

1960

The Constitutionality of Civil Inspections

Charles F. Angel

Theodore Corontzos

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Charles F. Angel and Theodore Corontzos, *The Constitutionality of Civil Inspections*, 21 Mont. L. Rev. 195 (1959).

Available at: <https://scholarworks.umt.edu/mlr/vol21/iss2/10>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

clearly so holding,⁵⁸ the Oregon Supreme Court decided that such a provision⁵⁹ was broad enough to include the authority vested in the court by the civil inspection laws. The court was influenced by Justice Cardozo's somewhat equivocal statement in *People ex rel. Lemon v. Supreme Court*,⁶⁰ that "the provisions of the Civil Codes for the discovery of documents are not rules of evidence in the strict sense. They are closely akin, however, to such rules, for they govern and define the remedies whereby evidence is made available."⁶¹

This seemingly strained statutory construction has been rejected by the Arizona Supreme Court.⁶¹

CONCLUSION

The defendant in a criminal case has no right to a pre-trial inspection of the prosecution's evidence. In the majority of jurisdictions discovery is now permitted but entirely within the sound discretion of the trial court. In the absence of statute this discretion has been founded upon either an unwarranted extension of the doctrine of inherent power or doubtful statutory construction. It is now generally felt that pre-trial discovery is a needed addition to criminal procedure, and that its application should be extended except where the prosecution can show the likelihood of substantial harm. But, to accomplish this, it would seem that comprehensive remedial legislation,⁶² rather than the development of an unworkable body of case law founded upon questionable premises, is the better way.

DAVID O. DEGRANDPRE

THE CONSTITUTIONALITY OF CIVIL INSPECTIONS*

Recent years have brought a marked increase in civil inspections.¹ Big city slums, with their attendant health and safety hazards, are no new problem, but in recent years new concern has been shown for finding some solution to this urban blight. Some answers are spectacular, like wholesale redevelopment; others are more prosaic, such as legislation giving public

⁵⁸State v. Leland, 100 Ore. 598, 227 P.2d 785 (1951).

⁵⁹ORE. CODE ANN. § 26-932 (1930) (now ORE. REV. STAT. ch. 136, § 510 (1953)).

⁶⁰245 N.Y. 24, 156 N.E. 84, 86, 52 A.L.R. 200, 206 (1927).

⁶¹State ex. rel. Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954).

⁶²Federal Rule 16 would serve as a useful guide, but any future legislation should also permit discovery of expert reports, confessions, and statements of witnesses in the hands of the prosecution.

*This Note is an outgrowth of the 1959 National Moot Court Competition, sponsored by the Association of the Bar of the City of New York. The hypothetical case posed for argument raised the issues discussed herein. The joint authors of this note, and in addition Arthur Ayers, participated in the law school intramural moot court competition, using the same factual situation. Thereafter, the moot court team participated in regional competition at Moscow, Idaho, and placed second.

¹As used herein, "civil inspections" means those inspections conducted by state or municipal authorities primarily to ascertain and correct a particular deplorable situation, rather than to punish a person for a violation of the law.

officials broad powers to make fire, health, and sanitation inspections. These statutes and ordinances are especially characteristic of areas of large population, but similar legislation is being adopted and enforced throughout the nation.

A problem of current concern, more obscured than solved by a recent decision of the United States Supreme Court,³ is the extent to which such civil inspections are governed by constitutional guarantees of freedom from unreasonable searches and seizures by government officials.⁴ The purpose of this Note is to show in the affirmative that legislation authorizing civil inspections must contain safeguards adequate to comply with these guarantees.

HISTORY OF THE FOURTH AMENDMENT

It has been argued that the protection guaranteed by the fourth amendment applies only to those searches being conducted for the purpose of securing evidence to be used in a criminal prosecution, or those searches looking toward the forfeiture of property. In order to ascertain the nature and scope of the protection which the framers of the Constitution intended to flow from the fourth amendment, one must examine the historical setting in which this amendment was adopted.⁵

"The origin of this amendment runs back in English history to the 17th century, when Charles II was placed on the throne."⁶ Search warrants existed at this time pursuant to an act of Parliament and were used to uncover evidence of obscene and seditious libel against the church or state. Sporadic re-enactments by Parliament contained the use of search warrants until the latter half of the 18th century when they began to be contested. In 1765 the case of *Entick v. Carrington*⁷ brought forth a judicial attack on the use of general warrants⁸ and resulted in the formulation of certain fundamental principles that were later formed into constitutional guarantees.

The *Entick* case was an action of trespass brought against Messengers to the King for the search of John Entick's house and the carrying away of certain papers and pamphlets. The Messengers defended their action on the ground that it was done pursuant to a general warrant. Lord Camden, Lord Chief Justice of the Common-Pleas, condemned the use of general

³Frank v. Maryland, 359 U.S. 360 (1959).

⁴"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. CONST. amend. IV.

⁵In Knowlton v. Moore, 178 U.S. 41, 95 (1900), Mr. Justice White stated: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning."

⁶2 WATSON, THE CONSTITUTION OF THE UNITED STATES 1414 (1910).

⁷19 Howell's State Trials, col. 1029 (1765).

⁸As used herein, "general warrants" means those warrants issued without particularizing the place to be searched or the persons or things to be seized.

warrants because they were an unreasonable means of invading the person's right to be secure in his property. The basis of this right of security was set forth as follows: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him."⁹ It is this principle which is at the very core of the protection to be afforded by the fourth amendment.⁹

At about the same time that general warrants were prevalent in England, similar proceedings were taking place in the American colonies. Writs of Assistance were being used to discover smugglers and to confiscate their goods. These writs in their nature resembled the general warrants used in England and were good in the hands of any officer. James Otis, who was the Advocate-General of the Crown in Boston, made a vigorous protest against their use, claiming that it was tyranny.¹⁰ He said:¹¹

Now one of the most essential branches of English liberty is the freedom of one's home. A man's house is his castle and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no count, can inquire.

A perusal of this quotation and the previous quotation from Lord Camden shows that the principles laid down therein were not limited to the situation involving enforcement of criminal law, and that in the period immediately before the adoption of our Constitution there was great resentment both in the American colonies and in England against arbitrary invasion of a man's home by government officials. It cannot be doubted that the framers of our Constitution were aware of the fact that in order to have a free nation with liberty and justice for all, arbitrary governmental invasions, for whatever purpose, of the individual's right to be secure in his home must be restricted. It was intended that by adopting the fourth amendment to the Constitution, every person was guaranteed this right.

FREEDOM FROM ARBITRARY SEARCH UNDER THE FOURTEENTH AMENDMENT

Although the first eight amendments to the United States Constitution restricted only the federal government, many rights guaranteed therein

⁹Entick v. Carrington, 19 Howell's State Trials, col. 1029, 1066 (1765).

¹⁰"As every American statesman, during our revolutionary . . . period . . . was undoubtedly familiar with this monument of English freedom [Camden's opinion], and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment. . . ." Boyd v. United States, 116 U.S. 616, 626 (1886).

¹¹2 WATSON, THE CONSTITUTION OF THE UNITED STATES 1415 (1910).

are implicit "in the concept of ordered liberty"¹² and thus constitute restraints upon state power and action also, through the vehicle of the due process clause of the fourteenth amendment. The Supreme Court in *Wolf v. Colorado*¹³ accepted as elementary that the security against arbitrary intrusion by governmental officials into one's privacy, which is the heart of the fourth amendment, is enforceable against the states through the due process clause. The Court said that "were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."¹⁴

Under its facts the *Wolf* case dealt with an unreasonable intrusion into an individual's home by police officers seeking evidence of crime. If the meaning of the statements in the case is limited to their terms and to the facts there involved, it relates only to arbitrary invasions by the police seeking to enforce criminal law. But surely no one would seriously contend that the search would be any the less objectionable if made by a public official other than a police officer. A seemingly more reasonable distinction may be advanced that the constitutional guarantee which is part of "the concept of ordered liberty" protects against arbitrary intrusion to enforce criminal law, with its attendant penalties, but not against a similar intrusion to enforce civil regulations for public safety, where protection of the public instead of punishment of the culprit is the objective. But this position is also unjustifiable. If due process prevents a state from affirmatively sanctioning an unreasonable invasion into the privacy of a suspected criminal, then every person should be entitled to this minimal protection.

The *Wolf* case was not intended to exclude all but criminals from this application of the due process clause. There is historical justification for the belief that in its inception the Constitution was intended to safeguard the privacy of all men. And in argument, in the *Wolf* decision the Court, citing *Davidson v. New Orleans*,¹⁵ pointed out: "The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.'"¹⁶ It should be emphasized that the *Wolf* case was an exercise of the process of "inclusion" whereby the due process clause was extended to include restrictions on states intruding into the privacy of a home. Nothing in the case suggests that this was an attempt to define the maximum limits for the enforcement of this right against the states. To the contrary, the Court recognized that the concept of due process is dynamic and expanding, and its application to the states cannot once and for all be defined.

It is submitted that the restraints which under the fourth and fourteenth amendments are imposed on federal and state police in the enforce-

¹²*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹³338 U.S. 25, 27 (1949).

¹⁴*Id.* at 28.

¹⁵96 U.S. 97 (1877).

¹⁶*Shutts v. Commonwealth*, 338 U.S. 271 (1949).

ment of criminal law should as well be extended to any other federal or state officials, even though their action be in the enforcement of civil inspection laws.

CASE LAW

Although federal case law is sparse, the early reported cases tend to support the proposition that the search and seizure provisions of the fourth amendment apply only to searches made with a view to criminal or quasi-criminal prosecution. In the case of *In re Meador*,¹⁷ the court, holding the prohibitions of the fourth amendment on the issuance of warrants not applicable to certain revenue cases, said, "but this is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against the Meadors. Therefore, in this proceeding, the fourth amendment is not violated." Similarly, *In re Strouse*¹⁸ held that the fourth amendment is applicable only to criminal cases. The Supreme Court of the United States indirectly dealt with this problem in an early landmark decision.¹⁹ The Court stated that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him are in their nature criminal proceedings, and for that reason within the fourth amendment. This holding strongly suggests that had the court found the proceeding to be civil in nature, the fourth amendment would have afforded no protection. However, there have been more recent cases in which the fourth amendment has been held applicable to civil proceedings.²⁰

The recent cases have dealt principally with the right of public officials to make health and safety inspections. In support of the argument that such inspections are invalid, the common contention was that, in the absence of a clear emergency, the requirement of a search warrant could not be constitutionally dispensed with. In *District of Columbia v. Little*²¹ a health regulation authorizing inspections without a warrant was attacked as unconstitutional. The homeowner refused to unlock his door to an inspector and was convicted of a misdemeanor, under the statute, for interfering with the inspection. The Court of Appeals reversed, concluding that in the absence of an emergency a magistrate must authorize the inspection. In answer to the argument that only searches for evidence of crime are within the purview of the fourth amendment, the majority of the court stated that such a proposition was wholly without merit and in fact preposterous. The dissent, however, argued that the fourth amendment was intended to apply only to criminal or quasi-criminal proceedings. On appeal to the Supreme Court, the constitutional issue was avoided, the Court affirming on other grounds.

The most significant decision to date concerning the constitutionality of

¹⁷16 Fed. Cas. 1294 (No. 9375) (N.D. Ga. 1869).

¹⁸23 Fed. Cas. 261 (No. 13548) (D. Nev. 1871).

¹⁹*Boyd v. United States*, 116 U.S. 616 (1886).

²⁰See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924); *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

to a regulatory scheme for the general welfare and not as a means of enforcing the criminal law are not violative of constitutional rights, provided the inspection is reasonable and is accompanied by certain minimum safeguards. Recognizing the impracticality of requiring a search warrant for the inspection involved, the Court said:²⁸

Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search, or as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search for evidence of criminal acts.

MINIMUM SAFEGUARDS NECESSARY TO THE VALIDITY OF INSPECTION STATUTES

The *Frank* decision should not, however, be construed as approving any and all civil inspections made without a warrant in the name of public health and safety. Although a warrant may not be required, civil inspections are nevertheless subject to the fourth amendment provisions as applied through the fourteenth amendment. The authorizing legislation must provide adequate safeguards to the individual so as to preclude inspections of a harassing or oppressive nature. The safeguards provided by the statute involved in the *Frank* case were held to be sufficient and included the following: The inspection could be made only in the daytime; the inspector must have had cause to suspect the existence of a nuisance in the home; the inspector was not authorized to force entry. In view of the fact that the Court was divided five to four, the statute apparently came dangerously close to unconstitutionality. This suggests that the safeguards provided by that statute should be considered as minimal. The advisability of incorporating additional safeguards in future legislation and amending existing legislation is obvious. Not only would constitutionality be more certain, but the additional concern for the convenience of the individual would tend to discourage litigation. As a consequence, efficient administration of the inspection program would be realized.

Provisions in addition to those provided in the statute involved in the *Frank* case might wisely include the following: The inspector must present identifying credentials to the individual whose home is to be inspected; the inspector must give prior notice to the homeowner that his dwelling is to be inspected; no inspection should be authorized for the purpose of gathering evidence of crime without the procurement of a valid search warrant; repeated inspections with a view to harassing the homeowner should be unauthorized; in the absence of an emergency, inspections should be restricted to certain specified hours.

The inspection of dwellings by health and safety officers has become increasingly important to community welfare. As communities grow, so will health and safety problems. The inspection system is recognized as the most desirable preventive weapon available to meet these problems. In view of

the *Frank* decision its use can be expected to increase considerably in the future. Although this procedure is available to meet community health and safety problems, care must be taken in drafting authorizing legislation so as not to encroach unreasonably on the individual's right of privacy. Though some general guides have been noted and suggested, the allowable limits of such legislation is still a matter of conjecture.

CHARLES F. ANGEL
THEODORE CORONTZOS

THE GOOD FAITH REQUIREMENT IN COLLECTIVE BARGAINING

The only safe generalization which can be made as to the requirements of good-faith bargaining is that it is risky to generalize. The courts and the Board have made it abundantly clear that the determination of whether there has been compliance with the obligation to bargain in good faith, depends ultimately on the facts and circumstances of a particular case.¹

ORIGIN OF THE REQUIREMENT — THE WAGNER ACT

In section 8(5) of the Wagner (National Labor Relations) Act Congress imposed the duty upon employers covered by the law to bargain collectively with the lawful representatives of their employees.² The Act did not define "collectively bargaining" but left it up to the National Labor Relations Board, which the Act had created, to work this out within the broad scope of the agency's authority to carry out the policies of the Act. It became obvious to the Board at an early date that the goal of industrial peace would be frustrated if the obligation of bargaining collectively could be satisfied by the employer coming to the bargaining table and only going through the motions without any intention of reaching an agreement. To overcome this obstacle the Board introduced the requirement of good faith.

The duty to bargain collectively, which the Act imposes upon employers . . . is not limited to the recognition of employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented. . . .³

This statutory interpretation by the Board of the meaning of the duty

¹McLean Arkansas Lumber Co., 109 N.L.R.B. 1022, 1036-37 (1954).

²49 Stat. 453 (1935), 29 U.S.C. § 158 (1952).

³Highland Park Mfg. Co., 12 N.L.R.B. 1238, 1248 (1939), *enforced*, 110 F.2d 632 (4th Cir. 1940). See also 84 N.L.R.B. 744 (1949), *enforcement denied*, 184 F.2d 98 (6th Cir. 1951).