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CRIMINAL ENFORCEMENT OF ILLINOIS'
ENVIRONMENTAL PROTECTION LAWS: WILL
CRIMINAL SANCTIONS ENHANCE OR
HINDER THE STATE'S GOAL OF
A HEALTHFUL ENVIRONMENT?

DAVID A. WARD, 1983*

The Illinois Constitution of 1970 provides: "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."¹ To help ensure the attainment of this public policy, the Illinois General Assembly enacted the Illinois Environmental Protection Act² in June, 1970, creating the Environmental Protection Agency³ and the Pollution Control Board⁴ to enforce the state's land, air, water, and noise pollution laws.⁵ Violations of the state's anti-pollution laws carry both civil remedies in the form of fines or injunctions⁶ and criminal penalties.⁷

Until recently, the civil penalties imposed by the Pollution Control Board, which consisted of fines of up to \$10,000 per day of violation,⁸ were a much more utilized enforcement tool than the misdemeanor

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1. ILL. CONST. art. XI, § 1.

2. 1970 Ill. Law 76-2429, codified as amended at ILL. REV. STAT. ch. 111-½, §§ 1001-1051 (1981) [hereinafter referred to as "Ill. EPA Act" or "the Act"].

3. ILL. REV. STAT. ch. 111-½, § 1004 (1981). The Illinois Environmental Protection Agency is hereinafter called the Ill. EPA.

4. ILL. REV. STAT. ch. 111-½, § 1005 (1981).

5. ILL. REV. STAT. ch. 111-½, §§ 1008-1028 (1981).

6. ILL. REV. STAT. ch. 111-½, §§ 1042, 1043 (1981).

7. ILL. REV. STAT. ch. 111-½, § 1044 (1981). Whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. *United States v. Ward*, 448 U.S. 242, 248-50 (1980). The inquiry in this regard proceeds on two levels. First, it must be determined whether the legislature, in establishing the penalizing mechanism, indicated a preference for one label or the other. Second, where the legislature has indicated an intention to establish a civil penalty, it must further be determined whether the statutory sanctions are so punitive as to transform what was intended to be a civil remedy into a criminal penalty. *Id.* One important consideration is whether the legislature imposed both criminal and civil sanctions in respect to the same act. *Id.* Where the same act carries both civil and criminal penalties with the civil penalties being in the form of fines paid into a remedial fund, and the criminal penalties being imposed in a separate section of the act, the purported civil penalties are likely to be construed in fact as civil penalties even though they tend to be punitive in certain respects. *Id.* Thus, since the penalties contained in the Illinois EPA Act are designated by different statutory sections, and since the civil penalties are deposited into various remedial funds, it is likely that such characterizations by the Illinois General Assembly are sufficient to separate the two types of penalties.

8. ILL. REV. STAT. ch. 111-½, § 1042(a) (1981).

penalties provided as criminal sanctions.⁹ Between 1970 and 1980, over 3,700 orders have been issued by the Pollution Control Board,¹⁰ some of which contained civil fines of up to \$50,000.¹¹ Recently, however, enforcement attitudes have begun to shift as national attention begins to focus on the control of hazardous wastes.¹² Discovery in 1978 of hazardous waste contamination at the Love Canal area of Niagara Falls, New York, precipitated a national surge of investigation and publicity about hazardous waste disposal.¹³ Since then, thousands of disposal sites have been identified and an inestimable number of hidden and illegal sites are presumed by the United States Environmental Protection Agency to exist.¹⁴

The recognition of the widespread existence of hazardous waste disposal sites and the developing connection between toxic wastes and serious health problems have prompted an escalation of enforcement efforts in the hazardous waste area.¹⁵ At the same time, the magnitude

9. ILL. REV. STAT. ch. 111-½, § 1044(a) (1981). Before a 1981 amendment the Act only provided that it shall be a Class A misdemeanor to violate the Act. A misdemeanor in Illinois is defined as "any offense for which a sentence to a term of imprisonment in other than a penitentiary for less than one year may be imposed." ILL. REV. STAT. ch. 38, § 2-11 (1979). Misdemeanors in Illinois are classified, for the purpose of sentencing into Class A, Class B and Class C violations, with Class A being the most severe. ILL. REV. STAT. ch. 38, § 1005-5-1(c) (1981). Factors in aggravation and mitigation are considered at sentencing in setting the specific term of imprisonment. ILL. REV. STAT. ch. 38, §§ 1005-5-3.1 & 3.2 (1981). To date, no cases resulting in criminal convictions have been located by the author. The 1981 amendment, which is discussed in note 45 *infra* and accompanying text, now provides that "knowing" waste dumping is a felony.

10. POLLUTION CONTROL BD. TENTH YEAR ANN. REP. 23 [1980].

11. *Id.* at 19-22.

12. "Hazardous wastes" are defined as substances that can corrode standard materials or are so toxic that they pose substantial danger to human life and environment. EPA Characteristics for Identifying Hazardous Wastes, 40 C.F.R. §§ 261.3, 261.20-.24 (1981); or, in Illinois as substances which cause or contribute to an increase in mortality or serious illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or managed. ILL. REV. STAT. ch. 111-½, § 1003(g) (1981).

13. See N.Y. Times, Aug. 2, 1978, at 1, col. 1. After the first story was printed dozens of articles followed describing the Love Canal situation and publicizing hazardous waste disposal sites across the country. See, e.g., N.Y. Times, Aug. 5, 1978, at 1, col. 3; N.Y. Times, Aug. 6, 1978, at 24, col. 3; *Id.*, § 4, at 1, col. 3; N.Y. Times, Aug. 8, 1978, at 1, col. 2; N.Y. Times, Aug. 9, 1978, § B, at 1, col. 3; N.Y. Times, Dec. 12, 1978, § B, at 3, col. 6; N.Y. Times, Jan. 10, 1979, at 12, col. 1; N.Y. Times, Jan. 19, 1979, at 12, col. 6; N.Y. Times, Apr. 29, 1979, at 36, col. 1; N.Y. Times, Jan. 6, 1980, § 23, at 18, col. 3; N.Y. Times, June 7, 1980, at 23, col. 1; N.Y. Times, Aug. 1, 1980, at 1, col. 1; N.Y. Times, Aug. 7, 1980, at 14, col. 2; N.Y. Times, Nov. 19, 1980, at 27, col. 1; N.Y. Times, Feb. 1, 1981, at 1, col. 1; N.Y. Times, Feb. 14, 1981, at 26, col. 1; N.Y. Times, June 12, 1981, B 2, at 1, col. 5.

14. The United States Environmental Protection Agency (U.S. EPA) estimates that there are over 50,000 hazardous waste disposal sites throughout the country which have the potential of posing environmental and health problems. N.Y. Times, Apr. 29, 1979, at 36, col. 1. The U.S. EPA also estimates that 20 different industries operating 750,000 industrial plants generate 57 million tons of waste annually. Parisi, *Who Pays? Cleaning Up the Love Canals*, N.Y. Times, June 8, 1980, § 3, at 1, col. 1.

15. See the Toxic Substance Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. IV 1980); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV

of the costs associated with the clean-up of unlawful hazardous waste disposal sites is being realized. The United States Environmental Protection Agency places the clean-up costs at more than \$44 billion¹⁶—an amount most likely beyond current public resources. As a result of the realization of the serious dangers to health and the environment presented by hazardous wastes and the tremendously high costs associated with the clean-up of improperly disposed hazardous wastes, environmental enforcement officials have recently indicated a desire to proceed in certain cases criminally rather than civilly.¹⁷

Illinois, too, has begun to focus on the problems created by the generation and disposal of hazardous wastes. In 1980, for example, Illinois generated approximately 44 million gallons of liquid hazardous wastes and over 340,000 cubic yards of solid hazardous wastes—ranking Illinois second in the country in the generation of hazardous waste material.¹⁸ Perhaps the most widely publicized Illinois case involved the Earthline Corporation's hazardous waste disposal site at Wilsonville, Illinois, an area of the state which had been heavily coal mined in earlier years.¹⁹ The dispute began in April, 1977, after residents of the small village northeast of St. Louis learned of planned shipments to the site of earth from Missouri contaminated with polychlorinated biphenyls (PCB), a fire retardant and carcinogen.²⁰ Earthline was licensed to receive such hazardous wastes²¹ and disposed of numerous shipments before being ordered to close in August, 1978 by an Illinois circuit court which determined that the site constituted a

1980). These acts attempt to respond to the national health problem presented by hazardous wastes. For example, the National Cancer Institute estimates that between 60 and 90 percent of the cancer suffered by United States citizens is caused by environmental contaminants. 1976 U.S. CODE CONG. & AD. NEWS 4491, 4494.

16. See N.Y. Times, Apr. 29, 1979, at 36, col. 1.

17. See, e.g., Address by James W. Moorman, Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice, *Criminal Enforcement of the Pollution Control Laws*, reprinted in ABA COMMITTEE ON ENVIRONMENTAL LAW, *Environmental Enforcement* 25 (1978), wherein Assistant Attorney General Moorman stated:

I am a believer in the pollution control laws, their integrity and their vindication. I believe that they can control anti-social behavior. If properly enforced they will be both a sword and a shield. A shield to protect society; a sword to chasten those who would bring misery upon society. I want all to know, and none to doubt, that the Department of Justice intends to enforce those laws through criminal prosecution.

Id. at 28.

18. ILLINOIS LEGISLATIVE INVESTIGATING COMM'N, LANDFILLING OF SPECIAL AND HAZARDOUS WASTE IN ILLINOIS 7-8 (1981) [hereinafter cited as HAZARDOUS WASTE IN ILLINOIS].

19. See HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 172-203. See also State Journal-Register (Springfield), Mar. 10, 1982, at 1, col. 1; State Journal-Register (Springfield), Feb. 28, 1982, at 5, col. 1; Alton Telegraph, Mar. 5, 1982, at 2, col. 1; Bukrow, *Leaking Buried Toxic Wastes Stir Lawsuits in Illinois*, Chicago Tribune, Feb. 21, 1982, at 4, col. 1.

20. HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 173 & 181.

21. *Id.* at 174.

public nuisance.²² In May, 1981, the Illinois Supreme Court affirmed the decision in *Village of Wilsonville v. SCA Services, Inc.*²³ stating that the placement of a disposal site above a shaft or tunneled mine was unlawful.²⁴ Earthline Corporation recently agreed to drop its appeal to the United States Supreme Court when it was learned that chemicals had migrated off-site by underground seepage—a distance of about 250 feet.²⁵ Clean-up costs at Wilsonville are estimated at \$10 million to \$20 million.²⁶

Another publicized example of a hazardous waste violation occurred recently in Du Page County on a forest preserve. The violation involved White's Septic Tank Cleaning Service of Bartlett, Illinois.²⁷ As early as 1975, the Illinois EPA file on White disclosed dumping violations. White, whose firm was registered with Illinois EPA for the disposal of septic wastes, was suspected of dumping other liquid wastes on his farm in areas near the west branch of the Du Page River.²⁸ White's 1976 permit listed several warnings against the disposal of industrial or commercial wastes.²⁹ Later inspections also revealed "unpermitted liquids" on White's property.³⁰

On July 14, 1978, White requested that the Illinois EPA inspect his property. Field workers from the agency found the property in "excellent condition and in general compliance."³¹ This condition did not last long, however. Two weeks later, state officials again investigated the property and found that a "paint-like waste had been dumped indiscriminately" on the property near the Du Page River.³² In later testimony before the Illinois Legislative Investigating Commission, Mrs. White admitted that her husband had supplemented the business by

22. *Id.* The circuit court also ordered the contaminated wastes to be exhumed for shipment elsewhere.

23. 86 Ill. 2d 1; 426 N.E.2d 824 (1981).

24. *Id.* at 18; 426 N.E.2d at 832. The General Assembly amended the Act after the inception of the Wilsonville suit to prevent the placement of a hazardous waste disposal site above a shaft or mine. *Id.* Earthline Corporation is owned by SCA Services, Inc. HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 175.

25. *See* State Journal-Register (Springfield), Mar. 10, 1982, at 1, col. 1; Alton Telegraph, Mar. 5, 1982, at 2, col. 1; Belleville News Democrat, Feb. 21, 1982, at 4, col. 1. Experts for Earthline had testified that the chemicals would not migrate offsite within 500 years. Belleville News Democrat, Feb. 21, 1982, at 4, col. 1.

26. *See* State Journal-Register (Springfield), Mar. 10, 1982, at 1, col. 1.

27. *See* HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 131-37.

28. *Id.* at 131.

29. *Id.* at 131-32.

30. *Id.* at 132.

31. *Id.*

32. *Id.*

hauling industrial wastes.³³

The Du Page County Forest Preserve District later acquired part of White's property and recently unearthed forty barrels of toxic wastes on the land.³⁴ Investigators from the Illinois Department of Law Enforcement and the Illinois Attorney General's Office investigated the incident.³⁵ A civil suit filed by the Attorney General's Office against White is currently pending.³⁶

A third recent example of a hazardous waste violation involved the King-Seeley Thermos Company and its plant engineer, Keith Kohn, near Freeport, Illinois in Stephenson County.³⁷ A five-count civil suit filed by the Illinois Attorney General claims that Kohn and the company were responsible for dumping more than 300 barrels of flammable and toxic substances on Kohn's 100-acre farm. An investigation by the sheriff's department uncovered the barrels dumped in various sites on the farm including a culvert within 100 feet of the Peconica River.³⁸ The barrels, many of which were overturned and leaking, contained such toxic solvents as toluene, benzene, biphenyls, lead and chromium.³⁹ The dumping, for which Kohn received payment by King-Seeley is believed to have occurred for several years.⁴⁰ The Illinois Attorney General's civil suits against Kohn and King-Seeley are currently pending.⁴¹

Illinois lawmakers, cognizant of the high costs and dangers posed by hazardous wastes,⁴² recently increased the civil and criminal penal-

33. *Id.* at 133. Mr. White was not able to testify due to a developing poor health condition which necessitated hospitalization. Mr. White had also begun to develop a difficulty in remembering facts. *Id.*

34. *Id.* at 203.

35. *Id.*

36. Interview with Morton Friedman, Special Assistant Attorney General, in Chicago (March 22, 1982). Future references to this case will be made as "White Septic."

37. See Freeport Journal-Standard, July 9, 1981, at 1, col. 3.

38. *Id.*

39. *Id.*

40. *Id.*

41. Interview with Morton Friedman, Special Assistant Attorney General, in Chicago (March 22, 1982). Future references to this case will be made as the "King-Seeley" case.

42. Other recent cases or discoveries of hazardous waste violations in Illinois include: (1) Outboard Marine Corp. in Waukegan was found to have dumped large quantities of PCB's in Waukegan Harbor (Lake Michigan). Cleanup costs are estimated at \$17 million. Bukrow, *Leaking Buried Toxic Waste Stir Lawsuits in Illinois*, Chicago Tribune, Feb. 21, 1982, at 4, col. 1; (2) The Johns Manville Corporation reportedly has asbestos wastes piled on the Lake Michigan shoreline and another site in Lake County where a closed landfill is allegedly leaking chemicals. Waukegan News Sun, Mar. 1, 1982, at 1, col. 3; (3) The U.S. Ecology Corporation's nuclear waste landfill near Sheffield, Illinois is suspected of leaking radioactive tritium and other hazardous wastes from the disposal site. See HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 157-172; Peoria Journal-Star, Mar. 10, 1982, § B, at 10, col. 1; (4) Monsanto Corporation's landfill near Sauget, Illinois, along the Mississippi River near St. Louis is suspected of leaking PCB's and

ties imposed under the Illinois Environmental Protection Act.⁴³ The civil penalties for conducting any hazardous waste production, storage, transportation or disposal operations in violation of the Act have been increased to a maximum of \$25,000 per day of violation.⁴⁴ The criminal penalties also have been dramatically increased under the new Act. The severest of the new penalty provisions provides for the imposition of a Class 3 felony and a criminal fine of up to \$1,000,000.⁴⁵

PROBLEMS IN ENVIRONMENTAL LAW ENFORCEMENT

The escalation of penalties for unlawful dumping of hazardous wastes indicates that the government desires to deal aggressively and sternly with hazardous waste violators.⁴⁶ However, the use of the criminal system as an enforcement tool in the environmental context will likely result in many unique problems for law enforcement, environmental, and public health officials. First, the use of the criminal system will result in heightened constitutional protections afforded to suspected violators as compared to a system which relies primarily upon civil penalties as an enforcement tool. Government officials from the state environmental protection agency, department of public health,

dioxins, highly toxic substances suspected to cause serious genetic defects. *Belleville News Democrat*, Feb. 26, 1981, § A, at 1, col. 1; *St. Louis Post Dispatch*, Feb. 24, 1982, at 4, col. 1. Illinois officials have compiled a list of 28 known hazardous chemical dumps throughout the state. *Chicago Tribune*, Feb. 21, 1982, at 4, col. 1.

43. See Environmental Protection Act, Pub. Act No. 82-380, 1981 Ill. Legis. Serv. 1699 (West) (codified as ILL. REV. STAT. ch. 111-½, §§ 1003-1044). The amendment to the Act was effective September 3, 1981.

44. Environmental Protection Act, Pub. Act No. 82-380, 1981 Ill. Legis. Serv. § 42(b)(3), 1722 (West) ILL. REV. STAT. ch. 111-½, § 1042(b)(3).

45. Environmental Protection Act, Pub. Act No. 82-380, 1981 Ill. Legis. Serv. § 44(c)(2), 1723 (West) ILL. REV. STAT. ch. 111-½, § 1044(c)(2). A Class 3 felony is imposed upon a person or organization for the transportation, treatment, storage or disposal of hazardous waste in violation of the Act when the person or organization knows at the time that he (or it) thereby places another person in imminent danger of death or serious bodily injury, and whose conduct in the circumstances manifests in extreme indifference for human life. *Id.* Conduct which manifests an unjustified and inexcusable disregard for human life carries a Class 4 felony penalty and criminal fine not to exceed \$250,000 in the case of a person and \$1,000,000 in the case of an organization. *Id.*

The Illinois Criminal Code § 2-7 defines "felony" as an offense for which a sentence to death or to a term of imprisonment in a penitentiary for one year or more is provided. ILL. REV. STAT. ch. 38, § 2-7 (1981). The Unified Code of Corrections provides for six classifications of felonies: Murder, Class X, Class 1, Class 2, Class 3, and Class 4. ILL. REV. STAT. ch. 38, § 1005-5-1(b) (1981). Factors in aggravation and mitigation are considered at sentencing in setting the specific term of imprisonment. ILL. REV. STAT. ch. 38, §§ 1005-5-3.1 & 3.2 (1981).

46. One additional concern raised by HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 79-80, indicates that there is a very real potential for infiltration by organized crime into the hazardous waste disposal industry due to the high profits in the business. See also *Chicago Sun-Times*, Aug. 19, 1981, at 80, col. 2. While there was little evidence of organized crime involvement in Illinois landfill operations, SCA Services, Inc., owner of the Wilsonville landfill, is reported to have links to organized crime. *Chicago Sun-Times*, Aug. 19, 1981, at 80, col. 2.

natural resources institute, as well as numerous local health department officials and sanitary district employees will be in a position for the first time to have primary responsibility for ensuring that the state acts within the constitutional limitations placed on it by the United States and Illinois constitutions.⁴⁷

Second, the ability of government officials to rely upon the consent of citizens whose premises are being inspected, either expressly or impliedly through a licensing provision, may be severely diminished. Once persons who are the objects of inspections under the environmental enforcement program become aware of the stiff criminal sanctions now incorporated into the law, many will most likely deny consent for such inspections. As a result, officials will need to be prepared to obtain the requisite warrants in order to gain entry to premises for purposes of enforcing the environmental laws.

Similarly, use of certain recognized exceptions to the warrant requirement may not be feasible since unlike fire, floods, natural gas leaks or other emergencies, most hazardous wastes do not present themselves in a way to make the danger obvious to the investigator, agent or citizen. Many substances go undetected for years before the dangers are known.⁴⁸ If laboratory analysis of a substance is required before the danger becomes known, then a warrant may be required to gain access to the premises containing the unknown substance if any evidence so obtained would be used in criminal proceedings.

Last, the factual showing necessary to receive a warrant may be difficult even for the agent trained in the area of hazardous wastes. Due to the fact that there are thousands of potentially hazardous waste substances⁴⁹ and seemingly limitless ways for improper disposal, investigators may be forced to resort to lengthy surveillances in order to get the requisite facts to support the issuance of a search warrant. In the meantime, the dumping activities may be posing immediate, though undetected, health dangers and causing irreparable harm to the environment.

For purposes of analyzing and discussing these problems, violations of the Act will be grouped into three classifications: reporting

47. The Illinois Environmental Protection Agency has over 800 employees who must now be very cognizant of the constitutional limitations placed upon them if effective criminal enforcement of the environmental laws is to be achieved. POLLUTION CONTROL BD. TENTH YEAR ANN. REP. [1980]. Illinois law also provides for county public health departments, ILL. REV. STAT. ch 111-½, § 20c1 (1981), whose officials also consider the environmental health within their purview.

48. See notes 13 & 14 *supra*, and accompanying text.

49. An estimated 3,000,000 chemical compounds existed in 1976, and an estimated 250,000 new chemicals are created each year. 1976 U.S. CODE CONG. & AD. NEWS 4491, 4493.

violations by those persons or organizations which report to the Illinois EPA;⁵⁰ substantive violations by those persons or organizations which have otherwise properly registered with the Illinois EPA;⁵¹ and surreptitious dumping violations by persons or organizations, the so-called "midnight dumpers" who secretly dispose of wastes for a cheaper price than the industry would pay for safer disposal.⁵² The criminal penalties have most likely been created to deter violations of the Act's reporting requirements and violations by "midnight dumpers" and to more effectively punish those violators, while the stiffer civil penalties will most likely continue to be utilized for the substantive violations by those who have otherwise submitted to the government's regulation.

The Illinois Environmental Protection Act's entry provision states:

The [Illinois Environmental Protection] Agency shall have authority to enter at all reasonable times upon any private or public property for the purposes of inspecting and investigating to ascertain possible violations of the Act or of regulations thereunder, or of permits or terms or conditions thereof, *in accordance with constitutional limitations*.⁵³

In light of the greatly enhanced criminal penalties and the expected interest in the criminal enforcement of the environmental protection

50. "Reporting violations" as used in this note refers to the situation where a person or organization registers with the Illinois Environmental Protection Agency but intentionally fails to accurately report to the Agency the quantity or characteristic of the product produced or disposed of. The White Septic case reported in notes 27-36 *supra* and accompanying text is an example of a reporting violation.

51. "Substantive violators" is used to refer to those persons or organizations which have appropriately registered with the Illinois EPA but in some way (either intentionally or inadvertently) failed to comply with the substantive provisions of the law. The Wilsonville case discussed in notes 19-26 *supra* and accompanying text illustrates this type of violation.

52. As used in this note, the term "surreptitious violator" or "midnight dumpers" refers to those persons who dispose of hazardous wastes outside the legislative registration scheme. The King-Seeley case discussed in notes 37-41 *supra* and accompanying text presents an example of a surreptitious violation. While such violators are usually those who operate totally outside the government's purview, a reporting violator may also be a surreptitious violator as used herein. For other examples of midnight dumpers, see N.Y. Times, Jan. 19, 1979, at 12, col. 6 and N.Y. Times, Jan. 10, 1979, at 12, col. 1. Culprits range from ignorant and irresponsible persons who occasionally dump illegally to the operator who systematically evades the law. See, e.g., HAZARDOUS WASTE IN ILLINOIS at 69-79.

Costs for proper disposal of hazardous wastes are high. Generators pay as much as \$1.35 per gallon or \$155 per drum for proper disposal. HAZARDOUS WASTE IN ILLINOIS, *supra* note 18, at 72-73. Thus, one tank truck load of wastes may cost as much as \$9,000 to dispose of properly. *Id.* at 72. Another estimate places proper disposal costs of the types of hazardous wastes found at Love Canal at \$40 per ton. N.Y. Times, June 8, 1980, § 3, at 1, col. 1. Therefore, for certain businesses which have thousands of tons of hazardous wastes to dispose of, "midnight dumping" could prove to be worth the risk financially. Stiff criminal penalties, however, may result in a reconsideration of the extent of risk-taking certain individuals are willing to take.

53. ILL. REV. STAT. ch. 111-½, § 1004(d) (1981) (emphasis added). In addition, the Act provides for "regular or periodic inspection of actual or potential contaminant or noise sources, of public water suppliers, and of refuse disposal sites." ILL. REV. STAT. ch. 111-½, § 1004(c) (1981).

laws by state and local prosecutors, an analysis of the appropriate constitutional limitations referred to in the Act is appropriate. This note will compare the constitutional limitations upon government officials between an environmental enforcement system which relies primarily upon civil penalties and one which relies heavily upon the criminal system as a method for enforcement. Principal focus will be on the fourth amendment search and seizure limitations upon government officials in the environmental protection area. The note will specifically address the problem of requiring a warrant in the environmental context and the degree of factual showing required by the enforcement officer to establish the requisite probable cause. This note will also discuss certain exceptions to the search warrant requirement and their potential application to environmental enforcement of the hazardous waste laws. Last, this note will assess the potential impact of the use of the criminal enforcement system upon the state's ultimate goal of a healthful environment.

THE FOURTH AMENDMENT WARRANT REQUIREMENT

The fourth amendment to the United States Constitution protects individuals against unreasonable searches and seizures of their persons or property by the government.⁵⁴ The fourth amendment, applicable to the states through the fourteenth amendment, protects people, not places, and encompasses an individual's reasonable expectation of privacy.⁵⁵ It is the reasonableness provision of the fourth amendment which the courts are frequently called upon to rule.⁵⁶ There is no question that the warrant requirement of the fourth amendment applies to searches of individuals or their property when the person is suspected

54. The fourth amendment provides:

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

U.S. CONST. amend. IV.

The Illinois Constitution protects individuals against unreasonable searches, seizures and invasions of privacy. ILL. CONST. art. 1 § 6. However, the Illinois Supreme Court has repeatedly stated that there is no good reason for interpreting the search and seizure provision of the Illinois Constitution any differently from the fourth amendment. *See, e.g.*, *People v. Bak*, 45 Ill. 2d 140, 258 N.E.2d 341 (1970); *People v. Estrada*, 68 Ill. App. 3d 272, 386 N.E.2d 128, *cert. denied*, 444 U.S. 968 (1979). Therefore, although it is possible that the Illinois courts may choose to extend greater protection to individuals than afforded by the fourth amendment, Illinois courts currently interpret the state and federal provisions consistently.

55. *See Katz v. United States*, 389 U.S. 347, 351 (1967).

56. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Katz v. United States*, 389 U.S. 347 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

of being involved in a crime.⁵⁷ However, the Court has not been so consistent when the issue was the requirement of a warrant by government officials for the purpose of inspections pursuant to legislatively established regulatory programs. Prior to 1967, the Supreme Court had ruled that warrantless regulatory inspections of private property by government agency officials did not violate the fourth amendment where officials had cause to believe that a regulation was being violated since such regulatory inspections were considered less hostile intrusions than the typical policeman's search for the fruits and instrumentalities of crime.⁵⁸ But in 1967, in the companion cases of *Camara v. Municipal Court*⁵⁹ and *See v. City of Seattle*,⁶⁰ the Court reversed its earlier position and held that, with certain exceptions, administrative inspections⁶¹ of private property, either residential or commercial, are unreasonable if conducted without a valid search warrant and therefore are violative of the fourth amendment.⁶²

The extent of the warrant requirement of *Camara* and *See* was not clear for several years⁶³ until the recent decision of *Marshall v. Barlow's, Inc.*⁶⁴ The *Marshall v. Barlow's* Court, in holding that the statutory authorization for warrantless Occupational Safety and Health Act inspections of business establishments failed to meet the exception from fourth amendment requirements, and was therefore unconstitutional, stated:

[*Camara* and *See*] held that the Fourth Amendment prohibition

57. See *Katz v. United States*, 389 U.S. 347 (1967). The *Katz* Court stated that criminal searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment, except in limited circumstances. *Id.* at 357 n.18.

58. See *Frank v. Maryland*, 359 U.S. 360 (1959) (Upheld warrantless inspections of residences where city health inspectors have cause to suspect that a nuisance exists since the intrusion is so minor).

59. 387 U.S. 523 (1967).

60. 387 U.S. 541 (1967).

61. The term "administrative inspection" is used to refer to government intrusions which serve some administrative or regulatory purpose and are not aimed at securing evidence of criminal violations. Administrative inspections need only be supported by administrative probable cause. See text accompanying notes 92-120 *infra* for discussion of administrative probable cause.

62. *Camara* established the warrant requirement for administrative inspections of residential property, and *See* established the warrant requirement for administrative inspections of commercial property.

63. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) which held that certain welfare benefits could be terminated if a recipient refused to permit a warrantless home visit by a government caseworker. The *Wyman* decision prompted certain commentators to interpret the Court's opinion as sanctioning warrantless government intrusions when the only applicable penalties are civil or when the government has conferred a benefit on the citizen. See, e.g., Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341, 379-84 (1975); Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 616-22 (1974).

64. 436 U.S. 307 (1978).

against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. [Citations] The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."⁶⁵

Thus, based on *Camara*, *See* and *Marshall*, the warrant requirement of the fourth amendment applies to inspections conducted by officials of the Illinois Environmental Protection Agency. A warrant is required for inspections regardless of whether the inspectors are merely pursuing routine regulatory interests under the statute or whether the true purpose of the inspection is to investigate for purposes of ascertaining a criminal violation. The probable cause requirements, however, are significantly different depending upon the purpose of the intrusion. Therefore, unless some established exception to the warrant requirement is available,⁶⁶ Illinois environmental and health officials must first obtain a warrant before entering private property.

THE PROBABLE CAUSE REQUIREMENTS

Although the fourth amendment's warrant requirement applies to both administrative inspections and criminal searches, the probable cause requirement for issuance of a search warrant differs significantly between the two.⁶⁷ The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest.⁶⁸ Reasonableness is a determination to be made by a neutral and detached judicial officer, not by a law enforcement agent or administrative official.⁶⁹ However, the factual showing to establish probable cause for a criminal search is more particular than the showing required to show the reasonableness of a routine administrative inspection.⁷⁰

Probable Cause for Criminal Searches

The fourth amendment requires that the affidavit in support of a warrant shall particularly describe the place to be searched and the

65. *Id.* at 312 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

66. *See* text accompanying notes 121-95 *infra*.

67. *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

68. *Id.* at 539.

69. *See Johnson v. United States*, 333 U.S. 10, 14 n.3 (1948). The "judicial officer" requirement poses no special problem in Illinois since court clerks, attorneys general and sheriffs are not empowered by Illinois law to issue warrants. The Illinois Code of Criminal Procedure limits the issuance of search warrants to circuit and associate judges. ILL. REV. STAT. ch. 38, §§ 102-13, 108-4 (1981).

70. *See Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967).

things to be seized.⁷¹ The United States Supreme Court has determined probable cause for a search to exist where the facts and circumstances within the officer's knowledge and received from a reasonably reliable person are sufficient in themselves to warrant a reasonably prudent person in the belief that the items to be searched for are connected with criminal activity and that they will be found in the place searched.⁷²

The overriding concern in judging a warrant's specificity as to the place of the search is the assurance that the government officer will not have discretion as to the place searched.⁷³ This aspect of establishing criminal probable cause in the environmental enforcement context could require an extensive surveillance of a suspected hazardous waste disposal site or storage facility before the seeker of the warrant could establish sufficient facts and circumstances to convince a judge that the object of the search will be found at the particular place described. A large building with several floors or rooms, or an area of land with several buildings, or perhaps even a large fenced area of land could all pose problems to the agent in establishing the particularity of places where hazardous wastes are believed will be found. Indeed, many suspected hazardous waste disposal sites are spread over scores of acres and may be fenced in thereby limiting surveillance to the vehicles entering the site.⁷⁴ In addition, the passage of time that may be required to establish probable cause for a criminal search could have critical consequences where hazardous wastes are present. Small quantities of highly toxic substances, once improperly disposed of, may render the area unsafe for years.⁷⁵ Indeed, even a short exposure to certain haz-

71. U.S. CONST. amend. IV. Section 108-3 of the Illinois Code of Criminal Procedure provides:

[U]pon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which *particularly describes* the place or person, or both, to be searched and the things to be seized, any judge may issue a search warrant for the seizure of . . . any instruments, articles or things which have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued.

ILL. REV. STAT. ch. 38, § 108-3 (1981) (emphasis added).

72. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *People v. Francisco*, 44 Ill. 2d 373, 255 N.E.2d 413 (1970).

73. See *People v. Smith*, 20 Ill. 2d 345, 169 N.E.2d 777 (1960), wherein the court stated:

A search warrant must contain a description of the premises to be searched so specifically and accurately as to avoid any unnecessary or unauthorized invasion of the right of security. It should identify the premises in such a manner as to leave the officer no doubt and no discretion as to the premises to be searched.

Id. at 349, 169 N.E.2d at 780 (citations omitted).

74. See examples cited in note 42 *supra*.

75. See, e.g., 1976 U.S. CODE CONG. & AD. NEWS 6238, 6255-61. For example, in Havertown, Pennsylvania, a wood preservative company disposed of pentachlorophenol in 1952.

ardous wastes may cause serious health problems to those persons living or working in the area. However, quite unlike most emergency situations, the danger of hazardous wastes frequently does not present itself to persons exposed to the wastes since people usually are not aware of their presence. Thus, the time required to establish the particularity of the area to be searched under a standard of criminal probable cause may be counter-productive to the goal of protecting persons from an unhealthful environment.⁷⁶

Perhaps more stringent than particularity as to place is the fourth amendment requirement as to specificity of items to be seized.⁷⁷ In a situation involving a suspected hazardous waste violation, the requisite particularity of items to be seized may also present unique constitutional problems. Given the large number of chemical compounds currently in production and the number of new compounds created every year,⁷⁸ it is doubtful that an environmental enforcement agent could know the particularity of the waste substance prior to investigation. This investigatory problem is likely more critical for surreptitious dumping violations or for reporting violations than for violations by those who have otherwise voluntarily cooperated with the environmental regulatory effort since those who have registered with the Illinois EPA are not likely to refuse warrantless admission to their premises for purpose of inspection. However, the problem of specificity indicates the uniqueness of establishing probable cause for a criminal search and seizure in a hazardous waste context. It is unknown whether in fact the courts will require such a level of particularity in this context. Should a valid warrant be issued without the traditional level of specificity, an agent could seize items in plain view⁷⁹ once legally on the premises.

Illinois courts have indicated a willingness to consider the stage of the investigation and the circumstances involved in considering the suf-

The chemical has now entered a stream, killing all life in the stream for approximately five miles. In Perham, Minnesota, arsenic wastes disposed of over 30 years ago continue to contaminate local drinking water supplies. *Id.* See also notes 19-26 *supra* and accompanying text regarding the *Wilsonville* case. There, hazardous substances have migrated underground outside the site into water sources.

76. The Illinois Code of Criminal Procedure does provide, however, that warrants shall not be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. ILL. REV. STAT. ch. 38, § 108-14 (1981). This provision will mitigate non-material irregularities as to the particularity of the place to be searched.

77. U.S. CONST. amend. IV. See, e.g., *Berger v. New York*, 388 U.S. 41 (1967) (condemning general warrants for failing to particularly describe the items to be seized thereby leaving too much to the discretion of the officer executing the order).

78. An estimated 3,000,000 chemical compounds existed in 1976, and an estimated 250,000 chemicals are created each year. 1976 U.S. CODE CONG. & AD. NEWS 4491, 4493.

79. See text accompanying notes 192-95 *infra*.

iciency of the search warrant in the criminal setting. In *People ex rel. Carey v. Covelli*,⁸⁰ the Illinois Supreme Court in upholding a warrant to search a locked desk on the theory that the contents of the desk would give some clue to a homicide, indicated that a search warrant issued at an investigatory stage may be less specific than one following indictment.⁸¹ Illinois courts also have indicated that other circumstances may be present which support a flexible standard as to the specificity requirement. In *People v. Wolski*⁸² an affidavit's failure to specify with particularity the items to be seized did not invalidate the pre-arrest search warrant since the affidavit "described the items to be seized with as much exactitude as was possible at that stage of the investigation . . . and sufficiently limited the discretion to be exercised by the officers in conducting the search."⁸³ The courts have stated that in determining the adequacy of the description of property to be seized, "we must avoid placing an emphasis upon technical detail at the expense of common sense. . . . [W]here property of a specified nature, rather than particular property, is to be seized, a description of its general characteristics is sufficient."⁸⁴

*People v. Hanei*⁸⁵ presents a case on point. In *Hanei*, the defendant, who was charged with the thallium poisoning of his father, challenged the specificity of a warrant which did not mention the alleged crime of thallium poisoning but called for the seizure of items "which have been used in the commission of, or which constitute evidence of criminal conduct."⁸⁶ Specifically, the defendant moved to suppress a mortar and pestle returned under the warrant which were found to con-

80. 61 Ill. 2d 394, 336 N.E.2d 759 (1975) (warrant authorized a search of a safe of a deceased person on the theory that some clue to the homicide might be found within).

81. The court stated:

Analysis of the existence or nonexistence of probable cause begins with a consideration of the nature of the proceeding for which the evidence is sought. . . . [W]hat the constitutions prohibit is not all searches and seizures, but only those which are unreasonable. [Where] no criminal action pending . . . questions of materiality and relevance must be tested by a standard which is broader than that which is available when the issues have been delineated by . . . indictment and plea in a criminal case.

61 Ill. 2d at 403, 336 N.E.2d at 765 (citations omitted).

82. 83 Ill. App. 3d 17, 403 N.E.2d 528 (1980).

83. *Id.* at 23-24, 403 N.E.2d at 533 (citations omitted).

84. *People v. Collins*, 69 Ill. App.3d 413, 426, 387 N.E.2d 995, 1005 (1979) (Affidavit's reference to "forged checks," though a legal conclusion rather than a statement of fact, was insufficient grounds to quash the warrant). *See also* *People v. Raicevich*, 61 Ill. App. 3d 143, 377 N.E.2d 1266, 1270 (1978) ("When circumstances such as presented in this case make an exact description of items a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking"). *Id.* at 147, 377 N.E.2d at 1270 (citations omitted).

85. 81 Ill. App. 3d 690, 403 N.E.2d 16 (1980).

86. *Id.* at 701, 403 N.E.2d at 25.

tain traces of thallium. The court, in addressing the particularity of the warrant, stated:

The degree of particularity required in search warrants varies in degree with the nature of the material to be seized. . . .

It is understandable that the complaint and affidavits could be attended by some degree of indefiniteness in enumerating the particular items to be sought in the search. Thallium is a rare element, and the means of storing, preparation and delivery for criminal purposes would be largely unknown to police officers and investigators. . . . The officers were obviously not scientifically knowledgeable, they did not have any special training in laboratory techniques, and they had no idea what thallium looked like. They were as specific in their listing as the circumstances would allow. . . .⁸⁷

Therefore, a carefully worded affidavit which otherwise limits the scope of a requested search at the investigatory stage may survive a constitutional challenge even though the place to be searched and the things to be seized are not described with particularity as indicated by the fourth amendment.⁸⁸

The reasonableness of searches and seizures depends upon a balance between the public's interest and the individual's right to freedom from arbitrary interference by law officers.⁸⁹ Given the technical complexity involved in ascertaining whether a substance is a hazardous waste, and the large number of potential substances involved, a "broader standard"⁹⁰ for the description of items seized in an investigatory search by Illinois EPA officials and other health officials should be appropriate in the hazardous waste context, even though the purpose of the search is to look for evidence of criminal activity. Such a standard should be placed in the Illinois Code of Criminal Procedure to ensure that the public interest is adequately protected from the catastrophic consequences of improperly disposed hazardous wastes.⁹¹

Probable Cause for Administrative Inspections

Probable cause for issuance of an administrative search warrant can be established by a lesser showing of facts than that required for

87. *Id.* at 704-05, 403 N.E.2d at 27 (citations omitted).

88. The statutory grounds for a search warrant also requires particularity as to place to be searched and as to items to be seized. ILL. REV. STAT. ch. 38, § 108-3 (1981).

89. *See* *People v. Estrada*, 68 Ill. App. 3d 272, 279-80, 386 N.E.2d 128, 131, *cert. denied*, 444 U.S. 968 (1979) (Upholding systematic and undiscretionary brief stops of automobiles by local police to check safety equipment and registration in the interest of furthering public safety).

90. *See* generally *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 403, 336 N.E.2d 759, 765 (1975). *See also* note 81 and accompanying text *supra*.

91. Suggested statutory language may be found in text accompanying notes 206-13 *infra*.

the issuance of a criminal search warrant.⁹² If a valid public interest, as expressed in the legislative provisions calling for routine periodic inspections of private property by government officials, is "reasonable," then probable cause exists to issue a suitably restricted search warrant.⁹³ Although reasonableness is still a determination to be made by a neutral and detached judicial officer, as with criminal probable cause, reasonableness of administrative inspections of private property is measured by the existence and degree of legislative or administrative standards as expressed in the statute or regulation.⁹⁴ Such standards, which vary with the program being enforced, may be based upon the passage of time, the nature of the premises to be searched, or the condition of the entire area.⁹⁵ But such standards do not necessarily depend upon specific knowledge of the place or objects of the search.⁹⁶

The *Camara* Court listed several factors which combine to justify a lower standard required to establish probable cause for administrative inspection warrants.⁹⁷ First, administrative inspections have a long history of judicial and public acceptance. Second, the public interest is served by the prevention and abatement of dangerous conditions. Third, because administrative inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of a citizen's privacy.⁹⁸ Thus, warrants for

92. See *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967) (relying upon *Frank v. Maryland*, 359 U.S. 360, 380 (Douglas, J., dissenting)). It should be noted at this point that the Illinois warrant statute does not specifically provide for the issuance of administrative inspection warrants. ILL. REV. STAT. ch. 38, § 108-3 (1981). However, the provision of the Illinois Environmental Protection Act providing for inspections "in accordance with constitutional limitations" ILL. REV. STAT. ch. 111-½, § 1004(d) (1981), should be read to mean that the standards set by *Camara* for the issuance of administrative inspection warrants should be available to government officials where appropriate.

93. See *Camara*, 387 U.S. at 539.

94. *Id.* at 532-39.

95. *Id.* at 538.

96. *Id.*

97. *Id.* at 537.

98. The *Camara* Court supported its conclusions by quoting both the majority and dissent in *Frank v. Maryland*, 359 U.S. 360 (1959):

Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned.

Id. at 372 (majority opinion) (footnotes omitted).

This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumen-

the inspection of private property⁹⁹ pursuant to statutory or administrative standards may issue despite the absence of probable cause to believe that a specific violation has occurred.¹⁰⁰ Where the public interest is great and the statute or regulation calls for periodic inspection subject to reasonable standards, very little factual showing is required for issuance of a warrant.¹⁰¹

The third rationale of the Court—that administrative inspections are not aimed at the discovery of evidence of a crime—is puzzling. Commentators have questioned whether the provision means that the lower standard is not available when the object of the administrative inspection is criminal prosecution, or whether the provision means that the lower standard is available because the administrative inspections are less intensive than criminal investigations.¹⁰² The United States Supreme Court, however, has held to the position that, “[t]he deliberate use by the Government of an administrative warrant *for the purpose* of gathering evidence in a criminal case must meet stern resistance by the courts.”¹⁰³ Therefore, it is clear that where the true purpose of the “inspection” is to obtain evidence of criminal conduct, a warrant issued under administrative probable cause standard is insufficient to ensure adequate fourth amendment protection to the person whose property is the object of the “inspection”. Such “inspection” is a criminal search in reality and should be supported by criminal probable cause standards.¹⁰⁴

Recent decisions by California courts have placed the use of ad-

talities of crime. 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 facilities 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 Amendment can take into account the nature of the search that is being sought.

Id. at 383 (dissenting opinion).

99. The administrative probable cause standard is available for commercial property as well as residential property. See *v. City of Seattle*, 387 U.S. 541, 542 (1967).

100. See *Camara*, 387 U.S. at 534, 538.

101. See *United States v. Blanchard*, 495 F.2d 1329 (1st Cir. 1974) (An affidavit stating that a liquor establishment had not been inspected within the last twelve months under a federal inspection program authorizing periodic inspections was sufficient to support a valid administrative inspection warrant).

102. See 3 W. LAFAYETTE, SEARCH AND SEIZURE § 10.1 at 188 (1978) wherein the author suggests that administrative probable cause should be available when the object of the search is criminal prosecutions. The author notes there is confusion among courts in this area.

103. *Abel v. United States*, 362 U.S. 217, 226 (1960) (emphasis added).

104. For a discussion of sham or bad faith governmental operations, see the text accompanying notes 196-205 *infra*.

ministrative inspection warrants in doubt where criminal sanctions are pervasive in the regulatory scheme. The California Appellate Court for the Fifth District in *Salwasser Mfg. Co. v. Municipal Court*¹⁰⁵ held that in view of the possible penal consequences of the California Occupational Safety and Health Act, the fourth amendment requires that warrants issued for inspections of property under the Act be supported by criminal probable cause standards.¹⁰⁶ The court specifically rejected the state's argument that the administrative probable cause standard should be retained since the Cal/OSHA department seldom initiates criminal prosecutions for safety violations.¹⁰⁷ The court also stated that to permit entry under an administrative warrant would permit the government to seize evidence of a criminal violation under the plain view doctrine¹⁰⁸ thereby legitimizing a criminal search under the guise of a regulatory search.¹⁰⁹ Last, the court held that the federal constitution requires a showing of probable cause to believe that a Cal/OSHA violation currently exists on the premises to be inspected.¹¹⁰

Following California law as enunciated in *Salwasser*, the Federal District Court for the Northern District of California in *Rush v. Obledo*¹¹¹ held that the existence of misdemeanor penalties in the California Health and Safety Code requires that warrants issued for inspections of family day care homes be supported by criminal probable cause.¹¹² The court stated:

[I]f the state chooses to subject family day care providers to criminal sanctions, it must also afford them the full panoply of protections associated with the criminal justice system. Thus, for any inspection whose purpose is to determine whether or not a violation of the statutes or regulations governing family day care homes is occurring, the administrative inspection warrant to enter the home must be based upon [criminal] probable cause. . . .¹¹³

The court also indicated, however, that only those inspections which are not aimed at detecting violations, such as routine licensing inspections, are permitted under a warrant supported by administrative prob-

105. 94 Cal. App. 3d 223, 156 Cal. Rptr. 292 (1979).

106. *Id.* In addition to civil penalties, Cal/OSHA provides for a misdemeanor penalty of "imprisonment in the county jail not exceeding six months or by a fine not exceeding five thousand dollars (\$5,000) or by both." *Id.* at 231, 156 Cal. Rptr. at 297 (1979). Compare Cal/OSHA's penalty provision to Illinois EPA's criminal provisions of up to a Class 3 felony which carries a minimum one year sentence in the state penitentiary and up to a \$1,000,000 fine.

107. *Id.* at 233-34, 156 Cal. Rptr. at 298.

108. See discussion of the Plain View Doctrine, *infra*.

109. 94 Cal. App. 3d at 234, 156 Cal. Rptr. at 298-99.

110. *Id.* at 235, 156 Cal. Rptr. at 297.

111. 517 F. Supp. 905 (N.D. Cal. 1981).

112. *Id.* at 916-17.

113. *Id.* at 917.

able cause.¹¹⁴ Because good faith by the government is impliedly required, the administrative warrant is insufficient where there is prior suspicion that a violation is present.¹¹⁵

The California decisions virtually eliminate the problem of evaluating the good faith of the government inspector—where criminal penalties are present, warrants supported by criminal probable cause are necessary unless the inspection is for a routine license renewal.¹¹⁶ This eliminates the problem of determining the subjective intent of the inspector that could arise under the Supreme Court's holding in *Abel v. United States*¹¹⁷ which bars the use of administrative warrants for the purpose of obtaining evidence in a criminal case.¹¹⁸ However, should the California standard be applied by Illinois courts to non-licensing inspections of hazardous waste or other disposal sites, the goal of a healthful environment could be significantly thwarted. Indiscriminate dumping of highly toxic wastes could present an unknown immediate danger to hundreds or thousands of persons which could last for generations—plus cause a serious scar to the environment. It is questioned whether such an extension of greater fourth amendment protections, as provided by California courts, to inspections of potential hazardous waste sites would be well-conceived.

It should be remembered that the reasonableness of the government's intrusion depends upon a balance between the public interest and the individual's right to freedom from arbitrary interference by law officers.¹¹⁹ Thus, where officials of the Illinois EPA are conducting inspections of subjects who have registered with the agency, administrative inspection warrants should be sufficient to gain access unless the true object of the "inspection" is a search for hazardous waste violations for the purpose of criminal prosecution. However, searches involving premises not already a part of the regulatory scheme would ostensibly be a search for purposes of obtaining evidence of a statutory violation since such a search would not likely occur but for some prior suspicion of illegal conduct. Where such suspicion exists, a criminal probable cause standard will likely be required to sustain any subsequent criminal proceedings. Therefore, it appears that where the gov-

114. *Id.*

115. *Id.*

116. Clearly a warrant is not required where a legitimate exception to the warrant requirement is present. See text accompanying notes 121-95 *infra*.

117. 362 U.S. 217 (1960).

118. *Id.* at 226.

119. See *People v. Estrada*, 68 Ill. App. 3d 272, 275, 386 N.E.2d 128, 131, *cert. denied*, 444 U.S. 968 (1979). See note 89 and accompanying text *supra*.

ernment desires to proceed *criminally* against suspected hazardous waste violators, a criminal probable cause standard must be met. But where the government will proceed *civilly* against suspected violators of the state's environmental protection laws, or where the government has no prior suspicion of a violation, an administrative probable cause standard—one requiring little factual showing under the statute or regulations—need only be met. Such standard should result in a much more readily obtainable warrant,¹²⁰ and, hopefully, a shorter period of public exposure to environmental contaminants.

EXCEPTIONS TO THE REQUIREMENT OF A SEARCH WARRANT FOR ENVIRONMENTAL INSPECTIONS

The general rule that searches conducted without prior approval by judge or magistrate are *per se* unreasonable under the fourth amendment is subject to a few specifically established and well-delineated exceptions.¹²¹ A few of the exceptions recognized by the Supreme Court will undoubtedly play a significant role in the state's enforcement of the environmental protection laws. However, the burden is upon the state to show the need for an exception from the warrant requirement.¹²²

The principal classes of exceptions from the warrant requirement for inspections by Illinois EPA agents are consent, emergency, reduced expectation of privacy¹²³ and plain view evidence. However, the courts will assess the facts and circumstances on a case by case basis to determine if the warrantless entry onto private property was reasonable in either an administrative or criminal proceeding.¹²⁴

120. For a discussion of the availability of criminal proceedings following evidence obtained by way of an administrative warrant, see the discussion of the "Plain View" exception to the warrant requirement, discussed in the text accompanying notes 192-95 *infra*.

121. See *Katz v. United States*, 389 U.S. 347, 357 n.18 (1967).

122. See *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (State was required to show that the search was within a recognized exception to the warrant requirement).

123. Reduced expectation of privacy is not traditionally considered as an exception to the warrant requirement. Rather, where a citizen has no reasonable expectation of privacy the Court has generally held that governmental intrusions are not unreasonable and that the citizen has no standing to object to the government's search or seizure. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (Holding that a defendant may seek to exclude evidence derived from a search or seizure only if his legitimate expectation of privacy was violated). The examples discussed in this area indicate that the analysis is not so clearly made by the courts. *Id.* at 164 (White, J., dissenting). See, e.g., *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (Held that pollution readings of smoke from a smoke stack was within the "open fields" exception to the fourth amendment rather than holding that there was no reasonable expectation of privacy). See also text accompanying notes 154-91 *infra*.

124. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Consent

Express Consent

Consent is perhaps most frequently employed when inspecting property under administrative inspection schemes. Most citizens individually share the mutual interests of society in preventing and abating health and safety hazards¹²⁵ and therefore freely consent to inspections. Usually, the citizen does not have any reason to suspect that evidence of a crime will be discovered during the inspection or that the purpose of the inspection is to uncover evidence of criminal activity. However, where evidence of criminal activity is discovered during the course of an administrative inspection authorized by consent of the citizen, the state faces the burden of proving that the consent was, in fact, freely and voluntarily given.¹²⁶

"Voluntariness" of consent to a search is to be determined by the "totality of the circumstances" surrounding the alleged consensual inspection.¹²⁷ While factors such as age, intelligence and prior experiences of the citizen consenting to the inspection are considered, perhaps the single most important limitation upon the voluntariness determination is whether consent was actually given or rather whether the citizen merely acquiesced to an assertion of present authority to inspect.¹²⁸

It is not necessary that the citizen be told that he or she has the right to refuse to consent, although, in assessing the totality of the circumstances, such a warning would strongly support the consent theory of the state.¹²⁹ But, the threat to obtain a warrant unless consent is given does not vitiate subsequent consent.¹³⁰

Thus, it appears that unless consent is given without any assertion of authority by the inspector, or given after the citizen is informed that

125. See note 98 *supra*.

126. See *Bumper v. North Carolina*, 391 U.S. 543, 548 n.12 (1968); *People v. Kincaid*, 51 Ill. App. 3d 975, 979, 367 N.E.2d 456, 459 (1977).

127. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

128. See *Bumper v. North Carolina*, 391 U.S. 543 (1968). "The burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49 (footnote omitted). See also *United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969), where an inspector for the Food and Drug Administration was permitted to inspect a warehouse of a grocery company after telling the owner that inspections were required under the law, where in fact they were not. The court held that the circumstances indicated that consent was not freely and voluntarily given.

129. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

130. See *People v. Magby*, 37 Ill. 2d 197, 226 N.E.2d 33 (1967); *People v. Griffin*, 53 Ill. App. 3d 294, 368 N.E.2d 738 (1977). In *Griffin*, the court interpreted the threat as containing an implicit warning that the suspect could withhold consent. *Id.* at 297, 368 N.E.2d at 741.

consent may be withheld, the EPA inspector should first obtain an administrative warrant to inspect the premises. Consent may be less frequently given under the current regulatory scheme because of the harsh criminal penalties and therefore the inspector should be prepared to obtain the administrative warrant more frequently. Also, given the harsh criminal penalties, courts may become less willing to accept the argument that consent was freely and voluntarily given by a citizen facing criminal charges. Thus, an administrative warrant should be obtained in addition to requesting consent if it is possible that violations will be discovered. However, acquiring a warrant for the inspection of property under an administrative inspection scheme when the true purpose of the inspection is to search for evidence of a criminal violation raises questions of sham which will be discussed further under the section entitled Evasion of the Fourth Amendment.¹³¹

Implied Consent

Certain types of businesses, by the very nature of their activity, may be subject to warrantless inspections.¹³² A recent United States Supreme Court decision has given the most definitive statement yet on when warrantless inspections are reasonable without consent or some other exception.¹³³ In *Donovan v. Dewey*, the Court, in upholding the standards for warrantless entry onto mining operations by inspectors, set the following standards for warrantless inspections of private property:

- (1) Property must be commercial;
- (2) Warrantless inspections must be authorized by legislation;
- (3) Legislation must provide for regularity of inspections and clarity as to their purpose; and
- (4) Legislation must indicate that the hazards associated with the activity are so inherently dangerous that pervasive regulation of the business is necessary to such an extent that the expectation of privacy is diminished.¹³⁴

The Court concluded that the warrantless inspection scheme provided by the Federal Mine Safety and Health Act of 1977¹³⁵ met the

131. See text accompanying notes 196-205 *infra*.

132. See, e.g., *United States v. Biswell*, 406 U.S. 311 (1972) (Warrantless inspections of gun dealer's premises authorized by the Gun Control Act of 1968 are not violative of the fourth amendment); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (Congress may authorize warrantless inspections of establishments in the liquor industry).

133. See *Donovan v. Dewey*, 452 U.S. 594 (1981) (Upheld warrantless inspection program of mine operations by federal mine inspectors).

134. *Id.* at 598-602.

135. 30 U.S.C. § 813(a) (Supp. IV 1980).

newly announced standards. The entry section calls for "frequent inspections and investigations" each year for the purpose of gathering data concerning accidents and health standards, and for the purpose of determining whether imminent danger exists and whether there is compliance with the health or safety standards of the Act.¹³⁶ The inspections for hazards and compliance must be made at least four times per year.¹³⁷ It is also important to note that the Act contains both civil and criminal penalties.¹³⁸ The Court also indicated that new and emerging industries, such as the nuclear power industry, could be subject to warrantless searches given proper legislative declarations and guidelines for such inspection programs.¹³⁹

The Court's holding raises the question of whether the Illinois EPA Act is sufficient to authorize warrantless inspections. The Act's entry provisions state:

The [Environmental Protection] Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of inspecting and investigating to ascertain possible violations of the Act or of regulations thereunder, or of permits or terms or conditions thereof, *in accordance with constitutional limitations*.¹⁴⁰

Placing the Illinois EPA Act's entry provisions against the four legislative requirements enunciated by the Court in *Donovan v. Dewey*, it appears that the Act fails to constitutionally authorize warrantless inspections of private facilities by Illinois EPA agents.¹⁴¹ Although it is not clear from this language whether the Illinois General Assembly intended to authorize warrantless inspections of private facilities, it should be clear from *Donovan v. Dewey* that the regulation of hazardous waste disposal sites could be accomplished by way of warrantless inspections should the legislature so desire. The Court indicated that if the hazards associated with the particular activity are so inherently dangerous that pervasive regulation is necessary, the legislature could properly conclude that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are

136. *Id.*

137. *Id.*

138. 30 U.S.C. § 820 (Supp. IV 1980). Section 820(d) provides for up to \$25,000 fine and/or up to one year imprisonment for willful violations of the health and safety standards.

139. See *Donovan v. Dewey*, 452 U.S. 594, 606 (1981).

140. ILL. REV. STAT. ch. 111-½, § 1004(d) (1981) (emphasis added). In addition, the Act provides for "regular or periodic inspection of actual or potential contaminant or noise sources, of public water supplies, and of refuse disposal sites." ILL. REV. STAT. ch. 111-½, § 1004(c) (1981).

141. The Act fails to state that the inspections will be conducted at regular intervals (e.g., twice per year or every month) and that the inspections of commercial property shall be permitted without prior announcements and without warrants.

essential."¹⁴²

However, the Court also indicated that a warrant is required whenever commercial property is searched for the purpose of obtaining contraband or evidence of a crime absent express consent or exigent circumstances.¹⁴³ This statement by the Court apparently limits the purpose and scope of warrantless inspections. The provision against authorizing warrantless inspections for the purpose of searching for evidence of a crime indicates that where a suspicion exists prior to entry that a violation which is sanctioned by criminal penalties will be found, an appropriate warrant based on criminal probable cause must be obtained unless another valid exception to the warrant requirement is present. However, since certain violations of the Mine Safety Act also carry criminal penalties and since the Court approved periodic and unannounced warrantless inspections of mines, it is clear that criminal proceedings will not be barred following warrantless inspections where there is no case pending or no prior suspicion of a violation.

In light of the fact that consent may not be given as freely in the future, Illinois lawmakers should consider providing for warrantless entry in certain circumstances. In particular, warrantless entry should be provided for landfill sites throughout the state, whether or not the site is approved for hazardous waste disposal, so that the regulatory scheme serves as a credible deterrent.¹⁴⁴

Emergency

State and federal cases have held that the fourth amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.¹⁴⁵ Other cases have recognized the importance of prompt inspections by regulatory agents without warrants in emergency situations.¹⁴⁶ But the scope of the warrantless entry is limited by the extent of the emergency.¹⁴⁷ Once the area is secure and the situation no

142. *Donovan*, 452 U.S. at 603 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

143. *Donovan*, 452 U.S. at 598 n.6.

144. Suggested statutory language may be found in RECOMMENDATIONS, *infra*.

145. *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 392-93 n.6-7 (1978) (citing cases); *People v. Connolly*, 55 Ill. 2d 421, 427, 303 N.E.2d 409 (1973).

146. *See Michigan v. Tyler*, 436 U.S. 499 (1978) (warrantless search permitted by fire personnel to determine the cause of a blaze). *See also North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory smallpox vaccination); *Campagne Francaise v. Board of Health*, 186 U.S. 380 (1902) (health quarantine).

147. *See Mincey v. Arizona*, 437 U.S. 385, 393-95 (1978); *Michigan v. Tyler*, 436 U.S. 499, 511 (1978).

longer poses any immediate threat of harm to persons or property, traditional requirements for search warrants must be followed.¹⁴⁸

In situations where government officials rely on the emergency exception, a determination of the reasonableness of the government's action will depend upon a weighing of factors including the factual basis for believing that an emergency exists;¹⁴⁹ the potential for immediate harm to persons or property;¹⁵⁰ and the course of action chosen by the officer.¹⁵¹

The emergency exception also may be an appropriate exception in certain environmental cases—in particular hazardous wastes. Where an agent has a reasonable basis for believing that a health emergency exists and the potential for harm is immediate,¹⁵² the emergency exception may be appropriate. However, such a determination in reality may be difficult to make. Surreptitious hazardous waste disposal may result in serious harm to persons and the environment but such harm may or may not be as immediate as the threat posed by fire. Also, the agent may not know whether the disposed substance indeed presents a threat sufficient to justify an emergency until the substance is subjected to laboratory analysis. If that is the case, the basis for believing that an emergency exists may not be reasonable before such analysis. A determination of whether the officer's actions were reasonable will be made on a case by case basis and the emergency exception will not likely be approved by the court unless the agent making the warrantless entry can articulate a reasonable basis for believing that the emergency existed prior to entry.¹⁵³

148. See *Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (search of a crime scene several days after the crime requires a warrant); *Michigan v. Tyler*, 436 U.S. 499, 511 (1978). In *Michigan v. Tyler*, once the origin of the fire was discovered and placed under control, the emergency had ended. Any subsequent entries for the purpose of obtaining evidence of arson required search warrants issued under traditional probable cause standards. *Id.*

149. See, e.g., *People v. Mitchel*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976) (articulated the criteria for judging the reasonableness of an emergency intrusion).

150. See, e.g., *United States v. Costa*, 356 F. Supp. 606, 611-12 (D.D.C.), *aff'd without opinion*, 479 F.2d 921 (D.C. Cir. 1973).

151. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

152. See notes 149 and 150 *supra* and accompanying text.

153. Failure to justify a warrantless entry on some exception basis may result in loss of the case in both civil and criminal contexts. See *EVASION OF THE FOURTH AMENDMENT* *infra* and may even result in the state being liable in tort to the individual for a violation of his or her constitutional rights. See *Nahmod, Section 1983 and the "Background of Tort Liability"*, 50 *IND. L.J.* 5 (1974).

*Reduced Expectation of Privacy*¹⁵⁴

In *Katz v. United States*,¹⁵⁵ the Court held:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹⁵⁶

The Court intended to change the discussion of fourth amendment protection from that of "constitutionally protected areas" to that of "reasonable expectation of privacy."¹⁵⁷ Thus, under a *Katz* approach, a warrant may not be required to inspect property where there is little or no manifestation that an expectation of privacy exists or where the expectation of privacy is unreasonable.¹⁵⁸

Open Fields Doctrine

Prior to *Katz*, the 1924 Supreme Court held in *Hester v. United States*¹⁵⁹ that fourth amendment protection of "persons, houses, papers and effects, is not extended to the open fields."¹⁶⁰ The rule of *Hester* has become known as the Open Fields Doctrine. While the subsequent language of *Katz* would have appeared to qualify the doctrine, the Court in *Air Pollution Variance Bd. v. Western Alfalfa Corp.*¹⁶¹ followed the Open Fields Doctrine without any discussion of the principles enunciated in *Katz*.¹⁶² Although the Court cited support for the warrant requirement provisions of *Camara* and *See*, the Court held that in making visual air pollution readings on the property of smoke from a chimney at a distance of two stack heights away from the plant, the inspector is "well within the 'open fields' exception to the fourth amendment approved in *Hester*."¹⁶³

It is clear that the United States Supreme Court will adhere to the

154. See note 123 *supra*.

155. 389 U.S. 347 (1967).

156. *Id.* at 351-52 (citations omitted).

157. *Id.*

158. See, e.g., *United States v. Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). See notes 165-69 and accompanying text *infra*. A warrant also may not be required where an individual lacks standing to assert a fourth amendment violation. It is assumed in this note that persons who are the object of a search have the requisite standing. See note 123 *supra*.

159. 265 U.S. 57 (1924) (Jugs of illegal whiskey were seized in a field without a warrant after being dropped by fleeing individuals).

160. *Id.* at 59.

161. 416 U.S. 861 (1974).

162. *Id.*

163. *Id.* at 865 (emphasis added).

open fields exception to the warrant requirement in appropriate circumstances. There is, nevertheless, great tension between *Katz* and the Open Fields Doctrine since a person may exhibit a reasonable expectation of privacy in objects located in open fields.¹⁶⁴ Recent federal and state court decisions seem to read the two principles together. In *United States v. Ramapuram*,¹⁶⁵ the defendant had stashed stolen dynamite in the trunk of an eleven-year old "junkie" located on the defendant's father's farm several hundred yards from the public road. The farm was not the residence of defendant or his family and the lock had been removed from the trunk of the car. Acting on information from another suspect, federal agents proceeded at night, without a warrant, to the farm and recovered the dynamite from the trunk of the car.¹⁶⁶ The court held that such intrusion was not justified by exigent circumstances, but, nevertheless determined:

[The defendant's] interest in the farm and "junkie" was sufficiently lessened to compel the judgment that he could not legitimately expect that the contents of the unlocked trunk of the "junkie" situated in an open field would remain secure from prying eyes, irrespective of whether those eyes were private or government.¹⁶⁷

The court also noted, "It is sufficient here to observe that whatever expectation of privacy attends a closed but unsecured 'effect' generally is diminished where the 'effect' itself is placed in an area totally without the protection of the fourth amendment such as in an open field."¹⁶⁸ Thus, although the car was not visible to the agents from the public road, the court, in balancing the defendant's manifestation of an expectation of privacy against the Open Fields Doctrine determined that "no privacy interest protected by the fourth amendment was invaded. . . ."¹⁶⁹

Illinois courts have afforded inconsistent protection to citizens under the Open Fields Doctrine. The Illinois Supreme Court in *City of Decatur v. Kushmer*,¹⁷⁰ without specifically applying the Open Fields Doctrine, held that warrantless entry onto an unenclosed yard adjacent to the appellant's house to view and photograph a potential health hazard which could be viewed from public areas was not a search since

164. See, e.g., *People v. Pakula*, 89 Ill. App. 3d 789, 411 N.E.2d 1385 (1980). See notes 175-78 and accompanying text *infra*.

165. 632 F.2d 1149 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

166. *Id.* at 1151.

167. *Id.* at 1156.

168. *Id.* at 1155 (emphasis added).

169. *Id.* at 1156. Thus the court favored a *Katz* analysis over one which relied upon the Open Fields Doctrine.

170. 43 Ill. 2d 334, 253 N.E.2d 425 (1969).

there was no probing into private places. The court, citing *Hester*, noted in dictum that "the fact that the officials may have trespassed by entering the land would not, of itself, transform their viewing into an unreasonable search."¹⁷¹

Specifically applying the Open Fields Doctrine, the Illinois Appellate Court in *People v. Lashmett*¹⁷² held that a warrantless search of farm equipment located 125 yards from a farm residence, adjacent to a building but in the open, was not unreasonable under the fourth amendment, even though a sheriff crossed two fences to search the equipment.¹⁷³ The equipment was not visible from the public road, but could be seen from the air by persons flying at safe altitudes in the public air space.¹⁷⁴

Both *Kushmer* and *Lashmett* seem to hinge upon the fact that the objects in question could be viewed from public places thereby indicating no reasonable expectation of privacy. However, the courts applied the open fields exception to the warrant requirement rather than merely indicating that there was no reasonable manifestation of privacy. But in *People v. Pakula*,¹⁷⁵ the court emphasized the expectation of privacy principle of *Katz* and down-played the open fields arguments of both the state and the defendant.¹⁷⁶ The defendants in *Pakula* were growing cannabis plants in their back yard. The yard was enclosed by a chain link fence but the plants, nevertheless, were visible from a public sidewalk. Police entered the back yard without consent or warrant and seized the cannabis. The state argued that the Open Fields Doctrine applied to the back yard. The defendants argued that the back yard was protected by the fourth amendment since the protection extended to the curtilage of their residence.¹⁷⁷ The court stated, however:

In our view the determination of the issue presented to us, the legality of the seizure, should not turn exclusively upon the ancient property law concept of curtilage. '[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. [Citations]. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.' *Katz v. United States* (1967), 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507, 511.

171. *Id.* at 338-39, 253 N.E.2d at 428.

172. 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979).

173. *Id.* at 436, 389 N.E.2d at 893.

174. *Id.* at 436-37, 389 N.E.2d at 893.

175. 89 Ill. App. 3d 789, 411 N.E.2d 1385 (1980).

176. *Id.*

177. *Id.* at 792, 411 N.E.2d at 1388.

The Pakula back yard was completely enclosed by a fence and was not accessible to the general public. The officers gained entry to seize the cannabis by opening and going through the closed gate after Annette Pakula refused to consent to their warrantless entry. The Pakula's dog instinctively barked and confronted the police as intruders and had to be restrained. The facts of the present case establish that the defendants expected their back yard to be private and free from outside intrusion. Under the circumstances we believe this expectation of privacy was reasonable and one that society is prepared to recognize.¹⁷⁸

Similarly, a recent federal district court decision emphasized the expectation of privacy principle in an environmental search context. In *Dow Chemical v. United States*,¹⁷⁹ the court held that the open fields exception does not apply to the taking of high resolution aerial photographs of a 2000 acre chemical plant. In *Dow Chemical*, the plant site had been constructed so that access to the interior of the facility was secured by fencing and guards. In addition, the interior of the grounds were not visible from the roadways outside the facility. The United States Environmental Protection Agency, having been denied warrantless entry to the site, decided to fly over the plant at various altitudes and take high resolution photographs of the plant. The court held that Dow's manifestation of privacy was reasonable and that the prying nature of the high resolution photographs,¹⁸⁰ taken without prior judicial approval, violated the fourth amendment.¹⁸¹

From these cases, it would appear that the location of the object of the search is not the determinative aspect of whether the fourth amendment protection is justified. Rather, the manifestation of an expectation of privacy and its reasonableness seem to be the key. Therefore, the Open Fields Doctrine should not be relied upon alone by environmental enforcement agents to provide an exception to the warrant requirement of the fourth amendment. In the absence of a statute providing authority for warrantless entry to disposal sites or in the ab-

178. *Id.* at 793, 411 N.E.2d at 1388-89.

179. 536 F. Supp. 1355 (E.D. Mich. 1982).

180. The court found that the photographs taken at 1,200 feet above the facility, once enlarged, permitted the viewer to easily discern objects as small as one-half inch in size. *Id.* at 1357.

181. *Id.* at 1358-72. The court, therefore, refused to adhere rigidly to the Open Fields Doctrine, preferring instead to read the doctrine together with the privacy principles of *Katz*. This court left open the question of whether a mere flyover at an altitude in the public domain, or whether the taking of regular photographs, would have been violative of the fourth amendment. In light of the *Katz* principles and the Illinois court's decision in *People v. Lashmett*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979), it would seem that to view objects which could be viewed without the assistance of high resolution camera lenses would not be violative of the fourth amendment since it would be likely that no reasonable expectation of privacy had been manifested in such a circumstance.

sence of some exception to the warrant requirement, such as consent or emergency, the agent should attempt to obtain a suitably issued warrant prior to entering the premises. However, the foregoing analysis makes it clear that no warrant will be required where there is no reasonable manifestation of an expectation of privacy.

Abandonment

In *Hester v. United States*,¹⁸² the United States Supreme Court referred to whiskey jugs as "abandoned" in developing the open fields exception to the warrant requirement of the fourth amendment.¹⁸³ The Court provided no analysis of that term in the case, however. The Illinois Supreme Court has also applied an abandonment concept without defining abandonment. In *People v. Brasfield*,¹⁸⁴ the court stated that where "property was discarded by the defendant prior to his arrest," a warrantless search and seizure of the property did not bar it from being properly admitted as evidence.¹⁸⁵ In *Brasfield*, police officers saw the defendant toss a package over his head immediately prior to their search of it which revealed that the package contained narcotics. However, the court did not define what constituted abandonment.

The Illinois Appellate Court in *People v. Dorney*,¹⁸⁶ set out guidelines for the determination of whether property is abandoned:

[T]he Fourth Amendment protects people, not places, and when property is abandoned by an individual, that property is no longer within the zone of protection offered by the Fourth Amendment and can be searched and seized without a warrant. [Citation].

Whether an abandonment has occurred is a question of fact requiring an examination of the *intent and actions of the defendant* by the trier of fact.¹⁸⁷

In *Dorney*, the court held that returning to a burned-out trailer periodically to recover salvageable property did not constitute conduct consistent with a theory of abandonment.¹⁸⁸

Illinois courts have concluded that warrantless searches of trash in cans or bags deposited at either the curbside or still within the backyard of the defendant do not violate the fourth amendment since the act of placing property in refuse containers for removal is consistent

182. 265 U.S. 57 (1924).

183. *Id.* at 58.

184. 28 Ill. 2d 518, 192 N.E.2d 914 (1963).

185. *Id.* at 520, 192 N.E.2d at 915.

186. 17 Ill. App. 3d 785, 308 N.E.2d 646 (1974).

187. *Id.* at 787, 308 N.E.2d at 648 (emphasis added) (citations omitted).

188. *Id.* at 788, 308 N.E.2d at 648.

with the intent to abandon the property.¹⁸⁹ Thus, the abandonment theory could be utilized in a context involving the dumping of hazardous wastes.¹⁹⁰ It would appear from the courts' decisions that the abandonment theory also could legitimately be used in conjunction with an "open fields" theory where seized wastes were disposed in containers since the circumstances would indicate that the dumper had no reasonable expectation of privacy.¹⁹¹

Plain View Doctrine

Where government officials have gained lawful access to property by a warrant issued under a legislative scheme for administrative inspections or under one of the exceptions to the warrant requirement discussed above, they may seize property which is reasonably believed to be evidence of a crime or criminal activity.¹⁹² The principle that government officials may seize evidence of criminal activity without a warrant as long as they are in a place that they may lawfully be in is known as the Plain View Doctrine.

In addition to the requirement that the government officials must first be in a place that they may lawfully be, the United States Supreme Court has further stated that the discovery of evidence by way of the Plain View Doctrine must be truly inadvertent.¹⁹³ The Court has stated:

[T]he discovery of evidence in plain view must be inadvertent. . . . [W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it . . . [t]he requirement of a warrant to seize imposes no inconvenience

189. See, e.g., *People v. Stein*, 51 Ill. App. 3d 421, 366 N.E.2d 629 (1977); *People v. Huddleston*, 38 Ill. App.3d 277, 347 N.E.2d 76 (1976); *United States v. Shelby*, 573 F.2d 971, 973 (7th Cir.), cert. denied, 439 U.S. 841 (1978).

190. Here it is presumed that the violator is dumping on land which he or she owns or leases and otherwise demonstrates some expectation of privacy in connection with the property. If this were not the case, the violator would most likely not have standing to assert a violation of fourth amendment rights. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978).

191. Such a theory would be consistent with *United States v. Ramapuram*, 632 F.2d 1149 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (See notes 165-69 *supra* and accompanying text); *Dow Chemical v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982) (See notes 179-81 *supra* and accompanying text); and *People v. Lashmet*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979) (See notes 172-74 *supra* and accompanying text).

192. See *Harris v. United States*, 390 U.S. 234 (1968) (Warrantless seizure of evidence in plain view discovered by police officers while securing an impounded automobile is not violative of the fourth amendment); *People v. Childress*, 2 Ill. App. 3d 319, 276 N.E.2d 360 (1971) (Validity of warrant was not at issue since evidence seized was in plain view in a car parked on the street).

193. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion) (Warrantless seizure of an automobile in plain view to be used as evidence is violative of the fourth amendment where police had intended for some time to seize the automobile and no other exigencies were present).

whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances'.¹⁹⁴

Thus, if Illinois environmental enforcement officials have gained entry to property by some constitutionally acceptable means, they may seize that which they reasonably believe to be evidence of criminal activity without a warrant. For example, where the purpose of the entry was to carry out routine administrative inspections, and entry was obtained by way of an administrative search warrant, the official may seize that which is reasonably believed to be evidence of crime. EPA officials or law enforcement agents trained in the area of hazardous wastes would be most likely to recognize violations. However, other law enforcement officials would not necessarily have a reasonable belief that the observed substance constitutes a violation. In the latter situation, the plain view exception would not be very helpful. However, where the true purpose of the "inspection" is to search for evidence of criminal activity, the plain view exception is applicable only if the "inspection" is undertaken by means of a search warrant issued under the standards of criminal probable cause to search.¹⁹⁵

EVASION OF THE FOURTH AMENDMENT

Thus far, this note has concluded that the general rule for searches of premises when the purpose is to search for evidence of criminal conduct is that a warrant based upon the standards of criminal probable cause is required.¹⁹⁶ However, the existence of the Plain View Doctrine which permits government agents to seize that which they reasonably believe to be evidence of criminal activity when the agents are in a place that they may lawfully be, may allow government agents to seize evidence of criminal conduct where entry to premises has been gained by means other than a criminal search warrant. For example, agents of the Illinois EPA having gained access by means of a warrant issued under a lower standard of administrative probable cause may seize evidence of criminal activity under the Plain View Doctrine while on the premises being inspected. Similarly, agents who have gained entry by way of one of the recognized exceptions to the warrant requirement may also seize that which they reasonably believe to be evidence of a crime while on the premises.

194. *Id.* at 469-71.

195. Recall the California courts' concern over this form of potential abuse. *See* notes 105-15 *supra* and accompanying text.

196. *See* note 103 *supra* and accompanying text.

However, there are limitations upon use of the plain view exception by government agents. The Court stated in *Abel v. United States*¹⁹⁷ that "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."¹⁹⁸ In *Donovan v. Dewey*,¹⁹⁹ the Court warned that, absent consent or exigent circumstances, commercial property may not be entered for the purpose of searching for evidence of a crime without a warrant.²⁰⁰ *Coolidge v. New Hampshire*²⁰¹ stands for the proposition that discovery of evidence under the Plain View Doctrine must be inadvertent; where the discovery is anticipated, a warrant to seize must be obtained.²⁰² Thus, it would appear that whenever environmental enforcement agents anticipate the possibility of discovering evidence of a crime during an inspection, in order to use such evidence in a criminal proceeding, they should first obtain a warrant based upon criminal probable cause unless entry is gained by way of true consent or some other exception.²⁰³ However, in the context of environmental enforcement of hazardous waste violations, meeting the required showing for criminal probable cause to search may be difficult indeed. Hazardous wastes are frequently not perceptible to the enforcement officer especially where the violator has engaged in surreptitious dumping or has failed to report to the EPA the true nature of the wastes being disposed. Therefore, agents may begin to use inspection warrants or one of the warrant exceptions in order to gain entry. Once entry is gained, agents could use the Plain View Doctrine to seize evidence.²⁰⁴

If a number of criminal charges are brought in the future against violators of the provisions of the Act as a result of inspections authorized under a lesser standard of probable cause for administrative inspections or under some theory justifying warrantless entry, the potential for claims of sham arises. The courts have suppressed evidence obtained by searches of property where the government's true motives for the searches as shown by the facts were not supported by the theories used to gain access.²⁰⁵ Admittedly, one problem in assess-

197. 362 U.S. 217 (1960).

198. *Id.* at 226.

199. 452 U.S. 594 (1981).

200. *Id.* at 598 n.6.

201. 403 U.S. 443 (1971).

202. *Id.* at 469-71.

203. However, the use of consent as an exception may pose special problems for the state as well. See discussion of the consent exception in the text accompanying notes 125-44 *supra*.

204. See note 192 *supra*.

205. See, e.g., *People v. James*, 44 Ill. App. 3d 300, 358 N.E.2d 88 (1976); *People v. Lilly*, 38

ing claims of sham is that of analyzing the subjective motivation of the enforcement officer. But, nevertheless, upon motions by future criminal defendants to suppress evidence, Illinois courts will make such an analysis based upon the facts before them.

RECOMMENDATIONS

In order to facilitate the investigation of hazardous waste sites suspected of being in violation of the environmental laws, it is recommended that the state's criminal search warrant statute be amended. Such amendment would conform the statute to Illinois case law which recognizes that the technical complexity of certain problem areas makes the traditional standards of specificity for the issuance of a warrant impossible to reach.²⁰⁶ A "broader standard"²⁰⁷ to be applied by judges when issuing pre-indictment search warrants would permit valid searches under warrant of sites suspected of being in violation of the environmental laws even though probable cause as measured by traditional standards has not been shown. Incorporation of the broader standard into the search warrant statute would strike a reasonable balance between the public's interest in a healthful environment for present and future generations and the individual's right to freedom from arbitrary interference by government.²⁰⁸

Such an amendment to the state's search warrant statute²⁰⁹ might take the following form:

108-3. Grounds for search warrant

§108-3. Grounds for Search Warrant. (a) Except as provided in subsections (b) and (c), upon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which particularly describes the place or person or both, to be searched and the things to be seized, any judge may issue a search warrant for the seizure of the following:

(1) Any instruments, articles or things which have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued.

Ill. App. 3d 379, 347 N.E.2d 842 (1976) (both cases suppressing evidence found by officers after stopping autos on theories not supporting their true motives for the stops). See also Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198 (1977).

206. See cases cited in notes 80-90 *supra* and accompanying text.

207. See generally *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 403, 336 N.E.2d 759, 765 (1975). See also note 81 *supra* and accompanying text.

208. See *People v. Estrada*, 68 Ill. App. 3d 272, 275, 386 N.E.2d 128, 131, *cert. denied*, 444 U.S. 968 (1979) ("The reasonableness of searches and seizures depends upon a balance between the public's interest and the individual's right to freedom from arbitrary interference by law officers." *Id.*).

209. See ILL. REV. STAT. ch. 38, § 108-3 (1981). The proposed amendment is shown in italics.

(2) Any person who has been kidnaped in violation of the laws of this State, or who has been kidnaped in another jurisdiction and is now concealed within this State, or any human fetus or human corpse.

(b) When the things to be seized are the work product of, or used in the ordinary course of business, and in the possession, custody, or control of any person known to be engaged in the gathering or dissemination of news for the print or broadcast media, no judge may issue a search warrant unless the requirements set forth in subsection (a) are satisfied and there is probable cause to believe that:

(1) such person has committed or is committing a criminal offense; or

(2) the things to be seized will be destroyed or removed from the State if the search warrant is not issued.

(c) *Upon presentation of a complaint and affidavit for the search of a suspected hazardous waste site pursuant to Ill. Rev. Stat. ch. 111-1/2, § 1004(d), the issuing judge shall consider that the requisite degree of particularity varies with the stage of the investigation and the nature of the material seized. Such complaint and affidavit shall not fail to be sufficiently particular in its descriptions where there is an indefiniteness in the enumeration of the items to be sought in the search. Where circumstances indicate that the potential for serious danger to the public safety and the environment exists, descriptions of general characteristics shall be sufficient.*

In addition, the legislature should consider amending the Illinois Environmental Protection Act's entry provisions to permit warrantless entry to disposal sites and other pollution control facilities monitored by the Illinois EPA. The United States Supreme Court in *Donovan v. Dewey*²¹⁰ recently announced that an appropriately worded statute could permit warrantless entry to sites and facilities in the interest of environmental protection.²¹¹ Frequent unannounced inspections may be essential in the hazardous waste setting because the very nature of the threat from hazardous wastes militates against early and easy detection of violations. Once waste is improperly disposed, the very disasters that the Environmental Protection Act is designed to prevent may be undetectable for many years and may present an immediate danger to health and environment or build slowly to dangerous levels. Thus, frequent unannounced searches would greatly facilitate enforcement.

In order to comport with the standards announced in *Donovan v. Dewey*, such a statute must embody the following provisions:

210. 452 U.S. 594 (1981).

211. The Court stated that where appropriate, new or emerging industries including ones such as the nuclear power industry that pose enormous safety and health problems, could be subjected to warrantless inspections. *Id.* at 606. See also notes 133-44 *supra* and accompanying text.

- (1) Property must be commercial site, registered for hazardous waste disposal;
- (2) Warrantless inspections must be authorized by legislation;
- (3) The statute must provide for regularity of inspections and clarity as to their purpose; and
- (4) The statute must indicate that the hazards associated with the activity are so inherently dangerous that pervasive regulation of the business is necessary to such an extent that the expectation of privacy is diminished.²¹²

Therefore, it is recommended that the Environmental Protection Act's entry provision, Section 1004(d)²¹³ be amended to include the following language:

(d) *Authorized representatives of the Agency shall make frequent inspections and investigations of hazardous waste disposal sites regulated by the Agency for the purpose of:*

(1) *collecting and disseminating such information relating to the general conditions of such site or facility;*

(2) *acquiring such technical data and conducting such experiments as may be necessary to further the purpose of the Act;*

(3) *ascertaining whether any immediate danger to the public health, to the employees at the site or to the environment exists;*

(4) *determining whether there is compliance with the health and safety standards of this Act or with prior orders of the Agency.*

In carrying out the requirements of this subsection, no advance notice of inspection need be provided to any person. Nothing herein shall be construed so as to bar notification of any person by the Agency. In carrying out the requirements of clauses (3) and (4) of this subsection, the Agency shall make inspections of each site or facility in their entirety at least four times per year. The Agency shall develop guidelines for additional inspections based upon criteria including, but not limited to, the hazards found in earlier routine inspections at the sites or facilities and each site's or facility's experience of past violations of this Act. Such authority to enter premises regulated by this Act shall exist at all reasonable times.

CONCLUSION

Illinois has begun to take a "get tough" position regarding hazardous waste disposal. With knowledge of the dangers posed to personal health and the environment by the improper disposal of hazardous wastes, lawmakers recently increased both the civil and criminal penalties for violations of the state's environmental laws. However, careful consideration must be given to the use of the criminal system as a deterrent and enforcement tool in the environmental context. In order to

212. 452 U.S. at 598-602.

213. Ill. Rev. Stat. ch. 111-½, § 1004(d) (1981).

ensure that the heightened constitutional protections offered to citizens who are brought into the criminal system by the state do not thwart the goal of the enforcement effort, two changes to the state's laws should be considered. First, the state's criminal search warrant statute should be amended to ensure that judges may issue valid warrants where the specificity of the affidavit's statement of facts and description of property to be seized are less than the requisite particularity required in other contexts. Second, the state's environmental protection law entry provision should be amended to permit warrantless entry by state EPA officials. Both changes present themselves at this stage of the new enforcement effort as ones which sacrifice little in the way of constitutional protection but which may help to ensure that the ultimate goal of a healthful environment is met in the safest possible manner.

