

# THE LAW OF ADMINISTRATIVE INSPECTIONS: ARE CAMARA AND SEE STILL ALIVE AND WELL?

## INTRODUCTION

The law of administrative inspections has undergone a significant transition in the last five years, as a consequence of the Supreme Court's redefinition of the scope of the fourth amendment. Although this note will explore the historical underpinnings of this shift in interpretation, it focuses primarily on developments since the Court's landmark decisions in *Camara* and *See*. The continued validity of those rulings will be examined by surveying the relevant case law as well as the response of the states to the problems created by the Court.

## HISTORY OF THE FOURTH AMENDMENT

Conflicting interpretations of the fourth amendment have survived to the present day. One view proceeds on the theory of the interrelationship of the fourth<sup>1</sup> and fifth<sup>2</sup> amendments, resulting in a limitation of the constitutional protections to searches for criminal evidence.<sup>3</sup> The

---

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

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

3. In the early colonial years people were harassed by searches and seizures made pursuant to writs of assistance and general warrants. But since these general warrants were used to authorize, on mere suspicion, a search for evidence of seditions, libels, and seizures of all suspected papers, they were declared illegal and void in the famous English case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765).

Under this view, the historical setting of the fourth amendment is limited to a reading of criminal cases such as *Entick*, which is considered the predecessor to the fourth amendment. By so doing, it becomes apparent that "civil" searches were intended to be outside fourth amendment protection. This approach to fourth amendment history was adopted by the Supreme Court in *Frank v. Maryland*, 359 U.S. 360, 363-65 (1959). The *Frank* Court reinforced this view by looking to *Boyd v. United States*, 116 U.S. 616 (1886), which it considered to be an application of the rationale in *Entick*. In *Boyd*, the Court held that where certain severe penalties imposed by customs laws "in substance" converted a civil proceeding into a criminal case, a court order compelling production of a document violated the fourth and fifth amend-

other adopts the approach that the fourth amendment was intended to protect the privacy of the home—whether “civil” or “criminal” evidence be the object of the search.<sup>4</sup> In addition to this civil-criminal dichotomy in fourth amendment interpretation, two theories have evolved concerning the relationship of the fourth amendment’s two basic clauses.<sup>5</sup> The first approach, which was followed by the Supreme Court for more than 150 years, views the reasonableness and warrant clauses as complements, so that a warrant is considered to be

---

ments. Proceeding on a theory of the interrelationship between the two amendments, the *Boyd* Court held that the fourth amendment was violated because the production order was the “equivalent” of an unreasonable search, since it required the accused to give evidence against himself in a criminal case. For a suggestion that the *Frank* Court misread *Entick* and *Boyd* in light of the entire fourth amendment history see 44 MINN. L. REV. 513 (1960); 28 U. CIN. L. REV. 478 (1959).

4. The colonial history of abuses has a broader scope than searches and seizures in connection with criminal libel proceedings. The colonists wanted security against intrusion into personal privacy as an ultimate value on its own. 28 U. CIN. L. REV. 478, 483 (1959). The colonists were also outraged at the unrestricted use of civil writs and warrants to enforce customs laws. 44 MINN. L. REV. 513, 521-22 (1960). In this regard particular attention should be given to James Otis’ argument against the writs of assistance in Paxton’s Case, Quincy’s Massachusetts Reports 1761-1772, 51,471 (1761), wherein he states: “this writ is against the fundamental principles of Law—The Privilege of House. A man, who is quiet, is as secure in his house, as a Prince in his castle.” From this it is argued that the framers of the fourth amendment did not intend to distinguish between civil and criminal searches. This view is supported by the words of the fourth amendment itself, which suggest no limitation to criminal searches. In addition to the foregoing, this theory views “both *Boyd* and *Entick* as tend[ing] . . . to support the view that the fourth amendment requires a warrant for both criminal and civil searches. Both cases suggest that even where the state has a strong interest in utilizing a power of search, and where search is conducted pursuant to a judicially issued warrant, the *reasonableness* of that search will *nevertheless* be subjected to close constitutional scrutiny.” 44 MINN. L. REV. 513, 526 (1960). [Emphasis in original].

Additional support for the right of privacy conception of the fourth amendment can be found in the Supreme Court’s decisions relating to the scope of administrative subpoenas. The Court has established certain requirements that must be met in issuing subpoenas, in part to protect the privacy of the person being investigated. *E.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Wilson v. United States*, 221 U.S. 361 (1911). See Note, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALB. L. REV. 155, 164 (1967).

5. The first clause is a recognition of a right of privacy. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961); *cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). The second clause “provides the basic procedural test for determining the reasonableness of a search.” Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U. L. REV. 1119 (1967). See *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

a prerequisite to a reasonable search.<sup>6</sup> In 1950 the Supreme Court adopted the second theory, which holds that the reasonableness of a search can be determined independently of the warrant requirement.<sup>7</sup> Strains of these various theories and interpretations run throughout the law of administrative search and seizure.

### *Administrative Inspections*

Statutory provisions which authorize administrative inspection of commercial structures, and of one's home, date to colonial times.<sup>8</sup> Here the inspector, theoretically, is not interested in prosecuting a person for building or sanitary code violations, but is only desirous of securing an individual's compliance with the applicable code section.<sup>9</sup> The courts which have addressed themselves to the problem of whether a warrant is required under such circumstances have reached conflicting results, leaving this area of the law unsettled.<sup>10</sup> Beginning in 1869, the lower federal courts consistently held that the fourth amendment applied only to criminal investigations.<sup>11</sup> The constitutionality

---

6. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966); Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U. L. REV. 1119 (1967). E.g., *McDonald v. United States*, 335 U.S. 451, 456 (1948); *Agnello v. United States*, 269 U.S. 20, 32 (1925). For administrative search and seizure cases representing this view: *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

7. *United States v. Rabinowitz*, 339 U.S. 56 (1950), wherein the Court stated: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 66. For administrative search and seizure cases representing this view: *Wyman v. James*, 400 U.S. 309 (1971); *Frank v. Maryland*, 359 U.S. 360 (1959).

8. See Note, *Administrative Inspection Procedures Under the Fourth Amendment — Administrative Probable Cause*, 32 ALB. L. REV. 115, 159 (1967). See also *Frank v. Maryland*, 359 U.S. 360, 367-68 nn. 5 & 6 (1959).

9. See 65 COLUM. L. REV. 288, 294 (1965).

10. Compare *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950) (requiring a search warrant absent valid consent or emergency) with *Wyman v. James*, 400 U.S. 309 (1971) (decision arguably authorizing a warrantless home visit by welfare caseworker); *Frank v. Maryland*, 359 U.S. 360 (1959) (authorizing warrantless health code inspection).

11. *In re Meador*, 16 F. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869): "[T]his is a civil proceeding and in no way does it partake of the character of a criminal prosecution . . . therefore, in this proceeding the fourth amendment is not violated." *In re Strouse*, 23 F. Cas. 261, 262 (No. 13,548) (D. Nev. 1871): "[T]he fourth amendment . . . is applicable in criminal cases only." Cf. *United States v. Three Tons of*

of warrantless administrative inspections was seldom challenged<sup>12</sup> until the 1949 decision of *District of Columbia v. Little*.<sup>13</sup> Mrs. Little refused to allow a health inspector to enter without a warrant and was convicted of having "hindered, obstructed, and interfered" with an inspector of the Health Department in the performance of his duty.<sup>14</sup> On appeal the government argued that a warrant is not required when there is no search for evidence of a crime,<sup>15</sup> since the fourth amendment is "premised upon and limited by the fifth amendment provisions regarding self-incrimination."<sup>16</sup> In affirming the reversal of the conviction, Judge Prettyman, for the court of appeals, rejected the government's argument, stating:

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 essentials of our concept of civilization. . . . It was not related to crime or to suspicion of crime. It belonged to all men, not merely criminals, real or suspected . . . 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.<sup>17</sup>

The United States Supreme Court avoided the constitutional issue and affirmed<sup>18</sup> on the ground that defendant's refusal to unlock her door was not "interference" within the meaning of the district statute.<sup>19</sup>

Coal, 28 F. Cas. 149 (No. 16,515) (E.D. Wis. 1875); *United States v. Distillery No. Twenty Eight*, 25 F. Cas. 868 (No. 14,966) (D. Ind. 1875); *Stockwell v. United States*, 23 F. Cas. 116 (No. 13,466) (C.C.D. Me. 1870); *In re Platt*, 19 F. Cas. 815 (No. 11,212) (S.D.N.Y. 1874).

12. The constitutionality of such inspections of commercial premises had previously been challenged on several occasions, but without success. See, e.g., *Hubbell v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910); *Dederick v. Smith*, 88 N.H. 63, 184 A. 595 (1936).

13. 178 F.2d 13 (D.C. Cir. 1949).

14. *Id.* at 14.

15. *Id.* at 16.

16. *Id.*

17. *Id.* at 16-17. "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. Inspect means to look at, search means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with tyranny." *Id.* at 18.

18. 339 U.S. 1 (1950).

19. "This is . . . an appropriate case in which to apply our sound general policy

In *Frank v. Maryland*,<sup>20</sup> the Supreme Court decided the question left unanswered by its disposition of the *Little* case. An inspector of the Baltimore City Health Department, acting under a provision of the Baltimore Health Code authorizing warrantless inspections for cause,<sup>21</sup> sought entry into a dwelling believed to be the source of rat infestation. Frank refused to allow the inspector to enter and was arrested and convicted for violating the code. A divided Supreme Court upheld the validity of the code provision, and rejected appellant's claim of protection, under the fourth and fourteenth amendments.<sup>22</sup> After reviewing the historical background of the fourth amendment,<sup>23</sup> Mr. Justice Frankfurter, writing for four members of the court, rejected the fundamental basis of the court of appeals' decision in *Little*, holding instead that a warrant meeting the requirements of the fourth amendment was needed only when the search or inspection was intended to secure evidence of a crime.<sup>24</sup> The Court found the constitutional right to privacy was not entitled to protection in this case since the intrusion under a health code inspection was slight compared with that of a criminal search.<sup>25</sup> The inspection touched "at most upon the per-

---

against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds." *Id.* at 4.

20. 359 U.S. 360 (1959). The cases which arose between the Supreme Court decisions in *Little* and *Frank* indicate the courts were not willing to follow the approach of the court of appeals in *Little*. See *Perry v. City of Birmingham*, 38 Ala. App. 460, 88 So. 2d 577 (1956), where a state statute requiring officers to obtain a warrant before searching for evidence of violation of liquor laws was held inapplicable to the enforcement of municipal liquor ordinances; *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956) which arose under the same statute as was involved in *Frank*. Here inspectors representing the Commissioner of Health, the Building's Inspection Engineer and the Chief Engineer of the Fire Department, accompanied by an electrical inspector and a uniformed policeman, visited the premises of appellant and asked permission to enter to make an inspection of the premises under the Baltimore City Code. The appellant refused the right of entry to the inspection team, and was subsequently found guilty of violations relating to the buildings. Appellant attacked the conviction upon the ground that these were unlawful searches. In affirming, the court of appeals determined that the inspection was not unlawful and did not involve any violation of the Maryland Constitution or the fourteenth amendment; *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955) (The constitutionality of a municipal housing ordinance, a provision of which authorized housing inspections without warrants, was upheld by a divided court.).

21. 359 U.S. at 361.

22. *Id.* at 366.

23. See notes 3-4 *supra* and accompanying text.

24. 359 U.S. at 365-66.

25. *Id.* at 366.

iphery of the important interests safeguarded by the fourteenth amendment."<sup>26</sup> The court went on to explain:

But giving the fullest scope to this constitutional right to privacy, its protection cannot here be invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection, and what he cannot properly resist, namely, act in a manner consistent with the maintenance of minimum community standards of health and well being, including his own. Appellant's resistance can only be based, not on admissible self-protection, but on a rarely voiced denial of any official justification for seeking to enter his home.<sup>27</sup>

Mr. Justice Whittaker concurred in the opinion of the court on the basis that under the facts of this case he could not say that the conviction was premised on an unreasonable search.<sup>28</sup> Mr. Justice Douglas, writing for the four dissenters, urged that both history and current authority show that the fourth amendment protects the privacy and dignity of the individual from invasion by "officious" government officers, without distinguishing between searches for "civil" or "criminal" evidence.<sup>29</sup>

After the *Frank* decision, the homeowner, when confronted by an inspector, was forced to make one of two choices. He could either refuse entry, thereby subjecting himself to criminal penalties, or permit

---

26. *Id.* at 367.

27. *Id.* at 366. The Court in *Frank* also considered the problem of whether a warrant could legally be obtained if one were required. The Court feared either that it could not be obtained because of the strict constitutional requirements of probable cause regulating their issuance, or that these requirements would thereby be lowered. Both alternatives were unsatisfactory to the Court—the first because it would greatly impair the efficiency of the inspection program, and the second because it would be constitutionally unacceptable. *Id.* at 373.

28. 359 U.S. at 373-74.

29. *Id.* at 374-82. The dissent particularly objected to the fact there were adequate grounds and opportunity for the inspector to obtain a warrant if he had chosen to do so; and pointed out that the need for a power of entry for health inspectors is questionable, since they are seldom denied entry. *Id.* at 381-83. Finally, the dissenters adopted the court's argument in *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949): "To say that a man suspected of a crime has a right to protection against search of his home without warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." 359 U.S. at 378.

entry, and thus subject himself to possible priminal prosecution, if the official discovered evidence of criminal activity during the inspection.<sup>30</sup>

### *Camara AND See*

Although *Frank* was followed by the courts in the years after its decision,<sup>31</sup> the sharp split among the members of the Court as to the

---

30. For a commentary taking critical view of the *Frank* decision see 44 MINN. L. REV. 513, 531-33 (1960).

31. See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960): the Supreme Court affirmed *ex necessitate* an Ohio Supreme Court decision, 168 Ohio St. 123, 151 N.E.2d 523 (1958), in which a warrantless inspection was held to be constitutional. In *Price* there was no showing of a belief on the part of the inspector, nor was one required, that a code violation did exist.

There are two noticeable differences between *Frank v. Maryland* and the *Price* case: (1) there is only a twenty dollar fine under the Baltimore ordinance while under the Dayton, Ohio ordinance a maximum fine of \$200, thirty days in jail, or both may be imposed and; (2) the Baltimore ordinance requires the officer to have cause to suspect that a nuisance exists in the dwelling before he can enter without a warrant, while the Dayton ordinance does not.

The dissent in *Price* argued that this decision went much further than the decision in *Frank* in that here only a general demand for entry was made. As in *Frank*, the dissent argued that when a homeowner refuses to consent to such an inspection a warrant should be required before the inspector may proceed. In response to the criticisms of such a requirement the dissent said:

It has been suggested that if the Fourth Amendment's requirement of a search warrant is acknowledged to be applicable here the result will be general watering down of the standards for the issuance of search warrants. For it is said that since it is agreed that a warrant for a health and safety inspection can be made on a showing quite different in kind from that which would, for example, justify a search for narcotics, magistrates will become lax generally in issuing warrants. The suggested preventative for this laxity is a drastic one: dispense with warrants for these inspections. We cannot believe that here it is necessary thus to burn down the house to roast the pig. 364 U.S. 263, 273 (1960).

See also *Parrish v. Civil Service Comm.*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (holding unconstitutional pre-dawn searches without warrants to determine welfare eligibility where denial of admittance was basis for cutting off funds; the court followed the *Frank* guidelines by stating that the evidence sought would have been the basis for prosecution and there was no suspicion as to the eligibility of the occupants of the homes searched); *State v. Schaffel*, 4 Conn. Cir. 234, 229 A.2d 552 (1966) (conviction affirmed, where there was specific complaint and probable cause that there was a violation of the housing code); *State v. Rees*, 258 Iowa 813, 139 N.W.2d 406 (1966) (upholding, in arson case, use of evidence obtained without a warrant by fire inspector investigating criminal cause of fire, when statute authorized investigation); *Commonwealth v. Hadley*, 351 Mass. 439, 222 N.E.2d 681 (1966), *vacated*, 388 U.S. 464 (1967) (upheld conviction for refusal to admit inspectors conducting city program of code enforcement); *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960) (affirming conviction for refusing to admit building commissioner who was "empowered at anytime between nine o'clock a.m. and six o'clock p.m., or at any time

scope of the fourth amendment suggested the issue had not been finally settled. Eight years later the issue of warrantless administrative searches confronted the Court again in *Camara v. Municipal Court*<sup>32</sup> and *See v. City of Seattle*.<sup>33</sup> In *Camara* an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health, having been informed by appellant's landlord that the rear portion of his leased premises was being used for residential purposes, contrary to the building's occupancy permit, sought to inspect the apartment on two occasions but was refused entry. On both occasions appellant refused entry to the inspector because of his failure to produce a search warrant. Thereupon appellant was directed to appear at the district attorney's office, but he failed to comply with the citation. He again refused to allow the inspection even though the ordinance authorizing such warrantless searches was read to him.<sup>34</sup> He was then arrested for failure to comply with the ordinance and was released on bail.<sup>35</sup>

Appellant's demurrer to the criminal complaint was denied, whereupon he filed a petition for a writ of prohibition alleging the ordinance authorizing the warrantless search was unconstitutional under the fourth and fourteenth amendments because it "authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein."<sup>36</sup>

The Court vacated the California court's denial of the writ, holding that the fourth amendment bars prosecution of a person who has refused to permit a warrantless code enforcement inspection of his pri-

---

it is necessary in his opinion to enter any structure); *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964) (conviction for violation of building zoning ordinance authorizing inspector "to enter any building or premises at any reasonable time" reversed, since evidence was for purpose of criminal prosecution and there was no warrant); *People v. Belcher*, 49 Misc. 2d 631, 268 N.Y.S.2d 148 (Nassau County Ct. 1966) (permitting police to enter private property to investigate potential hazard to public health when there was complaint); *People v. Maddaus*, 17 N.Y.2d 625, 216 N.E.2d 332, 269 N.Y.S.2d 127 (1966); *State v. Johnson*, 119 Ohio App. 477, 200 N.E.2d 711 (1962) (upholding conviction for refusing to permit entry of health inspectors for purposes of inspecting food service operations when ordinance provided entry at "reasonable time.")

32. 387 U.S. 523 (1967).

33. 387 U.S. 541 (1967).

34. 387 U.S. 523, 526 n.1 (1967).

35. *Id.* at 527.

36. *Id.*

vate residence.<sup>37</sup> The majority opinion stated that under the facts presented a search warrant was required,<sup>38</sup> and overruled *Frank* to the extent that it authorized such warrantless searches. In rejecting the *Frank* argument that the interests here protected are merely "peripheral", the court stated:

It is surely anomolous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior. For instance, 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, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.<sup>39</sup>

By recognizing that an individual's "right of privacy" is protected by the fourth amendment apart from any considerations of the fifth amendment, the Court adopted the construction urged by Judge Prettyman in the *Little* case.<sup>40</sup> In addition, the Court rejected the notion that administrative inspections are merely "civil" and not "criminal" in nature, the position the Court had taken in *Frank*.<sup>41</sup>

Having decided that a warrant was required once entry had been refused, the Court went on to consider the standard of reasonableness that should apply to administrative inspections. Though recognizing that probable cause is the constitutional measure of reasonableness, the Court rejected appellant's contention that a warrant should be is-

---

37. *Id.* at 540.

38. "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. 523, 528-29 (1967). "As we explained in *Camara*, a search of private houses is *presumptively unreasonable* if conducted without a warrant." (emphasis added). See *v. City of Seattle*, 387 U.S. 541, 543 (1967).

39. 387 U.S. 523, 530-31 (1967).

40. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949). See nn. 13-17 *supra* for full elaboration of the *Little* decision.

41. "And even accepting *Frank's* rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize self-protection interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence." 387 U.S. 523, 531 (1967).

sued only on a showing of probable cause that a particular dwelling has violated the code.<sup>42</sup> The Court declared that in applying the probable cause standard it is necessary to focus on the governmental interest which is sought to be furthered. The interest involved here is the prevention of conditions which are detrimental to the public health and well being. Recognizing that this interest is different from that involved in the search for the instrumentalities or fruits of a crime,<sup>43</sup> the Court determined that the most effective means of satisfying the relevant governmental interest is through an area inspection.<sup>44</sup> Accordingly a different standard for "probable cause" was established.

[P]robable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building . . . or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.<sup>45</sup>

---

42. Traditional probable cause exists when "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense was committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925); *accord*, *United States v. Ventresca*, 380 U.S. 102, 107-09 (1965); *Aguilar v. Texas*, 378 U.S. 108, 112 (1964); *Brinegar v. United States*, 338 U.S. 160, 175 (1949). It is clear that the nonapplicability of this test to the administrative search area is the most desirable view. To require the warrant applicants to describe with particularity the basis for each premises to be inspected would place an impossible burden on the administrative department and ultimately defeat the public interest involved. *See* 65 COLUM. L. REV. 288 (1965). For a comparison of administrative probable cause and criminal probable cause for the issuance of warrants *see* Note, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALB. L. REV. 155 (1967); 3 GONZAGA L. REV. 172 (1968).

43. *See* note 11 *supra*.

44. There are two common types of code-enforcement inspections. Complaint inspections occur upon receipt of a complaint alleging possible code violations on the part of the occupant or business owner. Area inspections are routine, periodic examinations of all the structures in a particular locality. As to the reasonableness of the area inspection the Court stated: ". . . a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. The Court then notes that the *Frank* decision supported this position. *Id.*

45. *Id.* at 538.

The Court in *Camara* noted two significant limitations on its holding that a warrant is required prior to an administrative inspection of a private dwelling: (1) a warrantless inspection in an emergency situation is not foreclosed;<sup>46</sup> (2) the warrant requirement is obviated if "proper consent" is given.<sup>47</sup>

The companion case of *See v. City of Seattle* presented the question of whether the owner of a locked commercial warehouse could, constitutionally, be convicted for failure to allow a fire inspector to conduct a warrantless inspection of the interior of the premises.<sup>48</sup> On the basis of the decision in *Camara*, the Court held that the fire inspector was required to procure a search warrant if the owner prohibited entry, and that the owner may not be prosecuted for his refusal to allow the warrantless search.<sup>49</sup> The same "flexible standard" governing the issuance of a warrant was held to be applicable in this situation.<sup>50</sup> However, this holding, like that in *Camara*, had limitations: (1) the Court did "not imply that business premises may not reasonably be inspected in many more situations than private homes";<sup>51</sup> (2) the Court did "not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspection of business establishment. . ."<sup>52</sup> (3) the Court did not question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."<sup>53</sup>

Mr. Justice Clark, writing for the four dissenters, found the constitutional issues involved in these two companion cases had already been decided in *Frank*. He was unable to find anything unreasonable about the searches here involved.<sup>54</sup> The dissent also rejected the majority's

---

46. *Id.* at 539; see notes 88-96 *infra* and accompanying text.

47. *Id.* at 528-30; see notes 59-71 *infra* and accompanying text.

48. 387 U.S. 541, 542 (1967).

49. *Id.* at 546.

50. See notes 42-45 *supra* and accompanying text.

51. 387 U.S. at 545-46.

52. *Id.* at 545 n.6. The Court in *Camara* did, however, note that "it seems likely . . . warrants should normally be sought only after entry is refused. . . ." 387 U.S. at 539. See notes 54-58 *infra* and accompanying text.

53. 387 U.S. at 546. For further discussion of the licensing exception, see notes 72-87 *infra* and accompanying text.

54. Justice Clark argues that each of these ordinances involved is "supported by findings as to the necessity for inspection of this type," that the authority of the inspector could be shown by a demand to see his identification card and that other

contention that there will be few refusals of entry to inspect, thus necessitating obtaining a warrant, by saying:

Human nature being what it is, we must face up to the fact that thousands of inspections are going to be denied. The economics of the situation alone will force this result. Homeowners generally try to minimize maintenance costs and some landlords make needed repairs only when required to do so. Immediate prospects for costly repairs to correct possible defects are going to keep many a door closed to the inspector.<sup>55</sup>

Finally, Mr. Justice Clark argued that the "lesser" showing required to secure a search warrant established by the majority "prostitutes the command of the fourth amendment that 'no Warrants shall issue, but upon probable cause.'"<sup>56</sup> He contended that the standard adopted by the Court would result in warrants being "printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course."<sup>57</sup> Mr. Justice Clark asserted that the magistrates' "rubber stamp" acceptance of inspectors' complaints would destroy the integrity of the warrant and degrade the issuing magistrate.<sup>58</sup>

#### THE EXCEPTIONS TO THE WARRANT REQUIREMENT

The Court in *Camara* and *See* clearly indicated that the warrant requirement is not absolute. Mr. Justice White emphasized that the generally recognized exceptions to the warrant procedure were still available. The question to be explored is the extent to which the courts have expanded the scope of these exceptions in the years since *Camara* and *See*.

##### A. Consent

Traditionally, a warrant is not required to conduct a search when the person has given his consent. Since consent involves the waiver of a constitutionally protected right, particular attention has been directed

---

problems could be resolved by a telephone call to his supervisor. 387 U.S. at 549 (1967).

55. *Id.* at 553.

56. *Id.* at 547.

57. *Id.* at 554.

58. *Id.*

to the requirements for an effective waiver of this right. The standard applied in cases involving searches for the fruits or instrumentalities of a crime requires that "consent must be unequivocal and specific, freely and intentionally given."<sup>59</sup> In *United States v. Thriftmart, Inc.*,<sup>60</sup> the Ninth Circuit considered the question whether the definition of consent to search employed in the area of criminal law was also applicable in defining an effective consent to an administrative inspection. Defendant warehouse managers gave their consent to an inspection by agents of the Food and Drug Administration. The inspectors found evidence of violations of the Federal Food, Drug and Cosmetic Act. On appeal, the defendants asserted that proper consent had not been given, since the FDA inspectors failed to inform the defendants of their right to insist upon a warrant before submitting to the inspection.<sup>61</sup> The court found the consent effective and held that consent to an administrative inspection was not subject to the same requirements as in a criminal search.<sup>62</sup> The court noted the difference in purpose between an inspection and a search, as well as the absence of coercion in the administrative inspection.<sup>63</sup> Any manifestation of assent "no matter how casual" could reasonably be accepted as proper consent.<sup>64</sup> The court indicated the person need not be informed of his right to insist upon a warrant.

The approach of the court in *Thriftmart* has been followed by other courts which have considered the question of effective consent to an administrative search. It is now the general rule that a person "need not have been aware of his rights in order to consent to a sur-

---

59. Edelman, *Search Warrants and Sanitation Inspections—The New Look in Enforcement*, 45 DENVER L.J. 296, 302 (1968) [hereinafter referred to as Edelman]. See Mintz, *Search of Premise by Consent*, 73 DICK. L. REV. 44 (1968).

60. 429 F.2d 1006 (9th Cir.), cert. denied, 400 U.S. 926 (1970), reh. denied, 400 U.S. 1002 (1971).

61. *Id.* at 1008. The defendants in this case argued that a waiver of the requirement of a search warrant "cannot be conclusively presumed from a verbal expression of assent. The court [so they argued] must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced and unequivocal election to grant officers a license which the person knows may be freely and effectively withheld". (emphasis added) *Id.*

62. *Id.* at 1008-9.

63. Quoting *Camara* the court points out: ". . . the administrative search is 'neither personal in nature nor aimed at the discovery of evidence of crime' . . ." *Id.* at 1009. The inherently coercive element found to be lacking by the court was the uniformed, armed policeman carrying a badge.

64. *Id.* at 1010.

vey of his premises."<sup>65</sup> Although the courts have not tightened the requirements for consent beyond what the *Camara* Court dictated, they have consistently held that once the owner has refused entry, any consent subsequently given because of threat of prosecution is invalid.<sup>66</sup>

An additional problem in this area is the question of whose consent is required for the court to find an effective authorization to conduct an inspection. The two situations in which the difficulty is most likely to present itself when dealing with code enforcement are: (1) where an employee-employer relationship is present and (2) when a landlord-tenant relationship is found to exist. The general rule with respect to third party consent has been stated in the following terms:

. . . immunity from unreasonable search and seizure can be waived only by the person whose rights are otherwise to be invaded or by someone known to have authority to make a waiver of that right for the person to be affected in his absence, and such authority cannot be implied or presumed.<sup>67</sup>

When the third party is an employee the courts have looked to whether the employee was acting within the scope of his authority at the time he gave his consent to the inspection;<sup>68</sup> if so the consent is effective. This approach appears to be no different from that employed in the

---

65. *United States v. Hammond Milling*, 413 F.2d 608 (5th Cir. 1969); *cf. United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969); *United States v. Kendall Co.*, 324 F. Supp. 628 (D. Mass. 1971); *United States v. Morton Provision Co.*, 294 F. Supp. 385 (D. Del. 1968) (consent obtained without apprising the defendants that the investigation and any evidence discovered could be used against them).

66. *United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969) (defendant repeatedly refused entry to FDA inspectors, consenting only after he was informed that he could not stop the inspection). *See also United States v. Stanack Sales Co.*, 387 F.2d 849 (3rd Cir. 1968). ("It is clear that the constitutional protection against unreasonable searches and seizures can be waived. . . . However, the waiver must be clear and intentional. . . . We should hesitate to find a waiver, particularly where the circumstances make it unclear whether the area searched was covered by the consent.") *Id.* at 853.

67. Edelman, *supra* note 59, at 303.

68. *See United States v. Alfred M. Lewis, Inc.*, 431 F.2d 303 (9th Cir.), *cert. denied*, 400 U.S. 878 (1970); *Akin Distributors of Florida, Inc. v. United States*, 399 F.2d 306 (5th Cir. 1968). In the foregoing two cases, the employer gave the employee express authority to permit the search. As a result, the courts had no problem in finding the agents' consent valid. However, where no express authority is found, it can be expected that the courts will employ a test encompassing an examination of the area under the control of the employee, as has been done in the area of criminal searches. *See Note, Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 29.

criminal search.<sup>69</sup> Two views have been expressed on the question of whether a tenant's consent to an inspection of his apartment is binding on the landlord. The first holds that, since the tenant has rights co-equal with those of landlord with respect to the leased premises, either may give his consent to a search.<sup>70</sup> The other approach holds that the tenant cannot "consent to a search of property personal to her landlord" even though it be within the leased premises.<sup>71</sup>

### B. Licensing

A second generally recognized exception to the warrant requirement involves the inspection of a licensed business.<sup>72</sup> The courts since *Camara* and *See* have allowed a somewhat broadened use of the exception, but have adhered to certain specific limitations. While there was some question as to whether the licensing exception applies to inspections of a licensed business beyond the initial inspection required to obtain a license,<sup>73</sup> courts have indicated it does. A California appellate court faced the issue in *People v. White*,<sup>74</sup> a case involving

---

69. See Note, *Third Party, Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12.

70. *People v. Sybil Holding Corp.*, 64 Misc. 2d 693, 315 N.Y.S.2d 496 (N.Y. City Crim. Ct. 1970). See also *People v. Taddeo*, 62 Misc. 2d 833, 310 N.Y.S.2d 424 (N.Y. City Ct. 1969).

71. *People v. Rosenthal*, 59 Misc. 2d 565, 299 N.Y.S.2d 960 (N.Y. City Ct. 1969).

72. See notes 51-53 *supra* and accompanying text. It should be noted that the licensing exception to the warrant requirement only applies where closed commercial premises are involved, because business premises which are open to the public have been recognized as falling outside fourth amendment protection, at least with respect to the initial warrantless entry onto the premises. See, e.g., *United States v. Golden*, 413 F.2d 1010 (4th Cir. 1969); *United States v. Hofbrauhous of Hartford, Inc.*, 313 F. Supp. 544 (D. Conn. 1970).

73. The problem arose because of uncertainty over the meaning of Justice White's statement in *See* as follows:

We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections *prior* to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. [emphasis added]" 387 U.S. at 545-46.

Blabey, *See and Camara: Their Far-Reaching Effect on State Regulatory Activities and the Origin of the Civil Warrant in New York*, 33 ALB. L. REV. 64, 77 (1968) [hereinafter referred to as Blabey] wherein the author states: "Thus, the careful administrative practitioner will not force an inspection after the business is licensed if met with objection. A reasonable search requires a warrant."

74. 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (App. Dep't Super. Ct., L.A. 1968).

a warrantless inspection of a convalescent hospital which was operated under a license issued by the state department of health. State statutes required that such facilities be licensed and that periodic inspections of the hospitals so licensed be made, but did not require the inspection officer to procure a search warrant if entry was denied. The defendant asserted that under *See* the officer was required to secure a warrant after entry was denied for every inspection after the initial one.<sup>75</sup> The court rejected that contention because of the resultant interference with the enforcement of reasonable health codes.<sup>76</sup> The court concluded that "searches or seizures pursuant to licensing statutes which require inspection are valid and not subject to constitutional objection."<sup>77</sup>

While the court did not expressly say so, it seems likely that the exception is premised on a theory of implied consent. By applying for and accepting the license the licensee has given his consent to those searches necessary to assure compliance with the statutory scheme. The court in *John D. Newman Properties, Inc. v. District of Columbia Board of Appeals and Review*<sup>78</sup> adopted this approach holding that petitioner, by applying for a license to operate a building as a multi-family dwelling, was "taken to have consented to the inspection."<sup>79</sup>

Although the use of the warrantless license inspection has been expanded, the rights of the licensee have not been ignored. The Supreme Court, in *Colonnade Catering Corp. v. United States*,<sup>80</sup> warned that inspectors must adhere strictly to the provisions of the statute under which they are operating. Having observed a possible violation of the federal excise tax law, a federal agent demanded entry to the defendant's locked liquor storeroom, but was repeatedly denied access. The agent broke the lock and seized the liquor. The peti-

---

75. 259 Cal. App. 2d 936, 938, 65 Cal. Rptr. 923, 925.

76. 259 Cal. App. 2d 936, 941, 65 Cal. Rptr. 923, 925-26.

77. 259 Cal. App. 2d 936, 942, 65 Cal. Rptr. 923, 927. For other cases that have accepted the view adopted in *White*, see *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Golden*, 413 F.2d 1010 (4th Cir. 1969); *United States v. Sessions*, 283 F. Supp. 746 (N.D. Ga. 1968); *State Liquor Comm. v. Gilbert*, 270 A.2d 876 (Me. 1970); *Clark v. State*, 445 S.W.2d 516 (Tex. Crim. App. 1969); *Pride Club, Inc. v. State*, 25 Utah 2d 333, 481 P.2d 669 (1971); cf. *Salt Lake City v. Wheeler*, 24 Utah 2d 112, 466 P.2d 838 (1970).

78. 268 A.2d 605 (D.C. Ct. App. 1970).

79. *Id.* at 606.

80. 397 U.S. 72 (1970); see also *Hill v. State*, 238 So. 2d 608 (Fla. 1970) (court gives strict construction to statutory provision).

tioner, licensed to serve liquor in New York and holder of a federal tax stamp for retail liquor dealers, brought suit for the return of the liquor and for its suppression as evidence. The district court granted the relief, but was reversed by the court of appeals. The Supreme Court reversed, holding that Congress provided for a fine of \$500.00 which was the sole remedy available for refusal to allow an inspection.<sup>81</sup> Mr. Justice Douglas, writing for the majority stated:

As respects that industry [liquor] and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.<sup>82</sup>

Courts have also scrutinized the licensing statutes and ordinances themselves to insure against unconstitutionally vague and overly broad statutory directives. In *Salt Lake City v. Wheeler*,<sup>83</sup> the Utah Supreme Court declared unconstitutional a city ordinance which gave the police department power to inspect licensed premises. The ordinance contained no limitation on when a search could be conducted.<sup>84</sup>

Limiting the scope of the inspection authorized by the license is another means by which courts have sought to protect the rights of the licensee. *Finn's Liquor Shop Inc. v. State Liquor Authority*<sup>85</sup> is illustrative of this point. Petitioner granted a State Liquor Authority inspector permission to inspect his premises. The inspector also had statutory authorization to conduct the inspection. The inspector went to a room in the rear of the shop and searched the pockets of a coat

---

81. 26 U.S.C. § 7342 (1970).

82. 397 U.S. 72, 77.

83. 24 Utah 2d 112, 466 P.2d 838 (1970).

84. *Id.* See *Vagabond Club v. Salt Lake City*, 21 Utah 2d 318, 445 P.2d 691 (1968) which the court in *Wheeler* found to be dispositive of the issue involved. In the *Vagabond Club* case the court declared unconstitutional an ordinance which required owners of licensed social clubs to furnish a key to the police so that they might conduct "inspections". See also *Pride Club, Inc. v. State*, 25 Utah 2d 333, 481 P.2d 669 (1971) in which the court, in dicta, said that it was unable to discern any constitutional problem with a statute which required licensed clubs to permit police officers and other officials to inspect the clubhouse any time during which it is open.

85. 31 App. Div. 2d 15, 294 N.Y.S.2d 592 (1968), *aff'd*, 24 N.Y.2d 647, 249 N.E.2d 412, 301 N.Y.S.2d 647 (1969), *cert. denied*, 396 U.S. 840 (1969).

hanging there, though the books and records of the business were produced upon request. The search of the coat yielded sales slips which were evidence that petitioner was engaging in credit sales of liquor in violation of state law. When the Authority suspended his license for 10 days, petitioner appealed contending there was no evidence to sustain the charges because the slips were the fruit of an unlawful search.<sup>86</sup> The court upheld this contention saying:

Balancing the need for the search against the invasion and recalling that the [State Liquor Authority] has prior information, it not appearing this was an emergency, no reason is advanced why a warrant could not have been obtained. Finn was reasonably entitled to expect his personal clothing to be free of a warrantless governmental intrusion.<sup>87</sup>

### C. *Emergency*

An exception to the holding of *Camara* exists when the court finds the search was conducted in an emergency situation. This was explicitly recognized by the Supreme Court when it said: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."<sup>88</sup>

The case most often noted as an example of an emergency situation is *North American Cold Storage Co. v. Chicago*.<sup>89</sup> Although the case was decided long before 1967, and deals with a different (although not unrelated) problem, an examination of it is profitable because of the rationale used to justify the exception. In this case certain city

---

86. At the license suspension hearing it was established that the inspection was made because the Authority had received a letter stating that the petitioner was engaged in credit sales and that the slips could be found in his coat pocket.

87. 31 App. Div. 2d 15, 19, 294 N.Y.S.2d 592, 596. See Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. Rev. 1119, 1128 (1967) wherein it is argued:

. . . consent to inspection does not mean consent to unreasonable inspection. The waiver required of the licensee should be carefully limited to inspections conducted during business hours. Even if the waiver is not so restricted, the reasonableness requirement of the fourth amendment's first clause will still limit the time and extent of governmental intrusion.

But cf. *Clark v. State*, 445 S.W.2d 516 (Tex. Crim. App. 1969).

88. 387 U.S. 523, 539 (1968).

89. 211 U.S. 306 (1908). Cited also by the Court in *Camara* were: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (1902); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929).

officials, pursuant to statutory authorization,<sup>90</sup> ordered the surrender by the complainant of allegedly unfit poultry. In explaining why a hearing was not required prior to the seizure of the poultry, the Court addressed itself to the emergency situation. Mr. Justice Peckham, writing for the Court, said:

The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it.<sup>91</sup>

Repeated recognition of the emergency doctrine in judicial opinions evidences its continued vitality.<sup>92</sup> An interesting case decided shortly after the decisions of *Camara* and *See is Scherer v. Brennan*.<sup>93</sup> This was an action against treasury agents assigned to secure the protection of the President of the United States. The duties of the agents necessitated the constant surveillance of plaintiff, a firearms dealer maintaining a cannon at his home near the place the President was to

---

90. CHICAGO REVISED MUNICIPAL CODE § 1161 (1905) cited in 211 U.S. at 308: Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adopted or designed to be used for human food, shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or with respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes [sic] of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn and destroy any such putrid, decayed, poisoned and infested food, which any such inspector may find in and upon said premises.

91. 211 U.S. 306, 315.

92. *See, e.g., Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967), *cert. denied*, 389 U.S. 1021 (1967); *People v. Cacciola*, 64 Misc. 2d 670, 315 N.Y.S.2d 586 (Dist. Ct. 1970); *Sandflow Realty Corp. v. Diaz*, 64 Misc. 2d 625, 315 N.Y.S.2d 487 (N.Y. City Civ. Ct. 1970), *aff'd*, 66 Misc. 2d 904, 322 N.Y.S.2d 881 (Sup. Ct. 1971).

93. 379 F.2d 609 (7th Cir. 1967), *cert. denied*, 389 U.S. 1021 (1967).

visit. In his complaint plaintiff alleged that these agents, in the performance of their duty, trespassed on his property and unlawfully interfered with his access to, and occupation of, his place of residence by not permitting him to enter his home unaccompanied. The court, basing its decision on the doctrine of immunity of governmental officials held that the agents were not liable. In response to the argument that the officials were not acting in conformance with the fourth amendment, the court said:

Furthermore, we do not believe there is any Supreme Court case requiring a warrant in an emergency situation. Here, the need to protect the President of the United States from possible physical harm would justify measures that might not be considered appropriate in routine health inspections.<sup>94</sup>

The exception of emergency situations from the warrant requirement is both necessary and desirable in situations involving an immediate threat to the health or lives of individuals. The exception, however, is not an open invitation to officials to forego the warrant process. The factual situations of the cases cited by the court in *Camara*<sup>95</sup> illustrate that this is intended to be a narrow exception to an otherwise firm rule.<sup>96</sup>

As the cases surveyed indicate, neither the licensing nor the emergency exceptions have been expanded beyond the bounds generally recognized at the time of *Camara* and *See*. While it can be argued that the licensing exception has been broadened by applying it to inspections during the life of the business,<sup>97</sup> it is at least as likely that this use of the exception was anticipated by the Court in *See*.

It is the consent exception that has been potentially expanded to the point of swallowing the constitutional safeguard intended as the general rule. Believing there would be few instances of refusals of entry, Mr. Justice White noted that normally a warrant would not be needed until entry was refused.<sup>98</sup> The courts since 1967 have carried that statement one step further by holding that the inspectors need not in-

---

94. *Id.* at 612.

95. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (1902); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929).

96. *See Nelson, Building, Health and Housing Code Inspection in Missouri—A Need for Legislation*, 27 J. Mo. B. 572 (1971) [hereinafter referred to as *Nelson*].

97. *See* note 73 *supra* and accompanying text.

98. 387 U.S. 523, 539-40.

form the owner of the home or business of his right to refuse entry.<sup>99</sup> The owner can give "proper consent" without knowing his rights.

Regardless of the equity of that result, the practical effect of this interpretation of consent could be the virtual elimination of future *Camara-type* cases. Unless the owner of the home or business knows he has the right to refuse entry when confronted with a request to submit to a warrantless inspection, it is doubtful he will object to the inspection. It will be the rare person who, unaware of his rights and confronted by a uniformed inspector at the door, will refuse entry at the risk of what he almost certainly believes to be severe penalties. Thus only those citizens who already know their rights, admittedly a not insubstantial percentage, will be protected by the *Camara-See* safeguards.

The courts have sought to justify this curious result by distinguishing between administrative inspections and criminal searches. However, since this position allows a person to waive the constitutional safeguard against warrantless inspections without ever knowing of its existence, doubts as to the validity of that result will continue to be raised until the Supreme Court speaks to the issue. If the Court in *Camara* and *See* did intend such an approach to be taken in determining whether "proper consent" was given, then it is difficult to justify the excitement created by the decisions in *Camara* and *See*.

#### THE STATE'S RESPONSE TO *Camara*

Mr. Justice Clark, dissenting in *Camara* and *See*, expressed his disagreement with the Court's action in the following terms:

It [the Court's decision] prostitutes the command of the Fourth Amendment that 'no Warrants shall issue, but upon probable cause' and sets up in the health and safety codes area inspection a new fangled 'warrant' system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all towns and metropolitan cities in one fell swoop.<sup>100</sup>

One element of this subsequent confusion developed with regard to the search warrants themselves. Some states discovered that although a warrant was now required in this area they had no means by

---

99. See notes 62-64 *supra* and accompanying text.

100. 387 U.S. 523, 547.

which an inspector could procure one.<sup>101</sup> These states had statutory schemes specifically delineating the circumstances under which a warrant could be issued but the statutes did not provide for the issuance of administrative warrants.<sup>102</sup>

The states' response to this situation took the following forms: legislative action authorizing the issuance of such warrants,<sup>103</sup> court action,<sup>104</sup> and enactment by home-rule municipalities of the necessary ordinances.<sup>105</sup> We will here be concerned only with the first two.<sup>106</sup>

There is not complete agreement as to whether a court can issue a search warrant in instances not provided by statute. Some say that the authority to issue a warrant is limited only to those instances in which there is statutory authorization or a Supreme Court Rule.<sup>107</sup> Some courts, however, have held that they do possess such power, although the reasons employed as a justification are not in complete harmony. The decisions in Nevada and New York are illustrative.

At the time of the decision in *Camara* and *See*, New York was attempting to obtain federal certification for its cattle as brucellosis free.<sup>108</sup> The procurement of the certificate necessitated the inspection of all the cattle herds in the state by state veterinarians. The inspections were completed with the exception of one individual who adamantly refused to allow the inspectors on his premises. New York had no statute at this time authorizing the issuance of a search warrant

---

101. See Blabey *supra* note 73; Nelson *supra* note 96; and 4 WAKE FOREST INTRA. L. REV. 117 (1968).

102. See, Nelson, at 575.

103. CAL. CIV. PRO. §§ 1822.50-.57 (Deering Supp. 1971); N.C. GEN. STAT. §§ 15-27.1 to -27.2 (Supp. 1971); N.D. CENT. CODE §§ 29-29.1-01 to -06 (Supp. 1971); R.I. GEN. LAWS ANN. §§ 45-24.3-14 to -15 (Supp. 1970); WIS. STAT. ANN. §§ 66.122-.123 (Supp. 1971).

104. See Blabey, *supra* note 73.

105. An interesting ordinance in this area is § 17-10 of the CODE OF METROPOLITAN DADE COUNTY, cited in *Heinlein v. Metropolitan Dade City*, 239 So. 2d 635, 636 (Fla. Dist. Ct. App. 1970), which provides that "[t]he search warrant shall issue in accordance with the requirements of the United States Supreme Court case *Camara v. Municipal Court of the City and County of San Francisco*. . . ." See Nelson, *supra* note 96 for an analysis of the difficulties of such legislation in Missouri.

106. See Nelson, *supra* note 96, at 577.

107. *Id.* at 575, 576. In 1968, after the report of an unofficial working committee of the Missouri Supreme Court, it was decided that for the Missouri Supreme Court to take such action would involve it in matters beyond its rule-making powers.

108. Brucellosis is a disease in cattle which results in the abortion of newly infected animals. It is also manifested in human beings as undulant fever.

under these conditions. Nevertheless an affidavit<sup>109</sup> was presented to the court and the warrant was issued. The power of the court to issue the warrant was based on a New York constitutional provision providing that "[t]he Supreme Court shall have general original jurisdiction in law and equity. . .",<sup>110</sup> Section 2-b of the Judiciary Law,<sup>111</sup> which confers on a court of record the power to "devise and make new process and forms of proceeding necessary to carry into effect the powers and jurisdiction possessed by it", and on the Supreme Court decisions of *Camara and See*.<sup>112</sup>

A similar problem was faced in Nevada in the area of building inspections and was handled in quite a different manner. In *Owens v. City of Las Vegas*<sup>113</sup> an inspector, after repeated refusals by the homeowner to allow entry, obtained a search warrant for inspection purposes although it was not expressly provided for by statute. The homeowner resisted the inspection by force and was subsequently convicted of assault and battery and obstructing a police officer attempting to serve a search warrant. On appeal, Owens asserted the invalidity of the search warrant because it was not authorized by state law. The court dismissed this contention saying that when a warrant is issued under circumstances not covered by state statute, the question then becomes whether the search was reasonable under the fourth amendment. The court said that "just as a search authorized by state law may be an unreasonable one under the fourth amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one."<sup>114</sup> Here it was held that the inspection was reasonable under the fourth amendment.<sup>115</sup>

---

109. The affidavit showed that the farm in question was already under quarantine because of prior discovery of brucellosis, that the inspection was being conducted as part of a statutory program, that the public interest involved was to prevent bovine abortion and undulant fever caused by the disease, and illustrated the effectiveness of the program. Blabey, *supra* note 73.

110. N.Y. CONST. art. VI § 7.

111. N.Y. JUDICIARY LAW § 2b (McKinney 1968).

112. See Blabey, *supra* note 73, for a detailed discussion of this procedure in New York.

113. 85 Nev. 105, 450 P.2d 784 (1968).

114. *Id.* at , 450 P.2d at 786.

115. *Id.* at , 450 P.2d at 788. As to the reasonableness of the search appellant argued that the search was "constitutionally impermissible" because the inspector lacked probable cause to believe a code violation existed in the dwelling. The court dismissed this contention saying that an exterior observation of code violations was sufficient to establish probable cause for the search.

In many instances the state legislature enacted the statutes necessary to satisfy the new warrant requirement.<sup>116</sup> Mr. Justice Clark, in his dissent, expressed a fear that this requirement would result in additional, unnecessary "annoyances to the public." He said: "It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector can enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered."<sup>117</sup>

The statutory schemes established do not, in all instances, result in the inconveniences suggested by Mr. Justice Clark. Many limit the hours during which the warrant may be executed.<sup>118</sup> Such a limitation is desirable because it more nearly conforms to the avowed purposes of inspection programs: to assure *compliance* with the various codes rather than to seek out incriminating evidence where the element of surprise might be helpful.

The statutes authorize the issuance of a warrant upon the showing of probable cause and generally require a statement in the affidavit that entry has been sought and refused.<sup>119</sup> There is a wide variance, however, as to the time allowed for the execution of the warrant after its issuance. The North Carolina and North Dakota statutes<sup>120</sup> require the warrant to be executed within twenty-four hours of its issuance, while California<sup>121</sup> allows fourteen days. This longer period of time allowed by California can perhaps be explained by a provision<sup>122</sup> which requires prior notice that a warrant has been issued to be given to any person who had previously denied entry to an inspector unless the judge determines that immediate execution is necessary.

---

116. *But see* Nelson, *supra* note 96 where it is suggested that the refusal of an occupant to allow entry to an inspector precludes any further action to inspect because of the inability to procure a warrant in such circumstances in Missouri.

117. 387 U.S. at 555.

118. CAL. CIV. PRO. § 1822.56 (Deering Supp. 1971) (8:00 a.m. to 6:00 p.m.); N.C. GEN. STAT. § 15-27.2(e) (Supp. 1971) (8:00 a.m. to 8:00 p.m.); N.D. CENT. CODE § 29-29.1-04 (Supp. 1971) (8:00 a.m. to 8:00 p.m.); R.I. GEN. LAWS ANN. § 45-24.3-15 (Supp. 1970) (8:00 a.m. to 5:00 p.m.).

119. CAL. CIV. PRO. § 1822.50 (Deering Supp. 1971); R.I. GEN. LAWS ANN. § 45-24.3-15 (Supp. 1970); WIS. STAT. ANN. § 66.122(2) (Supp. 1971). *But see* N.C. GEN. STAT. 15-27.2 (Supp. 1971).

120. N.C. GEN. STAT. § 15-27.2(e) (Supp. 1971); N.D. CENT. CODE § 29-29.1-04 (Supp. 1971).

121. CAL. CIV. PRO. § 1822.55 (Deering Supp. 1971).

122. *Id.* § 1822.56.

The California statute<sup>123</sup> also expressly prohibits forcible entry except in special cases.<sup>124</sup> No other statute surveyed contains a similar prohibition. For refusal to allow entry when a suitable order has been issued, the Rhode Island formulation provides that the person "shall be subject to such penalties as may be authorized by law for violation of a court order."<sup>125</sup> One could argue, however, that this provision is the sole relief available to an inspector for the refusal of a person to comply with the order, and that a forcible entry would, therefore, not be allowed.<sup>126</sup> The California provision pertaining to the forcible entry would seem to be the most desirable because of the nature of the search involved. The possibility of physical injury to both the occupant and the officer, inherent in a forcible entry, would appear to outweigh the benefits to be derived from such a procedure, except in cases where an immediate threat to the public health or well being is found to exist.

An additional provision contained in some of the statutes is a limitation on the use of the evidence obtained by these inspections. Of the three states that have such a provision, Rhode Island's is the most drastic. It provides:

Evidence so obtained shall not be disclosed except as may be necessary in the judgment of the enforcing officer for the proper and effective administration and enforcement of the provisions of this chapter and rules and regulations issued pursuant thereto and shall not otherwise be admissible in any judicial proceeding without the consent of the owner, occupant, or other person in charge of the dwelling unit or rooming unit, or structure inspected.<sup>127</sup>

North Carolina and North Dakota, on the other hand, do not allow facts or evidence obtained in the inspection to be used in any subsequent proceeding if the warrant is invalid or if what is discovered is not "a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover."<sup>128</sup> The above limitation, however, does not apply in those instances in which a warrant is not constitutionally required.<sup>129</sup>

---

123. *Id.*

124. *Id.*

125. R.I. GEN. LAWS ANN. § 45-24.3-15 (Supp. 1970).

126. *See* *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

127. R.I. GEN. LAWS ANN. § 45-24.3-15 (Supp. 1970).

128. N.C. GEN. STAT. § 15-27.2(f) (Supp. 1971); N.D. CENT. CODE § 29-29.1-05 (Supp. 1971).

129. *Id.*

Additional states will, no doubt, enact legislation in this area in the future.<sup>130</sup> The desirability of such enactments is manifest for three reasons: (1) to establish an identifiable basis for the issuance of such warrants; (2) to erect basic guidelines for inspectors or officers for the execution of the warrants; and (3) to delineate the purposes for which the evidence obtained may subsequently be used. Home rule municipalities might also enact ordinances in this area. For such an ordinance to be held an effective exercise of the home rule power, however, it must be shown that the subject matter is of local concern and not a matter of state interest.<sup>131</sup> An additional approach at this level, suggested by one commentator,<sup>132</sup> is to require occupants of dwellings to consent to building and health inspections as a condition to receiving municipal services or an occupancy permit. Possible support for such an approach, according to that author, can be found in the Supreme Court decision of *Wyman v. James*.<sup>133</sup> The specific manner in which the states or municipalities solve this problem is minor compared with the need for the authority to issue such warrants.

Legislation can only aid the states in their development of procedures to protect public health and safety, regardless of the direction taken by the states on the questions of forcible entry and the use to which the evidence may be put. It would eliminate the confusion necessarily arising from reliance on the courts to mark the confines of acceptable behavior. This is especially true in those states in which denial of entry precludes any further action on the part of the inspector because of the inability to procure a warrant.<sup>134</sup>

### *Wyman v. James*

The confines of the fourth amendment's application to administrative searches have been most recently formulated by the Supreme

---

130. Blabey, *supra* note 73; Nelson, *supra* note 96.

131. Nelson, *supra* note 96, at 577. He expresses doubt that such ordinances would satisfy the "local concerns" concept. Such ordinances, he feels, raise doubts similar to those involved in ordinances attempting to authorize the appointment of receivers by circuit courts for the collection of rent to repair rental property, which the Supreme Court of Missouri recently indicated was a matter of state interest.

132. *Id.*

133. 400 U.S. 309 (1971).

134. Nelson, *supra* note 96. The necessity of such legislation is not sufficient to overcome the concept that "a man's home is his castle" in all instances however. For an example of the latter, see St. Louis Post Dispatch, Feb. 10, 1972, § W at 8, col. 4.

Court in *Wyman v. James*.<sup>135</sup> In this case, the plaintiff, mother and beneficiary under the program for Aid to Families With Dependent Children (AFDC), refused her caseworker's written request for a home visit, as required by New York's welfare laws.<sup>136</sup> After a pre-termination hearing<sup>137</sup> her assistance was discontinued. She brought an action seeking declaratory and injunctive relief in federal district court, alleging a violation of her right of privacy and her right to be free from unreasonable searches, as guaranteed by the fourth and fourteenth amendments.<sup>138</sup> The district court issued a temporary restraining order, convened a three-judge district court, and allowed the case to proceed as a class action.<sup>139</sup> In a divided opinion, the district court found the Supreme Court decision in *Camara* to be controlling. The court held that the home visit is a search, and when not consented to or supported by a warrant issued on the basis of probable cause, such a search is unreasonable.<sup>140</sup> On appeal, the United States Supreme Court reversed, holding that the home visit, as structured by the New York statutes and regulations, are not "searches" within the

---

135. 400 U.S. 309 (1971).

136. City of New York Dep't of Welfare Policies Governing the Administration of Public Assistance § 175 (1967) provides: "Mandatory visits must be made in accordance with law which requires that persons be visited at least once every three months if they are receiving . . . Aid to Dependent Children . . ." as quoted in 400 U.S. 309, 312 n.3. These policies were promulgated by the Department in accordance with the requirements of N.Y. Soc. WELFARE LAW § 134 (McKinney 1966), which authorizes the appropriate departments to issue regulations governing visits with individuals receiving public assistance. See generally N.Y. Dep't Soc. Servs., 18 N.Y. Codes, Rules & Regs. §§ 351.10, 351.21 (1962).

137. *Goldberg v. Kelly*, 397 U.S. 254 (1970), held that due process, guaranteed through the fourteenth amendment, required that the recipient be given an evidentiary hearing prior to termination of benefits.

138. *James v. Goldberg*, 302 F. Supp. 478 (S.D.N.Y. 1969). Mrs. James also alleged that the proposed visit was a violation of Subchapter IV of the Social Security Act of 1935. 42 U.S.C. § 602 (1970). *Wyman v. James*, 400 U.S. 309, 314 (1971). Neither the district court opinion nor the majority opinion of the Supreme Court discussed this allegation. In his dissent, however, Justice Marshall argued that § 2200 (a) of Part IV of the H.E.W. Handbook of Public Assistance is a regulation binding upon the states that prohibited an unconsented home visit, and by implication, the denial of benefits for withholding consent. *Id.* at 345.

139. 302 F. Supp. at 481.

140. *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), *rev'd sub nom.*, *Wyman v. James*, 400 U.S. 309 (1971). Furthermore the court ruled, in order to condition the receipt of welfare benefits upon the surrender of a constitutional right, the state must show a compelling public interest served by the surrender. *Id.* at 942. See 45 N.Y.U. L. REV. 168 (1970), 48 N.C. L. REV. 1010 (1970), 65 Nw. U.L. REV. 113 (1970), 79 YALE L.J. 746 (1970).

fourth amendment meaning of the term,<sup>141</sup> but that even if they were deemed to be searches, they did not violate the fourth amendment's standard of reasonableness.<sup>142</sup>

The Court's refusal to characterize the caseworker's home visit as a "search" was based on the nature and the purposes of such visits. While the majority conceded the home visit served an "investigative" function in conjunction with its "rehabilitative" purposes, it was felt the investigative aspect had been overemphasized when compared with a search in the traditional criminal law context.<sup>143</sup> The Court noted, in particular, that the visitation is not forced but must be accompanied by the recipient's consent for it to take place.<sup>144</sup> However, the most significant factor in the Court's determination that the home visit is not a search came from its finding that the beneficiary's denial of permission to visit could not serve as a basis for criminal sanction, but rather only the cessation of benefits.<sup>145</sup>

Justice Blackmun then presented the Court's alternative holding that, even assuming the visit to be a "search", the procedure is not unconstitutional "because it does not descend to the level of unreasonableness" proscribed by the fourth amendment.<sup>146</sup> In the course of the opinion he stated eleven factors which supported the Court's ultimate finding that "home visitation . . . is a reasonable administrative tool . . . [that threaten[s] the plaintiff with neither] an unwarranted invasion of personal privacy [nor the infringement of any right protected]

---

141. 400 U.S. 309, 318 (1970).

142. *Id.*

143. *Id.* at 317-20. See also Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 YALE L.J. 746, 748-51 (1971).

144. The Court indicated that "[i]f consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." 400 U.S. at 317-18. See note 155 *infra* and accompanying text, wherein Justice Douglas, dissenting, questions whether a valid consent could be given to the home visitation. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347; Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964). *Contra*, *Lynumn v. Illinois*, 372 U.S. 528 (1963), where the Court held involuntary a confession to unlawful possession and sale of marijuana when the police told the defendant that if she did not confess she would lose her welfare payments, would go to jail for 10 years, and would lose her two young children; *Parrish v. Civil Service Comm.*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

145. 400 U.S. at 317-18; *contra*, 400 U.S. at 326 (Douglas, J., dissenting); 400 U.S. at 338 (Marshall, J., dissenting).

146. 400 U.S. at 318.

by the fourth amendment."<sup>147</sup> In considering the reasonableness of the home intrusion, the Court stressed three legitimate state interests which were furthered by the home visit. Specifically, the Court found the visits were helpful in protecting children from abuse, in preventing fraud, and in rehabilitating the recipient. In sum, the Court remarked that the procedure was:

A gentle means<sup>148</sup> . . . [giving] written notice several days in advance of the intended home visit . . . and [providing that] [f]orcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden, . . . [which] minimizes any 'burden' on the homeowner's right against unreasonable intrusion.<sup>149</sup>

The final consideration on which the Court based its findings of reasonableness was the non-penal nature of the visit: "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding."<sup>150</sup> The Court distinguished the *Camara*, *See*, and *Frank* decisions on the ground that those cases "arose in a criminal context where a genuine search was denied and prosecution followed."<sup>151</sup> Accordingly, the Court concluded that the warrant requirement of *Camara* was inapplicable because no criminal penalty attaches to a welfare recipient's refusal to permit a home visit.<sup>152</sup>

Justices Douglas, Marshall and Brennan dissented from both of the majority's holdings. Justice Marshall, joined by Justice Brennan, concluded that since the HEW regulations impliedly bar such mandatory visits, it was unnecessary to decide the case on constitutional grounds.<sup>153</sup> He argued, moreover, that the majority discarded the absolute protection against warrantless administrative intrusions that *Camara* guaranteed. Specifically, he felt that *Camara* could not be distinguished from *Wyman* on the ground that a more severe intrusion or more onerous sanction was involved in *Camara*.<sup>154</sup> Justice Marshall

---

147. *Id.* at 326.

148. *Id.* at 319.

149. *Id.* at 320-21. "It is true that the record contains 12 affidavits. All essentially identical, of aid recipients (other than Mrs. James) which recite that a case-worker 'most often' comes without notice; that when he does, the plans the recipient had for that time cannot be carried out; . . ." *Id.* at 320 n.8.

150. 400 U.S. at 323.

151. *Id.* at 325.

152. *Id.*

153. 400 U.S. at 345-47.

154. "Actually the home visit is precisely the type of inspection proscribed by

also quarreled with what he considered the majority's disregard of the investigative nature of the home visits, since the Court expressly recognized that a caseworker is under a statutory duty to report criminal violations detected during the home visit.<sup>155</sup>

Justice Marshall then attacked the alternative holding of the majority (the visit, if it is a search, is not unreasonable), by arguing that the Court had failed to show that the visits fit any existing exception to the warrant requirement or that they justified the creation of a new exception.<sup>156</sup> However, Justice Douglas, in his dissenting opinion,<sup>157</sup> argued that the fourth amendment affords protection against all governmental intrusions, and, by forcing welfare recipients to choose between consenting to the search and forfeiting benefits, the state was conditioning the receipt of its largesse upon the surrender of a constitutional right.<sup>158</sup>

Any discussion of the effect of *Wyman* on the law of administrative inspections is necessarily speculative, both because of the lack of authoritative rulings to date based on *Wyman* and because of the inability of the Court to pinpoint a definitive holding in the case.

It is possible to argue that the decision will have little effect on the

---

*Camara* and *See*, except that the welfare visit is a more severe intrusion upon privacy and family dignity." *Id.* at 340. "Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a \$100 suspended fine." *Id.* at 341. Additionally, Justice Marshall notes that the Court has in the past rejected as "anomalous" the contention that only suspected criminals are protected by the fourth amendment. He states: "In an era of rapidly burgeoning governmental activities and their concomitant inspectors, [and] caseworkers, . . . a restriction of the fourth amendment to the 'traditional criminal law concept' tramples the ancient concept that a man's home is his castle. *Id.* at 339. The cases are indistinguishable on another ground since the criminal prosecution in *Camara* did not arise from evidence obtained during inspection, but was the sanction for refusing entry, just as the denial of benefits was the sanction in *Wyman*. *Id.* at 340.

155. See N.Y. SOC. WELFARE LAW § 145 (McKinney 1966); N.Y. PENAL LAW § 175.35 (McKinney 1967) (classifies as a felony the filing of a statement, known to be false, to mislead a public official.) Welfare fraud and child abuse, offenses which could be detected during a home visit, are also felonies in New York. 400 U.S. at 339.

156. 400 U.S. at 341. See notes 161-63 *infra* and accompanying text.

157. 400 U.S. at 326.

158. *Id.* at 327-28. "Whatever the semantics, the central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution." *Id.*

law of administrative inspections because of the Court's first holding that the welfare home visit was not a search and therefore not subject to fourth amendment constraints.<sup>159</sup> Support for this proposition can be inferred from the recognized principle that the fourth amendment does not apply to each and every governmental entry into the home.<sup>160</sup> This view of *Wyman* seems unlikely however, since the Court did in fact deal with the case as a fourth amendment problem in arriving at its alternative holding.

Several other interpretations, premised on the Court's treatment of the fourth amendment issue, seem more plausible. Justice Blackmun found that if in fact the home visit was a search, it was a reasonable one and no warrant was needed. This result suggests several alternative interpretations. First, the Court could have created a new exception to the warrant requirement for welfare home visits. There is support for this view in the emphasis the Court places on the unique characteristics of the home visit and the welfare program in general.<sup>161</sup> If this is in fact what the Court intended, the case will have little effect on the continued validity of *Camara* and *See*.

Secondly, the case does not fall under an already recognized exception. The caseworker was not faced with an emergency situation, nor did Mrs. James give her express consent. In addition, no actual license was involved.

Thirdly, the Court might have created a hybrid exception, by extending the licensing rationale used in *See* to the welfare area. When the owner of a business applies for a license which grants certain benefits, he is considered to have given his consent to inspections designed to monitor the licensing program. The Court suggests that this reasoning applies to the home visit; by accepting welfare benefits, the recipient thereby impliedly consented to a reasonable home visit.<sup>162</sup>

If the Court did extend the implied consent-licensing rationale into the welfare context, *Wyman* will have significance beyond its factual setting. Acceptance of the premise that the government can condition the receipt of welfare benefits upon the implied consent to search raises the question of whether the receipt of other benefits, such as

---

159. 400 U.S. at 317-18.

160. *See* 40 U. CYN. L. REV. 157, 162 (1971).

161. 400 U.S. at 319-23.

162. *Id.* at 324-25; *see also* 400 U.S. at 338 (Marshall, J., dissenting).

heating, water and other municipal services may also be conditioned on the implied consent to search.<sup>163</sup> The effect of such an approach on administrative inspection would be to remove the *Camara-See* constitutional safeguards from those governmental intrusions related to the receipt of benefits.

A fourth interpretation of the Court's treatment of the fourth amendment views the decision as a reinstatement of the *Frank* rationale and an overruling *sub silentio* of *Camara* and *See*. The basis of the latter two decisions was the assertion that there was no justifiable reason to distinguish between civil and criminal searches; the warrant requirement should pertain to both.<sup>164</sup> The warrant was considered the method for insuring the reasonableness of the search. Thus the two clauses of the fourth amendment were thought of as interdependent. A warrantless inspection was "presumptively unreasonable."<sup>165</sup>

While Justice Blackmun acknowledged the validity of *Camara* and *See*, he ignored their reading of the fourth amendment and adopted instead the *Frank* approach. A line was once again drawn between "civil" and "criminal" searches, with reasonableness alone the guide to the validity of a "civil" search. Implicit in this result is a belief that the warrant clause of the fourth amendment can be considered apart from the reasonableness clause, since the warrant requirement was intended to apply only as a complement to the fifth amendment self-incrimination clause in criminal searches.<sup>166</sup>

In so far as the decision may rest on the above reasoning, the Court has not only rejected its interpretation of the fourth amendment given only four years earlier, but substituted a result that is almost certain to cause confusion. The Court has instructed the lower courts, when confronted with "civil" searches, to consider any and all possible factors indicating reasonableness. Yet there is no indication which of the many elements discussed by the Court are the most significant nor how many are needed to find that the search is reasonable. If this inter-

---

163. See Nelson, *supra* note 96. Such an approach has been used to find that students have given implied consent to dormitory and locker inspections. See Moore v. Student Affairs Comm. of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968) (dormitory search); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1966), *vacated*, 393 U.S. 85 (1968) (per curiam) (high school locker search).

164. See note 41 *supra* and accompanying text.

165. See note 38 *supra* and accompanying text.

166. See notes 24-27 *supra* and accompanying text.

pretation is, in fact, the Court's position, Justice Blackmun has not only undercut the constitutional protection against warrantless searches, he has also managed to restore a considerable amount of uncertainty to the law of administrative inspections.

#### CONCLUSION

Although the Supreme Court altered the law of administrative inspections in *Camara* and *See*, only five years after those decisions, their validity has been undermined. At the same time that the states were adopting new statutes to comply with *Camara* and *See*, the courts were casting doubt on the soundness of the Supreme Court's approach. The lower federal courts' expansion of the consent exception, when coupled with the traditional exceptions to the warrant requirement, suggests that the *Camara-See* fact pattern will occur less frequently. Finally the Court's decision in *Wyman* provides another possible basis for skirting the *Camara-See* rulings. As a result, the law of administrative inspections remains unsettled.

