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Administrative Inspections and the Right of Privacy: The Frank Compromise

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COMMENTS

ADMINISTRATIVE INSPECTIONS AND THE RIGHT OF PRIVACY: THE *FRANK* COMPROMISE

I.

INTRODUCTION

A man's home is his castle . . . for where shall a man be safe if it be not in his home?[1]

> A man's home may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern 'castle' is connected to a central water system, a sewerage system, a garbage collection system, and frequently to the houses on either side.[2]

The increased activity in the area of urban renewal following World War II brought attendant challenges to the extensive grants of inspection powers which many municipal ordinances bestowed upon local administrative officers.[3] This development served to underscore the conflict between effective administration of municipal codes directed at the elimination of health and housing menaces and the Constitutional prohibitions against unreasonable searches. Infringement of domestic privacy is, to some extent, a necessary concomitant to the removal of these menaces and to the process of neighborhood "renewal."[4] Though the permissible limits of this encroachment have not as yet been delineated with precision,[5] the Supreme Court, in *Frank v. Maryland*,[6] provided a basic rationale for reconciling the individual's concern in safeguarding his right of privacy with the community's interest in implementing standards conducive to the public health and welfare.

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1. COKE, INSTITUTES III (1644).
2. Brief for the Member Municipalities of The National Institute of Municipal Law Officers as Amici Curiae, p. 6, Frank v. Maryland, 359 U.S. 360 (1959).
3. Of fifty-six cities surveyed having comprehensive housing codes, forty-three permit or require inspections of private dwellings by health or housing officials. Thirty-six of these make a search warrant for this purpose unnecessary. HHFA, PROVISIONS OF HOUSING CODES IN VARIOUS AMERICAN CITIES 5 Urban Renewal Bull. No. 3 (1956).
4. Note, 28 GEO. WASH. L. REV. 434 (1960).
5. The constitutionality of administrative searches by health officers has not been conclusively settled. None of the three cases concerning administrative inspections which have reached the Supreme Court involved actual entry by the inspector. See Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959); District of Columbia v. Little, 339 U.S. 1 (1950).
6. 359 U.S. 360 (1959).

II.

SUPREME COURT INTERPRETATION IN *Frank*

In *Frank v. Maryland*,[7] a representative of the Baltimore City Health Department received a complaint that appellant's basement was infested with rats. Upon examining the area, the inspector found the exterior of the house to be in an "extreme state of decay."[8] Though lacking a warrant, the inspector requested permission to examine the interior of the house. When appellant refused, the inspector left without making further attempts at gaining entrance. Subsequently, an arrest warrant was sworn out and a conviction obtained for a refusal to "admit a free inspection."[9]

The conviction was affirmed in a *de novo* proceeding, and the Maryland Court of Appeals denied certiorari; the case was then taken to the Supreme Court of the United States, appellant claiming that her conviction was in violation of the provisions of the fourteenth amendment.

The Supreme Court, with Mr. Justice Frankfurter as the majority's spokesman, utilized the case as a vehicle for distinguishing, for the first time,[10] between unreasonable searches and seizures in the criminal area which are prohibited by the fourteenth amendment[11] and inspections con-

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7. *Ibid* [hereinafter cited as *Frank*.]
8. 359 U.S. at 361.
9. BALTIMORE, MD., CITY CODE art. XII, § 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.
10. The analysis of Mr. Justice Frankfurter in *Frank* should be compared with that of Judge Prettyman in District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), where the power of a District of Columbia health inspector to inspect without a warrant was denied. The decision in *Little* was affirmed on other grounds by the Supreme Court, 339 U.S. 1 (1950). The tenor of Judge Prettyman's argument is suggested by the following: "The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." 178 F.2d at 16–17. "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *Id.* at 17.
In Givner v. State, 210 Md. 484, 124 A.2d 764 (1956), the Maryland Court of Appeals affirmed a conviction and a $50.00 fine for refusing entry to a team of inspectors, despite defendant's contention that the powers of entry asserted were repugnant to article twenty-six of the Maryland Declaration of Rights and the fourteenth amendment of the Constitution of the United States. The court, in construing the identical statute involved in the *Frank* case, held that these protections were intended to apply only to searches for evidence of crime.
In St. Louis v. Claspil, City Court of St. Louis, First Division (April 29, 1959), summarized in advance sheets to 327 S.W.2d, *Judicial Highlights*, p. 2, the court dismissed a complaint filed by a building inspector pursuant to the St. Louis, Missouri, Building Code which provides a right of entry "at any time it is necessary in his opinion to enter any structure or portion thereof." The court held the attempted inspection "unreasonable" because it was at night (9 p.m.), there was no emergency, and it was for the enforcement of a minor regulation.
11. 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

ducted without a warrant "as an adjunct to a regulatory scheme for the general welfare of the community."[12] The Court found the individual freedom which appellant asserted, the right of privacy, to be composed of two elements, each protected by separate, but related, proscription. The first is the right of personal privacy — simply stated, the right to be left alone. The second is the right of self-protection, "the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual"[13] — security against the unauthorized search for criminal evidence. This distinction was vital to the majority's thesis, since only the former right was invoked by the appellant. It is the distinction between administrative procedure and official action, between the preventive and the punitive, between inspection and search.[14] The Court concluded that the right which appellant asserted, "the absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place,"[15] amounted to privacy for its own sake and found it lacking constitutional protection in view of the state's paramount interest in providing for the public health.

The Court proceeded to fortify its conclusion with three lines of argument. It first found justification for administrative inspections without a warrant in the long and consistent practice of authorities, as well as the continued approval of the community at large.[16] It next turned to the safeguards built into the Baltimore City ordinance, which it found would adequately protect the individual's right to privacy. Lastly, it posited that a procedure requiring search warrants for administrative inspections would be impracticable; such a system would be incapable of effective implementation unless the constitutional requirements for the issue of a warrant, a showing of probable cause to suspect a violation, were not applied.[17]

Four Justices voiced vigorous dissent in an opinion by Mr. Justice Douglas,[18] criticizing the majority for diluting the right of privacy "which every homeowner had the right to believe was part of our American heritage."[19] They contended that the framers of federal and state con-

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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.

12. 359 U.S. at 367. It is everywhere admitted that the core of the fourth amendment applies through the fourteenth amendment to the states.

13. 359 U.S. at 365.

14. See Note, 9 J. PUB. L. 260, 263 (1960). The Court, in each of the twenty-three instances in which it uses the word "inspection," refers to the administrative, preventive type of entrance sanctioned by the Baltimore City ordinance. In contrast, the word "search" is used to denote an evidence-seeking type of entrance.

15. 359 U.S. at 366.

16. 359 U.S. at 367–71. See Note, 65 COLUM. L. REV. 288, 289 (1965).

17. 359 U.S. at 373.

18. Mr. Chief Justice Warren and Justices Black and Brennan joined in this opinion.

19. 359 U.S. at 374.

stitutions intended to proscribe more than searches for evidence to be used in criminal prosecutions.[20] They would have held that the public interest in protecting privacy is equally as great in administrative inspections as in criminal searches.

Significantly, those very Justices who favored a strict reading of the fourth amendment so as to require a search warrant in cases of this nature had no difficulty in relaxing that amendment's test of "probable cause" as a condition for its issuance. That they would establish different, and impliedly less stringent, requirements for the issuance of an "administrative warrant" is evidenced by their statement that the "test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought."[21]

Thus, the dissenting opinion seized upon the point that prosecutions for refusing entry under the Baltimore City ordinance averaged only one per year to justify its conclusion that the city's health program obviously had the support of the populace, and would not be impaired by the requirement of a warrant for inspections.

III.

THE *Frank* RULE REINFORCED

In *Ohio* ex rel. *Eaton v. Price*,[22] somewhat a kin to a companion case to *Frank*, an equally divided Court[23] affirmed *per curiam* a conviction for refusal to admit an inspector who requested entry pursuant to a Dayton ordinance.[24] The facts were much the same as in *Frank*, with the significant difference that there was no complaint initiating the inspection, the inspector being in the midst of a random investigation of the entire neighborhood. Nor was there any "probable cause" to suspect a health nuisance, and therefore no immediate hazard to the public welfare. However, it should be noted that the Dayton ordinance posited no requirement of "reason to suspect that a nuisance exists."[25]

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20. 359 U.S. at 376–81.

21. 359 U.S. at 383.

22. 364 U.S. at 263 (1960) [hereinafter cited as *Price*]. In the jurisdictional statement of the appeal filed to the Supreme Court of the United States, appellant stated that the *Frank* case, then awaiting decision, "is similar to the facts in this case at bar and involves the same constitutional questions," thus raising "substantially the same problems presented by this appeal." Ohio *ex rel.* Eaton v. Price, 360 U.S. 246 (1959). Therefore, the Court held this appeal until its decision in *Frank*.

23. Mr. Justice Stewart, a majority Justice in *Frank*, did not participate because his father had sat on the Ohio Supreme Court that decided *Price*. See 168 Ohio St. 123, 151 N.E.2d 523 (1958).

24. DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 806-30(a):

> The Housing Inspector is hereby authorized and directed to determine the condition of dwellings. . . . For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings. . . . The owner or occupant of every dwelling . . . shall give the Housing Inspector free access to such dwelling . . . at any reasonable hour for the purpose of such inspection.

25. See BALTIMORE, MD., CITY CODE art. XII, § 120 (1950), *supra* note 9.

Four of the Justices comprising the majority in *Frank* considered that decision "completely controlling,"[26] even in the face of these differences. In rendering its decision without advancing any supporting rationale the Court did little to clarify the limits of the *Frank* ruling. Rather the case adds only the determination that "reasonable cause" is not a condition precedent to a valid administrative inspection. This refusal of the Court to further elucidate the factors which validate an administrative search without a warrant has the dual result of providing an opportunity for a flexible application of the *Frank* rationale in the future, while leaving both inspector and homeowner to speculate as to the "legality" of their respective actions in any particular situations.

The four Justices who dissented in *Frank* did likewise in *Price,* Mr. Justice Brennan stating that the earlier decision should be overruled as inconsistent with the fourteenth amendment's incorporation of the fourth amendment protection of the right of privacy.[27]

IV.

THE FOURTH AMENDMENT AND THE USE OF SEARCH WARRANTS

The fourth amendment, historically, has demanded that law enforcement officers secure a search warrant when engaged in a search for evidence to be introduced in a criminal proceeding.[28] Subsequent modifications of this requirement have evolved in terms of explicit, well-defined exceptions limited primarily to judicial interpretations of "reasonableness."[29]

However, a different situation exists in the administrative area. As Judge Holtzoff stated in his dissenting opinion in the *Little* case:[30]

> There is no judicial document known to the law that would confer authority merely to inspect premises for the purpose of ascertaining whether certain laws, such as those relating to public health and public safety, are being observed. Such scrutiny has always been conducted by properly authorized officers without the requirement of judicial sanction. In effect, the opinion of the court proposes to create a new type of process, unknown to the common law or to any statute. . . .

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26. Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 248 (1959) (probable jurisdiction noted).

27. 364 U.S. at 274, citing Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

28. See, *e.g.,* McDonald v. United States, 335 U.S. 451 (1948); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925); Boyd v. United States, 116 U.S. 616 (1886).

29. Note, 50 CORNELL L.Q. 282, 284 (1965). The situations in which a search warrant is not required fall into four general classes: (a) searches incident to a lawful arrest, (b) cases involving movable vehicles, (c) situations where a suspect is fleeing or likely to flee, and (d) cases where evidence or contraband is threatened with removal or destruction. See United States v. Jeffers, 342 U.S. 48, 52 (1951); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

30. District of Columbia v. Little, 178 F.2d 13, 24 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950). Judge Holtzoff's views are used to good advantage by the majority in *Frank.*

It is doubtful that requiring a warrant in the administrative field would prove an acceptable method of protecting the individual's right of privacy, either by delaying or preventing undesirable administrative searches. The drawback is that the fourth amendment standard of probable cause must, of necessity, be greatly diluted to satisfy the community's need for general periodic inspections. This is particularly true where blight conditions are in their initial stages. The prime utility of periodic inspections — the discovery of housing and health violations before they take their toll on an unsuspecting community — would be frustrated were a showing of probable cause in the traditional sense required. The authorities, forced to delay until the symptoms of decay manifested themselves, might well be faced with an epidemic or a nascent slum which they are powerless to combat.

The alternative is clear: as suggested by the *Frank* dissent, relax the standard of probable cause. But this being done, there is increased danger that the issuance of warrants would tend to become a matter of routine, with the result that the existing practice of delaying searches at the homeowner's request would be undermined. Even if such a *pro forma* issuance were not to materialize, still the issuance of warrants would, of necessity, depend on magisterial discretion. Yet, in an *ex parte* proceeding, in the absence of the homeowner there is little assurance that the requirement of a warrant would prevent inspections "based on caprice or on personal or political spite."[31] How is the magistrate to determine what motive actuates the inspector in an individual case? It may be argued that the Supreme Court could formulate constitutional guidelines to aid the magistrate in determining the existence of probable cause, but in view of the Court's reluctance to do so in the past, as well as the vast differences in content of municipal health and housing ordinances, any such formulation seems doubtful. Thus we are left with the substitution of a magistrate's discretion for that of a building inspector in resolving the vital question of probable cause. The alternative does not impressively commend itself.

The necessity of procuring a search warrant may well have the anomalous effect of producing more frequent inspections at times more inconvenient to the homeowner. At present, the municipal official, uncertain of his authority to enter a dwelling, will likely honor the homeowner's appeal to return at a more suitable time.[32] Armed with a "synthetic warrant,"[33] however, the inspector would doubtless be less prone to heed such a request. This would lead inescapably to the further anomalous result that a resident no more suspect of having violated a municipal ordinance

31. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 271 (1960) (dissenting opinion).

32. The practice of both the Baltimore City Health Department and the Dayton Bureau of Housing Inspection is to return at a more convenient time if the homeowner refuses to admit the inspector on the initial visit. See 65 COLUM. L. REV. 288, 292 (1965).

33. Mr. Justice Frankfurter so termed the type of warrant which the dissent suggested could be secured in cases involving administrative inspections.

than any of his neighbors would be subject to an unwarranted intrusion on his privacy, whereas one suspected of the commission of a specific criminal offense would be safeguarded by the fourth amendment standard of probable cause. Rather than tending to safeguard the homeowner's right of privacy, the warrant which the dissenters in *Frank* and *Price* suggest might well undermine it.

V.

THE LIMITATIONS OF *Frank*

A. *Application of the Criminal "Exclusionary Rule"*

As it appears that requiring a warrant would not adequately protect the right to privacy there remains the need for a rule to bar the introduction of evidence discovered in an administrative search in any subsequent criminal proceeding. The *Frank* case did not have to come to grips with this issue, but the Supreme Court's decision two years later in *Mapp v. Ohio*,[34] barring the use of evidence illegally obtained by law enforcement officers from state criminal trials as violative of the fourth and fourteenth amendments, dramatizes the need for applying a similar ruling to searches by administrative officers. No such case has as yet reached the Supreme Court, but a recent state case, *People v. Laverne*,[35] provided an intelligent answer to the problem.

In the *Laverne* case, a village building inspector, under the authority of a local ordinance,[36] entered defendant's home without the latter's consent. Once inside, the inspector discovered that defendant was engaged in business activity proscribed by both the zoning ordinance and an earlier inspection.[37] The inspector's observations became the basis of three separate criminal prosecutions, resulting in defendant's conviction.[38]

In reversing the lower courts, the New York Court of Appeals[39] held that any evidence secured during the course of an administrative inspec-

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34. 367 U.S. 643 (1961).

35. 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

36. LAUREL HOLLOW, N.Y., GENERAL ORDINANCES art. X, § 10.1 (1960):
> It shall be the duty of the Building Inspector, and he thereby is given authority, to enforce provisions of this ordinance. The Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour.

The ordinance also provides (§ 10.2) that a violation of its mandate is disorderly conduct with a prescribed punishment.

37. 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).

38. The three separate criminal prosecutions were consolidated for the purpose of a single trial.

39. The court divided 4–3, with one of the majority, Chief Judge Desmond, concurring solely on the ground that the record contained "no showing of probable cause or reasonable ground for a search to detect possible zoning law violations." People v. Laverne, 14 N.Y.2d 304, 310, 200 N.E.2d 441, 444, 251 N.Y.S.2d 452, 456 (1964).

tion without a warrant and in the absence of the homeowner's consent must be excluded in a subsequent "criminal"[40] proceeding under the language of the fourth amendment. This finding is wholly consistent with the *Frank* rationale in recognizing that the warrant requirement of the fourth amendment is applicable to searches for criminal evidence — these searches, and subsequent use of the evidence they uncover, are restricted because they represent a primary means of invoking the punitive sanctions of the state against the individual.[41]

The dissenters in *Laverne* would allow the introduction of evidence thus discovered, thereby eliminating the *Frank* distinction of criminal-civil which they term a "most unhappy one."[42] They proceeded on the theory that a restriction on the type of penalty which may be imposed on violators of health and building codes might limit the municipality to sanctions inadequate to deter future violations.

It is submitted that this position contravenes the basic rationale of the *Frank* case and, if adopted, could well lead to the type of infringement on personal privacy that *Frank* found intolerable. Conversely, the majority offers a feasible, as well as necessary, distinction in delineating constitutional limitations on administrative inspections. Usually, the violation of a health or housing ordinance will result, not in criminal liability, but in civil sanctions, normally in the form of an order directing compliance with the statute. The object of public health and welfare ordinances is corrective, rather than punitive, and any penal sanctions which may be threatened can be avoided by compliance with the inspector's order. Such an ordinance should not be held to violate the constitutional requirements of the fourth amendment.

However, where a statute subjects the homeowner to prosecution for failure to heed an administrative order, a result as was reached in the *Laverne* case should follow. In this context, any proceeding which results in a fine or imprisonment though the homeowner undertakes corrective measures to comply with the statute, should be defined as "criminal." In contrast, the term "civil" would properly apply only to those proceedings where the sanctions of the applicable ordinance are either held in abeyance or are not to become effective until the homeowner is granted a reasonable period within which to correct the uncovered deficiency.

B. *Safeguards Inherent in the Statutes*

In deciding the *Frank* case, the Supreme Court relied heavily on the safeguards imbedded in the Baltimore City ordinance.[43] It found that

40. No attempt was made to define the term; the court found merely that a suspended sentence of six months imprisonment was a criminal penalty.

41. Note, 65 COLUM. L. REV. 288, 293 (1965).

42. People v. Laverne, 14 N.Y.2d 304, 313, 200 N.E.2d 441, 446, 251 N.Y.S.2d 452, 459 (1964).

43. *Supra* note 9.

these restrictions were "designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy."[44] The ordinance required the following: (1) that valid grounds exist for the suspicion of the existence of a nuisance before inspection may be made; (2) that inspection must occur during daylight hours; and (3) that the inspector must heed the homeowner's denial of entry — the ordinance did not give authority to force entry though a fine could be imposed for resistance.

The Dayton ordinance[45] involved in *Price* contained two of these three safeguards and added another. Inspection is allowed only "at any reasonable hours," and no right of forcible entry is conferred. In addition, entry is authorized only "upon showing appropriate identification." Noticeably absent is the requirement of valid reason to suspect a nuisance before inspection can occur; and, indeed, it will be recalled that no such ground existed in the *Price* case, the request for entry occurring during a random neighborhood inspection. That this particular safeguard is not essential, as might well have been thought, is suggested by the following dicta in *Frank*:

> Time and experience have forcefully taught that the power to inspect dwelling places, *either as a matter of systematic area-by-area search* or, as here, to treat a specific problem, is one of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the . . . safeguards necessary for a search [for] evidence of criminal acts.[46] (Emphasis added.)

However, just what safeguards, or combination thereof, the Court will deem essential to constitutionality cannot as yet be ascertained with any degree of precision.[47]

In view of the fact that the Court divided five to four in *Frank*, the Baltimore City ordinance apparently came dangerously close to unconstitutionality; because of their similarities, the same would apply to the Dayton ordinance. This suggests that the safeguards provided by those statutes should be considered minimal. Under this analysis, the advisability of incorporating additional safeguards in future legislation, as well as in amending existing legislation, is obvious. Not only would the probabilities of constitutionality be enhanced, but the additional concern for the convenience of the individual would certainly have the effect of

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44. Frank v. Maryland, 359 U.S. 360, 367 (1959).

45. *Supra* note 24.

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

47. Here again it should be noted that in District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *supra* note 10, the District of Columbia Court of Appeals refused to allow a health inspector, operating under a much broader statute that contained few of the safeguards of either the Baltimore or Dayton ordinances, to inspect a residence about which a complaint had been entered. The Supreme Court resolved the issue short of the constitutional question. 339 U.S. 1 (1950).

reducing future litigation. The ultimate result would be the realization of a more efficient administrative inspection procedure.

To this end, the following provisions are suggested as commending themselves: prior notice of an impending inspection should be accorded to the homeowner. An immediate, forcible entry and search cannot be justified in the orbit of administrative enforcement, except in those few cases where an immediate threat to the public health or welfare is known to exist on the homeowner's premises. In no other situation can the forcible intrusion on the right of privacy be offset by any community interest in having the inspector gain immediate entry. In contrast to a search for evidence of criminal activity, no public interest warrants surprising the occupant; the administrative inspection is but a vehicle to secure compliance with the local ordinance. Advance notification of twenty-four hours is suggested as sufficient in view of the interests to be considered. The inclusion of such a provision should be a principal concern to drafters of future legislation.

Secondly, repeated inspections designed to harass the homeowner should be prohibited. It is certainly conceivable that an inspector might have to make more than one call on the homeowner before compliance is effected. However, a second visit should take place only after an interval sufficient to allow the homeowner to remedy the situation. While the allotted time should vary with the gravity of the condition involved, a period of two weeks to a month constitutes ample time to allow the homeowner to demonstrate his good-faith compliance.

Finally, the holding of the *Laverne* case — that any evidence secured in the course of an administrative inspection is inadmissible in subsequent criminal proceedings — should be enacted in statutory form.

VI.

THE NEED FOR STATUTORY REFORM

A. *The Philadelphia Health and Housing Codes*

"The power of inspection granted by the Baltimore City Code is strictly limited, more exacting than the analogous provisions of many other municipal codes."[48] An examination of the Health and Housing Codes of the city of Philadelphia lends credence to the above statement. Consider, along with the following discussion, that Philadelphia is in the midst of an ambitious plan of urban renewal, a situation likely to lead to a series of challenges to its Health and Housing ordinances.

The Health Code provides simply for periodic inspections and entry "at all reasonable times" with "free and unhindered access for the pur-

48. Frank v. Maryland, 359 U.S. 360, 366 (1959).

poses of such inspection."[49] Section 6–103 of the Code subjects the violator of any provision of the title to a fine of "not less than $25. and not more than $150. for the first violation and not less than $150. and not more than $300. for the second and each subsequent violation together with imprisonment not exceeding 90 days if the fine and costs are not paid within 10 days." The section also provides that continuous violation of the same provision shall be treated as a separate violation for each day.

The Housing Code is more restrictive; it provides for "inspections on weekdays between 9 a.m. and 5 p.m. upon display of proper identification."[50] Upon discovery of a violation, a notice is sent to the owner of the premises,[51] specifying the violation and designating a reasonable time within which to correct it.[52] After the expiration of the period allowed for compliance, a re-inspection is provided for.[53] If the violation has not been corrected and no appeal is pending, the violation may be ordered corrected or prosecution instituted, or both, though a reasonable extension for the purpose of compliance may be granted in hardship cases.[54] Fines within stated limits are meted out for the first two violations of section 7–503, with the third violation punishable by fine, imprisonment or both.[55] As in the Health Code, a continuing violation after notice will constitute a separate violation for each day.[56]

While the Health and Housing Codes of Philadelphia have some of the safeguards found in the ordinances involved in the *Frank* and *Price* cases, others are noticeably absent. Neither code incorporates the suggested provisions of prior notice to the homeowner and regulation of the use of the evidence secured in the search; nor does either ordinance make the legality of the inspection turn on the existence of probable cause. Further, the Health Code does not limit the inspection to daylight hours nor does it necessitate the presentation of identifying credentials by the inspector. The sanctions of said code are similarly suspect; and while the sanctions provided for in the Housing Code are civil, at least as regards the first two violations,[57] the interpretation of section 6–103 presents a different problem. Though imprisonment may not occur until the ten day period allowed for compliance has expired, there is the possibility of imprisonment attaching to a first offense. How such a penalty is to be construed under the civil-

49. PHILADELPHIA, PA., HEALTH CODE 6-501(1) (1956).

50. PHILADELPHIA, PA., HOUSING CODE 7-503(1) (1956).

51. PHILADELPHIA, PA., HOUSING CODE 7-504(1) (1956).

52. PHILADELPHIA, PA., HOUSING CODE 7-504(2) (1956).

53. PHILADELPHIA, PA., HOUSING CODE 7-504(5) (1956).

54. *Ibid.*

55. PHILADELPHIA, PA., HOUSING CODE 7-104 (1956).

56. *Ibid.*

57. Since a penalty clause is criminal in nature if it provides for both fines and, in the alternative, imprisonment, the first and second violations, to which only fines attach, must be made the subject of a civil action.

criminal distinction is questionable, especially in light of the decision in *Laverne*.[58]

It is submitted that, while the Housing Code incorporates sufficient safeguards to be held constitutional under the rationale of the *Frank* and *Price* decisions, the Health Code might well be found to fall short of the constitutional requirements imposed by *Frank*.

B. *Other Health and Housing Codes*

The codes discussed in the previous section exemplify the rule rather than the exception. A recent survey[59] of fifty local health and housing ordinances lends further credence to Mr. Justice Frankfurter's statement quoted above.[60] In view of the fact that health authorities rely heavily on the voluntary cooperation of the homeowner, it is surprising that the majority of ordinances examined have provisions for inspection procedures which dangerously approach the brink of unconstitutionality.[61] While differing significantly in the powers of entry conferred upon administrative officers, the majority of codes do not even expressly limit the inspector to the minimum safeguards prescribed by case law.[62]

The need is obvious for a close scrutiny of all existing local ordinances and applicable state legislation. To continue the operation of urban renewal programs under existing regulations is to invite costly litigation and consequent disruption of the improvement programs.

VII.

CONCLUSION

To predict the future of the law in the area of administrative inspections would be presumptuous, indeed. It is even possible that the civil-criminal rationale propounded in the *Frank* case may no longer command the support of the majority of the present Court.[63] Indeed, Mr. Justice Brennan, in his dissent in the *Price* case, speaking for four of the members

58. The penalty provided for by the Health Code is similar to the one upheld by the Supreme Court in the *Price* case. However, since the Court has not definitively outlined the criteria of its civil–criminal distinction, any such penalty provided for in an ordinance as otherwise free of restrictions on the inspecting officer as the Health Code is must be suspect.

59. The survey was conducted for use in an Editorial Note published in 28 GEO. WASH. L. REV. 421 (1960). The cities whose ordinances were studied are listed therein at p. 447 (note 166). The entire note should be consulted for a comprehensive statement of the authors' findings and conclusions.

60. *Supra* note 48.

61. 28 GEO. WASH. L. REV. 421, 447 (1960).

62. *Ibid.*

63. Mr. Justice Frankfurter, the author of the *Frank* opinion, has since retired, as has Mr. Justice Whittaker.

of the presently constituted Court, termed *Frank* "the dubious pronouncement of a gravely divided Court."[64]

However, it is posited that the necessary balance between the interest of the community in effective enforcement of health and housing regulations and that of the individual's right to privacy can best be achieved by accepting the basic rationale of *Frank,* which provides as follows: civil inspections without a warrant as an adjunct to a regulatory scheme for the general welfare, and not as a means of enforcing the criminal law, are not violative of constitutional rights, provided the inspection is reasonable and is accompanied by minimum safeguards. However, *Frank* is in need of judicial implementation; it raises important collateral issues but fails to provide their answers. Will the Supreme Court decide the issue posed in the *Laverne* case in the same manner as the New York court? What safeguards or combination of safeguards *must* a statute contain to be assured of constitutionality? Is the civil-criminal distinction drawn by *Frank* to depend on the nature of the penalty, whether fine or imprisonment, or upon the time it attaches, whether immediately or only after noncompliance, or on either? What limits will be placed on the inspector's conduct is gaining entry? A resolution of these issues with proper regard for the interests of both the homeowner and the municipal agency would make the *Frank* rationale more workable and valuable.[65]

William T. Define

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64. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 269 (1960) (dissenting opinion).

65. In Camara v. Municipal Court, 46 Cal. Rptr. 585 (1965), a decision rendered subsequent to the preparation of this comment, a California District Court of Appeals applied the *Frank* rationale to strike down a San Francisco inspection statute. The disputed section, § 503 of the Housing Code of the City and County of San Francisco, authorized certain city officials to enter and inspect buildings and other structures within the city pursuant to the performance of their duties. However, it required that any such inspection be made in the course of official duty, at reasonable hours and only upon presentation of proper credentials. If such inspection resulted in a finding that any building or portion thereof was substandard, the owner was directed to remedy the situation, under § 505 of the same Act, and could appeal such order to the Housing Appeals Board. A penalty, providing for a fine or imprisonment or both, was imposed on the owner by § 507 of the Act *only* if he neglected or refused to comply with the order of correction.

Following his arrest for violation of § 503, plaintiff contested solely upon the ground that § 503 was unconstitutional in that it authorized an unreasonable search and seizure. After reviewing the Housing Code's introductory sections which stated the Code's purpose to be the promotion of sound and wholesome residential dwellings by the elimination of substandard, unsanitary, obsolete and deficient dwelling units, the court concluded that "section 503 is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions." 46 Cal. Rptr. at 591. It found that as the ordinance was similar to those held constitutional in the *Gioner* and *Price* cases, plaintiff's constitutional objections had to fail.

It is submitted that the *Camara* decision is a meritorious one, consistent with the *Frank* rationale and the analysis of this comment. While it sheds no new light on the ancillary problems of the *Frank* decision, this decision, together with the *Gioner* ruling, indicates that the *Frank* rationale is likely to be closely followed by the state courts. Accordingly, the need for clarification of *Frank* becomes more pressing.