

December 1993

## Clean Sweep or Witch Hunt: Constitutional Issues in Chicago's Public Housing Sweeps

David E.B. Smith

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

David E. Smith, *Clean Sweep or Witch Hunt: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 Chi.-Kent L. Rev. 505 (1993).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol69/iss2/12>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# CLEAN SWEEP OR WITCH HUNT?: CONSTITUTIONAL ISSUES IN CHICAGO'S PUBLIC HOUSING SWEEPS

DAVID E.B. SMITH\*

## INTRODUCTION

Describing life in America's public housing projects as "hell"<sup>1</sup> or "Beirut U.S.A."<sup>2</sup> trivializes a desperately tragic situation.<sup>3</sup> Random gunfire and violent death are part of each child's education. Mothers struggle to feed their children on the meager proceeds from welfare checks or low-paying jobs. Alcohol and drug use and the associated crime flourish. The buildings themselves crumble and decay from years of neglect and bureaucratic ineptitude. Those who can escape do, leaving behind in their wake an increasingly disadvantaged and deprived underclass.<sup>4</sup> The projects are increasingly seen as some "other America," isolated from and feared by the rest of the nation.

In 1988 the Chicago Housing Authority ("CHA" or "Authority") instituted a new program<sup>5</sup> intended to regain control of Chicago's

\* I am grateful to Professor David Thomas for his encouragement and patience during the development of this Note. The editorial contributions of J. Russell McFarlane and Kathleen J. Getty were invaluable: thanks to Rusty for disbelieving all my arguments and encouraging me to convince you, and thanks to Kathy for having the patience and initiative that I lacked. The 1992-93 staff and editors of the *Chicago-Kent Law Review* will never adequately receive the honor they deserve for their perseverance in the face of an overwhelming task. I will always be inspired by their dedication and grateful for their accomplishments in turning adversity into success. For their leadership and for the camaraderie we shared, I extend special praise to my fellow board members: Steve, Lesa, Ana, Shawn, Mary, and Mark. But most of all, thanks to Sally for her immeasurable tolerance, infinite patience, and unwavering support over the past four years.

1. Camilo C. Vergara, *Hell in a Very Tall Place; Conditions in New York City Public Housing Projects*, THE ATLANTIC, Sept. 1989, at 72. But see Zay N. Smith, *In a World of Death, Kids Sing About 'Living in Hell'*, CHI. SUN-TIMES, Oct. 18, 1992, at 29 (describing Cabrini-Green children's song "Living Here Is Like Living In Hell").

2. Thomas Moore et al., *Dead Zones*, U.S. NEWS & WORLD REP., Apr. 10, 1989, at 20.

3. For a moving account of two boys struggling to grow up in Chicago's Henry Horner Homes, see ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991). For a historical and sociological account of movement from Mississippi sharecropping farms to Chicago ghettos, including the Robert Taylor Homes, see NICHOLAS LEMANN, *THE PROMISED LAND* (1991).

4. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987), for a candid and nongonomic exploration of the social trauma of the inner city.

5. The idea, however, is not so new. In the 1960s, welfare officials conducted mass nighttime or early morning raids on the homes of welfare recipients in hopes of discovering an unauthorized "man in the house." See Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); see also *Parrish v. Civil Serv. Comm'n*, 425 P.2d 223 (Cal. 1967) (social worker seeking reinstatement after being discharged for refusing to participate in "Operation Bedcheck" raids).

public housing projects from the drug dealers and gangs who had come to control them. Under "Operation Clean Sweep," CHA officials and Chicago police officers would cordon off a target building, restricting access to a single entrance. Teams of officials and police would conduct door-to-door searches through apartments, seeking out evidence of drug trafficking and removing unauthorized residents. Unsafe and unsanitary building conditions would be noted and repair teams dispatched. Residents would be issued identification cards, which would thereafter be necessary to pass the guards posted round-the-clock in the lobby to screen and restrict visitors.

The "sweeps" quickly entered the vocabulary and the consciousness of the city. Tales of thankful residents praising the CHA for doing something to improve the projects fought for space in the newspapers with horror stories of abuses<sup>6</sup> perpetrated during the sweeps. After the American Civil Liberties Union ("ACLU") filed suit<sup>7</sup> against the CHA, the police department, and the city on behalf of aggrieved residents, the CHA cut back on some of the more aggressive "paramilitary" tactics as part of a consent decree.<sup>8</sup>

The program, meanwhile, had garnered national attention. Jack Kemp, the former Secretary of Housing and Urban Development, praised the CHA's efforts as a model for other cities. Sweep programs were considered or instituted in Atlanta,<sup>9</sup> Baltimore,<sup>10</sup> Boston,

6. Some alleged abuses arising out of the sweeps have not made the papers. In *Herring v. Chicago Housing Authority*, No. 90-C-3797 (N.D. Ill., amended complaint filed Dec. 6, 1990), a resident claims the CHA evicted her in retaliation for holding a meeting to organize a protest of the sweep program, that the CHA, in its eviction notice, termed "aiding and conducting a subversive meeting against C.H.A." Exhibit B, Plaintiff's First Amended Complaint, *Herring* (No. 90-L-3797). The complaint also alleges that two CHA managers told Mrs. Herring that she was "in trouble . . . for signing in communists" and that "CHA tenants are not allowed to protest against CHA." *Id.* at 5.

Another suit against the CHA is tangentially related to the sweeps. In *Turner v. Chicago Housing Authority*, No. 89-C-5801, 1990 WL 104113 (N.D. Ill. July 3, 1990), the plaintiffs were challenging a CHA policy of evicting residents from public housing because of crimes committed outside the apartment by relatives who do not live with them. The Turners claim that, during the pendency of the case, the CHA searched their apartment as part of a purported sweep. The magistrate found that the search had, in fact, been in retaliation for the filing of the suit, and ordered the CHA to give four days written notice to the Turners before entering other than in a bona fide emergency. *Turner v. Chicago Housing Authority*, No. 89-C-5801, 1990 WL 104113 (N.D. Ill. July 3, 1990).

7. *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill. Dec. 16, 1988).

8. Neal R. Peirce, *Putting Public Housing in Social Order*, WASH. POST, June 8, 1991, at F3.

9. In Atlanta, police set up roadblocks at the entrances to public housing projects and stopped all persons entering or leaving. Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, § 1, at 1.

10. USA TODAY, Oct. 11, 1990, at 6A.

Newark, Philadelphia,<sup>11</sup> Nashville, Detroit, Seattle, Des Moines,<sup>12</sup> Annapolis, and Marquette, Michigan.<sup>13</sup>

For three years the CHA sweeps continued irregularly, substantially within the terms of the consent decree. In October of 1992, the killing of a seven-year-old boy on his way to school at Cabrini-Green<sup>14</sup> shocked the city. In response, the CHA reinstated an even more aggressive sweep program, reigniting the litigation between the CHA and the ACLU<sup>15</sup> and again raising the issue of the legitimacy of the sweeps.

The CHA admits that some of the sweep tactics are illegal.<sup>16</sup> However, the legitimacy of Operation Clean Sweep has not been litigated beyond the District Court.<sup>17</sup> This Note, therefore, examines the question of whether these sweeps are constitutionally permissible. In doing so, this Note explores a broader issue of the extent to which the choice of theoretical framework determines the answer to this question, and attempts to predict how the Supreme Court would use its own precedents to determine the constitutionality of public housing sweeps.

Part I describes the manner in which the CHA has conducted these sweeps and the litigation which has arisen from it. Part II presents two conflicting methods of analysis, both of which fit the facts of the sweeps, but would likely result in opposite outcomes. Part II A describes a line of reasoning based on the concept of the traditional protections afforded to the home. Part II B describes a contrasting line of reasoning based on the concept of the sweep as an administrative search program. Part III applies each of these models to the facts of the sweep program and predicts the likely outcome. Part III A demonstrates that under the "home" model, the sweep pro-

11. *Proposal to "Seal Off" Projects is Part of a National Trend*, BALTIMORE SUN, Jan. 16, 1991, at 6.

12. Gwen Ifill, *Kemp Quarterbacks a Drug Fight*, WASH. POST, Mar. 22, 1989, at A17.

13. See *Proposal to "Seal Off" Projects is Part of a National Trend*, *supra* note 11.

14. Matthew Nickerson, *Fatal Walk to School*, CHI. TRIB., Oct. 14, 1992, § 1, at 1.

15. See *Motion to Modify Consent Decree*, *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill. Oct. 30, 1992) [hereinafter *Motion to Modify Consent Decree*]; Plaintiff's Motion for Rule to Show Cause Why Defendants CHA, Lane, Rodriguez and City of Chicago Should not be Held in Contempt for Noncompliance with Consent Decree, *Summeries* (No. 88-C-10566) (N.D. Ill. Nov. 25, 1992) [hereinafter *Motion to Show Cause*].

16. Maudlyne Ihejirika, *CHA Sweep Illegal, Cops Admit*, CHI. SUN-TIMES, Aug. 19, 1993, at 1.

17. As this Note was going to press, U.S. District Court Judge Wayne Andersen issued a temporary restraining order prohibiting the CHA from searching a tenant's apartment without either consent or probable cause to believe that a crime has occurred. Matt O'Connor, *Judge Blocks CHA Sweeps for Weapons*, CHI. TRIB., Feb. 15, 1994, § 2, at 1.

gram is clearly constitutionally impermissible. Part III B demonstrates that the "administrative" model requires a more involved analysis, allowing the motivation of the court to influence the outcome in either direction. Finally, Part IV concludes with suggestions for a sweep program which either viewpoint would find constitutionally acceptable while rendering the assistance that residents of public housing so desperately need.

## I. THE SWEEP PROGRAM

The CHA first executed "Operation Clean Sweep" on September 20, 1988.<sup>18</sup> As the sweeps were initially performed, CHA officials and Chicago police, in unannounced,<sup>19</sup> mid-morning<sup>20</sup> raids, would barricade the building.<sup>21</sup> Residents who tried to leave were threatened with arrest.<sup>22</sup> Residents who were allowed to enter were subjected to searches of their persons and parcels.<sup>23</sup> Other residents were forbidden entrance for lack of identification.<sup>24</sup>

Meanwhile, CHA officials and Chicago police would go door-to-door through the building.<sup>25</sup> The officials, lacking warrants, entered apartments without consent<sup>26</sup> to search for drugs, guns, and unauthorized residents.<sup>27</sup> The scope of the searches included looking through closets and shoeboxes,<sup>28</sup> under couch cushions, and in the freezer.<sup>29</sup> In one instance, a resident alleged that the officials picked the lock on her bedroom door to gain entry and search through the clothing in her dresser drawers.<sup>30</sup>

18. Jorge Casuso, *Sweeps Returning Hope to CHA Residents*, CHI. TRIB., Sept. 17, 1989, § 2, at 1.

19. Diane Geraghty, *CHA's Sweep Searches Went Too Far*, CHI. TRIB., Jan. 4, 1989, § 4 (Perspective), at 14.

20. See 7 *Arrested in Sweep at Cabrini*, CHI. TRIB., Dec. 7, 1988, § 2, at 13.

21. Ronald Henkoff, *Can Business Save Public Housing?*, FORTUNE, Nov. 20, 1989, at 121.

22. Plaintiff's Complaint at 10, *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill. Dec. 16, 1988).

23. *Id.* at 10, 14.

24. See *id.* at 10-11 (plaintiff's daughter, arriving home after school, was forced to remain outside in Chicago winter conditions).

25. Henkoff, *supra* note 21, at 122.

26. See Plaintiff's Complaint at 12, *Summeries* (No. 88-C-10566).

27. Sheri T. Prasso, *Housing Boss Squeezing Thugs out of Projects*, L.A. TIMES, Aug. 27, 1989, § 1, at 4.

28. Plaintiff's Complaint at 12, *Summeries* (No. 88-C-10566).

29. *Id.* at 13.

30. *Id.* at 13-14. According to the Plaintiff's Complaint, the resident locked her bedroom door "to keep her children out and to keep her cat out and maintain her privacy." *Id.* at 13.

After a building was swept, residents were issued identification cards to allow them entry to their homes.<sup>31</sup> Guards were posted in the lobby to maintain twenty-four hour access control.<sup>32</sup> A new visitation policy was instituted, requiring residents to go to the lobby of the building to sign in visitors, who were themselves required to present photographic identification.<sup>33</sup> Under the policy, no visitors were allowed to remain in the building after midnight.<sup>34</sup> In one instance, a resident who normally babysat while her sister worked was forced to remove the children from the building at midnight.<sup>35</sup>

As might be expected, the ACLU filed a suit challenging these policies on behalf of the tenants.<sup>36</sup> A consent decree was subsequently entered into by the ACLU, the CHA, and the City of Chicago.<sup>37</sup> As part of the decree, a less restrictive visitation policy<sup>38</sup> and more restrictive guidelines for the conduct of sweeps<sup>39</sup> were implemented by the CHA.

#### A. Visitation Policy

Under the Visitation Policy, residents are allowed to have visitors at any hour.<sup>40</sup> Visitors are required to identify themselves to the lobby guards and sign in, but they need not prove their identity.<sup>41</sup> If a resident notifies the lobby guard in advance of the name and estimated arrival time of a visitor, that visitor is to be admitted immediately.<sup>42</sup> If a visitor is unexpected, the lobby guard is to notify the resident "as

31. Peirce, *supra* note 8, at F3.

32. Henkoff, *supra* note 21, at 122.

33. Plaintiff's Complaint at 12, *Summeries* (No. 88-C-10566).

34. *Id.* at 11.

35. *Id.* at 12-13.

36. *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill. Dec. 16, 1988); *see also* Geraghty, *supra* note 19.

37. Consent Decree, *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill. ordered Nov. 30, 1989) [hereinafter Consent Decree]. For a discussion of the legal significance of consent decrees, see generally Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1. For a recent Supreme Court decision affecting the modifiability of consent decrees, see *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992).

38. Appendix A (Visitation Policy) to Consent Decree, *Summeries* (No. 88-C-10566) [hereinafter Visitation Policy].

39. Appendix B (Chicago Housing Authority Emergency Housing Inspection Guidelines) to Consent Decree, *Summeries* (No. 88-C-10566) [hereinafter Inspection Guidelines].

40. Visitation Policy, *supra* note 38, at 3.

41. The Visitation Policy states: "The guest upon entry to a CHA building will identify himself to CHA personnel. While CHA personnel may request that a guest provide independent verification (by printed I.D. or otherwise) of the guest's identity, no guest shall be required to provide independent verification of their identity." Visitation Policy, *supra* note 38, at 1 (emphasis added).

42. *Id.*

promptly as possible"<sup>43</sup> of the visitor's identity, and to admit the visitor upon confirmation from the tenant.<sup>44</sup> Visitors who stay longer than twenty-four hours are, at the request of the tenant, to be issued "Guest" cards, allowing free entry and exit.<sup>45</sup>

### B. Inspection Guidelines

The Inspection Guidelines characterize the sweep as an "emergency housing inspection."<sup>46</sup> The avowed purposes of inspections under the guidelines are to "remove and identify unauthorized occupants"<sup>47</sup> and to "inspect the condition of the units."<sup>48</sup>

A sweep is triggered by "reasonable cause to believe that there is an immediate threat to the safety and/or welfare of tenants and/or employees and/or business invitees and/or property of the CHA."<sup>49</sup> This determination is to be made, in writing, by the Chief Executive Officer of the CHA.<sup>50</sup> Under the terms of the Inspection Guidelines and the standard lease, no prior notice is required before a sweep is conducted.<sup>51</sup> However, the CHA is required to set up an "operations center"<sup>52</sup> on the grounds of the building being swept, complete with heating, cooling, and toilet facilities.<sup>53</sup>

The Inspection Guidelines direct CHA staff to conduct a structural inspection of the apartment.<sup>54</sup> This inspection is directed at ob-

43. *Id.*

44. *Id.* As part of the policy, the CHA is required to use its "best efforts" to provide a mechanism for prompt communication with residents. *Id.* at 1-2.

45. *Id.* at 2-3. Visitors are allowed to stay up to two weeks, *id.* at 3; the Visitation Policy does not specify how visitors for longer periods are to be handled.

46. Inspection Guidelines, *supra* note 39, at 1.

47. *Id.*

48. *Id.*

49. *Id.* This may be a description of everyday life in the projects.

50. *Id.* At the time of the consent decree, the CEO of the CHA was Vince Lane. *Id.*

51. The Inspection Guidelines specify "[N]othing in these guidelines shall modify the tenants' right to appropriate notice as set forth in Paragraph 12(a) [of the CHA lease]." Inspection Guidelines, *supra* note 39, at 1. The CHA lease at that time stated

12. (a) Management shall, upon reasonable advance notification to the Tenant, be permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvements or repairs, or to show the premises for re-leasing. A written statement specifying the purpose of the Management entry delivered to the premises at least two days before such entry shall be considered reasonable advance notification. (b) Management may enter the premises at any time without advance notification when there is a reasonable cause to believe that an emergency exists.

Exhibit A in Appendix B of Consent Decree, *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill., ordered Nov. 30, 1989) [hereinafter CHA Lease]. Since a sweep is categorized as an "emergency inspection," ¶ 12(b) would appear to apply and no notice would be required.

52. Inspection Guidelines, *supra* note 39, at 2.

53. *Id.*

54. *Id.* at 6.

serving the "condition of floors, ceilings, walls, electrical wiring, heating sources, windows, window frames, doors, locks, and equipment and/or appliances of the CHA"<sup>55</sup> and detecting "unsafe, hazardous or unsanitary conditions."<sup>56</sup> During this process, the CHA staff is instructed "not to in any way inspect or in any way harm or injure . . . the person or personal effects of any individual"<sup>57</sup> unless necessary to perform the inspection.<sup>58</sup>

Non-residents<sup>59</sup> discovered in an apartment with a tenant during a sweep are allowed to stay upon request by the tenant and upon the visitor identifying himself or herself to CHA staff.<sup>60</sup> Non-residents found in apartments where no tenant is present, or in common areas, are removed to the operations center.<sup>61</sup> There, they may be processed as a visitor or may request to be added to the lease.<sup>62</sup>

During a sweep, Chicago police personnel are not allowed to enter apartments or conduct searches "in the absence of independent legal justification."<sup>63</sup> They may be present at the site to provide police protection for the staff.<sup>64</sup> However, the terms of the Inspection Guidelines do not forbid CHA police personnel, who have full police powers, from participating in a sweep.<sup>65</sup> Furthermore, the Inspection Guidelines expressly allow "reporting [by CHA staff of] what appears to be a violation of the law, or any unlawful or criminal activity"<sup>66</sup> discovered during the sweep.

55. *Id.* at 6-7.

56. *Id.* at 7.

57. *Id.*

58. *Id.* The Inspection Guidelines, in apparent response to the charges in the original complaint, further specifies "CHA staff may not examine the personal property of CHA tenants or their guests, or the contents of such property, including: bureau or dresser drawers; closets; bed clothes; clothing; boxes; or other containers, or the like." *Id.*

59. Excepting babysitters and their charges or "ill or infirm" persons, *id.* at 3, unless "exigent circumstances" exist. *Id.*

60. *Id.* at 3-4. As with the Visitation Policy, no verification of identity is required. See Visitation Policy, *supra* note 38, at 1.

61. Inspection Guidelines, *supra* note 39, at 3, 8. The non-resident may alternately leave the premises entirely. *Id.* at 3.

62. *Id.* at 4.

63. *Id.* at 9.

64. *Id.* at 8.

65. See *id.* at 8-9. Between the time of the initial sweeps and the agreement to the consent decree, the Illinois Legislature granted to the CHA the authority to "establish, appoint and support a police force." See An Act relating to Housing Authorities, No. 86-457 (1988 Ill. Laws 2802-04) (codified at 310 ILL. COMP. STAT. § 10/8.1a (1993)). Members of such a police force have the same powers, including arrest powers, as the members of city and county police and sheriff's departments. *Id.* Since the consent decree, the CHA has indeed created its own force, which is not covered by the Inspection Guidelines exclusion of Chicago police personnel. See Inspection Guidelines, *supra* note 39, at 8-9; William Recktenwald, 2 *Are Charged, 1 Sought in Slaying of CHA Cop*, CHI. TRIB., Sept. 9, 1991, § 1, at 8.

66. Inspection Guidelines, *supra* note 39, at 9.



### C. Modifications to the Decree

On October 13, 1992, seven-year-old Dantrell Davis was walking to school in the Cabrini-Green project. A few feet from the school door, in view of his mother, his classmates, his teachers, and Chicago police officers, he was killed by a single rifle shot to the head.<sup>67</sup>

The murder of Dantrell Davis shocked the city. In response, the CHA mounted the most concentrated sweep since the creation of the program. CHA police and inspectors, Chicago police, and agents of the FBI, DEA, and Bureau of Alcohol, Tobacco and Firearms searched apartments, vacant and occupied, for guns and drugs.<sup>68</sup> The chairman of the CHA suggested calling in the National Guard as reinforcements.<sup>69</sup> All residents leaving the building were subjected to pat-down searches.<sup>70</sup> The CHA began removing residents from some of the high-rise buildings in preparation for vacating and sealing the buildings.<sup>71</sup> After ten days, the CHA had swept twenty-nine of thirty-one buildings at Cabrini, closing and sealing four of them, arresting forty-four persons, and seizing four firearms.<sup>72</sup>

The CHA also moved to expand the scope of the sweep program by seeking a modification of the consent decree.<sup>73</sup> The consent decree permitted the CHA to require that visitors to CHA buildings sign in prior to admittance.<sup>74</sup> The CHA sought to expand this authority to require these visitors to provide photographic identification.<sup>75</sup> The CHA also sought authority to install metal detectors at the entrance of each building and to require all persons, residents and visitors alike, to pass through the detectors prior to admittance.<sup>76</sup>

More disturbingly, the CHA sought expansive powers directly implicating the text of the Fourth Amendment. The CHA asked for

67. Nickerson, *supra* note 14.

68. Scott Fornek & Tom Seible, *Cabrini Sweep Under Way*, CHI. SUN-TIMES, Oct. 21, 1992, at 4; Jennifer Lenhart, *Cabrini Cleanup Begins*, CHI. TRIB., Oct. 21, 1992, at 4.

69. See Scott Fornek & Fran Spielman, *Send National Guard to Cabrini, Lane Says*, CHI. SUN-TIMES, Oct. 16, 1992, at 5.

70. *Sweep Continues at Cabrini*, CHI. SUN-TIMES, Oct. 22, 1992, at 1.

71. *Mayor Presents CHA Peace Plan*, CHI. SUN-TIMES, Oct. 20, 1992, at 1; Lenhart, *supra* note 68, at 4.

72. See Tom Seibel & Fran Spielman, *Truce, Cabrini Sweeps Open Way for Optimism*, CHI. SUN-TIMES, Oct. 30, 1992, at 26. Neither Dantrell Davis' killer nor the gun used were found in the sweeps; the suspect in the crime, who confessed after his arrest, was located after CHA residents identified him to police. See Tim Gerber, *Suspect Confessed, Police Say*, CHI. SUN-TIMES, Oct. 15, 1992, at 5.

73. See Motion to Modify Consent Decree, *supra* note 15.

74. Visitation Policy, *supra* note 38, at 1.

75. Motion to Modify Consent Decree, *supra* note 15, at 4.

76. *Id.*

the power to conduct searches, "including physical pat-down searches," without cause, of any visitors entering any CHA building.<sup>77</sup> Further, whereas the consent decree restricted apartment searches to visual inspections of unoccupied units,<sup>78</sup> the CHA sought the power to search occupied units as well.<sup>79</sup> Moreover, such searches would not be limited to mere visual inspections, but would extend to searches of any persons in those occupied units and their personal effects.<sup>80</sup>

In response to the intensity of the sweeps at Cabrini-Green, the ACLU sought to have the CHA declared in contempt of court for violating the consent decree.<sup>81</sup> The ACLU's motion documented instances in which the CHA had already implemented the sweep procedures that the CHA was seeking to have added to its powers under the consent decree. According to the ACLU's motion, the CHA was already requiring visitors to produce photographic identification<sup>82</sup> and residents to pass through metal detectors.<sup>83</sup> Moreover, CHA police were already conducting pat-down searches of residents and visitors<sup>84</sup> and searching personal effects and apartments.<sup>85</sup>

At the time of the writing of this Note, the litigation between the CHA and the ACLU continues. Meanwhile, the CHA continues to sweep its buildings,<sup>86</sup> and the debate over the legitimacy of the program continues.<sup>87</sup>

## II. CHOOSING A LEGAL PARADIGM<sup>88</sup>

The legality of the CHA sweep program is an issue that illustrates a conflict between two distinct lines of thought in Fourth Amendment

77. *Id.*

78. See Inspection Guidelines, *supra* note 39, at 6.

79. Motion to Modify Consent Decree, *supra* note 15, at 5.

80. *Id.*

81. Motion to Show Cause, *supra* note 15.

82. *Id.* at 11-12.

83. *Id.* at 7.

84. One resident was searched seven times and another nine times in one day. *Id.* at 4. Male officers conducted pat-down searches of female tenants. *Id.* at 4-5. CHA police searched children ranging in age from two months to six years old. *Id.* at 5-6; *The Jerry Springer Show* (WMAQ-TV television broadcast, Nov. 3, 1992).

85. CHA police searched grocery bags, handbags, diaper bags, and baby strollers. Motion to Show Cause, *supra* note 15, at 7. They also searched dresser drawers, closets and in one instance a locked bedroom. *Id.* at 7.

86. See *Cleaning the Apartments*, CHI. TRIB., Jan. 7, 1993, § 2, at 3.

87. See *Ihejirika*, *supra* note 16.

88. In the sense used in THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970), a paradigm is "a constellation of subtle institutions and beliefs surrounding any dominating example of successful scientific research." David Warsh, *From 'NP' to 'PC': Understanding the Structure of Differing World Views*, CHI. TRIB., Dec. 30, 1990, at 7D. Similarly, a legal paradigm would be the institutions and beliefs surrounding a dominating

jurisprudence. On the one hand, a public housing apartment is much like any private apartment. From this viewpoint (the "Home Paradigm"), the legality of the sweep program would be analyzed by studying the series of Supreme Court decisions involving searches of the home.<sup>89</sup> On the other hand, the sweep program is similar to administrative search programs which have engendered an entirely different line of Supreme Court decisions (the "Administrative Reasonableness Paradigm").<sup>90</sup> Two recent cases, decided the same year by the same Court, illustrate how the choice of analytic model<sup>91</sup> establishes the direction taken by the Court's reasoning, and thus effectively determines the outcome. In *Minnesota v. Olson*,<sup>92</sup> a suspect in a robbery-murder was traced to the apartment of a girlfriend, where he had been staying. Police entered the apartment without a warrant and arrested Olson. The Court, in a 7-2 decision, held the arrest to be illegal<sup>93</sup> and therefore suppressed a confession made to the arresting officers.<sup>94</sup> Following the Home Paradigm, the Court grounded the outcome in the determination that Olson's status as an overnight guest gave him an expectation of privacy, as in one's own home, that society was prepared to recognize as reasonable. Thus, under the Home Paradigm, the importance given the protection of the home from illegal intrusion forced the Court to allow an admittedly guilty defendant to escape by shielding himself behind the Fourth Amendment.<sup>95</sup>

In contrast, the Court followed the Administrative Reasonableness Paradigm in *Michigan Department of State Police v. Sitz*.<sup>96</sup> *Sitz*

example of legal analysis. See Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989), for a paradigmatic study of currents of constitutional thought. For a popular use (or misuse) of the concept, see, for example, Lance Morrow, *Old Paradigm, New Paradigm*, TIME, Jan. 14, 1991, at 65.

89. See *infra* notes 99-119 and accompanying text.

90. See *infra* notes 128-211 and accompanying text.

91. Cf. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Packer presents two contrasting value systems, Due Process Values and Crime Control Values, which illustrate conflicting trends in criminal law. *Id.* at 9-22. The "Home Paradigm" seems to encompass many of the Due Process Values, while the "Administrative Reasonableness Paradigm" would be consistent with Crime Control Values.

92. 110 S. Ct. 1684 (1990).

93. See *id.* at 1684.

94. The Court forcefully suggested, by citing the companion case of *New York v. Harris*, 110 S. Ct. 1640 (1990), that *Minnesota* had missed an opportunity by not raising the issue of whether Olson's subsequent admissions were also tainted by the illegality of the arrest. *Olson*, 110 S. Ct. at 1684 n.2. In *Harris*, with virtually identical facts, the Court held that, while the exclusionary rule required suppression of admissions made by Harris in his home, the rule did not require suppression of statements by Harris at the police station, as the taint of the illegal in-home arrest dissipated once he was removed from his home. *Harris*, 110 S. Ct. at 1640.

95. *Olson*, 110 S. Ct. at 1686-88.

96. 110 S. Ct. 2481 (1990).

involved a sobriety checkpoint program where all cars, without any suspicion of wrongdoing, were stopped for investigation. Since the checkpoints were operated pursuant to guidelines on site selection and checkpoint operation, the Court held them (in a 6-3 decision) to be a "reasonable" method of dealing with the problem of detecting drunken drivers and to be consistent with the Fourth Amendment.<sup>97</sup> The existence of administrative guidelines was sufficient to make the roadblocks constitutionally acceptable, even though the burden fell equally without suspicion upon the population at large. Thus, under the Administrative Reasonableness Paradigm, the Court relied on procedural regularity to justify excluding the admittedly innocent majority of the public from the protection of the Fourth Amendment.<sup>98</sup>

### A. *The Home Paradigm*

Among the shrinking protections<sup>99</sup> granted by the Fourth Amendment,<sup>100</sup> the inviolability of the home has been uniquely protected by the Supreme Court.<sup>101</sup> The historical continuity<sup>102</sup> of this

97. See *id.* at 2484.

98. See Robert L. Misner, *Justifying Searches on the Basis of Equality of Treatment*, 82 J. CRIM. L. & CRIMINOLOGY 547 (1991), for a discussion of this increasing trend.

99. See, e.g., Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

100. The Fourth Amendment states:

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 persons or things to be seized.

U.S. CONST. amend. IV.

101. The language used by the Court in discussing the security of the home reveals little room for doubt as to the firmness of their stance: "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . ." *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

William Pitt, *quoted in United States v. Ross*, 456 U.S. 798, 822 n.31 (1982); *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980); *Frank v. Maryland*, 359 U.S. 360, 378 (1959) (Douglas, J., dissenting), *overruled by Camara v. Municipal Court*, 387 U.S. 523 (1967); *Miller v. United States*, 357 U.S. 301, 307 (1958).

102. See, e.g., *Minnesota v. Olson*, 110 S. Ct. 1684 (1990); *United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Chimel v. California*, 395 U.S. 752 (1969); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *Taylor v. United States*, 286 U.S. 1 (1932); *Agnello v. United States*, 269 U.S. 20, 32-33 (1925); *Boyd v. United States*, 116 U.S. 616 (1886). See also *Entick v. Carrington*, 19 Howell St. Tr. 1029, 95 Eng. Rep. 807 (1765).

legacy remains at the forefront of the conscience of the Court.<sup>103</sup> As the form of privacy<sup>104</sup> most jealously guarded against official intrusion, this protection is "implicit in 'the concept of ordered liberty'"<sup>105</sup> and a fundamental component of due process.<sup>106</sup>

The practical result of this tradition is that warrantless searches and seizures in the home are presumptively unreasonable.<sup>107</sup> Thus, the government has the burden of demonstrating that a search or seizure in the home, absent neutral judicial scrutiny, is reasonable.<sup>108</sup> A few carefully circumscribed exceptions have been carved from this rule: the doctrines of plain view,<sup>109</sup> hot pursuit,<sup>110</sup> exigent circumstances,<sup>111</sup> and general emergency.<sup>112</sup> The Court has generally been unwilling to expand these categories,<sup>113</sup> thus reflecting a view that the right to the privacy of the home is nearly unconditional.<sup>114</sup>

103. The [Fourth] Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. . . . [T]he Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."

Oliver v. United States, 466 U.S. 170, 178 (1984) (quoting Payton v. New York, 445 U.S. 573, 601 (1980)).

104. As stated in *Katz v. United States*, "the Fourth Amendment protects people, not places." 389 U.S. 347, 351 (1967). It is the social and psychological aspects of "home-ness" which are protected. See *Minnesota v. Olson*, 110 S. Ct. 1684 (1984). Cf. Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (linking personhood with the idea of the home); Margaret Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 358-365 (1986) (use of property as a home is better justification for special protection than whether owned or rented).

105. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

106. See *id.* at 27-28.

107. *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (Scalia, J.).

108. See *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *United States v. Aquino*, 836 F.2d 1268, 1271 (10th Cir. 1988) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)). But cf. *Jones v. Lewis*, 874 F.2d 1125, 1134 (6th Cir. 1989) (in civil rights action claiming warrantless search was unreasonable, plaintiff bears burden of proving prima facie case).

109. See *Washington v. Chrisman*, 455 U.S. 1, 8-9 (1982).

110. See *United States v. Santana*, 427 U.S. 38, 42-43 (1976); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

111. See *Mincey v. Arizona*, 437 U.S. 385 (1978) (distinguishing police need to respond to gunfire from police need to subsequently investigate the crime).

112. The classic "emergency" situation is the entry of firemen to extinguish a fire. See *Michigan v. Clifford*, 464 U.S. 287 (1984) (boarding up house after fire reestablished expectation of privacy).

113. Unlike the Administrative Reasonableness Paradigm. See *infra* notes 128-211 and accompanying text.

114. Such protections have been categorized as absolute constraints on the pursuit of social utility, or alternately, as Kantian as opposed to utilitarian. See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* (rev. ed. 1990).

Furthermore, the Court has shown a willingness to expand the protections afforded the home to areas used in a similar fashion.<sup>115</sup> Thus, the Fourth Amendment protection of the home has been granted to hotel and motel rooms,<sup>116</sup> rented dwellings,<sup>117</sup> rooming houses,<sup>118</sup> and overnight guest lodgings.<sup>119</sup>

Searches of the person also have been traditionally regarded as presumptively unreasonable.<sup>120</sup> Outside of the custodial arrest situation,<sup>121</sup> the police may stop a person for questioning only if the officer has individualized, reasonable suspicion that the person is engaged in criminal activity.<sup>122</sup> Only if the officer has a reasonable belief that the suspect is "armed and presently dangerous" may the officer search the suspect, and then only to determine if in fact the person is armed.<sup>123</sup> The officer may remove from the person of the suspect only objects which are obviously (to the officer's "plain feel") weapons or contraband.<sup>124</sup>

### B. *The Administrative Reasonableness Paradigm*

In contrast to the near-absolute protection granted to the home, the Court's administrative search jurisprudence has been more a direction than a doctrine.<sup>125</sup> While it is easy to predict what the Court

115. Thus demonstrating that it is not the physical, but the psychological place, that is protected. *See supra* note 104.

116. *E.g.*, *Stoner v. California*, 376 U.S. 483 (1964); *Johnson v. United States*, 333 U.S. 10, 17 (1948).

117. *E.g.*, *Clinton v. Virginia*, 377 U.S. 158 (1964); *Chapman v. United States*, 365 U.S. 610, 613 (1961).

118. *E.g.*, *McDonald v. United States*, 335 U.S. 451 (1948).

119. *Minnesota v. Olson*, 110 S. Ct. 1684 (1990). The Court has apparently drawn the line at motor homes. *See California v. Carney*, 471 U.S. 386 (1986).

120. *See Minnesota v. Dickerson*, 113 S. Ct. 2130, 2139-40 (1993) (Scalia, J., concurring).

121. *See, e.g.*, *Chimel v. California*, 395 U.S. 752 (1969).

122. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

123. *Id.* at 24.

124. *See Minnesota v. Dickerson*, 113 S. Ct. at 2136-37; *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

In a concurring opinion to *Dickerson*, Justice Scalia suggests that the common-law doctrine by which the intent of the Framers should be measured would hold that the suspicionless stop would be permissible, but that a warrantless search, absent an arrest, would not be permissible. *Dickerson*, 113 S. Ct. at 2140.

125. *See Stephen J. Schulhofer, On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 107.

will do in these cases,<sup>126</sup> it is not so easy to uncover the principles underlying their decisions.<sup>127</sup>

### 1. Birth of the Administrative Search Doctrine

The Administrative Reasonableness Paradigm began with the birth of the "administrative search" doctrine in *Camara v. Municipal Court*.<sup>128</sup> A San Francisco housing inspector, performing a routine annual inspection of an apartment building, was informed by the landlord that Camara was living in the rear of the building, in apparent violation of the building code. Camara refused to allow the building inspector to enter his apartment without a warrant. He was ultimately charged with a misdemeanor for interfering with the attempted inspection and arrested.<sup>129</sup>

The Supreme Court held that a warrant was required for administrative searches.<sup>130</sup> However, in rejecting Camara's argument that the standard for issuance of the warrant should be "probable cause," the Court created the so-called "administrative search" doctrine and laid the groundwork for the development of the lower "reasonableness" standard for Fourth Amendment intrusions.

The Court rejected the argument that the lack of suspicion of criminal behavior allowed a lower level of Fourth Amendment protection. As the Court put it, "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority."<sup>131</sup> The Court also rejected the City's argument that requiring that the inspection be performed "reasonabl[y]" provided a safeguard which eliminated the need for individualized review of the reasonableness of the inspector's decision to enter.<sup>132</sup>

Nevertheless, the Court recognized that a traditional "probable cause" standard would be unworkable in the building inspection situation. Given the hidden nature of building code violations, it would be

126. "The Court has upheld nearly all the administrative searches it has considered since 1980 and has often gone out of its way to contemplate standards even less restrictive than those that had been satisfied on the facts before it." *Id.*

127. *See id.* ("a Court fundamentally in disarray"). *Cf.* KARL LLEWELLYN, *THE BRAMBLE BUSH* 12 (2d ed. 1951) ("What these officials do about disputes is, to my mind, the law itself.").

128. 387 U.S. 523 (1967).

129. *Id.* at 527.

130. *Id.* at 540.

131. *Id.* at 530-31.

132. *Id.* at 532 n.10. *See id.* at 533 ("[B]road statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.").

virtually impossible for the government to discover them through traditional investigatory means.<sup>133</sup> Thus, in determining whether the Fourth Amendment intrusion of a building inspection would be “reasonable,” the Court set forth a balancing test: the need to search, made up of the public interest at stake and the necessity of the method involved, would be weighed against the invasion which the search entailed.<sup>134</sup> In the city-wide inspection situation of *Camara*, the public interest in ensuring compliance with building codes, combined with the government’s need to use the method of area inspections as the only effective means of enforcing the code,<sup>135</sup> could outweigh the private interest in avoiding the search and thus be “reasonable” under the Fourth Amendment.<sup>136</sup> The requirement for issuance of a warrant, therefore, was not “probable cause.” For an administrative inspection, a warrant could issue if “reasonable legislative or administrative standards for conducting an area inspection are satisfied *with respect to a particular dwelling*.”<sup>137</sup> This standard required no specific knowledge of the condition of the particular dwelling, but did require the presence of some reasonable, predetermined factors which would give rise to a suspicion that building code violations were likely to be present.<sup>138</sup> Thus, even under the lower standard of suspicion in *Camara*, some indication that the search would be reasonably likely to be productive was required.

Later administrative search cases eliminated the need for a warrant in certain circumscribed cases. In cases such as *United States v. Biswell*,<sup>139</sup> *Donovan v. Dewey*,<sup>140</sup> and *New York v. Burger*,<sup>141</sup> the Court created the closely-regulated industry exception to the requirement for administrative search warrants. Under the Court’s reasoning, choosing to participate in industries which are subject to “pervasive” regulation by the government provides an almost constructive notice of the possibility of random searches not based upon probable cause. In effect, the government and public interest in the conduct of participants in these industries is substantial enough to out-

133. *Id.* at 537.

134. *Id.*

135. *Id.*

136. *Id.* at 538.

137. *Id.* (emphasis added).

138. *Cf. Terry v. Ohio*, 392 U.S. 1 (1968) (justifying less-than-full-blown searches and seizures upon the presence of objective facts reasonably indicating the likelihood of a suspect’s being armed and dangerous).

139. 406 U.S. 311 (1972) (gun dealers).

140. 452 U.S. 594 (1981) (mining industry).

141. 482 U.S. 691 (1987) (auto dismantlers).



weigh the invasion of individual privacy. In other industries which were not "closely-regulated," however, the Court continued to uphold the requirement of a warrant.<sup>142</sup>

## 2. Special Needs to the Fore

The "watershed"<sup>143</sup> in the expansion of the administrative search doctrine, and the defining case in the Administrative Reasonableness Paradigm, was *New Jersey v. T.L.O.*<sup>144</sup> Before *T.L.O.*, administrative searches were categorized as special situations in which the general standard of probable cause could be relaxed. "Reasonableness" was merely the standard to be applied in those exceptional cases where probable cause was not appropriate for reasons of practicality or where constructive consent to intrusion was present. *T.L.O.* turned these standards inside out by defining "reasonableness," and not probable cause, as the general standard for justifying a Fourth Amendment intrusion.<sup>145</sup> Whereas "probable cause" required the probability of a violation to be established before permitting an intrusion, thus implying that government needs must overcome privacy interests, "reasonableness" gives government needs and privacy interests the same weight, balancing them to determine whether the intrusion was justified.<sup>146</sup> As an afterthought, the former requirement of "probable cause" was relegated to a mere special case of reasonableness.<sup>147</sup>

The standard of reasonableness set forth in *T.L.O.* was comprised of two factors.<sup>148</sup> The first factor was whether the action was "justified at its inception."<sup>149</sup> A search would be justified if there were "reasonable grounds" for suspecting that it would turn up evidence of a violation.<sup>150</sup> Thus, some suspicion of wrongdoing was still required. The second factor in "reasonableness" was whether the scope of the

142. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrant required for OSHA inspection due to absence of "long tradition of close government supervision").

143. Schulhofer, *supra* note 125, at 99.

144. 469 U.S. 325 (1985).

145. *Id.* at 337.

146. Schulhofer, *supra* note 125, at 100.

147. See *T.L.O.*, 469 U.S. at 340.

148. *Id.* at 341-42.

149. *Id.* at 342.

150. *Id.* The Court also laid the groundwork for future expansion of this justification by explicitly refusing to decide whether the suspicion of wrongdoing was required to be an individualized suspicion. *Id.* at 342 n.9.

search (e.g., the methodology employed) was "reasonably related" to the intrusion caused and the "nature of the infraction."<sup>151</sup>

Justice Blackmun's concurring opinion provided the catchphrase by which the Court subsequently bypassed the need for probable cause or warrants. Derived from the principle that administrative searches do not require probable cause because they do not implicate criminal liability,<sup>152</sup> the *T.L.O.* "special needs"<sup>153</sup> qualification, on its face, restricted the applicability of the "reasonableness" standard to situations other than traditional law enforcement. As used by the Court, however, the qualification expanded to include all Fourth Amendment invasions other than those directly related to traditional law enforcement procedures.<sup>154</sup>

*O'Connor v. Ortega*<sup>155</sup> continued in the direction indicated by *T.L.O.* In *Ortega*, however, the suspicion of wrongdoing was more nebulous than in *T.L.O.* *Ortega*, a psychiatrist employed by the government, was suspected of improprieties in his management of a hospital residency program. While he was on administrative leave, officials of the hospital searched his office and seized personal items. The Court remanded the case for a determination of the justification of the search and seizure.<sup>156</sup> The Court stated that if the intrusion had been for the purpose of securing state property against loss, it would have been justified.<sup>157</sup> Contrarily, if the search had been for the purpose of investigating Dr. Ortega, it would not have been justified.<sup>158</sup> Thus, Dr. Ortega's individual interest in the privacy of his desk, though bringing the search within the scope of Fourth Amendment protection, was counterbalanced and outweighed by the state interest in retrieving its property.

151. *Id.* at 342.

152. This principle is not entirely correct. The gun dealer in *Biswell* was convicted of dealing in sawed-off shotguns without the necessary license. See *Biswell*, 406 U.S. 311.

153. *Id.* at 351 (Blackmun, J., concurring). The Court's later use of this phrase is a distortion of Justice Blackmun's point. The entire sentence reads, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interest for that of the Framers." *Id.* (emphasis added). He further stated, "The Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case." *Id.* at 352.

154. On the Court's use of favorable doctrines to expand the scope of a rule, see John M. Junker, *The Structure of the Fourth Amendment: The Scope of Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1109, 1124 (1989).

155. 480 U.S. 709 (1987).

156. *Id.* at 728-29.

157. *Id.* at 728.

158. See *id.* at 727.

### 3. Administrative Search of the Home<sup>159</sup>

The Administrative Reasonableness Paradigm and the Home Paradigm came into conflict in *Griffin v. Wisconsin*;<sup>160</sup> the Administrative Reasonableness Paradigm narrowly won.<sup>161</sup> In *Griffin*, a Wisconsin regulation allowed probation officers to search the home of a probationer without a warrant if they had "reasonable grounds" to suspect the presence of contraband.<sup>162</sup> The supervisor of Griffin's probation officer received a tip that Griffin might have guns in his house. Acting on this information, the supervisor and other officials searched Griffin's apartment and found a handgun.<sup>163</sup>

The majority held that the "special needs" of probation outweighed the Fourth Amendment protections granted to the home;<sup>164</sup> the dissent argued that the protection of the home outweighed the needs of the probation system.<sup>165</sup>

159. A somewhat confusing pre-*T.L.O.* case involving the relationship between administrative needs and Fourth Amendment protections was *Wyman v. James*, 400 U.S. 309 (1971). In *James*, a recipient of Aid to Families with Dependent Children refused to allow a home visit by her caseworker, as required by state regulations. Mrs. James challenged the subsequent termination of her welfare benefits on the grounds that the home visit violated her rights under the Fourth Amendment. See Note, *The Supreme Court, 1970 Term—Warrantless Home Visits to Welfare Recipients*, 85 HARV. L. REV. 258, 259 (1971).

The Supreme Court, in Justice Blackmun's first opinion, held that the home visit was not a search within the meaning of the Fourth Amendment. *James*, 400 U.S. at 318. Furthermore, the Court held, even if the home visit were a search within the meaning of the Fourth Amendment, it was not an unreasonable search. *Id.* Still furthermore, even if the search was unreasonable, the Court held that Mrs. James had waived her right to object by accepting welfare benefits. See *id.* at 324.

As commentators have pointed out, *James* is an anomaly in Fourth Amendment jurisprudence. The situation in *James* cannot, in a principled manner, be distinguished from that of the long-standing precedent of *Camara*, in which a similar intrusion was held not to be permissible. See Robert A. Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1302-03 (1971). It has been suggested that *James* was an attempt to avoid examining the politically sensitive issue of the goals of the welfare system. See Note, *supra*, at 265. In any event, *James* has been little applied outside the welfare recipient-caseworker factual situation, and even proponents of public housing sweeps admit that *James* has little relevance to that situation. See Steven Yarosh, *Operation Clean Sweep: Is the Chicago Housing Authority "Sweeping" Away the Fourth Amendment*, 86 NW. U. L. REV. 1103, 1115 (1992).

160. 483 U.S. 868 (1987).

161. By a 5-4 decision. *Griffin*, 483 U.S. at 868.

162. *Id.* at 870.

163. *Id.* at 871.

164. *Id.* at 873.

165. *Id.* at 883-84 (Blackmun, J., dissenting). Justice Stevens' separate dissent (quoted here in its entirety) demonstrates the cognitive dissonance which occurs when diverging paradigms are applied to the same facts:

Mere speculation by a police officer that a probationer "may have had" contraband in his possession is not a constitutionally sufficient basis for a warrantless, nonconsensual search of a private home. I simply do not understand how five members of this Court can reach a contrary conclusion. Accordingly, I respectfully dissent.

*Id.* at 890 (Stevens, J., dissenting).

The majority based the reasonableness of the search entirely on the existence of a governing regulation.<sup>166</sup> The Court discussed the “special needs” of a probation system<sup>167</sup> to regulate the behavior of probationers, citing the “ongoing supervisory relationship,”<sup>168</sup> and concluded that the regulation fulfilled those needs and thus was valid.<sup>169</sup> Essentially, the regulatory nature of the probation system brought *Griffin* within the closely-regulated-industry line of cases.<sup>170</sup> As the dissent pointed out, however, the conduct of the officers in *Griffin* did not even meet the standards of reasonableness required by the regulation.<sup>171</sup>

#### 4. Elimination of Individualized Suspicion

The Court next eliminated the requirement of predicating searches upon individualized suspicion, allowing investigative techniques that intrude upon the Fourth Amendment interests of the law-abiding majority. In *Skinner v. Railway Labor Executives Ass'n*<sup>172</sup> and *National Treasury Employees Union v. Von Raab*,<sup>173</sup> the Court held that the government’s interest in detecting drug use among employees<sup>174</sup> justified urine testing programs that intruded upon the privacy of the admittedly innocent majority.

Both *Skinner* and *Von Raab* were challenges to programs requiring drug-screening tests for large groups of employees. In *Skinner*, railroad employees who were engaged in accidents involving violation of safety rules were tested; in *Von Raab*, all applicants for positions involving carrying firearms or handling “classified” materials were required to pass a drug-screening test. In both cases, the targeted employees challenged the testing programs as being without suspicion of wrongdoing by the subjects of the tests.

166. *See id.* at 873.

167. *Id.* at 873-75.

168. *Id.* at 879.

169. *Id.* at 875-76.

170. *See supra* notes 139-42 and accompanying text.

171. *Griffin*, 483 U.S. at 887-90 (Blackmun, J., dissenting). *See also id.* at 880 n.8 (“That the procedures followed . . . may have violated Wisconsin state regulations, is irrelevant to the case before us.”).

172. 489 U.S. 602 (1989).

173. 489 U.S. 656 (1989).

174. Justice Scalia, who joined with the majority in *Skinner*, dissented (joined by Justice Stevens, also switching sides) in *Von Raab*. In *Skinner*, there was a demonstrated connection between drug use by railroad employees and accidents. In *Von Raab*, there was no such demonstration of drug use or any harm arising from it. In Justice Scalia’s view, the program in *Von Raab* was merely symbolic, and that “the impairment of individual liberties cannot be the means of making a point.” *Von Raab*, 489 U.S. at 687 (Scalia, J., dissenting).

In both cases, the Court recognized that the tests were significant intrusions upon individual privacy. Furthermore, the Court recognized that one of the traditional requirements of probable cause, that there be particularized suspicion that the individual in question committed the suspected act, was absent. Nevertheless, the Court characterized both cases as "special needs" situations, thus setting the standard for scrutiny as "reasonableness." Under this standard, the Court held that the individual interest in privacy was outweighed by the government and public interests involved. In *Skinner*, the government interest was in maintaining railroad safety, while in *Von Raab* it was maintaining physically and morally "fit" personnel in the front lines of the drug war. Similarly, the public interest in *Skinner* and *Von Raab* was in avoiding the damage which could arguably be caused by an "impaired" person operating a train or carrying firearms, respectively.<sup>175</sup>

Thus, *Skinner* and *Von Raab*, taken together, make it easier to find administrative searches to be "reasonable." Even though a search of any particular person may turn up nothing—even if such a search is *likely* to turn up nothing—the search may be permissible if, in the aggregate, some search will turn up something. This greatly tips the balance against the individual; the Court is allowed to aggregate the government and public interests in the result of the search, yet does not aggregate the individual intrusions for purposes of comparison.

### 5. Expansion to Criminal Law Enforcement

In *Michigan Dep't of State Police v. Sitz*,<sup>176</sup> the Court extended the administrative search doctrine to a field that formerly had been placed off-limits,<sup>177</sup> by allowing suspicionless mass seizures for purposes of traditional criminal law enforcement.<sup>178</sup> *Sitz* upheld the constitutionality of random sobriety checkpoints.<sup>179</sup> At these

175. See *Von Raab*, 489 U.S. 656; *Skinner*, 489 U.S. 602.

176. 110 S. Ct. 2481 (1990).

177. See *Camara*, 387 U.S. at 534-35; *Skinner*, 489 U.S. at 651 (Marshall, J., dissenting); *Von Raab*, 489 U.S. at 664-66.

178. Sobriety roadblocks are set up for the purpose of detecting and arresting drunken drivers. *Sitz*, 110 S. Ct. at 2484. Such roadblocks are "non-traditional" only in the sense that they have only been instituted since the Burger-Rehnquist Court began easing restrictions on Fourth Amendment intrusions. See *Sitz*, 110 S. Ct. at 2483, 2491-92 (Michigan program started in 1986; other states' programs date from the early 1980s).

179. In light of the Court's continued contraction of Fourth Amendment protections, it is reasonable to assume that *Sitz* will be a "foot in the door" upon which future expansions of government intrusions will be found to be permissible. See Junker, *supra* note 154, at 1109; see, e.g., *United States v. Morales-Zamoran*, 914 F.2d 200 (10th Cir. 1990) (upholding the use of drug-sniffing dogs during routine license and registration checks on authority of *Sitz*).

checkpoints, all motorists travelling upon a selected road are stopped and checked for signs of intoxication. Motorists suspected of driving under the influence are pulled aside to be subjected to further testing; motorists not suspected of being intoxicated are allowed to proceed after a "brief stop."<sup>180</sup>

The Court based its analysis on a balancing test derived from *Brown v. Texas*.<sup>181</sup> In *Brown*, the permissibility of a suspicionless stop was evaluated by "weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."<sup>182</sup> The language of *Brown* implies that an evaluation of all three factors is necessary. As the Court applied the test in *Sitz*, however, the factors on the state's side are accepted without scrutiny. In *Sitz*, the permissibility of a traffic stop was based on the "state's interest in preventing accidents," the "effectiveness" of the method used to achieve that goal, and the intrusion into the individual's privacy.<sup>183</sup>

In *Sitz*, the Court exhibited difficulty in distinguishing the admittedly similar "state" and "public" interests,<sup>184</sup> thus perpetuating confusion that, in other circumstances, may lead to improperly balancing the relative interests at stake.<sup>185</sup> "Public interest" as used in *Sitz* involved the "choice among reasonable alternatives" of enforcement methods which government officials may make, based upon their "unique understanding of, and a responsibility for, limited public resources."<sup>186</sup> This interest is only indirectly a "public" interest, and is more properly described as a particularly "state" interest.

The outcome in *Sitz* was largely predicated upon a "public" interest that was described as a "state" interest: eliminating drunken driv-

180. *Sitz*, 110 S. Ct. at 2487.

181. 443 U.S. 47 (1979).

182. *Brown*, 443 U.S. at 51.

183. *Sitz*, 110 S. Ct. at 2484.

184. In an ideal republic, "government interest" and "public interest" would be synonymous. While it may be true that the government generally acts in the public interest (and vice versa), it would be stretching the bounds of credulity to believe that this is always (or never) the case. The congruence of these interests is especially questionable in cases of government action against a particular group, rather than an individual. Cf. *Lankford v. Gelston*, 364 F.2d 197, 203-04 (4th Cir. 1966) (ordering injunction against mass suspicionless searches confined to black neighborhoods); see also cases cited *infra* note 275.

185. Cf. *United States v. Richey*, 924 F.2d 857, 870 (9th Cir. 1991) (dissenting opinion):

While we must remain aware of the importance of the government's general interest in nondisclosure and proceed cautiously, where countervailing first amendment interests exist the Constitution obligates us to look carefully at the particular harm to the individual as well as the general harm to first amendment values that would result from suppression of the specific speech in issue.

186. *Sitz*, 110 S. Ct. at 2487.

ers from the highways. The Court cited statistics on "alcohol-related death and mutilation,"<sup>187</sup> lamenting the "tragedy" of the "slaughter" on the highways.<sup>188</sup> This is not language characterizing interests of the government in performing its functions; this is a direct appeal to public fears of drunken drivers, and to public demands for a solution to the problem.<sup>189</sup> Framing the issue in such terms made forbidding sobriety checkpoints appear to be a dereliction of the Court's duty to the public.<sup>190</sup>

Against such a compelling public interest, the intrusion upon the individual could barely stand up to scrutiny. Yet the Court tipped the scales further, reducing the significance of individual interests to a level at which they may not counterbalance even a minimal public interest. First, the Court essentially eliminated any requirement that an intrusion be effective in combatting a harm. The Court cited statistics which indicated that the checkpoint in question had a 1.5% success rate in detecting drunken drivers. As this was more than the 0.12% success rate of the border checkpoint previously approved in *Martinez-Fuerte*, sobriety checkpoints were considered to be effective enough to be permissible.

The Court also further denigrated the individual's interest in remaining free from government intrusion by predicating the privilege on good behavior. The measure of the impact of such an intrusion was stated as "the fear and surprise engendered in law-abiding motorists by the nature of the stop."<sup>191</sup> Presumably, the Court felt that the innocent citizen has no fear of arrest,<sup>192</sup> and therefore knows that she will be able to pass a checkpoint without trouble.<sup>193</sup> Such a standard

187. *Id.* at 2485.

188. *Id.* at 2486.

189. A purely "government" interest such as the cost of enforcing drunken driving laws or medical care for victims would not have the same dramatic appeal as one combined with the "public" interests involved here.

190. *Cf.* Clint Eastwood as "Dirty Harry" Callahan, upon being criticized for violating the constitutional rights of a suspect to save a girl's life: "Then the law is crazy." *DIRTY HARRY* (Warner Brothers 1971).

191. *Sitz*, 110 S. Ct. at 2486.

192. Richard Posner has suggested that criminals have less reason to complain about Fourth Amendment violations because their sensibilities are hardened by their life of crime. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 59-60. Combined with the Court's belief that law-abiding citizens have no fear of Fourth Amendment invasions, *see Sitz*, 110 S. Ct. at 2486, it would seem that no one has a reason to complain about searches or seizures, thus rendering the Fourth Amendment yet another inkblot on the Constitution. *Cf.* LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 53-54 (1991); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990).

193. But see the dissenting opinion of Justice Stevens: "These fears are not, as the Court would have it, solely the lot of the guilty." *Sitz*, 110 S. Ct. at 2493.

ignores the basic purpose of the Fourth Amendment. It was designed precisely to protect the innocent citizen who has nothing to hide from being subjected to purposeless, intrusive government searches. Under traditional standards, the government was required to demonstrate some basis for suspicion before intruding upon an individual's privacy. By making intrusion the norm instead of the exception, the Court's standard of "reasonableness" as implemented in *Sitz* presumes all citizens to be suspects until they prove themselves innocent.

## 6. Summary of the Administrative Reasonableness Paradigm

The variety of factual situations and policies at work in the cases comprising the Administrative Reasonableness Paradigm preclude one from setting forth a formulaic set of rules which would predict a "correct" outcome in any new case. Indeed, the Justices themselves have not taken consistent, predictable stands in these cases.<sup>194</sup> What is possible, however, is to outline the factors that have been given weight as affecting the judgments in these cases.

The Court always employs a balancing test in Administrative Reasonableness Paradigm cases. On one side of the scale is the private interest at stake, which has shifting components based on the intrusion in question. On the other side of the scale, the Court places what is variously called the state interest, the government interest, or the public interest. In the earlier cases, these interests appeared to be used interchangeably; however, later decisions seem to make a distinction between the government or state interest, and the public interest. Indeed, the government and public interests should be treated separately.<sup>195</sup> Within each interest at stake are some components that bal-

194. Justice White wrote the majority opinion in *Camara*, *See*, and *T.L.O.*, and joined the majority in *Ortega*, *Griffin*, *Skinner*, *Von Raab*, and *Sitz*. Justice O'Connor and Chief Justice Rehnquist also joined the majority in all these cases. Justice Kennedy wrote the majority opinions in *Skinner* and *Von Raab*, and joined the majority in *Sitz*.

On the other hand, Justice Blackmun joined the majority in *Skinner* and *Von Raab*, dissented in *Ortega* and *Griffin*, and wrote concurring opinions rejecting the majority's reasoning in *T.L.O.* and *Sitz* (with regard to the latter, *cf. Welsh v. Wisconsin*, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring)). Justice Scalia wrote the majority opinion in *Griffin*, joined the majority in *Skinner* and *Sitz*, wrote a concurring opinion rejecting the plurality's reasoning in *Ortega*, and dissented in *Von Raab*. Justice Stevens dissented from the majority's conclusion that the search was justifiable in *T.L.O.*, essentially concurred with the majority in *Skinner*, and dissented in *Ortega*, *Griffin*, *Von Raab* and *Sitz*.

Thus, it appears that the Administrative Reasonableness mainstream has three solid votes (Rehnquist, O'Connor, and Kennedy), one likely but not certain vote (Scalia), two unlikely votes (Stevens and Blackmun), and three wild cards (Souter, Thomas and Ginsburg). *See also* Schulhofer, *supra* note 125, at 107-08; *cf. Junker*, *supra* note 154, at 1166-69 (tallying up non-unanimous Fourth Amendment decisions).

195. *See* *Shields v. Burge*, 874 F.2d 1201, 1204 (1989).



ance other interests separately. In other words, some portions of private interests must be weighed against government interests; some components of private interests must be weighed against public interests. As the Administrative Reasonableness Paradigm expands, it may be that government interests and public interests weigh against each other. Because the Court expressly evaluates these cases on the "totality of the circumstances," *all* the circumstances must be elucidated clearly and fully to allow a fair and even-handed evaluation of the case at hand.<sup>196</sup>

### a. *Private Interests*

The foremost private interest in Fourth Amendment questions is simply that protection which the amendment grants to the individual. In cases involving searches, the interest implicated is the individual's interest in privacy.<sup>197</sup> In cases involving stops or seizures, the interest implicated is the individual's interest in freedom from unreasonable government interference with liberty of movement.<sup>198</sup> The private interest to be evaluated is based upon two factors: the protection that is involved, and the degree to which the practice in question intrudes upon that interest.

While it has been frequently emphasized that the Fourth Amendment provides no greater protection for criminals than for the law-abiding citizen, the converse may not be true. The new standard for the measure of intrusiveness is the impact of the practice upon the law-abiding citizen.<sup>199</sup> The intrusion upon the criminal is considered no greater than that; indeed, it may even be considered to be less.<sup>200</sup>

196. Cf. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981) ("Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here . . .").

197. See, e.g., *Skinner*, 489 U.S. at 617.

198. See, e.g., *United States v. Brignoni-Price*, 422 U.S. 873, 878 (1975) ("[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person" and the Fourth Amendment requires that the seizure be "reasonable.") (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)). Seizures have generally been considered less intrusive than searches. See, e.g., *Smith v. Ohio*, 494 U.S. 541 (1990). But see *Tennessee v. Garner*, 471 U.S. 1 (1985) (killing a non-dangerous fleeing felon does not reasonably outweigh the suspect's interest in his own life); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (blocking a road with a bulldozer may constitute a Fourth Amendment "seizure" of a fleeing suspect when his car crashes into it). Intrusions of the same type, but for different purposes, are considered equally intrusive. See *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

199. See *Sitz*, 110 S. Ct. at 2486 ("The 'fear and surprise' to be considered are not the natural fear of one who has been drinking . . . but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop.").

200. "[A] person engaged in a dangerous, illegal business is likely to have greater emotional fortitude than the average person." Posner, *supra* note 192, at 60 (advocating elimination of the exclusionary rule in favor of tort remedies for Fourth Amendment violations).

However, where the effect of the practice falls almost exclusively upon law-abiding citizens, for whom the protections of the Fourth Amendment were intended,<sup>201</sup> the private interests should be given greater weight so that the need to intrude will be more closely scrutinized.

*b. Government Interests*

The archetypical government interest at stake in Fourth Amendment cases is the interest in law enforcement. Indeed, the Administrative Reasonableness Paradigm is founded upon the presence of "special needs, beyond the normal needs for law enforcement."<sup>202</sup> These "special needs" may be based upon one or more of four factors. The first factor is the urgency of the need for the intrusion. This may be a temporal urgency, as in the fireman-entry cases, or it may be based upon the severity of the proscribed conduct which is the reason for the intrusion, as with railroad accidents in *Skinner*.<sup>203</sup>

The second factor may be characterized as the cause for the intrusion.<sup>204</sup> Clearly, there must be some rational connection between the intrusion and the purpose for it. This is typically measured by the level of suspicion that the search will be successful.<sup>205</sup> Even where individualized suspicion has been eliminated as a requirement, there must be some demonstrable suspicion that the group whose members are to be intruded upon is actually a reasonable target for the purpose of the intrusion.<sup>206</sup>

The third factor may be characterized as the effectiveness of the method in achieving its ends. As construed by the Court, this factor may be a largely negative limitation. While an intrusion that is de-

201. Schulhofer, *supra* note 125, at 88.

202. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

203. See *Welsh v. Wisconsin*, 466 U.S. 740 (1984), for a "traditional" law enforcement case balancing these factors.

204. See *Camara*, 387 U.S. at 535 ("[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found.").

205. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1979).

206. Compare *Skinner*, 489 U.S. at 606-08 (drug testing of railroad workers involved in accidents) with *Von Raab*, 489 U.S. at 683-85 (Scalia, J., dissenting) (testing Customs employees without implication of drug use).

*Cf.* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 347-53 (1949) (discussing over- and under-inclusive classifications in equal protection analysis).

monstrably ineffective may not be justified,<sup>207</sup> any degree of effectiveness may be enough to justify the intrusion.<sup>208</sup>

The fourth factor is the availability of alternate methods of enforcement. While the scrutiny given to this factor has declined from *Camara* to *Sitz*, it is not clear that government officials may have unfettered discretion to implement any enforcement program without the possibility of judicial review.<sup>209</sup>

### c. Public Interests

The public interests at stake in a Fourth Amendment case are typically nebulously defined and selectively weighted by both sides. Those favoring the intrusion speak of the impact on society, of the harm to be controlled or eradicated. Those opposing the intrusion speak of the impact upon society that the intrusion itself will have. In *Sitz*, for example, the majority held that sobriety checkpoints were constitutionally permissible because such checkpoints might reduce drunken driving. The minority in *Sitz*, on the other hand, discussed the impact of sobriety checkpoints in terms of the fear which would be instilled in the mind of motorists.

A second level of public interests, not frequently discussed, is the indirect effect of the harm and intrusion upon the relationship between the target of the intrusion and society.<sup>210</sup> To properly balance the public interest at stake in a Fourth Amendment issue, the analysis should compare the relative effects upon the target's place in society that result from the intrusion and that result from the harm to be prevented. Such an analysis is especially important when the target of the search is an identifiable and distinguishable group. When such a

207. Compare *Skinner*, 489 U.S. at 606-08 (demonstrated drug use among railroad workers) with *Von Raab*, 489 U.S. at 683-85 (Scalia, J., dissenting) (no demonstrated drug problem among Customs employees); see also *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

208. See *Sitz*, 496 U.S. at 453-55.

209. See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

210. Discussions of such issues are rarely explicit. See, for example, the dissenting opinion of Justice Stevens in *Sitz*: "[U]nannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different than ours." In the accompanying footnote, Stevens quoted Justice Jackson "soon after his return from the Nuremberg Trials":

These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

*Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2495 & n.9 (1990) (Stevens, J., dissenting) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting))).

group is a "discrete and insular minority,"<sup>211</sup> the public interest in the social role of such a group may be comparable to the interest in eradicating some particular harm.

### III. APPLICATION OF THE TWO PARADIGMS

#### A. *Public Housing Sweeps Under the Home Paradigm*

Under the Home Paradigm, public housing sweeps infringe upon Fourth Amendment protections if public housing is considered a "home." Courts which have considered this issue of what is a home in other contexts have overwhelmingly answered in the affirmative.

From a property law viewpoint, an apartment in public housing is no less a home than an apartment in private housing.<sup>212</sup> If anything, residents of public housing have a stronger claim to the possession of their apartments as "home" than do residents of private apartments.<sup>213</sup> The standard CHA lease specifies that tenants "have the right to exclusive use and occupancy of the leased premises."<sup>214</sup> Unlike private housing, however, this right to exclusive use can only be terminated for good cause.<sup>215</sup> Furthermore, though the process is simplified, Public Housing Authorities ("PHAs") must use eviction proceedings to remove tenants from public housing.<sup>216</sup>

Where questions involving public housing and Fourth Amendment protections have arisen in other contexts, courts have not made distinctions on the basis of the type of housing. In *People v. Dunn*,<sup>217</sup> for example, the New York Court of Appeals held that Dunn's Fourth Amendment rights had not been violated by a canine sniff of the hall outside his apartment. The court's analysis of whether the procedure was constitutionally acceptable turned upon whether the "reasonable

211. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1937).

212. *See Brand v. Chicago Housing Authority*, 120 F.2d 786 (7th Cir. 1941).

213. Tenants in private housing classically have been considered to have an "estate for years," which terminates at the end of the lease period, or a "tenancy at will," which may be terminated without notice by either party. Tenants in public housing generally may only be ejected for good cause, after notice and a hearing; thus, they have a "life estate determinable" so long as they meet the standards for occupancy. *See* ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 2.9 (1980).

214. CHA Lease, *supra* note 51, ¶ 7. Current H.U.D. regulations require the lease language to read: "[T]he tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests." 24 C.F.R. § 966.4(d) (1992).

215. *See* 24 C.F.R. § 966.4(1)(2) (1992).

216. *See, e.g., United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991); Dean P. Cazenave, Note, *Congress Steps Up War on Drugs in Public Housing—Has It Gone One Step Too Far?*, 36 *LOY. L. REV.* 137 (1990).

217. 564 N.E.2d 1054 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

expectation of privacy" in Dunn's home was violated by the sniff. Only in passing was it noted that Dunn's apartment was in a housing project; this fact was never raised as an issue. The failure to distinguish on this factor in *Dunn* and in other search and seizure cases<sup>218</sup> indicates that whatever the expectation of privacy is in public housing, it is no less than that of private housing. A court operating under the Home Paradigm would therefore grant a high level of protection<sup>219</sup> to public housing residents and hold the sweep program to be constitutionally impermissible.

A tradition-based court sensitive to the Home Paradigm would consider the personal stops and searches under the sweep program similarly impermissible. The mere act of preventing residents from entering their homes implicates the Fourth Amendment.<sup>220</sup> Only narrowly limited searches, involving no physical contact,<sup>221</sup> have been considered to be constitutionally valid in the absence of individualized suspicion.<sup>222</sup> That the police may stop a person and subject him to a pat-down search simply because he lives in a (government-provided) high-crime area is plainly contradictory to established Fourth Amendment jurisprudence.<sup>223</sup>

218. See, e.g., *United States v. Turner*, 926 F.2d 883 (9th Cir. 1989) (search warrant for public housing unit); *United States v. Burnett*, 890 F.2d 1233 (D.C. Cir. 1989) (hallway of housing project); *United States v. Ricks*, 882 F.2d 885 (4th Cir. 1989) (search warrant for public housing unit); *United States v. Ferreira*, 821 F.2d 1 (1st Cir. 1987) (seizure in hallway of housing project); *United States v. DeJesus*, 806 F.2d 31, 33 (2d Cir. 1986) (search warrant for public housing unit); *United States v. Burke*, 784 F.2d 1090, 1091-92 (11th Cir. 1986) (wrong address on search warrant for public housing unit); *United States v. Buckner*, 717 F.2d 297 (6th Cir. 1983) (third-party search in housing project); *United States v. Morris*, 477 F.2d 657 (5th Cir. 1973) (improper affidavit for search warrant for housing project); *United States v. Jones*, 1991 U.S. Dist. LEXIS 2764 (S.D.N.Y. Mar. 12, 1991) (warrant for special narcotics team search in housing project).

219. See *supra* text accompanying notes 99-119.

220. See *Soldal v. County of Cook*, 942 F.2d 1073, 1083 (7th Cir. 1991) (Flaum, J., dissenting), *rev'd sub nom. Soldal v. Cook County*, 113 S. Ct. 538 (1992). See also *Soldal*, 113 S. Ct. at 548 ("[T]he right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken . . . to verify compliance with a housing regulation.").

221. See, e.g., *United States v. Place*, 462 U.S. 696 (1983) (drug-sniffing dog); *United States v. Dalpiaz*, 484 F.2d 374 (6th Cir. 1974) (airport metal detectors).

222. Cf. *Terry v. Ohio*, 392 U.S. 1 (1968).

223. See, e.g., *Brown v. Texas*, 443 U.S. 47 (1979). Cf. Justice Scalia's recent comments on "stop-and-frisk": "I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity." *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2140 (1993) (Scalia, J., concurring).

## B. Public Housing Sweeps Under the Administrative Reasonableness Paradigm

### 1. Private Interests

The private interests at issue in public housing sweeps include those arising under the Home Paradigm.<sup>224</sup> To hold that public housing residents have a less reasonable expectation of privacy than do private housing residents would be contrary to established precedent.<sup>225</sup> Thus, under a reasonableness standard the heightened expectation of privacy in the home would be regarded as a highly protected interest<sup>226</sup> and accorded a duly great weight in balancing against government and public interests.<sup>227</sup> The Home Paradigm, however, relies on the normative judgment that the "physical entry of the home is the chief evil"<sup>228</sup> to be guarded against. Under that model, an intrusion into the home is presumptively impermissible. Absent certain restricted exceptions, the inquiry goes no further. Under the Administrative Reasonableness Paradigm, however, no invasion of privacy is presumptively impermissible. Government action may intrude upon a reasonable expectation of privacy and yet may, under the circumstances, be considered "reasonable." Thus, to properly balance the interests under the Administrative Reasonableness Paradigm, it is necessary to examine private interests at stake in public housing

224. See *supra* text accompanying notes 99-119, 212-18.

225. See cases cited *supra* notes 217-18.

226. Persons living in poverty may, in fact, need even more heightened protections against invasions of the privacy and security of their homes: because they are less financially and socially able to protect themselves from a higher level of crime than the more well-off are, and because they may be more willing to give up what rights they have in exchange for protection. See Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACK-LETTER J. 181, 192-93 (1991).

227. The Court holds that warrantless searches of stone quarries are permitted because the mining industry has been pervasively regulated. *But I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions.* This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining.

*Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring) (emphasis added). *But see also Marek v. Chesny*, 473 U.S. 1, 12 (1985) (Rehnquist, J., concurring) ("In *Delta Airlines, Inc. v. August*, I expressed in dissent the view that the term 'costs' in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong.") (citation omitted) (citing *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950)) (Jackson, J., concurring) ("I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation."). *Cf. id.* at 177 ("Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and misled others.").

228. *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972).

sweeps beyond those that are shared with private housing. Public housing tenants have a particular interest which is not so significant in other circumstances—namely, an interest in the continuing tenancy in public housing. As some courts have recognized,<sup>229</sup> evicting tenants from public housing is a punishment beyond mere dispossession. The poverty of most public housing tenants means they will have a difficult time finding an affordable private housing alternative. Indeed, evicting a tenant from public housing may effectively force them into the ranks of the homeless.<sup>230</sup> Eviction from public housing also stigmatizes the tenant, making it even more difficult to find alternate housing in the private sector.

Under HUD regulations,<sup>231</sup> tenants of public housing may be evicted for acts of their family or guests, even if they had no control over or knowledge of the wrongdoing.<sup>232</sup> This eviction may occur “regardless of the stage of any criminal proceeding.”<sup>233</sup> In the civil eviction action, the PHA need only prove guilt of the criminal offense by a preponderance of the evidence.<sup>234</sup> Thus, a tenant who is actually innocent, or even merely legally innocent, may in practice be punished more severely than under a criminal sanction.<sup>235</sup> In such circumstances, the public housing sweep becomes a weapon, against which public housing residents cannot protect themselves. Under these rules, an entire family could be evicted if a relative or guest, stopped and frisked at a lobby checkpoint or present during a search of their apartment, happened to be carrying drugs, a weapon, or policy slips,<sup>236</sup> even unbeknownst to them. Since HUD has shifted the burden of dealing with crime in public housing to the residents themselves, using the carrot of continued tenancy and the stick of threatened eviction,<sup>237</sup> residents have an interest in maintaining that

229. See *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991). *But see Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283 (7th Cir. 1991) (Easterbrook, J.) (tenant shot by another tenant had freedom to move out of public housing so as to avoid the incident).

230. *121 Nostrand Avenue*, 760 F. Supp. at 1018.

231. 42 U.S.C. § 1437d(l)(5) (1991); Public Housing Lease and Grievance Procedures, 24 C.F.R. § 966.4(l)(2)(ii) (1992).

232. Public housing tenants have a statutory obligation to prevent criminal activity by their family and guests, and failure to meet this obligation is cause for eviction. Public Housing Lease and Grievance Procedures, 24 C.F.R. § 966.4(l)(2)(ii) (1992).

233. Public Housing and Grievance Procedures, 56 Fed. Reg. 51,560 (1991).

234. *Id.*

235. Whether it is preferable to spend a Chicago winter homeless on the streets or snug and warm in jail is a close question. See also *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015.

236. “Policy” is Chicago’s version of the “numbers” game. See generally OVID DEMARIS, *CAPTIVE CITY* (1969).

237. [I]f household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant’s right to con-

degree of privacy and security that will allow them to deal with the activities of their relatives and guests without the risk of premature intervention and draconian punishment by the housing authority. By creating a mechanism whereby residents may be punished for something they have not even had an opportunity to correct, rather than merely failed to correct, public housing sweeps endanger residents' interests in retaining the meager shelter that they already inhabit.

## 2. Government Interests

The government interests that would justify public housing sweeps must be based on "special needs, beyond the need for normal law enforcement."<sup>238</sup> Such needs may arise in two areas: where normal law enforcement methods would be ineffective in combatting the harm in question,<sup>239</sup> or where the harm to be combatted falls outside the scope of normal law enforcement activities.<sup>240</sup>

Under the Administrative Reasonableness Paradigm, the first factor that comprises government interest is the purpose of the intrusion. Public housing sweeps have been justified for two purposes. Officially, they are described as emergency building inspections, carried out under the terms of the lease, much as a fireman might enter a fire scene to detect smoldering embers<sup>241</sup> or a private landlord might inspect apartments after a plumbing leak to search for damage. Unofficially, sweeps are justified as an efficient method of removing guns and drug dealers from the projects. However, neither of these justifications stands up under close scrutiny.

The CHA guidelines for public housing sweeps describe these activities as "Emergency Housing Inspections."<sup>242</sup> Indeed, the lease provides that the CHA may enter an apartment without notice in case of a building emergency. Under the Administrative Reasonableness Paradigm, emergencies requiring immediate action are a well-established situation in which an otherwise impermissible government en-

tinued occupancy by the family. The standards proposed by some of the public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560 (1991).

238. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring).

239. *See, e.g., Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2487-88 (1990).

240. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

241. *Cf. Michigan v. Tyler*, 436 U.S. 499 (1978).

242. Inspection Guidelines, *supra* note 39, at 1.



try is reasonable to avoid the delay caused by waiting for a warrant or probable cause.<sup>243</sup>

However, the very terms of the Consent Decree demonstrate that sweeps are not conducted under "emergency" circumstances as within the Paradigm. The Inspection Guidelines provide that emergency inspections may be made when the CHA has "reasonable cause to believe that there is an immediate threat to the safety and/or welfare" of tenants, CHA employees, business invitees, or CHA property.<sup>244</sup> However, prior to conducting a sweep, the Chief Executive Officer of the CHA must make written findings as to the reasons for the emergency inspection.<sup>245</sup> As part of a sweep, the CHA is required to provide an "operations center" to shelter residents temporarily dispossessed or unable to return to their apartments.<sup>246</sup> Such facilities must include heat, cooling, and restrooms and must make provisions for the elderly and for children. Thus, the terms of the Consent Decree, accepted by the CHA, place substantial logistical burdens on the Authority before it can conduct the sweep. In a true emergency, meeting the terms of the Consent Decree would delay or prevent the CHA from effectively dealing with the situation. Assuming that the Authority would not consciously accept restrictions that would increase the possibility of personal injury or property damage, it is clear that the Emergency Inspection Guidelines cannot be contemplated to actually apply to emergencies. This suggests that the "emergency" classification is, in fact, merely a subterfuge to justify the sweep program as falling within an area of "reasonableness" that would make them permissible.<sup>247</sup>

Furthermore, sweeps have frequently been triggered, not by building problems, but by the occurrence of crimes.<sup>248</sup> This distinguishes the sweeps from the type of municipal housing inspections allowed in *Camara*. There, the inspections were performed on a regularly scheduled basis.<sup>249</sup> "Emergency" inspection would be per-

243. See, e.g., *Michigan v. Clifford*, 464 U.S. 287 (1984) (fire scene); *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire scene); *People v. Brooks*, 289 N.E.2d 207 (Ill. App. 1972) (odor from dead body could have been from live injured person, and so justified entry); *State v. Miller*, 486 S.W.2d 435 (Mo. 1972) (pat-down search of man lying face down in washroom reasonable as emergency condition).

244. Inspection Guidelines, *supra* note 39, at 1.

245. *Id.*

246. *Id.* at 2.

247. Cf. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Mincey v. Arizona*, 437 U.S. 385 (1978).

248. See *Recktenwald*, *supra* note 65; *Fornek & Seibel*, *supra* note 68.

249. *Camara*, 387 U.S. at 533.

missible only upon "a citizen complaint or . . . other satisfactory reason for securing immediate entry."<sup>250</sup> However, such a complaint would not justify the area inspections that were at issue in *Camara*, but would instead justify only the entry into the particular dwelling in question. As the Court pointed out, a criminal investigation for specific evidence "would hardly justify a sweeping search . . . conducted in the hope that these goods might be found."<sup>251</sup>

Moreover, the government's interest in eliminating crime from public housing is belied by its lack of interest in preventing crime. One of the primary purposes of the sweeps is to remove gangs and drug dealers from vacant apartments. But some buildings are almost entirely vacant.<sup>252</sup> This high vacancy rate is caused by the CHA's failure to renovate and re-rent apartments that become vacant.<sup>253</sup> As more units have become vacant, more tenants have moved out, increasingly depriving the CHA of rental income and therefore of funds to maintain the buildings. Poorly built to begin with,<sup>254</sup> the buildings have become nearly unlivable slums due to thirty years of neglect.<sup>255</sup> The growing vacancy of the projects, combined with the CHA's failure to secure the buildings until the present, is a direct cause of the evil that the CHA now wishes to eradicate.

CHA's physical neglect of the projects has also contributed to these problems by creating an environment in which decay and disorder is the norm.<sup>256</sup> Physical decay has been demonstrated to be caus-

250. *Id.* at 540.

251. *Id.* at 535.

252. In 1989, some of the buildings in Henry Horner Homes were 85% vacant. KOTLOWITZ, *supra* note 3, at 262. In two of the buildings closed after the October, 1992 Cabrini-Green sweeps, only 50 of 262 apartments were occupied. Tom Seibel, *5 More Buildings Swept at Cabrini*, CHI. SUN-TIMES, Oct. 22, 1992, at 3.

253. For a theoretical discussion of this effect, see Niels L. Prak & Hugo Priemus, *A Model for the Analysis of the Decline of Postwar Housing*, 10 INT'L J. OF URB. & REGIONAL RES. 1, 5 (1986).

254. The Soviet minister of city and urban construction, observing the construction of Henry Horner Homes in 1955, stated "We would be thrown off our jobs in Moscow if we left unfinished walls like this." KOTLOWITZ, *supra* note 3, at 22.

255. Kotlowitz documents one family's experience: apartment walls unpainted since the 1970's; inoperative oven; infestations of maggots and roaches; kitchen cabinets which had rusted completely through; a bathtub faucet which couldn't be turned off, so that hot water continually poured into the tub; overpowering odors rising from the toilet; sewage periodically rising from the kitchen drain. The last two problems were eventually remedied after the CHA discovered that the basement of the building was flooded with sewage, infested with roaches, fleas, rodents and cats, and contained garbage, dead animals, and human and animal excrement. In the midst of this was stored 2000 refrigerators, ranges, and kitchen cabinets, some brand new, and all rendered unusable. According to the building janitors, the basements had been like that for 15 years. KOTLOWITZ, *supra* note 3, at 27-28, 240-41.

256. See *Henry Horner Tenants Ass'n v. Chicago Hous. Auth.*, 780 F. Supp. 511 (N.D. Ill. 1991), where the court, denying CHA's 12(b)(6) motion, held that there was a triable factual

ally related to the social decay of the area.<sup>257</sup> Observable physical decay signifies and stimulates social decline and disorder.<sup>258</sup> An attitude of physical neglect spills over into the social realm. As the sense of social and civic responsibility dissolves, residents have increasingly less interest in maintaining the physical environment. Caught in a classic feedback loop, the physical and social environments collapse with ever-increasing rapidity.<sup>259</sup> Social disorder, engendered by physical neglect and decay, is reflected in increased criminal and anti-social activity.<sup>260</sup> Given the CHA's history of neglecting the projects, their choice of a clean-up method should be closely scrutinized. The government's interest in making the projects a safe place to live is not necessarily congruent with its interest in a particular method of doing so. Clearly, any policy that does not address the physical problems of the projects is doomed to failure.<sup>261</sup> Moreover, the choice of a method that places heavy burdens on the constitutional rights of the tenants requires that the CHA investigate alternative methods of solving the problem.<sup>262</sup> In light of the sweep program's significant intrusion upon the Fourth Amendment rights of the tenants, the CHA should not simply choose the "easiest" program, but should seek to minimize the intrusiveness while achieving the same results.<sup>263</sup>

The urgency of the government's interest in the subject of a Fourth Amendment intrusion should also be balanced by the effectiveness of the method chosen. The Court has taken an extremely deferential view of effectiveness,<sup>264</sup> requiring only that the method appear to have some effectiveness. Public housing sweeps appear initially to be effective.<sup>265</sup> Residents report a feeling of safety after a

issue as to whether the CHA had engaged in constructive demolition of projects by failing to maintain them.

257. See WESLEY G. SKOGAN, *DISORDER AND DECLINE* 36-49 (1990).

258. *Id.* at 49.

259. *See id.*

260. *Id.* at 75.

261. To some extent, the CHA is doing this. *See* Henkoff, *supra* note 21, at 122.

262. *See* *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) ("And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"); *Terry v. Ohio*, 392 U.S. 1 (1968) (Fourth Amendment protects privacy); *Katz v. United States*, 389 U.S. 347 (1967) (same).

263. *See* Strossen, *supra* note 209, at 1208-67.

264. *See* Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Enforcement of Constitutional Rights*, 42 *HASTINGS L.J.* 285, 293 (1991).

265. *See* Casuso, *infra* note 270.

After the October, 1992 sweeps at Cabrini-Green, the Chicago Police Department reported that crime in the projects had declined since the sweeps. Maudlyne Iherjirika, *CHA Crime Drops*, *CHI. SUN-TIMES*, Feb. 12, 1993, at 1. However, many residents of the projects attributed the decrease to a city-wide gang truce, organized after the killing of Dantrell Davis. *See* Lee

building has been swept and secured. However, the amount of criminal activity unearthed by the sweeps has been less than spectacular.<sup>266</sup> Excluding contraband discovered in vacant apartments or public areas, and excluding arrests for undifferentiated offenses such as "disorderly conduct," it is not clear from the results that the intrusive searches of occupied apartments have any real effect. Furthermore, residents of the swept buildings indicate that drug dealing continues "more quietly" after the sweeps.<sup>267</sup> Empirical studies have shown that the effects of police crackdown frequently "wear off" after some initial success.<sup>268</sup> Even where drug dealing is eliminated within a building by the sweep program, this method's inherent failure to deal with the underlying psychological and social causes of crime in the projects

Bey, *Dantrell's Legacy—A Cabrini Cease-Fire*, CHI. SUN-TIMES, Apr. 25, 1993, at 3. Moreover, the raw statistics cited by the CHA do not distinguish between swept or unswept buildings, nor do they eliminate variables such as vacancy rates and level of building maintenance, nor do they correct for variations in the crime rate in the city as a whole. Without such corrections, the raw statistics indicating crime rate decreases simply do not support the proposition that the decreases are the result of the sweeps.

266. In 10 days of intense sweeps through 31 buildings at Cabrini-Green in October 1992, 44 persons were arrested. Twenty-three of these were for criminal trespass, eight for disorderly conduct, nine for drug possession, and four for undisclosed weapons charges. A total of seven weapons were seized: one shotgun, two rifles, one handgun, one pellet gun, one BB gun, and two knives. Seibel & Spielman, *supra* note 72.

In a sweep conducted August 16, 1991 in response to the shooting of CHA police officer Jimmie Haynes, a search of five high-rise buildings at the Robert Taylor Homes uncovered no suspects in the shooting. Six arrests were made for drug possession, criminal trespass, and disorderly conduct, and three weapons were confiscated. Jodi Wilgoren, *Police Sweep CHA After Guard is Shot*, CHI. TRIB., Aug. 17, 1991, § 1, at 5.

In a sweep for guns conducted at Cabrini-Green Homes on the afternoon of August 8, 1991, 75 officers uncovered a single .30 caliber round and a holster in an area inaccessible to tenants. Seventeen "suspected gang members" were arrested for disorderly conduct, and one man was arrested for possession of a controlled substance. A second sweep with twice the number of officers later that night resulted in 15 arrests and the seizure of four undescribed "weapons." David Silverman, *Cops Sweep for Guns at Cabrini*, CHI. TRIB., Aug. 9, 1991, § 2, at 3.

A sweep of a 14-story apartment building at the Ida B. Wells Homes on November 16, 1989 resulted in the confiscation of three guns and the arrest of a man running through a corridor carrying a shotgun. *CHA Runs Sweep at Wells Homes*, CHI. TRIB., Nov. 17, 1989, § 2, at 3.

A sweep at Cabrini-Green on May 4, 1989 uncovered a rifle and several handguns in a basement crawlspace, and a 15-year-old girl was arrested for "concealing a large knife." *1 Arrest in CHA Building Sweep*, CHI. TRIB., May 5, 1989, § 2, at 3.

267. See Casuso, *supra* note 18, at 1.

268. Fifteen of eighteen case studies of police "crackdowns" showed initial effects of deterring crime. In most cases, the effects began to decay soon afterwards, though other studies indicated some overall residual effect. Lawrence W. Sherman, *Police Crackdowns: Initial and Residual Deterrence*, 12 CRIME & JUST. 1 (1990).

The Rockwell Gardens project was one of the first swept in 1988 and 1989. In 1989, crime at Rockwell dropped, but increased in 1990 and 1991 to exceed the 1988 level. Michael Gillis, *CHA Sees Decline In Serious Crime Reports in Projects*, CHI. SUN-TIMES, Oct. 25, 1992, at 32; Iherjirika, *supra* note 265, at 26.

will not diminish tendencies toward criminality, but will merely redirect them into other avenues.<sup>269</sup>

Expanding the scope of the inquiry only slightly beyond the swept buildings indicates that public housing sweeps are not merely ineffective in aiding the governmental interest in crime control, but are actually harmful to that interest. By the CHA's own admission, sweeps do not eliminate crime, but merely redistribute it.<sup>270</sup> The drug-dealing gangs evicted by the sweeps merely move to another nearby building where there is no official opposition, and set up shop. When the new turf is already controlled by a rival gang, the two factions sometimes battle it out until one can gain control of the area. Rather than a reduction in drug use, the city is faced with an increase in violent crime.<sup>271</sup> Sweeping the criminals out of the projects entirely will merely displace them to private housing. In practical terms, the sweeps may cause more crime than they prevent. This not only diminishes the strength of the possible government interest in the sweep program, but raises in counterbalance the private interests of those citizens surrounding the projects. Sweeps, evictions, and tenant restrictions may shuffle crime around; but unless the government can claim equal distribution of crime as an interest, they are inappropriate solutions to the problem.

### 3. Public Interest

"Public interest" may be the most determinative factor under the Administrative Reasonableness Paradigm. At the same time, it is the least objectifiable, and therefore the most manipulable,<sup>272</sup> element of this form of analysis. At first glance, the question of public interest seems an easy one. Conditions in public housing are indisputably bad. Eliminating crime and violence is indisputably an admirable goal.

Nevertheless, the importance of the interests at stake requires an impartial weighing of the gains and losses resulting from continuing the "sweep" program. Unfortunately, the Supreme Court has been

269. See Ronald V. Clarke, *Situational Crime Prevention: Its Theoretical Basis and Practical Scope*, 4 CRIME & JUST. 225, 226-27 (1983).

270. Jorge Casuso, *CHA Crime Not Ending, Just Shifting*, CHI. TRIB., July 16, 1989, § 2, at 1. While reports of serious crimes in two swept buildings at Cabrini-Green fell from 13 to 6, reported crimes in the buildings adjacent to those which had been swept rose from 15 to 48. *Id.* CHA chairman Vincent Lane was reported to have said that he expected the gangs to move out of the swept projects and into other nearby CHA projects. *Id.*

271. See results of empirical studies in Sherman, *supra* note 268, at 19.

272. See the dissent of Justice Stevens in *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2490-99 (1990).

less than thorough in its evaluation of the “public interest” in Administrative Reasonableness Paradigm cases.<sup>273</sup> Indeed, the Court has been almost entirely deferential to government interests in these cases. Though the Fourth Amendment may be dead as a practical matter,<sup>274</sup> it is nonetheless instructive to engage in a more complete analysis of the situation than we might expect to be forthcoming from the current Justices.

As a starting point, the “public interest” promulgated for public housing sweeps should be limited strictly to its own terms. The interests of the residents themselves, and of the government in fighting crime, should not enter into this evaluation. Each of these interests is properly evaluated and weighed on its own. To include them again under the heading of “public interest” unfairly tips the balance to arrive at a certain desired result. While the Court has typically spoken of “public interest” synonymously with government interest, there is no good reason to imprecisely use a precisely differentiated term. Since courts can distinguish “public interest” from “private” and “government” interests when appropriate,<sup>275</sup> using the term in a precise and distinguishable sense adds meaning to the discussion.

One “public interest” that may be delineated is the interest of the world at large, outside the projects. In this case, this interest may be defined by the effect that conducting the sweeps would have on the outside world, in comparison to the effect of not conducting the sweeps.

The sweeps have already been shown to be ineffective at stopping crime.<sup>276</sup> Proponents of sweeps cannot claim, in light of the overall

273. *See id.*

274. John Wesley Hall Jr., *Privacy: Drug War Casualty*, NAT'L L.J., Feb. 17, 1992, at 19.

275. *See* Planned Parenthood of S. Nev. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (balancing government interest in efficient operation against public interest in freedom from censorship); Adolph Coors Co. v. Brady, 944 F.2d 1543, 1552-53 (10th Cir. 1991) (balancing public interest in alcohol content of beer against government interest in preventing “strength wars”); Action for Children’s Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (Mikva, J.) (balancing public interest in free communication against government interest in protecting children from “indecent” programming); United States v. Richey, 924 F.2d 857, 859-61 (9th Cir. 1991) (majority opinion) (distinguishing individual’s private interest in the right to fair trial, public interest in being informed about potential judicial bias, and government interest in protecting confidentiality of taxpayer information); *id.* at 866-67, 870 (dissenting opinion); United States v. Moralez, 908 F.2d 565, 569 (10th Cir. 1990) (balancing public interest in relevant evidence and government interest in protecting confidential informant); United States v. Odom, 895 F.2d 928, 931 (4th Cir. 1990) (Murnaghan, J., dissenting from denial of hearing) (government interest in obtaining conviction balanced against public interest in freedom from repeated prosecutions); Moore v. City of Kilgore, 877 F.2d 364, 376 (5th Cir. 1989) (balancing firefighter’s private interest in communication, public interest in being informed, and government interest in efficient operation) (opinion of Higginbotham, J.).

276. *See* Casuso, *supra* note 270 and accompanying text.

absence of change in the crime rate,<sup>277</sup> that conducting the sweeps makes the community as a whole safer. Indeed, the CHA and the Chicago Police have admitted that sweeping a building drives gangs and criminals into the surrounding community.<sup>278</sup> The public interest of those residents in adjacent buildings does not include a program which encourages drug dealers to move in and set up shop.

Thus, the sweeps provide no positive benefit to the general public by reducing crime. The public interest may be further diminished by the resources required to conduct sweeps. Operation Clean Sweep has been terribly expensive.<sup>279</sup> Indeed, it is apparent that the CHA could not obtain the funding to sweep all of its buildings.<sup>280</sup> Since sweeping part of a project merely relocates crime, there is no net benefit in conducting a partial program of sweeps. To the extent that sweeps use resources which could be put to other uses, a partial program may be a waste of money and manpower. Alternative methods of crime control such as community-policing have been shown to have a positive effect on crime at a relatively low cost.<sup>281</sup> Additionally, as the physical decay of the projects directly contributes to crime, any funds expended on crime prevention without addressing the underlying problems are wasted.

Even granting the assumption that the sweep program has a positive effect on reducing crime in the projects, it is not demonstrated that the program will further the public interest. Contrary to popular belief, housing projects do not disproportionately contribute to crime in the surrounding areas.<sup>282</sup> Living near a housing project does not appear to be more dangerous than it would be living near a similar large concentration of equally impoverished residents of private housing.<sup>283</sup> Since outsiders tend to be afraid to enter the projects,<sup>284</sup> the crime within primarily victimizes the residents. Most of the residents of the projects cannot afford to be mobile enough to pose a threat to the world at large. Those crimes that residents do commit outside the

277. *Id.*

278. *Id.*

279. The estimated cost to sweep the CHA's 75 worst buildings is estimated at \$30 million, or \$400,000 per building. Casuso, *supra* note 18.

280. See Henkoff, *supra* note 21.

281. See SKOGAN, *supra* note 257, at 89 *passim*.

282. See Dennis W. Roncek et al., *Housing Projects and Crime: Testing a Proximity Hypothesis*, 29 SOC. PROBS. 151 (1981).

283. For a discussion of "concentration effects" upon the socialization of inner-city families, see WILSON, *supra* note 4, at 58.

284. See DEVEREUX BOWLY, JR., *THE POORHOUSE: SUBSIDIZED HOUSING IN CHICAGO, 1895-1976*, at 124 (1978); cf. E.V. Walter, *Dreadful Enclosures: Detoxifying an Urban Myth*, XVIII ARCHIVES EUROPÉENNES DE SOCIOLOGIE 151 (1977).

projects are not dissimilar to those committed by other equally poor, equally desperate citizens living in private housing.<sup>285</sup>

A broader issue of public interest involves the relationship of public housing residents to society at large. The use of the sweep program against public housing residents, and only public housing residents, marks them as less deserving of governmental respect and protection. The sweep program is a public judgment that the privacy of one group is less important than that of another. This distinction is not made because of race,<sup>286</sup> poverty, or criminal behavior,<sup>287</sup> but simply because of residence in public housing.

The sweep program thus sends a message<sup>288</sup> to the residents themselves and to the public at large that living in public housing makes one less of a citizen, less deserving of sharing in the protections accorded to the rest of society.<sup>289</sup> Public housing residence becomes a stigmatizing<sup>290</sup> and isolating characteristic.

The physical, economic and social characteristics of the projects already contribute to isolating public housing residents from "main-

285. See GERALD D. SUTTLES, *THE SOCIAL ORDER OF THE SLUM* 207 (1968).

286. In Chicago, the "bad" projects are largely confined to historically black areas (with the exception of Cabrini-Green, in a formerly Italian slum), and CHA residents are overwhelmingly black. It is safe to assume that most Chicagoans, thinking about public housing residents, assume them to be black. Cf. SUTTLES, *supra* note 285, at 16 n.5 ("Anyone who lives in the projects is automatically assumed to be a Negro or 'like the Negroes.'"). Nevertheless, the sweep program is aimed only at a subgroup of blacks, albeit an easily-targeted subgroup.

287. So-called "problem tenants" make up only 2% to 4% of the total public housing tenant population. RICHARD S. SCOBIE, *PROBLEM TENANTS IN PUBLIC HOUSING* 58 (1975).

288. For a discussion of the message implicit in the denial of constitutional protections, see Justice Brennan's dissent from the Court's denial of the petition for certiorari in *Doe v. Renfrow*, 451 U.S. 1022 (1982), *denying cert. to Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), *aff'g in part and remanding in part Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979). In *Doe*, the Highland, Indiana school system, in conjunction with the Highland Police Department and volunteer canine units, used drug-sniffing dogs to conduct a surprise mass inspection of the junior and senior high schools. Students to whom a dog reacted were instructed to empty their pockets or purses. In 11 cases where the dog continued to alert, authorities escorted the students to another office and strip-searched them. Doe was a 13-year-old girl who was subjected to such a search, which uncovered no drugs. It was later determined that the trained canine was reacting to the odor of Doe's own dog, which was in heat. Justice Brennan commented:

We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression on her than the one her teacher had hoped to convey. . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

*Doe v. Renfrow*, 451 U.S. at 1027-28 (Brennan, J., dissenting from denial of certiorari).

289. Compare this with the discussion of self-respect as a primary good and principle of justice, which is secured by the affirmation of equal citizenship for all, in JOHN RAWLS, *A THEORY OF JUSTICE* §§ 11, 67, 82 (1971).

290. Cf. SUTTLES, *supra* note 285, at 16 n.5 ("Just as there is guilt by association, so there is stigma by location.").



stream" society.<sup>291</sup> In many respects, the projects are not that different from the rest of the "inner city."<sup>292</sup> Unemployment separates the poor from the workday world in disproportionate numbers. Poverty prevents the poor from moving away from where they live. The outside world is afraid of the "underclass" and avoids contact with them. The only role models available to children are themselves caught up in poverty and despair. Lack of quality education prevents the poor from breaking out of the cycle of poverty and dependence.

The sweep programs mark residents of public housing as the worst of the worst. The programs have been imposed from "outside" for the good of the residents, without asking what they believe needs to be done,<sup>293</sup> and without the freedom to decline. No attempt is made to differentiate the innocent from the guilty; all residents are presumed to be legitimate targets of government attention.<sup>294</sup> The message sent to the residents is that they are the problem, that they are somehow different from others living in private housing just down the block. As the residents grow to believe this,<sup>295</sup> they will be increasingly less likely to perceive themselves as having a common social ground with the rest of society. Seeing less chance of fitting into society gives them less motivation to try to fit into society.

Furthermore, imposing sweep programs only on residents of public housing suggests to society at large that these persons are different, somehow lesser citizens than the rest of us.<sup>296</sup> Since the greater part of the "outside" world has no other contact with the world inside the projects, there is a danger that the notion that public housing residents need special "control" to protect them from themselves might become the dominant cultural perception. Thus marked as "culturally deficient," public housing residents become increasingly marginalized and

291. BOWLY, *supra* note 284, at 224.

292. Cf. WILSON, *supra* note 4, at 57-58.

293. In the mid-1970s, some researchers thought to ask residents for their solution to the problems of public housing. When it was discovered that the "one overriding preference" was for increased police presence and protection, a pilot program of increased police patrols and community relations was instituted, resulting in a decrease in crime. When the program was terminated for lack of funding, crime immediately increased. See ALVIN RABUSHKA & WILLIAM G. WEISSERT, CASEWORKERS OR POLICE 48-49, 56-58, 82 (1977).

294. The implicit message is that public housing residence is a predictor of criminal behavior. Cf. Steven L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 436 (1988) (unconscious notion of skin color as a predictor of criminal behavior).

295. Cf. Peggy C. Davis, *Popular Legal Culture: Law as Microaggression*, 98 YALE L.J. 1559, 1564-77 (1989) (discussing the adverse effects of an unconsciously racist legal establishment upon the personal and social esteem of blacks).

296. See Olga Popov, Note, *Towards a Theory of Underclass Revue*, 43 STAN. L. REV. 1095 (1991), for a representation-reinforcement-based argument for strict scrutiny for classifications which target the underclass as a group.

distanced from society.<sup>297</sup> When public housing residents are regarded as deviants from the dominant culture, it becomes easier to further impose burdens on them for their own good.<sup>298</sup>

Whatever short-term achievements are made by the sweep programs in fighting crime must be weighed against the long-term cultural damage that may occur. The public interest is not in further isolating residents of public housing from society, but in further including them. The public cannot continue to bear the economic and social burden of excluding a substantial number of its members from constructive participation in mainstream life, marginalizing them into a subjected and dependent role.

#### IV. RECOMMENDATIONS

Something needs to be done about public housing in America. However, sweep programs carry too many negative factors to be blindly accepted as the only answer. Exploring the interests at stake suggests ways in which public housing authorities may approach the issue and derive the maximum benefit. First, while increased physical security is necessary, the private interests of the legitimate tenants should be a limiting concern in implementing a program. Searches of apartments should be limited to vacant units, where no legitimate privacy interests are vulnerable.<sup>299</sup> While limiting public access to a building may be no more objectionable to a tenant of public housing than it would be to a tenant of a luxury high-rise, the building should be secured only after proper notice is given to the legitimate residents. Neither should limiting access be justified as keeping out "undesirables" if it limits the ability of legitimate tenants to freely associate with guests of their choosing.

Public housing authorities should also engage in alternative programs which indirectly fight crime in the projects. Vacant units should be adequately secured. Housing authorities could concentrate resources on rehabilitating particular "magnet" buildings to encourage tenants to move into them, thereby locally reducing vacancy rates and providing physical improvements with a narrowly focused economy of scale. Rather than a resented police intrusion, public housing security forces should provide a welcome police presence that differentiates

297. See KENNETH L. KARST, *BELONGING TO AMERICA* 133 (1989).

298. Or simply for the sake of repression. Cf. KARST, *supra* note 297, at 24.

299. See, *United States v. Dodd*, 946 F.2d 726, 728-29 (10th Cir. 1991) (holding that living in a vacant public housing unit did not provide a hiding suspect with an expectation of privacy which society could find reasonable).

between the "good" citizens and the "problem" tenants, and treats them accordingly.

#### CONCLUSION

A theoretical framework may guide a court's hand in arriving at a decision. Achieving an awareness of the control that such a framework has, and exploring alternate perspectives from other frameworks, may allow a more meaningful focus on the underlying issues. Analyzing the constitutional legitimacy of public housing sweeps requires such an awareness; without it, the outcome is likely to be decided at the start. But whether such sweeps are permissible is a more complex question than which paradigm they fit into. Fitting a factual situation into a model which determines the outcome should not be a substitute for reasoned analysis which takes into account *all* viewpoints. The question is not whether public housing sweeps fit this model or that model better; the question is what these sweeps are intended to do, and whether they accomplish it. The answers may reveal as much about our own beliefs and prejudices as about what the "correct" answer is. Our concern should be with what to do *for* public housing residents, not what we are allowed to do *to* them. The desperate need to do *something* to make public housing livable should not obscure the need to do the *right* thing.