

CONSTITUTIONAL LAW: EVIDENCE OBTAINED  
DURING AN ADMINISTRATIVE SEARCH WITHOUT  
A WARRANT HELD INADMISSIBLE IN SUBSEQUENT  
CRIMINAL PROSECUTION

BY VIRTUE of a 1961 Supreme Court decision,<sup>1</sup> the fourth amendment prohibition against unreasonable search and seizure<sup>2</sup> was extended to state as well as federal intrusions into the home. Prior to that time, however, the Supreme Court had distinguished between administrative investigations and criminal searches by holding that the fourth amendment did not require a search warrant for the former.<sup>3</sup> This limitation upon the amendment was narrowly construed in *People v. Laverne*,<sup>4</sup> where the New York Court of Appeals held that evidence obtained during an administrative search without a warrant cannot be constitutionally admissible in a subsequent criminal proceeding.

In *Laverne*, a local building inspector entered the defendant's home, without his consent, pursuant to a local zoning ordinance<sup>5</sup> authorizing investigations without a warrant. Once inside the home, the inspector discovered that the defendant was engaged in business activity proscribed both by the zoning ordinance and an earlier injunction.<sup>6</sup> The inspector's testimony was subsequently introduced

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<sup>1</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961). See generally Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319.

<sup>2</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." U.S. CONST. amend. IV.

<sup>3</sup> See, e.g., *Ohio ex. rel. Eaton v. Price* 364 U.S. 263 (1960), affirming by an equally divided Court 168 Ohio St. 123, 151 N.E.2d 523 (1958); *Frank v. Maryland*, 359 U.S. 360 (1959). Chief Justice Warren and Justices Douglas, Black and Brennan dissented in both opinions.

<sup>4</sup> 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

<sup>5</sup> "It shall be the duty of the Building Inspector, and he hereby 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." Brief for Appellants, p. 4, citing LAUREL HOLLOW, N.Y., GEN. ORDINANCES art. X, § 10.1 (1960).

<sup>6</sup> *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).

in a successful criminal prosecution<sup>7</sup> for violation of the zoning ordinance. The Court of Appeals reversed the conviction,<sup>8</sup> holding that when a search is conducted contrary to the wishes of a home owner, the fact that it may have been initially permissible for administrative purposes does not preclude the necessity of a warrant in order to introduce evidence obtained thereby in a criminal proceeding.<sup>9</sup>

Originally, the fourth amendment was framed in response to the pre-revolutionary English practice of issuing general warrants to uncover instances of seditious libel, as well as to the colonial writs of assistance used to enforce customs regulations.<sup>10</sup> When the fourth amendment was drafted to prevent such oppressive invasions of the home, its advocates drew no distinction between civil and criminal searches.<sup>11</sup> However, fourth amendment standards were originally developed only for criminal searches because early search and seizure issues brought before the courts were exclusively in criminal contexts.<sup>12</sup> Although several courts had decided that the states' power

<sup>7</sup> The inspector entered the home on three different occasions, resulting in three separate criminal prosecutions which were consolidated for the purpose of a single trial.

<sup>8</sup> The court divided four to three, with one of the majority, Chief Judge Desmond, filing a separate concurring opinion.

<sup>9</sup> By means of the fourteenth amendment, see text accompanying notes 1-2 *supra*, defendant Laverne derived a fourth amendment protection against unreasonable searches and seizures. In many instances searches without warrants for evidence of crime are unreasonable. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *McDonald v. United States*, 335 U.S. 451 (1948); *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>10</sup> See Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 476 (1961). For an exhaustive treatment of the historical development of the fourth amendment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORY AND POLITICAL SCIENCE, Series 55, No. 2 (1937). See also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46; Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1934); Wood, *The Scope of Constitutional Immunity Against Searches and Seizures*, 34 W. VA. L.Q. 1 (1927).

<sup>11</sup> See Lasson, *supra* note 10, at 93; Comment, 44 MINN. L. REV. 513, 523 (1960).

<sup>12</sup> See 17 U. CHI. L. REV. 733, 736-37 (1950). The lack of precedent on administrative search and seizure issues may result from the early absence of federal administrative agencies. See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 11 (4th ed. 1960). Another factor is the immunity from suit of federal officers as agents of the Government with the privilege of sovereign immunity. *Barr v. Matteo*, 360 U.S. 564 (1959); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); 1964 DUKE L.J. 603, 605. Furthermore, as the fourth amendment restricts only governmental action, there are no prohibitions on searches and seizures exercised by individuals. *E.g.*, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

See also *Boyd v. United States*, 116 U.S. 616, 633 (1886) (interrelationship between fourth and fifth amendments indicates fourth amendment applies only to criminal

to protect the health of its citizens was sufficient cause to permit inspection without a warrant,<sup>13</sup> the fourth amendment was not deemed sufficient to exclude evidence obtained in violation thereof in state court prosecutions.<sup>14</sup>

Therefore, it was not until 1949 that an *administrative* investigation was challenged under fourth amendment standards.<sup>15</sup> At that time the Court of Appeals for the District of Columbia, in ruling that a health inspection without a warrant was unconstitutional, held that administrative as well as criminal procedures are subjected to fourth amendment restrictions. The court reasoned that the right of privacy in the home was not limited to those guilty or suspected of crime.<sup>16</sup>

Ten years later, the Supreme Court in *Frank v. Maryland*<sup>17</sup> first considered the application of the fourth amendment to state administrative searches. There the defendant had refused to permit a local health official to enter his home for purposes of investigating an obvious health hazard.<sup>18</sup> In a five to four decision, the Court established a dichotomy between administrative and criminal searches,<sup>19</sup> holding that a warrant is required for a police search<sup>20</sup>

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contexts). *Contra*, 8 WIGMORE, EVIDENCE § 2264 n.4 (rev. ed. 1961) (privilege against self-incrimination not generically related to fourth amendment).

<sup>13</sup> E.g., *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956) (routine inspection made at reasonable hours); *Dedrick v. Smith*, 88 N.H. 63, 184 Atl. 595, *appeal dismissed*, 299 U.S. 506 (1936) (veterinarian may enter barn without warrant to test cattle for disease).

<sup>14</sup> *Wolf v. Colorado*, 338 U.S. 25, 33 (1948), overruled in *Mapp v. Ohio*, 367 U.S. 643, 645-60 (1961).

<sup>15</sup> *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

<sup>16</sup> *District of Columbia v. Little*, 178 F.2d 13, 16 (D.C. Cir. 1949). The court argued that a distinction between civil and criminal inspections would fail to recognize that the fourth amendment did not confer a right. Rather, it was a right already belonging to the people, and the amendment was intended to establish the only exception to that right, that is allowing a search with presentment of a warrant. *Id.* at 17. See 10 HASTINGS L.J. 430, 432 (1959).

The Supreme Court did not consider the merits of this interpretation but disposed of the case on other grounds. The Court found that there was no interference with an officer in pursuance of his duties, and therefore there had been no violation of the ordinance making interference a misdemeanor. Thus, the constitutional issues were avoided. *District of Columbia v. Little*, 339 U.S. 1, 4 (1950).

<sup>17</sup> 359 U.S. 360 (1959).

<sup>18</sup> The defendant home owner denied entry to a health inspector who was acting under the authority of a local health ordinance allowing the search without a warrant. The search was prompted by the sight of rat infestation outside the house. *Id.* at 361.

<sup>19</sup> *Id.* at 364, 366-67. The Court did not specify whether administrative investigations are subject to different standards under the fourth amendment than are criminal searches, or whether the fourth amendment is to apply solely to criminal cases.

but not for a reasonable administrative investigation.<sup>21</sup> After recognizing the value of administrative inspections to enforce minimal housing standards and inhibit the spread of disease, the majority determined that the effectiveness of such inspections would be severely limited by requiring a warrant for each individual search.<sup>22</sup> The Court also relied upon early case law to conclude that the fourth amendment was intended to restrict only police searches for crime.<sup>23</sup> The problem which the majority in *Frank* did not consider, however, was whether evidence obtained pursuant to an administrative entry and investigation could be used to impose subsequent criminal sanctions without the warrant required for most criminal searches.

It may be validly assumed in at least two situations that a search prompted by administrative considerations will retain its civil characteristics. First, the object may be simply to gather information for general ministerial purposes, such as a building inspector's study directed toward future rezoning. Second, the search may lead to administrative sanctions, such as reporting building violations to a special zoning board which may issue an order enjoining violative use of the property.<sup>24</sup> Although judicial injunctions may be required to enforce the order,<sup>25</sup> even in these instances subsequent legal action retains the civil characteristics of the original search.

Nevertheless, a search which commences as civil in nature may have certain criminal consequences, as violations of zoning ordi-

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Compare Comment, *supra* note 11, at 523-24, with 8 WIGMORE, *op. cit. supra* note 12, § 2264 n.4.

<sup>20</sup> If the police search is incident to a valid arrest, a search warrant is not needed. *Preston v. United States*, 376 U.S. 364 (1964); *Harris v. United States*, 331 U.S. 145 (1947); *Angello v. United States*, 269 U.S. 20, 30 (1925) (dictum).

<sup>21</sup> The inspection here was reasonable because it was made in furtherance of a health program; there were valid grounds for suspicion of a present nuisance; it was made during the daytime; and the inspector did not attempt to physically force himself into the house. 359 U.S. at 366-67.

<sup>22</sup> *Id.* at 371; see Stahl & Kuhn, *Inspections and the Fourth Amendment*, 11 U. PITT. L. REV. 256, 275-76 (1950); 28 FORDHAM L. REV. 529, 534 (1959); 108 U. PA. L. REV. 265, 276-77 (1959). But see Note, 69 HARV. L. REV. 1115, 1125 (1956); 44 ILL. L. REV. 845, 847-48 (1950).

<sup>23</sup> 359 U.S. at 365. But see text accompanying note 12 *supra*.

<sup>24</sup> See 359 U.S. at 366. See also 1 YORLEY, ZONING LAW AND PRACTICE § 51 (2d ed. 1953).

<sup>25</sup> Such injunctions are similar in nature to the injunctive relief necessary to abate a public nuisance. 1 YORLEY, *op. cit. supra* note 24, § 112; see, e.g., *Village of Northport v. Walsh*, 265 N.Y. 458, 193 N.E. 270 (1934); *City of New York v. M. Wineburgh Advertising Co.*, 122 App. Div. 748, 107 N.Y. Supp. 478 (1907); *Town of Ramapo v. Bockar*, 151 Misc. 613, 273 N.Y. Supp. 452 (Sup. Ct. 1934).

nances are frequently misdemeanors punishable by fine or imprisonment.<sup>26</sup> Furthermore, the investigator may discover evidence of a crime unrelated to the original purposes of his search. Whereas the *Frank* Court established the criminal-administrative dichotomy only with reference to the inspector's attempt to gain entry, the Court of Appeals in *Laverne* was confronted with evaluating the search with reference to its subsequent judicial consequences.

*Laverne* indicates that there are two possible alternatives within the context of the *Frank* holding. One is based upon the Supreme Court's assertion that an initially unreasonable search is not rendered constitutional by what it brings to bear.<sup>27</sup> From this rule of law, the dissent in *Laverne* inferred a corollary that a search which is legal in its incipiency cannot be rendered unconstitutional by its fruits.<sup>28</sup> Thus, a search initiated with a bona fide administrative intent will be valid irrespective of its consequences. This corollary, however, is anomalous in that the rule from which it is derived was established to strengthen the efficacy of fourth amendment rights. The effect of the corollary would frustrate the fundamental aim of the fourth amendment which was intended, at the very least, to require warrants for searches leading to criminal prosecutions.<sup>29</sup>

In order to avoid such an undesirable result, the plurality<sup>30</sup> in *Laverne* extended the criminal-administrative dichotomy to apply to subsequent judicial action. Although this precludes the imposition of criminal sanctions where there was a search without a warrant, it also predicates the validity of the search upon the result of the investigation. From a policy point of view, this denies the home owner any certainty as to the constitutionality of the search until long after the privacy of his home has been invaded. If he can resist an administrative investigation only to the extent of objecting to the admissibility of evidence in a criminal prosecution, then the

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<sup>26</sup> *E.g.*, *People v. Gillman*, 6 App. Div. 2d 899, 177 N.Y.S.2d 623 (1958); 1 YOKLEY, *op. cit. supra* note 24, §§ 105, 108.

<sup>27</sup> *United States v. Di Re*, 332 U.S. 581, 595 (1948); *Byars v. United States*, 273 U.S. 28, 29 (1927); see *Kelly v. United States*, 197 F.2d 162, 164 (5th Cir. 1952).

<sup>28</sup> 200 N.E.2d at 446, 251 N.Y.S.2d at 459-60. Support for this corollary may be found in *Abel v. United States*, 362 U.S. 217 (1960), where an espionage conviction was based upon evidence obtained by FBI agents during an administrative investigation. There, however, the search was authorized by a warrant.

<sup>29</sup> See 359 U.S. at 365.

<sup>30</sup> The term plurality is used to indicate the analysis of three of the four judges agreeing to reverse the conviction. Chief Judge Desmond in his concurring opinion agreed with this result solely on the basis that no reasonable grounds were shown for the necessity of a search without a warrant.

search will not infringe upon fourth amendment rights prior to a trial. However, at least two members of the Supreme Court have recognized that there is inherent in the fourth amendment a constitutional right of privacy against *arbitrary* governmental intrusion.<sup>31</sup> Freedom from arbitrary intrusion is seemingly frustrated in *Laverne* if the home owner cannot rely upon his right to resist intrusion until after the search is an accomplished fact.

If the criminal-administrative dichotomy established in *Frank* were abandoned, a standard for decision exists which could be applied to all search and seizure cases irrespective of their criminal or administrative characterizations. The "inherent necessity," or "exceptional circumstances," doctrine has been developed in numerous criminal cases.<sup>32</sup> This holds that lack of a warrant will not render a search unreasonable if there is an urgent need for investigation, such as a possible loss of evidence or imminent damage to the public interest, and time does not allow for obtaining a warrant. Under this doctrine, the status of the officer and the purpose of his mission are irrelevant—no government official can invade one's private home without a warrant except in cases of an immediate crisis.<sup>33</sup> It may be argued that the "inherent necessity" doctrine should not be applied in the context of an administrative search because it arose out of cases involving only criminal searches. This is not a particularly compelling argument, for it has only been recently that fourth amendment search and seizure issues were raised against administrative investigations.<sup>34</sup> Reconsideration of the criminal-administrative dichotomy by the Supreme Court would not

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<sup>31</sup> See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (privacy against arbitrary government intrusion is basic to fourth amendment); *Frank v. Maryland*, 359 U.S. at 365, 374-75; *cf. Poe v. Ullman*, 367 U.S. 497, 517, 549-50 (1961) (dissenting opinions on the merits).

<sup>32</sup> *E.g.*, *McDonald v. United States*, 335 U.S. 451, 455 (1948) (mere inconvenience in appearing before a magistrate not sufficient to justify lack of warrant); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (evidence would not grow stale from a delay in acquiring a warrant).

<sup>33</sup> The "inherent necessity" test would have brought a different result in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) *affirming by an equally divided Court* 168 Ohio St. 123, 151 N.E.2d 523 (1958). That case upheld an ordinance authorizing a building inspector's entry into the home without a warrant for the purpose of making necessary repairs and alterations required by housing standards. *Frank* was held controlling by the Justices for affirmance, *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 248 (1959), presumably because the attempted entry was a purely administrative exercise; but there was neither a reasonable belief that a code violation existed nor a showing of why a search warrant could not have been attained.

<sup>34</sup> See text accompanying notes 10-15 *supra*.

be inappropriate because *Frank* was decided before the Court applied fourth amendment unreasonable search and seizure standards to intrusions of state and local officials.<sup>35</sup> Moreover, the policy factors advanced in justification of *Frank*<sup>36</sup> could be satisfied by the stricter requirements of the "inherent necessity" doctrine. That is, when the time required to procure a warrant would defeat the purposes of inspection, the public interest in enforcing health and other laws would be of paramount importance. For mere routine inspections, however, the necessity of a warrant would not unduly restrict the effective enforcement of the law.

The Supreme Court precedent in *Frank* compelled both the plurality and dissenting opinions in *Laverne* to adhere to the criminal-administrative dichotomy. Hopefully, the inequitable results advocated by both opinions will prompt the Supreme Court to reappraise the problem<sup>37</sup> and formulate a new standard for decision.<sup>38</sup> An application of the "inherent necessity" theory would avoid the tenuous distinction between administrative and criminal searches, as well as provide the home owner with some degree of security against arbitrary intrusions at the time of entry.

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<sup>35</sup> Mr. Justice Brennan has expressed an opinion that the *Frank* decision was strongly influenced by a distinction between the guaranties of privacy in the fourth and fourteenth amendments. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274 (1960) (dissenting opinion), *affirming by an equally divided Court* 168 Ohio St. 123, 151 N.E.2d 523 (1958). Since *Mapp v. Ohio*, 367 U.S. 643 (1961) incorporated fourth amendment guaranties in the fourteenth, the Supreme Court is no longer concerned with such a distinction.

<sup>36</sup> See text accompanying note 22 *supra*.

<sup>37</sup> A further argument against use of the dichotomy is that it could lead to a practice analogous to the "silver platter" doctrine. This concept allowed federal officers to send state policemen, who were not subject to fourth amendment prohibitions at that time, to make the search. Evidence so obtained would then be used in federal prosecutions. In the present context, police officers could send administrative officials to gather criminal evidence in the course of their inspections. However, the "silver platter" doctrine was rejected in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Elkins v. United States*, 364 U.S. 206 (1960). See generally Traynor, *supra* note 1.

*Abel v. United States*, 362 U.S. 217, 230 (1960), (criminal evidence obtained under the authority of a valid administrative search admissible), attempts to eliminate any possible analogy to the "silver platter" doctrine by emphasizing that the initial administrative search must be a bona fide step to a civil proceeding. See also note 28 *supra*.

<sup>38</sup> The equal division of the Court in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), *affirming by an equally divided Court* 168 Ohio St. 123, 151 N.E.2d 523 (1958), and *Frank*, see note 3 *supra*, indicates that the addition of Mr. Justice Goldberg in place of Mr. Justice Frankfurter may result in overruling *Frank*.