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SUPREME COURT REVIEW

FOREWORD

PERPLEXING QUESTIONS ABOUT THREE BASIC FOURTH AMENDMENT ISSUES: FOURTH AMENDMENT ACTIVITY, PROBABLE CAUSE, AND THE WARRANT REQUIREMENT

JOSEPH D. GRANO*

I

INTRODUCTION

For a criminal procedure enthusiast, the Supreme Court's 1977 term added few "new stories to the temples of constitutional law."¹ Nevertheless, the term was important. The decisions this term should finally put to rest, if this has not already been done, the simplistic and inaccurate view of the present Court as an uncompromising champion of law enforcement interests.² Result-oriented ide-

ologues on both sides of the spectrum will have to discriminate carefully in hailing or lamenting the Court's work product this term.³ For example, the Court declined an invitation to limit further the right to counsel at identification procedures.⁴ Instead, it "extended"⁵ the right to preindictment

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¹ Douglas v. Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., dissenting).

² For an excellent study demonstrating the inaccuracy of this criticism of the Court, see Israel, *Criminal Procedure, The Burger Court, And the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977). But cf. Hartman, *Supreme Court Review (1974)—Foreword: The Burger Court—1973 Term: Leaving the Sixties Behind Us*, 65 J. CRIM. L. & C. 437 (1974) (referring disapprovingly to the "Burger Court" as a "champion of law and order"); Skinner, *Supreme Court Review (1976)—Foreword: A New Balance*, 67 J. CRIM. L. & C. 365 (1976) (approvingly observing that the Court has moved away from the "liberalism" of the Warren years).

The legal analysis of Supreme Court cases would be advanced by dropping political descriptions of the Court and its decisions. For one thing, political labels like liberal and conservative frequently have little meaning in constitutional analysis. In *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978), for example, the United States Chamber of Commerce and the American Conservative Union filed amicus briefs on behalf of the company supporting the need for a search warrant in OSHA inspections while the Sierra Club and the Friends of the Earth filed an amicus supporting the government. The "liberal" fourth amendment position was thus taken by the "conservative" advocates, and this position prevailed with the support of the "liberal" Justice Marshall.

Furthermore, the fallacy of a solid "Burger" block should now be apparent. In *Barlow's, id.*, Chief Justice Burger and Justice Powell adopted the "liberal" constitutional but "conservative" political position, while Justices Blackmun and Rehnquist went the other way. In *Franks v. Delaware*, 98 S. Ct. 2674 (1978), on the other hand, Justice Blackmun wrote the decision permitting defendants to challenge the truthfulness of statements in search warrant affidavits, while the Chief Justice and Justice Rehnquist dissented. Given this reality of individual judgment on the Court, the cartoon by Herblock, in response to *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978) (allowing search pursuant to warrant of newspaper office rather than requiring a subpoena) can only be described as a cheap shot. The cartoon, featured in TIME MAGAZINE, June 12, 1978, at 101, depicts former President Nixon standing with a victory salute behind his four appointees, each wearing a label describing him as a "Nixon Justice."

These extended remarks may seem to belabor the obvious, but experience in Criminal Procedure and Constitutional Law classes has convinced me that far too many students view both the Court and its decisions in an unanalytic, political manner. Sadder yet, this approach is frequently encouraged, deliberately or unwittingly, by faculty. See, e.g., Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971), an excellent article with an unfortunate title that conveys much the same message as the Herblock cartoon.

³ This is not something new this term. Compare *Wainwright v. Sykes*, 433 U.S. 72 (1977) (limiting habeas corpus) with *Brewer v. Williams*, 430 U.S. 387 (1977) (establishing a new role for the sixth amendment right to counsel in certain interrogation contexts).

⁴ *Moore v. Illinois*, 434 U.S. 220, (1977).

⁵ In *United States v. Wade*, 388 U.S. 218 (1967), the Court first applied the sixth amendment right to counsel to lineups. *Wade* involved a postindictment lineup. In *Kirby v. Illinois*, 406 U.S. 682, 684 (1972), the Court refused to "extend" this right to precharge identification

stages⁶ and to one-person showups⁷ while reaffirming the exclusionary rule in the context of identification evidence.⁸ Similarly ruling for defendants, the Court invalidated the Ohio death penalty statute,⁹ rejected proposed new exceptions to the search warrant requirement,¹⁰ and freed even further the double jeopardy protection from the limitations of its common law moorings.¹¹ On the other side, however, prosecutors also came away with some significant double jeopardy and search and seizure victories.¹² The Court further restricted the scope of the fourth amendment exclusionary remedy, this time by making it *almost* impossible to apply the fruit of the poisonous tree doctrine to a live witness.¹³ And in a case that certainly warrants careful

analysis, the Court found prosecutorial threats of more severe punishment virtually indistinguishable from promises of leniency as permissible inducements for guilty pleas.¹⁴

More pragmatically, the 1977 term produced some decisions that should have a favorable impact on the actual day-to-day operations of the criminal justice system. Most significantly, perhaps, the Court recognized a right of representation by separate counsel in joint trials, at least where counsel advises the court that joint representation could create a conflict of interest.¹⁵ By holding that an involuntary confession, unlike a confession obtained in violation of *Miranda*, cannot be used for any purpose,¹⁶ the Court reminded suppression hearing judges that separate voluntariness and *Miranda* rulings should be made with respect to each challenged confession. Similarly, by carefully re-examining the manifest necessity doctrine, the Court for the first time provided some concrete guidelines that should better enable trial judges to predict the double jeopardy ramifications of mistrial declarations.¹⁷

procedures. For the view that *Kirby* did not involve a question of extension, see Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 725-30 (1974).

⁶ The identification in *Moore* occurred at a judicial hearing that can best be described as a combination preliminary arraignment and preliminary examination. Since the Court had just recently applied the sixth amendment right to counsel to police interrogation occurring after the preliminary arraignment, *Brewer v. Williams*, 430 U.S. 387 (1977), it could not with intellectual honesty have limited the right to counsel to postindictment lineups. See also note 5 *supra*.

⁷ Until *Moore*, none of the Court's right to counsel cases had involved a showup. An extreme formalist could say that the lineup cases, see note 5 *supra*, did not dictate the result in cases involving a showup. Cf. *United States v. Ash*, 413 U.S. 632 (1973) (refusing to apply the lineup cases to photographic identifications). For a criticism of *Ash*, see Grano, *supra* note 5, at 759-71.

⁸ Only Justice Rehnquist expressed a desire to re-examine at some point the exclusionary rule in this context. 434 U.S. at 232 (Rehnquist, J., concurring).

⁹ *Lockett v. Ohio*, 98 S. Ct. 2954 (1978).

¹⁰ The search and seizure cases are the topic of this article.

¹¹ See, e.g., *Crist v. Bretz*, 98 S. Ct. 2156 (1978) (jeopardy attaches when the jury is empaneled and sworn).

¹² See, e.g., *Swisher v. Brady*, 98 S. Ct. 2699 (1978) (master's hearing and review by juvenile court do not constitute separate trials for double jeopardy purposes); *United States v. Scott*, 98 S. Ct. 2187 (1978) (government can appeal dismissal during trial granted at defendant's request).

¹³ *United States v. Ceccolini*, 435 U.S. 268 (1978). Writing for the Court, Justice Rehnquist refused to adopt a per se rule barring the exclusion of a witness' testimony. Chief Justice Burger would have gone this far. Given the conflicting goals of convicting the guilty and deterring unconstitutional police conduct, *Ceccolini* arguably achieved a correct balance. Nevertheless, the Court's assertion that free will has something to do with the purposes, and thus proper scope, of the exclusionary rule was not totally convincing: "The greater the willingness

of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." *Id.* at 276. Of course, the police cannot know in advance if an unknown witness will testify freely.

For a pre-*Ceccolini* criticism of the "free-will" analysis, see Pitler, "The Fruit of the Poisonous Tree" Revisited and *Shepardized*, 56 CAL. L. REV. 579, 621-24 (1968).

¹⁴ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

¹⁵ *Holloway v. Arkansas*, 435 U.S. 475 (1978). The Court's opinion is consistent with the view advocated by the American Bar Association. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.5 (Approved Draft, 1971). Interestingly, Chief Justice Burger, who authored *Holloway*, served as Chairman of the ABA Advisory Committee on the Prosecution and Defense Functions. The Court did refuse to adopt a per se rule dispensing with the need to make some minimal showing of conflict, but the opinion of Justice Powell is certainly correct in seeing the "seeds of a per se rule" in the Court's analysis. 435 U.S. at 491. (Powell, J., dissenting).

¹⁶ *Mincey v. Arizona*, 98 S. Ct. 2408 (1978). This should have been apparent after *Harris v. New York*, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda*, if otherwise voluntary, may be used for impeachment purposes). The Court also seemed to reaffirm the rule of automatic reversal in cases where an involuntary confession is actually used at trial.

¹⁷ *Arizona v. Washington*, 434 U.S. 497 (1978). Writing for the Court, Justice Stevens persuasively argued that the meaning of "necessity" must vary as a function of the particular reason given in support of a mistrial declaration. For example, the strictest appellate scrutiny

The 1977 term most deserves study, however, from the perspective of doctrinal development. In the double jeopardy area alone, the Court rendered eight written opinions and thus continued the avalanche that started three years ago. Whether this sudden interest in double jeopardy has produced an internally consistent doctrine remains to be analyzed.¹⁸ More intriguing than newly emerged doctrine are the seeds that have fallen, some perhaps inadvertently, that could blossom into landmark decisions in future terms. From this perspective, the search and seizure cases decided this term are the most fascinating.

The issues and holdings in the search and seizure cases were relatively straightforward and, with one exception, hardly novel. Taking the cases in decisional order, but excluding those that have little bearing on this article, the Court held in *Pennsylvania v. Mimms*¹⁹ that it is "reasonable" for police to order a lawfully stopped motorist out of the car even though they lack any articulable suspicion that the motorist is dangerous. Next,²⁰ toward the end of the term, the Court in *Marshall v. Barlow's, Inc.*²¹ held that OSHA²² inspectors need a search warrant when the owner of a business refuses to consent to a safety inspection. Adhering to *Camara v. Municipal Court*,²³ the *Barlow's* Court further maintained that probable cause can be established by a showing that reasonable administrative standards govern the particular inspection. In a similar decision, the Court held in *Michigan v. Tyler*²⁴ that fire inspectors seeking to ascertain the cause of a fire need a warrant when they return to a burned structure after the fire has been extinguished. The Court recognized that the fire itself creates an exigency that permits the warrantless entry of firefighters, and it also noted that fire officials do

of necessity is required when the prosecutor seeks a mistrial to buttress a weak case. *Id.* at 507-08.

¹⁸ The Court may be moving too quickly in this area. See, e.g., *United States v. Scott*, 98 S. Ct. 2187 (1978), where the Court, in a 5-4 opinion, found it necessary to overrule *United States v. Jenkins*, 420 U.S. 358 (1975). Justice Rehnquist authored both opinions.

¹⁹ 434 U.S. 106 (1977) (per curiam).

²⁰ After *Mimms*, the Court decided *United States v. Ceccolini*, 435 U.S. 268 (1978) (dealing with the fruit of the poisonous tree doctrine) and *Scott v. United States*, 98 S. Ct. 1717 (1978) (dealing with the minimization requirement in the wiretap statute and discussing the relevance of police motive in assessing the constitutionality of searches). Neither case is discussed in this article.

²¹ 98 S. Ct. 1816 (1978).

²² Occupational Safety and Health Act of 1970, 29 U.S.C. § 657 (1970).

²³ 387 U.S. 523 (1967).

²⁴ 98 S. Ct. 1942 (1978).

not need a warrant to remain in a burned building a reasonable time after the fire has been extinguished for purposes of investigating its cause.²⁵ As in *Barlow's*, the *Tyler* Court contended that traditional probable cause need not be shown for a fire inspection warrant, unless the fire officials are seeking evidence to be used in a criminal prosecution. Recognizing, however, that investigatory fire searches are responsive to individual events and thus different from routine administrative inspections like those conducted by OSHA, the Court held that the issuing magistrate should make a "particularized inquiry," taking into account factors such as the "number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders."²⁶

While the above cases involved application of obviously relevant precedent, *Zurcher v. Stanford Daily*²⁷ raised a question of first impression for the Court. Conceding that the police had probable cause to believe that evidence of crime would be found, the *Stanford Daily*, a student newspaper, nevertheless claimed that a search of its premises pursuant to a search warrant was illegal because the police did not first seek to obtain the evidence by subpoena. More specifically, the paper contended that the fourth amendment forbids a search of a person not suspected of crime unless there is probable cause to believe that a subpoena duces tecum would be impractical. The Court, however, rejected this contention and a related contention that the first amendment warranted this special protection for the press. Writing for the Court, Justice White, who also authored *Camara* in 1967 and the reaffirmation of *Camara* in *Barlow's*,²⁸ de-

²⁵ In a somewhat unusual holding, the Court characterized the early morning re-entries of the burned building, some four or five hours after the officials first left the building, as a "continuation" of the first entry. *Id.* at 1951.

²⁶ *Id.* at 1949.

²⁷ 98 S. Ct. 1970 (1978).

²⁸ It would be interesting to examine Justice White's effect on fourth amendment doctrine. He also authored *Chambers v. Maroney*, 399 U.S. 42 (1970) and *United States v. White*, 401 U.S. 745 (1971), two cases that this article argues should be overruled. His dissenting opinion in *Chimel v. California*, 395 U.S. 752 (1969), on the proper scope of a search incident to arrest, still seems to dominate much of his fourth amendment thinking. See, e.g., the debate between Justices Stewart and White in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). See also *United States v. Edwards*, 415 U.S. 800 (1974), where Justice White authored a 5-4 opinion that seems difficult

scribed the lower court's adoption of the paper's third party search rule as a "sweeping revision" of the fourth amendment without precedential support.²⁹ The Court thus held that probable cause that evidence will be found is a sufficient condition for a warrant to search third party premises. Justices Stewart and Marshall dissented on first amendment grounds, but more interesting for purposes of this article, Justice Stevens filed a lone dissent in which he framed the issue as one relating to the kind of probable cause that must be established in third party search cases.

In *Mincey v. Arizona*,³⁰ the Court overturned a decision of the Arizona Supreme Court that had recognized a murder scene exception to the warrant requirement. Reaffirming the now famous "principle" that warrantless searches are per se unreasonable unless they fall within "a few specifically established and well-delineated exceptions,"³¹ the Court concluded that the four day search at issue, which resulted in the seizure of over two hundred objects, could not be rationalized under an emergency theory. The Court did allow, however, warrantless searches for evidence that can be lost, destroyed or removed during the time required to obtain a warrant.³²

to square with prior decisions on the search incident to arrest doctrine. Indeed, the rejected rationale of Justice White's *Chimel* dissent seems to underlie the holdings in *Chambers*, *Eduards*, and perhaps even *United States v. Robinson*, 414 U.S. 218 (1973). Whether he has been right or wrong in his views, it seems fair to say that his opinions have resulted in much of the doctrinal uncertainty that permeates search and seizure law.

²⁹ 98 S. Ct. at 1975. Justice White also described the holding in the lower federal courts as "remarkable." *Id.* 1979. As this article attempts to demonstrate, Justice White's opinions in both *Camara* and *Barlow*'s made such unusually harsh criticism inappropriate. See section III B *infra*.

³⁰ 98 S. Ct. 2408 (1978).

³¹ *Id.* at 2412. For a persuasive argument that the warrant exceptions are neither well-delineated nor few, see Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977).

³² In *Franks v. Delaware*, 98 S. Ct. 2674 (1978), the last search and seizure case of the 1977 term, the Court held that a defendant is entitled to a hearing to challenge the truthfulness of a search warrant affidavit if he can make a substantial preliminary showing that a false statement, made intentionally or in reckless disregard of the truth, was made by the affiant. The Court thus reversed a Delaware court that had immunized such affidavits from challenge. Somewhat surprisingly, perhaps, the preliminary showing requirement, which will usually be impossible to satisfy, especially in cases where probable cause is based upon an alleged informant's tip, did not provoke a dissent. For an argument against the

Though seemingly simple and straightforward, the above five cases raise questions that go to the very heart of search and seizure law. While no area of criminal procedure, with the possible exception now of double jeopardy, is as complex as search and seizure, the latter can still fairly well be organized around three basic issues: (a) whether certain conduct constitutes a search or seizure—that is, whether fourth amendment activity is involved; (b) whether the fourth amendment activity at issue requires as justification full traditional probable cause or, instead, some other degree or kind of support; (c) whether the fourth amendment activity at issue requires prior judicial approval.³³ Unfortunately, the law is in disarray on each of these basic issues and the cases decided this term may further cause confusion. Even if the holdings in each of the five cases were correct—and good arguments can be made for most of them—the decisions raise serious questions about previously decided cases. The broad thesis of this article, then, is that this term's cases mandate some fundamental rethinking about some very old and basic questions and that such rethinking in turn mandates some fundamental changes.

II

FOURTH AMENDMENT ACTIVITY

A. NEW STATEMENTS ABOUT AN OLD ISSUE

The fourth amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."³⁴ By its terms, therefore, the fourth amendment does not protect against unreasonable governmental conduct that cannot be defined as a search or seizure, and presumably such unreasonable governmental conduct is constitutionally permissible unless it violates some other constitutional provision, such as the due process clause or the first amendment.³⁵ In determining over the years what

preliminary showing requirement, see Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Policy Perjury*, 1971 U. ILL. L.F. 405, 424-27. *Franks* will not be further discussed in this article.

³³ For an outline of the four other major issues that dominate search and seizure law, see Grano, *Criminal Procedure*, 1976 *Ann. Survey of Mich. Law*, 23 WAYNE L. REV. 517, 519 (1977).

³⁴ U.S. CONST. amend. IV.

³⁵ *Cf. United States v. Dionisio*, 410 U.S. 1, 15 (1973) (grand jury subpoena for voice exemplars did not impli-

constitutes a search or seizure, the Court has shifted from emphasizing the security of private property to emphasizing the security of some aspects of privacy.³⁶ At one time, for example, putting a tap on outside telephone lines was not considered a search, for such a tap neither required the police to intrude physically into a constitutionally protected area nor resulted in the taking of any tangible "effects."³⁷ In *Katz v. United States*,³⁸ however, the Court considered the matter quite differently:

For the 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.³⁹

To the *Katz* Court, the government's conduct of electronically eavesdropping upon a defendant's telephone conversation "violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."⁴⁰

By now, of course, the *Katz* justifiable or reasonable expectation of privacy test⁴¹ is familiar to all who take even the most rudimentary interest in

cate fourth amendment interests and accordingly did not have to satisfy "even the minimal requirement of reasonableness"). *Dionisio* did suggest, however, that due process concerns would be implicated by a showing that subpoenas were being used for harassment. *Id.* at 12. See also *Branzburg v. Hayes*, 408 U.S. 665 (1973) (suggesting that grand jury harassment of the press would implicate first amendment concerns).

³⁶ For an excellent review of both the shift in emphasis and its philosophical underpinnings, see Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977). A consideration of what constitutes fourth amendment activity appears in Y. KAMISAR, J. GRANO, & J. HADDAD, *SUM AND SUBSTANCE OF CRIMINAL PROCEDURE* 22-27 (1977).

³⁷ See *Olmstead v. United States*, 277 U.S. 438 (1928).

³⁸ 389 U.S. 347 (1967).

³⁹ *Id.* at 351-52.

⁴⁰ *Id.* at 353.

⁴¹ The "reasonable expectation of privacy" language comes from Justice Harlan's concurring opinion in *Katz*. 389 U.S. at 360 (Harlan, J., concurring). Lower courts quickly seized upon this language as stating the appropriate test, and in post-*Katz* cases, the Supreme Court itself used the Harlan formulation. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (grand jury subpoena for voice exemplars does not implicate fourth amendment interests because "no person can have a reasonable expectation that others will not know the sound of his voice").

fourth amendment law. Equally familiar, however, is the doctrinal chaos that this test has created.⁴² Obviously designed to extend fourth amendment protections to governmental invasions of security made possible by technological development and the growth of modern police forces,⁴³ the test has been used both to extend constitutional protection to the most trivial interests⁴⁴ and to withhold, or withdraw, constitutional protection from interests that seem basic in a free society.⁴⁵ That *Katz* would be used for both purposes was perhaps inevitable given the inherent ambiguity in its new test.⁴⁶

It should cause little surprise, therefore, that the government in three of the search and seizure cases this term relied on *Katz* to suggest an end run around traditional fourth amendment "reasonableness" requirements. In the most restrained of the three arguments, the government argued in *Barlow's* that "there are areas of a commercial building in which the owner does not have a significant expectation of privacy from reasonable, limited-purpose inspections during business hours."⁴⁷ Stated in slightly different words, the government

⁴² For a good discussion of the problem, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-58, 363-65, 380-409 (1974). See also Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75 (1976).

⁴³ See Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 468, 475 (1976). For a prescient forecast of the dangers of electronic surveillance long before they materialized, see *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). *Katz*, by overruling *Olmstead*, encompassed these dangers within the scope of the fourth amendment.

⁴⁴ It has been held, for example, that the use of sniffing dogs constitutes a search. See Peebles, note 42 *supra*.

⁴⁵ See, e.g., *United States v. Miller*, 425 U.S. 435 (1976) (government subpoena for depositor's bank records); *People v. Guerra*, 21 Cal. App. 3d 534, 98 Cal. Rptr. 627 (1971) (police press ears to apartment doorway to overhear conversations within; court indicates that persons desiring privacy should whisper). *Miller* is discussed extensively in section II B 2 *infra*.

⁴⁶ Commentators have been virtually unanimous in finding the new test ambiguous. See, e.g., Amsterdam, *supra* note 42, at 383-86; Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U.L. REV. 831, 838 (1973); Note, *supra* note 43, at 471. For an article predicting the confusion that has surrounded the *Katz* test, see Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133 (P. Kurland ed.).

⁴⁷ Brief for Appellants at 28-29, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (emphasis added). The argument did not go to the extreme of contending that the employer had no expectation of privacy whatsoever. Compare that argument with the prosecutor's argument in *Tyler* described in the text at notes 59-60 *infra*.

argued that OSHA inspections do not "touch upon interests that implicate 'the essential purpose of the Fourth Amendment.'"⁴⁸ The rationale for this position was quite simple:

While the work areas of a conventional factory housing a legitimate business enterprise may be closed to the general public . . . their routine occupation by the owner's employees and the frequent visits by those outside parties who deliver materials for the conduct of the enterprise effectively diminish any claim of privacy by the factory owner with respect to such areas—especially vis-a-vis inspectors whose mission is to insure the health and safety of the very employees whom the owner has assigned for his profit to the areas at issue.⁴⁹

The government further reasoned that the pervasiveness of state and national safety regulations refutes the view that an employer can have a "realistic privacy interest" in employee work areas.⁵⁰

In an opinion authored by Justice White, the Court rejected these arguments. It concluded that an individual can have a reasonable expectation of privacy against the government even though such an expectation may not exist against certain private individuals. As Justice White noted:

The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent. Employees are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.⁵¹

⁴⁸ *Id.* at 29 (quoting *Jones v. United States*, 357 U.S. 493, 498 (1958)).

⁴⁹ *Id.* at 29.

⁵⁰ Reply Brief for Appellants at 3, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

⁵¹ *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1821-22. *Cf. Stoner v. California*, 376 U.S. 483, 489-90 (1964) (reasoning that although hotel patron gives implied consent to maids and other hotel employees to enter his room in the performance of their duties, such consent does not extend to entry by government agents in search of evidence).

The government's argument that pervasive regulation had severely diminished the reasonableness of an employer's privacy expectations was more difficult, and the Court did not handle it as well. The Court agreed that government can reduce or negate reasonable expectations of privacy, but it narrowed the implications of this position by suggesting that a long history of governmental oversight and regulation was required to accomplish such a result.⁵² This qualification, however, cannot explain *United States v. Biswell*,⁵³ also authored by Justice White, where the Court just six years ago found the relative recency of federal firearms regulation irrelevant. Viewing firearms inspections as minimally intrusive into justifiable expectations of privacy, the *Biswell* Court reasoned that a dealer knows what to expect upon entering "this pervasively regulated business."⁵⁴ *Barlow's* is unsatisfactory, therefore, in distinguishing the business in *Biswell* as one involving a "long tradition of close government supervision."⁵⁵ Perhaps appreciating this, Justice White hedged somewhat by adding that businessmen in federally licensed and regulated enterprises "accept the burdens as well as the benefits of their trade, whereas . . . [Barlow's] was not engaged in any regulated or licensed business."⁵⁶ But the government had contended that businesses, especially those affecting interstate commerce, were indeed subject to pervasive health and safety regulations. To this Justice White could

⁵² 98 S. Ct. at 1821.

⁵³ 406 U.S. 311 (1972).

⁵⁴ *Id.* at 316. A major analytic difficulty in many cases is the failure to distinguish the question of whether fourth amendment interests are present from the question of whether fourth amendment interests are reasonably invaded. *Biswell* did not question the presence of fourth amendment interests but instead held that a warrantless inspection was reasonable under the fourth amendment. Citing both *Biswell* and *Katz*, however, the *Barlow's* Court stated that "certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." 98 S. Ct. at 1821. *See also United States v. White*, 401 U.S. 745, 751, 753 (1971), holding that participant monitoring does not implicate fourth amendment interests but also suggesting, without noticing the inconsistency, that such monitoring is "reasonable" under the fourth amendment. The distinction, of course, is not just a matter of semantics. To say that government notice or regulation can negate expectations of privacy is to say that government can withdraw from the fourth amendment activity that otherwise would clearly constitute a search. *See Amsterdam, supra* note 42, at 384.

⁵⁵ 98 S. Ct. at 1821.

⁵⁶ *Id.* at 1821 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)).

only answer that "the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates."⁵⁷ Unfortunately, this response failed to explain why the pervasiveness of the current OSHA regulations did not reduce or negate reasonable expectations of privacy. The response also left unclear whether it is the longevity or the pervasiveness of government regulation, or some combination of the two, that ultimately accounts for reduced privacy expectations, and thus for reduced fourth amendment interests.⁵⁸

Unlike the government in *Barlow's*, the prosecutor in *Tyler* took a much bolder approach to the *Katz* question, one that should serve as a "how not to" model for law students and appellate advocates. A fire, the prosecutor argued, raises two possibilities: "either the occupant burned his own premises, or the fire was caused accidentally or by [third-party] malicious arson."⁵⁹ The first alternative, the argument continued, speaks directly to the occupant's expectation of privacy in his burned premises: "It says that he has none whatsoever."⁶⁰ The prosecutor conceded that fire investigators cannot know before their inspection whether the occupant has burned his premises, but he considered this irrelevant because "the fact remains that no constitutional right will have been violated by such a search."⁶¹ With respect to the second alternative—accident or third-party arson—the prosecutor's argument was equally facile. "Victims," he maintained, will welcome the investigation and thus neither need nor want traditional fourth

amendment protection.⁶² Either way, therefore, a fire inspection does not implicate fourth amendment interests.

The Court, with Justice Stewart writing the opinion, used little effort in rejecting these arguments. The Court first observed that "victims" do have "protectable expectations of privacy in whatever remains of their property."⁶³ The Court recognized, in addition, that such persons may be concerned about the time, frequency, and scope of the inspections.⁶⁴ Having recognized this, the Court easily unraveled the rest of the prosecutor's argument, "for it is of course impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved."⁶⁵

Citing *Tyler*, the Court in *Mincey*⁶⁶ summarily rejected a similar argument that a defendant had forfeited any reasonable expectation of privacy in his apartment by killing an officer who was attempting to arrest him. The Court simply observed that such reasoning "would impermissibly convict the suspect even before the evidence against him was gathered."⁶⁷

In summary, then, *Barlow's*, *Tyler*, and *Mincey* helped clarify some important aspects of the *Katz* reasonable expectation of privacy test. First, and perhaps most important, the Court emphasized that granting a right of access to third parties does not necessarily result in a forfeiture of fourth amendment interests and a concomitant right of access by government. Indeed, *Barlow's* indicates that the relevant question is the individual's reasonable expectation of privacy vis-à-vis the government. Second, reasonable expectations of privacy do not depend upon post facto judgments concerning the individual's guilt or innocence. Thus, the question of whether the police have engaged in a fourth amendment search must turn on the nature of the police intrusion and not on what the police have uncovered through their endeavors. Finally, and this is the ambiguous part, government can pass regulatory laws that defeat what otherwise would be reasonable expectations of privacy, but only in exceptional cases will regulatory laws be permitted to have this effect.

⁵⁷ *Id.* 98 S. Ct. at 1821. The Court also noted that few businesses can be conducted without having some effect on interstate commerce. It may be that the Court is finally beginning to see the ramifications of its commerce doctrine permitting Congress to regulate health and morals, although such areas are not included in the Art. I, § 8 enumerated powers, merely because some de minimus connection with interstate commerce can be found. *See, e.g., Scarborough v. United States*, 431 U.S. 563 (1977). Whether the Court will ever deal directly with the commerce issue may be doubted. *But cf. National League of Cities v. Usery*, 426 U.S. 833 (1976) (limiting ability of Congress to regulate certain state activity under the commerce clause).

⁵⁸ To argue that the pervasiveness of governmental regulation alone may reduce legitimate privacy expectations is to give government a potent weapon to immunize its conduct from fourth amendment scrutiny. *See* note 54, *supra*.

⁵⁹ Petitioner's Brief at 7, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

⁶⁰ *Id.* at 12.

⁶¹ *Id.*

⁶² *Id.* at 13-16.

⁶³ 98 S. Ct. at 1948.

⁶⁴ *Id.* at 1948, 1949. The Court made this observation in the section of its opinion describing the magistrate's task when a warrant is sought.

⁶⁵ *Id.* at 1948.

⁶⁶ *Mincey v. Arizona*, 98 S. Ct. 2408 (1978).

⁶⁷ *Id.* at 2413.

B. IMPLICATIONS OF THE NEW STATEMENTS

1. *Participant Monitoring Reconsidered*

The first two statements in the above summary may seem rather obvious. Because the fourth amendment protects citizens from government, logic and reason would seem to dictate that the relevant inquiry focus on the expectations that citizens have about governmental intrusions into their privacy.⁶⁸ Lawless citizens may break into our offices and homes, steal and read our mail, listen in on our telephone conversations, and otherwise reduce both present privacy and our privacy expectations, but certainly this has nothing to do with ascertaining what government conduct is subject to fourth amendment requirements.⁶⁹ Similarly, our deliberate invitations and disclosures to select individuals seem irrelevant when the question is whether the government's forced entry or compulsory disclosure is regulated by the fourth amendment.⁷⁰ The question of whether govern-

⁶⁸ For an argument persuasively demonstrating the validity of this view, see Amsterdam, *supra* note 42, at 406-07.

⁶⁹ See *id.*, arguing that although a person may assume the risk of burglary by parking a car in Greenwich Village, this hardly suggests that government can break into the car free of fourth amendment restraints.

⁷⁰ On the other hand, if a person's conduct is observable to any person who happens to be in the vicinity, a privacy expectation can hardly be claimed. Cf. Comment, *supra* note 46, at 838 ("A democratic society should demonstrate the same respect for individual privacy that the reasonable man expects from the general public.") *Barlow's* makes clear that there is a constitutional difference between disclosing information or opening an area to select individuals and making information or an area available to any member of the general public. See also *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (inspector testing plumes of smoke was observing what *anyone* near the plant could see).

One important limitation is necessary. To immunize conduct from fourth amendment scrutiny, the government should make its observations in the same manner as that available to any member of the public. Thus, if one engages in illegal conduct in a restroom stall, the absence of a stall door should be irrelevant to the question of whether an agent hiding in the ceiling is conducting a search. See *People v. Triggs*, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). But see *Buchanan v. State*, 471 S.W.2d 401 (Tex. Crim. App. 1971). Our legitimate expectations against government, which define what conduct will be considered a search, must be assessed against that very conduct and not some other that government could have engaged in without violating privacy expectations. To this extent, *Katz* is misleading when it says merely that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." See the text at note 39 *supra*. (Of course, the quote is also inconsistent with

ment conduct constitutes a search—not the separate question of whether the search is reasonable—simply cannot depend upon such matters.

It must likewise seem obvious that an individual's guilt or innocence is irrelevant to the question of whether government conduct constitutes a search. To conclude otherwise would make it impossible to know in advance whether government conduct is covered by the fourth amendment. The logic of the rejected arguments in *Tyler* and *Mincey*, for example, would suggest that police are searching when, hidden in a ceiling, they observe "innocent" behavior in a restroom but not when they observe an illegal sexual act or a narcotics transaction. For it is but a short step from the abandonment argument in *Tyler* and the forfeiture argument in *Mincey* to the view that expectations of privacy are reasonable only when the right to privacy has not been forfeited by an illegal act.⁷¹

While the Court's holdings thus seem to affirm the obvious, they raise serious questions and renewed doubts about the validity of previous cases dealing with participant monitoring. Participant monitoring, unlike third party monitoring, involves the use of a participant spy, an informant or undercover government agent who deals directly with the person whose conduct or conversations are to be monitored.⁷² The spy may report observations to other agents, as in *Hoffa v. United States*,⁷³ secretly tape record a transaction, as in *Osborn v. United States*,⁷⁴ or secretly transmit radio signals to other agents not present at the scene, as in *United States v. White*.⁷⁵ The spy may be a trusted friend, as in *Hoffa*, or a total stranger, as in *Lewis v. United States*.⁷⁶ Whether bugged or unbugged, friend or

Barlow's, unless it is understood as covering only the situation in which the activity in the home is observable by *any* member of the public.) See also *Stoner v. California*, 376 U.S. 483 (1964).

⁷¹ The prosecutor in *Tyler* denied that his argument dictated such a conclusion. Instead, he argued that arson, unlike other crimes, suggests abandonment. Petitioner's Brief at 11-12, *Tyler v. Michigan*, 98 S. Ct. 1942 (1978). The argument in *Mincey*, of course, could not depend upon abandonment.

⁷² Under this definition, *Katz* is a third-party monitoring case, because the government overheard the conversation without the knowledge or consent of either party.

⁷³ 385 U.S. 293 (1966) (defendant's supposed friend, assumed by the Court to be a government plant, disclosed conversations in the defendant's hotel suite during a criminal trial).

⁷⁴ 385 U.S. 323 (1966).

⁷⁵ 401 U.S. 745 (1971).

⁷⁶ 385 U.S. 206 (1966) (unbugged agent, who described

stranger, the participant monitor, the Supreme Court has ruled, does not implicate fourth amendment interests.

*United States v. White*⁷⁷ is the Supreme Court's most recent pronouncement on the subject. In *White*, an informant with a hidden electronic device secretly transmitted to other government agents several conversations with the defendant. The conversations, relating to narcotics, occurred in the informant's home and car, in the defendant's home, and in a restaurant. Because the informant was unavailable for the defendant's subsequent trial, the other agents testified about the overheard conversations. The Court, in an opinion by Justice White, rejected the defendant's claims that the electronic surveillance of his conversations violated his reasonable expectations of privacy—that is, constituted a search—and thus was unreasonable absent a valid search warrant.⁷⁸ Using a rationale difficult to reconcile with this term's cases, the Court could find nothing in *Katz* to suggest that an individual has a "constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police."⁷⁹

The Court thus did not appear to recognize that one's expectations about what government is doing may legitimately differ from one's expectations about what associates are or will be doing as private citizens. Moreover, the Court repeatedly examined the expectation of privacy question from the perspective of a "wrongdoer." Quoting *Hoffa*, the Court indicated that the fourth amendment "affords no protection to 'a wrongdoer's misplaced

belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"⁸⁰ Building upon *Lewis* and *Hoffa*, which found no fourth amendment activity in the government's use of bugged informants,⁸¹ the *White* Court added that "if the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations."⁸² Finally, the Court observed that if "one contemplating illegal activities" doubts the trustworthiness of companions and converses nonetheless, "the risk is his."⁸³

Much of the debate in *White* focused upon the effect of bugged informants on a person's willingness to engage in conversation. In terms of a "defendant's" willingness to speak, the Court could see no difference between having to risk that an associate is a spy and having to risk that an associate is a spy wired for sound.⁸⁴ Stressing the average person's willingness to speak,⁸⁵ dissenting Justice Harlan saw a major difference:

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging⁸⁶ a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to

himself as "Jimmy the Polack," purchased narcotics in the defendant's home).

⁷⁷ 401 U.S. 745 (1971). *White* was a plurality opinion, but Justice Black went even further than the plurality in arguing that words cannot be a subject of fourth amendment protection. The Court has treated *White* as precedent. See *United States v. Miller*, 425 U.S. 435 (1976).

⁷⁸ A sentence or two in the opinion misleadingly suggests that warrantless participant bugging is a reasonable search under the fourth amendment. See note 54 *supra*. Of course, if such participant bugging constituted fourth amendment activity, the Court would have had to justify the creation of a new exception to the warrant requirement. It did not do this, thus reinforcing the primary emphasis in the opinion that such conduct does not constitute a search.

Cases like *White* cannot be read as consent-search cases. First, the Court's opinion discussed *Katz*, not the third-party consent cases. Second, it would be anomalous to conclude that a search is made legal by the consent of the government agent conducting the search.

⁷⁹ 401 U.S. at 749.

⁸⁰ *Id.* (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). *Hoffa* was decided one year before *Katz*.

⁸¹ See notes 73-76 and accompanying text *supra* for a brief description of *Lewis* and *Hoffa*. See also note 110 and accompanying text *infra*.

⁸² 401 U.S. at 752.

⁸³ *Id.*

⁸⁴ *Id.*:

Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound.

⁸⁵ *Id.* at 789 (Harlan, J., dissenting).

⁸⁶ The text of this article, unlike Justice Harlan's opinion, limits the use of the term "third-party bugging" to those situations in which the government eavesdrops without the consent of any party to the conversation. See text at notes 72-76, *supra*.

contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.⁸⁷

At first glance, Justice Harlan's dissent in *White* gains support from this term's cases. *Tyler* and *Mincey* certainly support his view that the presence of fourth amendment activity does not depend upon hindsight determinations of the defendant's guilt.⁸⁸ Thus, the Court's focus on the "wrongdoer's" expectations in *White* clearly seems to be wrong.⁸⁹ Moreover, the employer in *Barlow's* had to assume the risk that employees would report safety violations, but to the *Barlow's* Court this did not imply that government had an unrestricted right to observe for itself. It is difficult to see, therefore, why the risk of simultaneous eavesdropping by unknown agents fell upon the defendant in *White* merely because he had to assume the risk that an associate or confidant would later report his activities to the government.

Yet, the matter is not so simple. First, Professor Weinreb seems to have observed correctly that Justice Harlan's concern for protecting frivolous or impetuous speech is not encompassed within the fourth amendment.⁹⁰ As careful as Justice Harlan was to note the pitfalls of the *Katz* test,⁹¹ he failed to distinguish the general notion of privacy from the more limited notion of privacy protected by the fourth amendment. *Katz*, however, explicitly recognized that the "general right to privacy—[the] right to be let alone by other people"—is outside the fourth amendment's domain.⁹²

⁸⁷ 401 U.S. at 787-89 (Harlan, J., dissenting).

⁸⁸ See text at notes 59-70 *supra*.

⁸⁹ Commentators had criticized this aspect of *White* before *Tyler* and *Mincey* were decided. See, e.g., Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 337 (1977); Comment, *supra* note 46, at 843.

⁹⁰ Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 68 (1974).

⁹¹ Justice Harlan cautioned that the *Katz* test, although an advance over the trespass doctrine, can also lead to the "substitution of words for analysis." 401 U.S. at 786 (Harlan, J., dissenting). He added:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

Id.

⁹² *Katz v. United States*, 389 U.S. 347, 350-51 (1967):

The precise issue in *White*, then, ignored by Justice Harlan, was the nature of the privacy interest protected by the fourth amendment. The substantive right to do certain private things without government inhibition, such as to use contraceptives, to have an abortion, or to make frivolous remarks, is not rooted in the fourth amendment,⁹³ but the secrecy or confidentiality of things done in private is. Thus, the fourth amendment gave *Katz* no right to communicate with another from a telephone booth, but it gave him a right, once inside the booth, to keep the government out, both physically and informationally. Indeed, since the government did not commit a physical trespass in *Katz*, the only apparent fourth amendment interest in that case was one of informational privacy.⁹⁴ Freed from its property moorings, then, the fourth amendment limits the government's ability to be-

[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

⁹³ To the extent substantive privacy rights have a constitutional basis, their source is the due process clause. See *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). *But cf. Griswold v. Connecticut*, 381 U.S. 479 (1975) (right of married couples to use contraceptives rooted in the penumbras of several provisions in the Bill of Rights, including the fourth amendment).

⁹⁴ Professor Weinreb has suggested that the fourth amendment protects the "privacy of presence" and the "privacy of place." The former refers to our privacy interests against government as long as we are in a private place; the latter refers to our privacy interests in a place whether or not we are present. Weinreb, *supra* note 90, at 69. This interpretation of the fourth amendment can explain both *Katz* and *White*. The defendant in *Katz* had the privacy of presence while he was using the phone booth, but the defendant in *White*, at least while in the informant's home and in the restaurant, had the privacy of neither presence nor place. *Id.* at 69 n.65.

Professor Weinreb's interpretation ties the fourth amendment to property concepts. For example, he sees no fourth amendment issue when an undercover agent buys narcotics from a defendant on the street, but he sees a violation of the privacy of place when, as in *Lewis*, the same agent enters the defendant's home to complete the purchase. Surely, however, the fourth amendment is concerned with more than property-privacy. What *Katz* and the spy cases have in common is a governmental intrusion upon informational privacy in situations where the individual is seeking to make only a limited disclosure.

come cognizant of our private lives: the conditions we live in, the things we possess, the activities we pursue, the thoughts we sparingly share.

In *White*, Justice Harlan seemed concerned with protecting a substantive right to engage in impetuous speech. In any event, it seems clear that he was not concerned with informational privacy, for he agreed with the majority that unbugged government informants do not implicate fourth amendment concerns.⁹⁵ From the perspective of informational privacy, however, bugged and unbugged informants are difficult to distinguish. Accordingly, Justice White may have been correct in refusing to make such a distinction.

A hypothetical may prove helpful at this point in seeing the merit of Justice White's all-or-nothing approach in *White*. Suppose that the government in *Barlow's* arranged for an undercover OSHA inspector to be hired as an employee. Suppose further that the employee orally reported observations to superiors, took snapshots, and occasionally transmitted television pictures to other agents on the outside. Would any of this activity be covered by the fourth amendment? Under *White* the answer would be no. As long as the employee-spy did not intrude into areas forbidden to employees,⁹⁶ the employer assumed the risk. Under Justice Harlan's view, the television transmission—and perhaps the taking of snapshots⁹⁷—would be considered fourth amendment activity, but not the visual observation and later reporting. Yet in terms of informational privacy, each of the spy's activities divulged to the government information it could not otherwise

obtain, and aside from informational privacy, it is difficult to discern what privacy interest any of the spying invaded. Therefore, if the fourth amendment addresses the hypothetical at all, it seems illogical to exclude some of the spy's activities from its umbrella.⁹⁸

The ultimate, difficult question, then, is whether the fourth amendment should speak at all to the issue of participant monitoring. Unfortunately, neither the reasoning nor the holdings in the cases decided this term provide a definitive answer. While *Barlow's* states that expectations of privacy must be analyzed vis-à-vis the government, it nowhere provides guidelines for determining what expectations against government are reasonable. In fact, *Barlow's* fails to specify the exact interest or expectation that an unwanted OSHA inspection would violate. On one plausible reading, the unwanted entry upon private property constituted the evil in *Barlow's*.⁹⁹ That is, *Barlow's* may be read

⁹⁸ Justice Harlan reasoned that the unbugged spy may forget some of what is said, thus making it more difficult for the government to reformulate the conversation. *Id.* at 788. Contrasting the use of recording devices and transmitters, he suggested that an informant may decide not to play a recording, whereas a transmission, of course, is instantaneous. *Id.* at 788 n.24. It is difficult to see why these suggested distinctions have any bearing on the question of whether the agent is engaged in a search. The intrusion upon informational privacy is no less merely because some details are forgotten. Moreover, a search for physical objects would be no less intrusive if the agent decided not to turn the spoils over to superiors. In terms of the interests intruded upon, searches differ from seizures, and the question of whether a search has occurred cannot depend upon the agent's subsequent decision to take or ignore the fruits of his endeavors.

⁹⁹ "The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent." *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1821 (1978). The Court continued:

The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

Id. at 1822 (emphasis added). Such a "property" reading of *Barlow's* is also suggested by portions of the appellee's brief:

[A] most comprehensive variety of privacy interests are protected from governmental intrusion by the safeguards of the Fourth Amendment. Clearly, legitimate expectations of privacy, in the sense of protected privacy interests, include those interests related to the use and enjoyment of "private" prop-

⁹⁵ Justice Harlan felt that the electronic spying in *White* had a greater impact on privacy than "the ordinary type of 'informer' investigation upheld in *Lewis and Hoffa*." 401 U.S. at 787 (Harlan, J., dissenting). Justice Harlan was not yet prepared to say that the fourth amendment's umbrella should extend to the informant with a hidden tape recorder as well as to the informant with a hidden transmitting device. *Id.* at 788 n.24. *But see* note 97 *infra*.

⁹⁶ In *Gouled v. United States*, 255 U.S. 298 (1921), a business acquaintance, invited into the defendant's office, searched the office in the defendant's absence. The Court found the search, instituted at the government's behest, unconstitutional. Distinguishing *Gouled*, the Court in *Lewis v. United States*, 385 U.S. 206, 210 (1966), noted that the agent in the latter case did not "see, hear, or take anything that was not contemplated and in fact intended by petitioner as a necessary part of his illegal business."

⁹⁷ While not yet prepared to say that secret recording fell within the scope of the fourth amendment, *see* note 95, *supra*, Justice Harlan did express doubts about his reasoning in a previous case holding that it did not. 401 U.S. at 788 n.24 (Harlan, J., dissenting).

as holding that one may invite others onto private property without opening the door to government. Under this limited reading, expectations of privacy would be defined vis-à-vis government when property interests are at stake, but in the context of informational privacy, voluntary disclosure to others would be tantamount to relinquishment of fourth amendment interests. *Katz* cannot preclude such a "property" reading of *Barlow's*, for *Katz* held only that property concepts do not limit the fourth amendment's ultimate reach, not that property concepts are irrelevant altogether to fourth amendment analysis.¹⁰⁰ Indeed, the fourth amendment must have something to do with property, because it explicitly protects against the unreasonable seizure of things.¹⁰¹ Moreover, only a property analysis can explain *Alderman v. United States*,¹⁰² which held, two years after *Katz*, that a wiretap of a phone in a defendant's home implicates his fourth amendment interests, even when the tap intrudes upon the conversations of others while the defendant is away.

While thus permissible, a property reading of *Barlow's* would nevertheless render the fourth amendment functionally trivial in that case and at the same time ignore the significance of *Katz*. It seems frivolous to suggest that the employer's only interest in *Barlow's* was in keeping government agents from trespassing upon his premises. Certainly what the employer found offensive was not mere presence, but presence for the purpose of seeking out information. Indeed, the search warrant's function of defining the legitimate scope of an OSHA inspection addresses this very concern. While *Katz* does not dictate this broader reading of *Barlow's*, it clearly supports it. In *Katz*, the uninvented ear intruded upon the privacy of a conver-

sation without trespassing onto property.¹⁰³ By applying the fourth amendment to that situation, the Court made clear that informational privacy, as well as property-privacy, is a valid fourth amendment concern.

If *Barlow's* thus stands for the proposition that expectations of informational privacy must be considered vis-à-vis the government, the planted spy becomes a ready subject of fourth amendment interest. Nevertheless, a rejoinder may still be attempted. Conceding that expectations of informational privacy must be defined against government, it may be argued that the case still has not been made for concluding that a presumably innocent person has a justifiable expectation that government will not be planting spies to see what he will voluntarily expose. After all, the difference between the OSHA inspection in *Barlow's* and the spying activity in *Lewis, Hoffa*,¹⁰⁴ *White*, and the above OSHA spy hypothetical is that the defendants in the latter either authorized entry or voluntarily disclosed information. This counterargument, however, misses the point. Once informational privacy is recognized as an appropriate fourth amendment interest, and once this interest is defined vis-à-vis government, the voluntary disclosure rationale breaks down. By talking to a confidant, the defendant in *White* no more consented to governmental information-gathering than did the defendant in *Barlow's*, who permitted employees to observe his premises.¹⁰⁵ Indeed, if all else fails, the spy hypothetical should make the point. From the view of informational privacy interests against government, one would have a heavy burden explaining why the fourth amendment addresses the inspector's attempt to enter at the front door to gather evidence and yet stands oblivious to the government's undercover entry in the rear for the same purpose.¹⁰⁶

erty in circumstances not necessarily restricted to solitude. . . . "[E]xcept in certain carefully defined classes of cases" the privacy interests in private property must be safeguarded against governmental intrusion by a valid search warrant procedure.

Brief for Appellee at 28, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

¹⁰⁰ See Amsterdam, *supra* note 42, at 358 & 443-44 n.83.

¹⁰¹ Recently some commentators have again been stressing the importance of property concepts in fourth amendment analysis. See, e.g., Weinreb, *supra* note 90, at 53 & 69, emphasizing the importance of intrusions upon the privacy of place; Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 181 (1977), arguing that property concepts should be used as a bottom line to define fourth amendment protections. See also Note, *supra* note 36. Professor Weinreb's position is discussed in more detail in note 94 *supra*.

¹⁰² 394 U.S. 165 (1969).

¹⁰³ The bugging device in *Katz* was outside the phone booth used by the defendant.

¹⁰⁴ The facts in *Lewis* and *Hoffa* are discussed briefly in notes 73 and 76 *supra*, and in the accompanying text. See also note 110 *infra*.

¹⁰⁵ Cf. *Stoner v. California*, 376 U.S. 483, 489-90 (1964) (consent for hotel employees to enter hotel room to perform their jobs is not consent for government to enter and search for information). But see Weinreb, *supra* note 90, at 69, suggesting that an intrusion in the latter instance would violate the "privacy of place." Professor Weinreb's views are discussed in note 94 *supra*.

¹⁰⁶ Cf. Amsterdam, *supra* note 42, at 365 ("I can conceive of no rational system of concerns and values that restricts the government's power to rifle my drawers or tap my telephone but not its power to infiltrate my home or my life with a legion of spies."). Amsterdam also

An obvious tension exists, therefore, between cases like *Barlow's*, and *Katz* on the one hand and cases like *Lewis*, *Hoffa*, and *White* on the other. Barring a reconsideration of the *Katz* doctrine, which now seems basic to fourth amendment law, it is submitted that the latter cases, with the possible exception of *Lewis*,¹⁰⁷ should be overruled. This suggestion should not cause great consternation if it is remembered, as it too often is not, that the issue is whether spying for information is a search under the fourth amendment and not whether a search warrant or full traditional probable cause should be required.¹⁰⁸

The possible exception for *Lewis* requires explanation. Situations may arise in which government is seeking information and yet an informational privacy interest against government is not justifiable.¹⁰⁹ Not every government quest for evidence or information is, or need be, a subject of fourth amendment interest. For example, undercover fencing operations—popularly known as “sting” operations—should not raise fourth amendment concerns. What distinguishes the deception in such an operation from the deception in *Hoffa*?¹¹⁰ The answer must be that one, unlike the other, involves no threat to justifiable expectations of informational privacy. The reason for this assertion is the difficult part. As a tentative reason, the implications of which need further study, it is submitted that such operations can only induce individuals to acknowledge guilt or commit a crime. Merely to ask someone to acknowledge wrongdoing (e.g., “Do you have any radios you would like to fence?”) or to commit a crime (e.g., “I’ll pay you ten dollars for a stolen clock radio.”) does not seem to impli-

suggested that the government’s use of spies may be more intrusive than its use of third-party electronic surveillance. *Id.* at 407–09.

¹⁰⁷ *Lewis* is briefly discussed in note 76 *supra*. Interestingly, Professor Weinreb would overrule *Lewis* but not *White*. See note 94 *supra*.

¹⁰⁸ For a discussion of these separate issues, see sections III and IV, *infra*.

¹⁰⁹ For example, it is not a search for the government deliberately to observe what the defendant discloses to the general public. See note 70 *supra*.

¹¹⁰ In *Hoffa v. United States*, 385 U.S. 293 (1966), a friend of Hoffa’s acted as a government spy. The friend disclosed conversations in Hoffa’s hotel suite during Hoffa’s trial on criminal charges. The Court assumed *arguendo* that the friend was a planted spy rather than a self-motivated tattletale, but this made no difference to its analysis. For purposes of the analysis suggested in the text, the distinction between tattletales and spies is constitutionally significant, because, as *Barlow’s* teaches, expectations of privacy are defined against government.

cate privacy at all. In any event, expectations that government will not engage in such activity hardly seem reasonable or justifiable and thus should not be encompassed within the area of fourth amendment concern.

This hypothesis contravenes neither the above criticism of the “wrongdoer” approach in *White* nor the rejection of that approach in *Tyler* and *Mincey*. It is one thing to use a *hindsight* approach to withdraw fourth amendment protections because the defendant was a wrongdoer; it should be another to deny fourth amendment protections *in advance* because of the nature of the government’s activity. This is not to say that the guilty do not deserve fourth amendment protection. The question at issue is what kind of police conduct implicates fourth amendment concerns, and once this conduct is identified, the appropriate fourth amendment restraints apply in cases involving the guilty and innocent alike. In taking the first step of defining the activity that constitutes a search it suffices, in a free society, to ask whether the conduct at issue could ever threaten or intrude upon informational privacy expectations unrelated to criminal conduct.¹¹¹ The spying in *Hoffa*, the inspection in *Tyler* and *Barlow’s*, and the search in *Mincey* all could intrude upon innocent privacy expectations, for not only could the individuals affected have been innocent of wrongdoing, but the police intrusion, by its very nature, had to uncover more than unlawful conduct.¹¹² The spy in *Hoffa*, for example,

¹¹¹ As the preceding paragraph in the text indicates, the proffered rationale for cases like *Lewis* is tentative. In a phone conversation, Professor Kamisar of Michigan has raised questions that cannot be ignored. For example, suppose the government develops a sensor that detects narcotics but nothing else. Would the use of such a sensor, at airports for example, constitute fourth amendment activity? To the extent the text suggests that this conduct would not be a search because it can only detect unlawful activity, the analysis does not seem satisfactory.

In Y. KAMISAR, J. GRANO, J. HADDAD, *supra* note 36, at 122–25, the thesis is proffered that cases like *Lewis* are based upon the defendant’s voluntary decision to disclose his illegal activity to “anyone” interested in participating in it. This thesis would satisfactorily account for Professor Weinreb’s concern of a “squad of government agents posing as gas and electric company inspectors” to enter houses. See note 114 *infra*. The difficulty, however, is that defendants in cases like *Lewis* are not willing to make disclosures to the general public but only to those segments of the public willing to engage in the illegal enterprise. The same, of course, could be said for the defendant in *White*. If cases like *White* and *Lewis* are to be distinguished, therefore, as this article suggests they should, the rationale set forth in the cited book also seems incomplete.

¹¹² The hypothesis suggested in the text provides a

necessarily intruded upon both lawful and unlawful conversations.¹¹³

The proffered hypothesis, then, is that the fourth amendment's concern for the security of persons is exceeded when justifiable expectations of privacy include expectations that relate to nothing more than a propensity for wrongful conduct. A "sting" operation can only uncover a person's propensity to commit crime. Similarly, it would seem that the police conduct in *Lewis*, unlike that in *Hoffa*, did not constitute a threat to any justifiable expectation of privacy. Barring persistent entreaties that smack of entrapment, a simple request for an in-

dividual to sell narcotics can only ascertain whether that individual is willing to do so. The request in *Lewis*, unlike the spying in *Hoffa*, posed no threat to justifiable expectations of informational privacy.¹¹⁴

It may be hard to draw a line between spying activities that necessarily intrude broadly and indiscriminately upon informational privacy on the one hand and undercover activities or decoy operations that only give an individual an opportunity to acknowledge or commit wrongdoing on the other. Yet not to attempt to draw it, or to draw some other satisfactory line,¹¹⁵ results in either too little fourth amendment protection, as in *White*, or too much.¹¹⁶

rationale for the statement by Professor Kitch that a burglar cannot complain about governmental monitoring of the burglarized house without the owner's consent. Kitch, *supra* note 46, at 136. With respect to the burglar, such monitoring, like a "sting" operation, could not intrude upon any privacy expectations concerning lawful activity. *But see* note 111 *supra*.

Professor Kitch's hypothetical, however, really raises a question of standing, not one of fourth amendment activity. Secret monitoring poses a threat to legitimate informational privacy interests and thus is a search, but without either a property interest or a justifiable privacy interest, the burglar lacks standing to raise the issue. *See Mancusi v. DeForte*, 392 U.S. 364 (1968).

¹¹³ Similarly, it would be a search for an undercover agent to give a defendant a television with a hidden radio transmitter in exchange for a delivery of narcotics. Although the transmitter would be imposed on an obviously guilty person, it, like the spy in *Hoffa*, would intrude upon conversations of both the defendant and third parties having nothing to do with wrongdoing. It bears emphasis that the hypothesis in the text does not deny justifiable expectations of privacy to guilty people; rather, the hypothesis suggests that expectations of privacy that relate only to wrongful conduct are not justifiable. Most governmental quests for information necessarily pose a threat to both justifiable and unjustifiable expectations of privacy. Such quests, therefore, would be considered searches under the hypothesis in the text.

Changing the facts somewhat, it should likewise be a search if the agent attached a hidden "beeper"—a tracking device that emits an electronic signal but does not transmit conversation—to the television. Again, it cannot matter that the defendant must be guilty. The information disclosed by a beeper encompasses more than criminal conduct. *But see* *United States v. Perez*, 526 F.2d 859 (5th Cir. 1976). Of course, it is another thing altogether to suggest that individuals, whether guilty or innocent, cannot have privacy expectations in their comings and goings because such matters are necessarily observable by the general public. As previously discussed, however, the fourth amendment requirements should apply unless the government uses the same means as the general public to observe the defendant. *See* note 70 *supra*. *See also* *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *aff'd by an equally divided court*, 537 F.2d 227 (1976) (en banc).

2. *Third-Party Subpoenas Reconsidered*

This term's search and seizure cases also require reconsideration of the issue of third-party subpoenas—subpoenas addressed to third parties that seek information about another individual. Addressing this issue two years ago, the Supreme

¹¹⁴ In arguing that *Lewis* should be overruled, Professor Weinreb posits the hypothetical of a squad of government agents posing as gas and electric company inspectors. Weinreb, *supra* note 90, at 67. The Weinreb hypothetical, however, is clearly distinguishable from *Lewis*. The agent in *Lewis* only provided an opportunity for the defendant to commit a crime; the agents in Professor Weinreb's hypothetical would obviously intrude upon the justifiable privacy expectations of innocent and guilty people alike. For another explanation, see note 111 *supra*.

¹¹⁵ *Cf.* Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in Conversation*, 68 COLUM. L. REV. 189, 224 (1968) (suggesting that the planting of friends as spies may be different than the planting of strangers). Professor Weinreb's hypothetical, note 114 *supra*, and the OSHA spy hypothetical described in the text, notes 96-98 *supra*, have convinced this author that such a distinction, without more, is untenable. For another proposal concerning the appropriate place to draw the line, see note 111 *supra*.

¹¹⁶ *But see* *Amsterdam*, *supra* note 42, at 403:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make.

The argument in the text is that "sting" operations and police activity like that employed in *Lewis*, unlike the police activity in *Hoffa* and in Professor Weinreb's hypothetical, see note 114 *supra*, do not pose a threat to the privacy and freedom that make our society free.

Court in *United States v. Miller*,¹¹⁷ in an opinion authored by Justice Powell, held that a depositor has "no protectable fourth amendment interest"¹¹⁸ in bank records—deposit slips, cancelled checks, and financial statements—subpoenaed by the government. Under provisions of the Bank Secrecy Act,¹¹⁹ banks were required to maintain such records.¹²⁰

The *Miller* Court first noted that depositors have no property interest in bank records,¹²¹ a conclusion that itself may not be altogether correct.¹²² More significantly, however, the Court concluded that a person has no legitimate expectation of privacy in

¹¹⁷ 425 U.S. 435 (1976).

¹¹⁸ *Id.* at 437. In its brief, the government framed the issue in terms of standing, contending that the fourth amendment protects only one against whom a search is directed, not one who merely claims prejudice through the use of gathered evidence. Petitioner's Brief at 11-12, 18, *United States v. Miller*, 425 U.S. 435 (1976). The Court, however, did not make clear whether the subpoena duces tecum at issue was not a search or whether the respondent simply lacked standing to challenge the legality of such a search. By citing *Lewis, Hoffa, Katz* and *White*, the opinion suggests that the subpoena did not implicate fourth amendment interests. 425 U.S. at 440-43. On the other hand, the Court also cited *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), which suggested that a subpoena duces tecum is subject to at least minimum fourth amendment "reasonableness" requirements. Similarly, in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), the Court considered the merits of a fourth amendment challenge by banks to statutory requirements that they report financial transactions of their depositors. This suggests, then, that a subpoena for bank records is a search for fourth amendment purposes, but one that only the bank has standing to challenge. *See also* text at notes 137-41 *infra*.

It is easy to confuse the questions of fourth amendment activity and standing, because one of the standing grounds is identical with the *Katz* test for determining whether a search has occurred. *See Mancusi v. DeForte*, 392 U.S. 364 (1968). Nonetheless, the distinction is important. As illustrated above, for example, if a subpoena duces tecum is not a search, even the banks would be precluded from making a fourth amendment challenge.

However *Miller* is read, the contention in this section of the article is that it was wrongly decided.

¹¹⁹ 12 U.S.C. § 1829 (b), (d) (1970).

¹²⁰ The Court upheld the recordkeeping requirements over fourth amendment challenges by both banks and depositors in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

¹²¹ 425 U.S. at 440.

¹²² *See* Comment, *Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976*, 14 Hous. L. Rev. 636, 644 n.58 (1977). *See also* Petitioner's Brief at 21 n.13, *United States v. Miller*, 425 U.S. 435 (1976), conceding that cancelled checks belong to the drawer but arguing that this has no bearing when a microfilm copy of such a check is subpoenaed.

the "contents" of such records. The Court observed that checks "are not confidential communications but negotiable instruments to be used in commercial transactions."¹²³ Moreover, all the subpoenaed documents contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."¹²⁴ Citing *White*, the Court added that "the depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."¹²⁵ This is true, the Court continued, "even if the information is revealed on the assumption that it will be used only for a limited purpose."¹²⁶ Finding no fourth amendment interests implicated, the Court applied "the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at that time."¹²⁷

This term's cases are not needed to challenge the *Miller* Court's first *Katz* argument that checks are not confidential communications but only commercial instruments. As Justice Powell himself recognized just two years before *Miller*, "financial transactions can reveal much about a person's activities, associations, and beliefs."¹²⁸ And, as Powell had further noted, governmental inquiry into such areas clearly seems to implicate "legitimate expectations of privacy."¹²⁹ This conclusion, nevertheless, is not sufficient to undermine the *Miller* holding, for the role of the bank as a party to the financial transaction may have fourth amendment significance.

The *Miller* Court viewed the bank's role as similar to that of the informant or undercover agent in the participant monitoring cases. This view may be challenged even if the conclusions reached in the previous section are put aside and *Hoffa* and *White* are thus assumed to be correctly decided.

¹²³ 425 U.S. at 442.

¹²⁴ *Id.*

¹²⁵ *Id.* at 443.

¹²⁶ *Id.*

¹²⁷ *Id.* at 444. This application of the "general rule" seems redundant because the Court had basically said the same thing by concluding that the defendant did not have a reasonable expectation of privacy in the contents of the records.

¹²⁸ *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (Powell & Blackmun, JJ., concurring). For an excellent description of the dangers, see Comment, *supra* note 122.

¹²⁹ *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 79 (Powell & Blackmun, JJ., concurring).

Even if we further assume that banking transactions are "voluntary" in today's economically sophisticated world,¹³⁰ the obligation of a bank that receives "volunteered" information seems clearly distinguishable, at least from a legal perspective, from the obligation of a friend or associate who receives confidences. A bank, unlike an associate, can be sued for unauthorized disclosure,¹³¹ a fact that the *Miller* Court failed to address and that the government fudged in its brief.¹³² Something more than a disappointed expectation would be justified if a bank teller broadcast the details of a depositor's just-completed transaction to the other customers at the bank.

This term's cases, of course, make the argument against *Miller* much stronger. *Barlow's*, as previously discussed, held that the voluntary disclosure of information to select individuals does not necessarily undermine reasonable expectations of privacy against government. Just as the employer in *Barlow's* could have reasonable expectations that government would not intrude upon his premises even though he opened them to employees and other business contractors, it would seem that the defendant in *Miller* could legitimately expect that his limited disclosures to business associates and bank employees would not result in *carte blanche*

¹³⁰ In its brief, the government maintained that it is no more necessary to use bank checks and to have bank accounts than it is to engage in employment, sales, or business transactions. Petitioner's Brief at 26, *United States v. Miller*, 425 U.S. 435 (1976). The analogy should itself defeat the argument. See also Comment, *supra* note 122, at 639 n.22, claiming that there are over 200 million bank accounts in the country.

¹³¹ See Comment, *supra* note 122, at 644 n.66; Note, *IRS Access to Bank Records; Proposed Modifications in Administrative Subpoena Procedure*, 28 *HASTINGS L.J.* 247, 261 n.72 (1976).

¹³² The government conceded in a footnote that some courts have found an obligation of confidentiality under both contract and tort law, but it maintained that this obligation did not extend to disclosures to government. It added that such disclosures were mandated by the bank's public duty to cooperate with government. Petitioner's Brief at 27 n.17, *United States v. Miller*, 425 U.S. 435 (1976). This, of course, begged the question, for if a duty of confidentiality exists, a plausible argument can be made that the duty should yield only when the governmental request is in the form of valid legal process. The Court found it unnecessary to address the question of what constitutes valid legal process in view of its conclusion that a depositor takes the risk by disclosing financial transactions to a bank. 425 U.S. at 439-40.

Perhaps the Court cannot be faulted for passing over the confidentiality issue. Like the government's 54 page brief, respondent's 16 page brief relegated the issue to a footnote. Respondent's Brief at 6 n.1, *United States v. Miller*, 425 U.S. 435 (1976).

access to these dealings by government. Of course, Justice Powell in *Miller* denied that the Court had authorized unnecessarily wide-ranging inquiries,¹³³ but if such a limitation truly exists it seems more relevant to the question of whether a search is reasonable than to the initial question of whether a search has occurred. Indeed, Powell's caveat seems to concede that legitimate privacy expectations are not relinquished by disclosure to the bank.

Despite these criticisms, *Miller* remains a difficult case, for a difference can be perceived, even if only in moral tone, between government issuing a subpoena for third-party testimony and government planting a spy.¹³⁴ More broadly, a fourth amendment difference seems to exist between a subpoena for evidence, no matter to whom addressed, and overt conduct, such as forceful rummaging through possessions, usually identified as a search.¹³⁵ Justice McKenna stated it well in his separate opinion in *Hale v. Henkel*:¹³⁶

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant. . . . The distinction is based upon what is authorized or directed to be done . . . "The quest of an officer" acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. . . . Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

Of course, the last quoted sentence can be interpreted as suggesting that a subpoena for evidence is a "reasonable" search under the fourth amendment, but the thrust of Justice McKenna's argument was clearly that subpoenas and searches are different things. Nevertheless, despite some ambiguous passages in its opinion,¹³⁷ this view did not

¹³³ 425 U.S. at 444 n.6.

¹³⁴ Of course, the bank's role is more analogous to that of a planted spy when the government requires it to keep the records in the first place, but the Court, citing *Lewis*, found this irrelevant. 425 U.S. at 443.

¹³⁵ See McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 *IND. L.J.* 55, 89-90 (1977).

¹³⁶ 201 U.S. 43, 80-81 (1905).

¹³⁷ The Court criticized the reasoning in *Boyd v.*

prevail with a majority of the Court. Indeed, *Hale* specifically held that the grand jury subpoena duces tecum at issue was far too sweeping to be "reasonable" under the fourth amendment.¹³⁸ To this extent, *Hale* remained true to the teaching of *Boyd v. United States*¹³⁹ that the evil addressed by the fourth amendment includes "the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum."¹⁴⁰ And although the Court has never applied traditional probable cause requirements to such subpoenas, it has continued to assert that their reasonableness must be addressed under the fourth amendment.¹⁴¹

In its *Miller* brief, however, the government argued that a subpoena to the bank for records of Miller's transactions could not be distinguished from a subpoena seeking the testimony of one of Miller's friends.¹⁴² The implication, of course, was that if Miller had a fourth amendment interest in the former, he would have a similar interest in the latter. Undoubtedly intended as *reductio ad absurdum*, the argument, at least at first glance, seems extremely powerful. In terms of fourth amendment implications, a difference surely seems to exist between a subpoena directed to a party for his records or testimony, as in *Boyd* and *Hale*, and a subpoena for a third person's testimony concerning activities

or conversations of the first party. To say otherwise is to depart radically from the common assumption and to risk one's analytic credibility.¹⁴³ Nevertheless, with the reminder that a finding of fourth amendment activity says nothing about either the need for a warrant or the need for traditional probable cause, it is submitted that this term's cases, *Barlow's* in particular, lend support to what in any event would be a strong argument that third-party subpoenas for testimony may sometimes implicate fourth amendment interests.¹⁴⁴

Although the thesis is radical, a couple of hypotheticals may help make at least a presumptive case for the argument. First, suppose that government officials have a reasonable suspicion that X, in violation of the law, is regularly mailing obscene literature or gambling information to Y. Seeking to learn about the content of these mailings, the officials contemplate the following courses of action:

1. An interception of the mail in route, with the purpose of opening it and reading its contents.
2. A subpoena duces tecum to be served on X just before he drops the suspected mailing in the mailbox.¹⁴⁵
3. A subpoena served on X, either before or after the mailing, seeking his oral testimony about the contents.
4. A subpoena duces tecum to be served on Y just after he receives the suspected mailing.
5. A subpoena served on Y, just after he receives the mailing, seeking his oral testimony about the contents.

United States, 116 U.S. 616 (1886), which first held that a subpoena for private papers raises fourth amendment questions. 201 U.S. at 71-73. The Court also said that it was "quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence." *Id.* at 73. Of course, subpoenas issued during the course of a trial raise different questions than subpoenas issued during the investigatory process.

¹³⁸ 201 U.S. at 76.

¹³⁹ 116 U.S. 616 (1886).

¹⁴⁰ 201 U.S. at 76. The full quote reads:

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum.

¹⁴¹ See, e.g., *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 207-08 (1945). See also, *United States v. Dionisio*, 410 U.S. 1, 11 (1973). *Dionisio* also held, however, that a subpoena to appear and testify does not constitute a seizure for fourth amendment purposes. *Dionisio* is discussed further in note 154 *infra*.

¹⁴² Petitioner's Brief at 12, *United States v. Miller*, 425 U.S. 435 (1976).

¹⁴³ As Justice Douglas once stated, "it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." *Donaldson v. United States*, 400 U.S. 517, 537 (1971) (Douglas, J., concurring).

¹⁴⁴ A third-party subpoena only implicates fourth amendment interests when the third-party is asked to reveal confidences. That is, as *Katz* teaches, reasonable expectations of privacy must be implicated. See Note, *supra* note 36, at 988-89. For example, it should be obvious that a subpoena to a bank robbery witness does not implicate any fourth amendment interests of the robber. Concededly, however, it may sometimes be difficult to distinguish that which is private and protected from that which is not. See McKenna, *supra* note 135, at 55 n.1.

¹⁴⁵ This is not too far fetched from the standpoint of factual possibility. In *Katz*, the agents were able to learn that the defendant would be using a certain phone booth for several minutes at the same time each morning. *Katz v. United States*, 389 U.S. 347, 354 n.14 (1967).

For a second and similar hypothetical, reconsider the facts in *Katz*.¹⁴⁶ There, presumably with full probable cause that the defendant was using a certain phone booth to transmit wagering information, the government placed an electronic listening device outside the booth. This activity may be analogized to the actual interception of the letter in the first hypothetical. As alternative courses of action, the government could have contemplated subpoenas like those in the third or fifth options described in the letter hypothetical. The question, of course, is whether from the standpoint of implicating fourth amendment interests—not from the standpoint of ultimate reasonableness requirements—the options in these hypotheticals can be distinguished.

Although it has been over a century since the Supreme Court recognized that opening the mail constitutes fourth amendment activity,¹⁴⁷ it has only been slightly over a decade since the Court applied the fourth amendment to non-trespassory wiretapping.¹⁴⁸ The distinction between the two procedures was perhaps viable as long as property concepts dominated fourth amendment analysis. However, a property-privacy dichotomy cannot really explain the difference, for surely opening and reading a letter was always considered more intrusive than a temporary seizure.¹⁴⁹ The reason, suggested by *Katz*, is that reading the contents of a letter intrudes upon informational privacy, a central concern of the fourth amendment.¹⁵⁰

From the perspective of informational privacy, it would be formalistic to maintain that the fourth amendment is implicated by mail reading and wiretapping but not by governmental attempts to obtain the same information by subpoenas addressed to the party sending the message. Hence, the second and third option in the letter hypothetical and the second option in the *Katz* hypothetical would, like traditional searches, implicate fourth amendment interests.¹⁵¹ Indeed, as already noted, the Supreme Court recognized in *Boyd* and *Hale*, and apparently continues to recognize, that the

party receiving a subpoena may have fourth amendment interests to assert.¹⁵² *Katz*, of course, reinforces this position, for once informational privacy is recognized as the relevant fourth amendment concern, the absence of trespass or force—so crucial to Justice McKenna in *Hale*¹⁵³—must be irrelevant.¹⁵⁴

This leaves for consideration the third-party subpoenas. First, it should be apparent that the fourth amendment issue cannot turn on any distinction between a subpoena for testimony and one for documents. In the mail hypothetical, for example, X's informational privacy interests—whatever they may be—are surely implicated to the same degree whether the subpoena be for Y's testimony or for Y to bring the letter.¹⁵⁵ Moreover, to distinguish the subpoena for the letter in the first hypothetical from the subpoena for the testimony of *Katz*' telephone partner in the second hypothetical would be to resurrect the distinction between tangible and intangible effects, a distinction *Katz* put to final rest.

It requires no belabored discussion at this point

¹⁵² See text at notes 137–41, *supra*. *Boyd* found the fourth amendment implicated by "any forcible and compulsory extortion of a man's own testimony or of his private papers." *Boyd v. United States*, 116 U.S. 616, 630 (1886) (emphasis added).

¹⁵³ See text at note 136 *supra*.

¹⁵⁴ Until recently, the fifth amendment protection against compulsory self-incrimination overshadowed the fourth amendment concern in first party subpoenas. In *Fisher v. United States*, 425 U.S. 391 (1976), however, the Court suggested, without holding, that the fifth amendment may not protect against disclosure of previously written documents. Because of the doubts raised by *Fisher*, and because of the increasing use of testimonial immunity, the fourth amendment privacy concern now looms much larger.

In *United States v. Dionisio*, 410 U.S. 1 (1973), the Court, reasoning that every person has an obligation to appear and give evidence before a grand jury, held that a grand jury subpoena does not "seize" a person for fourth amendment purposes. *Dionisio*, however, does not suggest that a subpoenaed person lacks any fourth amendment interest in the subject matter of his testimony. Rather, the Court carefully noted that the grand jury request for a voice sample from the subpoenaed person involved "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id.* at 15 (quoting *Davis v. Mississippi*, 394 U.S. 721, 727 (1969)).

The statement in the text that the absence of trespass or force is irrelevant should not be taken out of context. Again, it must be emphasized that the issue under discussion is whether a subpoena constitutes a search, not the reasonableness requirements that subpoenas have to meet to constitute searches.

¹⁵⁵ Note, *supra* note 36, at 989–90.

¹⁴⁶ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴⁷ *In re Jackson*, 96 U.S. 727 (1878).

¹⁴⁸ *Katz v. United States*, 389 U.S. 347 (1967). See also *Berger v. New York*, 388 U.S. 41 (1967) (trespassory electronic surveillance).

¹⁴⁹ *United States v. Van Leeuwen*, 397 U.S. 249 (1970). See also *In re Jackson*, 96 U.S. 727, 733 (1877) (distinguishing sealed and open packages and talking about the "secrecy" of letters).

¹⁵⁰ See section II B 1 *supra*.

¹⁵¹ See McKenna, *supra* note 135, at 85–87.

to reach the conclusion that the third-party subpoenas in both hypotheticals implicate fourth amendment interests.¹⁵⁶ In the first hypothetical, it cannot matter that X's letter is now in Y's hands, for the relevant concern is informational privacy, not property-privacy. Nor can it be argued that X, or Katz in the second hypothetical, relinquished expectations of informational privacy by disclosing thoughts to another, for *Barlow's* makes clear that a limited disclosure to third parties does not negate privacy expectations against government. *Barlow's* should reassure us that government does not obtain a right of *carte blanche* access to our thoughts whenever we decide to write letters or make phone calls.

Of course, the fourth amendment, which addresses governmental activity, does not protect us against the risk that a confidant will become a tattletale and willingly testify against us.¹⁵⁷ Moreover, there still may be a constitutional difference

¹⁵⁶ As previously indicated, the *Miller* Court made reference to a general rule that "the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued." See text at note 127, *supra*. Nevertheless, the Court did this only after first analyzing the fourth amendment interests of the depositor. To the extent the Court incorrectly analyzed those interests, the cited rule cannot preclude application of the fourth amendment. In any event, the so-called general rule crept into the cases without supporting analysis. The oldest Supreme Court case supporting the rule is a per curiam affirmance of a lower court opinion. See *First Nat'l Bank of Mobile v. United States*, 267 U.S. 576 (1925) (per curiam) *aff'g* 295 F.2d 142 (S.D. Ala. 1924). The lower court opinion, however, rejected a subpoenaed bank's attempt to assert the rights of its customers. It does not appear from the opinion that the customers tried to assert their own fourth amendment rights. See also *Justice v. United States*, 390 U.S. 199 (1968) (per curiam) *aff'g* *United States v. First Nat'l Bank of Pikesville*, 274 F. Supp. 283 (E.D. Ky. 1967). The taxpayer intervened in this case, but the lower court rejected the constitutional challenge simply by noting that the record failed to support the assertion that the IRS wanted the bank records for purposes of a criminal investigation. The lower court's opinion was decided six months before *Katz*, and the appellant's brief to the Supreme Court did not cite that case. In *Donaldson v. United States*, 400 U.S. 517, 522 (1971), the taxpayer conceded that a subpoena to his employer did not present a constitutional issue, and the Court, merely citing the above cases, added gratuitously that the question "appears to have been settled long ago." Finally, in *United States v. LaSalle Nat'l Bank*, 98 S. Ct. 2357, 2362 n.8 (1978), the Court referred to its conclusion in *Donaldson* "that the summoning of the employer's and the accountant's records for an investigation of the taxpayer did not violate the constitutional rights of any of them."

¹⁵⁷ See Note, *supra* note 36, at 989-90.

between the government planting a spy, as in *Hoffa*, and the government issuing a third-party subpoena. Unlike governmental spying, which uses deception to intrude upon privacy interests, a subpoena may be viewed simply as a request for information.¹⁵⁸ To the extent this is true, the third party's decision not to challenge the subpoena may make the situation analogous to that of the tattletale.¹⁵⁹ At the very least, the doctrine of third-party consent should preclude the first party from being able to assert fourth amendment reasonableness requirements.¹⁶⁰

This latter reasoning, however, should not be available in cases like *Miller*. Just as a hotel clerk cannot give legal consent to a search of a rented hotel room,¹⁶¹ the bank's legal obligation of confidentiality¹⁶² should preclude it from having a right to consent. The bank, then, should have an obligation either to challenge the subpoena in a hearing at which the customer can appear or, at a minimum, to notify the customer of the option of consenting to or fighting the subpoena.

The only possible remaining argument on behalf of *Miller* is that the Bank Secrecy Act, by mandating the recording and disclosure of bank records, has negated reasonable expectations of informational privacy. This, as earlier noted, involves an ambiguous part of the *Barlow's* holding.¹⁶³ Nevertheless, by requiring either a long history of past

¹⁵⁸ See Petitioner's Brief at 49, *United States v. Miller*, 425 U.S. 435 (1976), arguing that a subpoena is not self-executing even if it says that the person is "commanded" to testify or to produce documents.

¹⁵⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) makes it unnecessary for the government to advise the third party of the right to refuse consent. On the other hand, the use of words like "command" in the subpoena might create a problem. Cf. *Bumper v. North Carolina*, 391 U.S. 543 (1968) (claim of authority by police vitiates consent). But see Petitioner's Brief at 49, *United States v. Miller*, 425 U.S. 435 (1976).

¹⁶⁰ See *United States v. Matlock*, 415 U.S. 164 (1974). See also White, *The Fourth Amendment As a Way of Talking About People: A Study of Robinson and Matlock*, 1974 Sup. Ct. Rev. 165, 216-32 (P. Kurland ed.).

¹⁶¹ *Stoner v. California*, 376 U.S. 483 (1964). Whether the phone company should be permitted to consent to the government's request by subpoena for a customer's long distance phone records may be a more difficult question. See Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co., 23 Crim. L. Rep. 2558 (BNA) (D.C. Cir. 1978) simply reasoning along lines rejected in this article that the customer lost his fourth amendment protections by transacting business with third parties.

¹⁶² See note 13 *supra*, and accompanying text.

¹⁶³ See text at notes 52-58 *supra*.

regulation, or perhaps a short history of pervasive regulation, *Barlow's* rejected the view that government can simply define its conduct outside the fourth amendment's umbrella. *Barlow's* should thus make apparent that the fourth amendment implications of subpoenas cannot be avoided merely by statutory decree.

In summary, *Miller*, like *Hoffa* and *White*, cannot survive an analysis predicated on *Katz* and this term's search and seizure principles. Indeed, the fourth amendment implications of *Barlow's* and *Katz* extend well beyond the subpoena for bank records at issue in *Miller*. It remains, however, to ascertain what this term's cases have to say about the reasonableness of such searches.

III

THE REQUISITE STANDARD OF CAUSE

A. THE BALANCING TEST: REQUIRING LESS THAN TRADITIONAL PROBABLE CAUSE

1. *Probable Cause Based Upon Administrative Guidelines*

Although *Barlow's* required search warrants to justify unwanted entries by OSHA inspectors, it did not require probable cause in the traditional sense of that term. Quoting *Camara v. Municipal Court*,¹⁶⁴ *Barlow's* held that it would suffice to show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."¹⁶⁵ *Camara*, as is now widely known, held that the meaning of probable cause may vary from one context to another as a function of reasonableness. And in a frequently quoted sentence, *Camara* added that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."¹⁶⁶ While this doctrinal development was extremely important, especially for the soon to be decided stop and frisk cases,¹⁶⁷ the notion of probable cause as a flexible concept originated long before *Camara*. For example, in *Oklahoma Press Pub. Co. v. Walling*,¹⁶⁸—a case given just a passing cita-

tion in *Camara*¹⁶⁹—the Court recognized that probable cause does not have its traditional meaning in the context of evidentiary subpoenas.¹⁷⁰

The *Camara* dissenters criticized the Court for prostituting the fourth amendment's command that no warrants shall issue but upon probable cause.¹⁷¹ In both *Barlow's* and *Tyler*, Justice Stevens, joined by Justices Rehnquist and Blackmun, expressed the same view. Maintaining that the framers directed the fourth amendment at the evil of the general warrant, Justice Stevens argued that the requirement of traditional probable cause protects against this evil. The warrant clause should not apply, he stated, when traditional notions of probable cause are inappropriate.¹⁷²

The functional significance of Justice Stevens'

¹⁶⁹ Toward the end of its discussion of probable cause, the *Camara* Court reiterated that "if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." The Court then made a *cf.* citation to *Oklahoma Press*. In *See v. Seattle*, 387 U.S. 541, 545 (1967), a companion case to *Camara*, the Court cited *Oklahoma Press* for the proposition that a subpoena for corporate records constitutes a "constructive" search.

¹⁷⁰ 327 U.S. at 209.

The requirement of probable cause, supported by oath or affirmation, literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.

¹⁷¹ The fourth amendment has two clauses. The first protects the right of the people to be secure against "unreasonable searches and seizures;" the second states that 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.

¹⁷² According to Justice Stevens:

The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first clause, not the Warrant clause, that the Framers adopted to limit this category of searches. . . . [W]e should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially developed, warrant-preference scheme.

Marshall v. Barlow's, Inc., 98 S. Ct. 1816, 1828 (1978) (Stevens, J., dissenting). *See also Michigan v. Tyler*, 98 S. Ct. 1942, 1952 (Stevens, J., concurring and dissenting).

¹⁶⁴ 387 U.S. 523 (1967).

¹⁶⁵ *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1824 (1978) (quoting 387 U.S. at 538).

¹⁶⁶ 387 U.S. at 536-37.

¹⁶⁷ *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968). For an excellent discussion of the balancing principle in the stop and frisk cases, see LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968).

¹⁶⁸ 327 U.S. 186 (1946).

position is difficult to appreciate. Both he and the majority agreed in *Barlow's* and *Tyler* that a balancing analysis was appropriate; they disagreed, however, over the issue to be resolved by balancing. To the majority, balancing gave meaning to probable cause, but to Justice Stevens, balancing determined whether a warrant should be required.¹⁷³ Of course, by balancing away the need for a warrant in OSHA cases, Justice Stevens, like the majority, also rejected the need for traditional probable cause; warrantless searches are governed, he argued, by the reasonableness clause of the fourth amendment.¹⁷⁴ Both the majority and dissenting positions, therefore, recognized a doctrinal basis for avoiding traditional probable cause requirements.

To the extent, however, that the need for a warrant in certain classes of cases is firmly established,¹⁷⁵ Justice Stevens' approach may leave less room for tampering with traditional probable cause requirements and thus provide some assurance that fourth amendment law will not ultimately degenerate into one large, subjective test of reasonableness.¹⁷⁶ On the other hand, the Court's automobile cases suggest that the need for traditional probable cause may sometimes be more firmly grounded than is the warrant requirement.¹⁷⁷ If this is true, then Justice Stevens' approach constitutes the greater threat to established

fourth amendment safeguards, for it provides a ready analysis for those inclined to dispense even further with the warrant requirement.¹⁷⁸ The result, of course, could be an increasingly large class of cases in which neither pre-search judicial scrutiny nor traditional probable cause would apply.¹⁷⁹

Unlike *Camara*, neither *Barlow's* nor *Tyler* attempted to justify the lesser standard of probable cause in the context of OSHA inspections and fire investigations. *Camara*, however, did not hold that all administrative inspections, whatever their nature, are reasonable on less than traditional probable cause; rather, that decision attempted to balance the public need against the degree of intrusion in the particular context of municipal code inspections.¹⁸⁰ The *Camara* Court noted that such inspections "have a long history of judicial and public acceptance", are necessary to detect dangerous conditions such as faulty wiring, and are neither personal in nature nor aimed at the discovery of criminal evidence.¹⁸¹ While some of this reasoning has been soundly criticized, most notably by Professor LaFave,¹⁸² it seems fair to say that the Court ultimately reached the correct conclusion on the probable cause issue.¹⁸³

Whether the Court reached the correct conclusion in *Barlow's* is difficult to say in the absence of any analysis to review. The Court's lack of analysis with regard to probable cause is particularly unfortunate since the company in *Barlow's* specifically argued that the OSHA inspection mandate is "so broad . . . that the *Camara* examples of passage of time and area characteristic tests for probable cause

¹⁷³ In *Barlow's*, Justice Stevens said, "In determining whether a warrant is a necessary safeguard in a given class of cases, 'the Court has weighed the public interest against the Fourth Amendment interest of the individual. . .'" 98 S. Ct. at 1829 (Stevens, J., dissenting) (quoting *United States v. Martinez-Fuerte* 428 U.S. 543, 555 (1976)). The quote from *Martinez-Fuerte* does not support Justice Stevens' position, for the Court in that section of its opinion was concerned with the requisite standard of cause for stops at fixed checkpoints near the border, not with the need for a warrant.

¹⁷⁴ 98 S. Ct. at 1827 (Stevens, J., dissenting). In actuality, the Court has usually required full probable cause for warrantless searches whenever full probable cause would be required for similar searches conducted pursuant to a warrant. Otherwise, the incentive for obtaining warrants would be weakened. See LaFave, *supra* note 167, at 53-54.

¹⁷⁵ Justice Stevens said that the Court has "generally" required a warrant "in cases involving the investigation of criminal activity." 98 S. Ct. at 1827 (Stevens, J., dissenting).

¹⁷⁶ For a discussion of this danger, see Amsterdam, *supra* note 42, at 393-94.

¹⁷⁷ See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970). See also, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1822 n.10 (1978) (observing that the requirement of probable cause has not been abandoned in the automobile cases).

¹⁷⁸ See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976) (permitting warrantless inventory searches of automobiles lawfully in police custody); *United States v. Edwards*, 415 U.S. 800 (1974) (permitting warrantless seizure and search of trousers taken from person in police custody). See also *United States v. Chadwick*, 433 U.S. 1, 17-24 (1977) (Blackmun & Rehnquist, JJ., dissenting) (arguing that warrantless search of footlocker in police custody should be upheld).

¹⁷⁹ Whether right or wrong, the balancing analysis of Justice Stevens' opinion may help explain the automobile cases. See section IV B *infra*.

¹⁸⁰ In *See v. Seattle*, 387 U.S. 541 (1967), a companion case to *Camara*, the Court imposed a warrant requirement on fire code inspections of commercial premises. Without balancing the interests, the Court summarily concluded that probable cause would be measured by a "flexible standard of reasonableness." *Id.* at 545.

¹⁸¹ 387 U.S. at 537.

¹⁸² See LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 13-20 (P. Kurland ed.).

¹⁸³ See *id.* at 20.

would not necessarily apply."¹⁸⁴ Even a quick consideration of the factors found relevant in *Camara* suggests that the company's position may have had merit. First, as the Court itself conceded, "the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates."¹⁸⁵ Hence, it cannot be said that OSHA inspections "have a long history of judicial and public acceptance." Indeed, such inspections have provoked quite a bit of hostility, at least from some segments of the public.¹⁸⁶ Second, the need for OSHA inspections on less than traditional probable cause may be open to question. Certainly employees, who have a direct stake in health and safety, are free to report observable hazards to the government,¹⁸⁷ a fact that perhaps distinguishes the housing inspections in *Camara*.¹⁸⁸ Of course, the effectiveness of employee reporting depends to some extent on the scope of the inspector's authority. To the extent that the inspector has a broad right of access, the more limited observations of employees may not be deemed a satisfactory substitute.

In terms of the third *Camara* factor—the intrusiveness of the inspection—the scope of the inspector's authority may itself be a problem. Even assuming that OSHA inspections are not aimed at

the discovery of criminal evidence,¹⁸⁹ they may nevertheless be personal in nature and highly intrusive. This is demonstrated by the judicial authorization the government finally obtained in *Barlow's* permitting the inspection to extend to

the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated . . . pursuant to [the] Act.¹⁹⁰

Armed with such authority, an OSHA inspector can obviously examine practically everything on the premises, including written documents¹⁹¹—something the inspector in *Camara* clearly could not do. Moreover, by having broad authority to check for the violation of any health and safety standard, the inspector can conduct a wide ranging inspection to ascertain whether over 4,000 promulgated standards have been satisfied.¹⁹²

Given these possible distinctions of *Camara*, the Court's summary treatment of the probable cause issue in *Barlow's* cannot be defended. In fact, the Court should not have resolved the issue at all,

¹⁸⁹ The government's brief indicated that catching violators was more important to OSHA administrators than inducing compliance with safety regulations. Brief for Appellants at 38-40, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978) (suggesting that advance notice of inspections would give employers an opportunity to conceal or correct defects). See also Brief for Amicus Curiae for Pacific Legal Foundation at 18, referring to the "cops and robbers" mentality of the government's brief; Brief for the Chamber of Commerce of the United States of America, Amicus Curiae at 18: "Even assuming, *arguendo*, that an employer were able to identify and correct all possible violations while a warrant is obtained, then the principle purpose of the Act, abatement of hazardous conditions, will have been achieved."

¹⁹⁰ 98 S. Ct. at 1823-24 n.14. The government obtained the order after the company refused entry to the OSHA inspector.

¹⁹¹ Although the judicial order quoted in the text appeared to permit the inspector to examine all relevant records and files, the OSHA regulations authorize inspection only of those records required to be kept under the Act. 29 C.F.R. § 1903.3 (1977).

¹⁹² See note 186 *supra*.

¹⁸⁴ Brief for Appellee at 54-55, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978). After concluding that probable cause could be based upon reasonable administrative standards, *Camara* indicated that such standards may be based upon the passage of time since a previous inspection, the nature of the building, or the condition of the entire area. 387 U.S. at 538.

¹⁸⁵ 98 S. Ct. at 1821.

¹⁸⁶ Some of this hostility was evident in the briefs filed against the government. Several, for example, referred to the burden on employers in trying to comply with over 4,000 regulations. *E.g.*, Brief for Appellee at 39; Brief for the Chamber of Commerce of the United States of America, Amicus Curiae at 17, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978). The brief by the Chamber of Commerce also described many of the OSHA regulations as vague. *Id.* See also Brief for Amicus Curiae for Pacific Legal Foundation at 18, referring to the "nit-picking . . . for which OSHA has become notorious." For an expression of judicial uneasiness over the scope of OSHA's authority, see *Brennan v. Gibson's Prod., Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976). Drivers of automobiles may also have observed bumper stickers urging the repeal of OSHA.

¹⁸⁷ See Brief for Amicus Curiae for Pacific Legal Foundation at 17-18, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978) (urging that probable cause be based upon employee complaints).

¹⁸⁸ See *LaFave*, *supra* note 182 at 16, pointing out that reliance on citizen complaints would not assure "a reasonable level of enforcement" of municipal housing codes.

since it received only passing footnote reference in the government's principal brief and less than three pages of attention in the government's reply brief.¹⁹³ By addressing the issue and resolving it as it did, the Court has suggested that the need for traditional probable cause may be easily balanced away on rather flimsy evidence, even when the search at issue is highly intrusive. To so extend *Camara* without full briefing and argument from both sides is regrettable.

2. Probable Cause Based Upon A General Notion of Reasonableness

The *Camara* balancing principle can affect either the kind or degree of probable cause required in a given context. In the administrative context, the principle has usually affected the kind of required cause. That is, probable cause in such cases is usually not expressed in terms of probabilities or suspicions of individual wrongdoing but instead, as in *Barlow's*, in terms of the reasonableness of governing administrative standards. In the criminal context, however, the balancing principle has usually affected the degree of the requisite individualized cause. In the stop and frisk cases, for example, the Court permitted police conduct to be based upon reasonable suspicion rather than traditional probable cause,¹⁹⁴ and it justified this by balancing the public need to prevent crime against the limited intrusiveness of such police activity.

Two terms ago, the Court held in *United States v. Martinez-Fuerte*¹⁹⁵ that temporary stops and brief questioning may be conducted at fixed checkpoints near the border "in the absence of any individualized suspicion."¹⁹⁶ The Court did not even require administrative guidelines to determine the appropriateness of any given stop, for "the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."¹⁹⁷ Throughout the opinion, the Court emphasized that checkpoint stops constitute

¹⁹³ Brief for Appellants at 51 n.27; Reply Brief for Appellants at 4-6, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

¹⁹⁴ See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968). The Court did not actually use the term *reasonable suspicion* until *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), but the *Terry* standard of cause could easily be described by such a term. Cf. LaFave, *supra* note 167, at 68 & 73-75 (using the terms "reasonable grounds to suspect" and "substantial possibility"). Traditional probable cause encompasses something close to a more-probable-than-not standard. *Id.* at 73-74.

¹⁹⁵ 428 U.S. 543 (1976).

¹⁹⁶ *Id.* at 562.

¹⁹⁷ *Id.* at 563-64.

only a minimal intrusion upon fourth amendment interests.¹⁹⁸ Whether right or wrong on the facts before it, the holding of *Martinez-Fuerte* was a logical development of the *Camara* doctrine, which, in effect, established a sliding scale approach to probable cause issues: the most intrusive fourth amendment activity—full arrests and full searches under the criminal law—normally require an individualized judgment of full, traditional probable cause; somewhat lesser intrusions under the criminal law—such as street stops and frisks—normally require an individualized judgment of cause,¹⁹⁹ but something less than full, traditional probable cause; investigations for civil purposes, which typically are less intrusive than investigations under the criminal law,²⁰⁰ normally require objective administrative guidelines but not individualized cause; criminal or civil investigations that intrude only marginally upon fourth amendment interests require only a general assessment of reasonableness. *Martinez-Fuerte* merely completed the continuum by adding the last point.

In *Pennsylvania v. Mimms*,²⁰¹ by a per curiam decision, the Court applied the test of simple reasonableness to uphold a minor seizure of an automobile driver.²⁰² There, two police officers stopped the defendant for driving with an expired license plate. One of the officers then asked the defendant to step from the car. When the defendant did this, the officer noticed a bulge under his sports jacket. Fearing a gun, the officer frisked the defendant, finding a .38 caliber revolver. The Pennsylvania Supreme Court reversed the defendant's subsequent conviction on gun charges.²⁰³ Finding that the initial detention was lawful and assuming that the frisk was lawful once the officer observed the bulge,²⁰⁴ the court nevertheless concluded that the order to leave the car was an unlawful seizure,

¹⁹⁸ *Id.* at 562.

¹⁹⁹ *Martinez-Fuerte* recognized that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *Id.* at 560.

²⁰⁰ LaFave, *supra* note 182, at 18-20.

²⁰¹ 434 U.S. 106 (1977).

²⁰² Curiously, *Mimms* did not cite *Martinez-Fuerte*, the precedent most strongly supporting the Court's holding.

²⁰³ *Commonwealth v. Mimms*, 471 Pa. 546, 370 A.2d 1157 (1977).

²⁰⁴ In a separate part of its opinion, the United States Supreme Court concluded that there was "little question" that "the bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer." 434 U.S. at 112. No one dissented on this point. If the mere observation of a bulge will always justify a frisk, the reasonable suspicion standard cannot have much teeth.

because the officer had no factual basis to suspect either criminal activity or the presence of weapons.²⁰⁵ This illegal seizure, the court concluded, tainted the subsequent frisk and required suppression of the gun. The United States Supreme Court summarily reversed.

The Court began its analysis by stating that "reasonableness" was the appropriate test. To determine reasonableness, the Court balanced the public interest against the intrusiveness of the officer's conduct. Citing the dangers that confront officers while engaged in traffic stops, the Court found the safety of the officer a "legitimate and weighty" justification for ordering the defendant to leave the car.²⁰⁶ Turning to the defendant's interests, the Court described the "incremental intrusion"²⁰⁷ resulting from the order to leave the car as "de minimis".²⁰⁸

The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity."²⁰⁹

In a dissenting opinion, Justice Stevens criticized the Court for its summary disposition of the case. Addressing the merits, Justice Stevens questioned whether ordering a routine traffic offender out of the car really enhances an officer's safety.²¹⁰ Justice Stevens also questioned the Court's conclusion that the driver's interest was negligible. Certain individuals, he argued, may fear for their safety, object to standing in the rain or cold, or be embarrassed about not being fully dressed.²¹¹ Justice Stevens also observed that the Court's logic necessarily applies to passengers,²¹² and he further suggested that the Court's holding means that whenever an officer has occasion to speak with the driver of a vehicle, he may order the driver from the car.²¹³

Although Justice Stevens was perhaps correct in

²⁰⁵ 471 Pa. at 552, 370 A.2d at 1160.

²⁰⁶ 434 U.S. at 111.

²⁰⁷ *Id.* at 110.

²⁰⁸ *Id.* at 111.

²⁰⁹ *Id.* (quoting *Terry v. Ohio*, 342 U.S. 1, 17 (1968)).

²¹⁰ *Id.* at 115 (Stevens, J., dissenting).

²¹¹ *Id.* at 116.

²¹² *Id.* at 117. *Accord*, *State v. Ferrise*, 269 N.W.2d 888 (Minn. 1978).

²¹³ 434 U.S. at 117.

his criticism of the Court's summary disposition of *Mimms*, his discussion of the merits seems flawed. Obviously, as he appeared to concede,²¹⁴ the Court has no business choosing the one procedure among reasonable alternatives that would most enhance an officer's safety.²¹⁵ Turning to the driver's interests, Justice Stevens' hypotheticals seem makeweight. Certainly the appropriate constitutional rule should not turn on the possibility that some people may occasionally run errands without being fully clothed.²¹⁶ Justice Stevens' observation that the Court's holding necessarily applies to passengers seems correct, but nothing in his dissent illustrates why ordering passengers to leave a stopped car is unreasonable.

Justice Stevens appears to be most incorrect in his suggestion that the majority's holding implies that an officer can order anyone with whom he has occasion to speak out of a car. The crux of the Court's reasoning was that the driver had already been inconvenienced by the initial interference with his travels.²¹⁷ Given this initial intrusion, the

²¹⁴ *Id.* at 116.

²¹⁵ In balancing the public's interest against that of the individual, however, the disagreement among police experts about the safest procedure would be a relevant consideration. The difference between taking disagreement of experts into account in the balancing process and appearing to resolve the disputes among experts is subtle but nevertheless important in constitutional law. *Compare* *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) with *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) and *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).

²¹⁶ Getting out of a car in inclement weather may, of course, be rather annoying. The Court had to choose, however, among three alternatives: a per se rule finding an order to exit reasonable, a case-by-case assessment of reasonableness, or a per se rule finding such an order unreasonable. The latter would be justified only if Justice Stevens' hypotheticals described fairly frequent occurrences. Atypical occurrences should not produce rigid constitutional restraints, especially when so little in terms of constitutional liberty is at stake. Left to choose among the first two alternatives, the Court's selection of a per se rule over case-by-case adjudication may make good sense. *Cf. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 *SUP. CT. REV.* 127, 140-43 (P. Kurland ed.) (arguing that a per se approach is most appropriate for police conduct that constitutes only a minor intrusion into privacy interests).

²¹⁷ Answering Justice Stevens, the Court said, "We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle . . ." 434 U.S. at 111 n.6. As suggested in the text accompanying note 216 *supra*, the Court's reasoning seems equally applicable to passengers. Stopping a car interferes with their travels as much as it interferes with the driver's. The Court's

intrusion of being forced to leave the car was "de minimis". Without the initial intrusion, however, the officer's demand would have effectuated the initial seizure and thus have constituted a significant intrusion requiring individualized cause.

The Court's holding in *Mimms* is important because it recognizes that the judiciary should not measure an officer's each and every step with a precisely calibrated vernier. *Martinez-Fuerte* had recognized much the same thing, but in the context of fixed checkpoint stops, where there is substantial administrative oversight, little if any surprise to the motorist, and considerable public visibility. *Mimms* proceeds to the next step by holding that some of an individual officer's decisions on the street, where oversight, advance notice, and public visibility are absent, need not be pigeonholed on the scale of individualized cause.²¹⁸ *Mimms* teaches that a test no more specific than general reasonableness is sufficient for minor intrusions that are incidental to antecedent intrusions of a more serious nature, which do require some degree of individualized cause.

The reasonableness test, while imprecise and prone to subjective judgments, simplifies the law and permits adequate flexibility for the myriad courses of action that may be open to an officer temporarily confronting a person on the street. This is especially so if the test is applied with appropriate deference to the officer's judgments.²¹⁹

rationale for allowing the officer to order the driver from the car was not that the driver had already committed a wrong and thus could not complain about the additional inconvenience but rather that the initial inconvenience overshadowed the subsequent one. The subsequent inconvenience is equally de minimis for passengers. See *State v. Ferrise*, 269 N.W.2d 888 (Minn. 1978).

²¹⁸ The Court in *Martinez-Fuerte* relied on all these factors in rejecting the need for individualized cause. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559-62 (1976). The absence of these factors distinguishes *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), where the Court held that the roving border patrol needs individualized suspicion to stop cars away from the border. *Brignoni-Ponce* did not dictate a different result in *Mimms* for the reason, already discussed, that the latter case involved an initial intrusion justified by individualized cause.

²¹⁹ An issue that pervades all constitutional adjudication is whether the Court should engage in strict scrutiny, putting a heavy burden on the state to justify its conduct, or apply a deferential test of rationality, allowing the state to prevail even if reasonable people disagree on the wisdom of the adopted policy. The latter approach seems more appropriate in fourth amendment adjudication when the individual interests involved are at the periph-

In any event, specific rules governing an officer's every move would probably be unworkable. As Professor LaFave recently remarked:

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."²²⁰

Of course, courts will still have the sometimes difficult task of determining whether a given intrusion is sufficiently minor to justify analysis under the flexible reasonableness standard. In the context of street encounters, courts after *Mimms* will frequently have to decide whether a given course of conduct adds only marginally to a serious, antecedent intrusion or instead constitutes a significant additional intrusion requiring individualized justification. Clearly, for example, a frisk cannot be considered just a "de minimis" incremental intrusion following a lawful stop,²²¹ nor can a temporary detention at the station.²²² Whether returning a lawfully stopped person to a crime scene for possible identification should require separate and greater justification is a difficult question, one that may depend upon factors such as the distance to be traveled and the time consumed.²²³ While gray areas obviously remain, the reasonableness test, especially as it gets developed and applied, should nevertheless provide some badly needed breathing space both for courts seeking to establish a coherent body of fourth amendment doctrine and for officers

ery of fourth amendment concerns. See also note 215, and accompanying text *supra*.

²²⁰ LaFave, *supra* note 216, at 141.

²²¹ *Terry v. Ohio*, 392 U.S. 1 (1968) specifically rejected the view that a frisk is a petty indignity. In *Mimms* Justice Stevens said, "If this new rule is truly predicated on a safety rationale . . . it should also justify a frisk for weapons, or at least an order directing the driver to lean on the hood of the car with legs and arms spread out." 434 U.S. at 123. This analysis fails to recognize that such police conduct is more than a de minimis incremental intrusion to the initial stop. At least as long as *Terry* survives, the concern for safety, absent specific facts indicating a risk of danger, cannot outweigh the major intrusion of such police conduct.

²²² See *Davis v. Mississippi*, 394 U.S. 721 (1969).

²²³ Cf. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 (1) (Proposed Official Draft, 1975) (allowing an officer to stop a person on reasonable suspicion and detain the individual "near" the place of initial detention, but for no more than twenty minutes, to obtain an identification).

faced with the task of quick decisionmaking on the street.²²⁴

B. THE BALANCING TEST: REQUIRING MORE THAN TRADITIONAL PROBABLE CAUSE

In *Zurcher v. Stanford Daily*,²²⁵ police with traditional probable cause obtained a warrant to search the offices of a student newspaper for photographic evidence of previous campus violence. The warrant affidavit did not suggest that any members of the paper were involved in the unlawful conduct. Pursuant to the warrant, police searched the paper's offices, including photographic laboratories, filing cabinets, desks, and waste paper baskets, but not including locked rooms and drawers. The search was unsuccessful. Shortly thereafter, the paper brought a civil rights action against the police, and the federal district court issued a declaratory judgment that the search violated the paper's first and fourth amendment rights.²²⁶ The court concluded that the fourth amendment prohibits a search of premises belonging to a person not suspected of crime unless probable cause exists that a subpoena duces tecum would be impractical. In addition, the court concluded that the first amendment requires even more stringent protection for the press.²²⁷ The court of appeals affirmed the district court,²²⁸ but the Supreme Court, in an opinion written by Justice White, reversed.

The Court began its analysis by observing that "it is an understatement to say that there is no direct authority . . . for the District Court's sweeping revision of the Fourth Amendment."²²⁹ Existing law, the Court maintained, permits the search of

²²⁴ Cases like the following should be much easier after *Mimms*. An officer, acting on a citizen's complaint, investigated two men sitting in a car outside a house. Both men indicated they were waiting for a woman who had gone into the house. The officer then ordered the men to accompany him to the house to check the story. Assuming the officer had grounds to detain the men in the car for temporary questioning, the order to accompany him to the house seems eminently reasonable. See *People v. Rivers*, 42 Mich. App. 561, 202 N.W. 2d 498 (1972) (upholding the officer's conduct on reasonableness grounds).

²²⁵ 98 S. Ct. 1970 (1978).

²²⁶ *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

²²⁷ The court required a "clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order will be futile." *Id.* at 135.

²²⁸ *Zurcher v. Stanford Daily*, 550 F.2d 464 (9th Cir. 1977) (adopting the opinion of the district court).

²²⁹ 98 S. Ct. at 1975.

any place on probable cause that evidence will be found. But the fourth amendment does not require probable cause to believe that the person whose premises are to be searched was involved in the crime.²³⁰ Quoting *Camara*, the Court noted "that in criminal investigations, a warrant to search for recoverable items is reasonable 'only when there is probable cause to believe they will be uncovered in a particular dwelling.'" ²³¹ The Court also relied on *Camara* for the proposition that "a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor."²³² The Court then added,

The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by *subpoena duces tecum*, whether on the theory that the latter is a less intrusive alternative, or otherwise.²³³

Although confidently articulated, the Court's reasoning appears questionable. *Camara*, first of all, did not hold that a less stringent standard of probable cause is acceptable when the entry is not aimed at securing evidence of crime against the possessor. Rather, as previously discussed, *Camara* held that a less stringent standard of cause was permissible in the specific context of municipal housing inspections.²³⁴ In justifying its conclusion, the *Camara* Court did observe that housing inspections are not aimed at the discovery of criminal evidence,²³⁵ but as Professor LaFave noted some time ago, this rationale only makes sense if understood as suggesting that housing inspections, because of their limited objective, are not as intrusive as a typical search for criminal evidence.²³⁶ The

²³⁰ In effect, the Court held that a search of premises requires "search probable cause," but not "offender probable cause." See Haddad, *supra* note 31, at 214-15. The newspaper had argued that a search warrant should not issue unless there is probable cause to believe that someone connected with the premises is a wrongdoer (i.e., offender probable cause) or that someone connected with the premises would destroy or conceal the desired evidence.

²³¹ 98 S. Ct. at 1976 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)).

²³² 98 S. Ct. at 1976.

²³³ *Id.* at 1978.

²³⁴ See notes 180-93 *supra*. But see note 180 and accompanying text *supra*.

²³⁵ 387 U.S. at 537.

²³⁶ LaFave, *supra* note 182, at 17-20. In *Michigan v.*

search in *Zurcher*, unlike that in *Camara*, involved extensive rummaging.

More significantly, the *Zurcher* Court begged the question with its conclusion that the fourth amendment only requires probable cause for searches. The real question in *Zurcher*, as Justice Stevens recognized in his dissent, concerned "what kind of 'probable cause' must be established in order to obtain a warrant to conduct an unannounced search for documentary evidence in the private files of a person not suspected of involvement in any criminal activity."²³⁷ The Court's accusation that the district court revised the fourth amendment by balancing the public need against the intrusiveness of the search has the distinct flavor of the dissents in *Camara* and *Barlow's*.

As discussed in the previous section, the *Camara* balancing principle can affect either the kind or degree of probable cause required in a given context.²³⁸ Applying *Camara* and *Barlow's*, it is at least tenable to suggest that probable cause in third party contexts requires a showing that administrative procedures will not suffice to obtain the evidence. That is, in third party contexts, the kind of probable cause perhaps should differ from that found acceptable in first party searches. Or, applying the principle underlying *Martinez-Fuerte* and *Mimms*, it is at least tenable to suggest that only a

Tyler, 98 S. Ct. 1942 (1978), the Court held that entries into buildings to investigate the cause of a fire must be made according to the test set out in *Camara*. If, however, the authorities are seeking evidence of arson, they must have traditional probable cause. *Id.* at 1950, 1951. The Court provided no supporting rationale for the distinction, but its holding is consistent with Professor LaFave's thesis. An arson investigation is normally much more intrusive than an investigation to determine the cause of a fire:

[T]he arson investigator may look at the goods, clothing and furnishings remaining on the premises He might seize and examine the records and personal papers found on the premises. Or he might seal off the premises from everyone, including the owner, in order to preserve evidence. Those investigations far exceed the physical intrusion by someone who just wants to determine the cause of a fire.

Respondent's Brief at 19-20, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

²³⁷ 98 S. Ct. at 1987 (Stevens, J., dissenting). This assertion by Justice Stevens is rather remarkable given his dissenting opinions in *Barlow's* and *Tyler*. See the text at notes 171-79 *supra*. In *Zurcher*, Justices White and Stevens seem to have traded doctrinal positions.

In fairness to the Court, however, it should be noted that none of the briefs stated the issue in terms of the *Camara* balancing principle.

²³⁸ See notes 198-201 and accompanying text *supra*.

strong probability that evidence will be found should justify a search of third party premises: third party searches should perhaps require a higher degree of individualized probable cause than first party searches. By virtually ignoring these possibilities, however, the Court in *Zurcher* unfortunately suggested that the sliding scale approach to probable cause issues has a downward slope but no upward ladder.²³⁹

After chastising the lower court for revising the fourth amendment with a balancing analysis, the *Zurcher* Court proceeded nevertheless to consider the reasoning behind the lower court's "remarkable conclusion."²⁴⁰ As the Court observed, the state's interest in obtaining evidence does not vary as a function of whether the individual to be searched is a suspect. Focusing on the individual's interests, the Court reasoned that since a warrant will inform the person about the desired evidence, "it is doubtful that he should then be permitted to object to the search . . . and insist that the officers serve him with a subpoena *duces tecum*."²⁴¹ This, like the wrongdoer approach rejected in *Tyler* and *Mincey*, appears to be a bootstrap argument, for notice will provide an opportunity to disclose the evidence only if the evidence is in fact on the premises to be searched.

More persuasively, the Court reasoned that a seemingly innocent third party may turn out, after further investigation, not to be innocent at all. A subpoena *duces tecum* in such instances would give a guilty party, or one sympathetic to the guilty party, sufficient opportunity to destroy or conceal the evidence.²⁴² Moreover, the Court continued, requiring a subpoena may not significantly enhance privacy interests, since subpoenas, unlike search warrants, do not require a showing of probable cause.²⁴³

While this latter reasoning seems to be more justifiable, it cannot substitute for the thorough balancing of interests required by *Camara*. First, as Justice Stevens noted in his dissent, subpoenas

²³⁹ Soon after *Camara* was decided, Professor LaFave recognized that its rationale called for a higher than ordinary standard of probable cause "when the intrusion is particularly severe." LaFave, *supra* note 167, at 55 n.82. See also Berger v. New York, 388 U.S. 41, 68-69 (1967) (Stewart, J., concurring).

²⁴⁰ 98 S. Ct. at 1979.

²⁴¹ *Id.*

²⁴² *Id.* The paper in *Zurcher* was sympathetic to the students involved in the campus violence. *Id.* at 1983 n.1 (Powell, J., concurring).

²⁴³ 98 S. Ct. at 1980.

seemed to satisfy the public's need for obtaining items of mere evidence, such as photographs and documents, when the so-called mere evidence rule precluded such items from being seized in a traditional search.²⁴⁴ For such items at least, the Court's fear of destruction or concealment of evidence may be overstated.²⁴⁵ Second, the Court never did consider the intrusiveness of third party searches. While search warrants do require traditional probable cause and thus provide a modicum of protection that subpoenas do not,²⁴⁶ they, unlike subpoenas, permit a careful rummaging through possessions until the desired items are found or all possible places of concealment are eliminated. A search for documentary evidence is a paradigm of intrusiveness, since it can extend into virtually every nook and cranny and must inevitably intrude, at least to some extent, into the privacies of documents not subject to seizure.²⁴⁷

Even if these factors are not ultimately determinative, the fact that the party to be searched is a newspaper may tip the scales in the direction of a higher standard of probable cause. The Court conceded that the fourth amendment emerged from the historic struggle between the Crown and the press,²⁴⁸ but it concluded that the fourth amendment's probable cause requirement struck the appropriate balance of interests.²⁴⁹ Justice Powell, in his concurring opinion, reiterated this theme by noting that nothing in the wording of the fourth amendment suggests that the press should receive protections not available to others.²⁵⁰ But, of course, nothing in the wording of the fourth amendment suggests that housing inspections,

²⁴⁴ 98 S. Ct. at 1990 (Stevens, J., dissenting). Until *Warden v. Hayden*, 387 U.S. 294 (1967), a search warrant could only be obtained for contraband, stolen items, or instrumentalities of crime. "Mere evidence" was immune. By abrogating this rule, *Hayden* continued the trend of freeing search and seizure law from property concepts.

²⁴⁵ In Justice Stevens' words, probable cause to search for contraband, stolen goods, or instrumentalities supports an inference "that the custodian is involved in criminal activity, and that, if given notice, he will conceal or destroy what is being sought." 98 S. Ct. at 1990. A special rule for third party searches, he argued, is thus necessary only when items of mere evidence are involved, for in such instances no inference of wrongdoing on the part of the custodian is justified. *Id.*

²⁴⁶ Since a subpoena can only be enforced in a judicial proceeding, an objecting party at least obtains the opportunity to present his objections in an adversary proceeding.

²⁴⁷ See McKenna, *supra* note 135, at 67-70.

²⁴⁸ 98 S. Ct. at 1981.

²⁴⁹ *Id.* at 1981-82.

²⁵⁰ *Id.* at 1983 (Powell, J., concurring).

street stops, frisks and orders to exit a stopped car are deserving of less scrutiny than traditional arrests and searches. Similarly, nothing in the wording of the fourth amendment suggests that houses deserve more protection than cars; yet, relying at least in part on considerations of intrusiveness, the Court has consistently made such a distinction.²⁵¹ The point is simply that when the issue is correctly perceived as one involving the kind of probable cause needed to justify a search warrant, the historical concerns of the fourth amendment may dictate a particularly rigorous answer. The framers no more answered this question than they did other probable cause questions for which the Court has found a balancing analysis appropriate.

In summary, *Zurcher* is a poorly reasoned decision. The Court erred first by failing to state the issue in terms of the sliding scale model of probable cause²⁵² and by suggesting that a balancing approach was inappropriate. Moreover, even where it did undertake to balance the interests, the Court failed to present a complete analysis. This is not to say that the Court's ultimate holding is wrong. Such a conclusion mandates a more complete balancing of interests than that undertaken here. Nevertheless, the above analysis, albeit brief, must at least raise doubts about the holding as well as the underlying reasoning.

C. THE BALANCING TEST: EVIDENTIARY SUBPOENAS AND PARTICIPANT MONITORING

Earlier in this article, arguments were made that both participant monitoring and certain evidentiary subpoenas implicate fourth amendment interests.²⁵³ Assuming that these arguments have merit, the task remains of developing a standard of reasonableness for such searches. The initial question, suggested by the last two sections, is whether a standard of traditional probable cause or some different standard of justification should be adopted.

Evidentiary subpoenas are the easier of the two procedures to analyze. Subpoenas for evidence are far less intrusive than traditional searches, as the student newspaper in *Zurcher* obviously recognized.²⁵⁴ A subpoena does not entitle an officer to

²⁵¹ As the Court stated in *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976), "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."

²⁵² *But see* note 237 *supra*.

²⁵³ See sections II B (1) & (2) *supra*.

²⁵⁴ See McKenna, *supra* note 135, at 89.

trespass upon private property nor to rummage through private possessions looking for the desired evidence.²⁵⁵ Unless a subpoena is overbroad—and overbreadth has long been a recognized ground for challenging a subpoena²⁵⁶—it directs the recipient to the specific items desired by the investigator. Finally, if the recipient refuses to comply, the party serving the subpoena must seek judicial enforcement, thus giving the recipient or an appropriate party a chance to air his objections in an adversary proceeding.²⁵⁷ No such opportunity exists, of course, before a traditional search is conducted.

This is not to say that subpoenas are not intrusive at all. They can, as earlier discussed, infringe upon informational privacy, and it is this infringement that justifies some degree of fourth amendment scrutiny.²⁵⁸ Moreover, in some instances, a subpoena may seem just as intrusive as the more traditional search. In the previously described letter hypothetical,²⁵⁹ for example, there seems to be little difference in terms of intrusions upon informational privacy between the opening and reading of the letter and the issuance of a subpoena to one of the parties to disclose its contents. Similarly, in the *Katz* hypothetical²⁶⁰ the informational privacy of a telephone conversation may be infringed just as much by a subpoena as by electronic surveillance. Nevertheless, even in these hypotheticals, differences between the two procedures do exist. Most importantly, the recipient, or an appropriate party, can always obtain a judicial hearing by refusing to honor the subpoena. At such a hearing, the person objecting can claim that portions of the letter or phone conversation are purely personal and totally irrelevant to whatever investigation is in progress. When the subpoena is for documentary evidence—like the letter itself—the individual can ask the court to excise the irrelevant portions. Of course, when the subpoena seeks oral testimony, the individual can personally prevent the disclosure of that which is private and irrelevant.

From the perspective of the public's interest, it would also be difficult to subject the subpoena power to full traditional probable cause. Like municipal housing inspections, the practice of issuing subpoenas without traditional probable cause has

²⁵⁵ See the quote from Justice McKenna in the text at note 136, *supra*.

²⁵⁶ See *Hale v. Henkel*, 201 U.S. 43 (1906).

²⁵⁷ See *LaFave*, *supra* note 182, at 31.

²⁵⁸ It bears emphasis again that only subpoenas that infringe upon informational privacy intrude upon fourth amendment interests. See note 144 *supra*.

²⁵⁹ See note 145 and accompanying text *supra*.

²⁶⁰ See note 146 and accompanying text *supra*.

been accepted for many years.²⁶¹ Moreover, some administrative agencies, like the Internal Revenue Service, would literally be crippled by a requirement of traditional probable cause. Random spot checks, in which taxpayers are asked to reveal their financial records, are necessary if the system of voluntary income tax reporting is to succeed. Similarly, grand juries would be hampered severely in performing an investigative function if traditional probable cause had to precede an investigation.²⁶²

Balancing the great public need against the degree of intrusiveness, a strong case can be made for equating probable cause in the administrative subpoena context with the *Camara* standard of reasonableness for certain administrative searches.²⁶³ That is, when a person can show that a subpoena interferes with his or her informational privacy interests, the government should have to show that "reasonable legislative or administrative standards for . . . [issuing the subpoena] are satisfied with respect to . . . [the] particular . . . [individual]."²⁶⁴ At a minimum, this would require the government to show that the investigation "is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."²⁶⁵ Equally important, however, the government should have to show, as the Court required in *Barlow's*, that the particular person has been selected for investigation "on the basis of a

²⁶¹ Speaking of subpoenas, Justice Murphy said over thirty years ago, "It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years." *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 218 (1946).

²⁶² The investigative role of the grand jury has long been recognized as legitimate. See, e.g., *Blair v. United States*, 250 U.S. 273 (1919).

²⁶³ In *See v. Seattle*, 387 U.S. 541, 544-45 (1967), the Court said:

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive. . . . In addition, while the demand to inspect may be issued by the agency . . . it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering the penalties for refusing to comply.

It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments.

²⁶⁴ *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

²⁶⁵ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946). The full quote is provided in note 167, *supra*.

general administrative plan for the enforcement of the [applicable] Act derived from neutral sources.²⁶⁶ Such a requirement would prevent mere harassment of unpopular individuals.²⁶⁷

When a subpoena is not issued as part of a general administrative plan, the government should have to show individualized reasonable suspicion. Not to require this would be to permit mere fishing expeditions that intrude upon informational privacy interests protected by the fourth amendment. When a grand jury is investigating a particular incident, or a particular concern such as local corruption, it should not have *carte blanche* access to information encompassed within the fourth amendment protection of informational privacy. A showing of reasonable suspicion would not severely hamper the investigative function in such cases.

To some, these minimal standards may appear less than adequate.²⁶⁸ Concededly, they would not significantly impede current practices, nor should they. An enormously heavy burden would have to be carried by a person advocating a standard of reasonableness that would make it impossible for the IRS to administer the tax law or the grand jury to function as an investigative institution. On the other hand, however, the advocated standards would prevent the abuse made possible by cases like *Miller*, where a bank depositor was left with no fourth amendment protection whatsoever for the informational privacy of his bank records.²⁶⁹ Under the *Miller* doctrine, the government can examine the bank records of anyone and everyone with no real purpose in mind. Under the proposed standards, an objecting depositor would be entitled to a showing of administrative reasonableness or individualized suspicion. And while agencies like the IRS may often be able to show administrative reasonableness, others, like the FBI, would be re-

strained by the fourth amendment absent a showing of individualized suspicion.²⁷⁰

The practice of participant monitoring presents problems much tougher than those associated with evidentiary subpoenas. The target of a spy, unlike the recipient of a subpoena, has no opportunity, of course, for a prior judicial hearing. Moreover, a spy necessarily must intrude on much that is lawful to detect the unlawful. In terms of informational privacy, therefore, a spy necessarily intrudes broadly upon privacy interests. It may be significant, however, that the person being spied upon, unlike the target of a traditional search, can control the information disclosed. While the officer executing a traditional search may turn over every stone in the quest for the desired items,²⁷¹ the spy must depend upon the target's willingness to disclose. Although it cannot be said, as previously discussed, that the willingness to disclose negates reasonable expectations of privacy against government, it perhaps may fairly be said that such willingness limits somewhat the intrusiveness of the government's activity.

The public's need for police spying absent a showing of traditional probable cause is difficult to evaluate. Putting aside political cases, most police spying occurs in areas, such as vice enforcement, where evidence is difficult to obtain.²⁷² On the other hand, it has been noted that police usually engage in undercover surveillance only when they

²⁷⁰ The FBI obviously has no administrative tasks to perform that would justify spot-check investigations like those undertaken by the IRS. Moreover, Congress has not given the FBI subpoena power. In any event, just as the *Camara* rule for administrative inspections should not unthinkingly be applied to all administrative agencies, see notes 180-93 and accompanying text *supra*, the standard of administrative reasonableness should not necessarily be sufficient for the subpoenas of all administrative agencies. The public interest should always be balanced against the degree of intrusiveness.

Interestingly, the subpoenas for the bank records in *Miller*, although nominally issued by an investigating grand jury, were prompted by an investigation of liquor law violations undertaken by agents from the Treasury Department's Alcohol, Tobacco and Firearms Unit. *United States v. Miller*, 425 U.S. 435, 437 (1976). Under the views expressed in the text, such subpoenas could not be enforced without individualized reasonable suspicion. From the facts disclosed in the opinion, the government may have had not only reasonable suspicion but full traditional probable cause. *Id.*

²⁷¹ Of course, the officer may not look in places where the desired items could not be concealed. See LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9, 26 (1972).

²⁷² L. TIFFANY, D. MCINTRYE, & D. ROTENBERG, *DETECTION OF CRIME* 207-82 (1967).

²⁶⁶ *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1825 (1978).

²⁶⁷ These requirements will not overly tax the administrative process even when third-party subpoenas are involved. As previously discussed, if the third party desires to comply with a subpoena, the individual whose privacy interests are implicated is subject to the law of third-party consent. See the text at notes 158-60, *supra*. Moreover, although the IRS has an enormous workload, Congress has seen fit to require it to notify a bank customer of the right to challenge in court a summons for bank records. See Comment, *supra* note 122, at 646.

²⁶⁸ Cf. McKenna, *supra* note 135, at 89-90 (arguing for a more stringent standard for documentary subpoenas).

²⁶⁹ The facts in *Miller* are discussed in the text at notes 117-27 *supra*.

have at least a reasonable suspicion of wrongdoing.²⁷³

Without further evidence concerning the need for police spying, it can only be said at this point that a standard of reasonable suspicion is the minimum that should be required. Such a standard would take into account the uncertainty about the actual need for police spying and the somewhat lesser nature of the intrusion upon informational privacy. Further analysis, however, may suggest a basis for employing a standard somewhere between reasonable suspicion and traditional probable cause and perhaps even demonstrate that the traditional standard would not be so extreme.

IV

THE WARRANT REQUIREMENT

A. THE WARRANT REQUIREMENT REAFFIRMED

If this term's search and seizure cases sounded one clear message, it was that "the bulwark of Fourth Amendment protection . . . is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search."²⁷⁴ Reaffirming *Camara* and *See v. Seattle*,²⁷⁵ the Court during the term held that this rule applies "during civil as well as criminal investigations"²⁷⁶ and to searches of "commercial premises as well as homes."²⁷⁷ In *Barlow's*, the Court refused to create a special exception for OSHA inspections. It rejected the government's arguments that warrantless inspections are necessary to preserve the element of surprise and that a warrant requirement would provide only marginal protection for an employer's privacy interests. Concerning the latter, the Court said,

A warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.²⁷⁸

²⁷³ *Id.* at 274, 281.

²⁷⁴ *Franks v. Delaware*, 98 S. Ct. 2674, 2681 (1978).

²⁷⁵ 387 U.S. 541 (1967). *See*, a companion case to *Camara*, involved an inspection of commercial premises.

²⁷⁶ *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1820 (1978).

²⁷⁷ *Id.* at 1820.

²⁷⁸ *Id.* at 1826.

In *Tyler*,²⁷⁹ the Court rejected a similar argument that a warrant requirement for post-fire investigations would not serve any purpose. Attempting to distinguish *Camara*, the prosecutor had argued that "the fact of a fire is so readily ascertainable that there seems to be little need for individualized review."²⁸⁰ The Court conceded that "a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire,"²⁸¹ but it maintained nevertheless that a warrant requirement would help keep the invasion to a minimum.²⁸² Describing the magistrate's duty as one of "particularized inquiry," the Court indicated that "the number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders" would be relevant factors for the magistrate to consider.²⁸³ The Court also noted, as it had in *Barlow's*, that a warrant would advise the owner or occupant of both the investigator's authority to search and the scope of the authorized investigation.

*Mincey v. Arizona*²⁸⁴ involved a murder scene search and thus, like *Tyler*, presented a situation in which probable cause for the initial intrusion would rarely, if ever, be contestable. Nevertheless, again stressing the warrant's function of limiting the scope of a search, the Court refused to create a murder scene exception to the warrant requirement. The Court also rejected the argument that the search in issue could be justified under an emergency rationale. It noted that all the persons in the apartment had been located before the search began, and it expressed incredulity at the suggestion that a four day search could be justified under an emergency theory.

Shortly after *Camara* and *See*, Professor LaFave expressed doubt that those decisions had significantly advanced individual rights.²⁸⁵ His doubt, of course, was prompted by the de minimus role imposed upon the magistrate by the reduced standard of probable cause.²⁸⁶ Little would be gained by repeating Professor LaFave's arguments here,

²⁷⁹ *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

²⁸⁰ Brief for Petitioner at 17, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

²⁸¹ 98 S. Ct. at 1949.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ 98 S. Ct. 2408 (1978).

²⁸⁵ LaFave, *supra* note 182, at 37.

²⁸⁶ The *Camara* balancing test is discussed in section III *supra*.

except to note that they generally apply to *Barlow's* and *Tyler* as well. Indeed, the company in *Barlow's* maintained that application of the *Camara* standards to OSHA inspections would result in "rubber stamp warrants."²⁸⁷ The Court did, however, drop some subtle hints that the magistrate should at least occasionally say no. The *Barlow's* Court did, for example, note that the government, in obtaining judicial authorization, had referred to the inspection at issue as part of a general program designed to assure compliance with the Act, but the Court also observed that the government had described neither the program nor *Barlow's* connection with it.²⁸⁸ Similarly, by recognizing the number of previous entries, the lapse of time since the fire and the owner's efforts to secure the building as relevant factors for the magistrate to consider, the Court in *Tyler* seemed to be suggesting that a fire investigation at some point would be unreasonable. Even assuming, however, that the Court seriously intended to convey this message in *Barlow's* and *Tyler*, it may still be doubted that it provided the magistrate enough clout to impeach Professor LaFave's reservations about the warrant procedure serving as a check on administrative action.

Whatever the merits of the warrant requirement in the administrative context, the facts in *Barlow's* and *Tyler* were not conducive to abandonment of the *Camara* doctrine.²⁸⁹ In *Barlow's*, the government sought a far reaching power of inspection that seemed to include virtually everything on the premises including business records.²⁹⁰ Moreover, the briefs against the government recounted instances of abuse and possible harassment by OSHA inspectors.²⁹¹ In *Tyler*, fire investigators returned to

the premises the morning after the fire and on several occasions during the next few weeks. During the course of their visits, the investigators removed pieces of carpet, sections of the stairway²⁹² and business records.²⁹³ While the facts in these cases thus suggested a need to control at least the scope of the respective searches, the reasons presented by the government and state for abandoning the warrant requirement were far from convincing. In *Barlow's*, the government expressed despair over the loss of surprise that would result from a warrant requirement, even though existing OSHA regulations provided an opportunity for a recalcitrant employer to have a pre-inspection adversary hearing in court.²⁹⁴ In *Tyler*, the state devoted most of its brief to the argument that arsonists do not have privacy expectations and innocent victims do not resent inspections;²⁹⁵ the state completely ignored the question of unnecessary intrusion raised by the repeated visits to the burned premises.

Mincey, of course, was a much tougher case than *Barlow's* or *Tyler* in terms of abandoning the warrant requirement, for it involved the search of a home for evidence of crime, the quintessential example of the warrant requirement. Nevertheless, the murder occurred after the officer-victim, in undercover capacity and accompanied by other plain clothes officers, had entered the defendant's premises ostensibly to make a purchase of narcotics. To require a warrant in such circumstances certainly seems to suggest a "rubber stamp" function for the magistrate. To excuse the warrant requirement on this basis, however, would open up a Pandora's box. For example, when an officer personally observes stolen goods or narcotics in a certain dwelling, there is normally as little for the magistrate to evaluate as in murder scene cases. Of course, the officer's credibility may be a consideration for the magistrate in such situations, but it conceivably could also be a consideration in *Mincey* cases. One could perhaps attempt to distinguish

²⁸⁷ Brief for Appellee at 53, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

²⁸⁸ 98 S. Ct. at 1826 n.20. The government obtained a judicial order for the inspection after the employer refused to admit the OSHA inspector onto the premises.

²⁸⁹ It should be noted that Professor LaFave did not support the dissenting opinion in *Camara*, which favored outright rejection of the warrant requirement. Rather, Professor LaFave maintained that the warrant protection would not suffice to protect individual rights, and accordingly he suggested that administrative warrants should be enforceable only after a recalcitrant owner has been given an opportunity to be heard in court. LaFave, *supra* note 182, 27-32. See also *Michigan v. Tyler*, 98 S. Ct. 1942, 1952-53 (Stevens, J., concurring in part).

²⁹⁰ The judicial order the government finally obtained in *Barlow's* is quoted in the text at note 190, *supra*.

²⁹¹ See, e.g., Brief for Appellee at 46 n.36, *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816 (1978), referring to one case in which an employer was inspected seven times for the

same noise standard and acquitted each time, and another case in which inspectors attempted to inspect the employer's home because he permitted employees to keep their lunches in his home refrigerator.

²⁹² 98 S. Ct. at 1946.

²⁹³ Brief for Respondent at 2, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978). The Court's opinion does not refer to the seizure of business records.

²⁹⁴ 98 S. Ct. at 1822-24.

²⁹⁵ The prosecutor's argument is discussed in the text at notes 59-65, *supra*. The prosecutor stuck to the same misguided theme throughout the brief. See, e.g., Brief for Petitioner at 21-22, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

the credibility problem in murder scene cases from that in other cases, but this would be a weak theoretical reed for a new exception to the warrant requirement.²⁹⁶

Not surprisingly, therefore, the state attempted to justify the proposed murder scene exception under an emergency rationale, the rationale that underlies most warrant exceptions. The *Mincey* Court recognized that an emergency theory would justify some search activity such as a quick look for other victims or offenders.²⁹⁷ The Court even recognized that a warrantless search for evidence would sometimes be permissible, as in situations presenting a danger that evidence might be lost, destroyed or removed.²⁹⁸ The facts in *Mincey*, however, like those in *Barlow's* and *Tyler*, did little to advance the cause for the legality of the search at issue. First, as previously noted, the officers had accounted for all of the occupants and a police guard minimized the possibility that evidence would be destroyed.²⁹⁹ More significantly, the search lasted four days, extended to virtually every nook and cranny of the apartment, and resulted in the seizure of over two hundred items.³⁰⁰

In summary, *Barlow's*, *Tyler*, and *Mincey* reaffirmed the traditional warrant requirement. *Barlow's* and *Tyler* did this in the administrative search context, where the Court has found the intrusion upon privacy interests less significant than in criminal cases and where it accordingly has reduced the traditional probable cause requirement to one of administrative reasonableness, thus leaving little for the magistrate to assess. *Mincey* reaffirmed the principle in the context of a criminal investigation, but one in which the facts left little for the magistrate's independent judgment. All three cases expressed a reluctance to create new exceptions to

²⁹⁶ Cf. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) ("Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn.")

²⁹⁷ 98 S. Ct. at 2414.

²⁹⁸ *Id.* at 2414-15. See also *id.* at 2421 (Rehnquist, J., concurring and dissenting) suggesting that the police had to conduct an immediate examination of blood stains.

²⁹⁹ *Id.* at 2415. The reference to the police guard is important, because it suggests an answer to the question left open in *Vale v. Louisiana*, 399 U.S. 30 (1970), where the Court did not permit a search of a dwelling even though the defendant's mother and brother arrived on the scene shortly after his arrest. Although *Vale* thus seemed to involve exigent circumstances, *Mincey* suggests that seizing the house by posting a guard is a lesser intrusion than a warrantless search. Compare the discussion of the automobile cases in section III B *infra*.

³⁰⁰ 98 S. Ct. at 2412 (1978).

the warrant requirement. *Mincey*, in addition, suggested a reluctance to create new exceptions in the criminal context absent a real emergency, and it stressed the need for a warrantless search to be "strictly circumscribed by the exigencies which justify its initiation."³⁰¹ Finally, each case recognized that the need to control the scope of a search may be as important, in terms of imposing a warrant requirement, as the need to determine whether the search should occur in the first place.

B. THE AUTOMOBILE EXCEPTION RECONSIDERED

In *Chambers v. Maroney*,³⁰² the Supreme Court permitted a warrantless search of an automobile as part of a criminal investigation even though exigent circumstances were not really present.³⁰³ After a gas station robbery, police, with full probable cause, stopped a station wagon and arrested its occupants. The police then drove the car to the station, where a warrantless search yielded several items of evidence. In upholding the search, the Court first reaffirmed the long settled doctrine that a search warrant is unnecessary "where there is probable cause to search an automobile stopped on the highway, the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant is obtained."³⁰⁴ The Court noted that even in such circumstances an argument could

³⁰¹ *Id.* at 2414 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

³⁰² 399 U.S. 42 (1970).

³⁰³ *Chambers* was not the first case to uphold a warrantless automobile search for criminal evidence, but it appears to be the first to do so without regard to exigent circumstances. In *Carroll v. United States*, 267 U.S. 132 (1925), police stopped and searched a moving vehicle. The exigency arose not just from the mobility of the car but from the fact that the officers could not arrest the occupants, since the suspected crime was a misdemeanor not committed in their presence. See *LaFave, supra* note 271, at 18 n.36. *Husty v. United States*, 282 U.S. 694 (1931), also upheld a warrantless search of a car, but the Court used an emergency rationale, although its application of that rationale may seem dubious.

Prior to *Chambers*, the Court had gone back and forth in another series of automobile cases. Compare *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) and *Preston v. United States*, 376 U.S. 364 (1964) with *Cooper v. California*, 386 U.S. 58 (1967). Unlike *Chambers*, these cases are better understood as raising a question about the lawfulness of inventory searches of cars lawfully in police custody. Inventory searches may be subject to restraints that do not apply to searches conducted as part of a criminal investigation. See *South Dakota v. Opperman*, 428 U.S. 364 (1976).

³⁰⁴ 399 U.S. at 51, describing this as the holding of *Carroll v. United States*, 267 U.S. 132 (1925).

be made that it would be a lesser intrusion to seize the car and obtain a warrant for the search. However, the Court rejected this argument and explained that:

[W]hich is the "greater" and which the "lesser" intrusion is . . . a debatable question and the answer may depend upon a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.³⁰⁵

In *Chambers*, however, the car had in fact been seized before the search; the occupants were in custody and were thus unable to move the car. Nevertheless, employing similar rationale, the Court upheld the warrantless search at the station. The Court noted that:

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.³⁰⁶

The Court in *Chambers* did not explain its somewhat dubious assertion that a warrantless search is not a greater intrusion than a warrantless seizure.³⁰⁷ In subsequent cases, however, the Court began to develop an argument that a person has less of an expectation of privacy in a car than in other places, such as a home. In *Cardwell v. Lewis*,³⁰⁸ the Court reasoned that a car's primary function is transportation and that it seldom serves as a repository of personal effects. The *Cardwell* Court also noted that a car "travels public thoroughfares where both its occupants and its contents are in plain view."³⁰⁹ In

³⁰⁵ 399 U.S. at 51-52. For a brief discussion of the shortcomings of this reasoning, see LaFave, *supra* note 271, at 18-19.

³⁰⁶ 399 U.S. at 52.

³⁰⁷ Justice Harlan made a persuasive argument that the search is the greater intrusion. 399 U.S. at 63 (Harlan, J., concurring and dissenting). *Chambers* employs rationale remarkably similar to that found in Justice White's dissenting opinion in *Chimel v. California*, 395 U.S. 752, 770 (1969).

³⁰⁸ 417 U.S. 583 (1973).

³⁰⁹ *Id.* at 590.

South Dakota v. Opperman,³¹⁰ the Court further reasoned that automobiles are subject to pervasive and continuing governmental regulation, and that "as an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."³¹¹

The lesser expectation of privacy rationale has enabled the Court to limit the possible ramifications of the lesser-greater intrusion doctrine. In *United States v. Chadwick*,³¹² for example, government agents with probable cause seized a 200 pound double locked footlocker as it was about to be placed in an automobile trunk outside a train station. The agents took the footlocker to their office, where they opened it sometime later and discovered a large quantity of marijuana. The government relied on the automobile cases to justify the warrantless search. On the surface this argument had appeal, for one could certainly contend, as the Court had in *Chambers*, that a warrantless detention of the footlocker while a search warrant was obtained would have been just as intrusive as the warrantless search. The Court, however, relying on the expectation of privacy rationale, found the warrantless search more intrusive. As the Court maintained:

Though surely a substantial infringement with respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.

It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage.³¹³

Despite the sentiment expressed in *Chadwick* favoring a warrant, one could still rely on the automobile cases in other contexts to justify proposed exemptions from the warrant requirement. In *Barlow's*, for example, the government argued that the automobile cases demonstrated that warrantless searches are permissible where "core privacy interests are not . . . implicated."³¹⁴ The government

³¹⁰ 428 U.S. 364 (1976).

³¹¹ *Id.* at 368.

³¹² 433 U.S. 1 (1977).

³¹³ *Id.* at 14 n.8.

³¹⁴ Brief for Appellants at 16, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

also maintained that OSHA inspections, like automobile searches, do not "implicate significant privacy interests calling for the imposition of the warrant requirement."³¹⁵ The Court answered this argument in a footnote:

The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt, due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plainview observations of a car's contents. . . . Even so, probable cause has not been abandoned as a requirement for stopping and searching an automobile.³¹⁶

The attempts by the Court in *Chadwick* and *Barlow's* to distinguish the automobile cases—especially *Chambers*—do not appear acceptable. Instead, these cases only highlight what Justice Harlan recognized in *Chambers* itself: fidelity to the warrant requirement dictates that a search warrant be obtained for automobile searches except in exigent circumstances.³¹⁷ Accordingly, for the sake of consistency in fourth amendment theory, *Chambers* should be overruled.

Upon consideration of this theory, it should first be recognized that the Court's continuing references to a car's mobility cannot support *Chambers*, for the car in *Chambers* was no more mobile than the footlocker in *Chadwick*. The only plausible rationale for the warrant exception in *Chambers*, therefore, is the one positing a lesser expectation of privacy in cars than in other items or places. Assuming for the moment the validity of this rationale, the above statement in *Barlow's* that a search of an automobile requires probable cause—presumably in the traditional sense of that term—is somewhat anomalous. The teaching of *Camara*, *Martinez-Fuerte*, *Mimms*, and *Barlow's*³¹⁸ is that lesser intrusions upon privacy interests do not require full, traditional probable cause. It would seem, then, that if the Court was really serious about its hypothesis of a reduced expectation of privacy in automobiles, a strong presumptive case would exist for balancing down the probable cause requirement. Yet, as the quote from *Barlow's* indicates, the Court has not considered this possibility.

Moreover, the Court has not really explained why a warrant is required in cases like *Camara* and *Barlow's*, but not in automobile cases like *Chambers*.

³¹⁵ *Id.* at 27.

³¹⁶ 98 S. Ct. at 1822 n.10.

³¹⁷ 399 U.S. at 61 (Harlan, J., concurring and dissenting).

³¹⁸ See section III A *supra*.

While the searches in the former cases did involve premises, the Court in *Camara* explicitly relied upon a rationale that administrative searches are not as intrusive to privacy interests as criminal searches. It would seem, therefore, especially after *Katz*, that the nature of the threatened intrusion, not the place of the intrusion, should be determinative in assessing the need for a warrant. Still, as Justice Stevens argued in *Barlow's* in the context of OSHA inspections,³¹⁹ one might attempt to justify a warrant exception for cars by balancing the public interest against the lesser nature of the intrusion. The difficulty, however, is that if the limited intrusiveness of a housing code inspection is sufficient to provoke warrant protection, the intrusiveness of an automobile search would hardly seem insufficient. In any event, *Barlow's*, *Tyler*, and *Mincey* stressed that a warrant is needed to control the scope of a search, and this need is apparent in automobile searches, where the officer must decide whether to enter locked compartments, to open locked or closed containers, to pull up carpeting, or even to dismantle parts of the vehicle.³²⁰

The most telling point against *Chambers*, however, is that the Court has not proved its claim that expectations of privacy are lower in automobiles than in most other places. Automobiles are indeed regulated, but the fact that police may examine license plates, inspection stickers, headlights, exhaust systems, and other such things³²¹ hardly proves that one has a reduced expectation of privacy in items held in the glove compartment, under the seat, or in the trunk. Similarly, the fact that an automobile travels public thoroughfares hardly proves that one has a reduced expectation of privacy against governmental prying into concealed areas.³²² *Barlow's* seems to teach the very opposite: neither governmental regulation nor an individual's limited disclosures of some aspects of an activity give government a right of warrantless *carte*

³¹⁹ See text at note 178 *supra*.

³²⁰ For an example of a car search that included lifting up carpeting, see *United States v. Edwards*, 554 F.2d 1331 (5th Cir. 1977).

³²¹ It is not at all clear, moreover, that police may randomly stop automobiles to check such things. See *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977). The Supreme Court may soon decide this issue. *Delaware v. Prouse*, cert. granted, 99 S. Ct. 76 (1978).

³²² In fact, one may have a reasonable expectation of privacy against government surveillance, especially with electronic tracking devices, while traveling on public thoroughfares. See *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *aff'd by an equally divided court*, 537 F.2d 227 (1976) (en banc).

blanche access to all the rest. Expectations of privacy are not so easily diminished.

Finally, the Court's assertion that cars are not repositories of personal belongings defies common sense. Cars, like footlockers, are used to transport personal possessions. One's most private possessions, such as books, documents, diaries, photographs, and letters, and one's most valuable property, such as jewelry, invariably wind up in one's car at one point or another.³²³ Moreover, people frequently leave valuables in glove compartments and trunks while temporarily away from the car. One need only think of freeway service plazas to realize how much people depend upon the security of a locked car for the protection of valuable possessions. Indeed, an unattended, locked automobile undoubtedly provides more security for possessions than an unattended, locked suitcase or footlocker.

That the warrant requirement cannot legitimately be excused in automobile cases under a reduced expectation of privacy theory can be further demonstrated with *Chadwick* hypotheticals. Suppose the agents in that case waited to act until the defendants drove away with the footlocker in the trunk of their car. Suppose, moreover, that the agents then stopped the car and arrested all of the occupants. Several options may now be considered: (1) the agents search the trunk of the car on the spot, discovering the footlocker; (2) the agents, in addition, open the footlocker; (3) the agents search the trunk of the car on the spot but take the footlocker back to their office, where they search it without a warrant; (4) the agents do not search the car on the spot but take it to their office, where they search it, but not the footlocker, without a warrant; (5) the agents search both the car and the footlocker without a warrant at their office.

Under *Chambers*, the first and fourth hypotheticals, involving searches of just the automobile,

³²³ See *United States v. Edwards*, 554 F.2d 1331, 1338 (5th Cir. 1977):

Despite the wealth of language that privacy in automobiles is less important than in other areas, most members of our society must frequently use automobiles to convey undeniably private papers and effects. For example, the workload of this court often requires judges to take their work home. The automobile provides the usual mode for transporting drafts of opinions, notations indicating the probable outcome of submitted cases, and confidential messages from other judges. To say that there is no expectation of privacy in such papers, release of which would constitute a dereliction of duty, would be to ignore reality. And judges are of course not alone in this regard. Virtually everyone must sometimes use an automobile to carry private papers.

would clearly constitute lawful police activity.³²⁴ The searches of the footlocker in the remaining hypotheticals, however, are not so easy. Absent an emergency—and the arrest of the occupants negates an emergency rationale—*Chadwick's* rationale about the privacy of footlockers would seem to suggest that the warrantless searches of the footlocker could not be upheld, unless one's expectations of privacy in a footlocker rise and fall depending upon whether the footlocker is in or out of one's car.³²⁵ Moreover, to permit the footlocker to be searched only when it is searched with the car, as in the second and fifth hypotheticals, but not when it is searched sometime later, as in the third hypothetical,³²⁶ would have "the perverse result of allowing fortuitous circumstances to control the outcome" of search and seizure cases.³²⁷ In any event, the message to police officers would be clear: keep the footlocker in the car until you are ready to search it. On the other hand, however, permitting a warrantless search of the car both on the spot and later at the station while prohibiting the warrantless search of containers in the car would make a mockery of the automobile exception. As the hypotheticals thus demonstrate, something is obviously askew, and that something is most obviously *Chambers*, which permits a warrantless search of a car even in the absence of exigent circumstances.³²⁸

Chambers could be overruled without necessarily

³²⁴ See *Texas v. White*, 423 U.S. 67 (1975) (per curiam), permitting the police to take the car back to the station for a search. The dissent maintained that *Chambers* did not control because the police in *White* could easily have searched the car on the spot and thus had no need to take the car to the station.

³²⁵ The search of the footlocker could not be upheld under the search incident to arrest doctrine, for a locked footlocker in a trunk of a car can hardly be deemed to be within the defendant's immediate reach. *Chimel v. California*, 395 U.S. 752 (1969). But see *United States v. Chadwick*, 433 U.S. 1, 23 (1977) (Blackmun & Rehnquist, JJ., dissenting).

³²⁶ Lower court decisions seem to be making this very distinction. See, e.g., *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States v. Stevie*, 578 F.2d 204 (8th Cir. 1977), *rev'd en banc*, 582 F.2d 1175 (1978). The Supreme Court may soon decide this issue. See *Arkansas v. Sanders*, 262 Ark. 595, 559 S.W.2d 704 (1977), *cert. granted*, 99 S. Ct. 247 (1978).

³²⁷ Arguing that the officers could have searched the footlocker in *Chadwick* without a warrant either by acting a little earlier or a little later, the dissenters maintained that the Court's holding turned on fortuitous circumstances. *United States v. Chadwick*, 433 U.S. 1, 22 (1977) (Blackmun & Rehnquist, JJ., dissenting).

³²⁸ Except for interests too inconsequential to merit warrant protection, a warrant should be required for all searches absent exigent circumstances. This would greatly

overruling the more recent automobile case, *Cardwell v. Lewis*.³²⁹ In *Cardwell*, police seized a defendant's car from a parking lot after interrogating him all day at a nearby police station. Before the defendant arrived at the station, the police had developed probable cause to believe that he committed murder by using his car to force the victim off the road. In fact, the police had obtained an arrest warrant, but not a warrant for the car, before the defendant appeared at the station. Upon arresting the defendant and seizing the car, the police took some paint scrapings from the exterior and examined tire treads. The Court first concluded that the examination of the car's exterior infringed at most an "abstract and theoretical" expectation of privacy.³³⁰ Turning to the warrantless seizure, which enabled the police to examine the car's exterior, the Court, in convoluted analysis, relied upon *Chambers*.³³¹

If *Chambers* was wrong, *Cardwell's* reliance upon it cannot be defended. Yet, the result in *Cardwell*

simplify search and seizure law by eliminating the need to identify specific exceptions, such as hot pursuit. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), a plurality opinion, stressed the exigent circumstances rationale of warrant exceptions, but *Cardwell v. Lewis*, 417 U.S. 583 (1974), also a plurality opinion, discussed in the text *infra* read *Coolidge* as a case involving the seizure of an automobile from private property, not as a case standing for the proposition that a search warrant should always be obtained if there is time to do so.

If warrantless automobile searches were permitted only in exigent circumstances, the *Chadwick* hypotheticals would become easy. Exigent circumstances would justify a warrantless search of both the car and footlocker, but absent such circumstances, both searches would require a warrant. Cf. *United States v. Fontecha*, 576 F.2d 601 (5th Cir. 1978) (applying emergency theory, rather than automobile exception, to permit search of suitcase in automobile).

³²⁹ 417 U.S. 583 (1974) (plurality opinion).

³³⁰ *Id.* at 592.

³³¹ The Court emphasized both the reduced expectation of privacy in automobiles and the exigent circumstances rationale. Concerning the latter, the Court said: "The fact that the car in *Chambers* was seized after being stopped on a highway, whereas *Lewis'* car was seized from a public parking lot, has little, if any, legal significance. The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain." *Id.* at 594-95. Of course, if the search is the greater intrusion, posting a guard may be just what the fourth amendment requires. See the discussion of *Mincey* in note 299 and the accompanying text *supra*. In any event, in terms of the exigent circumstances rationale, the Court was simply wrong in treating as irrelevant the fact that the police had an entire day to obtain a warrant. See *Vale v. Louisiana*, 399 U.S. 30 (1970). To contend otherwise would be to allow the police always to create their own emergencies, and such emergencies would obviously apply to houses as well as cars.

may be defended, for *Cardwell* did not have to rely upon *Chambers* at all. The ultimate validity of *Cardwell* depends upon the first part of its holding, which upheld an examination of the car's exterior without a warrant. Using precise language, the Court stated the issue as "whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect."³³² As the Court recognized, the examination at issue barely involved privacy interests. Of course, the police activity did interfere with possessory property interests, which the fourth amendment protects, but such interests may be adequately protected without prior judicial review. Furthermore, nothing in *Camara*, *Barlow's*, or *Tyler* contravenes this analysis. Administrative searches may not be as intrusive as criminal searches, but they still threaten privacy interests—not just property interests—much more than the police activity in *Cardwell*.

Once it is recognized that the "search" in *Cardwell* was too inconsequential in nature to justify invocation of the warrant rule, the seizure of the car becomes easy. Seizures as such only affect possessory property interests; they affect privacy interests only when their purpose is a subsequent search. When possessory interests alone are at stake, the Court has not normally required warrant protection. In *G.M. Leasing Corp. v. United States*,³³³ for example, the Court permitted the warrantless seizure of several automobiles from public places in partial satisfaction of a tax assessment. The Court simply reasoned in one paragraph that the seizure of the cars, unlike the entry into an office to seize business records in the same case, "did not involve any invasion of privacy."³³⁴ Similarly, the plain view doctrine, which permits officers from a lawful vantage point to make warrantless seizures, demonstrates that possessory interests alone normally do not demand warrant protection.³³⁵ Finally, al-

³³² 417 U.S. at 589.

³³³ 429 U.S. 338 (1977).

³³⁴ *Id.* at 351.

³³⁵ In *Coolidge v. New Hampshire*, 403 U.S. 443, 466-72 (1971), a plurality of the Court held that plain view seizures are lawful only if the officers have come upon the evidence inadvertently, although contraband, stolen goods, and items dangerous in themselves seemed to be exempted from this rule. The inadvertence rule does not further what the Court described as the two functions of the warrant requirement: eliminating searches that are not supported by probable cause and restricting the scope of searches that are. *Id.* at 466-67. Rather, as Professor LaFave has demonstrated, the inadvertence rule protects possessory property interests,

though the issue is analytically distinct, it should be noted that the Court has even upheld the warrantless seizure of a person from a public place.³³⁶ Only a skewed hierarchy of fourth amendment values would demand a warrant for a seizure *qua* seizure of an automobile but not of a person.

In short, a seizure of an automobile should only implicate the warrant requirement if the seizure is for the purpose of conducting a search that requires prior judicial approval. The car in *Chambers* was seized for the purpose of conducting such a search; the car in *Cardwell* was not. To require a warrant for the seizure in *Cardwell*, after concluding that the subsequent warrantless examination was permissible, would be to contravene *G. M. Leasing*, a unanimous opinion, and the plain view doctrine. *Cardwell*, therefore, can survive the much needed demise of *Chambers*.

C. PARTICIPANT MONITORING AND THE WARRANT REQUIREMENT

Previous sections of this article have argued both that participant monitoring by the government implicates fourth amendment interests and that such governmental activity should require, at a minimum, reasonable suspicion of wrongdoing.³³⁷ The remaining question is whether the warrant requirement should apply to participant monitoring.

The issue need not be belabored. The preceding discussion suggested that a search warrant should be required unless either (1) the interests implicated are too inconsequential to require warrant protection³³⁸ or (2) exigent circumstances make it

and nothing else. LaFave, *supra* note 271, at 24-26. *But see* Weinreb, *supra* note 90, at 65 n.54.

In *Trupiano v. United States*, 334 U.S. 699 (1948), the Court invalidated the warrantless seizure of items after the police lawfully entered the premises to make an arrest. The Court reasoned that the police had sufficient time to procure a warrant. Had the officers engaged in a search for the items, the *Trupiano* rule would have been correct. *See* note 328 *supra*. The Court's holding, however, that the officers could enter the premises to seize the defendants, but that once inside they could not seize items in plain view, made the fourth amendment warrant requirement appear silly. *Trupiano* was overruled after just two years in *United States v. Rabinowitz*, 339 U.S. 56 (1950), a decision that itself was overruled, on the issue of the proper scope of a search incident to an arrest, in *Chimel v. California*, 395 U.S. 752 (1969). *Trupiano*, however, has never been completely resurrected. In *Coolidge*, for example, the plurality said, "we do not 'reinstate' *Trupiano*, since we cannot adopt all its implications." 403 U.S. at 482.

³³⁶ *United States v. Watson*, 423 U.S. 411 (1976).

³³⁷ *See* sections II B 2 and III C *supra*.

³³⁸ *See* text at notes 332-36 *supra*.

impractical to get a warrant.³³⁹ This term's cases suggest that the Court will not readily find fourth amendment interests too insignificant for warrant protection. Reaffirming *Camara*, both *Barlow's* and *Tyler* made it clear that the warrant requirement is not limited to contexts demanding full, traditional probable cause. *Mincey*, moreover, made it clear that the Court will not adopt facile arguments of exigent circumstances to establish new exceptions to the warrant requirement.

Spying, as previously discussed, intrudes significantly upon informational privacy, and it does this whether or not electronic aids are employed. In addition, spying rarely, if ever, occurs under circumstances making it impossible to obtain prior judicial approval. A warrant requirement would provide a neutral assessment of the requisite standard of cause. Just as significantly, a warrant requirement would establish some parameters on the scope of such activity.

The only conceivable argument against the warrant requirement in this context is distrust of the magistrate's integrity.³⁴⁰ The Court, however, has previously rejected the suggestion that a warrant exception could be justified on this basis.³⁴¹ In any event, safeguards could be established, such as the designation of certain judges to approve warrant applications for participant monitoring. With this argument eliminated, no basis exists for refusing to apply the warrant requirement—"the bulwark of Fourth Amendment protection."³⁴²

V.

CONCLUSION

A frustrated court once lamented that it would take the mind of a medieval scholastic to unwind the Supreme Court's search and seizure cases.³⁴³ This term's cases provide some hope that the long overdue rethinking of search and seizure law can proceed in a meaningful way, for they focus attention, sometimes with new insights, on the three most basic questions of search and seizure law. In analyzing this term's cases, and their logical ramifications, this article has argued that *Hoffa v. United*

³³⁹ *See* section IV B *supra*.

³⁴⁰ It might also be asserted that the warrant could not particularly describe the place to be searched and items to be seized. But this would be no more of a problem than it is in third-party monitoring, where a warrant is required. *Katz v. United States*, 389 U.S. 347 (1967).

³⁴¹ *United States v. United States District Court*, 407 U.S. 297 (1972).

³⁴² *Franks v. Delaware*, 98 S. Ct. 2674, 2681 (1978).

³⁴³ *United States v. Sutton*, 341 F. Supp. 320, 322 (W.D. Tenn. 1972).

States, *United States v. White*, *United States v. Miller* and *Chambers v. Maroney* should be overruled. The argument that several major cases should be overruled has not been made lightly. Nevertheless, as Professor LaFave once remarked, what we need, above all, is "some assurance that [search and seizure] cases are being decided in accordance with a coherent analytical framework."³⁴⁴ This article

has attempted to show that the above named cases are inconsistent with the analytical framework that encompasses *Katz* and this term's cases. If the analysis in the article has been basically correct, the overruling of the named cases can be avoided only by overruling *Katz* and rejecting much of the reasoning in this term's cases. Either way, therefore, a radical overhaul is required, unless we choose to accept the inconsistencies and forego the goal of analytic coherence.

³⁴⁴ LaFave, *supra* note 271, at 27.