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Criminal Law - Search and Seizure - Closey-Regulated Industry Exception to Fourth Amendment's Warrant Requirement Expanded to Vehicle Dismantling Industry on Basis of State Regulatory Statute Case Note.

L. Eric Friedland

CASENOTES

CRIMINAL LAW—Search And Seizure—Closely-Regulated Industry Exception to Fourth Amendment's Warrant Requirement Expanded to Vehicle Dismantling Industry on Basis of State Regulatory Statute

New York v. Burger
__ U.S. __, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987)

Joseph Burger's business consisted in part of dismantling automobiles and selling the pieces.[1] On the afternoon of November 17, 1982, five plainclothes New York City police officers entered Burger's business premises and asked to see his license to operate and his records pertaining to the automobiles and parts on his lot.[2] These requests were made pursuant to a New York state statute requiring all persons in the junkyard or vehicle dismantling business to have an operating license and keep records of all vehicles and parts.[3] The statute further provides for warrantless inspection of a vehicle

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1. *See* New York v. Burger, __ U.S. __, __, 107 S. Ct. 2636, 2639, 96 L. Ed. 2d 601, 608 (1987). Burger's junkyard was in an open lot surrounded by a high metal fence. *See id.*

2. *See id.*; *see also* N.Y. VEH. & TRAF. LAW § 415-a(1) (McKinney 1986). Individuals who operate vehicle dismantling businesses in New York are required by state statute to have a license. *See id.* The New York statute provides:

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

Id.

3. *See* Burger, __ U.S. at __, 107 S. Ct. at 2639, 96 L. Ed. 2d at 608. The New York statute provides that every vehicle dismantler:

> shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession . . . . Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to

dismantler's premises to ensure compliance with its provisions.[4] In response to the officers' request, Burger replied that he had neither a license nor a book containing the required records.[5] The officers then announced their intention to inspect the premises,[6] to which Burger voiced no objection.[7] The search revealed stolen vehicles and parts.[8] Consequently, Burger was arrested and charged with five counts of possession of stolen property[9] and one count of unregistered operation as a vehicle dismantler.[10]

In state court, Burger moved to suppress the evidence obtained during the search on the ground that the New York inspection statute authorized an unconstitutional search and seizure under the fourth amendment.[11] Burger's motion was denied on the basis that the junkyard business is a closely-regulated industry and is, therefore, subject to warrantless administrative inspections.[12] After the trial court's denial of his motion, Burger pled guilty

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the record keeping requirements of this section and which are on the premises. . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.

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

4. N.Y. VEH. & TRAF. LAW § 515-a(5) (McKinney 1986).

5. *See* Burger, __ U.S. at __ n.4, 107 S. Ct. at 2640 n.4, 96 L. Ed. 2d at 609 n.4. Confusion arose among the inspecting officers as to whether Burger had failed to compile the required record, known as a "police book," or whether at the time of the inspection the book was merely not in his possession. *See id.*

6. *See id.* at __ nn.1, 3, 107 S. Ct. at 2639 nn.1, 3, 96 L. Ed. 2d at 608-09 nn.1, 3; N.Y. VEH. & TRAF. LAW § 415-a(5) (McKinney 1986). Subdivision 5 of section 415-a of the New York Vehicle and Traffic Law, under which the police officers were acting, provides that a vehicle dismantler must allow police officers to examine the records as well as vehicles or parts on the premises and to subject themselves to the requirements of the statute. *See id.*

7. *See* Burger, __ U.S. at __, 107 S. Ct. 2640, 96 L. Ed. 2d at 609.

8. *See id.* During the search, the officers recorded vehicle inspection numbers of several vehicles and parts in the junkyard as well as the serial numbers of a wheelchair and of a walker for a handicapped person. A check of these numbers against a police computerized list revealed that some of the items were stolen. *See id.*

9. *See id.* Burger was charged with two counts of criminal possession of stolen property in the second degree, a Class E felony, pursuant to section 165.45 of the New York Penal Law, and three counts of criminal possession of stolen property in the third degree, a class A misdemeanor, pursuant to section 165.40. *See id.*, *see also* N.Y. PENAL LAW §§ 165.40, 165.45 (McKinney 1986).

10. *See* Burger, __ U.S. at __, 107 S. Ct. at 2640, 96 L. Ed. 2d at 609; *see also* N.Y. VEH. & TRAF. LAW § 415-a(1) (McKinney 1986). Violation of the license requirement constitutes a class E felony. *See id.*; *see also* Burger, __ U.S. at __ n.3, 107 S. Ct. at 2639 n.3, 96 L. Ed. 2d at 609 n.3.

11. *See* Burger, __ U.S. at __, 107 S. Ct. at 2640, 96 L. Ed. 2d at 610 (citing People v. Burger, 479 N.Y.S.2d 936 (Sup. Ct. 1984), *aff'd*, 493 N.Y.S.2d 34 (App. Div. 1985)); *see also* Weeks v. United States, 232 U.S. 383, 383-94 (1914)(evidence obtained in violation of fourth amendment subject to exclusion from use as evidence); U.S. CONST. amend IV.

12. *See* People v. Burger, 479 N.Y.S.2d 936, 937 (Sup. Ct. 1984), *aff'd*, 493 N.Y.S.2d 34

to and was convicted of criminal possession of stolen property in the second degree.[13] The Appellate Division affirmed Burger's conviction.[14] Burger appealed, alleging that the New York inspection statute was facially unconstitutional in that, regardless of the auto junkyard's status as a closely-regulated industry, the statute authorized warrantless searches not designed to further an administrative objective, but to gather evidence for criminal prosecutions.[15]

The New York Court of Appeals determined that the statute was unconstitutional and reversed Burger's conviction.[16] The United States Supreme Court granted certiorari because of the states' interest in combatting an increasing incidence of auto theft by regulating the vehicle dismantling and junkyard industry.[17] Held—*Reversed*. A warrantless inspection of the commercial premises of a closely-regulated industry is reasonable for fourth amendment purposes if conducted pursuant to a valid state statute.[18]

The fourth amendment of the United States Constitution protects persons against unreasonable searches and seizures by the government,[19] and mandates that searches be based upon probable cause and conducted pursuant to a warrant.[20] The underlying purpose of the fourth amendment is to safe-

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(N.Y. App. Div. 1985). Burger filed a motion for rehearing on the denial of his suppression motion based upon the then-recent decision of *People v. Pace*, 475 N.Y.S.2d 443 (App. Div. 1984), *aff'd*, 481 N.E.2d 250 (N.Y. 1985). In *Pace*, the warrantless search of a junkyard was held unconstitutional because the officers were acting upon recently discovered evidence of criminal activity, rather than conducting an administrative search. *See id.* at 446-47.

13. *See* Burger, 479 N.Y.S.2d at 940 (distinguishing administrative search in instant case from search in *Pace*), *aff'd*, 493 N.Y.S.2d 34 (N.Y. App. Div. 1985).

14. *See* People v. Burger, 493 N.Y.S.2d 34, 35 (App. Div. 1985), *rev'd*, 493 N.E.2d 926 (N.Y. 1986). The Appellate Division court reiterated the trial court's holding that the police were not using the administrative search as a pretext to gather evidence for use in a criminal prosecution. *See id.*; *see also* People v. Cusumano, 484 N.Y.S.2d 909, 911 (App. Div. 1985) (constitutionality of New York statutory provisions regulating searches of vehicle dismantlers' premises upheld).

15. *See* People v. Burger, 488 N.E.2d 121 (N.Y. 1985)(granting appeal).

16. *See* People v. Burger, 493 N.E.2d 926, 930 (N.Y. 1986).

17. New York v. Burger, __ U.S. __, __, 107 S. Ct. 2636, 2641-42, 96 L. Ed. 2d 601, 611 (1987); *see also* New York v. Burger, __ U.S. __, 107 S. Ct. 61, 93 L. Ed. 2d 20 (1986)(writ of certiorari granted).

18. Burger, __ U.S. at __, 107 S. Ct. at 2652, 96 L. Ed. 2d at 623 (reversing and remanding to the New York Court of Appeals).

19. *See* U.S. CONST. amend. IV; *see also* Donovan v. Dewey, 452 U.S. 594, 598-600 (1981)(fourth amendment prohibition against unreasonable searches applies to inspections of commercial property); Rakas v. Illinois, 439 U.S. 128, 143 (1978)(capacity to claim fourth amendment protection depends not upon property right but upon person's legitimate expectation of privacy); Katz v. United States, 389 U.S. 347, 351-52 (1967)(what person seeks to preserve as private, even if accessible to public, may be constitutionally protected); Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

20. *See* U.S. CONST. amend. IV. The fourth amendment provides that the "right of the

guard the privacy and security of individuals against arbitrary invasion by government officials.[21] The fourth amendment's protections extend, in general, to all areas in which an individual maintains a reasonable expectation of privacy,[22] including such areas within commercial premises.[23] There are, however, judicially recognized, constitutionally valid exceptions to the fourth amendment's warrant and probable cause requirements,[24] including, but not limited to: border searches,[25] searches incident to arrest,[26] inven-

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people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated" and that no warrant shall be issued unless there is "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*; *see also* Stoner v. California, 376 U.S. 483, 486 (1964)(warrantless search allowed only upon showing that facts bring it within exception to rule). *See generally*, Baldassano, *Police Created Exigencies: Implications for the Fourth Amendment*, 37 SYRACUSE L. REV. 147, 147-48 (1986)(discussion of exigent circumstances as constituting exceptions). Courts generally hold that searches and seizures are unreasonable unless conducted pursuant to a warrant issued by a neutral magistrate who has determined that probable cause exists. *See, e.g.*, New York v. Belton, 453 U.S. 454, 457 (1981)(first principle of fourth amendment jurisprudence requires that police may not search without first convincing neutral magistrate of existence of probable cause); Steagald v. United States, 451 U.S. 204, 216 (1981)(participation of neutral detached magistrate in probable cause determination essential ingredient of reasonable search or seizure); Katz v. United States, 389 U.S. 347, 357 (1967)(searches conducted outside judicial process per se unreasonable).

21. *See* Camara v. Municipal Court, 387 U.S. 523, 528 (1967)(fourth amendment protects individual privacy rights against governmental intrusion); *see also* Ravas v. Illinois, 439 U.S. 128, 143 (1978)(capacity to claim fourth amendment protection depends not upon property right but upon person's legitimate privacy expectation); Katz v. United States, 389 U.S. 237, 351-52 (1967) (even items accessible to public, can be constitutionally protected when a person seeks to preserve its privacy).

22. *See* Katz, 389 U.S. at 351-52 (constitutional protection determined by intent of person seeking fourth amendment shelter, not by nature of area involved).

23. *See* Donovan v. Dewey, 452 U.S. 594, 598-600 (1981)(fourth amendment prohibition against unreasonable searches applies to inspections of commercial property); *see also* Katz v. United States, 389 U.S. 347, 352 (1967)(fourth amendment protection extends to business office); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919)(fourth amendment applied to invalidate search of corporation offices).

24. *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 60, 77 (1970)(warrantless search of storeroom of business justified when business dealing in liquor that is statutorily controlled); United States v. Green, 671 F.2d 46, 53 (1st Cir.)(exigencies of maritime setting afford those on vessels lesser expectation of privacy, obviating warrant requirement), *cert. denied*, 457 U.S. 1135 (1982); *see also* Oliver v. United States, 466 U.S. 170, 178-79 (1984)(open fields not setting for intimate activities intended for protection from government interference); Abel v. United States, 362 U.S. 217, 241 (1960)(no warrant required and nothing unlawful in government's appropriation of abandoned property); Carroll v. United States, 267 U.S. 132, 149 (1925)(warrantless search and seizure justified when officer reasonably believes vehicle contains contraband).

25. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)(routine search of persons and property at border not subject to requirements of reasonable suspicion, probable cause or warrant); United States v. Ramsey, 431 U.S. 606, 619 (1977)(recognition of border searches as reasonable has history contemporaneous with fourth amendment). The

tory searches,[27] exigent circumstances,[28] and administrative searches.[29]

Administrative searches are premised upon the constitutional power of federal or state legislatures in furthering public health, safety, and welfare by creating agencies and regulations to carry out those purposes.[30] These searches are generally conducted pursuant to a warrant.[31] However, courts have held that under certain circumstances, administrative searches may be

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border area exception to the warrant requirement also extends to areas in the immediate vicinity of the border. *See* Ramsey, 431 U.S. at 619; *see also* Carroll v. United States, 267 U.S. 132, 154 (1925)(travellers may be searched when crossing international boundary due to national interests); United States v. Beck, 483 F.2d 203, 207-08 (3d Cir. 1973)(elasticity advocated in describing area within which border searches apply), *cert. denied*, 414 U.S. 1132 (1974); United States v. Warner, 441 F.2d 821, 832-33 (5th Cir.)(border area includes both actual crossing points and reasonably extended geographic area in vicinity of crossing point), *cert. denied*, 404 U.S. 829 (1971).

26. *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 644 (1983)(citing United States v. Robinson, 414 U.S. 218, 236 (1973))(officer may search person of arrestee immediately after arrest); New York v. Belton, 453 U.S. 454, 460-61 (1981)(custodial arrest of vehicle's occupant permits warrantless search of passenger compartment); Chimel v. California, 395 U.S. 752, 762-63 (1969) (upon arrest, officer may reasonably search arrestee as well as area within his immediate control); United States v. Fleming, 677 F.2d 602, 606 (7th Cir. 1982)(search incident to arrest properly undertaken to prevent arrestee from seizing weapon or destroying evidence).

27. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 368-69 (1976)(interest of public safety and community caretaking justify warrantless search of automobiles in police custody); Harris v. United States, 390 U.S. 234, 237 (1968)(police can search for evidence in car pursuant to impoundment of vehicle); Cooper v. California, 386 U.S. 58, 61 (1967)(lawful custody does not dispense with constitutional requirements but nature of custody may justify search); United States v. Griffin, 729 F.2d 475, 481 (7th Cir. 1984)(absence of warrant immaterial to reasonableness of inventory search).

28. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984)(search without warrant per se unreasonable absent exigent circumstances); Arkansas v. Sanders, 442 U.S. 753, 759 (1979)(public interest requires flexibility in warrant requirement; danger to law officers, risk of loss or possible destruction of evidence constitute exigencies which may give rise to exception to warrant requirement); Warden v. Hayden, 387 U.S. 294, 298-99 (1967)(no constitutional requirement for officers to delay investigation and endanger lives when conducting searches). *But see* United States v. Hultgren, 713 F.2d 79, 86-88 (5th Cir. 1983)(warrantless search not justified where exigent circumstances of government's own creation).

29. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981)(warrant not required where search necessary to further regulatory scheme); United States v. Biswell, 406 U.S. 311, 315-17 (1972)(strict regulation of firearms traffic important to federal efforts to prevent violent crime); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)(warrant procedures inapplicable where Congress has broad powers to mandate inspections under liquor laws).

30. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 75-77 (1970). *See generally* W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS, ch. 14-1 (1987) (discussion of administrative searches).

31. *See, e.g.*, Michigan v. Clifford, 467 U.S. 287, 311 (1984)(administrative searches generally require warrants, absent consent or exigency); Michigan v. Tyler, 436 U.S. 499, 504-06 (1978)(administrative searches encompassed by fourth amendment); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978)(warrant clause of fourth amendment protects commercial buildings as well as private homes); See v. City of Seattle, 387 U.S. 541, 543 (1967)(warrant required

conducted without a warrant.[32] For example, no warrant is required for administrative searches in an emergency.[33] Additionally, where a vital governmental interest is at stake, dispensing with the warrant requirement may be justified.[34] In narrow circumstances, warrantless administrative searches of closely-regulated industries have been upheld upon the theory that an operator of a closely-regulated business impliedly consents to such inspections by virtue of his awareness of the heavy governmental regulation surrounding the industry.[35] The closely-regulated industry exception to the warrant requirement is applied in circumstances where an agency of the state or federal government conducts inspections authorized by statute of businesses operating within the industry who are required by law to furnish the inspecting agency with information necessary to evidence compliance with the statutes

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for administrative search of commercial premises); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967)(warrant required for administrative search of premises for fire code violations).

32. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981)(no warrant required for administrative search of premises devoted to closely-regulated mining industry); United States v. Biswell, 406 U.S. 311, 315-17 (1972)(no warrant required for inspection of firearms industry location); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)(closely-regulated liquor industry renders warrant requirement inapplicable); McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978)(vital government interests of security allow warrantless searches of persons at courthouse door).

33. *See* Clifford, 467 U.S. at 311 (warrantless inspection permitted to ascertain cause of fire). In *Clifford*, officials were investigating the cause of a fire while the fire was still burning. The purpose of the search was to ascertain the cause of the fire and to ensure that the area was safe and secure from further incineration. *See id.*; *see also* Michigan v. Tyler, 436 U.S. 499, 502-06 (1978)(warrantless inspection justified to ascertain fire cause but not for arson investigation). In *Tyler*, officials investigating a fire properly conducted a number of searches and seizures on the site to determine the cause. Days after the initial investigation, however, arson investigators continued to search the premises. Evidence uncovered in the later searches was held inadmissible because it had been seized without a warrant. *See id.*; *see also* North Am. Storage Co. v. Chicago, 211 U.S. 306, 318-21 (1908)(emergency warrantless search of warehouses and retail food stores for tainted food).

34. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985)(warrantless searches of high school students justified to prevent drug use); McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978)(inspections at courthouse entrances necessary to prevent violence); United States v. Miles, 480 F.2d 1217, 1219 (9th Cir.)(warrantless inspection allowed to prevent entry of firearms into restricted military area), *cert. denied*, 414 U.S. 1008 (1973); Downing v. Kunzig, 454 F.2d 1230, 1232 (6th Cir. 1972)(inspection permitted at entrance to federal building for safety purposes). For a general discussion of exceptions to the warrant requirement see Vargo, New Jersey v. T.L.O.: *An Abandonment of the Fourth Amendment's Probable Cause Requirement in the Public School Setting*, 22 IDAHO L. REV. 399, (1986).

35. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981)(warrantless inspection authorized where mine operators have knowledge of vast array of regulations); United States v. Biswell, 406 U.S. 311, 316 (1972)(firearms dealer aware of heavy regulations and impliedly consents to same). In *Donovan*, the Court, in dicta, noted that the regulations imposed upon the mines were sufficiently pervasive and well-defined that the owner of such a mine could not help but be aware that he would be subject to inspection. *See* Donovan, 452 U.S. at 603-04.

and administrative regulations governing the industry.[36] United States Supreme Court decisions addressing the closely-regulated industry exception to the fourth amendment warrant requirement indicate that such searches are reasonable[37] where an industry is closely regulated by a federal statute which authorizes inspection, while limiting inspector discretion, and where the federal government has a strong interest in the subject matter.[38] Traditionally, industries which the Supreme Court has deemed closely-regulated and subject to warrantless inspection have been those governed by pervasive federal regulations promulgated in an attempt to deal with national issues.[39]

Despite the Supreme Court's restrictive application of the closely-regulated industry exception, a majority of the fifty state legislatures have categorized the vehicle dismantling and junkyard business as a closely-regulated industry for fourth amendment purposes, thus allowing warrantless inspections pursuant to state statutes regulating their operation.[40] At least one

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36. *See* Biswell, 406 U.S. at 312 (1972)(warrantless search of firearms dealer for inventory records). *See generally* Bloom, *Entries and Searches in the Administrative Setting*, 53 GEO. WASH. L. REV. 230, 230 (1984)(warrants generally required for administrative searching, but courts inconsistent in applying rules).

37. *See* Biswell, 406 U.S. at 317 (warrantless search of firearms dealer's storeroom not unreasonable). *See generally* Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 866 (1979)(warrantless administrative searches reasonable in limited circumstances).

38. *See* Donovan v. Dewey, 452 U.S. 594, 602-05 (1981)(heavy governmental interest in health, safety of industry workers, safeguards of privacy interests through regulations, combine to serve fourth amendment purposes); *see also* Colonnade Catering Corp. v. United States, 397 U.S. 72, 75-76 (1970)(liquor industry has long history of regulation). As evidence of the strong federal interest in the industry, the Supreme Court in *Colonnade* stated that in 1791, the United States government enacted legislation regulating the liquor business with excise taxes and allowing inspections without warrants. *See id.* An early Supreme Court case made note that a 1789 liquor law was passed by the same Congress which approved adoption of the Constitution's first set of amendments, including the fourth amendment, and that Congress did not view related searches and seizures as unreasonable. *See* Boyd v. United States, 116 U.S. 616, 623 (1886). *See generally* Note, *Administrative Searches—The Ninth Circuit Extends the Closely-Regulated Industry Exception to the Fourth Amendment*, 4 ARIZ. ST. L.J. 973, 978 n.51 (1985)(administrative inspection of tuna fishing boats reasonable). The Court in *Biswell* noted that strong federal interests in regulating firearms were at stake because of the link between firearms and violent crimes. *See* Biswell, 406 U.S. at 315-16. The Court additionally held that compliance with the regulations limited invasions of privacy upon inspectees. *See id.*

39. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 603 (1981)(Federal Mine Safety and Health Act passed to monitor accidents and regulate working conditions in mining industry); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)(Internal Revenue Service regulations prevasive in liquor business); Balelo v. Baldrige 724 F.2d 753 (9th Cir.)(indication of tuna fishing industry regulation is Marine Mammal Protection Act passed to protect whales, porpoises and other marine mammals), *cert. denied*, 467 U.S. 1252 (1984).

40. *See* New York v. Burger, __ U.S. __, __ n.11, 107 S. Ct. 2636, 2641 n.11, 96 L. Ed. 2d 601, 611 n.11 (1987). The *Burger* majority listed the following statutes as examples of state dismantling and junkyard regulation:

federal court has upheld the constitutionality of a state statute authorizing warrantless searches of junkyards,[41] but the United States Supreme Court had not considered the issue until *New York v. Burger*.[42]

In *New York v. Burger*, the Supreme Court held that the vehicle dismantling and junkyard business is a closely-regulated industry for fourth amendment purposes.[43] The Court found that New York regulations governing

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ALA. CODE § 40-12-419 (1985); ARIZ. REV. STAT. ANN. § 28-1307C (Supp. 1986); ARK. STAT. ANN. § 75-1803 (1979); CAL. VEH. CODE ANN. §§ 2805(a) & (c) (West Supp. 1987); CONN. GEN. STAT. § 14-67m(a) (Supp. 1987); DEL. CODE ANN. tit. 21, § 6717(a) (1985); FLA. STAT. §§ 812.055 (Supp. 1987); GA. CODE ANN. § 43-48-16 (1984); ILL. REV. STAT., ch. 95 § 5-403 (Supp. 1986); IND. CODE §§ 9-1-3.6-10 (Supp. 1986); IOWA CODE §§ 321.90(3)(b) and 321.95 (1985); KAN. STAT. ANN. § 8-2408(c) (1982); KY. REV. STAT. § 177.935(7) (1986); LA. REV. STAT. ANN. § 32:757 (West 1987); ME. REV. STAT. ANN. tit. 29, § 2459 (Supp. 1986); MD. TRANSP. CODE ANN. § 15-105 (Supp. 1986); MICH. COMP. LAWS § 257.251 (Supp. 1986); MISS. CODE ANN. § 27-19-313 (1972); MO. REV. STAT. § 301-225 (Supp. 1987); MONT. CODE ANN. §§ 75-10-503 and 512 (1985); NEV. REV. STAT. § 482.3263 (1986); N.H. REV. STAT. ANN. § 261:132 (1982); N.J. STAT. ANN. § 30.10B-2 (Supp. 1986); N.M. STAT. ANN. § 66-2-12(A)(4) (1984); OKLA. STAT. tit. 47, § 591.6 (Supp. 1987); OR. REV. STAT. § 810.480 (1985); R.I. GEN. LAWS § 42-14.2-15 (Supp. 1986); S.C. CODE ANN. § 56-5-5670 (Law Co-Op 1976); S.D. CODIFIED LAWS §§ 32-6B-39 and 40 (Supp. 1987); TENN. CODE ANN. § 55-14-106 (1980); TEX. REV. CIV. STAT. ANN. art 6687-2 (Vernon 1987); UTAH CODE ANN. § 41-3-23(2) (1981); VT. STAT. ANN. tit. 23, § 466 (1978); VA. CODE § 46.1-550.12 (1986); WASH. REV. CODE § 46.80.080 (1987); W. VA. CODE § 17A-6-25 (1986); WIS. STAT. §§ 218.22(4)(c) and 23 (1982); WYO. STAT. § 31-13-112(e) (1987).

Id.

41. *See* Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1031 (7th Cir. 1983). The court of appeals in *Fahner* noted that the district court had held that a provision in the Illinois Vehicle Code was unconstitutional under the fourth amendment because the section gave officials too much discretion in conducting the searches and failed to define regular enforcement procedures. *See* Bionic Auto Parts and Sales, Inc. v. Fahner, 518 F. Supp. 582, 586 (N.D. Ill. 1981). One month after oral argument in the court of appeals, the Illinois Code was amended to impose additional limits on the frequency and duration of the searches authorized under the section. *See* Fahner, 721 F.2d at 1076-77. The appellate court which reviewed the *Fahner* decision did not address the constitutionality of the regulatory scheme as it existed prior to the amendment, but, instead, held that the addition of the new sections cured any possible previous unconstitutionality. *See id.* at 1075. *But see* People v. Krull, 481 N.E.2d 703, 708 (Ill. 1985), *rev'd*, __ U.S. __, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)(state supreme court construed Illinois statute before amendment's effective date as unconstitutional). Although agreeing with the Illinois Supreme Court that the statute which permitted the warrantless search in *Krull* was unconstitutional, the United States Supreme Court determined that the evidence obtained during the unauthorized search was admissible. *See* Krull, __ U.S. at __, 107 S. Ct. at 1171, 94 L. Ed. 2d at 380. The Court reasoned that because the arresting officer relied in good faith on the sttute's validity the fourth amendment's exclusionary rule did not apply. *See id.*

42. __ U.S. __, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

43. *See* New York v. Burger, __ U.S. __, 107 S. Ct. 2636, 2644, 96 L. Ed. 2d 601, 614 (1987). The Court found that a New York statute governing junkyards and vehicle dismantlers revealed on its face that the industry was closely-regulated. The Court reasoned that

operation of the industry allowed warrantless inspections.[44] The Court further supported its holding by finding that New York has a substantial interest in regulating the industry because of the greatly increased incidence of auto theft.[45] The Court found the statute provided an adequate substitute for a warrant by ensuring that the time, place, and scope of the inspections were limited and the discretion of the inspectors minimized.[46] Finally, the Court held that state interests in controlling auto theft were reasonably served by the provisions of the statute.[47]

In dissent, Justice Brennan maintained that Burger's vehicle dismantling business should not be considered closely-regulated.[48] Justice Brennan argued that even if the business was considered closely-regulated, the search nevertheless violated the fourth amendment because the statute authorizing the search provided an insufficient substitute for a warrant.[49] Justice Brennan asserted that an administrative search should not serve as a pretext to search without a warrant for evidence of criminal acts.[50]

By holding that the search of Burger's junkyard pursuant to the New York statute fell within the closely-regulated industry exception to the warrant requirement for administrative searches, the United States Supreme Court majority significantly expanded the exception and weakened the fourth amendment by sanctioning the gathering of criminal evidence in the course of an administrative search.[51] The cases cited by the majority to sup-

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because of the presence of the statute in New York and the fact that many states have historically had similar statutes, the industry should be considered closely-regulated for fourth amendment purposes. *See id* at __, 107 S. Ct. at 2644-46, 96 L. Ed. 2d at 616-17.

44. *See id.* at __, 107 S. Ct. at 2646-47, 96 L. Ed. 2d at 617.

45. *See id.*

46. *See id.* at __, 107 S. Ct. at 2647, 96 L. Ed. 2d at 618.

47. *See id.* at __, 107 S. Ct. at 2648, 96 L. Ed. 2d at 619.

48. *See id.* at __, 107 S. Ct. at 2652, 96 L. Ed. 2d at 623 (Brennan, J., dissenting). Justice Brennan was joined in parts one and two of his dissent by Justices Marshall and O'Connor. Justice Brennan took issue with the majority's decision to classify the junkyard and vehicle dismantling business as closely-regulated for fourth amendment purposes, noting that the Court had found "pervasive regulation in the barest of administrative schemes." *Id.*

49. *See id.* at __, 107 S. Ct. at 2654, 96 L. Ed. 2d at 626. In the second part of his dissent, Justice Brennan argued that the New York inspection statute was an inadequate substitute for a warrant because of its lack of "certainty and regularity . . . of application." *Id.* Justice Brennan noted that, while searching, the police took identification numbers from a wheelchair and a walker, neither of which were subject to the "statutory scope of a permissible administrative search." *Id.* at __, 107 S. Ct. at 2655, 96 L. Ed. 2d at 627.

50. *See id.* at __, 107 S. Ct. at 2655, 96 L. Ed. 2d 627. Justice Brennan argued that the Supreme Court had previously held that administrative searches may not be used as pretexts to gather criminal evidence and that the Court's decision in the instant case would virtually eliminate fourth amendment protection of commercial entities in the context of administrative searches. *See id.*

51. *See id.* at __, 107 S. Ct. at 2652, 96 L. Ed. 2d at 624. Justice Brennan argued that Burger's vehicle dismantling business was not closely-regulated and therefore a warrant was

port its decision in *Burger*, however, do not deal directly with attempts to curb criminal activity or to gather evidence thereof;[52] rather, they illustrate the purely administrative nature of their respective statutory goals.[53] For example, the Internal Revenue Service provisions at issue in *Colonnade Catering Corp. v. United States*[54] were designed to help service agents verify that proper taxes had been paid upon liquor.[55] In *Donovan v. Dewey*,[56] insuring safe working conditions in the nation's mines was the purpose of regulations which provided for warrantless searches.[57] The case of *United States v. Biswell*[58] dealt with the licensing of ammunition and sporting firearms; though the ultimate purpose of the Gun Control Act of 1968 was to reduce illegal weapons traffic, the warrantless inspections were used to insure that each merchant had the proper license for the type of firearms

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required for the administrative search. *See id.* The Court's decision effectively renders meaningless the general rule that a warrant is required for searches of commercial property, causing the exception to become the rule. *Id.*; *see also* Camara v. Municipal Court, 387 U.S. 523, 534 (1967)(administrative searches constitute intrusions on fourth amendment interests and lack safeguards guaranteed by fourth amendment). In *Camara*, the Court held that the rationale presented in previous cases for upholding such warrantless searches was not sufficient to justify weakening the fourth amendment. *See id.*; *see also* See v. Seattle, 387 U.S. 541, 545 (1967) (warrant required for administrative search of commercial premises). There is no interest sufficiently compelling to justify relaxing fourth amendment safeguards where an official inspection is meant to help enforce laws setting standards for commercial premises. *Id.*

52. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981)(regulating health and safety in mines); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978)(inspections for OSHA violations); United States v. Biswell, 406 U.S. 311, 311 (1972)(inspection of pawn shop premises for violations of Gun Control Act of 1968 proscription against certain firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)(inspection of catering business dealing in liquor).

53. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981)(Federal Mine Safety and Health Act of 1977 implemented to improve health and safety conditions in nation's underground and surface mines); Marshall v. Barlow's Inc., 436 U.S. 307, 311 (1978)(Occupational Safety and Health Act of 1970 implemented to regulate health and safety practices in commercial settings); United States v. Biswell, 406 U.S. 311, 312 (1972)(Gun Control Act of 1968 regulates registration and sales of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)(Internal Revenue Service statutes govern sale and distribution of liquor).

54. 397 U.S. 72 (1970).

55. *See id.* at 77. The Supreme Court in *Colonnade* reversed a conviction for violation of federal excise tax statute requirements because evidence was obtained by a search conducted without a warrant. In so holding, the Court noted that under the statutes applicable in the case inspections were proper for the purpose of ascertaining payment or nonpayment by the dealer of the required occupational tax stamp. *See id.* at 72-77. However, the authority to inspect did not include the authority to forcibly enter the dealer's premises without a warrant. *See id.*

56. 452 U.S. 594 (1981).

57. *See id.* at 600, 603. The Mine Safety and Health Act was designed to address an "industrial activity with a notorious history of serious accident and unhealthful working conditions." *Id.*

58. 406 U.S. 311 (1971).

sold.[59] Although the cases which constitute the body of the closely-regulated industry exception deal with federal regulation of industries on a national level, the *Burger* majority broke with that precedent by applying the exception to an industry which is regulated on a state-by-state basis.[60] Additionally, in designating the junkyard business as closely-regulated for fourth amendment purposes, the Court failed to critically analyze the magnitude and effect of adding another industry to the exception.[61]

The closely-regulated industry exception to the warrant requirement has

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59. *See id.* at 315-16. The Court in *Biswell* found that the legislative intent underlying the Gun Control Act of 1968 was to assure "that weapons are distributed through regular channels in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." *Id.*; *see also* 18 U.S.C. §§ 921-28 (1982 & Supp. III 1985 & Supp. IV 1986)(current codification of Act).

60. *See* Colonnade, 397 U.S. at 76 (regulation of national liquor industry). In *Colonnade*, Internal Revenue Service agents were operating under federal statutes designed to monitor the taxing and distribution of liquor throughout the United States. *See id* at 73-74. The Court in *Donovan* addressed the mining industry's "notorious history of serious accidents and unhealthful working conditions." Donovan, 452 U.S. at 603. The Federal Mine Safety and Health Act was tailored to address those concerns and provided for inspections of all mines in the nation by representatives of the Secretary of the Interior. *See id.* at 603-04. In *Marshall v. Barlow's, Inc.*, the Court dealt with inspections for safety hazards and regulatory violations pursuant to the statute by agents of the Secretary of Labor. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 309 (1978). The search provisions ostensibly applied to all businesses engaging in interstate commerce. *See id.* The statute under consideration in *Biswell* concerned federal regulations for licensing and sale of sporting weapons, with inspections made throughout the United States by federal Treasury agents. *See* Biswell, 406 U.S. at 311-12.

61. *See* New York v. Burger, __ U.S. __, __, 107 S. Ct. 2636, 2652-53, 96 L. Ed. 2d 601, 624-25 (1978)(Brennan, J., dissenting). The Supreme Court has made clear that the closely-regulated industries are narrow exceptions to the general constitutional rule. *See id.*; *see also* Camara v. Municipal Court, 387 U.S. 523, 538 (1967). When an administrative search warrant is required, the standard to be applied by a magistrate in assessing probable cause is lower than that applied in a criminal case. *See id.*; *c.f.* See v. Seattle, 387 U.S. 541, 543 (1967)(no justification for relaxing fourth amendment safeguards for inspection of commercial premises). *See generally* Kress & Ianelli, *Administrative Search and Seizure, Whither the Warrant?*, 31 VILL. L. REV. 705, 712 (1986). When agencies are given jurisdiction over industries designated closely-regulated, the agencies are completely exempt from the administrative search warrant requirement. *See id.* It is generally held that administrative searches cannot be used as pretexts for gathering criminal evidence. *See* Abel v. United States, 362 U.S. 217, 226 (1960)(gathering criminal evidence by way of administrative inspection impermissible). However, the *Burger* decision allows warrantless administrative searches for criminal evidence by including the junkyard business in the closely-regulated industry exception. *See* Burger, __ U.S. at __, 107 S. Ct. at 2651, 96 L. Ed. 2d at 622; *see also* Donovan, 452 U.S. at 613-14 (Stewart, J., dissenting)(Congress may avoid need to comply with fourth amendment procedures by labeling industry dangerous). *See generally* Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to* Camara *and* See*?*, 50 WASH. L. REV. 341, 382 (1975). The Rothsteins contend that the courts are enlarging upon exceptions to the warrant requirement set out in *Camara* and *See* to the extent that the very essence of those decisions is threatened. *See id.*

been historically narrow.[62] Cases which have traditionally fallen within the confines of this exception involved areas of national concern in which federal regulations governed virtually every facet of an industry's operations.[63] The vehicle dismantling and junkyard business at issue in *Burger* does not fit the traditional mold of a closely-regulated industry because it is not regulated on a national scale; each state regulates the industry separately.[64] In addition, the regulations governing the junkyard business are minimal as compared to the complex and comprehensive regulations that allow the federal government to scrutinize all aspects of the traditionally recognized closely-regulated industries.[65] The majority in *Burger* not only disregarded its own

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62. Burger, __ U.S. at __ n.2, 107 S. Ct. at 2652 n.2, 96 L. Ed. 2d at 624 n.2 (Brennan, J. dissenting). The closely-regulated industry exception has previously been invoked in only in the coal mining, firearms and ammunition, and liquor industries. *See id.*; *see also* Donovan, 452 U.S. at 602 (coal mining industry); Biswell, 406 U.S. at 317 (firearms and ammunition industry); Colonnade, 397 U.S. at 77 (liquor industry). The Supreme Court has refused to apply the closely-regulated exception to Occupational Safety and Health Act (OSHA) inspections of commercial premises, concluding that otherwise every business involved in interstate commerce could be subject to warrantless inspections. *See* Marshall, 436 U.S. at 313 (inspection of electrical and plumbing business to check conformity with OSHA provisions).

63. *See* Burger, __ U.S. at __ nn.2, 3, 107 S. Ct. at 2652 nn.2, 3, 96 L. Ed. 2d at 624 nn.2, 3 (Brennan, J., dissenting). The majority in the *Burger* opinion made no assertion that the vehicle dismantling and junkyard business is an industry that requires national attention. *See* Burger, __ U.S. __, 107 S. Ct. 2636, 96 L. Ed. 2d 601. Rather, the Court stated that the industry provides a major market for stolen vehicles and parts, that motor vehicle theft had become a major problem in New York, and that stolen automobiles were often used in the commission of other crimes. The Court concluded that automobile theft had become a large-scale problem placing enormous economic burdens on individual states. *See id.* at __, 107 S. Ct. at 2647, 96 L. Ed. 2d at 617.

64. *See id.* at __, 107 S. Ct. at 2645-46, 96 L. Ed. 2d at 616-17. The majority in *Burger* examined the history of the closely-regulated industry exception and noted that regulatory record keeping and warrantless inspection provisions had been a part of New York City law for at least 140 years. *See id.* The fact that the Supreme Court recognized the vehicle dismantling industry as a matter of state concern and not the subject of federal regulations is evidenced by its grant of certiorari due to the important state interest in administrative schemes designed to regulate the industry. *See id.* at __, 107 S. Ct. at 2641, 96 L. Ed. 2d at 611. The Court made note of the fact that most states had a regulatory scheme governing vehicle dismantlers and junkyards. *See id.* at __ n.11, 107 S. Ct. at 2641 n.11, 96 L. Ed. 2d 611 n.11.

65. *See id.* at __, 107 S. Ct. at 2653, 96 L. Ed. 2d at 625 (Brennan, J., dissenting)(neither junkyard industry nor vehicle dismantling industry pervasively regulated). The New York City Code has numerous provisions for licensing apart from those applicable to the junkyard business. *See id.* A vehicle dismantler in New York is required only to have a license and keep a record of the vehicles and parts passing through his business. *See id.* at __ n.5, 6, 107 S. Ct. at 2653 n.5, 6, 94 L. Ed. 2d at 601 n.5, 6 (Brennan, J., dissenting). New York does not regulate the condition of the premises of vehicle dismantlers, the manner or hours in which vehicle dismantlers may operate their businesses, or the equipment which a vehicle dismantler may use in the business. *See id.* The Mine Safety and Health Act discussed in *Donovan v. Dewey* mandated inspection of all mines, defined the frequency of inspection, required follow-up inspections where violations had been found, prescribed immediate inspection upon notification

standard for deciding whether an industry is closely-regulated, but also widened the once narrow exception to the warrant requirement in administrative searches.[66]

The *Burger* majority failed to make the crucial distinction between the incidental discovery of criminal evidence in the course of an administrative search and an administrative scheme designed to ferret out evidence of crime.[67] The Supreme Court has held that administrative inspections are not proper methods for gathering evidence of criminal activity,[68] particularly where the search is conducted without a warrant.[69] The purpose of obtaining a warrant for a criminal search is to interject an element of neutrality, through use of a detached magistrate, into the probable cause and

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by a miner or a miner's representative that a dangerous condition exists, required compliance with elaborate standards set forth in the Act and Title 30 of the Code of Federal Regulations, and mandated individual notification to mine operators of all standards proposed pursuant to the Act. *See* Donovan v. Dewey, 452 U.S. 594, 603-04 (1981).

66. *See* Burger, __ U.S. at __, 107 S. Ct. at 2653, 96 L. Ed. 2d at 625. For the majority to consider only the inspection statute itself as proof of pervasive regulation would be bootstrapping. Justice Brennan pointed out that New York City, as well as many other states and cities, impose similar and often much more complicated and pervasive licensing, recordkeeping and other regulatory burdens on various trades and businesses. *See id.*; *see also* Donovan v. Dewey, 452 U.S. 594, 606 (1981)(closely-regulated doctrine essentially defined by pervasiveness of federal regulations and effect on owner's expectation of privacy).

67. *See* Burger, __ U.S. at __, 107 S. Ct. at 2651, 96 L. Ed. 2d at 623. The *Burger* majority saw no reason why an administrative scheme is unconstitutional simply because an officer, in the course of enforcing it, may discover evidence of crimes apart from violations of the scheme itself. *See id. But see* People v. Pace, 475 N.Y.S.2d 443, 447 (App. Div. 1984) (holding warrantless search of junkyard unconstitutional because officers were acting upon recently discovered evidence of criminal activity rather than conducting administrative search), *aff'd*, 481 N.E.2d 250 (1985).

68. *See* Michigan v. Clifford, 464 U.S. 287, 294 (1984)(fire investigation followed by arson investigation). Where the primary object of a search is to find the cause of a fire, a warrant issued under the administrative search standard will be sufficient. If the main objective of the search, however, is to seek out evidence of crime, a criminal search warrant must be obtained. Consequently, if evidence of a crime is found inadvertently during a valid administrative search, it can be properly seized under the plain view doctrine. *See id.*; *see also* Abel v. United States, 362 U.S. 217, 226 (1960). However, "the deliberate use by the government of an administrative safety statute for the purpose of gathering evidence in a criminal case must be resisted by the courts." *Id.* For a thorough discussion of the warrant requirement in the administrative setting see generally Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to* Camara *and* See*?*, 50 WASH. L. REV. 341, 348 (1975).

69. *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Although the Court in *Camara* held that the degree of probable cause could be less for issuance of an administrative search warrant, a warrant should nevertheless be obtained. *See id.*; *see also* United States v. Anile, 352 F. Supp. 14, 18 (N.D. W.Va. 1973). The court in *Anile* recognized that suspicion will not necessarily convert an administrative investigation into a traditional criminal one; the problem is one of degree. The primary consideration must be the protection of recognized individual rights. *See id. See generally* Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 639-45 (1974).

scope determinations of a particular search.[70] The majority in *Burger* holds that the New York statute which authorizes warrantless administrative searches of junkyards is reasonable under a fourth amendment analysis because it provides a sufficient substitute for a warrant.[71] The effect of this holding is to equate a search warrant based upon probable cause with a warrantless search justified by the fact that the premises to be searched house a business which is closely-regulated.[72] According to the standard established in *Burger*, a state's agents may search a business without a warrant once the state has labeled that business a closely-regulated industry and drafted a statute permitting regulatory searches of that business.[73] Consequently, the

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70. *See* Steagald v. United States, 451 U.S. 204, 216 (1981)(participation of detached magistrate in probable cause determination is essential element of reasonableness); Johnson v. United States, 333 U.S. 10, 14 (1948)(inferences of probable cause "must be drawn by neutral and detached magistrate instead of officer engaged in often competitive enterprise of ferreting out crime"). *See generally* W. LA FAVE, CRIMINAL PROCEDURE 129 (1985)(constitutional rules governing criminal procedure extend to administrative searches).

71. *See* New York v. Burger, __ U.S. __, __, 107 S. Ct. at 2636, 2648, 96 L. Ed. 2d 601, 619 (1987). The majority in *Burger* concluded that the New York statute provided a sufficient substitute for a warrant. The majority reasoned that the statute provided notice to the junkyard operator that inspections would be made on a regular basis, and also set forth the scope of the inspection, putting the operator on notice of how to comply. The statute also notified the business operator as to who may conduct an inspection of the premises. The statute provided that inspections were allowed only during normal business hours, and only vehicle dismantling and related items and records, books, vehicles or parts of vehicles were subject to inspection. *See id.*; *see also* Donovan v. Dewey, 452 U.S. 594, 603 (1981)(statute regulating mine safety constitutionally adequate substitute for warrant where regulations sufficiently pervasive and defined).

72. *See* See v. Seattle, 387 U.S. 541, 543 (1967). In *See*, the defendant was convicted for not allowing a warrantless fire inspection of his locked commercial warehouse. The Supreme Court held that a warrant was required to make the search and reversed the conviction. The Court reasoned that there was no justification for relaxing fourth amendment safeguards where official inspections are used to enforce laws prescribing standards for commercial premises and that businessmen should be as free from governmental intrusions as residential occupants. *See id.*; *see also* Camara v. Municipal Court, 387 U.S. 523, 535 (1967)(public interest could not justify sweeping search of city to find stolen goods). *Camara* dealt with the refusal of a landlord to allow a housing code inspector to enter his premises, a portion of which he rented to others. *See id.* The Court held that the search was improper because there was no exigent circumstance to justify a warrantless search and the resident had not consented to the search. *See id.* at 538. The dissent in *Burger* argued that the search of Burger's junkyard would not have been questionable if the police would have obtained a warrant to look for evidence of stolen property. *See* Burger, __ U.S. at __, 107 S. Ct. at 2656-57, 96 L. Ed. 2d at 628-30 (Brennan, J., dissenting).

73. *See* Burger, __ U.S. at __, 107 S. Ct. at 2656-57, 96 L. Ed. 2d at 628-30 (Brennan, J., dissenting). The dissent stated that New York had used an administrative scheme as a pretext to search for criminal evidence, thus circumventing fourth amendment requirements by merely changing the label placed on the search. This argument is supported by the fact that the police copied down numbers of a wheelchair and a walker for the handicapped. While both were found inside an automobile, neither were within the purview of the statute. Once Burger's

Burger opinion permits the states to constrict the parameters of the fourth amendment by skillful statutory construction.[74]

The Supreme Court's recent fourth amendment decisions illustrate the Court's intent to assist law enforcement agencies by recognizing exceptions to fourth amendment mandates.[75] As crime increases, the compelling state interest in controlling criminal activity escalates proportionately, and expectations of privacy in the commercial context will need to be attenuated in the

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administrative violations were discovered, the continuing search became one for evidence of criminal acts, because the statute does not, in and of itself, encompass sanctions for, nor regulate possession of, stolen property. *See id.*; *see also*, Michigan v. Clifford, 464 U.S. 287, 291-94 (1984)(administrative inspection seeking origin of fire). The Court in *Clifford* held that where the inspection officials had concluded their determination of the cause and source of a fire, a search of other portions of the house could only be conducted pursuant to a warrant based upon probable cause that a crime had been committed. *See id.* at 300. The Court emphasized that the "circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined." *See id.* at 294. Justice Brennan, while dissenting in *Burger*, cited *Clifford* and argued that the administrative search in *Burger* ceased when all administrative purposes had been fulfilled, and that any further investigation was a search for evidence of crime, thus requiring a warrant. *See* Burger, __ U.S. at __ n.15, 107 S. Ct. at 2656 n.15, 96 L. Ed. 2d at 629 n.15; *see also* Abel v. United States, 362 U.S. 217, 248 (1960)(Douglas, J., dissenting)(government cannot escape fourth amendment by acting as administrative officials while preparing case for criminal prosecution); Frank v. Maryland, 359 U.S. 360, 365 (1959)(evidence of crime may not be seized without judicially issued search warrant).

74. *See* Donovan, 452 U.S. at 613-14 (Stewart, J., dissenting). Justice Stewart argued that Congress could avoid the fourth amendment on an industry-by-industry basis, even though the Court held in *Marshall* that Congress could not avoid the amendment. *See id.*; *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978). Congress could, however, define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its constituent members. *See* Donovan, 452 U.S. at 613-14; *see also* Burger, __ U.S. at __, 107 S. Ct. at 2647, 96 L. Ed. 2d at 630 (Brennan, J., dissenting). The Court's holding in *Burger* implies that if an administrative scheme has designated objectives and if a search serves those objectives, "it may be upheld even if no concrete administrative consequences could follow from a particular search." *See id.* Justice Brennan wrote that a "legislature cannot abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime." *See id.*; *see also* Donovan, 452 U.S. at 608 (Rehnquist, J., concurring). Justice Rehnquist believed that if Congress enacted a statute similar to the one involved in *Donovan v. Dewey*, authorizing unannounced warrantless searches of property reasonably thought to house unlawful drug activity, the warrantless search would be struck down under existing fourth amendment decisions. Justice Rehnquist wrote that the Court would invalidate such a search despite Congress' strong interest in regulating and preventing drug related crime and the fact that Congress has, in fact, pervasively regulated such crime for a longer period of time than it had regulated mining. *See id.*

75. *See* Donovan, 452 U.S. at 613-14 (Stewart, J., dissenting)(Court expands warrantless inspection applications); *see also* O'Connor v. Ortega, __ U.S. __, 107 S. Ct. 1492, 1504, 94 L. Ed. 2d 714, 730 (1987)(summary judgment favoring state employee in civil rights action based upon warrantless search of office inappropriate where search may have been reasonable).

face of increased regulation.[76] The *Burger* decision, however, fails to create a workable standard by which a business may be placed within the exception to the warrant requirement for administrative searches.[77]

The *Burger* majority's recognition of the vehicle dismantling and junkyard business as a closely-regulated industry expands the closely regulated industry exception to the fourth amendment's warrant requirement. A probable result of the Supreme Court's continuing recognition of additional exceptions to the fourth amendment's warrant and probable cause requirements will be a diminution in the sanctity traditionally given to a person's legitimate expectation of privacy and the decline of the role of the fourth amendment as a buffer between law enforcement and individual rights. The *Burger* decision also invites state circumvention of fourth amendment requirements; by merely labeling a business closely-regulated and artfully drafting statutes, state legislatures may authorize warrantless searches which the fourth amendment would otherwise prohibit.

L. Eric Friedland

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76. *See, e.g.*, Burger, __ U.S. at __, 107 S. Ct. at 2642, 96 L. Ed. 2d at 612 (expectation of privacy particularly attenuated in commercial property employed in closely-regulated industries); New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985)(compelling state interest in keeping drugs from schools justifies warrantless searches of students). In *T.L.O.*, the Supreme Court employed a balancing test that weighed the state's interests in keeping drugs out of schools against the fourth amendment rights of students. *See* T.L.O., 469 U.S. at 339-41. The Court concluded that the state interests outweighed the students' legitimate expectations of privacy and determined that warrants were not required if searches of students were based upon reasonable suspicion rather than the higher standard of probable cause. *See id.*; *see also* Balelo v. Baldrige, 724 F.2d 753, 764-67 (9th Cir.)(federal regulation requiring owners of fishing vessels to allow warrantless inspection based on the closely-regulated industry exception to the fourth amendment), *cert. denied*, 467 U.S. 1252 (1984). *See generally* Note, *Administrative Searches-The Ninth Circuit Extends the Closely Regulated Industry Exception to the Fourth Amendment*, 1985 ARIZ. ST. L.J. 973, 974 (inspection not based on federal statutes passed by Congress which previously allowed warrantless inspections, but on regulations promulgated by Secretary of Commerce). By its refusal to grant certiorari in *Balelo*, the Supreme Court implies that the issue of the case needs no further discussion, thus, seemingly validating the Ninth Circuit's holding. *See* Balelo, 724 F.2d at 764-67.

77. *See* E. GRISWOLD, SEARCH & SEIZURE: A DILEMMA OF THE SUPREME COURT 47-48 (1975). Griswold urges that the Supreme Court endeavor to classify or standardize its approach to search and seizure decisions. *See id.* Griswold concedes that establishing a category with a corresponding role for search and seizure cases "underlies many of the opinions of Justices Douglas, Brennan, and Marshall." *See id.* at 49. "Their solution to the problem of providing a rule rather than a mass of detail would be to require a warrant in nearly every case." *Id.*