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

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.

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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.
stages while reaffirming the exclusionary rule in the context of identification evidence. Similarly ruling for defendants, the Court invalidated the Ohio death penalty statute, rejected proposed new exceptions to the search warrant requirement, and freed even further the double jeopardy protection from the limitations of its common law moorings. On the other side, however, prosecutors also came away with some significant double jeopardy and search and seizure victories. 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. And in a case that certainly warrants careful 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).

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 post-indictment lineups. See also note 5 supra.

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.

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).


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

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


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

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. By holding that an involuntary confession, unlike a confession obtained in violation of Miranda, cannot be used for any purpose, 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.
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. 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 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, toward the end of the term, the Court in Marshall v. Barlow's, Inc. held that OSHA inspectors need a search warrant when the owner of a business refuses to consent to a safety inspection. Adhering to Camara v. Municipal Court, 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 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 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. 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."

While the above cases involved application of obviously relevant precedent, Zurcher v. Stanford Daily 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 ducem 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, 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.

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. 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, 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," 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.

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. 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." 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. In determining over the years what
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. 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." In Katz v. United States, 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.

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."

By now, of course, the Katz justifiable or reasonable expectation of privacy test 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).


Id. at 351-52.
Id. at 353.

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").


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


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.).

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." 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

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

48 Id. at 29 (quoting Jones v. United States, 357 U.S. 493, 498 (1958)).
49 Id. at 29.
52 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).
53 98 S. Ct. at 1821.
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 involve-
ment in employee working circumstances has never
been of the order of specificity and pervasiveness
that OSHA mandates. Unfortunately, this re-
sponse 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 ac-
counts for reduced privacy expectations, and thus
for reduced fourth amendment interests.58

Unlike the government in Barlow's, the prosecu-
tor 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 advoca-
tes. 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 alterna-
tive, 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 consid-
ered this irrelevant because "the fact remains that
no constitutional right will have been violated by
such a search."61 With respect to the second alter-
native—accident or third-party arson—the pro-
sector'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 amend-
ment interests.

The Court, with Justice Stewart writing the
opinion, used little effort in rejecting these argu-
ments. The Court first observed that "victims" do
have "protectable expectations of privacy in what-
ever remains of their property."63 The Court rec-
ognized, 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 argu-
ment, "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 Mincey66 summarily
rejected a similar argument that a defendant had
forfeited any reasonable expectation of privacy in
his apartment by killing an officer who was at-
tempting 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 rea-
sonable expectation of privacy vis-à-vis the govern-
ment. Second, reasonable expectations of privacy
do not depend upon post facto judgments concern-
ing 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
discipline permitting Congress to regulate health and mor-
als, 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,
Whether the Court will ever deal directly with the com-
merce 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 expecta-
tions 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.
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
work when a warrant is sought.
65 Id. at 1948.
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 anyone 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 Alalfa 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

\(^{71}\) 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.
stranger, the participant monitor, the Supreme Court has ruled, does not implicate fourth amendment interests.

*United States v. White* 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. 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.”

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 himself as “Jimmy the Polack,” purchased narcotics in the defendant’s home).

*United States v. White* is 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).

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.

Belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”

Building upon *Lewis* and *Hoffa*, which found no fourth amendment activity in the government’s use of unbugged informants, 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.” Finally, the Court observed that if “one contemplating illegal activities” doubts the trustworthiness of companions and conversations nonetheless, “the risk is his.”

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 “wrongdoer’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.” Stressing the average person’s willingness to speak, 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 bugging 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.
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 “wrong-doer’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.
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.
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, 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.

90 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).
92 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 impec- tuous 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. 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, the employer assumed the risk. Under Justice Harlan's view, the television transmission—and perhaps the taking of snapshots—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.

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*. That is, *Barlow's* may be read

58 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-

98 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.

99 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 relinquishing 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 uninvited ear intruded upon the privacy of a conver-

100 See Amsterdam, supra note 42, at 358 & 443–44 n.83.
101 See Amsterdam, supra note 42, at 358 & 443–44 n.83. See also Note, supra note 36, Professor Weinreb’s position is discussed in more detail in note 94 supra.
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*, 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. 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. 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*? 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 imply

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. 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. The spy in *Hoffa*, for example,

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<th>107</th>
<th><em>Lewis</em> is briefly discussed in note 76 supra. Interestingly, Professor Weinreb would overrule <em>Lewis</em> but not <em>White</em>. See note 94 infra.</th>
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<td>108</td>
<td>For a discussion of these separate issues, see sections III and IV, infra.</td>
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<td>109</td>
<td>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.</td>
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<td>110</td>
<td>In <em>Hoffa</em> v. United States, 385 U.S. 293 (1966), a friend of <em>Hoffa’s</em> acted as a government spy. The friend disclosed conversations in <em>Hoffa’s</em> hotel suite during <em>Hoffa’s</em> trial on criminal charges. The Court assumed <em>arguendo</em> 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 <em>Barlow’s</em> teaches, expectations of privacy are defined against government.</td>
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<td>111</td>
<td>As the preceding paragraph in the text indicates, the proffered rationale for cases like <em>Lewis</em> 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.</td>
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| 112  | The hypothesis suggested in the text provides a
necessarily intruded upon both lawful and unlawful conversations.\textsuperscript{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 \textit{Lewis}, unlike that in \textit{Hoffa}, did not constitute a threat to any justifiable expectation of privacy. Barring persistent entreaties that smack of entrapment, a simple request for an individual to sell narcotics can only ascertain whether that individual is willing to do so. The request in \textit{Lewis}, unlike the spying in \textit{Hoffa}, posed no threat to justifiable expectations of informational privacy.\textsuperscript{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,\textsuperscript{115} results in either too little fourth amendment protection, as in \textit{White}, or too much.\textsuperscript{116}

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 Court to make.

In arguing that \textit{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 \textit{Lewis}. The agent in \textit{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.

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\textsuperscript{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.

\textsuperscript{116} \textit{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 \textit{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 \textit{Lewis}, unlike the police activity in \textit{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*, in an opinion authored by Justice Powell, held that a depositor has "no protectable fourth amendment interest" in bank records—deposit slips, cancelled checks, and financial statements—subpoenaed by the government. Under provisions of the Bank Secrecy Act, banks were required to maintain such records.

The Miller Court first noted that depositors have no property interest in bank records, a conclusion that itself may not be altogether correct. More significantly, however, the Court concluded that a person has no legitimate expectation of privacy in a microfilm copy of such a check is subpoenaed.

U.S. Petitioner's Brief at 21


precluded from making a fourth amendment challenge.

portant. As illustrated above, for example, if a subpoena

whether a search has occurred.

grounds is identical with the merits of a fourth amendment challenge. 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.

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.


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 440–45. 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.

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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.

Even if we further assume that banking transactions are "voluntary" in today's economically sophisticated world, 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, a fact that the Miller Court failed to address and that the government fudged in its brief. 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 access to these dealings by government. Of course, Justice Powell in Miller denied that the Court had authorized unnecessarily wide-ranging inquiries, 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. 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. Justice McKenna stated it well in his separate opinion in *Hale v. Henkel*:

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, this view did not gain much traction. The Court criticized the reasoning in *Boyd v. United States* (1875), holding that the government had a right to inspect the records of a private bank.

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120 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.


122 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).
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.\textsuperscript{138} To this extent, Hale remained true to the teaching of Boyd v. United States\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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.\textsuperscript{138} 201 U.S. at 76.\textsuperscript{139} 116 U.S. 616 (1886).\textsuperscript{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.\textsuperscript{141}

\textsuperscript{138} 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.

\textsuperscript{140} Petitioner's Brief at 12, United States v. Miller, 425 U.S. 435 (1976).

or conversations of the first party. To say otherwise is to depart radically from the common assumption and to risk one's analytic credibility.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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 988–99. For example, it should be obvious that a subpoena to a bank robbery witness does not implicate any fourth amendment interests of the robber. Cconcededly, 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.

\textsuperscript{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. 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, it has only been slightly over a decade since the Court applied the fourth amendment to non-trespassory wiretapping. 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. The reason, suggested by Katz, is that reading the contents of a letter intrudes upon informational privacy, a central concern of the fourth amendment.

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.

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. 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—must be irrelevant.

This leaves for consideration the third-party subpoena. 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. 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

154 See text at note 136 supra. Boyd found the fourth 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.
to reach the conclusion that the third-party sub-
poena in both hypotheticals implicates fourth
amendment interests. 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 when-
ever we decide to write letters or make phone calls.

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

As previously indicated, the Miller Court made
reference to a general rule that “the issuance of a sub-
poena 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. Never-
theless, 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
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 summon-
ing of the employer’s and the accountant’s records for an
investigation of the taxpayer did not violate the constitu-
tional rights of any of them.”

between the government planting a spy, as in Hoffa,
and the government issuing a third-party sub-
poena. Unlike governmental spying, which uses
deception to intrude upon privacy interests, a sub-
poena may be viewed simply as a request for
information. 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 tattle-
tale. At the very least, the doctrine of third-party
consent should preclude the first party from being
able to assert fourth amendment reasonableness
requirements.

This latter reasoning, however, should not be
available in case like Miller. Just as a hotel clerk
cannot give legal consent to a search of a rented
hotel room, the bank’s legal obligation of confiden-
tiality should preclude it from having a right
to consent. The bank, then, should have an obli-
gation either to challenge the subpoena in a hear-
ing 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 mandat-
ing the recording and disclosure of bank records,
has negated reasonable expectations of informa-
tional privacy. This, as earlier noted, involves an
ambiguous part of the Barlow’s holding. Nevertheless,
by requiring either a long history of past

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.

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 violates
consent). But see Petitioner’s Brief at 49, United States v.
Miller, 425 U.S. 435 (1976). See also United States v. Matlock,
415 U.S. 164 (1974). See also White, The Fourth Amendment As a Way of Talking

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 trans-
acting business with third parties.

See note 13 supra, and accompanying text.

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 Hough 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,64 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]."65 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."66 While this doctrinal development was extremely important, especially for the soon to be decided stop and frisk cases,67 the notion of probable cause as a flexible concept originated long before Camara. For example, in Oklahoma Press Pub. Co. v. Walling,68—a case given just a passing cita-

166 387 U.S. at 536-37.
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. 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. 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, 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. 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. 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. 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.

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. 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. While some of this reasoning has been soundly criticized, most notably by Professor LaFave, it seems fair to say that the Court ultimately reached the correct conclusion on the probable cause issue.

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.


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.


183 See id. at 20.
would not necessarily apply. 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." 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. Second, the need for OSHA inspections on less than traditional probable cause may be open to question. Certainly employers, who have a direct stake in health and safety, are free to report observable hazards to the government, a fact that perhaps distinguishes the housing inspections in Camara. 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, 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.

Armed with such authority, an OSHA inspector can obviously examine practically everything on the premises, including written documents—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.

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, 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 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.

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 17: "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."

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).
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. 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 regretttable.

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, 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_ that temporary stops and brief questioning may be conducted at fixed checkpoints near the border "in the absence of any individualized suspicion." 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." Throughout the opinion, the Court emphasized that checkpoint stops constitute only a minimal intrusion upon fourth amendment interests. 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, but something less than full, traditional probable cause; investigations for civil purposes, which typically are less intrusive than investigations under the criminal law, 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_, by a per curiam decision, the Court applied the test of simple reasonableness to uphold a minor seizure of an automobile driver. 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. Finding that the initial detention was lawful and assuming that the frisk was lawful once the officer observed the bulge, the court nevertheless concluded that the order to leave the car was an unlawful seizure.

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189 _Martinez-Fuerte_ recognized that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." _Id._ at 560.
189 _LaFave_, supra note 182, at 18–20.
190 Curiously, _Mimms_ did not cite _Martinez-Fuerte_, the precedent most strongly supporting the Court's holding.
190 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." _Id._ 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.

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because the officer had no factual basis to suspect either criminal activity or the presence of weapons.\footnote{471 Pa. at 552, 370 A.2d at 1160.} 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.\footnote{434 U.S. at 111.} Turning to the defendant's interests, the Court described the "incremental intrusion\footnote{Id. at 110.} resulting from the order to leave the car as "de minimis":\footnote{Id. at 111.}

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 existence 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."\footnote{Id. (quoting Terry v. Ohio, 342 U.S. 1, 17 (1968)).}

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.\footnote{Id. at 115 (Stevens, J., dissenting).} 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.\footnote{Id. at 116.} Justice Stevens also observed that the Court's logic necessarily applies to passengers,\footnote{Id. at 117. Accord, State v. Ferrise, 269 N.W.2d 888 (Minn. 1978).} 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.\footnote{434 U.S. at 117.}

Although Justice Stevens was perhaps correct in

\begin{itemize}
  \item his criticism of the Court's summary disposition of Mimms, his discussion of the merits seems flawed.
  \item Obviously, as he appeared to concede, the Court has no business choosing the one procedure among reasonable alternatives that would most enhance an officer's safety. 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.\footnote{Imposition of a "petty indignity" in 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., 305 U.S. 177 (1938).} 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.\footnote{Id. at 116.} Given this initial intrusion, the public interest against the intrusiveness of the officer's conduct may make good sense. 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., 305 U.S. 177 (1938).\footnote{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).}

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

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 minimus" 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. 222 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
faced with the task of quick decision making 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.229

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 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

224 Id. at 1976 (quoting Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967)).
225 98 S. Ct. at 1976. 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.
227 387 U.S. at 537.
229 See 171 F.2d 29 (2d Cir. 1950).
230 Id. at 214–15.
232 98 S. Ct. at 1976. The
233 The
234 98 S. Ct. at 1976. The
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 Minims, it is at least tenable to suggest that only a 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


237 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.


238 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.

239 See notes 198–201 and accompanying text supra.


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.\textsuperscript{244} For such items at least, the Court's fear of destruction or concealment of evidence may be overstated.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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\textsuperscript{248} but it concluded that the fourth amendment's probable cause requirement struck the appropriate balance of interests.\textsuperscript{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.\textsuperscript{250} But, of course, nothing in the wording of the fourth amendment suggests that housing inspections, 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.\textsuperscript{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, \textit{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 cause 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.\textsuperscript{252} 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 \textit{Zurcher} obviously recognized.\textsuperscript{253} A subpoena does not entitle an officer to

\textsuperscript{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, \textit{Hayden} continued the trend of freeing search and seizure law from property concepts.\textsuperscript{254}

\textsuperscript{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. \textit{Id.}

\textsuperscript{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.

\textsuperscript{247} See McKenna, \textit{supra} note 135, at 67–70.

\textsuperscript{248} 98 S. Ct. at 1981.

\textsuperscript{249} \textit{Id.} at 1981–82.

\textsuperscript{250} \textit{Id.} at 1983 (Powell, J., concurring).

\textsuperscript{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."

\textsuperscript{252} \textit{But see} note 237 \textit{supra}.

\textsuperscript{253} \textit{See} sections II B (1) & (2) \textit{supra}.

\textsuperscript{254} See McKenna, \textit{supra} note 135, at 89.
trespass upon private property nor to rummage through private possessions looking for the desired evidence.2\textsuperscript{2}5 Unless a subpoena is overbroad—and overbreadth has long been a recognized ground for challenging a subpoena2\textsuperscript{2}6—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.2\textsuperscript{2}7 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.2\textsuperscript{2}8 Moreover, in some instances, a subpoena may seem just as intrusive as the more traditional search. In the previously described letter hypothetical,2\textsuperscript{2}9 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 	extit{Katz} hypothetical2\textsuperscript{3}0 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 been accepted for many years.2\textsuperscript{3}1 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.2\textsuperscript{3}2

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 	extit{Camara} standard of reasonableness for certain administrative searches.2\textsuperscript{3}3 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]."2\textsuperscript{3}4 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."2\textsuperscript{3}5 Equally important, however, the government should have to show, as the Court required in 	extit{Blair}, that the particular person has been selected for investigation "on the basis of a

2\textsuperscript{2}5 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).

2\textsuperscript{2}6 The investigative role of the grand jury has long been recognized as legitimate. See, e.g., 	extit{Blair} v. United States, 250 U.S. 273 (1919).

2\textsuperscript{3}3 In 	extit{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.

2\textsuperscript{3}4 	extit{Camara} v. Municipal Court, 387 U.S. 523, 538 (1967).

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

When a subpoena is not issued as part of a
general administrative plan, the government
should have to show individualized reasonable sus-
picion. Not to require this would be to permit mere
fishing expeditions that intrude upon informa-
tional 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 pri-

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.\textsuperscript{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.\textsuperscript{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 stan-
dards, an objecting depositor would be entitled to
a showing of administrative reasonableness or in-
dividualized 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 show-
ing of individualized suspicion.\textsuperscript{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 signifi-
cant, however, that the person being spied upon,
unlike the target of a traditional search, can control
the information disclosed. While the officer execut-
ing a traditional search may turn over every stone
in the quest for the desired items,\textsuperscript{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 per-
haps 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.\textsuperscript{272} On the
other hand, it has been noted that police usually
engage in undercover surveillance only when they

\textsuperscript{266} Marshall v. Barlow's, Inc., 98 S. Ct. 1816, 1825
(1978).

\textsuperscript{267} These requirements will not overly tax the admin-
istrative process even when third-party subpoenas are
involved. As previously discussed, if the third party de-
sires 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.
\textsuperscript{268} Cf. McKenna, supra note 135, at 89–90 (arguing for a
more stringent standard for documentary subpoenas).

\textsuperscript{269} The facts in Miller are discussed in the text at notes
117–27 supra.

\textsuperscript{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 stan-
dard of administrative reasonableness should not neces-
ecessarily 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.
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

\textsuperscript{271} Cf. McKenna, supra note 135, at 89–90 (arguing for a
more stringent standard for documentary subpoenas).

\textsuperscript{272} Cf. McKenna, supra note 135, at 89–90 (arguing for a
more stringent standard for documentary subpoenas).

\textsuperscript{271} Id.

\textsuperscript{272} L. Tiffany, D. McIntyre, & D. Rotenberg; De-
tection of Crime 207–82 (1967).
have at least a reasonable suspicion of wrongdo-

ing.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 mini-
mum 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

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. Arizona284 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.

273 Id. at 274, 281.
275 387 U.S. 541 (1967). See, a companion case to Camara, involved an inspection of commercial premises.
277 Id. at 1820.
278 Id. at 1826.
281 98 S. Ct. at 1949.
282 Id.
283 Id.
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." 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. 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. In Barlow's, the government sought a far reaching power of inspection that seemed to include virtually everything on the premises including business records. Moreover, the briefs against the government recounted instances of abuse and possible harassment by OSHA inspectors. 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 stairway and business records. 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. 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; 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 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.

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
the seizure of over two hundred sion seemed to involve exigent circumstances, pressed a reluctance to create new exceptions to but one in principle in the context of a criminal investigation, for the magistrate to assess. traditional probable cause requirement to one of low's and Tyler intrusion than a warrantless search. Compare the discus-

that seizing the house the scene shortly after his arrest. Although though the defendant's mother and brother arrived on left open in Vale important, because it suggests an answer to the question to conduct an immediate examination of blood stains. The Court recognized that an emergency theory would 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. 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. 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. 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.

In summary, Barlow's, Tyler, and Mincey reaffirmed the traditional warrant requirement. Bar-

low's and Tyler did this in the administrative search context, where the Court has found the intrusion upon privacy interests less significant than in crim-

inal 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 magis-

trate's independent judgment. All three cases ex-

pressed a reluctance to create new exceptions to

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." 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, the Supreme Court permitted a warrantless search of an automobile as part of a criminal investigation even though exigent circumstances were not really present. 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." The Court noted that even in such circumstances an argument could

301 Id. at 2414 (quoting Terry v. Ohio, 392 U.S. 1, 15 (1968)).
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:

[Which 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.]

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.

The Court in *Chambers* did not explain its somewhat dubious assertion that a warrantless search is not a greater intrusion than a warrantless seizure. 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*, 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.”

In *South Dakota v. Opperman*, 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.”

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*, 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.

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.” The government

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306 399 U.S. at 51-52. For a brief discussion of the shortcomings of this reasoning, see LaFave, * supra* note 271, at 18-19.

307 399 U.S. at 52.

308 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).


310 Id. at 590.
also maintained that OSHA inspections, like automobile searches, do not "implicate significant privacy interests calling for the imposition of the warrant requirement." 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.

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. 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 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 Chambers. 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, 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.

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 things 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. 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

316 Id. at 27.
317 98 S. Ct. at 1822 n.10.
318 399 U.S. at 61 (Harlan, J., concurring and dissenting).
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 (9th 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).
warrant; (5) the agents search both the car and the footlocker without a warrant at their office. (1st Cir. 1977):

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 trunk of the car 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, would clearly constitute lawful police activity. 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. 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, would have "the perverse result of allowing fortuitous circumstances to control the outcome" of search and seizure cases. 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.

Chambers could be overruled without necessarily

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.

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).

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).

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).

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. 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. Turning to the warrantless seizure, which enabled the police to examine the car's exterior, the Court, in convoluted analysis, relied upon Chambers.

If Chambers was wrong, Cardwell's reliance upon it cannot be defended. Yet, the result in Cardwell simplifies 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 would become easy. Exigent circumstances would justify obtaining if there is time to do so.

Concerning the latter, the Court said: "The fact that the examination of the car's exterior infringed at most an "abstract and theoretical" expectation of privacy. Turning to the warrantless seizure, which enabled the police to examine the car's exterior, the Court stressed the exigent circumstances rationale of automobile exceptions, to permit search of suitcase in exigent circumstances, 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, 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. 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. Finally, allow may be defended, for Cardwell did not have to rely upon Chambers at all. The ultimate validity of Cardwell...
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. 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. 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 protection or (2) exigent circumstances make it impractical to get a warrant. 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. The Court, however, has previously rejected the suggestion that a warrant exception could be justified on this basis. 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.

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

333 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). United States v. United States District Court, 407 U.S. 297 (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." 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.

LaFave, supra note 271, at 27.