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# State Health Inspections and Unreasonable Search: The Frank Exclusion of Civil Searches

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# Comments

## State Health Inspections

### and "Unreasonable Search":

#### The *Frank* Exclusion of Civil Searches

"Unreasonable search" is a constitutional concept of imprecise and fluctuating content. The distinguishing characteristics of that concept and the scope of its application to state officials have been the subject of a developing, but unreliable, body of law. The United States Supreme Court, in *Frank v. Maryland*,<sup>1</sup> recently added a new, and perhaps too rigid, dimension to the concept of unreasonableness by finding a constitutional difference between searches designed to enforce "civil" regulations and searches for "criminal" evidence. The same case also invited clarification of the federal constitutional standard to be applied to searches by state officials; but the Court's decision merely perpetuated the uncertainty that began with *Wolf v. Colorado*.<sup>2</sup>

In *Frank*, a divided Court upheld a homeowner's conviction for refusing to permit examination of his home by a health inspector who demanded entry without warrant pursuant to the power of entry provided by a Baltimore health ordinance.<sup>3</sup> Rejecting the defendant's claim of protection under the fourth and fourteenth amend-

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1. 359 U.S. 360 (1959).

2. 338 U.S. 25 (1949).

3. The inspector had good reason to suspect rat infestation violative of BALTIMORE, MD., CITY CODE, art. 12, § 112 (1950), which provides:

Every dwelling and every part thereof shall be kept clean and free from any accumulation of dirt, filth, rubbish, garbish, or similar matter, and shall be kept free from vermin or rodent infestation.

That section was normally enforced by a system of inspections and warning notices designed to induce compliance. Defendant's refusal to allow inspection resulted in his conviction by a Baltimore police court and by the Criminal Court, Part II of Baltimore, on *de novo* review, for violation of BALTIMORE, MD., CITY CODE, art. 12 § 120 (1950), which provides:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar, or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

Defendant claimed that the conviction violated his rights under the twenty-third and twenty-sixth articles of the declaration of rights of the Maryland Constitution, as well as under the fourth and fourteenth amendments of the federal constitution. The Mary-

ments,<sup>4</sup> Mr. Justice Frankfurter reasoned that although the interest protected by the fourth amendment is the privacy of the individual, the historical background of that provision indicates that the "unreasonable searches"<sup>5</sup> which it prohibits include only searches for evidence to be used in *criminal* proceedings. The "broad restraints of due process"<sup>6</sup> do not restrain the states where there has been long public acceptance of "civil" searches in the enforcement of municipal regulations. The Court concluded that privacy was not "unreasonably" interfered with, for these limited powers of inspection,<sup>7</sup> exer-

land Court of Appeals denied certiorari without opinion, by endorsement on the petition (R. 170). Brief for Appellant, Jurisdictional Statement, p. 9, *Frank v. Maryland*, 359 U.S. 360 (1959). Denial of certiorari was probably based on the decision of the Maryland court in *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1955), discussed at note 58 *infra*.

The inspector warned defendant (Record, p. 10) by reading him BALTIMORE, MD., CITY CODE, art. 12, § 6 (1950), which provides in part:

If any person shall knowingly obstruct or resist the Commissioner of Health, or any person by him appointed . . . such persons shall forfeit and pay a sum not exceeding Two Hundred Dollars.

The state's use of BALTIMORE, MD., CITY CODE, art. 12, § 120 (1950) in prosecuting defendant may be explained by considering *District of Columbia v. Little*, 339 U.S. 1 (1950), where the United States Supreme Court held that an ordinance provision similar to that last-quoted had not been violated because "refusing entry" was not an "interference." But the availability of § 6 as a means of coercing home owners in situations where there is questionable "cause to suspect a nuisance" puts much greater power in the hands of an overly-enthusiastic health inspector.

4. 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 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.

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. XIV.

5. The first clause of the fourth amendment "is general and forbids every search that is unreasonable. . . .", and the second clause emphasizes the purpose of the first. *Go-Bart v. United States*, 282 U.S. 344, 357 (1931). "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Ibid.* See also *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950).

State courts have occasionally distinguished "inspections" from "searches" when construing state constitutional protections against search and seizure. See *Sister Felicita v. Hartridge*, 148 Ga. 832, 98 S.E. 538 (1919). *But see* *District of Columbia v. Little*, 178 F.2d 13, 18 (1949), *aff'd on other grounds*, 339 U.S. 1 (1950). The Court in *Frank* relied on no such argument, and seemed to assume that an "inspection" is a "search."

6. 359 U.S. at 363.

7. BALTIMORE, MD., CITY CODE, art. 12, § 120 (1950), limits the inspection powers of health officials: the inspection must be in the daytime; there must be reasonable grounds for suspecting the presence of a nuisance. See note 3 *supra*. From the ordinance, in addition to these limitations, the Court implied the further limitation that inspecting officers are not authorized to exercise force in obtaining entry. 359 U.S. at 366-67.

There is no question that the health inspector in *Frank* had reasonable grounds for suspecting a nuisance. Uncontested evidence in the lower court indicated that the house was in an "extreme state of decay"; collections of debris, openings at the base

cised in response to the increasing needs of a crowding population, "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment. . . ."<sup>8</sup>

The precise scope of the fourth amendment's prohibition of "unreasonable searches," as it applies to state officials, has been uncertain since *Wolf v. Colorado* ruled that "the security of one's privacy . . . the core of the Fourth Amendment—is basic to a free society [and] is therefore . . . enforceable against the States through the Due Process Clause."<sup>9</sup> The *Frank* case does not dispel

of the house, and a pile of "rodent feces mixed with straw and trash and debris to approximately half a ton" in the back yard created a strong probability of rat infestation. But the Court, in emphasizing the presence of rodent feces as a basis for "cause to suspect" a nuisance, failed to point out that the inspector first referred to the rodent feces as "probably chinchilla," and in subsequent testimony refused to use a more precise term than "rodent feces." Record, p. 9. Thus, it is reasonable to conclude that the Court would support an inspector's discretionary determination of "cause" on evidence somewhat weaker than that which, on analysis of the opinion alone, seemed to be before the Court.

8. 359 U.S. at 367.

Mr. Justice Whittaker concurred in the opinion on the basis that the conviction did not enforce a power of "unreasonable search," making clear that his understanding of the opinion was that it in no way qualified the force of *Wolf v. Colorado*. It may be significant that in evaluating the "reasonableness" of the power of search, he did not mention Mr. Justice Frankfurter's important distinction between searches for "civil" and "criminal" evidence, discussed *infra*. Thus, that distinction may yet be subject to revision.

Mr. Justice Douglas writing for the four dissenters, urged that both history and current authority show that the fourth amendment protects the privacy and dignity of the individual from invasion by "official" government officers, without distinguishing between searches for "civil" or "criminal" evidence. 359 U.S. at 374-82. Constitutional protections should not yield to the "official's measure of his own need," for that measure "often does not square with the Bill of Rights." *Id.* at 382. The dissent particularly objected to the fact that there were adequate grounds and opportunity for the inspector to obtain a warrant if he had chosen to do so; and pointed out that the need for a power of entry for health inspectors is questionable, since they are seldom denied entry. *Id.* at 381, 382 & 383. Finally, the dissenters adopted the court's argument in *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949): "To say that a man suspected of a crime has a right to protection against search of his home without warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." 359 U.S. at 378.

9. 338 U.S. 25, 27-28 (1949).

A hotly-debated "uncertainty" is that involved in predicting the effect of *Wolf v. Colorado* on the rules respecting the admissibility of illegally seized evidence. See Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1123 (1959): "*Wolf* teaches us that some fundamental rights are less 'fundamental' . . . less 'immutable' . . . less 'basic' than others. That evidence is not to be excluded unless it was obtained in violation of sub-minimal standards. . . . *Irvine* teaches us that . . . only when such violations are sufficiently 'incredible' and 'flagrant' do we exclude their fruits."

Professor Kamisar is particularly concerned with the uncertain effect of *Wolf* upon the doctrines expressed in *Lustig v. United States*, 338 U.S. 74 (1949), and *Byars v. United States*, 273 U.S. 28 (1927), which would allow federal prosecution upon evidence illegally seized by state officers if presented to federal authorities on a "silver platter." *Id.*, commencing at 1129.

Any distinction drawn between the "remedy" of exclusion of evidence and the federal "right," as it is abstractly recognized in *Wolf*, may be somewhat formalistic. Compare *Wolf v. Colorado*, 338 U.S. 25, 29 (1949) ("We must hesitate to treat this

that uncertainty. Rather, the Court's ambiguous references to the relationship between the fourth and fourteenth amendments<sup>10</sup> typify the method by which the Court, after throwing the question open in *Wolf*, has avoided clarifying the extent to which the fourth amendment's protections are "incorporated" in the due process clause of the fourteenth amendment.<sup>11</sup> Thus, *Frank* could reasonably be regarded as support for the alternative propositions that: (1) the protections from unreasonable search required by the fourth amendment are substantially "incorporated" in the fourteenth amendment, but are not violated by the power of search enforced in *Frank*;<sup>12</sup> or

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remedy [exclusion of evidence] as an essential ingredient of the right"), with *Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 9 (1950):

[I]n rejecting the exclusionary rule . . . the Court has given an entirely different character to the rights of the individual against unreasonable searches and seizures under the Fourteenth Amendment from that to his rights under the Fourth. . . . [I]f the 'federal rule' [of exclusion] be rejected in state cases, what, if anything, has the Court substituted in its place to give reality to the federal right?

10. *E.g.*, "[T]he application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within . . . historic bounds." 359 U.S. at 365-66.

11. Each case dealing with the problem compounds the ambiguity by citing *Wolf's* inconclusive statement of principle. See, *e.g.*, *Irvine v. California*, 347 U.S. 128, 132 (1954); *Stefanelli v. Minard*, 342 U.S. 117, 119 (1951).

In *Stefanelli v. Minard*, *supra* at 122, the Court apparently reasoned that a "mere" conviction on evidence illegally seized pursuant to an unreasonable search by state officers would not violate due process unless it threatened "irreparable injury, clear and imminent." Apparently then, any "injury" less severe than that will not be a violation of due process requiring exclusion of evidence unless it "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Yet Mr. Justice Jackson, speaking for the Court in *Irvine v. California*, *supra* at 134, said: "Never, until June of 1949 did this court hold the basic search-and-seizure prohibition in any way applicable to the states. . . . We adhere to *Wolf* . . . and decline to introduce vague and subjective distinctions." (Emphasis added.) This is probably the most explicit statement in which the Court has recognized any substantial *identity* between the protections involved in the fourth and fourteenth amendments. But if the protections of the fourth amendment are "in any way" applicable to the states, it may be that in some unspecified ways those protections are less extensive and that state searches may safely be somewhat *more unreasonable* than the unreasonable searches conducted by federal officers.

12. The manner in which Mr. Justice Frankfurter traced the historical origins of the fourth amendment in *Frank* seemed to indicate a concern with the substantive protections of *that* amendment:

Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context. . . .

The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was meant to respect. . . . [V]ivid memory . . . of . . . abuses produced the Fourth Amendment.

359 U.S. at 363.

[T]wo protections emerge from the broad constitutional proscriptions of official invasion . . . the right to be secure from intrusion into personal privacy . . . [and] the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state. . . . Thus, evidence of

(2) the due process clause only requires state officers to respect the fundamental safeguards which are essential to the American concept of a free society, and though the precedents of the fourth amendment may be relevant to a determination of what is essential, the power of search enforced in *Frank* violates none of those "fundamental" safeguards.<sup>13</sup> By using language open to such carian interpretation, the Court has expanded its freedom to deal, case-by-case, with the particular facts of an alleged "unreasonable search,"<sup>14</sup> for it need no longer restrict itself to an evaluation of that which is "of the very essence of a scheme of ordered liberty,"<sup>15</sup> but may also draw heavily on the precedents of the fourth amendment.

However, it is safe to assume that the Justices of the United States Supreme Court, in expanding the scope of their discretionary evaluation of the facts, have not ignored their traditional responsibility for delineating the proper spheres of state and federal authority.<sup>16</sup> If the Court had been proceeding *ad hoc*, basing decisions solely on a discretionary weighing of the facts, it would have needed no more than honorific citations to *Wolf*; but the Justices' repeated citation of the strong statement in that case of the principles of the fourth amendment, in the context of decisions which did not fully effectuate those principles,<sup>17</sup> belies such a discretionary approach. Therefore, *Frank* should probably be regarded as another in a series of cases in which the Court's majority was made up of Justices whose inclination toward an "incorporation"<sup>18</sup> approach, or perhaps, more ex-

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criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant.  
*Id.* at 365.

13. "[T]he inspection touch[es] at most upon the periphery of the important interests safeguarded by the *Fourteenth Amendment's* protection against official intrusion. . . ." *Id.* at 367. (Emphasis added.) "[B]y reason of its intrinsic elements, its historic sanctions, and its safeguards, the Maryland proceedings . . . [do] not offend the protection of the *Fourteenth Amendment.*" *Id.* at 373.

14. Thus, Mr. Justice Jackson, writing for the majority in *Irvine v. California*, 347 U.S. 128, 133 (1954), distinguished *Rochin v. California*, 342 U.S. 165 (1952): "However obnoxious are the facts in the case before us, they do not involve coercion, violence, or brutality to the person, but rather a trespass to property plus eavesdropping."

15. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

16. *Compare Adamson v. California*, 332 U.S. 46 (1947), *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), with *Griffin v. Illinois*, 351 U.S. 12 (1956), *Powell v. Alabama*, 287 U.S. 45 (1932), and *Near v. Minnesota*, 283 U.S. 697 (1931).

17. See note 11 *supra*. In *Stefanelli v. Minard*, 342 U.S. 117 (1951), the Court upheld a federal district court dismissal of a suit in equity brought to compel a state criminal court to suppress evidence obtained by state officers by means of an allegedly illegal search. In *Irvine v. California*, 347 U.S. 128 (1954), the Court refused to set aside a state conviction based on evidence obtained by means which the Court, in refusing, said "flagrantly, deliberately, and persistently violated the fundamental principle declared by the *Fourth Amendment.* . . ." *Id.* at 132. See also *Allen*, *supra* note 9.

18. Mr. Justice Black's dissent in *Adamson v. California*, 332 U.S. 46, 89 (1947),

tensive supervision of state enforcement procedure under the due process clause,<sup>19</sup> is tempered by a desire to avoid interfering with the political processes by which freedom is best maintained.<sup>20</sup> The following discussion is predicated on the assumption that the statement in *Wolf*, that "were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment,"<sup>21</sup> means that a state may not, by legislative enactment, *create* a power of "unreasonable search" in the sense in which that term is used in the fourth amendment. If that assumption is correct, it would seem to be inconsequential whether

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provides the most complete statement of the "incorporation" approach: "I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights."

19. "The conviction has steadily grown that, in protecting and vindicating basic individual freedoms and immunities . . . the Court may justifiably abandon many of the self-imposed limitations on judicial power generally recognized in other types of constitutional adjudication." Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 9 (1950). Allen cited *Ex parte Endo*, 323 U.S. 283, 299-300 (1944), and *Prince v. Massachusetts*, 321 U.S. 158, 173 (1944) (Murphy, J., dissenting) as well as Mr. Justice Stone's suggestion in *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938), that "there may be narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Allen, *supra* at 9.

20. Mr. Justice Frankfurter has consistently tried to steer somewhere between "supervision" of the states and pre-emption of the effective political processes, which he regards as the ultimate guardian of liberty. See his opinion in *Wolf v. Colorado*, 338 U.S. 25, 32-33 (1949): "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." And in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940), he said: "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when its is ingrained in people's habits and not enforced against popular policy by the coercion of adjudicated law."

See JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80, 81 (1955).

I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. . . .

It is not idle speculation to inquire which comes first, either in time or importance, an independent and enlightened judiciary or a free and tolerant society. . . . [I]t is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions.

See also COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 73 (1950):

The tendency to decide issues of personal liberty in the judicial arena alone has the effect of lulling the people into apathy towards issues that are fundamentally their concern, with the comforting notion that the courts will take care of personal and minority rights. It effectively removes these issues from the arena of public discussion and thus deprives democracy of the inestimable benefit of experimentation.

21. 338 U.S. 25, 28 (1949).

its correctness results from incorporation of the protections of the fourth amendment into the fourteenth or from the prohibitions which fundamental principles of justice interpose against any "affirmative incursion into privacy."<sup>22</sup>

Although some health inspectors may infrequently assist in criminal investigations,<sup>23</sup> the usual scope of their inspections may be appropriately designated "civil."<sup>24</sup> Such "civil" searches *might* prop-

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22. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949). But if *Frank* is based on an "incorporation" approach—defining the concept of "unreasonable search" under the fourth amendment—it *does* make at least one important difference: the distinction between "civil" and "criminal" searches, as *Frank* stated it, must then be treated as a limitation on the constitutional protection against searches by *federal* officials.

23. On two or three occasions, the inspectors of the Minneapolis Health Department have provided the morals squad of the municipal police department with information about narcotics violations observed in the course of routine inspections. However, the police have not solicited such information, and the normal course of the Health Department's inspection procedure is directed only to the discovery of health nuisances. The director of the Housing Inspection Division emphasized that a health inspection system will probably be more effective where the inspectors concern themselves only with violations of the health ordinances. Interview With Director of Housing Inspection, Minneapolis Health Department in Minneapolis, Sept. 24, 1959.

Similarly, the housing inspectors of the St. Paul, Minn., Health Department have had little to do with procuring criminal evidence. Although they were recently requested by the police of that city to "keep their eyes on" a particular private club and to report evidence of violations of liquor laws, that was the only such request within the memory of the present inspectors. Interview With Health Sanitarian, St. Paul Health Department, in St. Paul, Oct. 16, 1959.

On the other hand, use of health inspections as a means for obtaining evidence of crime may be encouraged by the decision in *Frank*. The Baltimore police did not wait long to try that device: in *State v. Pettiford*, Baltimore Superior Bench, December, 1959, summarized in 28 U.S.L. WEEK 2286 (Dec. 22, 1959), a police officer, assigned to the sanitation division, had utilized the power of entry granted by the Baltimore health ordinance (apparently City Code, art. 12, § 120; see note 3 *supra*) to gain entry to a house, observe an illegal lottery, and then signal a waiting vice-squad officer. The court ruled that *Wolf v. Colorado*, *supra* note 22, required that the evidence be excluded, for the "exception" to *Wolf* created by *Frank* "is not to be used to cover searches without warrants inconsistent with conceptions of human rights embodied in our State and Federal Constitutions."

Thus, convictions obtained as a result of these novel "searches" for *criminal* evidence may not stand in the face of proof of collaboration between police and health inspectors, *at least* where conviction is by a federal court. *Weeks v. United States*, 232 U.S. 383 (1914). But even where the exclusionary rule is in effect, obtaining proof of collaboration would probably be difficult, for it is likely that most police techniques utilizing this new approach will be more sophisticated than the feeble attempt made by the Baltimore police.

24. Under the BALTIMORE, MD., CITY CODE, art. 12, § 119 (1950), any person who fails to obey an order of the Commissioner of Health to remedy unsatisfactory conditions found on a first inspection is guilty of a misdemeanor. The court in *Frank* reasoned that the purpose of the inspection is "civil" because it is "merely to ascertain the existence of evils to be corrected upon due notification, or, in default of such correction, to be made the basis of punishment." 359 U.S. at 362.

It is not clear whether the search is denominated "civil" because of the nature of the subject-matter of the ordinance which the inspection enforces or because of the fact that the penalties are inoperative until the defendant has failed to comply with the order. If the latter is the determinative factor, it would seem that a different result is called for where the ordinance provides for an immediate penalty for the



erly have been read out of the protections of the fourth amendment if the historical context in which those protections developed had been limited to criminal cases such as *Entick v. Carrington*.<sup>25</sup> But the *Frank* Court cited *Entick*, an important constitutional precedent, in support of its holding that the fourth amendment applies only to searches for *criminal* evidence,<sup>26</sup> without attempting to reconcile important aspects of the historical development of that provision

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maintenance of certain prohibited conditions. Similarly, inspections to ascertain compliance with an order to correct conditions discovered on an earlier inspection would seem to fall outside of the "civil" category, for their only purpose is to provide evidence for invoking criminal sanctions. A recent Note on the problems of urban renewal indicates that these may be more than academic propositions. In discussing the desirability of having the city counsel attend "team" inspections by members of various city departments, it states that "the presence of a lawyer tends to assure that adequate evidence will be gathered to support a prosecution, and affords the prosecuting attorney a greater familiarity with the case." Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 546 (1959).

On the other hand, it may be the subject-matter of the ordinance enforced by search which determines whether that search is "civil" or "criminal." But from the viewpoint of the person whose privacy is intruded upon, "reasonableness" must depend upon the particular manner of search and the harshness of the sanction which may be enforced by search.

In the latter regard, see the discussion of *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *prob. juris. noted*, 360 U.S. 246 (1959), note 58 *infra*.

25. 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765). *Entick* held that the British Secretary of State had no power to issue general warrants for search and seizure upon mere suspicion of criminal (seditious) libel, and allowed the victim of a search to recover in trespass.

26. 359 U.S. at 363, 364, 365. Although the Court never expressed that precise holding, it is difficult to draw any other conclusion from the language it used. After specifically noting that the interest protected by the fourth amendment is the privacy of the individual, the Court proceeded to find that interest to be without protection because the search involved was not a search for criminal evidence. *Id.* at 365. In view of the Court's emphasis upon the qualitative difference between "civil" and "criminal" searches, there can be little consolation in its statement that the application of the fourth amendment is "of course not restricted within these historic bounds." *Id.* at 366. And the fact that the ordinance limits the inspector's power of "civil" search is probably not a factor of great constitutional importance. See note 7 *supra* and note 70 *infra* and accompanying text. Nevertheless, these qualifications to the controlling "civil" aspect of the case should not be ignored; in some future case the Court may be inclined to rely on them to qualify the force of the apparent holding of the instant case. It has been suggested that *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *prob. juris. noted*, 360 U.S. 246 (1959), discussed at note 58 *infra*, may test the significance of the limitations which an ordinance imposes on an inspector's power because the inspection ordinance involved in that case, DAYTON, OHIO, CODE § 806-30 (1959), does not require that the inspector have "cause." See 108 U. PA. L. REV. 265, 278 n.77 (1959). On the other hand, it may be argued that there is no substantial difference between the two provisions, since the Baltimore ordinance, note 3 *supra*, leaves the determination of probable cause to the discretion of the inspector. If the argument at note 70 *infra* and accompanying text is accepted, then the Dayton ordinance appears to require adherence to substantially the same types of restrictions that the Baltimore ordinance imposed: inspection must be conducted in the daytime and (by judicial construction) may not be effectuated by forcible entry.

which would have supported an opposite conclusion.<sup>27</sup>

Long before the dispute in *Entick* focused attention on the broad powers of search for criminal evidence granted by "general warrants,"<sup>28</sup> unrestricted powers of "civil"<sup>29</sup> search, exercised by customs officers<sup>30</sup> and local officials of organized trades,<sup>31</sup> were publicly con-

27. For a thorough historical treatment of the development of the fourth amendment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE, Series 55, No. 2 (1937).

28. These powers, early adopted by the Privy Council and the Court of Star Chamber to suppress non-conformism and sedition, were granted the king by the Licensing Act, 14 (13 & 14) Car. 2, c. 33 § 15 (1662), for the same purposes. Upon expiration of that act, the Secretary of State continued to claim the power to issue general warrants; and the exercise of that power, resulting in the imprisonment of John Wilkes, member of parliament and author of the incendiary pamphlet *North Briton*, led to the series of opinions by Chief Justice Pratt of the Court of Common Pleas which culminated in *Entick v. Carrington*, 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765). Lasson, *supra* note 27, at 24-48.

Typically, these warrants were general as to grounds for suspicion, person suspected, place to be searched, and thing to be seized. Some of these objectionable features may be implied from the modifications recommended by Lord Hale's treatise:

The moderation and temperments that are to be added to these warrants, are these:

1. They are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do show his reasons for such suspicion.

And therefore I do take it, that a general warrant to search all suspected places is not good, but only to search in particular places. . . .

2 HALE, *THE HISTORY OF THE PLEAS OF THE CROWN 149-150* (1847).

29. Compared to the notoriously severe criminal penalties of the seventeenth and eighteenth centuries, which emphasized corporal punishment, the provisions for forfeiture of goods, vessels, and sums of money up to one hundred pounds were "civil" penalties. See HOOPER, *THE HISTORY OF NEWGATE AND THE OLD BAILEY*, ch. 5 (1935). And those penalties were not different in substance than the penalties which could have been invoked by authority of the statute in *Frank* for non-compliance with orders demanding remedy of health nuisances. See, e.g., Cider Tax, 3 Geo. 3, c. 12 (1762) (forfeitures from ten to twenty pounds or value of goods with their casks); Excise Tax, 1 Anne Stat. 2, c. 3 (1702) (forfeitures from ten to fifty pounds or double the value of the duty owed); Hearth Money Tax, 16 Car. 2, c. 3 (1664) (value of hearth money tax to be satisfied by distress and sale of goods); An Act to Prevent Frauds and Abuses In The Custom, 14 (13 & 14) Car. 2, c. 11 (1662) (forfeitures from five to one hundred pounds; forfeiture of goods and boat—allowed to expire); Excise Tax, 12 Car. 2, c. 33 (1660) (forfeitures from five pounds to double the value of the goods sold without clearing excise); Excise Tax, 12 Car. 2, c. 4 (1660) (forfeiture of uncustomed goods).

30. General powers of search were resisted by the people when granted to customs officers for collection of the Cider Tax, 3 Geo. 3, c. 12 (1762) (contemporaneous with the unrest over the arrest of John Wilkes—see note 28 *supra*); the Hearth Money Tax, 14 Car. 2, c. 10 (1662); the Excise Tax, 12 Car. 2, c. 23 (1660); and the duty of Tonnage and Poundage, 1 Jac. 1, c. 33 (1640). The defeat of an Excise Scheme for taxing wines as they were withdrawn from warehouses for home consumption, proposed by Walpole in 1733, must be attributed in part to popular opposition to the investigation and search provisions of the bill. And the generally unpopular Writs of Assistance, which commanded all persons to "assist" in their execution, were adopted as part of An Act to Prevent Frauds and Abuses In The Custom, 14 (13 & 14) Car. 2, c. 11 (1662). Lasson, *supra* note 27, at 34, 37-38, 40-41.

31. Henry VI, and later, Parliament and the Court of Star Chamber gave "general

demned and resisted. In the colonies, the despised writs of assistance were an important catalyst for revolution.<sup>32</sup> These writs were employed almost exclusively in sporadic and generally unsuccessful attempts to enforce customs regulations carrying civil penalties no different from those imposed upon an English violator.<sup>33</sup> Otis' heated

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searching powers to certain organized trades in the enforcement of their sundry regulations." Lasson cites 39 Eliz., c. 13 (1597) and 11 Hen. 7, c. 27 (1495) as examples of acts of Parliament granting such powers. See Lasson, *supra* note 27, at 24.

32. The first generally known statute to include provision for "Writs of Assistance" was An Act to Prevent Frauds and Abuses In The Custom, 14 (13 & 14) Car. 3, c. 11, §§ 5, 30 (1662) which provided for a non-returnable order requiring public officers to assist the officers of the customs in gaining entry to unspecified places and conducting searches for unspecified, uncustomed goods. A subsequent re-enactment in 1696, 7 & 8 Wm. 3, c. 22, § 6, gave the officers of the customs in the colonies "the same powers and authorities" that they had in England. Disputation over the validity of the issuance of these writs by colonial courts, which culminated in *Paxton's Case*, QUINCY'S MASSACHUSETTS REPORTS, 1761-1772, at 469-77 (1865), was set to rest by the Townshend Act in 1767. But vocal and physical resistance to the broad powers of inspection and search which they granted dated from *Paxton's Case*. Lasson, *supra* note 27, at 53-58, 71.

33. Until commencement of the Seven Year's War, the duties on sugar, molasses and rum imported from the French Indies had been left largely unenforced. Lasson, *supra* note 27, at 52. After the commencement of the war with France, the British sought to discourage that trade by demanding enforcement of various restrictive duties, primarily the Sugar Acts, 6 Geo. 2, c. 13 (1732); 4 Geo. 3, c. 15 (1763). But attempts at enforcement were substantially defeated by resistance in the colonies, much of which sprang from the exercise of inquisitorial powers by the customs officers. Judgments of forfeiture were infrequent in the common-law courts. McCLELLAN, SMUGGLING IN THE COLONIES 60 (1912). And even when a judgment of forfeiture might issue from a vice-admiralty court, the customs officers were discouraged from performing their duties by the willingness of the common-law juries to render verdicts in trespass against customs officers who utilized their power of entry. BEER, BRITISH COLONIAL POLICY, 1754-1765, at 120 (1907). The vice-admiralty courts, on which the crown relied to enforce the acts, were also amenable to the local temperament: "[D]efects were revealed in the system of vice-admiralty courts. Some of these courts were strongly influenced by local feeling and refused to condemn vessels for trading with the enemy." BEER, *op. cit. supra* at 126.

The typical penalties which the crown sought to enforce for violation of the customs laws are illustrated by those provided for in the Sugar Acts *supra*. The Act of 1732 provided for forfeiture of goods landed without registration for payment of duty. Anyone found to have assisted the smuggler by transporting goods or receiving them for storage was to forfeit three times the value of the goods transported or received; and the master of the transporting ship was subject to a forfeiture of up to one hundred pounds. In addition, a provision similar to the ordinance in *Frank* required that for resistance to the customs collector, there should be a forfeiture of up to fifty pounds. The Sugar Bill of 1763, 4 Geo. 3, c. 15, made the customs regulations somewhat more stringent (*e.g.*, master required to give bond when transporting goods between colonial ports) and added to the list of forfeitures: (1) the vessel in which contraband goods were transported; (2) a monetary forfeiture of three times the value of any unreported, concealed goods found aboard ship after filing of the customs report, to be paid by the master.

As discussed in note 29, these penalties are not in character with the criminal penalties of that day. And although the one hundred pound forfeiture might approach a "criminal" penalty in severity if not in form, the principal penalty relied upon was probably seizure and forfeiture, a rather ineffective sanction according to McCLELLAN, *supra*, and BEER, *supra*. Not only did the courts render unlikely the infliction of any penalty except possibly seizure and forfeiture of the contraband

argument in *Paxton's Case*<sup>34</sup> against the issuance of writs of assistance to the collector of customs indicates that the colonists feared arbitrary and wanton exercise of governmental authority, whether in "criminal" or "civil" cases.<sup>35</sup> When the advocates of the Bill of Rights argued for adoption of its constitutional safeguards, they did not distinguish between searches for "civil" and "criminal" evidence. Rather, they illustrated the dangers of arbitrary search with examples drawn from their own experience with the "civil" inspections of customs officers.<sup>36</sup>

In *Frank*, the Court cited *Boyd v. United States*<sup>37</sup> and *Entick v. Carrington*<sup>38</sup> to support the proposition that the prohibitions of the fourth amendment were developed as a protection against searches for criminal evidence, and therefore have no application to civil searches.<sup>39</sup> In *Boyd*, the Court held that where certain severe penalties imposed by customs laws "in substance" converted a civil pro-

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goods, but subsequent to the Stamp Act Riot of 1765, rescue parties rendered even the few attempted seizures unsuccessful. See Lasson, *supra* note 27, at 68. Even if the forfeitures had been criminal penalties in form, the "law in action" was so different from the "law on the books" that it is inconceivable that those colonists subjected to search felt themselves threatened by criminal penalties. Thus, in both form and substance, the circumstances which gave rise to the later demand for constitutional protections from unreasonable search involved essentially "civil" enforcement.

34. QUINCY'S MASSACHUSETTS REPORTS, 1761-1772, at 469-77 (1865).

35. Otis illustrated with the following example the consequences of giving arbitrary powers of search to petty officials:

Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the sabbath-day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, Yes. Well, then, said Mr. Ware, I will show you a little of my power. I command you to permit me to search your house for uncustomed goods; and went on to search the house from the garret to the cellar; and then served the constable in the same manner!

Account of Otis' argument in *Paxton's Case*. TUDOR, LIFE OF JAMES OTIS 67 (1823).

Otis further explained the scope of the protection which the law should afford: "Otis. This Writ is against the fundamental Principles of Law.—The Privilege of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle—notwithstanding all his debts, & civil processes of any Kind." Account of Otis' argument in *Paxton's Case*, QUINCY'S MASSACHUSETTS REPORTS, 1761-1772, at 471 (1865). (Emphasis added.)

36. Lasson quoted from Patrick Henry's speech to the Virginia adoptive convention: "Excisemen may come in multitudes. . . . They may . . . search and ransack and measure everything you eat, drink, or wear." Lasson, *supra* note 27, at 93. He also noted that James Madison used the example of the revenue officer in arguing for the adoption of the fourth amendment. *Id.* at 99.

37. 116 U.S. 616 (1886).

38. 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765).

39. 359 U.S. 365. *Boyd* has occasionally been cited for this proposition. See *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932). But generally such references are in connection with the assertion in *Boyd* that the provisions of the fourth amendment have no application to civil attachments for debt, seizures by customs agents, etc.—all in a context which, as discussed in note 51 *infra*, may well have assumed preliminary discretionary action by a judicial officer. See *Carroll v. United States*, 267 U.S. 132, 151 (1925); *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965 (1895).

ceeding into a criminal case, a court order compelling production of a document violated the fourth and fifth amendments. Proceeding on a questionable theory of interrelationship between the two amendments,<sup>40</sup> the *Boyd* Court held that the fourth amendment was violated because the production order was the "equivalent" of an unreasonable search, since it required the accused to give evidence against himself in a criminal case.<sup>41</sup> In *Frank*, Mr. Justice Frankfurter reasoned that *Boyd* merely applied the rationale of *Entick* in holding that the fifth amendment (applicable only to criminal cases<sup>42</sup>) "throws light" on the types of searches prohibited by the fourth amendment.<sup>43</sup> Since *Entick* and *Boyd* explained the rationale of the protections incorporated in the fourth amendment in the context of a "criminal" case, Mr. Justice Frankfurter concluded that the fourth amendment must apply *only* to criminal cases.<sup>44</sup>

The rationale of *Entick*, revealed in the lines quoted by Mr. Justice Frankfurter,<sup>45</sup> does not compel his conclusion that the protections

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40. Many subsequent decisions have ignored the interrelationship. In *Wilson v. United States*, 221 U.S. 361 (1911), where a subpoena duces tecum required production of evidence by the officers of a corporation in a criminal proceeding (grand jury) against them, the Court ignored the "light" which the fifth amendment throws on the fourth, and held that such compelled production of incriminating evidence was not an "unreasonable search and seizure." *Cf. Davis v. United States*, 328 U.S. 582 (1946).

To the extent that the purpose of the fifth amendment's prohibition of testimonial compulsion is to discourage reliance upon "less dependable admissions . . . obtained as a result of compulsory interrogation" and thereby "stimulate the police and prosecutor into a search for the most dependable evidence procurable by their own exertions," INBAU, SELF-INCRIMINATION 7 (1950), the fourth amendment, by protecting privacy from the "exertions" of police and prosecutor, at the cost of "the most dependable evidence," would seem to *conflict* with the fifth.

41. The concept of "constructive" search and seizure, which originated with *Boyd v. United States*, relied upon the theory that an order to produce evidence (usually documentary) was the "equivalent" of an actual search and seizure. In *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924), the Court avoided the question of the constitutionality of the subpoena duces tecum, but noted that it could not have been the intent of Congress under § 9 of the Federal Trade Commission Act to authorize the use of the subpoena power except where limited to reasonable demands for papers of shown materiality. The reliance of the dissent in *Frank*, at 359 U.S. 375-76, upon the strong implications of *American Tobacco* ignores *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the effect of which is firmly stated by Professor Davis to be that "objections under the Fourth Amendment to a subpoena duces tecum are answered by the simple observation that such a subpoena involves 'no question of actual search and seizure.'" 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 3.05, at 181 (1958).

42. "No person . . . shall be compelled in any *criminal case* to be a witness against himself." U.S. CONST. amend. V. (Emphasis added.)

43. 359 U.S. at 364-65. Although the opinion purports to find it unnecessary "to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments . . .", it nevertheless adopts the language of *Boyd*, which expresses that interrelationship, as illustrative of a "background" from which "emerges" a constitutional protection limited in scope to searches for criminal evidence. *Id.* at 365.

44. *Ibid.*

45. *Id.* at 364-65.

of the fourth amendment apply only to searches for *criminal* evidence:

the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.<sup>46</sup>

A neutral and more reasonable interpretation of these lines is that the relationship between the constitutional prohibitions of the fourth and fifth amendments may be found in the fact that arbitrary conduct by government officers may result in coerced self-incrimination or invasion of privacy, consequences which may fall equally on both the innocent and the guilty. But since the relationship is limited to the fact that both innocent and guilty may share those consequences,<sup>47</sup> the Court in *Frank* would have been free to conclude that the interest protected by the privilege against self-incrimination is freedom from testimonial compulsion,<sup>48</sup> while the interest protected by the privilege against unreasonable searches and seizures is the privacy of the home<sup>49</sup> — whether “civil” or “criminal” evidence be the object

46. 19 Howell's State Trials, col. 1029, 1073 (1765).

47. When Chief Justice Pratt said that “the innocent would be *confounded* with the guilty” (emphasis added), he was not particularly concerned with the possibility that the innocent may ultimately be found guilty as a result of the “evidence” extracted, but rather with the probability that innocent persons may be made to suffer the consequences of the “necessary means of compelling self-accusation” and search of private homes, *i.e.*, arbitrary action by government officers. See MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY 561 (2d ed. 1947): *con-found'* . . . 1. *Archaic.* a To bring to ruin or naught . . . discomfit. . . .”

48. “[I]t is the employment of the legal process to extract from the person's own lips an admission of his guilt . . . .” 4 WIGMORE, EVIDENCE § 2263, at 863 (2d ed. 1923).

49. The statement that the fourth amendment protects the privacy of the home has been made in some form in virtually every important search and seizure case. See, *e.g.*, *McDonald v. United States*, 335 U.S. 451, 453 (1948); *Agnello v. United States*, 269 U.S. 20, 32 (1925).

Some writers have contended that the ultimate interest protected by the prohibitions of both the fourth and the fifth amendments is personal privacy. See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 17 (1925): “[B]oth are based upon the idea that the government's authority to infringe upon personal privacy should be limited. . . . The [fourth amendment] is ostensibly to protect physical privacy; and the [fifth amendment] the privacy of one's knowledge.” But even Atkinson, in setting forth this relationship between the amendments, recognized that unreasonable search may involve an invasion of privacy more difficult to control than compelled self-incrimination; and the basis of that recognition admits of no distinction between “civil” and “criminal” searches:

The Fourth Amendment is generally a limitation upon enforcement officers, and the privilege against self-incrimination is a limitation upon prosecutors and trial courts. . . . [U]nreasonable search presents a much stronger case for the exclusion of evidence [because] . . . the search cannot be so effectively restrained, for it is ordinarily conducted by petty, free-lance officials, away from the eye of the court.

*Id.* at 17.

of search.<sup>50</sup> The fact that the prohibited evils of invasion of privacy and testimonial compulsion may, as in *Boyd*, be compounded by compelled production of documents should not obscure the fact that both *Boyd* and *Entick* tend, if anything, to support the view that the fourth amendment requires a warrant for both "criminal" and "civil" searches. Both cases suggest that even where the state has a strong interest in utilizing a power of search, and where search is only conducted pursuant to a judicially issued warrant, the *reasonableness* of that search will *nevertheless* be subjected to close constitutional scrutiny.<sup>51</sup> That approach has been so embodied in our

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50. Logical support for Mr. Justice Frankfurter's reasoning might be found in the fact that in *Boyd* it would have been unnecessary for the court to find "the substance" of a criminal proceeding if search and seizure in a civil proceeding was unconstitutional. This theory ignores the basic weakness of the holding that the compelled production of documents constitutes a "search" within the meaning of the fourth amendment, discussed in note 41 *supra*. In order to bolster its holding that the compelled production of documents was compelled self-incrimination within the meaning of the fifth amendment, it was necessary for the Court to argue that arbitrary search and seizure was among the forms of self-incrimination prohibited. Similarly, the Court bolstered its holding that compelled production of documents was the "equivalent" of an *unreasonable* search by relying on the "unreasonableness" of compelled self-incrimination inherent in the order to produce documents. And for the prohibition against self-incrimination to be applicable, it was necessary to determine that the civil proceeding was "in substance a criminal case." See Atkinson, *supra* note 49, at 15: "The holding in the prevailing opinion of the *Boyd* case that the Fourth Amendment was violated, as well as the Fifth, was probably not necessary for the decision of the case."

51. *Entick* actually went much further, for dictum in that case emphasized that the basis on which the court denied the power of search granted by general warrants was, that with the exception of searches for stolen goods, the law forbade *all* searches as unreasonable, regardless of limitations or checks which might be imposed upon them:

The case of searching for stolen goods crept into the law by imperceptible practice. . . .

Observe too the caution with which the law proceeds in this singular case. . . .

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks . . . my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

19 Howell's State Trials at col. 1067 (1865).

*Entick's* approach was modified in the United States to allow search on the authority of a properly issued warrant in cases where a great public interest was at stake. See *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841); *Sandford v. Nichols*, 13 Mass. 285 (1816); *Bell v. Clapp*, 10 Johns. R. 263 (N.Y. Sup. Ct. 1813). And in *Robinson v. Richardson*, 79 Mass. (13 Gray) 454, 457 (1859), the court said of searches *pursuant to warrant*:

Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted . . . . But their legality has long been considered to be established on the ground of public necessity, because without them felons and other malefactors would escape detection. . . . [T]he adoption of the 14th Article of the Declaration of Rights [state prohibition of unreasonable searches] . . . was . . . certainly not [intended] so to vary, extend, and enlarge the purposes for and occasions on which they might be used, or to make them

law that until the instant case, it would have been difficult to imagine a civil case so important that intrusion upon privacy, without warrant, could withstand the test of reasonableness.<sup>52</sup> The dissenters in *Frank* perceptively pinpointed the essence of the traditional approach by observing that while estimates of the reasonableness of particular kinds of searches may differ, depending upon the objective of the search—for example, evidence of narcotics violation, murder, subversion, fire hazards—“the public interest in protecting privacy is equally as great in one case as in another.”<sup>53</sup>

The United States Supreme Court and the high courts of the several states have recognized each state's special responsibility for protecting the health of its citizens.<sup>54</sup> These courts have consistently

legal and available in the course, or for the maintenance of [private] civil proceedings.

Thus, the question in each case was *not* whether there could be search *without* a warrant, but rather, whether *even with* a judicially issued warrant, a particular power of search was unreasonable and constitutionally prohibited.

These questions became particularly difficult where the courts dealt, under the revenue laws, with orders to produce documents or with powers of search, because the courts recognized the strong national interest in an efficient investigative procedure. *Stockwell v. United States*, 23 Fed. Cas. 116 (No. 13,466) (D. Me. 1870), was the leading case cited by *Boyd*, at 635, 636. There it was urged that the power to authorize warrants was limited to criminal cases, and it is apparent that the Court, in an action for debt for recovery of duties and penalties, felt compelled to find a “criminal” element in the action *before it could justify a search pursuant to a warrant*.

*Boyd v. United States*, 116 U.S. 616 (1886), involved the same question. There too, the “search” involved in the order to produce documents was subjected to a constitutional test *despite* the fact that the order, the “equivalent” of the warrant in cases of actual search, was only to be issued at the judge's “discretion.” ACT TO AMEND THE CUSTOMS REVENUE LAWS, AND TO REPEAL MOIETIES, § 5, 18 Stat. 186 (1874), cited in *Boyd v. United States*, *supra*, at 619–20. It is clear that that limitation required the test of “probable cause” to be met. See 2 CONG. REC. 4681–82 & 4817 (1874) (remarks of Senators Wright and Conkling).

52. A few of the “revenue cases” before *Boyd* relied on the fact that actions enforcing customs regulations were “civil” and that search in such cases was not “unreasonable.” But these cases, too, arose where a *judicial warrant had been issued*; only in that context was the “reasonableness” of the search determined by its civil purpose. See *In re Platt*, 19 Fed. Cas. 815 (No. 11, 212) (S.D.N.Y. 1874), and *In re Meador*, 16 Fed. Cas. 1294 (No. 9, 375) (D.C.N.D. Ga. 1869).

A search warrant was also found to be reasonable because it was for a “civil” rather than for a “criminal” search, in *Camden County Beverage Co. v. Blair*, 46 F.2d 648 (D.N.J. 1930). But most of the authority cited in support of that holding, when read in context, emphasized the use of *warrants* in criminal cases as a means of showing the reasonableness of the particular search. And two of the cases, *People v. Kempner*, 208 N.Y. 16, 101 N.E. 794 (1913), and *Newberry v. Carpenter*, 107 Mich. 567, 65 N.W. 530 (1895), *reject* the propriety of issuing search warrants where the warrants may interfere with the rights of the parties in *civil* actions.

53. 359 U.S. at 382.

54. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Kimmish v. Ball*, 129 U.S. 217 (1889); *Nelson v. City of Minneapolis*, 112 Minn. 16, 127 N.W. 445 (1910); *accord*, *Queenside Hills Co. v. Saxl*, 328 U.S. 80 (1946); *St. Louis Consol. Coal Co. v.*



expanded the scope of constitutionally reasonable<sup>55</sup> or necessary<sup>56</sup> exercises of police powers in response to new developments in medical knowledge or techniques.<sup>57</sup> However, in only a few reported cases has the power of inspection without warrant come into open conflict with an individual's right to privacy.<sup>58</sup> This fact seems to

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Illinois, 185 U.S. 203 (1902). *Cf.* District of Columbia v. Brooke, 214 U.S. 138 (1909); Mugler v. Kansas, 123 U.S. 623 (1887); Patterson v. Kentucky, 97 U.S. 501 (1878); Hurst v. Warner, 102 Mich. 238, 60 N.W. 440 (1894). See Annot. 47 Am. St. Rep. 544 (1894). See generally, HEMENWAY, LEGAL PRINCIPLES OF PUBLIC HEALTH ADMINISTRATION 168-83 (1914).

55. Most constitutional challenges to public health ordinances have been directed at protection of property interests. See generally, Annot., 47 Am. St. Rep. 544 (1894); HEMENWAY, *op. cit. supra* note 54. If the protection against arbitrary search and seizure is to be liberally construed, these cases affirming the broad powers of the states in the area of public health need not be controlling. *Go-Bart v. United States*, 282 U.S. 344, 357 (1931). *But see In re Groban*, 352 U.S. 330 (1957); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right*, 25 IND. L.J. 259 (1950).

56. Many early cases upholding broad exercises of the police power were based on the law of "necessity." *Cf.* *People v. Robertson*, 302 Ill. 422, 432-33, 134 N.E. 815, 819 (1922). But as early as 1894, some observers were beginning to recognize that more modern techniques of preventive medicine required less interference with the liberty of the individual: "These personal rights of liberty and property suffer less from encroachment in the quarantine laws and practice of most recent establishment, conditioned upon the enlightened views of sanitary science and experience . . ." PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 114-15 (1894).

57. Delegation of broad regulatory powers to local health boards: *Lieberman v. Van De Carr*, 199 U.S. 552 (1905); *City of Cedar Rapids v. Holcomb*, 68 Iowa 107, 26 N.W. 33 (1885); *Board of Health v. Heister*, 37 N.Y. 661, 6 Trans. App. 170 (1868); *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658 (1909). *But see People v. Board of Educ.*, 234 Ill. 422, 84 N.E. 1046 (1908); *Gregory v. City of New York*, 40 N.Y. 273 (1869). *But cf.* *Hurst v. Warner*, 102 Mich. 239, 60 N.W. 440 (1894).

Delegation of special powers during attacks of dangerous communicable diseases: *People v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922); *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900). *But. cf.* *Hurst v. Warner*, 102 Mich. 239, 60 N.W. 440 (1894).

"Taking" of private property: *Mugler v. Kansas*, 123 U.S. 623 (1887); *Nelson v. City of Minneapolis*, 112 Minn. 16, 127 N.W. 445 (1910).

Interference with contract rights: *Guillotte v. City of New Orleans*, 12 La. 432 (1857).

Interference with other property interests: *Queenside Hills Co. v. Saxl*, 328 U.S. 80 (1946); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203 (1902); *Patterson v. Kentucky*, 97 U.S. 501 (1878); *City of Salem v. Eastern R.R.*, 98 Mass. 431, 96 Am. Dec. 650 (1868).

Deprivation of (state) constitutionally protected rights to public-supported education: *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *cf.* *Zucht v. King*, 260 U.S. 174 (1922).

Compelled submission to quarantine: *People v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922).

Compelled submission to vaccination: *Jacobson v. Massachusetts*, 197 U.S. 11 (1904); *cf.* *Zucht v. King*, 260 U.S. 174 (1922).

58. Health officer's powers of inspection were held *not* to be illegal powers of search in two early cases, distinguishable from *Frank* on their facts: *Hubbell v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910) (inspection of hotel for compliance with

support Mr. Justice Frankfurter's assertion in *Frank* that, after being acceptance, these powers of inspection are "hardly to be deemed to violate due process."<sup>59</sup> But the early inspection practices cited in support of that reasoning are only of slight relevance, since they dealt primarily with problems arising outside the privacy of the

sanitary and fire regulations); *Commonwealth v. Carter*, 132 Mass. 12 (1882) (inspection of milk-delivery wagon). Both cases involved inspections of commercial operations holding out services to the public, a fact that must limit their authority, in view of the frequent holding that licensing of commercial establishments may be conditioned on granting a right of inspection. *Safee v. City of Buffalo*, 204 App. Div. 561, 198 N.Y.S. 646 (1923). Cf. *Zap v. United States*, 328 U.S. 624 (1946); *State v. Nelson*, 66 Minn. 166, 68 N.W. 1066 (1896); *Pasco v. State*, 195 Wis. 348, 218 N.W. 365 (1928).

Four other recent cases have dealt with substantially the same issues raised by *Frank*:

(1) *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956), affirmed a conviction and \$50.00 fine for refusing entry to a team of inspectors including representatives from the Commissioner of Health, the Building Inspection Engineer, and the Chief Engineer of the Fire Department, despite defendant's contention that the powers of entry asserted were repugnant to article twenty-six of the Maryland Declaration of Rights and the fourteenth amendment of the Constitution of the United States. The court held that these protections were intended to apply only to searches for evidence of crime.

(2) *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), reversed a municipal court conviction for "interference" with a health inspection of defendant's home, and held that the protection against unreasonable searches precluded health officials from inspecting a private home without a warrant; the United States Supreme Court avoided the constitutional issue and affirmed on the ground that refusing entry was not the kind of "interference" proscribed by the regulation in question.

(3) *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *prob. juris. noted*, 360 U.S. 246 (1959), held that inspection under an ordinance similar to the one in *Frank*, *supra* note 3, was not so unreasonable as to violate the search and seizure provision of the state constitution, and rejected summarily defendant's claim of protection under the fourth amendment. Thus, the question which was left unanswered when the Court affirmed *Little*, and was apparently answered in *Frank*, is now to be argued again on appeal in *Eaton*. The substantially heavier penalties which may be imposed under the city ordinance in question in *Eaton* might be some grounds for the dissenters in *Frank*, who cast the only votes for noting jurisdiction over *Eaton*, to believe that the ruling in the *Frank* case can be limited. It is also possible that they may have noted jurisdiction in *Eaton* in order to maintain undiminished some of the effect of *Wolf v. Colorado*, 338 U.S. 25 (1949), by rebutting the Ohio Court's summary rejection of the defendant's claim under the fourth amendment.

(4) The most recent case to raise the constitutional issue is *St. Louis v. Claspil*, City Court of St. Louis, First Division (April 29, 1959), summarized in advance sheets to 327 S.W.2d, *Judicial Highlights*, p. 2. That court dismissed a complaint filed by a building inspector pursuant to the St. Louis, Missouri, Building Code which provides a right of entry "at any time it is necessary in his opinion to enter any structure or portion thereof," and held the attempted inspection "unreasonable" because it was at night (9 p.m.), there was no urgency, and it was for the enforcement of a minor regulation.

See also *Perry v. City of Birmingham*, 38 Ala. App. 460, 88 So. 2d 573 (1956), where a state statute requiring officers to obtain a warrant before searching for evidence of violation of liquor laws was held inapplicable to the enforcement of municipal liquor ordinances.

59. 359 U.S. at 371.

home.<sup>60</sup> More relevant to due process, and properly considered by the Court, is the current, nationwide adoption of health inspection programs,<sup>61</sup> indicating a legislative judgment that such programs are an effective and constitutional method of meeting the health menace inherent in large urban centers.<sup>62</sup> Nevertheless, the type of inspection power to be granted is a constitutional question which the Court must determine by balancing the constitutional importance of *unrestricted*<sup>63</sup> entry for health inspectors against a *liberal* application of the principles of the fourth amendment.<sup>64</sup>

60. Relatively few of the "thousands upon thousands" of inspections made by officials of the Baltimore Health Department in the latter half of the nineteenth century, cited by the *Frank* Court, 359 U.S. at 370, to support the contention that home inspection is a "time honored procedure," were actually inspections conducted *within* a private home. The inspectors were primarily concerned with removing the dangers resulting from the overflow of organic wastes from household drainage, cesspools, and privy-wells. See HOWARD, PUBLIC HEALTH ADMINISTRATION AND THE NATURAL HISTORY OF DISEASE IN BALTIMORE, MARYLAND 121-22, 140-46 (1924).

Most of the early inspection statutes cited by the *Frank* Court are only remotely relevant to inspection of the interior of a private home: inspections of goods stored in ships or community warehouses and intended for public consumption, and entry on the curtilage or open fields for laying sewers or repairing roads are comparatively insignificant invasions of privacy.

But even if these inspection practices had been relevant, the constitutional importance to be attached to their "long acceptance" should be tempered by Cooley's realistic evaluation of the impact of developing social institutions on the Constitution: "[A] power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against. . . ." COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 71 (1st ed. 1868).

Mr. Justice Frankfurter's argument based on "long acceptance" may be qualified in yet another way if the practice of Minneapolis and St. Paul health inspectors is typical of that in other cities. The inspectors normally make no attempt to enforce by legal action the right of entry granted them by city ordinance. Rather, they try to obtain the co-operation of homeowners by maintaining good public relations and relying on persuasion or ignoring an occasional refusal of entry. Interview with Director of Housing Inspection, Minneapolis, Minn. Health Department, in Minneapolis Sept. 24, 1959; interview with Health Sanitarian, St. Paul, Minn. Health Department, in St. Paul Oct. 16, 1959.

61. A survey published in 1953 shows that by provision of law, regulation, or commonly accepted practice, every state in the union has empowered local health officers or boards of health to make sanitary investigations and inspections. U.S. PUBLIC HEALTH SERVICE, STATE LAWS GOVERNING LOCAL HEALTH DEPARTMENTS, table A-2, pp. 8-14 (1953). This, of course, does not mean that every city has a paid sanitary inspector, or that the powers of all sanitary inspectors are sanctioned by penalties for refusal of entry.

62. See generally Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 545 (1959); Note, *Municipal Housing Codes*, 69 HARV. L. REV. 115 (1956).

63. Note 70 *infra* and accompanying text makes clear that the practical effect of the holding in *Frank* is to give health inspectors an *unrestricted* right of entry, because the only substantial restrictions must be self-imposed.

64. Starting with *Boyd v. United States*, 116 U.S. 616 (1886), there have been frequent judicial admonitions that the fourth amendment is to be liberally construed. See *Go-Bart v. United States*, 282 U.S. 344 (1931); *cf. Trupiano v. United States*, 334 U.S. 699 (1948). Despite an occasional lapse, *Olmstead v. United States*

In the balancing process, the Court in *Frank* should have considered the fact that upholding the constitutional protection against unreasonable searches would not disable municipalities from administering their inspection programs, but would merely require inspectors to secure a warrant where entry is refused.<sup>65</sup> The Court did not attempt to support its contention that health inspections would be "greatly hobbled" by the admittedly small number of persons likely to invoke their constitutional privilege.<sup>66</sup> Rather, it seems to have reasoned that the systematic, area-by-area inspections, which are the best preventive measures might be rendered ineffective by the inability of inspectors to support an application for a warrant by a showing of probable cause. It is questionable whether failure to inspect the homes of the few persons likely to assert their right of privacy poses much of a threat to the community.<sup>67</sup> But

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States, 277 U.S. 438 (1928), this admonition has been heeded. *Weeks v. United States*, 232 U.S. 383 (1914) significantly expanded the realm of protected privacy; *Wolf v. Colorado*, 338 U.S. 25 (1949), at least opened the question of federal supervision of state action. The *Frank* case qualifies that protection with a vague and possibly dangerous precedent which ignores Mr. Justice Brandeis' reminder that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Olmstead v. United States*, *supra* at 473 (dissent).

65. See Mr. Justice Jackson's concurrence in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949), where he developed the thesis that the Court may properly interfere more freely with state regulatory measures in enforcing the equal protection clause than in applying the due process clause. He reasoned that invalidation of a state enactment under the former provision does not disable the state in its attempt to regulate, but requires only that the subject of regulation be defined more inclusively. Like the equal protection clause, the due process clause *applied to this situation* would "not disable any governmental body from dealing with the subject at hand." See notes 66 & 67 *infra*.

66. 359 U.S. at 372.

The initial reaction of the Director of Housing Inspection, Minneapolis Health Department, to the suggestion that health inspectors should be required, where resistance is encountered, to obtain search warrants in order to carry out their duties was concern over the difficulty, inconvenience, and expense involved in taking time to obtain a warrant. When asked whether such a requirement would, as a result of that delay, pose a serious threat to community health, his reply dealt with emergency situations which would not be within the constitutional limitation. Interview, note 60 *supra*.

St. Paul, Minn. health inspectors felt that such a requirement would impose no significant burden on their inspection program. Interview, note 60 *supra*.

Mr. Justice Frankfurter's observation that "these inspections are apparently welcomed by all but an insignificant few," 359 U.S. at 372, was borne out in substance by the estimate of the Director of Housing Inspection, Minneapolis Health Department. He sought to emphasize the inconvenience which might result from requiring housing inspectors to obtain warrants where entry is resisted, by predicting that the incidence of such resistance might rise from less than 1% to as high as 10% of all houses inspected. Interview, note 60 *supra*. St. Paul, Minn. health inspectors encounter no significant resistance when requesting entry, and would expect little change if they were required to obtain a warrant upon meeting resistance. Interview, note 60 *supra*.

67. The Director of Housing Inspection, Minneapolis Health Department, stated that the "ideal" municipal inspection program would include both scheduled, repetitive, area-by-area inspections and a system for responding to specific complaints.

even conceding the probability that inspection would be less effective, only a very serious threat to community health—a problem scarcely discussed by the Court—could justify compromise with the principle that the need for each intrusion must be proved by the intruder.<sup>68</sup>

The Court also relied on the fact that the Baltimore health inspector must have cause to suspect a nuisance before demanding entry, as an additional indication of "reasonableness."<sup>69</sup> But practically speaking, the enforcement officer will determine for himself whether a reasonable cause for invasion of privacy exists;<sup>70</sup> and the

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But he also stated that Minneapolis is one of relatively few cities which have been able to progress beyond the "specific complaint" stage. Interview, note 60 *supra*. If this is an accurate appraisal of the present development of inspection systems, there was even less reason for the Court to be concerned. Inspectors responding to specific complaints should generally have enough information available to support an application for a warrant.

Assuming that incomplete inspection does pose some substantial danger to the community, at least two alternatives to the strict requirement of probable cause are suggested by the dissent in *Frank* as a possible means of resolving the conflict between public health and privacy, while still preserving the restraining check of the judiciary on the arbitrary exercise of authority by government officers: (1) It may be possible to provide that for the purpose of regular, area-by-area inspections, the passage of a certain period of time between inspections may be a sufficient showing of need, where there is some correlation between the period chosen and experience with urban deterioration. (2) The evidence necessary to support an inference of probable cause need not necessarily meet the test required to support application for a warrant to search for criminal evidence. 359 U.S. at 383. Thus, "slight evidence" of rat infestation might be regarded as sufficient grounds for a warrant in circumstances similar to that in *Frank*; that is, where there is some independent reason to suspect the presence of rats in the vicinity.

In either case, the *discretionary act* is taken out of the hands of the enforcement officer and entrusted to a magistrate.

68. See, e.g., *Jones v. United States*, 357 U.S. 493, 498 (1958); *Hart v. United States*, 162 F.2d 74, 76 (10th Cir. 1947).

69. See note 7 *supra*.

70. It might properly be argued that the health inspector's power to "determine for himself whether reasonable cause for invasion of privacy exists" is not substantially different from the same prerogative which every enforcement officer has of determining for himself, in a particular situation, whether he must have a warrant before proceeding to search. It is true that in both cases, the basis for the asserted "reasonable" or "probable" cause may be judicially examined where challenged after the search. But where the inspector *need never* obtain a warrant in order to effectuate his search, the "reasonableness" of the cause on which he proceeds will be subjected to judicial scrutiny only where the victim resists and subjects himself to the risks of criminal prosecution, or attempts to assert a dubious cause of action in trespass.

The real protection of privacy in the requirement that the "probable cause" justifying a search must be judicially approved is to be found in its effect upon the daily practice of the enforcement officer. The police officer knows that the probable cause which will support a warrant will not necessarily justify him in searching without a warrant, except where the need for an immediate search is urgent. *McDonald v. United States*, 335 U.S. 451, 454 (1948). The health inspector, however, is assured that he need never obtain a warrant.

The protection provided by a warrant may frequently be insubstantial, due to judicial abdication of the responsibility for *independent evaluation* of probable

enforcement officer's duty to be "reasonable" is not the protection required by the fourth amendment. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, *not* by a policeman or *government enforcement agent*."<sup>71</sup>

It is often claimed that in an expanding welfare state the loss of individuality and independence of spirit poses a serious threat to the democratic ideal.<sup>72</sup> One way in which that threat may be diminished is to preserve the security and privacy of the home from unmerited invasion by administrative officers of the state, by requiring adherence to the traditional procedural safeguard of a warrant for every search, issued upon a magistrate's independent evaluation of probable cause.

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cause. Through Professor Yale Kamisar of the University of Minnesota Law School, the writer of this comment has had access to the unpublished report of the American Bar Foundation pilot project on the administration of criminal justice in the United States. The field reports and other data contained therein support this observation, as do the conclusions drawn from these materials by Professor Fred E. Inbau of the Northwestern University Law School. See also DASH, KNOWLTON & SCHWARTZ, *THE EAVESDROPPERS* 45-46, 67 (1959). But inept administration of the constitutional protections of the fourth amendment is hardly a justification for further dissipating its requirements.

71. *Johnson v. United States*, 333 U.S. 10, 14 (1948). (Emphasis added.)

72. Cf. Foreword to HAYEK, *THE ROAD TO SERFDOM* xiv (1944):

[T]he most important change which extensive government control produces is a psychological change, an alteration in the character of the people. . . . [E]ven a strong tradition of political liberty is no safeguard if the danger is precisely that new institutions and policies will gradually undermine and destroy that spirit.

The threat and exercise of government control through inspections by health officials is different only in form from the extensive economic controls which concerned Hayek. The relatively less intense supervision which inheres in court protection of privacy from such inspections is the better constitutional choice.