Notes and Comments

The Fourth Amendment and Housing Inspections

Most Fourth Amendment search and seizure cases have arisen from police pursuit of criminals or evidence of crime. However, the Amendment is not in terms limited to the criminal process, and citizens have from time to time complained that civil inspections violate their right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] The form of civil inspection impinging most seriously on the privacy and security of individuals is housing inspection—the examination of dwellings for conditions which endanger the health, welfare and safety of the community.[2]

The Supreme Court's first serious encounter with the Fourth Amendment problem raised by housing inspections was *Frank v. Maryland*,[3] decided in 1959. In *Frank*, a five-man majority upheld a typical city ordinance requiring householders to admit inspectors not armed with search warrants.[4] Last term, in the companion cases of *Camara v. Municipal Court*[5] and *See v. City of Seattle*,[6] the Court overruled *Frank* and forbade punishment of those who refuse to admit warrantless inspectors.

1. U.S. CONST. amend. IV. State and municipal civil inspections have been open to Fourth Amendment challenge since the Fourth Amendment was held applicable to state and local governmental action through the due process clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

2. The number of municipalities enforcing housing codes through inspection programs has grown very rapidly in recent years, partly in response to the federal government's making enactment and effective enforcement of housing codes a condition of eligibility for federal housing aid. Housing Act of 1954, § 303, *as amended*, 42 U.S.C. § 1451(c) (Supp. I, 1965). *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1260 n.19 (1966).

3. 359 U.S. 360 (1959). The question was first before the Court in District of Columbia v. Little, 339 U.S. 1 (1950), *aff'g* 178 F.2d 13 (D.C. Cir. 1949), but in that case the Court (with two Justices dissenting) chose not to reach the question of the constitutionality of warrantless housing inspections. Reversal of the defendant's conviction (which the Court of Appeals had based on constitutional grounds) was affirmed on the ground that the defendant's conduct was not "interference" within the meaning of the penal ordinance in question.

4. The *Frank* case was followed the next year by Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960), in which an equally divided Court (Mr. Justice Stewart taking no part) affirmed a decision of the Ohio Supreme Court, 168 Ohio St. 123, 151 N.E.2d 523 (1958), finding warrantless housing inspections constitutional. *Eaton* differed from *Frank* in that the inspector in the Ohio case was not required to have and did not in fact have reasonable cause to believe that a housing code violation would be found in the particular inspection challenged.

5. 387 U.S. 523 (1967).

6. 387 U.S. 541 (1967).

The Court went on to give its blessing to a new species of "area probable cause" for housing inspection warrants—a standard requiring a substantially lesser showing than that needed to justify a criminal search warrant.[7]

The virtue of *Camara* is its recognition that important Fourth Amendment interests are threatened by the intrusions of civil authorities as well as by those of the police. Its weakness is its failure to give those interests the greatest possible concrete protection consistent with a respect for society's need to inspect.

I.

The movement from *Frank* to *Camara* signals a shift in the Court's evaluation of the impact of civil inspections of dwellings on Fourth Amendment interests. In *Frank*, Justice Frankfurter stated those interests as follows:

> [T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.[8]

7. 387 U.S. at 538.

8. 359 U.S. at 365. Justice Frankfurter's recognition of a separate Fourth Amendment interest in "self-protection" is unusual. Normally the Court in Fourth Amendment cases talks only of privacy. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 304 (1967) ("the principal object of the Fourth Amendment is the protection of privacy rather than property").

Whether the courts should recognize the interest of criminals in concealing evidence of crime from the government is a question which has long vexed courts dealing with search and seizure cases. In the first landmark search and seizure case, Entick v. Carrington, 19 Howell's State Trials 1029 (reported more briefly at 95 Eng. Rep. 807) (C.P. 1765), the Chief Justice, Lord Camden, pronounced general warrants illegal but declined to rule whether the illegality arose in part from a recognition of the guilty man's interest in protecting himself from punishment:

> Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

19 Howell's State Trials at 1073.

Less cautious than Lord Camden, but apparently equally uncertain, Justice Douglas has come down firmly on both sides of the question:

> The law of searches and seizures as revealed in the decisions of this Court is the interplay of these two constitutional provisions [the Fourth Amendment and the Fifth Amendment privilege against self-incrimination] . . . . It reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him.

Davis v. United States, 328 U.S. 582, 587 (1946).

He went on to argue that these interests were touched at most at the "periphery" by the inspection then before the Court.[9] The privacy interest was protected by the limitations on time and manner of inspection imposed by the municipal ordinance; inspections were required to be carried out during the day, and the inspector had no power to force his way into an objecting householder's dwelling.[10] The "self-protection" interest was, the Justice thought, not at all in issue, since the inspection was not for the purpose of discovering evidence of crime.[11] Given the strong public interest in safe and healthful housing, such minor incursions upon protected interests did not, on Justice Frankfurter's scale, require the procedural apparatus of the warrant clause.[12] The

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

McDonald v. United States, 335 U.S. 451, 455 (1948).

The strongest argument in favor of judicial recognition of the citizen's interest in self-protection against the evidence-gathering activities of the police is that the interest in self-protection which is threatened when the state takes from the home of an individual evidence linking that individual with a crime is very close to the interest recognized and protected in the Fifth Amendment privilege against self-incrimination. The intimate relationship between the right not to be compelled to incriminate oneself and the right not to be subjected to illegal searches and seizures was recognized in Entick v. Carrington, 19 Howell's State Trials at 1073, and reaffirmed by the Supreme Court as early as Boyd v. United States, 116 U.S. 616, 630 (1886). *See also* Schmerber v. California, 384 U.S. 757, 767 (1966) ("The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion of Brandeis, J.).

Probably the strongest argument against recognition by the judiciary of the interest in self-protection is that the judicial branch of a government should avoid recognizing affirmative value in private citizens' interests in escaping the punishment decreed by the legislature and sought to be imposed by the executive. Though, as noted in Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 699-700 (1961), a "hedge against bad law" may be desirable, the value of the hedge arguably should not be proclaimed by the Court. Fortunately, the Court can almost always avoid the question because an intrusion by a government agent which threatens the interest of citizens in self-protection will almost always involve an invasion of privacy as well. Hence, only the interest in the protection of privacy need be cited in applying the Fourth Amendment.

9. 359 U.S. at 367.

10. *Id.* at 366-67.

11. *Id.* at 366.

12. Thus, not only does the inspection touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion, but it is hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy. Such a demand must be assessed in the light of the needs which have produced it.

> . . . .
>
> 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 of evidence of criminal acts. The need for preventive action is great . . . .

359 U.S. at 367, 372.

Court's holding was not that housing inspections were exempt from Fourth Amendment requirements of "reasonableness"; indeed the examination of the "time and manner" restrictions in the challenged city ordinance implied quite the opposite. The point was rather that if the type of inspection authorized by an ordinance does not impose heavy burdens upon citizens' privacy or their interest in self-protection, a magistrate's prior evaluation of the need for each such inspection is not necessary.[13]

In *Camara*, the Court rejected its earlier weighing of the danger to protected interests posed by housing inspections. It held that the power of government officials to enter the homes of citizens—a power backed by punitive sanctions—does significantly threaten the privacy of the home.[14] And if there was a separate Fourth Amendment interest in "self-protection"[15] it too was threatened; under some ordinances, a first in-

13. The *Frank* case is part of a larger debate within the Court over the relationship between the warrant clause of the Fourth Amendment—"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"—and the "reasonableness" clause—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." On one side of the controversy is the view taken by the majority in Trupiano v. United States, 334 U.S. 699 (1948) that the warrant clause states an independent constitutional requirement that "law enforcement agents must secure and use search warrants whenever reasonably practicable." 334 U.S. at 705. *Accord*, McDonald v. United States, 335 U.S. 451, 456 (1948). On the other side is the view taken by the Court in United States v. Rabinowitz, 339 U.S. 56 (1950), that the existence of a warrant is only one factor to be taken into account in assessing whether a search is "reasonable" or "unreasonable":

> It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. . . . To the extent that Trupiano v. United States, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled.

339 U.S. at 65-66.

It is interesting to note that, while Justice Frankfurter's opinion in *Frank* apparently rests in part on a "practicability" test like that announced in the short-lived *Trupiano* opinion (which Frankfurter had supported), in the main his approach to the problem involves the *Rabinowitz* assimilation of the warrant requirement to the substantive "reasonableness" standard (from which Frankfurter vigorously dissented, 339 U.S. at 68-86). Though Frankfurter understandably did not cite the case in *Frank*, several of the state courts upholding the constitutionality of warrantless housing inspections cited to *Rabinowitz* for the proposition that the reasonableness of the search is the central Fourth Amendment question. Givner v. State, 210 Md. 484, 494-95, 124 A.2d 764, 769 (1956); City of St. Louis v. Evans, 337 S.W.2d 948, 958-59 (Mo. 1960). *See also* See v. City of Seattle, 67 Wash. 2d 475, 485, 408 P.2d 262, 268 (1965), *rev'd*, 387 U.S. 541 (1967).

In recent years, though *Rabinowitz* still gives the police virtual carte blanche to make warrantless searches "incident to" lawful arrests, the Court has shown a tendency to return to *Trupiano* and the view that the warrant clause states an independent requirement in criminal search cases. *See, e.g.*, Chapman v. United States, 365 U.S. 610 (1961); *cf.* United States v. Ventresca, 380 U.S. 102 (1965). In Wong Sun v. United States, 371 U.S. 471 (1963), the five-man majority refused to take a view on the continuing validity of *Rabinowitz*. 371 U.S. at 480 n.8.

14. 387 U.S. at 530-31.

15. Justice White for the Court expressed doubt that the "self-protection" interest

spection could lead to prosecution, and under all, violations found in a first inspection could be punished if still uncorrected after a second (also warrantless) inspection.[16]

However, revaluation of the "citizen's side" of the Fourth Amendment balance did not solve the Court's problem. On the other side, there remained the undeniably strong police power policy of ensuring the healthfulness and safety of dwellings, and the unavailability of equally efficient substitutes for general area-wide inspections to enforce that policy.[17] The Court recognized that these considerations fatally undermined the position taken by petitioner in *Camara*: that no housing inspector could demand entry without a magistrate's prior finding of probable cause that a code violation existed in the particular dwelling to be inspected.[18]

Rejection of the minimal "time and manner" review implied by *Frank* and the warrant-cum-full-probable-cause rule sought by petitioner left the Court with two intermediate options. It could have used the Fourth Amendment's "reasonableness" clause to regulate closely the types of inspections and inspection techniques employed,[19] or it could have resorted to the warrant clause to impose some requirement of prior authorization of inspections that would prevent misuse of the process without making all area-wide inspections impossible.

The Court chose to apply the warrant clause. *Camara* forbade penalizing a householder who refuses entry to a housing inspector not armed with a search warrant.[20] But it created a new species of probable cause

should be recognized, calling the recognition of such an interest "*Frank*'s rather remarkable premise." 387 U.S. at 531.

16. 387 U.S. at 531. Immediately prior to this discussion, Justice White notes the interest of householders in preventing criminals from gaining entry into the home by claiming to be housing inspectors. This interest, while real enough and deserving of recognition and protection, is not the sort of interest which has traditionally been given protection by the warrant requirement, and it is hard to see how the requirement of an easily forged warrant would be much of a safeguard against such criminal entry under false pretenses. The substantive criminal law, and not the constitutional warrant requirement, is equipped to deal with those tempted to use a false claim of governmental authority to gain entry for the purpose of committing crime.

17. 387 U.S. at 531. *See* note 22 *infra.*

18. 387 U.S. at 534-39.

19. Such regulation might have taken the form of case by case evaluation of the reasonableness of specific housing inspections or a detailed statement by the Court of required housing inspection procedures. Compare the case by case approach to the problem of coerced confessions in, *e.g.*, Watts v. Indiana, 338 U.S. 49 (1949) with the judicial legislation of Miranda v. Arizona, 384 U.S. 436 (1966).

20. 387 U.S. at 540. The *Camara* application of the warrant requirement to otherwise very reasonable housing inspections would seem to indicate that the assimilation of the warrant clause to the "reasonableness" clause which was the rationale of United States v. Rabinowitz, 339 U.S. 56 (1950), is not now accepted by a majority of the Court. It remains to be seen whether the implicit rejection of the *Rabinowitz* rationale presages new limitations on presently wide-ranging warrantless searches incident to arrests. *See* note 13 *supra.*

for inspection warrants which can be established by no more than the condition of an area and the passage of time:

> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable 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 (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[21]

Given the evident desirability of area-wide inspections,[22] the concept of area probable cause for inspection warrants is defensible. Any more rigorous standard would make warrants for such inspections impossible to obtain. Moreover, area-wide inspections do not involve the insult present in criminal searches; since they reach everyone in a given area, they carry no implication that the persons searched are individually suspected of misdeeds. To this extent, and because of the other restraints observed by inspecting agencies, inspections are among the least intrusive of searches.[23]

21. 387 U.S. at 538. The lower standard of area probable cause for civil inspection warrants was first suggested by Justice Douglas dissenting in *Frank*, 359 U.S. at 383. The portion of Justice Douglas' dissent making this suggestion is quoted by the *Camara* court, 387 U.S. at 538.

22. On the necessity to public health and safety of housing inspections and the superiority of area-wide inspections over complaint-initiated inspections, see J. SIEGEL & C. BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION 5 (1953); Osgood & Zwerner, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 705, 718-20 (1960); Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 420-24 (1966); Stahl & Kuhn, *Inspections and the Fourth Amendment*, 11 U. PITT. L. REV. 256 (1950); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 316-17 (1965); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 806-09 (1965); Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1118 (1956).

23. All of the cases involving housing inspections which have been decided by the Supreme Court have involved daytime inspections in which inspectors made no attempt to gain entry by force when the permission of the householder was refused. In all the cases except District of Columbia v. Little, 339 U.S. 1 (1950), several attempts were made to arrange an inspection time convenient for the householder. Some evidence of the mildness of the intrusion involved in a housing inspection is to be found in the absence of specific complaints other than complaints as to the absence of a warrant in the appellants' briefs in *Camara* and *See*, and in the fact that organizations devoted to the protection of the interests of tenants have usually given strong support to housing inspection programs. *See, e.g.*, N.Y. Times, Jan. 22, 1966, at 14, col. 1; N.Y. Times, Jan. 25, 1966, at 33, col. 1. Opposition to housing inspection has come not from the slum tenants whose homes are most often invaded by housing inspectors but from owner-occupiers who must pay for the correction of all violations found in inspections of their homes. *See, e.g.*, Brief of Homeowners in Opposition to Housing Authoritarianism as amicus curiae, *Camara v. Municipal Court* 387 U.S. 523 (1967), for a strong anti-inspection statement by a small

The aspect of the inspection system envisioned by the Court in *Camara* which is most dubious is its acceptance of warrantless inspections in cases where householders admit inspectors without protest.[24] In the face of the argument by the dissenting Justices that obtaining warrants would place a heavy administrative burden on the inspecting agencies,[25] the Court apparently assumed, as did Justice Douglas in his *Frank* dissent,[26] that little more than "one rebel a year" would have the temerity to demand a search warrant of a housing inspector.

The assumption of the solitary rebel is no doubt correct.[27] First, most

group of Baltimore homeowners. Further evidence of the hostility of owner-occupiers to inspections of their dwellings is to be found in the circumstances surrounding the recent enactment of New York City's housing code. Under pressure from the federal government (which threatened to cut off housing aid), New York City enacted a new code (effective July 14, 1967) covering for the first time one- and two-family residences as well as multiple dwellings. Partly as a result of strong opposition to the systematic inspection of one- and two-family residences from councilmen from areas with a large proportion of owner-occupied residences, N.Y. Times, May 12, 1967, at 36, col. 2, the new code exempts owner-occupied one- and two-family dwellings from all inspections except those initiated by a signed complaint. NEW YORK CITY, N.Y., HOUSING MAINTENANCE CODE D26-40.07(a) (1967).

Of course the fact that only owner-occupiers appear to be complaining in any numbers and that they are apparently complaining for reasons which may not be worthy of Fourth Amendment recognition does not indicate that inspections should be unrestrained. Privacy and security of tenants may be significantly infringed by inspections without provoking complaint because tenants in lower class areas are concerned about the many more tangible and immediate threats to their security and well-being. *See* Rainwater, *Fear and the House-as-Haven in the Lower Class*, 32 J. AM. INST. OF PLANNERS 23 (1966). In addition, the inspector's intrusion may be viewed by the tenants as a necessary price to pay for governmental assistance in coercing their landlords to meet the minimum requirements of the housing code. *See* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). But where it is possible to do otherwise, governmental agencies must not be allowed to condition the provision of services on the relinquishment of constitutional rights of those desiring the services. *See* Sherbert v. Verner, 374 U.S. 398, 404-06 (1963); Parrish v. Civil Serv. Comm'n, — Cal. 2d —, 425 P.2d 223, 57 Cal. Rptr. 623 (1967); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

24. Justices Douglas and Brennan had previously suggested reliance on consent. Frank v. Maryland, 359 U.S. 360, 383 (1959) (dissenting opinion of Douglas, J.); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 272 (1960) (separate opinion of Brennan, J.).

The Court presented its heavy reliance on consent to warrantless inspections in a way which indicates that it was less than proud of this aspect of the warrant procedure it proposed:

> [I]n the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.

387 U.S. at 539-40. But the Court seemed to hint in *See* that skipping the warrantless request for consent in housing inspection cases might be a violation of the Fourth Amendment because the householder would be thereby deprived of all legal protection against surprise inspections. 387 U.S. at 545 n.6.

25. 387 U.S. at 552-55.

26. 359 U.S. at 384.

27. In the first four months after the *Camara* decision the number of "rebels" does not appear to have been significant. In New Haven and New York City the impact on the

householders will not know of their right to demand a warrant.[28] Nor would a requirement of a *Miranda*-type warning[29] to cure this ignorance be realistically enforceable. Few inspections result in trials where the exclusionary rule could be effective to enforce a warning rule. Second, even if householders knew of their rights, and even if they felt an infringement on their privacy and security, they would normally grant the inspector's request to enter. Like the policeman searching for evidence of crime, the civilian inspector brings to the householder's door an aura of governmental authority and the power to make life difficult for the citizen, however innocent, who makes life difficult for him.[30] While the inspector, unarmed and usually not in uniform, is a less menacing figure than the policeman, the ease with which he can find a technical violation of a complex municipal housing code may make him a greater potential nuisance.[31] And a constitutionally knowledgeable householder has some hope of sending a policeman away without later having to admit him, since the policeman must show traditional probable cause to

ability of inspectors to obtain entry without warrants was inconsequential. Interview with Elliot A. Segal, Director, Division of Neighborhood Improvement, New Haven Redevelopment Agency, in New Haven, Conn., Oct. 27, 1967; telephone interview with William J. Quirk, General Counsel, Department of Buildings, New York City, Oct. 17, 1967.

28. Consider the comment of Judge (later Chief Justice) Vinson on the layman's ignorance of his Fourth Amendment rights in criminal search cases:

> His rights had been violated before he confronted the officers. He may never have heard of the IVth Amendment. Undoubtedly, he had even less of an idea as to the method that would insure its continuing protection. He was not a bootlegger or a gambler schooled in resistance to law. He probably had the average layman's respect for the common symbol of the law, officers in uniform. It is for the courts to protect such men's constitutional rights, not for the courts to study the finesse by which persons preserve their protection.

Nueslein v. District of Columbia, 115 F.2d 690, 694 (D.C. Cir. 1940).

29. A requirement of an announcement of constitutional rights when police request consent to a warrantless criminal search has been suggested in Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964) and Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967). *See* United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

30. In cases of warrantless police searches, the courts have become less and less willing to find a waiver of Fourth Amendment rights in a "consent" given by a householder to an armed policeman. Occasionally, the courts have rested a refusal to find a waiver on the householder's apparent lack of knowledge of his rights. *See, e.g.*, United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966). But much more frequently, coercion has been found to arise from the "disparity of position . . . of the government agent and this humble defendant." Canida v. United States, 250 F.2d 822 (5th Cir. 1958). *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13 (1948) ("[entry] was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"); Amos v. United States, 255 U.S. 313 (1921); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940); United States v. Slusser, 270 F. 818 (S.D. Ohio 1921); Parrish v. Civil Serv. Comm'n, — Cal. 2d —, 425 P.2d 223, 228-30 57 Cal. Rptr. 623, 628-30 (1967); People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964); *cf.* Miranda v. Arizona, 384 U.S 436 (1966).

31. *Cf.* Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1125 (1956) (suggesting that most occupants would not wish to exercise constitutional rights against housing inspectors for fear of alienating the inspectors).

obtain a search warrant.[32] The relaxed *Camara* standards governing issuance of the inspector's warrant make his return, with the attendant potential for harassment, a virtual certainty.

Given that "consent" to warrantless searches will be virtually universal, what protection does *Camara* give to Fourth Amendment interests? In practical terms, the benefits are slight.

The decision abstractly reaffirms a Fourth Amendment policy not explicitly recognized in *Frank*: the policy that when official activities impinge upon the privacy and security of the home, checks on such activity should not be left to *post hoc* judicial review (normally in the context of a prosecution of the householder), but should be subject to a prior determination by a responsible official that the activity is in accord with substantive Fourth Amendment standards of reasonableness.[33] The emphasis on the warrant clause, here as in recent criminal cases,[34] expresses a distrust of on-the-spot decisions by subordinate law enforcement officials that particular invasions of privacy and security are "reasonable."[35] Applying this policy to inspections would reduce the possibility of inspectors' using their discretion to harass citizens.[36] Further, it could con-

32. The policeman must show facts from which it is possible for a magistrate to conclude that it is likely that the persons or things sought to be seized in the criminal search will be found in the dwelling searched. *See* Aguilar v. Texas, 378 U.S. 108 (1964); *cf.* Giordenello v. United States, 357 U.S. 480 (1958) (arrest warrant).

33. The point is made by Justice Brennan's separate opinion in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 272 (1960) and by Justice White for the Court in *Camara*, 387 U.S. at 532-33. Unfortunately, neither Justice Brennan nor Justice White describes how a warrant procedure employing area probable cause and relying heavily on consent to warrantless inspections gives any substantial protection to the interests of citizens in privacy and security.

34. *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965); Stanford v. Texas, 379 U.S. 476 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Chapman v. United States, 365 U.S. 610 (1961).

35. The classical expressions of the value of prior higher level review of decisions to invade the privacy and security of the home are those of Justices Jackson and Douglas in two 1948 cases:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948)

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

McDonald v. United States, 335 U.S. 451, 455-56 (1948).

36. There is absolutely no evidence that harassment through housing inspections has ever taken place in any part of the United States, but the possibility does exist:

fer some psychological security on householders who know of their theoretical right to insist with impunity on a higher official's written determination that a particular inspection is authorized and reasonable. But the coercive nature of the warrantless inspector's request to gain entry by consent vastly reduces the practical effect of this theoretical gain. A suspicious or timorous citizen, facing a purported housing inspector at his door, can demand that his visitor obtain and present proof of his proper authorization only by inconveniencing him and thus incurring the risks of future petty harassment.

To the solitary rebel who refuses entry to a warrantless housing inspector, the intrusion upon privacy and security of the inspection outweighs the risk of future harassment and the inconvenience to the inspector which flow from a demand for a warrant. The vast majority, unwilling to incur the risk or impose the inconvenience, suffer the same invasion of privacy and security in silence. Extending to all householders the prior review and written authorization which *Camara* clumsily grants only to the solitary rebel would accord greater protection to citizens' Fourth Amendment interests.

II.

The approach suggested here accepts *Camara's* central assumptions: that the institution of area-wide inspections is necessary but should be policed, and that a standard of "area probable cause" more relaxed than the criminal standard can meaningfully be applied to such inspections. The suggested approach extends *Camara*'s requirement of prior review to all routine inspections. It further protects Fourth Amendment interests slighted in *Camara* by guarding against unannounced inspections, and limiting the hostility of the inspector's intrusion into the home.

The approach involves three departures from *Camara*: (1) no reliance is placed on the consent of the householder; rather inspectors must obtain a higher-level determination of the reasonableness of a proposed in-

> [T]he inspectors' action could have been based on caprice or on personal or political spite. It hardly contradicts experience to suggest that the practical administration of local government in this country can be infected with such motives. Building inspection ordinances can lend themselves readily to such abuse.

Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 271 (1960) (separate opinion of Brennan, J.).

The *Camara* warrant requirement would make such a possibility less likely by offering a legally riskless way for a citizen to challenge a harassing inspection and hence an added deterrent to such behavior by housing inspectors. The value of this desirable effect of the *Camara* procedure would depend on how real the danger is that housing inspections may be used as a form of petty tyranny and how much this danger is reduced by allowing householders a riskless demand for a warrant in addition to the challenges previously available.

spection before the first knock on the householder's door; (2) inspecting agencies must normally give advance notice of inspections to householders; (3) the penalties which may result from an inspector's findings are limited to those necessary to enforce the municipal code involved.[37]

A. *Prior Review*

If inspectors had to obtain an advance determination that a particular area inspection was reasonable, and had to carry with them warrants stating and limiting the scope of their authority, the goal of prior review recognized in *Camara* could be better achieved. Householders who feared intruders posing as inspectors could reassure themselves without imposing on the inspector a costly and irritating trip to a magistrate. Inspectors who attempted to harass particular householders would have to reveal such activity to their superiors in their request for authority to inspect.

More generally, and perhaps more importantly, the issuance of warrants for all routine inspections would remind citizens frequently and officials daily of the constitutional limitations on the government's right to intrude on the privacy of the home.[38]

An objection to requiring a warrant for each inspection is that this procedure might impose cost and inconvenience on the inspecting agencies.[39] However, the cost and inconvenience of the warrant process would not be great if a warrant was issued for an entire area (a block or several blocks) on the basis of a showing that previously promulgated legislative or administrative standards were met by a proposed inspection. Such a procedure would be an adequate means of reviewing the constitutional reasonableness of housing inspections since the condition of an area supplies the probable cause for the inspection of the dwellings within it.[40]

37. In emergencies, time does not permit the first two suggested departures from *Camara*—prior review and notice. *Cf.* Camara v. Municipal Court, 387 U.S. 523, 539 (1967). Hence, in the case of emergency inspections, only the third suggested departure from *Camara*—limitation on penalties—should be applied.

38. The recurring reminder of constitutional limits on the inspecting power of local governments would make the proposed wide application of the warrant clause to housing inspections just the reverse of the prostitution and degradation of the Fourth Amendment which the dissenters claimed to see in *Camara*, 387 U.S. at 547-48, 554.

39. See the *Camara* dissent for such an objection made on the (probably erroneous) assumption that the *Camara* approach would bring forth so many refusals to consent that warrants would have to be issued in advance for all dwellings. 387 U.S. at 554.

40. In setting out the "area probable cause" which could justify an inspection warrant the *Camara* Court suggested such a use of legislative or administrative standards:

> [I]t is obvious that "probable 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.

387 U.S. at 538.

The legislative or administrative standards employed in issuing inspection warrants would have to be rather detailed and would differ according to the type of inspection and the type of area. They should set minimum periods between inspections, prescribe the hours for inspection, and outline minimum standards for the behavior of inspecting officials. The requirements of notice and limitation on punitive consequences, proposed below, should also be part of these standards.

Given such detailed regulations, the magistrate or other reviewing official would require only an affidavit from the inspecting agency showing that each of the standards was met by the proposed inspection. The affidavit would describe the area to be searched, give the date of the last inspection and the date and time of the proposed inspection, recite that the required notice had been given to affected householders, and state that the inspection had no purpose other than enforcement of the housing code. The warrant could then issue almost automatically.

The required notice to householders suggested below would afford an opportunity to any householder to challenge before the magistrate a proposed inspection on the grounds that it was not permitted by the applicable standards of probable cause and reasonableness. Further, any affected householder could challenge either the application of the standards or the standards themselves in a suit to enjoin an inspection program which was alleged to violate Fourth Amendment rights of householders.[41]

In short, the model proposed rests on the application of administrative rules, not the case-by-case determination of "reasonableness" performed, in theory, by the magistrates who issue criminal search and arrest warrants.[42] This model contains built-in checks against arbitrary or harassing inspections. If the inspecting agencies take proper account of the privacy and security of individuals in formulating and applying

41. The suit for an injunction could be brought under the general civil remedy section of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For an example of injunctive relief granted under this section against unconstitutional searches by the Baltimore police, see Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

42. In Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386, 388 (1960), it is argued that, in the case of arrest warrants, the issuance of warrants is in practice more an administrative act than "judicial review of the decision to arrest."

their regulations, few householders will object to the issuance of warrants and inspections will be authorized with dispatch and efficiency.

Two problems remain: who should issue the warrants and what form should they take? The majority in *Frank* and the dissenters in *Camara* objected to the proposal that warrants be required for housing inspections with a reduced standard of probable cause, apparently fearing that this would debase the standard of probable cause in the minds of magistrates, and thus relax their vigilance in issuing criminal search and arrest warrants.[43] The objection displays remarkable optimism about the present effectiveness of the magistrate in criminal search and arrest cases; but even accepting its premises, it can be met. Nothing in the Constitution requires the same magistrates to issue all warrants; if civil and criminal warrant procedures should be kept separate, an independent administrative magistrate (a kind of adjudicative ombudsman) could review the inspection plans of civil enforcement agencies.[44]

The problem of the *form* the warrant should take has provided some merriment to opponents of a warrant requirement. Noting that the Fourth Amendment requires warrants "particularly describing the place to be searched," Justice Clark, dissenting in *Camara*, conjured up the vision of inspectors armed with pads of printed inspection warrant forms, differing only as to house number, which rubber-stamping magistrates had issued to them wholesale.[45] Of course the Constitution requires no such sheaves of paper; the "place to be searched" could as well be a defined area, and thus a single document would suffice.

B. *Notice to Householders*

Perhaps the most serious invasions of privacy involved in housing inspections result from the unannounced character of inspectors' visits. When inspectors arrive without notice, as they may under *Camara*, householders may be sleepy or drunk or unclad; their dwellings may be in embarrassing disarray; they may have guests whose presence they would prefer not to have known. Unannounced inspections intrude unnecessarily. Notice allows the householder to prepare his dwelling for public view, thus minimizing the intrusion on privacy. Inspecting agen-

43. Frank v. Maryland, 359 U.S. 360, 373 (1959); Camara v. Municipal Court, 387 U.S. 523, 554 (1967) (dissenting opinion of Clark, J.). Justice Brennan responded to such a suggestion by arguing that magistrates were quite capable of applying different standards to civil and criminal inspections just as they already required different showings of probable cause for different sorts of criminal searches. Ohio *ex. rel.* Eaton v. Price, 364 U.S. 263, 273 (1960) (separate opinion of Brennan, J.).

44. Compare the suggestion made by the *Camara* dissent that if warrants are required at all, "administrative warrants" be used for civil inspections, 387 U.S. at 548 n.1 (1967).

45. 387 U.S. at 554.

cies should be required to notify householders of the time and nature of a planned inspection by postcard, publicly displayed poster, or other equally effective means.[46] The notice should briefly describe the limitations on the inspector's authority to search and to initiate penal sanctions; this reassurance will reduce the felt hostility, and hence the intrusion upon privacy and security, of the inspection when it occurs. Finally, the notice should inform the householder how he may contest the issuance of the inspection warrant.

Notice is not a traditional requirement of a reasonable search under the Fourth Amendment. In the criminal area, notice of impending searches or arrests would usually defeat law enforcement purposes. But this is not the case with civil inspections, where the purpose is not to punish malefactors, but to correct the deficiencies which exist in the healthfulness and safety of dwellings.[47] Most housing code violations cannot readily be concealed without being corrected; to the extent that householders take advantage of notice to correct deficiencies, the purposes of the housing code are advanced rather than thwarted.

The necessity of planning inspections one or two weeks in advance, sending out notices, and adhering to proposed schedules would impose additional administrative costs on inspecting agencies. On the other hand, notice would probably reduce the number of dwellings which can not be inspected on the first visit because no one is at home to admit the inspector.[48] Though some householders might attempt to avoid inspection if given notice, most would cooperate especially if the hostility and coercive power of inspectors were limited as recommended below.

46. Some inspection agencies now normally give notice to householders of coming inspections both to improve their public relations with householders and to reduce the number of cases in which no one is at home to admit the inspector when he calls. In New Haven, the notification is by letter. Interview with Elliot A. Segal, Director, Division of Neighborhood Improvement, New Haven Redevelopment Agency, in New Haven, Connecticut, Oct. 27, 1967. New York City posts notices in buildings to be inspected. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 808 (1965). Malden, Massachusetts employs written announcements, letters and cards. Brief for the Commonwealth of Massachusetts, the City of Malden and the Malden Redevelopment Authority as Amici Curiae at A-14 to A-15, Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967).

47. That compliance with the housing code and not punishment is normally the goal of housing inspection has been noted many times. *See, e.g.*, Givner v. State, 210 Md. 484, 504, 124 A.2d 764, 775 (1956); Commonwealth v. Hadley, 351 Mass. 439, 222 N.E.2d 681 (1966), *remanded*, 388 U.S. 464 (1967); Stahl & Kuhn, *Inspections and the Fourth Amendment*, 11 U. PITT. L. REV. 256, 263 (1950); Note, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288, 292 (1965); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 814 (1965). *But see* People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964) (inspection conducted for purpose of gathering evidence on which to base prosecution for violation of zoning ordinance).

48. Municipalities which now give notice do so at least in part to minimize the number of cases in which no one is at home when the inspector calls. *See* note 46 *supra*.

The major problem with requiring advance notice of inspections is that some code violations can be hidden without being corrected. The most important examples are violations of the occupancy standards which combat overcrowding in urban housing. If the enforcement of these standards is essential to the health and safety of city-dwellers,[49] and if notice would wholly frustrate their enforcement, then inspections for these violations without notice would perforce be "reasonable" under the Fourth Amendment on the ground of necessity. However, a municipality which would use unannounced inspections to enforce occupancy standards should bear the burden of showing the overriding necessity of such inspections..

C. *Limitations on Punitive Consequences*

Inspection agencies normally do not punish householders for code violations found on a first visit.[50] They usually issue an order to abate the violation and then make a second visit to check for noncompliance. Yet, this normal practice is not usually required by housing codes,[51] and hence a householder can never be sure that it will be followed in his case. Moreover, the law does not limit the use in criminal proceedings of evidence found by housing inspectors.[52]

To limit the inspector's invasion of privacy and security to the minimum necessary for the enforcement of housing codes, no punishment other than for failure to correct a violation should follow from a housing inspection justified on the loose standard of probable cause created in *Camara*. To reassure householders, this limitation on inspec-

49. One important but somewhat dated study concluded that the most important housing code provisions in the prevention of urban blight are the maximum occupancy provisions. J. SIEGEL & C. BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION 2, 19, 33 (1953). *See also* Osgood & Zwerner, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 705, 720 (1960). No detailed argument is given by Siegel and Brooks for this judgment, and the view has not been echoed strongly by most subsequent writers in the field.

50. *See* note 47 *supra*.

51. *See, e.g.*, NEW YORK CITY, N.Y., HOUSING MAINTENANCE CODE § D26-52.01 (1967) (any person who "violates any provisions" of the Code liable to a maximum penalty of a $500 fine and thirty days' imprisonment for a first offense); SAN FRANCISCO, CAL., HOUSING CODE § 507 ("Any person . . . who violates, disobeys, omits, neglects, or refuses to comply with . . . any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code" is subject to a maximum penalty of $500 and six months' imprisonment).

52. It is probable that under current decisions an inspector could not constitutionally seize evidence he found in the course of an inspection unless the evidence in question was so likely to be destroyed or hidden that a call to the police giving them probable cause to make a warranted seizure would not be practicable. *Cf.* United States v. Scott, 149 F. Supp. 837, 841 (D.D.C. 1957) (police lawfully in an apartment could note the existence of stolen items in plain sight but could not seize the items without a warrant).

tors' coercive power should be stated both in the notice sent to householders and in the warrant which the inspectors carry.[53]

The Fourth Amendment requires warrants "particularly describing the . . . persons or things to be seized." It is, of course, not the business of housing inspectors to seize "persons or things"; to this extent the language of the Amendment does not literally apply. But the limiting spirit of the clause should restrict the kinds of information which may be noted or "seized" and the uses which the government may make of such information to conform to the standard of probable cause required for the warrant.

The loose standard of "area probable cause" prescribed by the Supreme Court in *Camara* was justified in part by reference to the "relatively limited invasion of the urban citizen's privacy" involved in inspections which are not "aimed at the discovery of evidence of crime."[54] Elsewhere in its opinion the Court described civil inspection as "a less hostile intrusion than the typical policeman's search."[55] It is to insure that the hostility of inspections *is* limited that the above restrictions on the punitive consequences of an inspector's visit are proposed. Without them, citizens could perceive inspecting agencies as but another arm of the police—an arm with the unusual power of searching dwellings on a showing of probable cause utterly insufficient to justify a normal police search.[56] Nor would their perceptions neces-

53. Though the proposed limitation on punitive consequences might be enforced to a large extent by the exclusion of evidence from penalty proceedings, *cf.* Mapp v. Ohio, 367 U.S. 643 (1961), the proposal gives greater security to the householder than the exclusionary rule alone because the limitation is formally recognized and stated to the householder prior to the inspection.

54. 387 U.S. at 537.

55. *Id.* at 530.

56. The same reasoning which supports limited housing inspections for conditions which are dangerous to the health and welfare of the people might also support limited warranted searches by the police in extreme circumstances, not to gather evidence against criminals, but to prevent the social harms of threatened future crimes. For example, if the police knew that some unknown resident within a three-block area illegally possessed a chemical which might be used to poison the water supply of the city, a house-by-house search of the area for the poison should be recognized as constitutionally reasonable. In the described circumstances, a house-by-house search would no doubt be made regardless of the exact state of search and seizure law. But in the present state of the law, the courts would condemn the search of the dwellings as being without probable cause, would hold the poison seized inadmissible in a criminal action against the person possessing the poison, and yet would permit the state to retain or destroy the poison which had just been held to have been unconstitutionally seized. *See* Warden v. Hayden, 387 U.S. 294, 307 (1967); United States v. Jeffers, 342 U.S. 48, 52-54 (1951). It would be more realistic and also make the vitally necessary house-by-house search less intrusive on the privacy and security of householders within the area if the search were made pursuant to a warrant which limited the punitive consequences to confiscation of the poison. *Cf.* Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissenting opinion of Jackson, J.). If used, the suggested limited warrant should authorize entry by force if necessary, but should recognize the liability of the government for all damage to the property or person inflicted (whether

sarily be false; collusion between police and inspecting agencies would remain a constant threat.[57]

The *Camara* Court did not address itself to the punitive consequences that might flow from an inspection based on "area probable cause"; the issue was not before it. In an earlier case, *Abel v. United States*,[58] agents of the Immigration and Naturalization Service (working closely with the F.B.I.) had searched defendant's effects incident to an arrest authorized by an administrative warrant. Colonel Abel was convicted of espionage on the basis of evidence the agents found. The Court held that only a finding of a "bad faith" use of administrative search powers for crime detection purposes would require exclusion of the evidence discovered.[59] The facts in *Abel* demonstrate the weakness of the "bad faith" test; even though the I.N.S. was shown to have worked closely with the F.B.I. in making the "administrative arrest" and in conducting the search "incident to" that arrest, five Justices could not find "bad faith."[60]

The *Abel* approach should not be followed for housing inspections;[61] no "bad faith" should have to be shown in order to exclude from a criminal prosecution evidence turned up by a housing inspection (or

innocently, negligently, or maliciously) by the police in the course of the house-to-house search.

57. Not many examples of collusion have come to light. The most publicized was that involved in the case of Maryland v. Pettiford, 28 U.S.L.W. 2286 (Dec. 22, 1959) discussed in Abel v. United States, 362 U.S. 217, 242-43 (1960) (dissenting opinion of Douglas, J.). In *Pettiford* the Supreme Bench of Baltimore City held the evidence obtained in the collusive inspection inadmissible. *See also* Comment, *State Health Inspections and "Unreasonable Search": The* Frank *Exclusion of Civil Searches*, 44 MINN. L. REV. 513, 519 n.23 (1960) (noting one reportedly isolated instance of collusion in St. Paul, Minnesota).

58. 362 U.S. 217 (1960).

59. *Id.* at 226, 240.

60. *See* United States v. Alvarado, 321 F.2d 336 (2d Cir. 1963); State v. Rees, — Iowa —, 139 N.W.2d 406 (1966). Some lower courts have, however, applied the "bad faith purpose" test with greater realism. United States v. Lange, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965) ("shake down" inspection conducted with the purpose of finding evidence of crime; evidence inadmissible); State v. Buxton, 238 Ind. 93, 148 N.E.2d 547 (1958) (fire inspection conducted for the purpose of obtaining evidence of arson; evidence inadmissible); People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964) (inspection for purpose of obtaining evidence for prosecution for zoning violation; evidence inadmissible).

61. A refusal to follow the *Abel* approach in the case of housing inspections would not necessarily require a repudiation of the *Abel* approach in other contexts. Where (as perhaps was the case in *Abel* itself) the reason initially justifying the government intrusion involves a high degree of hostility to the person subjected to the intrusion, a limitation of punishment consequences to those directly related to the justification for the search would reduce very little the hostility of the government's intrusion and hence would be of little value to the search victim's interests in privacy and in protecting himself from governmental punishment. Such considerations may be in part responsible for the Court's acceptance of the admissibility of evidence seized in the course of a lawful search which did not have as its legitimate object the evidence actually seized and used. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967); Harris v. United States, 331 U.S. 145 (1947); Love v. United States, 170 F.2d 32 (4th Cir. 1948).

as the fruit of such an inspection). The householder perceives the inspector as a hostile or "police-like" intruder to the extent the inspector has the power to bring the householder into the dock. The subjective good or bad faith of the inspector is irrelevant to this perceived hostility.[62]

Limiting the coercive consequences of housing inspections will not only reduce the hostility and intrusiveness of the inspector's visit but will also deter undesirable collusion between police and inspecting agencies by making it "unprofitable."[63] And as a practical matter, it will detract little from effective law enforcement; if there were no restriction on punitive consequences, few criminals would leave evidence of crime around the house after receiving notice of an impending inspection, and those who did would surely refuse admittance to the inspector and pay the small penalty typically imposed for such refusal.

III.

The analysis thus far has applied to regular area-wide inspections by housing code enforcement agencies. While the area-wide inspection is the preferred method of enforcing code compliance,[64] in some cities most housing inspections still are initiated by complaints. Many of these complaints are made by householders themselves, and are directed against landlord failures to meet code requirements. In such cases, no constitutional problems arise since the householder—the only person whose right to privacy is involved—consents to the inspection.[65]

When the complaint is made by someone other than the householder, the analysis and proposals given above for area-wide inspections apply *mutatis mutandis*. The complaint rather than the passage of time

62. *Cf.* Abel v. United States, 362 U.S. 217, 255 (1960) (dissenting opinion of Brennan, J.); Lankford v. Gelston, 364 F.2d 197, 205-06 (4th Cir. 1966).

63. Evidence turned up by an inspector would not be admissible even if the defendant was unable to prove that the inspector was acting in collusion with the police. Under the proposed procedure, concealed collusion (in which the police would use information supplied by an inspector but claim to have another source, such as a reliable informer) would only be possible if the inspecting agent was willing to risk serious penalties for submitting a false affidavit as to the absence of collusion when the inspection warrant was sought. It is not to be supposed that many housing inspectors would wish to run this risk to help out the police.

64. *See* note 22 *supra*.

65. If however it is found administratively convenient to make an inspection covering all code violations when complaint-initiated inspections are made, to the extent that the inspection exceeds the bounds of the householder's request, unwaived Fourth Amendment rights of the householder are involved. In such circumstances a civil inspection warrant with stated limits on punitive consequences should be sought following as far as practicable the procedures for area inspection warrants proposed in part II.

and the condition of the area provides the limited quantum of probable cause needed to initiate an inspection.[66] Notice is sent to the householder, and a limited inspection warrant issues upon presentation of evidence of a complaint to the magistrate. The inspection is carried out according to the "reasonable" limitations prescribed in the ordinance or the inspecting agency's regulations, and the punitive consequences are limited as proposed above.[67]

IV.

In *See v. City of Seattle*,[68] the companion case to *Camara*, the Court granted the right to demand an inspection warrant to owners of business premises as well as to householders. This limited requirement may well be justified on the ground that businessmen should be able to demand proof of proper authorization from those seeking to enter their premises. However, the extension of *Camara* proposed in this Note need not apply across the board to inspections of business premises. The approach suggested here is premised primarily upon the theory that inspections of dwellings involve substantial invasions of privacy and security; they can embarrass and frighten people within their own homes. To find similar invasions of privacy in regular inspections of business premises open to employees and, to a greater or lesser degree, to customers and the general public, would unduly exalt technical property concepts over the substantive personal rights protected by the Fourth Amendment.[69]

Similar considerations rule the application of the Fourth Amendment to landlords whose property is subject to housing inspections. Landlords suffer no invasion of protected interests when their tenants' dwellings are inspected. Inspection of the common areas of multiple-dwelling buildings infringes only the technical property interest con-

66. Since the complaint-initiated inspection, like the systematic area inspection, is made with notice, opportunity to challenge and limitation on punitive consequences, the complaint necessary to supply probable cause would need to be nothing more than an anonymous telephone "tip." Such a "tip" would of course not supply adequate probable cause for a criminal search. Lankford v. Schmidt, 240 F. Supp. 550, 557 (D. Md. 1965), *rev'd on other grounds sub nom.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

67. Of course, where the complaint together with supporting affidavits provides traditional probable cause—probable cause to believe that a code violation exists in a particular dwelling—none of the above limitations would apply as a matter of constitutional law. A normal criminal search without notice or limitation as to punitive consequences could then follow. Such searches would be the appropriate means of enforcing maximum occupancy standards and should if possible be the only means used to enforce them.

68. 387 U.S. 541 (1967).

69. *See* note 8 *supra*.

ferred by the landlord's legal possession of these areas. Because such inspections threaten no invasion of landlords' personal privacy,[70] the Fourth Amendment does not dictate the same careful procedures required to protect the privacy of citizens in their own homes.

70. *See* State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (App. Div. 1966), *petition for certification for appeal denied,* 228 A.2d 560 (Conn. 1967) (holding that a landlord's privacy was not infringed by an inspection to which his tenants had consented); City of St. Louis v. Evans, 337 S.W.2d 948, 956 (Mo. 1960).