Constitutional Law -- Administrative Searches --
*Marshall v. Barlow's Inc.: OSHA Needs a Warrant*

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showing that an attorney has regularly acted in another capacity for a corporation. Finally, even though the modified subject matter test will probably have its critics, this new test appears to effect a balance between the narrowness of the control group test and the expansiveness of the traditional subject matter test on the issue of personification of the corporation. In a confused field the Court of Appeals for the Eighth Circuit has provided much needed clarity.

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Occupational Safety and Health Act (OSHA) inspectors have since OSHA's passage seven years ago\textsuperscript{1} entered and inspected the business premises of thousands of employers to ascertain compliance with the myriad of job safety standards promulgated by the Secretary of Labor.\textsuperscript{2} A great number of these inspections have been made pursuant to section 8(a)\textsuperscript{3} of OSHA, which apparently authorized warrantless inspec-


\textsuperscript{2} The stated congressional purpose behind OSHA was

[T]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

\dots

3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to business affecting interstate commerce.


\textsuperscript{3} Section 8(a) of OSHA provides:

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

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

2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equip-
Before the enactment of OSHA the Supreme Court had held that "except in certain carefully defined classes of cases, a[n administrative inspection] ... of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." The Court later held that the exceptional cases in which warrants are not needed include administrative inspections of certain heavily regulated businesses. In *Marshall v. Barlow's, Inc.*, the Court refused to extend this narrow exception to the warrant requirement, and held that search warrants are required for OSHA inspections.

OSHA authorities chose Barlow's, Incorporated for inspection based on OSHA's standard selection process. When the inspector appeared the president of Barlow's refused to permit an inspection of the employee area of the business because the inspector did not have a warrant. The inspector returned three months later armed with a court order compelling the president to submit to an inspection. Con-
sent was again refused and Barlow's brought an action to enjoin OSHA from conducting warrantless inspections. A three-judge court ruled in Barlow's favor, holding that if consent to inspect is denied, the fourth amendment requires OSHA inspectors to obtain a warrant and that section 8(a) authorizing warrantless inspections is unconstitutional.

Affirming the lower court's holding that warrantless OSHA inspections are unconstitutional, the Supreme Court reinforced its prior holdings "that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations" and "that this rule applies to commercial premises as well as homes." Because "warrantless searches are generally unreasonable" a warrantless search would have to fit under a recognized exception. The Secretary argued that despite this rule the warrantless OSHA inspection is reasonable and therefore an exception to the warrant requirement rule. Specifically, the Secretary urged that OSHA inspections are covered by the warrant requirement exception applicable to pervasively regulated businesses. The Court, however, reasoned that this exception for inspections of certain heavily regulated businesses is inapplicable because the degree of federal involvement in OSHA-affected businesses does not rise to the level necessary to activate that exception. According to the Court, federal imposition of

1350 (S.D. Ga. 1974). It is the latter type of compulsory process that the OSHA inspectors presented on their second visit.

In prior cases in which OSHA had sought orders to compel, OSHA had made no effort to establish administrative probable cause, (for discussion of administrative probable cause, see notes 24 & 25 and accompanying text infra), but had merely cited the provisions of § 8(a) as evidencing their authority to inspect. See, e.g., 418 F. Supp. at 629 n.3. The Court in Barlow's indicated that the order to compel an inspection may be the "functional equivalent of a warrant" if the fourth amendment is satisfied by a showing of administrative probable cause. 98 S. Ct. at 1827 n.23.

12. 98 S. Ct. at 1819.
14. The lower court entered an injunction prohibiting any OSHA searches under § 8(a). Justice Rehnquist stayed that order pending appeal except as it applied to Barlow's. Jurisdictional Statement at 37.
15. 98 S. Ct. at 1820. The Secretary had argued that Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), were distinguishable from Barlow's because the municipal housing codes involved in Camara and See, unlike OSHA, provided for fines for refusal to consent to an inspection. Brief for Appellant at 14. The holding in Barlow's would seem to indicate that it is not the punitive nature of a fine or sanction but the invasion of privacy interests occasioned by the inspection that is determinative.
16. 98 S. Ct. at 1820.
17. Id.
18. Id.
minimum wages and maximum hours does not constitute sufficient regulation to find implied consent to detailed OSHA inspections.20

The Secretary also contended that the warrantless inspection was reasonable, and therefore in compliance with the fourth amendment,21 because OSHA enforcement depends upon warrantless inspections and because the restrictions on agency discretion in the Act protected privacy as much as a warrant would. The Court found, however, that contrary to the Secretary's assertions, warrantless inspections are not essential to the proper enforcement of OSHA,22 and the incremental protections of the employer's privacy afforded by a warrant are not "so marginal that [the protections] fail to justify the administrative burden that may be entailed."23

The cases in which the Court had previously found exceptions to the warrant requirement rule for administrative inspections involved a federally licensed retail liquor dealer, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and a federally licensed firearms dealer, United States v. Biswell, 406 U.S. 311 (1972). Barlow's held that whereas a liquor or firearms dealer, by engaging in a regulated business, "has voluntarily chosen to subject himself to a full arsenal of governmental regulation," 98 S. Ct. at 1821, all businesses involved in interstate commerce are not regulated so heavily that engaging in them would constitute implied consent to later searches.

20. 98 S. Ct. at 1821. The Court's discussion of the point indicates that the level of government intrusion impliedly consented to by a certain business corresponds to that level of federal regulation covering the business. Conceivably, the Court could find that the relatively minor minimum wage regulations would support implied consent to some lesser intrusions. See note 86 infra.

The Court also rejected the argument that because work areas are open to employees these areas should be open to inspectors. 98 S. Ct. at 1821-22. If, on the other hand, the area to be inspected is open, not only to employees, but to the general public as well, then the inspector does not need a warrant. See, e.g., Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

21. 98 S. Ct. at 1822. Although the Court discussed the Secretary's two contentions in different parts of the opinion, both contentions are basically that the warrantless OSHA inspection is reasonable. The first contention, that OSHA inspections come within those cases allowing warrantless inspections of heavily regulated businesses, is termed by the Court "an exception from the search warrant requirement." Id. at 1820. The finding, however, of such an exception to the rule that warrantless searches are generally unreasonable is tantamount to finding a reasonable search. Indeed, the cases recognizing this exception speak in terms of the reasonableness of the search. See, e.g., Colonnade Catering Corp. v. United States, 397 U.S. 72, 75 (1970).

22. 98 S. Ct. at 1822. The Court based this determination on its belief that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant," id.; its inference that because OSHA regulations provide for obtaining compulsory process if consent is initially refused, the Secretary must have determined that such a procedure would not cripple the Act's effectiveness, id. at 1823-24; and its observation that if surprise is actually imperative, then the desired result may be achieved by obtaining an ex parte warrant before seeking to inspect, id. at 1824. Justice Stevens, in dissent, joined by Justices Blackmun and Rehnquist, stated that he "would defer to Congress' judgment regarding the importance of a warrantless search power to the OSHA enforcement scheme." Id. at 1829 (dissenting opinion).

23. Id. at 1825. The Court concluded that 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," id. at 1826, and "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed," id. Stevens' dissent urged that the first function would be served by the statute itself...
Although the Court found that OSHA inspections are not reasonable absent a warrant, it also held that the showing necessary for the issuance of an administrative warrant is not the same as "probable cause in the criminal law sense." The standard of "administrative probable cause" may be met by showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources, such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area.

Thus, the Court continued a middle of the road posture with respect to administrative inspections by requiring a warrant, but one that could be issued on a showing of administrative probable cause rather than the more rigid standard of particularized probable cause.

*Id.* at 1830 (dissenting opinion). It is inconsistent with traditional fourth amendment analysis, however, to allow the searcher's own set of rules to substitute for the determination of a neutral and detached magistrate.  *Cf.* Johnson v. United States, 333 U.S. 10, 14 (1948) (a warrant's "protection consists in requiring . . . a neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime"); Brief for Appellee at 43. The Secretary urged, however, that, unlike police officers in the field, OSHA field inspectors do not exercise discretion in determining which businesses to inspect; that decision belongs to the area director. Therefore, a magistrate's warrant is not needed because the area director serves as the neutral and detached decisionmaker. Brief for Appellant at 35, 44-45; *cf.* 37 CIN. L. REV. 243, 246-47 (1968) (distinguishing police searches from health inspections with similar discretion argument).

If criminal probable cause were required it would be necessary for OSHA agents to demonstrate to a magistrate that they had probable cause to believe conditions on the particular business premises to be searched were in violation of OSHA standards. This standard can be termed *particularized* probable cause because it requires an assessment of a particular situation. It is this feature that distinguishes probable cause in the criminal law sense from administrative probable cause.

The fourth amendment comprises two different clauses: (1) the reasonableness clause—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and (2) the warrant clause—"no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. The clauses are interrelated by virtue of the general rule that searches made pursuant to a valid warrant under the warrant clause are reasonable and thus not prohibited by the reasonableness clause; searches made without a warrant are prohibited unless they fall within an exceptional class of searches that are considered reasonable apart from any requirement of a warrant. The *Barlow's* majority found the OSHA inspection to be unreasonable and therefore under the warrant requirement. The warrant they require, however, does not meet the probable cause standard of the warrant clause. The dissenters correctly assert that the administrative standard of probable cause, based not on a particularized belief that there are violations on the premises, but on compliance with administrative selection procedures, is inconsistent with the warrant clause. 98 S. Ct. at 1828 (Stevens, J., dissenting). The dissenting opinion accuses the majority of acting inconsistently in using the lack of a warrant to find the search unreasonable but then only requiring an administrative warrant based on less than particularized probable cause.

For definition of particularized probable cause, see note 24 *supra*.
Prior to the birth of administrative probable cause in *Camara v. Municipal Court*\(^{27}\) and *See v. City of Seattle*,\(^{28}\) the Supreme Court had consistently held that the protections of the fourth amendment had no application outside the criminal area.\(^{29}\) The reversal of this position began in *Camara* in which the appellant was arrested and convicted under a city ordinance for refusing to allow city housing inspectors to inspect the portion of his leased premises that he used as a residence.\(^{30}\) The Court held the fourth amendment warrant requirement applicable to the administrative search contemplated by the municipal housing code.\(^{31}\) Yet, the Court realized that the criminal standard of particularized probable cause was inappropriate for such compliance inspections.\(^{32}\) Instead, a new standard applicable to administrative inspections was enunciated: "'[P]robable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."\(^{33}\)

In *See v. City of Seattle*, the appellant was arrested and convicted for refusing to allow city housing inspectors to inspect his commercial warehouse. The Court held that "*Camara* applies to similar inspections of commercial structures which are not used as private residences."\(^{34}\) The opinion, however, contained some dicta that was to become the basis for later exceptions to the rule:

We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or

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29. *See Eaton v. Price*, 364 U.S. 263 (1960) (per curiam) (equally divided Court let stand decision by Ohio Supreme Court upholding conviction of defendant who refused to submit to warrantless housing inspection); Frank v. Maryland, 359 U.S. 360 (1959) (upholding defendant's conviction on similar facts as *Eaton* but inspection was prompted by neighbor's complaint); cf. Boyd v. United States, 116 U.S. 616 (1886) (fourth amendment protected defendant from seizure of business invoices that could be used to establish violations of revenue laws because sanctions involved were in substance criminal). For further background on application of the fourth amendment in civil in contrast to criminal contexts, see generally Sonnenreich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment*, 24 Sw. L.J. 418 (1970).
30. *Id.* at 525-27.
31. *Id.* at 534.
32. *Id.* at 536. This is true because "the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building." *Id.*
33. *Id.* at 538.
34. *Id.* at 542.
marketing a product. Any constitutional challenge to such programs can only be resolved, as many have in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness.\textsuperscript{35}

Thus, the \textit{See} holding was carefully limited to local housing code inspections and did not "consider the reach of the Fourth Amendment with respect to various federal regulatory statutes."\textsuperscript{36}

The Court had its first opportunity to resolve a conflict between the fourth amendment and a federal regulatory scheme in \textit{Colonnade Catering Corp. v. United States}.\textsuperscript{37} Colonnade had been licensed by the State of New York to serve liquor and was subject to the federal retail liquor dealer's tax.\textsuperscript{38} In the course of enforcing the latter regulation, agents of the Internal Revenue Service\textsuperscript{39} requested permission to inspect a locked warehouse on Colonnade's premises. Permission was refused by Colonnade's president on the ground that the agents did not have a search warrant. Thereupon, the agents broke the lock and confiscated a quantity of liquor.\textsuperscript{40} The Court held that the warrant requirement of \textit{Camara} and \textit{See} was not applicable in this case,\textsuperscript{41} basing its holding on the long history of "close supervision and inspection" of the liquor industry.\textsuperscript{42} The Court noted that warrantless liquor inspections date from pre-fourth amendment legislation.\textsuperscript{43} Moreover, this special treatment of liquor inspections was predicated on a governmental property interest in untaxed liquor.\textsuperscript{44} The idea that an owner engaging in a highly regulated business in effect consents to warrantless inspections did not begin to appear until later cases.

This exception to \textit{Camara} and \textit{See} was broadened two years later by \textit{United States v. Biswell}.\textsuperscript{45} Biswell was a pawn shop operator feder-
ally licensed to deal in sporting weapons. A city policeman and a federal Treasury agent seeking to ascertain compliance with federal law asked to enter a locked storeroom on Biswell's premises. Biswell unlocked the storeroom and allowed the inspectors to enter without a warrant but only after being referred to the warrantless inspection provision in the Gun Control Act. The Court ultimately held that this warrantless search provision fell within the Colonnade exception to Camara and See. Because, however, "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry," the Court found it necessary to augment its Colonnade reasoning with four inferred factors in order to uphold the Biswell search: (1) Gun control is an important federal interest and inspection is a crucial part of the regulatory scheme. (2) The requirement of a warrant easily could frustrate this crucial inspection. (3) Protections afforded by a warrant would be negligible. (4) The threat to privacy is limited since the dealer is already engaging in a

46. Id. at 312.
47. Id. The Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976), authorizes federal agents to enter the premises of any firearms or ammunition dealer to examine documents, firearms, or ammunition. Id. § 923(g).
48. 406 U.S. at 317. Whether the search was lawful depended on whether the warrantless search provision of the Gun Control Act was constitutional and not on whether Biswell's consent to the search was valid. If the warrantless search provision was unconstitutional, Biswell's consent, given only after reading the provision, could not support the search. Cf. Bumper v. North Carolina, 391 U.S. 543 (1968) (consent to search obtained after presentation of invalid warrant is insufficient). And, if the warrantless search was constitutional, the lawfulness of the search did not depend on consent. 406 U.S. at 315.
49. 406 U.S. at 315. It is also clear that the government had no property interest in weapons as it did in untaxed liquor.
50. Id. This factor is arguably present in the housing code situations of Camara and See.
51. Id. at 316. The Court in Camara failed to discuss the possibility that a warrant requirement would frustrate housing code inspection programs except to say "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." 387 U.S. at 533. The Biswell Court, however, found that gun control would be frustrated by a warrant requirement and distinguished the housing code situation by observing that building code violations were "conditions that were relatively difficult to conceal or to correct in a short time;" warrants could, therefore, be required "with little if any threat to the effectiveness of the inspection system there at issue." 406 U.S. at 316. The Court was undoubtedly referring to its recommended procedure of first seeking consent and then reappearing with a warrant after having alerted the building owner of an impending inspection. See 387 U.S. at 539-40. The Court was concerned that the unannounced aspect of gun control inspections, which they considered crucial, would be jeopardized by a warrant requirement. The opinion never addressed the possibility of obtaining an ex parte warrant before the search.
52. 406 U.S. at 316. The Court did not elaborate on this factor except to indicate that if an inspection under the Gun Control Act is to be effective it must be flexible with regard to time, scope and frequency, and that any warrant that allowed this flexibility would not provide much protection. Id.
pervasively regulated business.\textsuperscript{53}

Because Biswell represented an expansion of the Colonnade exception, the question arose whether the exception had replaced the Camara-See warrant requirement.\textsuperscript{54} This uncertainty was resolved in Almeida-Sanchez v. United States\textsuperscript{55} in which the Court reaffirmed the Camara-See rule. In Almeida-Sanchez, petitioner's automobile had been stopped and searched twenty-five miles from the Mexican border by roving border patrol agents who had neither a warrant nor probable cause for the search.\textsuperscript{56} The search uncovered marijuana and led to petitioner's conviction for illegal importation.\textsuperscript{57} The search was conducted pursuant to the Immigration and Nationality Act, which provided for warrantless searches of automobiles within a reasonable distance from the border.\textsuperscript{58} Almeida-Sanchez challenged this provision as a violation of the fourth amendment. The Government argued that the warrantless search provision came within the Colonnade-Biswell exception to the warrant requirement rule.\textsuperscript{59} In holding the search unconstitutional, the Court rejected the applicability of the Colonnade-Biswell exception.\textsuperscript{60} Although there was a history of federal regulation in the case,\textsuperscript{61} as there was in Colonnade and to a lesser extent in

\textsuperscript{53} Id. This factor is the only one listed by the Biswell Court that was based on the Colonnade rationale of a highly regulated business. The Biswell opinion, unlike Colonnade, hints of an implied consent rationale. "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." Id.

\textsuperscript{54} Cf. 98 S. Ct. at 1821 ("The clear import of our cases is that the closely regulated industry of the type involved in Colonnade and Biswell is the exception. The Secretary would make it the rule.")


Although the statute allows warrantless searches for illegal aliens, marijuana discovered would be admissible if it was "in plain view" during a search for illegal aliens and provided that such a search for aliens was constitutional. Cf. Harris v. United States, 390 U.S. 234, 236 (1968) ("objects falling in plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be introduced into evidence").

\textsuperscript{56} Id. at 267-68.

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\textsuperscript{59} 413 U.S. at 270-71. The government did not attempt to justify the search as within the automobile exception to the warrant requirement that allows warrantless searches of automobiles if there is probable cause. Id. at 269-70; see Carroll v. United States, 267 U.S. 132 (1925). Since there was no probable cause in Almeida-Sanchez, 413 U.S. at 268, the automobile exception would have been of no avail.

\textsuperscript{60} 413 U.S. at 271.

\textsuperscript{61} "Since 1875, Congress has given 'almost continuous attention . . . to the problems of immigration and of excludability of certain defined classes of aliens.'" Id. at 292 (White, J., dissenting) (quoting Kleindienst v. Maudel, 408 U.S. 753, 761-62 (1972)).
Biswell, the Court distinguished those cases as involving implied consent to search:

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises as [alcohol and firearms] accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.62

Unlike Almeida-Sanchez, the petitioner in Barlow's was engaged in a regulated business. But the Court distinguished Barlow's from Colonnade and Biswell on the grounds that the degree of business regulation in Barlow's did not support implied consent to search as it did in Colonnade and Biswell. Such an implied consent rationale, however, is obviously a fiction and alone is an insufficient basis for applying the Colonnade-Biswell exception.63 Indeed, the Court recognized a second ground on which to distinguish Colonnade-Biswell—whereas liquor and firearms regulatory programs would be frustrated by a warrant re-

62. 413 U.S. at 271. The Almeida-Sanchez dissent considered the Colonnade-Biswell exception broad enough to cover that case. The dissent argued that two of Biswell's four factors, see text accompanying notes 50-53 supra, would support a warrantless search. Specifically, the dissent noted the important federal interest in immigration control, and the belief that roving patrol searches were essential to the regulatory scheme, to support the warrantless search. 413 U.S. at 292-93 (White, J., dissenting). The dissent discussed the history of immigration regulation, not to support an implied consent argument, but to bolster the finding that immigration control is an important federal interest.

The position of Chief Justice Burger and Justice White in Barlow's, voting to require OSHA to get a warrant, is clearly inconsistent with their dissenting posture in Almeida-Sanchez in which Justice White argued that the roving border patrol warrantless search was sanctioned by Colonnade-Biswell. Id. at 294. Moreover, Justice White, writing for the Barlow's majority, cited the majority language in Almeida-Sanchez in order to distinguish Colonnade and Biswell. 98 S. Ct. at 1821. In the past both Justice White and Chief Justice Burger have been receptive to reasonableness arguments as justifications for not requiring law enforcement officers to get warrants. It was, however, their unwillingness to accept the reasonableness analysis of Justice Stevens that was crucial to the outcome of Barlow's. The inconsistency is perhaps explained by the different probable cause showing required for criminal as opposed to administrative searches. In the criminal area, in which there is a rigid requirement of particularized probable cause, Chief Justice Burger and Justice White may be more disposed to permit warrantless searches based upon a reasonableness analysis than in the administrative area in which the probable cause requirement is less stringent. This argument, however, does not adequately explain why Chief Justice Burger and Justice White voted to allow warrantless roving border patrol searches in Almeida-Sanchez rather than supporting Justice Powell's position requiring an administrative warrant. See 413 U.S. at 275 (Powell, J., concurring).

63. As Justice Stevens pointed out in his dissent, implied consent, taken to its logical extreme, can be reduced to absurdity. Stevens observed that under an implied consent analysis it is only those regulatory programs started long ago that will come under the Colonnade-Biswell exception. 98 S. Ct. at 1832-33 (dissenting opinion). A logical extension of the implied consent doctrine would demand that if businessman A started his business before the regulations began he would be protected from warrantless searches, while businessman B who began business after it was subject to regulation could be said to have impliedly consented to a warrantless inspection provision.
quirement, the success of OSHA is not so dependent on a warrantless inspection. In support of this conclusion, the Court reasoned that OSHA would not be affected adversely by a warrant requirement because most businessmen would consent to warrantless OSHA inspections.

This reliance on the probability that businessmen will consent to government intrusions is perhaps unsound in view of the inevitable awareness that consent is not required. An additional distinction, not emphasized by the Court, suggests more strongly that the success of OSHA is not dependent on warrantless inspections: whereas no one directly involved with an illegal liquor or firearms operation has any interest in informing the government of the illegality, employees do have significant interest in informing OSHA of safety violations. Moreover, information concerning violations can be relayed anonymously. Employee complaints, therefore, provide an alternative enforcement opportunity available to OSHA regulators that was not available in the liquor and firearms cases.

Thus, although the Barlow's opinion stressed the implied consent rationale, the Court implies that the availability of alternative enforcement opportunities is also a factor distinguishing the Barlow's warrantless inspection from those upheld under the Colonnade-Biswell exception to the warrant requirement. Combining these two factors, application of the Colonnade-Biswell exception appears subject to a two-pronged requirement that there be (1) regulation of a business enterprise sufficient to support an implied consent to search theory and (2) no alternative enforcement opportunity to a warrantless inspection.

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64. Cf. Biswell v. United States, 406 U.S. at 316 (in context of gun control in which violations are easily concealed, a warrant could frustrate deterrent effect of inspections).

65. See note 22 and accompanying text supra. The Court also noted that OSHA regulations require agents to seek compulsory process if entry to inspect is denied rather than forcibly entering the premises. This regulation, not required by the Act, is viewed by the Court as evidence that the Secretary himself does not believe that warrantless, surprise inspections are necessary for OSHA's effectiveness. 98 S. Ct. at 1823-24.

66. Furthermore, "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint . . . under or related to [OSHA]." 29 U.S.C. § 660(c)(1) (1970).

67. See, Biswell, and Almeida-Sanchez all mention federally licensed and regulated enterprises. It is likely, however, that a license requirement in a regulatory scheme will not alone activate the Colonnade-Biswell exception. See, e.g., Camara v. Municipal Court, 387 U.S. at 526 n.1 (housing ordinance required each owner to obtain license renewable every year upon inspection). Thus, the amount of regulation and not the license requirement is determinative.

68. The unavailability of enforcement opportunities other than warrantless inspections is not sufficient without the implied consent requirement to activate the Colonnade-Biswell exception. In
were not satisfied, the Barlow's Court found that warrantless OSHA inspections were unreasonable and therefore unconstitutional. 69

While Barlow's did find that warrantless OSHA inspections were unconstitutional, the Court held that a warrant need not be supported by a showing of particularized probable cause but only by a showing of administrative probable cause. 70 The dissenters in Camara and See, as well as Justice Stevens in Barlow's, were correct in arguing that administrative probable cause is inconsistent with the literal language of the fourth amendment warrant clause. 71 Particularized probable cause, however, is inappropriate in an OSHA context just as it was in the housing code cases. Because the purpose of OSHA inspections is more to encourage compliance with the safety regulations than to catch violations that are thought to exist, 72 a decision to inspect is necessarily based on criteria such as the safety record of an entire industry rather than on knowledge of violations within particular business premises. Thus, requiring a particularized probable cause standard would limit OSHA inspections to those conducted pursuant to employee complaints or after catastrophic accidents and thereby curtail OSHA's ability to encourage pre-accident compliance with safety regulations. If compelled to require particularized probable cause and thus emascu-

69. Part I of the majority opinion in Barlow's deals with the applicability of the Colonnade-Biswell exception to the warrant requirement rule, while part II deals with the determination of the reasonableness of the warrantless inspection by balancing administrative necessities against the incremental protection a warrant would provide. As noted above, note 21 supra, finding the Colonnade-Biswell exception applicable constitutes a finding that the search is reasonable. In the context of a full scale intrusion into privacy such as an OSHA inspection, it is unlikely that the balancing test discussed in part II would ever render a warrantless search reasonable. This test does not consider the privacy expectations of the inspectee as does the Colonnade-Biswell test, which contains the implied consent element. A balancing test is only appropriate in a situation in which there is a limited intrusion. Cf. United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (routine warrantless stops for questioning at permanent border check points are constitutional based on balancing of governmental interests and personal privacy interests, but intrusion was "quite minimal"). Therefore, due to the inapplicability of a balancing test in a full scale intrusion context, the entire reasonableness inquiry should be whether the Colonnade-Biswell exception is applicable. It is necessary, however, to borrow the "no other enforcement opportunities" factor from the balancing analysis in order to adequately distinguish Colonnade-Biswell from Barlow's.

70. 98 S. Ct. at 1824.
71. See note 25 supra.
late OSHA, the Court would likely have found the inspections to be reasonable and therefore not subject to any warrant requirement. Requiring the administrative warrant instead is preferable because it does provide the businessman protection from a vengeful regulator by requiring that the decision to inspect be based on a rational administrative selection process. Such protection, while not as great as that afforded by particularized probable cause, is better than no independent review of the inspection decision.

The ultimate impact of Barlow's on OSHA enforcement might depend in part on the level of actual consent required to justify a consensual administrative inspection. As noted earlier, the Barlow's decision was based in part on the Court's belief that most employers probably would consent to a warrantless inspection. How valid the Court's guess is will depend to a significant extent on what level of consent will be required. If a voluntariness test as found in the criminal context is required for consent to an administrative inspection, arguably fewer businessmen will be held to have given their consent. In the criminal context, knowledge of the right to withhold consent to search, while not necessary, is a factor in determining the voluntariness of the consent. For example, submitting to a search by a government agent who announces "I am here to search your premises" has been held not to constitute valid consent in a criminal case. Some lower courts may be willing to apply a less rigid standard for administrative inspections, just as the Camara Court lessened the probable cause standard.

73. For a detailed discussion by lower courts on the showing that would support an OSHA warrant, see Reynolds Metals Co. v. Secretary of Labor, 442 F. Supp. 195 (W.D. Va. 1977), and Morris v. United States Dept' of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977).

74. Despite the vigorous arguments by the Secretary of Labor that a warrant requirement would severely hamper OSHA enforcement, see Brief for Appellant at 44-45, George H. R. Taylor, Director of the AFL-CIO's new Occupational Safety and Health Department (whose organization filed an amicus brief on behalf of appellant), stated that an amendment to a Small Business Administration bill passed by the Senate "is a far worse threat than the Barlow's decision." Bus. Week, Sept. 11, 1978, at 53. That amendment would exempt from OSHA regulations businesses in low injury rate industries with 10 or fewer employees. Id.


76. Id. at 232-34.

77. Amos v. United States, 255 U.S. 313 (1921) (no valid consent when defendant acquiesced in search by revenue officers who said they had come to search premises for violations of revenue law).

78. In two OSHA cases, Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84 (5th Cir. 1975), and Stockwell Mfg. Co. v. Usery, 536 F.2d 1306 (10th Cir. 1976), lower courts found adequate actual consent to inspection when inspectors merely showed their credentials and were then allowed to search. The courts in these cases did not consider that the actual consent standard they
Barlow's will also affect other federal regulatory statutes that provide for warrantless inspections but, unlike OSHA, are aimed at specific industries rather than all businesses affecting interstate commerce. Soon after the Barlow's decision the Supreme Court vacated and remanded for reconsideration in light of the Barlow's decision a Sixth Circuit case involving warrantless safety inspections under the Coal Mine Safety and Health Act. Justice White suggested that these single industry warrantless inspections might be constitutional "where regulations [are] so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply." Even if a single industry inspection does not come under that exception, many of the statutes provide for resort to federal court for an order to compel inspection rather than allowing a forcible inspection. Once in court the agency could make a showing of administrative probable cause and then be allowed to search.

Moreover, Barlow's will affect other federal regulatory inspections that, like OSHA, are aimed at thousands of businesses in many unrelated industries. For example, the Supreme Court recently vacated and remanded for reconsideration in light of Barlow's two Fifth Circuit cases challenging the government's right to make warrantless inspections to check compliance with employment discrimination rules that affect all businesses that contract with the federal government. Re-applying was any different from that applied in criminal cases. An argument can be made, however, that the consent involved in these cases did not rise to the Schneckloth v. Bustamonte, 412 U.S. 218 (1973), voluntariness requirements. Thus these holdings indicate a willingness to relax actual consent standards in administrative searches.

81. 98 S. Ct. at 1825. Despite this dicta Justice Stevens believed that the Barlow's decision rendered inspection provisions in legislation directed at single industries presumptively invalid. Id at 1834 n.11 (Stevens, J., dissenting).
82. Id. at 1825 nn.18 & 19.
83. OSHA regulations, but not the Act itself, required that inspectors seek compulsory process if entry was refused. The issue in Barlow's was not whether an adequate showing had been made in court to support the order compelling inspection, but whether any resort to judicial process was needed given the Act's provision for warrantless inspections.
84. In United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977), vacated and remanded mem., 98 S. Ct. 2841 (1978), and United States v. Mississippi Power & Light Co., 553 F.2d 480 (5th Cir. 1977), vacated and remanded mem., 98 S. Ct. 2841 (1978), two utilities questioned the constitutionality of Executive Order No. 11246, 3 C.F.R. § 339 (1964-1965 Compilation), as amended by Exec. Order No. 11375, 3 C.F.R. § 406 (1969), which prohibits employment discrimination by government contractors. The constitutional challenge is based in part on a fourth amendment violation in that the Order requires government contractors to permit access to their books and records by government officials to determine compliance with the Order. The Court of Appeals for the Fifth Circuit held that public utilities come within the Colonnade-Biswell
consideration of these cases will inevitably focus on two aspects of the implied consent rationale not fully clarified in Barlow’s.

First, because the defendants in these employment discrimination cases are electric utility companies and therefore heavily regulated in the rate-setting function of their business, the question arises whether regulation of rates will support implied consent to inspections concerning employment practices. Barlow’s did not answer this question because no aspect of the business involved in that case was appreciably regulated. In both Colonnade and Biswell the warrantless inspections were directly related to the purposes behind the federal regulation considered crucial in upholding the inspections. Moreover, it would strain the existing fiction of implied consent if regulation in one aspect of a business could lead to implied consent to a search relating to another aspect. It would seem, therefore, that regulation in one aspect of a business cannot support consent to a search related to another aspect.

A second aspect of the Barlow’s implied consent rationale that must be explored in the reconsideration of these employment discrimination cases is whether the electric utilities by contracting with the federal government to supply electricity have impliedly consented to warrantless inspections in the same way that businessmen engaging in certain federally regulated businesses have. If the warrantless inspection is related to the contract provisions, the business, by accepting the benefits of the contract, might be said to accept the burden of warrantless inspection. In the electric utility cases, however, selling electricity to the government has nothing to do with hiring practices. Therefore, requiring these utilities, because they contract with the government, to be subject to unrelated warrantless inspections of employment records is inconsistent with the implied consent requirement behind the Colonnade-Biswell exception.

Even if the government is able to succeed on the implied consent arguments, the second requirement of the Colonnade-Biswell test, that

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553 F.2d at 471.


86. Some language in the Barlow’s opinion arguably could support a finding of implied consent in the employment discrimination cases. See 98 S. Ct. at 1821. A lesser intrusion of looking through employment records (as opposed to detailed and minute OSHA inspections) might be supported by a lesser amount of regulation or, conceivably, by pervasive regulation in other as-
there be no alternative enforcement opportunities, should preclude the application of the warrant requirement exception in the employment discrimination context. The regulatory enforcement of employment discrimination rules will not suffer appreciably due to a warrant requirement because employees, just as they have an interest in reporting safety hazards, have an interest in reporting employment discrimination. Because there are effective alternative enforcement opportunities, fourth amendment rights need not bow to the urgent federal interest in the employment discrimination area.

The result of Barlow's is laudable in that it halts, temporarily at least, the Burger Court's erosion of fourth amendment rights. The Court recognized that protection of privacy provided by administrative probable cause is not counter-balanced by mere administrative convenience or congressionally perceived urgency. In finding the Colonnade-Biswell exception to the warrant requirement inapplicable, the Court emphasized that consent to inspect, implied from a businessman's awareness of significant government regulation of his business, is necessary to support a warrantless inspection. In addition, although implied consent is the primary factor in a Colonnade-Biswell analysis, there should also be an inquiry into whether there are alternative enforcement opportunities available to government regulators. These two factors provide a test to determine whether the Colonnade-Biswell exception is applicable to allow a warrantless regulatory inspection. Thus, by examining both the level of implied consent and the availability of alternative enforcement opportunities, a proper balance can be

struck between the individual's right to privacy and the public's interest in regulation. By not opening the gates of all businesses engaged in interstate commerce to government inspectors, but yet applying the more lenient administrative probable cause standard, *Barlow's* will allow the Court to seek that proper balance.

H. BRYAN IVES, III

Constitutional Law—Rights of the Mentally Retarded: *Haderman v. Pennhurst* Closes State Institution and Mandates Community Care

Until the middle of this century the mentally retarded, neglected by the medical profession, were routinely consigned for life to isolated institutions. During the last two decades, however, medical advances regarding the capabilities and treatment of the retarded have spurred judicial recognition of the rights of that institutionalized population. Recent cases have held, principally on the basis of the eighth and fourteenth amendments, that institutionalized retardates possess a right to habilitation—the education, training, and care required by mentally retarded individuals to reach their maximum development.

This right to habilitation was first recognized and applied in *Wyatt v. Stickney* to mandate minimum standards of care and supervision


2. Id. at 136-43. A recent paper credits "mid-twentieth century discoveries (or rediscoveries) of the capacities of disabled people, of teaching and learning techniques to evoke those capacities and the more or less wide distribution of knowledge of those techniques among school people and other service agents in our society." T. Gilhool & E. Sturtman, Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504, at 7 (1978) (unpublished paper for Public Interest Law Center of Philadelphia).


   the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.