



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 5 | Number 1

Article 4

---

1988

## **Administrative Searches For Evidence of Crime: The Impact of New York v. Burger**

Perry S. Reich

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Administrative Law Commons](#), [Commercial Law Commons](#), [Courts Commons](#), [Criminal Procedure Commons](#), [Evidence Commons](#), [Fourth Amendment Commons](#), [Judges Commons](#), [Law Enforcement and Corrections Commons](#), and the [Supreme Court of the United States Commons](#)

---

### **Recommended Citation**

Reich, Perry S. (1988) "Administrative Searches For Evidence of Crime: The Impact of New York v. Burger," *Touro Law Review*: Vol. 5: No. 1, Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol5/iss1/4>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# ADMINISTRATIVE SEARCHES FOR EVIDENCE OF CRIME: THE IMPACT OF *NEW YORK v.* *BURGER*

Perry S. Reich\*

## INTRODUCTION

Cognizant of the abuses inherent in the infamous writs of assistance<sup>1</sup> which legislatively authorized warrantless, random searches of commercial property, the framers of the Bill of Rights proposed the fourth amendment to the United States Constitution, which barred “unreasonable” searches and seizures of all properties.<sup>2</sup> In construing the reach of the fourth amendment, the Supreme Court, until recently, had rather consistently followed what it described as “one governing principle . . . : except in certain carefully defined classes

---

\* Adjunct Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. The author was one of the attorneys for the defendant in the *Burger* case at the United States Supreme Court level.

The author expresses his thanks to Pamela Armstrong, Robert Cipriano, and Marjorie Zuckerman for their assistance in the research and preparation of this article.

1. Writs of assistance were created in England by an ancient Act of Parliament. They authorized indiscriminate general searches of property, and their existence was a bitter point of contention in the Colonies. The writs gave broad powers to the King's agents to search the colonists' property for smuggled goods. In particular, they were widely used to inspect the property and products of colonial merchants for compliance with unpopular revenue measures including the Stamp Act of 1765 and the tea tax of 1773. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (footnotes omitted).

James Otis argued against such writs in 1761 saying, writs of assistance were “a power, that places the liberty of every man in the hands of every petty officer. . . . No Acts of Parliament can establish such a writ.” *Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) (quoting 2 WORKS OF JOHN ADAMS 523-25 (C. Adams ed. 1850)); see also H. COM-MAGER, DOCUMENTS OF AMERICAN HISTORY 52-63 (8th ed. 1968); 1 S. MORISON, H. COM-MAGER, & W. LEUCHTENBERG, THE GROWTH OF THE AMERICAN REPUBLIC 143-60 (1969).

2. U.S. CONST. amend. IV. states:

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

*Id.*; see *Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting); *Payton v. New York*, 445 U.S. 573, 583-84 n.21 (1980); *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965); *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-48 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (1937); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-44 (1969).

of cases, a search of private property without proper consent is 'unreasonable' [within the meaning of the fourth amendment] unless it has been authorized by a valid search warrant."<sup>3</sup> Such a warrant could only be issued by a neutral and detached magistrate upon probable cause, supported by oath or affirmation, that contraband or evidence of crime would be found at the location to be searched.<sup>4</sup>

In addition to the "carefully defined classes of cases" that developed pursuant to the holding in *Camara v. Municipal Court*<sup>5</sup> (automobile searches,<sup>6</sup> consent,<sup>7</sup> searches incident to arrest,<sup>8</sup> and plain view<sup>9</sup>) the Court also engrafted an exception for administrative or regulatory inspections.<sup>10</sup> The Court reasoned that such inspections posed unique problems, not involving investigative and enforcement activities of police agencies in general,<sup>11</sup> which required a more fluid analysis. There was strong historical justification for warrantless searches whose primary purpose was not criminal investigation. Custom searches, for example, were directed towards enhancement of revenue, rather than detection of crime. Fire and safety inspections, and to some extent hijacker detection screening, were designed to protect the public welfare, with only a secondary, and tangential, role for law enforcement.<sup>12</sup>

Recently, however, in *New York v. Burger*,<sup>13</sup> the Supreme Court blurred the distinction it had so long maintained, and justified warrantless searches based on legislative enactment by labeling such searches, whose purpose was clearly designed to uncover evidence of criminal activity, administrative in nature.<sup>14</sup>

---

3. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (citations omitted) (prohibition of unreasonable searches applies to civil as well as criminal investigations, since the purpose of the fourth amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials"); accord *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) ("warrantless searches are generally unreasonable, and . . . this rule applies to commercial premises as well as homes"); See *v. City of Seattle*, 387 U.S. 541, 543 (1967) ("a search of private houses is presumptively unreasonable if conducted without a warrant").

4. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

5. 387 U.S. 523 (1967).

6. *United States v. Ross*, 456 U.S. 798 (1982).

7. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

8. *New York v. Belton*, 453 U.S. 454 (1981).

9. *Texas v. Brown*, 460 U.S. 730 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

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

11. *Id.* at 2642; see also 1 W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.9 (1984) [hereinafter LAFAYE] (discussing the special problems of regulatory searches and inspections).

12. LAFAYE, *supra* note 11, § 3.9.

13. 107 S. Ct. 2636 (1987).

14. *Id.* at 2639, 2655-56 (Brennan, J., dissenting).

## I. HISTORICAL BACKGROUND

To understand the impact, and danger of the *Burger* holding, as well its sharp break with the past, one must begin with the seminal administrative inspection decisions, *Camara v. Municipal Court*<sup>15</sup> and *See v. City of Seattle*.<sup>16</sup>

Although the *Camara* Court clearly affirmed that the fourth amendment applied to administrative inspections, it further reasoned that the unique circumstances presented by some statutory schemes compelled a different, and somewhat less rigorous, balancing of factors to determine the constitutional reasonableness of an intrusion into privacy.<sup>17</sup> *Camara* involved "routine" inspections for housing violations and its core questions were whether such inspections could be undertaken without a warrant, and, if not, whether probable cause, in the traditional sense, was required for the issuance of a warrant.<sup>18</sup>

Finding that properly applied constitutional restraint would not retard "fire, health, and housing code inspection programs . . . [from] achiev[ing] their goals within the confines of a reasonable search warrant requirement,"<sup>19</sup> and that such searches are "significant intrusions"<sup>20</sup> which, "when . . . conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees,"<sup>21</sup> the Court held that unconsented inspections could not be conducted without a warrant.<sup>22</sup> Applying a balancing test,<sup>23</sup> however, the Court rejected the argument that such a warrant could only issue upon "probable cause to believe that a particular dwelling contains violations of . . . the code being enforced."<sup>24</sup> Instead, explicitly observing that such inspections were "neither personal in nature nor aimed at the discovery of evidence of crime,"<sup>25</sup> the Court held that reasonable standards "based upon [such factors as] the passage of

---

15. 387 U.S. 523 (1967).

16. 387 U.S. 541 (1967).

17. *Camara*, 387 U.S. at 534. This holding overruled *Frank v. Maryland*, 359 U.S. 360 (1959) insofar as *Frank* had allowed warrantless searches or inspections under municipal fire, health and housing codes.

18. *Id.* at 527.

19. *Id.* at 533.

20. *Id.* at 534.

21. *Id.*

22. *Id.*

23. *Id.* at 536-37 ("there can be no ready test for reasonableness other than by balancing the need to search against the invasion which the search entails").

24. *Id.* at 534.

25. *Id.* at 537.

time, the nature of the building . . . or the condition of the entire area"<sup>26</sup> would furnish a sufficient basis for the issuance of such an administrative warrant.<sup>27</sup>

Applying the *Camara* holding in the companion case of *See v. City of Seattle*,<sup>28</sup> the Court reversed a businessman's conviction for refusing entry to conduct a warrantless fire inspection of his locked commercial warehouse.<sup>29</sup> Nonetheless, the Court took pains to emphasize that it was not suggesting "that business premises may not reasonably be inspected in many more situations than private homes, nor [did it] question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."<sup>30</sup>

Subsequent to the decisions in *Camara* and *See*, the Supreme Court grappled with numerous cases in which state or federal officials, pointing to some sort of a regulatory scheme, sought to undertake a search of private premises without a traditional search warrant, supported by probable cause. In some of those cases, the Court required that an administrative warrant such as that specified in *Camara* be obtained.<sup>31</sup> In others, the Court permitted warrantless administrative inspection without any prior neutral scrutiny at all, where Congress had made a reasonable determination that a warrantless inspection was necessary.<sup>32</sup>

In *Colonnade Catering Corp. v. United States*,<sup>33</sup> the Court considered the validity of a forced search of the locked storeroom of a liquor licensee under federal statutes which conferred broad authority

26. *Id.* at 538.

27. *Id.* at 538-39. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

28. 387 U.S. 541 (1967).

29. *Id.* at 542.

30. *Id.* at 546. However, the Court did explicitly state that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.* at 543. And, "[w]e hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises." *Id.* at 546.

31. See *Michigan v. Clifford*, 464 U.S. 287 (1984) (arson investigation); *Michigan v. Tyler*, 436 U.S. 499 (1978) (same); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (health and safety inspection pursuant to federal statute).

32. *Donovan v. Dewey*, 452 U.S. 594 (1981) (mine safety); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms control); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor control).

33. 397 U.S. 72 (1970).

for warrantless inspections by Treasury agents.<sup>34</sup> The Court found the warrantless search invalid under the fourth amendment. Acknowledging that the liquor industry had a long history of close regulation, the Court admitted that Congress could constitutionally legislate standards and procedures for reasonable searches, including forced entries, without a warrant. However, in this case, the statutory scheme did not provide adequately delineated standards. The Court concluded, "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."<sup>35</sup>

*United States v. Biswell*<sup>36</sup> concerned the warrantless search of a locked gun storeroom. During an inspection of a pawn shop licensed to deal in firearms, a Treasury agent, pursuant to a federal statute authorizing the inspection of records and firearms to dealers, requested entry to the storeroom.<sup>37</sup> The owner consented. Upon entry,

---

34. *Id.* at 73-74; Act of Sept. 2, 1958, Pub. L. No. 85-859, 72 Stat. 1348 (current version at 26 U.S.C. § 5146(a)-(b) (1982)).

(a) Preservation and inspection of records.—Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under the chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

*Id.*

35. *Colonnade*, 397 U.S. at 77.

36. 406 U.S. 311 (1972).

37. *Id.* at 312; 18 U.S.C. § 923(g) (1976).

Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within

the agent found two illegal, sawed-off shotguns in violation of the pawnbroker's license, and seized them.<sup>38</sup>

In validating the search and seizure, the Court rejected the notion that consent by the owner was a crucial factor,<sup>39</sup> although in an earlier case, the Court had validated a warrantless inspection scheme on the theory that obtaining a license constitutes an implied consent to surrender of fourth amendment rights.<sup>40</sup> The *Biswell* court, however, found that "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."<sup>41</sup> In this case, the inspection statute was part of a comprehensive regulatory scheme and was "of central importance" to the goal of the scheme in preventing violent crime.<sup>42</sup> The achievement of this important governmental interest necessitated frequent and unannounced inspections. The statute specifically authorized inspections of both the dealer's firearms records and the firearms themselves.<sup>43</sup> The Court found these considerations outweighed the minimal threat to the dealer's privacy. The Court concluded that because of the explicit nature of the statutory scheme, a dealer's privacy interests were not seriously compromised; he is "not left to wonder about the purposes of the inspector or the limits of his task."<sup>44</sup>

Together, *Colonnade* and *Biswell* created an exception to fourth amendment search warrant requirements which allowed statutes to validly authorize warrantless administrative inspections in certain "closely regulated" industries. The general rule had been announced in *Camara*: inspection of a private dwelling by administrative officers without proper consent is unconstitutional "unless it has been authorized by a valid search warrant."<sup>45</sup> *See* had applied this rule to

---

such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

*Id.*

38. *Biswell*, 406 U.S. at 312.

39. *Id.* at 315.

40. *Zap v. United States*, 328 U.S. 624, 628 ("[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."), *vacated* 330 U.S. 800 (1946).

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

42. *Id.*

43. 18 U.S.C. § 923(g) (1976); *see supra* note 37.

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

45. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

commercial property.<sup>46</sup> *Colonnade* provided the first exception by implicitly accepting warrantless searches subject to valid regulatory schemes in the “closely regulated” liquor industry.<sup>47</sup> *Biswell* created a second exception for the firearms industry.<sup>48</sup> The “*Colonnade-Biswell*” exception provides the standard for warrantless administrative searches: in “closely regulated” industries “where . . . regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.”<sup>49</sup>

In *Marshall v. Barlow's, Inc.*,<sup>50</sup> the Court clarified the limits of the “*Colonnade-Biswell*” exception when it found that health and safety inspections made without warrants pursuant to the Occupational Safety and Health Act of 1970 [hereinafter OSHA] regulations were unconstitutional.<sup>51</sup> The Secretary of Labor argued that warrantless inspections for safety violations were necessary for all businesses under OSHA jurisdiction.<sup>52</sup> The Court rejected this contention on the grounds that “[t]he clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception.”<sup>53</sup> The Court refused to expose all businesses dealing in interstate commerce to forced warrantless inspections by OSHA. Given the nature and purpose of the inspections, the Court decided that requiring a warrant would not seriously burden

46. See *v. City of Seattle*, 387 U.S. 541, 546 (1967).

47. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970).

48. *Biswell*, 406 U.S. at 316-17.

49. *Id.* at 317.

50. 436 U.S. 307 (1978).

51. *Id.* at 311; see 29 U.S.C. § 657(a) (1976).

§ 657. Inspections, investigations, and recordkeeping

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner.

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

*Id.*

52. *Marshall*, 436 U.S. at 311.

53. *Id.* at 313.



the system, prevent inspections, or make them less effective.<sup>54</sup> Moreover, since only an administrative warrant was required, an inspector need not show probable cause to obtain one. He had only to show reasonable administrative standards for conducting the search.<sup>55</sup> On the other hand, failure to require any warrant would seriously impair an employer's privacy interests. Granting OSHA's inspectors the authority to make warrantless searches would "devolve[] almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search."<sup>56</sup> The Court found such discretion abusive and unnecessary to accomplish the purpose of the safety inspections under OSHA regulations.<sup>57</sup>

Finally, in *Donovan v. Dewey*,<sup>58</sup> the Court clearly set forth the requirements that statutes authorizing warrantless administrative inspections must satisfy in order to be deemed valid. The Court held that warrantless inspections of mines to insure compliance with health and safety standards required by law did not violate the fourth amendment.<sup>59</sup> Mining, which had a dismal record of compliance with safety regulations, and which was regarded as one of the most dangerous of industries, had been closely regulated for a long time.<sup>60</sup> Acknowledging that the fourth amendment prohibits unreasonable administrative inspections, the Court asserted that "[t]he interest of the owner of commercial property is not . . . in being free from *any* inspections."<sup>61</sup> Rather, the owner's interest is in being free from unreasonable inspections: searches that are not legally authorized, searches which do not further federal interests, or random and unpredictable searches providing no notice or expectation to the owner that his property will be inspected.<sup>62</sup> "Where Congress . . . authorize[s] inspections, but [makes] no rules governing the procedures," times, and places for them, the fourth amendment warrant requirements apply.<sup>63</sup> However, a warrant may not be required when "Congress has reasonably determined that warrantless searches are necessary to further a [comprehensive] regulatory scheme" which is so clearly "defined that the owner of commercial property cannot

---

54. *Id.* at 316.

55. *Id.* at 320.

56. *Id.* at 323.

57. *Id.* at 323-24.

58. 452 U.S. 594 (1981).

59. *Id.* at 606.

60. *Id.* at 603.

61. *Id.* at 599 (emphasis added).

62. *Id.*

63. *Id.* (quoting *colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970)).

help but be aware that his property will be subject to periodic inspections undertaken for specific [legitimate and reasonable] purposes.”<sup>64</sup> In this case, the inspection regulations were detailed, specifically setting out the times, places, and scope of inspections.<sup>65</sup> They forbade forcible entry and required inspectors who were denied entry to obtain an injunction.<sup>66</sup> The Court stated that “[u]nder these circumstances, it is difficult to see what additional protection a warrant requirement would provide.”<sup>67</sup> Stating that “it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment,”<sup>68</sup> the Court

---

64. *Id.* at 600.

65. *Id.* at 596; 30 U.S.C. § 813(a) (1982).

Purposes; advance notice; guidelines for additional inspections; right of entry. Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title [30 USCS §§ 811 et seq.] or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

*Id.*

66. 30 U.S.C. § 818(a)(1)(C) (1982).

(a) Civil action by Secretary

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

• • •

(C) refuses to admit such representatives to the coal or other mine.

*Id.*

67. *Donovan*, 452 U.S. at 605.

68. *Id.* at 606.

found mining to be another industry subject to the "*Colonnade-Biswell*" exception.<sup>69</sup>

Historically, in those cases in which the Court dispensed with a warrant requirement, it reasoned that individuals engaged in an industry subject to a long-standing, complex, and pervasive pattern of close supervision and inspection possess a substantially diminished expectation of privacy and "this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."<sup>70</sup> Applying this exception to the liquor,<sup>71</sup> firearms,<sup>72</sup> and mining<sup>73</sup> industries, the Court noted that, in these cases, warrantless inspections were crucial to a comprehensive administrative scheme, that the additional protections afforded by a warrant requirement were negligible, and that, unlike the circumstances in *Camara*, a warrant requirement could easily frustrate the purpose of the inspection, for in such industries, "unannounced, even frequent, inspections are essential," and the "necessary flexibility as to time, scope, and frequency . . . [must] be preserved."<sup>74</sup> For warrantless inspections to qualify as reasonable under fourth amendment scrutiny, however, the Court has generally required that the statutory scheme itself provide "an adequate substitute for a warrant"<sup>75</sup> in terms of the certainty and regularity of its application; it may not delegate too much autonomy to officers in the field to determine whom to search and when to search them.<sup>76</sup>

Most recently, in *Michigan v. Clifford*,<sup>77</sup> the Supreme Court emphasized the need to limit the scope of warrantless administrative searches. *Clifford* involved a warrantless administrative inspection of a basement to determine the cause and origin of a fire which had occurred several hours earlier. During the initial inspection, evidence of arson was discovered and the search was expanded from the basement to other parts of the house.<sup>78</sup> In finding the expanded search invalid, the Court was "unanimous in [its] opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be con-

---

69. *Id.*

70. *Id.* at 599 (citing *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

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

72. *United States v. Biswell*, 406 U.S. 311 (1972).

73. *Donovan*, 452 U.S. at 594.

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

75. *Donovan*, 452 U.S. at 603.

76. *Id.* at 601 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1971)).

77. 464 U.S. 287 (1984).

78. *Id.* at 291.

ducted only pursuant to a warrant, issued upon probable cause that a crime has been committed.”<sup>79</sup> Once the purpose of an administrative search has been accomplished, its validity ends. A valid warrantless inspection cannot be used as a pretext or excuse for a search for criminal evidence.<sup>80</sup> In *Clifford*, the Court maintained a clear and unweakened distinction between administrative inspections for violations of regulations and criminal searches for evidence of crimes.<sup>81</sup>

Although there may not always have been absolute certainty as to which cases would trigger warrant requirements and which would qualify for warrantless administrative searches, one common thread pervaded all the Court’s decisions flowing from *Camara*. In each case in which a search of private property was approved without the full panoply of safeguards traditionally demanded by the fourth amendment, the search at issue involved limited inspections designed to insure compliance with regulations imposed under a comprehensive administrative scheme enacted to further pressing public health and safety concerns. When, however, the principle objective of a search was to uncover evidence of criminal acts substantially unrelated to the regulatory scheme traditional fourth amendment warrant requirements were mandated.<sup>82</sup>

Then came *New York v. Burger*.<sup>83</sup>

## II. THE BURGER DECISION

### A. *The Facts*

The basic facts of *Burger* are simple and straightforward. The defendant owned a junkyard in Brooklyn, New York, which he used for a scrap metal business. The premises were enclosed by a thirteen to fourteen foot high opaque metal fence, separated from the nearest public street by 200 feet of privately owned property.<sup>84</sup>

On November 17, 1982, pursuant to a New York state statute,<sup>85</sup> five plainclothes New York City police officers, attached to the Auto Crimes Division, entered the premises and asked to see Burger’s registration and his records of the vehicles and vehicle parts in his pos-

---

79. *Id.* at 300 (Stevens, J., concurring).

80. *Id.* at 294.

81. *Id.*

82. *Id.*

83. 107 S. Ct. 2636 (1987).

84. Brief Amicus Curiae of the American Civil Liberties Union and the New York Civil Liberties Union at 1, *New York v. Burger*, 107 S. Ct. 2636 (1987) (No. 86-80) [hereinafter ACLU Brief].

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

session. When he replied that he did not have the documents required by the statute, the police announced that they were going to conduct a search of the property. The officers then proceeded to execute a thorough search of the yard, examining automobiles, automobile parts, and other items found there. The vehicle identification numbers or serial numbers were copied and checked against a police computer to determine whether such items had been reported stolen.<sup>86</sup>

The acknowledged purpose of the search was to determine whether Burger was in possession of stolen property. The officers, however, had obtained no warrant of any kind and conceded that they had no information whatsoever, much less probable cause, to even remotely suggest either that Burger was involved in criminal activity or even that any evidence of crime would be found on the premises.<sup>87</sup> The search was predicated entirely on a police department policy of conducting random searches of junkyards and automobile dismantlers to determine whether they possessed stolen property, a policy authorized by both New York State<sup>88</sup> and New York City statutes.<sup>89</sup>

86. *Burger*, 107 S. Ct. 2636, 2639-40.

87. ACLU Brief, *supra* note 84, at 2.

88. N.Y. VEH. & TRAF. LAW § 415-a.5(a) (McKinney 1986).

Upon request of an agent of the commissioner or of any police office and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. Upon request of any agent of the commissioner and during his regular and usual business hours, a salvage pool, mobile car crusher or itinerant vehicle collector shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.

*Id.*

89. N.Y.C. CHARTER § 436 (Supp. 1983-84).

The commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.

*Id.*

After the officers determined that Burger was in possession of stolen property which included vehicles and auto parts, as well as a wheelchair and walker found in a stolen vehicle in the yard, they placed him under arrest and charged him with five counts of criminal possession of stolen property and unregistered operation as a vehicle dismantler.<sup>90</sup> His motion to suppress the evidence obtained as a result of the inspection was denied, and following a plea of guilty, a judgment of conviction was entered which was affirmed by the Appellate Division, Second Department.<sup>91</sup> On further appeal, the New York Court of Appeals reversed.<sup>92</sup> That court reasoned that the statutes at issue did "little more than authorize general searches, including those conducted by the police, of certain commercial premises,"<sup>93</sup> and were "in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property."<sup>94</sup> The United States Supreme Court granted certiorari, and, by a divided court, reversed.<sup>95</sup>

### B. *The Majority Opinion*

The majority opinion, by Justice Blackmun, concluded that the warrantless search authorized by the state statute fell within the exception to the warrant requirement for administrative inspections of closely regulated businesses.<sup>96</sup> Applying the rationale that the state has a substantial interest in regulating the junkyard industry to deter trafficking in stolen property;<sup>97</sup> that the regulation of the vehicle-dismantling industry reasonably serves that interest;<sup>98</sup> that warrantless

---

90. *Burger*, 107 S. Ct. 2636, 2640 & n.5.

91. *People v. Burger*, 112 A.D.2d 1046, 493 N.Y.S.2d 34 (2d Dep't 1985), *rev'd*, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986), *rev'd*, 107 S. Ct. 2636 (1987).

92. *People v. Burger*, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986), *rev'd*, 107 S. Ct. 2636 (1987).

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

94. *Id.*

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

96. *Id.* at 2644 & n.13. The constitutionality of the New York City Charter provision was not reached. The provision simply announces a power in the police commissioner or his designee to conduct a warrantless search of certain commercial premises at any time and without prior notice. *Supra* note 89; *see, People v. Pace*, 101 A.D.2d 336, 339 n.2, 475 N.Y.S.2d 443, 445 n.2 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985); *id.* at 347 n.2, 475 N.Y.S.2d at 450 n.2 (Mangano, J., dissenting). There is no pretense of an administrative scheme at all. Because the Supreme Court did not reach the issue of its constitutionality, the Appellate Term of the New York Supreme Court has held that the Court of Appeals' holding of unconstitutionality still stands. *See People v. Lopez*, N.Y.L.J., Nov. 18, 1987, at 13, col. 3 (2d Dep't).

97. *Burger*, 107 S. Ct. at 2646.

98. *Id.* at 2647.

inspections are necessary to further the regulatory scheme;<sup>99</sup> and that the statutory inspection scheme provides an adequate substitute for a warrant,<sup>100</sup> the majority found that the New York statute satisfied the criteria necessary to make the warrantless inspections it authorized reasonable within the meaning of the fourth amendment.<sup>101</sup>

The majority first focused its attention on whether a "*Colonnade-Biswell*" exception was appropriate in this case. It found that, while regulation of auto-dismantlers is relatively new because the phenomenon of widespread use of the automobile is recent, regulation of related businesses such as junkyards and pawnshops, was long-standing.<sup>102</sup> The Court, therefore, concluded that auto dismantling constitutes a "closely regulated" industry.<sup>103</sup> Thus, "an operator of a junkyard engaging in vehicle dismantling has a reduced expectation of privacy. . . ."<sup>104</sup> And "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable. . . ."<sup>105</sup>

Although the *Burger* Court did not specifically deal with the notion that a businessman's application for registration constitutes an implied consent to surrender of fourth amendment rights, some courts found support for such a rationale in *Zap v. United States*.<sup>106</sup> That rationale ran counter to better reasoned authority<sup>107</sup> and was ultimately rejected in *Donovan v. Dewey*.<sup>108</sup> The better analysis is to

99. *Id.* at 2647-48.

100. *Id.* at 2648.

101. *Id.* at 2648-49.

102. *Id.* at 2645-46.

103. *Id.* at 2646.

104. *Id.*

105. *Id.* at 2643.

106. 328 U.S. 624, *vacated*, 330 U.S. 800 (1946); *see supra* note 40 and accompanying text.

107. *See, e.g.,* *Matter of Finn's Liquor Shop v. State Liq. Auth.*, 24 N.Y.2d 647, 658, 249 N.E.2d 440, 445, 301 N.Y.S.2d 584, 591, *cert. denied*, 396 U.S. 840 (1969). The New York Court of Appeals rejected the waiver theory and concluded,

[N]o State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified.

*Id.*

108. 452 U.S. 594 (1981). Acquiring a license for a commercial venture or a property does not entail a waiver of fourth amendment protections. Rather, some licensed businesses are heavily and closely regulated to further substantial federal or state interests in general health and safety. When those regulations provide for certain and regular procedures of inspection of licensed businesses, they serve as "a constitutionally adequate substitute for a warrant." *Id.* at 603. Thus, there is no "waiver" of fourth amendment rights, rather the commercial owner is

balance the need to search against the invasion which the search entails, during which another form of implied consent, i.e. that businessmen consent to entry by the general public to public parts of their businesses during regular business hours, is properly taken into account.<sup>109</sup>

Having determined that Burger was engaged in a closely regulated business, the Court next considered whether the New York state statute met its criteria for exemption from the usual fourth amendment warrant requirements. First, although the Court did not find the urgent government interest required by *Biswell*, it did find that the state's interest in reducing auto theft, which is associated with dismantling shops, was a substantial one.<sup>110</sup> The reductions of the standard from "urgent" to "substantial" did not disturb the Court.

Second, since "[a]utomobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts,"<sup>111</sup> the Court found it reasonable for the state to discourage business owners from this practice by requiring them to keep records of the vehicles on the premises. It also found that frequent and unannounced warrantless searches were necessary to further the statute's purpose.<sup>112</sup>

Third, the Court found that the New York state statute's authorized inspection procedure provided a constitutional alternative to a warrant.<sup>113</sup> The statute provided that the commissioner (or his agents) or any police officer may enter the premises and inspect vehicle records, vehicles, and vehicle parts during regular business hours.<sup>114</sup> The Court, following *Biswell*, decided that such regulation was a sufficient substitute for a warrant. It

---

put on notice that he will be subject to reasonable inspections which meet the requirements of reasonable search under the fourth amendment.

109. LAFAYE, *supra* note 11, § 3.9.

110. *New York v. Burger*, 107 S. Ct. 2636, 2646 (1987).

111. *Id.* (citation omitted).

112. *Id.* at 2648.

113. *Id.* at 2648. The Court found the statute's adequacy in this regard "indistinguishable" from that of *United States v. Biswell*. *Id.* at 2648 n.22. There, the statute mandated that firearms dealers keep records of all firearms and ammunition they handled. The Secretary of the Treasury (or his agents) was authorized to enter the premises and inspect all records, firearms, and ammunition during regular business hours. *Biswell*, 406 U.S. at 312 n.1.

114. N.Y. VEH. & TRAF. LAW § 415-a.5(a) (McKinney 1986)

Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicle or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.

*Id.*



informs the operator . . . that inspections will be made on a regular basis . . . [it] sets forth the scope of the inspection . . . it notifies the operator as to who is authorized to conduct an inspection. . . . [T]he 'time, place, and scope' of the inspection is limited . . . to place appropriate restraints upon the discretion of the inspecting officers."<sup>115</sup>

The Court concluded, "A search conducted pursuant to [this statute], therefore, clearly falls within the well-established exception to the warrant requirement for administrative inspections of 'closely regulated' businesses."<sup>116</sup>

The majority was untroubled by the argument that the New York statute afforded the police an expedient means to enforce penal sanctions for possession of stolen property. The Court found that a state could properly attack "a 'major social problem' both by way of an administrative scheme and through penal sanctions;" the overlap was entirely irrelevant.<sup>117</sup> Nor did the Court attach any constitutional significance to New York's use of police officers, possessed of general police powers, rather than specialized administrative agents, to conduct such warrantless searches.<sup>118</sup>

Finally, the Court totally rejected the New York Court of Appeals' finding that there was no real administrative purpose for the statute, and that it was merely a pretext for allowing police to search for evidence of auto theft without the necessity of first obtaining a warrant.<sup>119</sup> Instead, the Court found that there was a proper administrative purpose for the statute: to identify junkyard operators and deter them from dealing in stolen vehicles. This purpose, the majority found, was served by inspection of the inventory even after the operator had already acknowledged his violation of the statute by his failure to register and keep the required records for inspection.<sup>120</sup>

The majority opinion did not confront one of the unique circumstances in this case. During the inspection of Burger's property, the police recorded, in addition to the vehicle identification numbers of automobiles and automobile parts, the serial numbers of a wheelchair and a walker, and seized them as stolen property.<sup>121</sup> Neither of

115. *Burger*, 107 S. Ct. at 2648 (citations omitted).

116. *Id.* at 2648-49.

117. *Id.* at 2649 (emphasis omitted).

118. *Id.* at 2651.

119. *Id.* The New York Court of Appeals had held that "the fundamental defect . . . is that [it] authorize[s] searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme . . . designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." *People v. Burger*, 67 N.Y.2d 338, 344, 493 N.E.2d 926, 929, 502 N.Y.S.2d 702, 705 (1986).

120. *Burger*, 107 S. Ct., at 2650.

121. *Burger*, 67 N.Y.2d at 341, 493 N.E.2d at 927, 507 N.Y.S.2d at 703.

these items was within the proper scope of the search authorized by the statute.<sup>122</sup> Yet the operator was convicted of criminal possession of this stolen property on the basis of this warrantless administrative search and seizure.<sup>123</sup> Ignoring its ruling to the contrary in *Clifford*,<sup>124</sup> the Court simply stated, “[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.”<sup>125</sup>

### C. *The Dissent*

The dissenters urged that a vehicle dismantling business is not pervasively regulated unless most businesses are;<sup>126</sup> that the statute failed to provide guidance and limitation of police discretion;<sup>127</sup> and that a search for evidence of only criminal wrongdoing cannot be characterized as administrative.<sup>128</sup> They argued that the general rule requiring a warrant for administrative searches of commercial property had been rendered meaningless by the majority’s decision.<sup>129</sup>

The dissent disputed the majority’s characterization of the vehicle dismantling business as “closely regulated” under the “*Colonnade-Biswell*” standard. The regulations promulgated by the New York statute were simply not, in the dissent’s view, sufficiently comprehensive to be considered pervasive.<sup>130</sup> The statute required only that an applicant meet minimal eligibility criteria,<sup>131</sup> pay a nominal charge

---

122. *Id.* at 340 n.2, 493 N.E.2d at 927 n.2, 507 N.Y.S.2d at 703 n.2 (citing N.Y. VEH. & TRAF. LAW § 415-a).

123. This is precisely the reason the New York Court of Appeals found the Statute to be flawed. *Burger*, 67 N.Y.2d at 344-45, 493 N.Y.2d at 929-30, 502 N.Y.S.2d at 705-06. In *Biswell*, on the other hand, during an administrative search, a Treasury agent seized two sawed-off shotguns for which the pawnshop operator was convicted of dealing in firearms without having paid a tax and was acquitted of other charges, including possession of unregistered firearms. *United States v. Biswell*, 406 U.S. 311, 313 n.2 (1972). In that case, the search and seizure of the guns was within the scope of authorization, because the inspection of firearms was the subject of the inspection. *Id.* at 312 n.1.

124. 464 U.S. 287 (1984). See *supra* text accompanying notes 77-81.

125. *New York v. Burger*, 107 S. Ct. 2636, 2651 (1987).

126. *Id.* at 2652 (Brennan, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 2653.

131. N.Y. VEH. & TRAF. LAW § 415-a.2, 4 (McKinney 1986).

2. Application for registration. An application for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be made to the commissioner on a form prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the

for registration,<sup>132</sup> and, in order to operate a vehicle dismantling business, display a registration certificate, maintain a record of motor vehicles and major parts, and permit inspections.<sup>133</sup> The dissenters

business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and any other person required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.

*Id.* at § 415-a.2.

4. Requirements for registration. (a) Except as otherwise provided herein, no registration shall be issued or renewed unless the applicant has a permanent place of business at which the activity requiring registration is performed which conforms to section one hundred thirty-six of the general municipal law as such section applies and to all local laws or ordinances and the applicant and all persons having a financial interest in the business have been determined by the commissioner to be fit persons to engage in such business. However, the commissioner may issue a temporary registration pending final investigation of an application.

(b) The provisions of this subdivision requiring a place of business at which the activity requiring registration is performed shall not apply to a mobile car crusher nor to an itinerant vehicle collector. However, the mobile car crusher or itinerant vehicle collector must otherwise comply with all applicable local licensing laws or ordinances.

(c) Notwithstanding the provisions of paragraph (a) of this subdivision, the commissioner may issue a registration to an applicant for registration as a vehicle dismantler or salvage pool to a person who may not comply with local laws relating to zoning provided that the applicant has engaged in business at that location as a vehicle dismantler since September first, nineteen hundred seventy-three. However, the issuance of such registration shall not be a defense with respect to any action brought with respect to violation of any such local law.

*Id.* at § 415-a.4.

132. *Id.* at § 415-a.3.

3. Fees. The annual fee for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be fifty dollars. Upon approval of an application, an appropriate registration shall be issued for a period of time determined by the commissioner and if issued for a period of more or less than one year, the fee shall be prorated on a monthly basis.

*Id.*

133. *Id.* at § 415-a.5.

5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police

noted that there were none of the traditional licensing requirements characteristic of "closely regulated" businesses; there was no regulation on the condition of the premises, nor were there limitations on the method or hours of operation, or restrictions on the types and uses of equipment.<sup>134</sup> They observed that similar, and often more stringent, regulations were required of many other businesses.<sup>135</sup> If the majority view prevailed, the dissent continued, almost any business would count as "closely regulated."<sup>136</sup> But the "*Colonnade-Biswell*" exception for closely regulated businesses was intended to be the exception; with the majority's holding, the exception had swallowed the rule.<sup>137</sup>

Another major problem troubled the dissenters. The statute did not, in their eyes, provide an adequate alternative for the fourth amendment's warrant requirement. "The warrant requirement protects the owner of a business from the 'unbridled discretion (of) executive and administrative officers'<sup>138</sup> by ensuring that 'reasonable legislative or administrative standards for conducting an . . . inspec-

---

officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. Upon request of any agent of the commissioner and during his regular and usual business hours, a salvage pool, mobile car crusher or itinerant vehicle collector shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such inspection on the part of any person required to be required pursuant to this section as required by this paragraph shall be a Class A misdemeanor.

(b) Every vehicle dismantler and salvage pool shall display at his place of business at least one sign upon which his registration number and any other information required by the commissioner is affixed in a manner prescribed by the commissioner and further shall affix his registration number on all advertising, business cards, and vehicles used by him in connection with his business cards, and vehicles used by him in connection with his business. The commissioner is hereby empowered to require, by regulation, that vehicle dismantlers, and salvage pools mark, stamp or tag major component parts of vehicles in their possession in a manner prescribed by the commissioner so as to enable the part so marked to be identified as having come from a particular vehicle and from a particular vehicle dismantler and salvage pool. A violation of this paragraph shall be a class A misdemeanor.

*Id.*

134. *Burger*, 107 S. Ct. at 2653 (Brennan, J., dissenting).

135. *Id.* at n.5. Other businesses equally or more heavily regulated include: bowling alleys, N.Y.C. ADMIN. CODE § B32-46.0; laundries, § B32-167.0; garages and parking lots, § B32-251.0; coffeehouses, § B32-311.0; and general vendors, § B32-491.0. "New York State has equally comprehensive licensing and permitting requirements. See New York Exec. Law § 875. . . ." *Burger*, 107 S. Ct. 2653 n.5 (Brennan, J., dissenting).

136. *Burger*, 107 S. Ct. at 2653 (Brennan, J., dissenting).

137. *Id.* at 2652.

138. *Id.* at 2654 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978)).

tion are satisfied with respect to a particular [business].’ ”<sup>139</sup> To meet the test for an alternative to a warrant, “an administrative statute must create ‘a predictable and guided [governmental] presence.’ ”<sup>140</sup> But this statute does not provide for regular inspections,<sup>141</sup> limits or, guidance on the selection of businesses for inspection,<sup>142</sup> or the explicit standards of compliance.<sup>143</sup> “[I]n fact, there is *no* assurance that any inspections at all will occur.”<sup>144</sup> The statute creates unbridled discretion for police officers to decide when to search and whom to search, and so, the dissent continued, it should be held invalid.<sup>145</sup> “The *sole* limitation . . . is that it must occur during business hours; otherwise it is open season.”<sup>146</sup> “[T]he frequency and purpose of the inspections [are left] to the unchecked discretion of Government officers.’ ”<sup>147</sup> Thus, “[t]he unguided discretion afforded police in this scheme precludes its substitution for a warrant.”<sup>148</sup>

Finally, the dissent seriously and respectfully considered the New York Court of Appeals’ analysis in *People v. Burger*.<sup>149</sup> The only punishable violations described in the state statute are: operating a vehicle dismantling business without a registration;<sup>150</sup> failure to keep

139. *Id.* at 2654 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

140. *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 604 (1981)).

141. *Compare* N.Y. VEH. & TRAF. LAW § 415-1 (McKinney 1986) (providing for inspection upon request of commissioner) *with* 30 U.S.C. § 813 (a) (1982) (providing for “frequent inspections . . . each year”).

142. *Burger*, 107 S. Ct. at 2654 (Brennan, J., dissenting).

In fact, the State could not explain why Burger’s operation was selected for inspection. . . . This is precisely what was objectionable about the inspection scheme invalidated in *Marshall*: It failed to ‘provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search.’ ”

*Id.* (quoting *Donovan*, 452 U.S. at 601).

143. *Id.*; *cf.* *Donovan*, 452 U.S. at 604 (“the standards with which a [business] operator is required to comply are specifically set forth.”).

144. *Id.* (emphasis in original) (citing to N.Y. VEH. & TRAF. LAW § 415-a.5(a) (McKinney 1986)).

145. *Id.*

146. *Id.* at 2655 (emphasis in original).

147. *Id.* (quoting *Donovan*, 452 U.S. at 604).

148. *Id.*

149. 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986), *rev’d*, 107 S. Ct. 2636 (1987).

150. N.Y. VEH. & TRAF. LAW § 415-a.1 (McKinney 1986).

1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class E felony.

*Id.*

or produce records on vehicles for inspection;<sup>151</sup> and failure to display a registration number at the place of business.<sup>152</sup> Any of these violations are readily discoverable without a search of the premises. "Plainly, a statute authorizing a search which can uncover *no* administrative violations is not sufficiently limited in scope. . . ."<sup>153</sup> Based on this reasoning, the dissent concurred with the New York Court of Appeals. "[T]he State has used an administrative scheme as a pretext to search without probable cause for evidence of criminal violations."<sup>154</sup> "[I]t is factually impossible that the search was intended to discover wrongdoing subject to administrative sanction. . . . [Burger] had violated every requirement of the administrative scheme. There is no *administrative* provision forbidding possession of stolen automobiles or automobile parts."<sup>155</sup> "The inspection became a search for evidence of criminal acts when all possible administrative violations had been uncovered."<sup>156</sup> The dissent refused to eliminate or even to blur the distinction between administrative inspections for regulatory violations and searches for evidence of criminal wrongdoing.<sup>157</sup>

Unlike the majority, the dissent followed *Michigan v. Clifford*.<sup>158</sup> Once it was determined that Burger had no registration and no record book, he was guilty of all possible administrative violations under the statute, and the questionably valid warrantless search ended. Any further search was solely to discover evidence of criminal wrongdoing. Such a search necessitates a warrant based on probable cause that a crime has been committed. The dissent found that the search of Burger's premises was unconstitutional because "one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations."<sup>159</sup> According to the dissent, to hold

151. *Id.* at § 415-a.5(a); *see supra* note 133.

152. *Id.* at § 415-a.5(b); *see supra* note 133.

153. *New York v. Burger*, 107 S. Ct. 2636, 2654-55 (Brennan, J., dissenting) (emphasis in original) (1987).

154. *Id.* at 2656.

155. *Id.* (emphasis added) (footnote omitted). *But see* N.Y. VEH. & TRAF. LAW § 415-a.6(a). ("A registration may be suspended or revoked . . . upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or . . . stolen motor vehicle parts.")

156. *Burger*, 107 S. Ct. at 2656 (Brennan, J., dissenting).

157. *Id.* at 2657. "In no other . . . case has this Court allowed the State to conduct an 'administrative search' which violated no administrative provision and had no possible administrative consequences." *Id.* (footnote omitted).

158. *Clifford*, 464 U.S. 287 (1984); *see supra* notes 77-81 and accompanying text.

159. *Burger*, 107 S. Ct. at 2655 (Brennan, J., dissenting).

otherwise, as the majority did, overturns precedent,<sup>160</sup> is dangerous,<sup>161</sup> and undermines the point of the fourth amendment protections because "the implications of the [majority's] opinion . . . will virtually eliminate Fourth Amendment protection of commercial entities in the context of administrative searches."<sup>162</sup> In essence, the dissenters tried to retain some restrictions on the unreasonable search and seizure of commercial property in the face of a sweeping majority decision which weakened those limits if it did not eliminate them altogether.

## CONCLUSION

From an historical viewpoint, the Court's decision cannot be justified. The search undertaken by the police was the very kind of random, unjustified general search for unspecified evidence of crime that the fourth amendment was intended to interdict.<sup>163</sup> Further, if the police department itself had evolved a policy of undertaking routine searches of commercial properties, there would be no doubt about the unconstitutionality of such a policy.<sup>164</sup> The only difference between such a policy and the one the Court upheld in *Burger*, a

---

160. *Id.* at 2654. "See [*v. City of Seattle*] has been constructively overruled." *Id.*

161. *Id.* at 2657.

162. *Id.*

163. The fourth amendment contains two separate clauses. The first protects the basic right to be free from unreasonable searches and seizures. The second requires that warrants be particular and based on probable cause. "Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment." *Payton v. New York*, 445 U.S. 573, 585 (1980). These principles "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). "The simple language of the Amendment applies equally to seizures of persons and to seizures of property." *Id.* "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). "It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable." *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.'" *Id.* at 454-55 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "[T]he values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power." *Id.* at 455 (footnotes omitted); see *supra* note 2 and accompanying text.

164. See *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Sibron v. New York*, 392 U.S. 40, 61 (1968).

difference the Court apparently concluded was dispositive, is that the New York State Legislature authorized the conduct at issue. Yet, this is tautological; a legislative body cannot authorize police conduct which the Constitution proscribes.<sup>165</sup>

Other courts have recognized that clothing police officers with general warrantless search powers under the rubric of an administrative scheme would be more intrusive than giving those same powers to specialized administrative agents.<sup>166</sup> Thus, in sustaining a New York statute authorizing inspection of druggists' narcotics records, the late Judge Friendly took pains to emphasize that the statute had been amended "to restrict the right of inspection to representatives of the Health Department, . . . rather than 'all peace officers within the state.'"<sup>167</sup> Assignment of the power to search to police officers gives rise to the danger of pretext searches, as well as the harassment of legitimate businessmen.<sup>168</sup>

---

165. Legislatures have, upon occasion, failed to adhere to the requirements of the Fourth Amendment . . . the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate . . .

[I]t is a measure of the Framers' fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself.

*Illinois v. Krull*, 480 U.S. 340, 363 (1987) (O'Connor, J., dissenting). "The principle that no legislative act can authorize an unreasonable search became embodied in the Fourth Amendment." *Id.* at 363.

166. See *United States v. Russo*, 517 F. Supp. 83 (E.D. Mich. 1981); *United States v. Anile*, 352 F. Supp. 14 (N.D. W. Va. 1973); *Commonwealth v. Frodyma*, 386 Mass. 434, 436 N.E.2d 925 (1982); *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86 (1982); *State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984); *State v. Williams*, 84 N.J. 217, 417 A.2d 1046 (1980).

Subsequent to *Burger*, an intermediate appellate court in Pennsylvania held that a police officer could not, under the statute then in force, undertake a warrantless search of a liquor club, because a police officer was not an alcoholic beverage enforcement agent. The court noted that the legislature could not amend the statute to permit such a search. *Commonwealth v. Black*, 365 Pa. Super. 502, 530 A.2d 423 (1987). In *Cahill v. Montgomery County*, 72 Md. App. 274, 528 A.2d 527 (1987), the court held that *Burger* did not reach animal control inspection laws; an administrative warrant was still required to inspect a residential premises.

167. *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 685 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974). Professor LaFave, in his authoritative treatise on the fourth amendment, similarly suggests that an administrative search scheme be limited to true administrative agents, as opposed to those with general law enforcement powers. 3 LAFAVE, SEARCH & SEIZURE, § 10.2(f) (2d ed. 1987).

168. The statutes at issue in *Burger* had already been the subject of abuse, having been employed to justify pretext searches for evidence of crime, e.g. *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985); *People v. Sullivan*, 129 Misc. 2d 747, 493 N.Y.S.2d 932 (Sup. Ct. Queens County 1985), *aff'd*, 121 A.D.2d 663, 503 N.Y.S.2d 1009 (2d Dep't 1986) and, routinely, as a way to avoid having to make an application for a search warrant, e.g., *People v. Salamino*, 107 A.D.2d 827, 484 N.Y.S.2d 666 (2d Dep't 1985); *People v. Ost*, 127 Misc. 2d 183, 485



Equally troublesome, is how thin an administrative scheme will serve as a sufficient artifice to disguise what is really legislative sanction for warrantless searches for evidence of crime. The registration requirements contained in the New York state statute considered by the Court are a mere formality, not a serious regulatory effort. The statute places virtually no substantive qualifications upon an individual who desires to operate as a vehicle dismantler.<sup>169</sup> In New York, anyone who wishes to become a vehicle dismantler need only pay a \$50 fee, comply with local zoning laws, and be found, in accordance with no articulated standard, to be a fit person.<sup>170</sup> The statute does not even speak of "licensing," which carries a connotation, at least, of safeguards and qualifications, but employs the term "registration" instead. There is no limitation or regulation concerning the nature of a vehicle dismantler's premises, its method of operation, the hours that it may be open for business, or the functions that it may perform. All that is required is that a business subject to its requirements display its registration certificate, keep a record of all motor vehicles or motor vehicle parts acquired and the disposition of such parts, and submit to possible, unspecified inspections. Prior Supreme

---

N.Y.S.2d 483 (Sup. Ct. Queens County 1985), *aff'd*, 121 A.D.2d 571, 503 N.Y.S.2d 620 (2d Dep't 1986); *People v. Leto*, 124 Misc. 2d 549, 478 N.Y.S.2d 765 (Sup. Ct. Queens County 1984); *People v. Martinelli*, 117 Misc. 2d 310, 458 N.Y.S.2d 785 (Sup. Ct. Kings County 1982); *Mubarez v. State*, 115 Misc. 2d 57, 453 N.Y.S.2d 549 (Ct. Cl. 1982); *People v. Camme*, 112 Misc. 2d 792, 447 N.Y.S.2d 621 (Sup. Ct. Queens County 1982); *People v. Ruggieri*, 102 Misc. 2d 238, 423 N.Y.S.2d 108 (Sup. Ct. Kings County 1979); *People v. Tinneney*, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (Sup. Ct. Kings County 1979); *People v. R. Kelly Freedman & Son, Inc.*, 95 Misc. 2d 564, 407 N.Y.S.2d 963 (Sup. Ct. Albany County 1978).

In *Serpes v. Schmidt*, 827 F.2d 23 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1075 (1988), a divided court held that an Illinois statute regulating the racing industry could not be used to justify the warrantless search of a track dormitory. The dissent viewed *Burger* as dispositive and would have sustained the statute. *Id.* at 34.

169. *Brunacini v. Loomis*, 12 A.D.2d 298, 211 N.Y.S.2d 371 (4th Dep't 1961).

Contrast the specific licensing requirements imposed by New York on other trades and businesses. *See, e.g.*, N.Y. EDUC. LAW § 3228 (McKinney 1981 & Supp. 1988) (newspaper carriers regulated by age as well as by time and manner of delivery). *Id.* §§ 7804-7806 (McKinney 1985 & Supp. 1988) (Masseurs regulated by age, education, examination and fee); N.Y. TOWN LAW § 136 (McKinney 1987) authorizing towns to license and regulate numerous occupations, including "the doing of a retail business in the sale of goods of any description within the limits of the town from canal boats . . ." *id.* subd. 2, "the use of any public hall or opera house," *id.* subd. 4, and "the running of hotels, inns, boarding houses . . . and lodging houses," *id.* subd. 10. The standards for the issuance of such licenses are open-ended and appear to be revenue devices more than regulatory schemes. *See* N.Y. TOWN LAW § 137 (McKinney 1987) (town board has authority to set license fees).

170. N.Y. VEH. & TRAF. LAW § 415-a. 3,4 (McKinney 1986); *see supra* notes 131-32.

Court decisions permitting warrantless administrative searches involved far more comprehensive and detailed regulatory schemes.<sup>171</sup>

In essence, the New York statutory scheme, sustained by the *Burger* Court, reverses the unusual constitutional presumption that personal privacy and property rights may not be violated by a criminal investigation until and unless the state establishes probable cause to believe that the place to be searched contains evidence of criminal activity. The fourth amendment protection afforded business premises can be swept aside by legislation which simply finds a propensity for certain criminal acts on the part of those engaged in specified businesses, requires such businesses to obtain pro forma licenses, and then authorizes regular "inspections" to make sure that no crimes are being committed.

On that basis, hotels could be searched for prostitutes; candy-stores could be inspected for evidence of bookmaking; booksellers could be checked for pornography, and so on. All that is needed is a regulatory scheme designed to forestall criminal activity sometimes carried out under the cover of such businesses.

The limits of *Burger* are difficult to discern. Apparently, a legislative body, by "a single rifle shot aimed directly at the Fourth Amendment,"<sup>172</sup> may now subject any commercial establishment to warrantless regulatory inspections by law enforcement agencies possessing general police powers. Although this may indeed greatly assist law enforcement, the result is at variance with the intent of the framers of the fourth amendment and is too high a price for society at large to pay.

---

171. The regulations promulgated by the Secretary of the Treasury under the Gun Control Act, whose administrative inspection scheme was sustained in *United States v. Biswell*, 406 U.S. 311 (1972), are codified in 27 C.F.R. part 178 (1988). The inspections can only be undertaken by an Alcohol, Tobacco and Firearms officer, during business hours, and the inspection itself limited to specified items and areas which comport with the administrative scheme. 27 C.F.R. § 178.23 (1988). Similar limitations may be found under the Magnuson Act of 1976. 16 U.S.C. § 1801, 1861(b)(1)-(2) (1982); see *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (upholding administrative law judge's determination that inspectors were within scope of duties when attempting to board dock to inspect fishing catch).

In *Bionic Auto Parts & Sales v. Fahner*, 721 F.2d 1072 (7th Cir. 1983), the Seventh Circuit sustained the constitutionality of an Illinois statute which permitted inspections of automobile dismantlers. That statute, however, was rather tightly drafted, specifically delineating the time, manner, frequency, and scope of the inspection. The Seventh Circuit has recently reaffirmed the analysis in *Bionic Auto Parts* over a dissent that urged that *Burger* permitted a broader standard. *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987).

172. ACLU Brief, *supra* note 84, at 47.

