code violation and the resident does not wish a government official to enter his home, the resident should be able to refuse entry. Administrative authorities must devise alternative, less intrusive means to enforce a statute.\textsuperscript{174} The right to be left alone warrants that respect.

\textsuperscript{173.} See Note, supra note 111, at 180-83.

\textsuperscript{174.} Such alternatives are available. For instance, one of the greatest concerns with requiring traditional probable cause for code inspections of dwellings is the impracticality of enforcement in multiple-unit dwellings. The worry is well-founded, as violations in multiple-unit dwellings present a hazard to large numbers of people who may be totally ignorant of their neighbors' violations.

A solution that satisfies the commercial-private dwelling distinction is possible. Several cities already have ordinances that require the owner of a building to have the premises inspected before he sells the structure or before he rents it to a new tenant. See Wilson v. City of Cincinnati, 46 Ohio St. 2d 138, 346 N.E.2d 666 (1976); Loventhal v. City of Mt. Vernon, 51 App. Div. 2d 732, 379 N.Y.S.2d 130 (1976).

Such statutes can reconcile meaningful apartment house inspections and the traditional probable cause requirement. For example, a city ordinance could require all landlords or owners of residential units to allow a general code inspection of the premises and to obtain a certificate of inspection as a prerequisite to the sale or leasing of any unit. The city authorities would have the power to conduct an inspection prior to granting the certificate if deemed necessary.

The certificate inspection would require a warrant based upon administrative, and not traditional, probable cause. The landlord would apply for the certificate after the previous tenant had vacated the premises. The code enforcement authorities, in turn, would be required to obtain the warrant and, if an inspection were determined to be necessary, inspect within a few days after the landlord gave notice of vacancy. If the authorities failed to inspect within this period, the certificate would be automatically granted, and the landlord could rent the premises.

Note that this arrangement does not offend the traditional probable cause requirement for the home. When an apartment or house is vacant between tenants, it is essentially the landlord's commercial property rather than a private dwelling. During that period, the structure could be inspected with a warrant based on administrative probable cause. Yet, at the same time, such an arrangement would ensure that the opportunity to inspect the dwelling exists at least as often as the apartment changes hands. It is unclear whether this scheme would permit an apartment to be inspected more or less often than under present random spot inspection plans, but it does provide greater protection of privacy than the spot checks while supplying a comparable level of enforcement. It also provides an additional incentive for the landlord to repair the rental unit for the next tenant.
B. Searches and Inspections of Commercial Premises: Administrative Probable Cause

Searches and inspections of business operations stand on a different footing than those conducted in the home. While it is undeniably true that businesses and corporations are entitled to fourth amendment protection,175 it does not necessarily follow that they deserve the same protection as private dwellings.

Even while extending fourth amendment protections to commercial enterprises in See, the Court recognized that more lenient requirements for inspection were appropriate in the business setting:

We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. . . . We hold only that the basic component of a reasonable search under the Fourth Amendment— that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises.176

This distinction is not only intuitively attractive; it also has considerable precedent supporting it. Corporations historically have been subject to broad state visitorial power.177 As creatures of the state, they are not entitled to all constitutional protections granted to private individuals.178


176. 387 U.S. at 545-46. In footnote 6 of See, the Court laid further groundwork for the idea that the treatment of businesses and private homes under the fourth amendment was not intended to be identical:

We do not decide whether warrants to inspect business premises may be issued only after access is refused [as argued in the Camara decision]; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

387 U.S. at 545 n.6.


178. 327 U.S. at 205. The distinction has been recognized elsewhere as well. In United States v. Colgate-Palmolive Co., 375 F. Supp. 962, 967 (D. Kan. 1974), the court flatly stated that “[c]orporations can claim no equality with individuals in the enjoyment of [the] right to privacy.” In GM Leasing Corp. v. United States, 429 U.S. 338, 353 (1977), the Court recognized that “business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context.”
A broader justification, however, for more lenient search requirements for commercial property lies in the balancing test first presented in *Camara*. In a business search, the government enforcement interest frequently weighs more heavily than in the search of a private dwelling, but the privacy interest of a business is considerably less than that of an individual home. A critical analysis of the Court's argument in *Marshall v. Barlow's, Inc.* supporting fourth amendment protection for businesses reveals the reason for that distinction.

Justice White's majority opinion in *Barlow's* states that businesses deserve fourth amendment protection because one of the evils that amendment sought to eliminate was the oppressive inspection of colonial merchants' premises. History does indeed support fourth amendment protection for businesses, but it does not indicate that they are on an equal plane with private dwellings. Merchants and businessmen in colonial times typically operated sole proprietorships, and the business shop frequently lay adjacent to the living quarters. The modern business concern, in contrast, is a large amalgamation of people and machinery that may itself be a separate legal entity. Moreover, a modern business may employ hundreds or thousands of workers and distribute products to be purchased by thousands of people over a large geographical area. No longer is the conduct of a business the private concern of a single proprietor. The health and safety interests of a business's many customers and employ-

180. See A. CONARD, R. KNauSs, & S. SIEGER, ENTERPRISE ORGANIZATION 1 (2d ed. 1977). The corporate form of commercial enterprise was virtually unknown in colonial times. Id. at 604.
182. Of course, that argument could lead to the conclusion that sole proprietorships should, like the home, be given the protection of the traditional probable cause requirement. However, the results of such a distinction could be arbitrary: Very small corporations would receive less protection than a large sole proprietorship solely because of the management's choice of business organization. It would also mean that courts would have to determine when a business affects the interests of enough consumers and employees to justify imposition of the administrative probable cause. As stated earlier, there is need for a bright line distinction between traditional and administrative probable cause. To that end, searches of commercial enterprise should require only administrative probable cause, regardless of the form of business organization, and private dwellings should receive the protection of traditional probable cause. Although even this classification is not without borderline cases, see, e.g., United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972), aff'd., 480 F.2d 918 (3d Cir. 1973), it appears clearer than one based upon the substantiality of a business's operations and the number of people affected.
ees severely dilute its own privacy interest. Thus, the government interests advanced by health and safety inspections of a business are great, and the privacy interest impinged is correspondingly slight. This balance contrasts starkly with the interests of a private home.

This is not, of course, an argument that businesses lie beyond the fourth amendment's warrant requirement. Rather, all businesses should have the protection that a nonpervasively regulated industry now enjoys — that of an administrative probable cause test. Necessary to this resolution, then, is the elimination of the "pervasively regulated" exception to the warrant requirement.

A strong argument for this conclusion emerges from an examination of how courts have distinguished OSHA inspections from the

183. Privacy interests may be limited in a public setting where the rights and welfare of other citizens are directly involved. In Public Utils. Commn. v. Pollak, 343 U.S. 451 (1952), disgruntled bus passengers sued the District of Columbia public utilities commission, alleging that radio programs broadcast on the buses invaded rights of privacy secured under the first and fifth amendments. (No fourth amendment issue was present as no search or seizure was involved.) The Commission had determined that the majority of the passengers favored the service. The Supreme Court held for the Commission, stating:

"This position [of the complainants] wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

343 U.S. at 464. The Pollak decision, though dealing with a public area, has implications for businesses as well. The Court lessened an individual's privacy interest as that individual left the haven of the home and ventured into the public. The same outcome probably would have resulted in Pollak had the bus been privately owned.

This analysis was confirmed in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973), where the Court upheld an injunction shutting down an adult theater even though there was no evidence that minors had been illegally admitted. The theater owners relied on the privacy arguments of the Stanley case, see text at notes 157-58 supra, but the Court distinguished that case on the grounds that Stanley involved the presence of obscene films in the home while Paris Adult Theatre I involved obscene films shown publicly by a commercial enterprise. The Court recognized what might be termed a zone of privacy around the home, implicitly limiting the privacy interest of a commercial enterprise.

184. For the commercial establishment, this is no illusory protection. Although the administrative probable cause standard does not afford the privacy protection of traditional probable cause, it has at least four definite advantages over warrantless searches: (1) It interposes an independent magistrate between the government inspector and the business firm, assuring that the search is neither arbitrary nor capricious. (2) The magistrate ensures that the inspection is properly limited in time, place, and scope, eliminating the unbridled discretion of the inspector. (3) The warrant notifies the business of the statutory limits of the search. (4) It identifies the facts presented to justify the search, in case the business later wants to question the validity of the warrant in court. See note 84 supra.

185. The Court's use of the Colonnade-Biswell exception recognizes this Note's suggested distinction between commercial facilities and private dwellings. The exception, however, goes too far, abusing fourth amendment guarantees.
Colonnade-Biswell exception.

Since the "pervasively regulated" exception applies only to statutes regulating a single industry, courts have refused to apply it to OSHA because OSHA covers practically all of American industry.\footnote{186} This argument wilts under scrutiny. If a primary basis for the "pervasively regulated" exception is an urgent federal interest in the authorizing statute, Congress could hardly express a more urgent interest than it did in OSHA.\footnote{187} Indeed, the interest that OSHA protects arguably benefits many more people (the whole of the American work force) than the narrower liquor, gun, or coal mine laws that the exception has embraced.\footnote{188} Assuming that a compelling interest justifies suspension of fourth amendment requirements in certain industries, a similar suspension certainly should follow when a broader statute states an even more compelling interest.\footnote{189} The point is not that OSHA should be included in the "pervasively regulated" exception, but rather that the exception itself is unsound.

Furthermore, there is little cause for fear that requiring administrative warrants for inspections of pervasively regulated industries will unduly frustrate enforcement. The issuance of administrative warrants based on ex parte hearings will not upset the surprise necessary for such searches, but it will afford the subject of the inspection a degree of fourth amendment protection.\footnote{190}


\footnote{187. The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . .

29 U.S.C. § 651(a) & (b) (1976).}

\footnote{188. The liquor industry may perhaps be a valid exception, due not so much to its long history of regulation as to its unique constitutional treatment in the twenty-first amendment.}

\footnote{189. In addition, the privacy interests at stake in an OSHA search may be less significant than in a search of a pervasively regulated business. One commentator argues that subjects of OSHA inspections, which take place in a semi-public work area, have a lesser "justifiable expectation of privacy" than pervasively regulated businesses have in locked storeroom areas. Comment, supra note 133, at 438.}

\footnote{190. See note 184 supra.
IV. Conclusion

The changes that this Note proposes for the theory of fourth amendment protection are in no way radical, but they would better protect the privacy of people and businesses without unduly hampering enforcement of government safety regulations. First, administrative searches of private dwellings should be removed from the administrative probable cause standard and placed under the traditional probable cause standard, which now covers no administrative searches. In particular, the warrantless welfare inspection of Wyman should be discarded, and welfare searches should require traditional probable cause since they invade the home. Furthermore, the “pervasively regulated” exception should end, and those industries it previously embraced should receive the benefit of the administrative probable cause standard.

This new analysis of administrative searches offers some degree of order and predictability in an area of constitutional law that has been uncertain for several years. It also has the advantage of fitting fairly well into existing case law.191 Most importantly, it rationally resolves the central problem of administrative searches: balancing the government’s enforcement interest against a citizen’s underestimated right to be left alone.

191. The only cases that fail to fit into the scheme are Colonnade, Biswell, and Wyman, all of which were incorrectly decided, for reasons discussed in text at notes 131-47 supra.