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Administrative Law - Criminal Law - Inspections without a Warrant Made under Public Health, safety, and Welfare Laws Held Unconstitutional for Purpose of Criminal Prosecutions

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capacity as sole owner, the policies of the privilege should take precedence over incidental difficulties in regulation.[40]

Wild's claim of self incrimination is the type which the fifth amendment should protect. The *Wilson* and *Grant* decisions do not compel the "mechanical" rejection of Wild's constitutional privilege merely because of incorporation. Since Wild's claim fits the spirit and policy of the privilege, he should not be compelled to give up the records, whether he or his corporation is being investigated, if they tend to incriminate him.

Administrative Law—Criminal Law—Inspections Without a Warrant Made Under Public Health, Safety, and Welfare Laws Held Unconstitutional for Purpose of Criminal Prosecutions

Defendant had been convicted of violating a zoning ordinance of the village of Laurel Hollow, New York, which made it a crime to conduct a business in a nonbusiness zone.[1] Building inspectors had entered defendant's premises, over his objections, under authority of section 10.1 of the village Building Zone Ordinance, which authorized the building inspector "to enter any building or premises at any reasonable hour." Evidence was thereby obtained that defendant was using his mansion, in a residential area, for the business of design and fabrication of furniture, fabrics, wall coverings, and similar materials. On appeal the New York Court of Appeals, by a divided court, reversed and *held* that a search by public officials without a warrant was unconstitutional when done for the purpose of obtaining criminal prosecutions. *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

The leading case on administrative search is *Frank v. Maryland*,[2] in which the United States Supreme Court held, by a divided court, that the power of health inspectors to search did not depend upon a search warrant.[3] In *Frank*, a city health in-

40. A test to determine which types of corporations are such that the custodian should be permitted to claim his personal privilege as to the documents is difficult to state with precision. Perhaps the *White* test, now used for unincorporated associations, is a start. See note 36 *supra*.

1. Laurel Hollow, N.Y., Building Zone Ordinance art. x, §§ 50, 10.2, referred to in the instant case.

2. 359 U.S. 360 (1959).

3. A number of earlier state cases, not relied on in *Frank*, allowed health and safety inspections of public or quasi-public places without warrants. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910) (hotel); Keiper v. City of Louisville, 152 Ky. 691, 154 S.W. 18 (1913); City of St. Louis v. Evans, 337

spector, having reasonable grounds to believe that a house was rat infested, demanded entry.[4] The homeowner refused and was subsequently convicted under an ordinance imposing a 20 dollar fine for refusing entry.[5] The Court held that imposing a duty on homeowners to allow inspections without a warrant by health officials was a reasonable infringement of privacy rights[6] and did not violate the due process clause of the fourteenth amendment.[7]

In allowing inspection without a warrant, Mr. Justice Frankfurter, writing for the majority in *Frank*, distinguished the administrative inspection from the search for criminal evidence. "Inspection" is designed to determine whether conditions exist that are proscribed by health and safety laws so that civil proceedings of notice and orders to remedy the improper conditions can be instituted.[8] "Searches" are designed to produce evidence to be used in criminal prosecutions. The appellant in *Frank* had argued

S.W.2d 948 (Mo. 1960) (rooming house); Dederick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936), *appeal dismissed*, 299 U.S. 506 (1936) (barns); State v. Normand, 76 N.H. 541, 85 Atl. 899 (1913); Reinhart v. State, 193 Tenn. 15, 241 S.W.2d 854 (1951) (hospital); Mazanec v. Flannery, 176 Tenn. 125, 138 S.W.2d 441 (1940) (strawberry packing plant). Givner v. State, 210 Md. 484, 124 A.2d 764 (1956), allowed routine inspections of private dwellings at reasonable hours without a warrant.

In District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), the Court of Appeals held that health inspectors needed warrants, and the Supreme Court affirmed on another ground of statutory interpretation, expressly stating and avoiding the constitutional problem. The *Frank* Court did not follow the reasoning of the Court of Appeals in *Little*.

Finally, in St. Louis v. Claspil, City Court of St. Louis, First Division, April 29, 1959 (unreported), an inspection was held unreasonable when done at night, under no emergency, for enforcement of a minor violation. See 14 U. MIAMI L. REV. 473, 476 (1960).

4. Following a complaint of rats in the neighborhood, a health inspector found a pile of rat feces outside defendant's home. 359 U.S. at 361.

5. BALTIMORE, MD., CITY CODE art. 12, § 120 (1950):

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

Quoted in 359 U.S. at 361.

6. 359 U.S. at 367.

Following *Frank*, a conviction for violation of a similar ordinance that authorized health inspection at any reasonable hour, without the requirement of reasonable grounds, was affirmed by an equally divided Court in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960).

7. U.S. CONST. amend. XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

8. 359 U.S. at 362, 366.

that whether or not the fourth amendment[9] prohibition against unreasonable searches and seizures applied directly to the states, under *Wolf v. Colorado*[10] the core of that amendment — "the security of one's privacy against arbitrary intrusion . . ."[11] — applied to the states through the due process clause of the fourteenth amendment.[12] Frankfurter argued that historically the fourth amendment was primarily intended to protect citizens from searches for criminal evidence, and that the due process clause, incorporating the core of that amendment, was therefore also primarily concerned with criminal, not "civil,"[13] searches.[14] In the criminal area a search, to be "reasonable," must be carried out under a warrant, incident to a valid arrest, or under unusual circumstances of necessity.[15] Distinguishing administrative inspection from searches for criminal evidence avoids the rigid safeguards in the criminal area and facilitates the use of inspection to maintain community health.[16] By finding the fourth amendment inapplicable, Frankfurter was able to treat the problem of the warrantless inspection purely in fourteenth amendment terms.[17] Balancing the interests of the community in maintaining health and safety standards against the interest of the individual in privacy of the home, Frankfurter found the public interest to outweigh the slight encroachment on privacy produced by civil administrative inspection[18] and thus found no denial of due process.

9. U.S. CONST. amend. IV:

> 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.

10. 338 U.S. 25 (1949).

11. *Id.* 27–28.

12. Brief for Appellant, p. 9, Frank v. Maryland, 359 U.S. 360 (1959).

13. Administrative inspections can be called "civil" searches because they are part of a civil administrative process as opposed to the criminal process.

14. 359 U.S. at 365. However, Mr. Justice Douglas disagreed with Mr. Justice Frankfurter's interpretation of history. Douglas argued that the fourth amendment primarily protects privacy rights, and therefore its protection is not limited to criminal prosecutions in connection with the more explicit safeguards against self incrimination of the fifth amendment, but can stand alone to prohibit invasion of the home by government officials. *Id.* at 376–82 (dissenting opinion).

15. United States v. Rabinowitz, 339 U.S. 56 (1950); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Harris v. United States, 331 U.S. 145 (1947).

16. See Frank v. Maryland, 359 U.S. 360, 372 (1959).

17. See 59 MICH. L. REV. 447, 448 (1961); 108 U. PA. L. REV. 265, 270–71 (1959).

18. 359 U.S. at 372.

The *Laverne* case treats a different type of administrative search than that approved in *Frank*; that is, an administrative search to obtain evidence for criminal prosecutions. Because of its purpose, the inspection could not be considered merely as part of administrative or civil proceedings. There being no showing of special circumstances, the New York court held the inspection to be unreasonable and excluded the evidence so obtained.[19] The court did not consider whether New York standards were more stringent than federal standards of reasonableness[20] and did not consider whether the privacy guarantees of the fourth and fourteenth amendments, or of the state constitution,[21] were limited to criminal situations; but once having found a criminal situation it assumed that the inspection was unconstitutional when done without a warrant.

Laverne differs from *Frank* in that here the inspection ordinance apparently authorized forced entry, while the ordinance in *Frank* penalized the homeowner if he refused entry[22] but did not authorize forced entry.[23] In the instant case the criminal sanctions of the zoning ordinance operated immediately, while in *Frank* the procedure for enforcing the health regulations was a civil order to abate the nuisance that the inspection uncovered.[24] Both ordinances[25] were civil in subject matter — regulations of public

19. Weeks v. United States, 232 U.S. 383 (1914), held that the fourth amendment barred the use of evidence secured through illegal search and seizure in a federal prosecution. Wolf v. Colorado, 338 U.S. 25 (1949), held that although the core of the fourth amendment applied to the states through the fourteenth amendment, the exclusionary rule was not binding. Mapp v. Ohio, 367 U.S. 643 (1961) held that the exclusionary rule also applied to the states.

Evidence consisting of testimony concerning objects observed by officials while illegally searching is treated the same as evidence of physical objects illegally seized. Williams v. United States, 263 F.2d 487, 489 (D.C. Cir. 1959); McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955). This position has been adopted by the New York courts. People v. O'Neill, 11 N.Y.2d 148, 153–54, 182 N.E.2d 95, 98, 227 N.Y.S.2d 416, 420 (1962).

20. Although a state may require higher standards of reasonableness for searches and seizures than does the federal constitution, New York apparently does not. People v. Ward, 32 Misc. 2d 843, 223 N.Y.S.2d 355 (County Ct. 1962); see Ker v. California, 374 U.S. 23, 34 (1963).

21. The search and seizure provisions of the New York Constitution and the fourth amendment are identically worded. N.Y. CONST. art. I, § 12.

22. The ordinance in the instant case authorized the inspector "to enter." In *Frank* the ordinance was worded "he may demand entry." See note 5 *supra*.

23. 359 U.S. at 367.

24. Brief for Appellee, pp. 22–23, Frank v. Maryland, 359 U.S. 360 (1959).

25. Zoning ordinances, as well as health ordinances, are valid exercises of the state police power in regulating public health, safety, and welfare. *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

health, safety, and welfare without requiring scienter[26] — but in the instant case the process of immediate enforcement of community standards was not the civil process as in *Frank*, but the criminal process. Distinguishing civil inspections from criminal searches on the basis of the resultant sanction presents difficulties because all regulations must ultimately depend upon criminal sanctions for enforcement. Frankfurter did not demand criminal safeguards in administrative inspections because the inspection did not bring about criminal penalties. However, if the civil procedures fail to accomplish correction of substandard conditions, the reasoning of the New York court seems to indicate that the evidence obtained by the inspection would be excluded in a resort to criminal prosecution. Thus, the civil-criminal distinction breaks down if the homeowner refuses to obey a civil order based on the administrative search.[27]

In searches for criminal evidence, requiring a warrant protects the individual citizen from arbitrary police intrusions. However, enforcement of public welfare regulations depends upon inspection to determine whether or not substandard conditions requiring correction exist. Normally the dangers of health, safety, and welfare defects are hidden or realized only by the expert eye.[28] Thus it is necessary and reasonable for the community to authorize administrative inspection without a warrant in order to determine whether any dangerous conditions are present. But the civil-crim-

26. Regulations in the noncriminal fields of pure food, traffic, building, labor and wages might be labeled criminal, but these statutory crimes are "in reality an attempt to utilize . . . criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt." Commonwealth v. Koczwara, 397 Pa. 575, 580, 155 A.2d 825, 827–28 (1959); *cf.* Brief for Appellee, p. 25, Frank v. Maryland, 359 U.S. 360 (1959). These public welfare offenses impair "the efficiency of controls deemed essential to the social order . . ." Morissette v. United States, 342 U.S. 246, 256 (1952). Thus, unlike true crimes, violations of public welfare statutes do not require scienter, except perhaps in the obscenity area where there is a conflict with the free speech and press guarantees of the first amendment. See Smith v. California, 361 U.S. 147, 152 (1959); *Id.* at 162 (concurring opinion).

27. Mr. Justice Douglas suggested that a "probable cause" test for issuance of an administrative inspection warrant could take into account the nature of civil inspections, and that the mere lapse of time might be reason enough to allow periodic inspection. Frank v. Maryland, 359 U.S. 360, 383 (dissenting opinion). Mr. Justice Frankfurter counters that this would be a mere "synthetic search warrant" having the same effect as not requiring a warrant at all. See *Id.* at 373. It would seem that requiring such a weak warrant would simply unduly complicate the administrative process. See 108 U. PA. L. REV. 265, 276–78 (1959).

28. See *id.* at 274.

inal distinction of *Frank* does not solve community enforcement problems. Perhaps a more profitable analysis would be from the subject matter point of view. Reasonable warrantless inspections to enforce public welfare regulations could be permitted. Whether the criminal process was immediately used — though a factor — need not be controlling. Considerations in determining whether the ordinance authorizing inspection was reasonable could be time of day, authority given inspectors, and harshness of penalties for either violation of inspection regulations or violations of the welfare regulations themselves.[29] As to the inspection itself, notice and reasonableness in its execution should be required to protect the individual's interests.[30] Individual protections would come from safeguards during prosecutions for violations, such as excluding evidence obtained unreasonably, and in allowing or providing remedies against offending officials, such as a civil suit or criminal prosecution.[31]

Although the problems discussed above were raised by the *Laverne* case and the court's approach to zoning inspection, they were not, and did not need to be, solved. Violation of a zoning ordinance can normally be proved without resort to inspection much more readily than the hidden violations of health or safety regulations. The defendant's corporation had previously been enjoined from carrying on the activities complained of here.[32] Thus, it would seem that there was no need for forced entry, since a warrant could have been obtained on the basis of observations from without defendant's home. Although reaching a proper result by following the *Frank* analysis, the court restricted the use of administrative searches to enforce public welfare provisions. These restrictions seem to be neither necessary nor desirable.

29. See Comment, 44 MINN. L. REV. 513, 519–20 n.24 (1960); Comment, 5 S.D. L. REV. 40, 56 (1960); 1959 U. ILL. L.F. 661, 662.

30. See 108 U. PA. L. REV. 265, 276 (1959).

31. The problem with civil suits is that it would be difficult for the homeowner to show any real damage, and the offending official may well be unable to satisfy a substantial judgment against him. A number of states provide criminal penalties in the form of fines against officials who overstep their authority in search and seizure, but these provisions afford no relief to the homeowner. See the statutes referred to in Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961).

32. Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 283 App. Div. 795, 128 N.Y.S.2d 326, *aff'd*, 307 N.Y. 784, 121 N.E.2d 618 (1954).