SANITATION

Legal Aspects of Sanitation Programs

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"There must be progress, and if in its march private interests are in the way they must yield to the good of the community."—Mr. Justice McKenna in *Hadacheck* v. *Los Angeles,* 239 U.S. 394, 410 (1915).

THE CONCENTRATION of two-thirds of our population in 212 metropolitan areas poses staggering problems of sanitation and services. "Great cities, when badly administered, cannot be sold or abolished; they simply become dirty, unhealthy, unsafe, disgraceful, and expensive" (*1*).

Achieving and maintaining a healthful community environment, however, requires, among other things, control of activities which may adversely affect that environment. Such control is achieved by laws, municipal ordinances, or regulations which inevitably run afoul of private interests. The extent to which these private interests may be required to yield to the needs of the community is determined by the constitutional scope of the governmental power, called the "police power," exercised by the State and by the community as authorized by the State.

These constitutional limitations are expressed in the following amendments to the Constitution as protections of the personal and property rights of individuals:

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

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Article V: No person . . . shall be compelled . . . to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . .

Article XIV: . . . no State . . . shall deprive any person of life, liberty, or property, without due process of law.

The rights guaranteed by the 4th amendment, implemented by the self-incrimination clause of the 5th amendment, are enforceable against the Federal Government and, through the due process clause of the 14th amendment, against the States (*2*).

Derived from the Greek word "polis," meaning "city," the police power has never been precisely defined. As the Supreme Court of the United States said, almost 100 years ago (*3*), the police "power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." It has been called "one of the most essential powers of government, one that is the least limitable" (*4*). While it may sometimes seem harsh in its exercise as applied to an individual, "the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily" (*4*).

Since it is by the exercise of this coercive power that States and communities carry on sanitation programs, some of the basic cases which have involved the application of constitutional limitations to these programs are discussed below.

A good starting point is the mundane and ubiquitous problem of garbage and other solid refuse, the collection and disposal of which has

plagued cities for thousands of years. Although American cities spend almost $1½ billion annually for this purpose (*5*), the problem is yet unsolved. The health and safety hazards of improper disposal of these solid wastes are obvious. What can be more sensible than provision by a municipality for the safe and sanitary collection and disposal of such material?

But garbage and refuse are property, owned by someone, which does have value, slight though it may be. Can a city deprive a person of this property by requiring him to deliver it to a designated collector without paying him for it?

This question was considered by the Supreme Court in 1905. The case of *Reduction Company* v. *Sanitary Works* (*6*) involved an ordinance of the city of San Francisco, which gave an exclusive franchise to one company to collect and incinerate all garbage and solid refuse from within the city. It prohibited any other person from so doing and required that all persons deliver such refuse to the incinerator at their own expense. This latter requirement could, of course, be met by paying the franchised company to collect and dispose of the refuse.

The defendant, however, collected waste from various establishments within the city and carried it to an area outside the city where he dumped it. The plaintiff sued to enjoin this infringement of its franchise, and the defendant replied that the ordinance violated the 14th amendment since the refuse had value and the owners were deprived of the right to dispose of their property.

Finding that the safe and sanitary disposal of garbage and refuse was reasonably related to the protection of the public health, the Court held that the ordinance was clearly within the authority of the city, as was the giving of an exclusive franchise for its collection and disposal.

With respect to the deprivation of the property right, the Court noted the health hazards involved in the improper disposal of such refuse, and declared that even if the material had some value, its collection and disposal as a means for the protection of the public health "cannot be properly considered, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes" (*6a*).

Underlying the conclusion of the Court was the basic concept that no one has a property right in a nuisance endangering the public health or welfare that is so protected that the community may not abate the nuisance without compensating the owner for the value of the property. The nuisance potential of garbage was accepted by the Court as beyond argument.

This concept has long been upheld as an inherent element of the police power. Thus, in *Lawton* v. *Steele* (*7*), the Supreme Court noted that the police power of a State ". . . is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay . . . , the slaughter of diseased cattle; the destruction of decayed or unwholesome food. . . ."

But what if the existence of a health hazard is subject to dispute? May it be summarily abated, without compensation and without a hearing? This question confronted the Supreme Court several years later in *North American Storage Co.* v. *Chicago* (*8*), where the validity of an ordinance of the city of Chicago authorizing meat and food inspectors to enter business premises and "forthwith seize, condemn and destroy any . . . putrid, decayed, poisoned and infected food" was challenged.

The plaintiff, a cold storage company, refused to yield 47 barrels of poultry, which inspectors claimed were subject to destruction under the ordinance, and contended that the attempt to seize, condemn, and destroy the poultry without a judicial determination of the fact of its condition was a violation of the due process clause of the 14th amendment. The Court rejected this contention in the most positive language, and stated (*8a*):

> We are of the opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based on 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.

But, the Court continued, this did not deprive the owner of his day in court. The determination of the seizing officers was not conclusive, and the party could have his hearing *after* the seizure. (The fact that no health emergency was present and the food could have been kept in cold storage without a deterioration did not, in the Court's judgment, establish a basis for requiring a preliminary hearing. Cf. *9*.) At such a hearing, the Court noted, those who destroyed the property "can only successfully defend if the jury shall find the fact of unwholesomeness." If the jury did not so find, the owner would be entitled to compensation for the property wrongfully destroyed.

While the seizure and destruction of property, where necessary to protect the public health or safety, is thus not violative of constitutional protections, is State action for this purpose that requires the expenditure of private funds similarly within the ambit of permissible action? The answer to this is that legislation that is otherwise reasonable does not necessarily become unreasonable because it may require the repair, improvement, or even the removal of existing property in order to comply with it. The application of this principle to housing is, perhaps, of the most interest to us.

In *Queenside Hills Realty Co., Inc.* v. *Saxl* (*10*), the appellant had constructed a lodging-house in New York City, which at the time (1940) complied with all applicable laws. In 1944, however, New York amended its multiple dwelling law to provide, among other things, that lodginghouses of nonfireproof construction existing prior to enactment of the amendment should comply with certain new amendments, including installation of an automatic wet-pipe sprinkler. Appellant sought to enjoin the enforcement of these provisions as violative of the due process clause of the 14th amendment, contending that the building did not constitute a fire hazard or a danger to its occupants, that it had a market value of only $25,000, that the cost of complying with the law would be $7,500, and that such compliance would be of neligible benefit.

The Supreme Court swept these arguments aside, and held (*10a*):

Protection of the safety of persons is one of the most traditional uses of the police power. Experts may differ as to the most appropriate ways of dealing with fire hazard in lodging houses . . . But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. . . . But in no case does the owner of property acquire immunity against exercise of police power because he constructed it in compliance with existing laws.

The police power may also be used to establish standards for habitable dwellings, which are in keeping with "civilized living." Thus, in *City of Louisville* v. *Thompson* (*11*), the city adopted an amendment to its "Minimum Standards for Habitable Buildings," which required that every dwelling unit be equipped with an inside bathroom, including a toilet, lavatory basin, and bathtub or shower, and also that each kitchen sink, lavatory basin, bathtub, and shower be connected to hot and cold waterlines, with water-heating facilities. The ordinance was attacked by various property owners as a violation of the due process clause.

Rejecting this attack, the Kentucky Court of Appeals held that the purpose of the ordinance was clearly related to the protection of the public health, safety, morals, and welfare, and was reasonable in its effect, stating (*11a*):

A separate dwelling house without decent bathing facilities is just as conducive to disease and delinquency as a flat in a tenement house without such facilities. In the great thickly populated cities of a country that prides itself as the most civilized in the world, there is no longer any reason for the continued existence of such conditions. The legislative authority of the City of Louisville in the exercise of its police powers has determined that the $800 to $1,000 per dwelling unit estimated by the appellees as the probable cost of complying with the building code can be better afforded by the individuals directly affected

than the public can afford the unassayable results of submarginal sanitary facilities.

The court went on to quote with approval from *Berman* v. *Parker* (*12*):

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which to turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Illustrating the extent to which the reasonableness of legislative judgments in this area is subject to judicial review, however, a year after the decision in *City of Louisville* (*11*) the Supreme Court of Rhode Island held an almost identical ordinance of the city of Providence invalid in *Early Estates Inc.* v. *Housing Board of Review* (*13*), saying:

> The requirement of those [hot water] facilities is not necessarily related to sanitation or public health and welfare, nor is such requirement reasonably necessary to make dwellings and dwelling premises fit for human habitation.

The growth of cities, the crowding of populations, and the increased awareness of the State's responsibility for the living conditions of its citizens, as illustrated in *City of Louisville* and *Berman*, all have combined to create problems of the enforcement of minimum standards, which have forcefully taught that the right to inspect dwelling places is of indispensable importance to the maintenance of community health. An obvious and essential condition for such inspections is a properly drafted inspection statute, which must be clear in its requirements and impose a duty to admit the inspecting officer. The importance of meeting these requirements is illustrated by the following two cases.

In *City of St. Louis* v. *Evans* (*14*), section 14 of the city ordinance empowered designated city officials to enter any premises between 9 a.m. and 6 p.m. for the purpose of making inspections and provided: "Should such right of entry be denied in any instance such official may invoke the aid of the police department to enforce such right."

The defendant was charged with a violation of this provision for refusing to permit inspection of his roominghouse by city officials who suspected that he was operating without a permit. The defendant persisted in his refusal even after a policeman was summoned. In dismissing the charge under the quoted section, the court declared (*14a*):

> We think it is clear that Section 14 imposes no duty to admit such officials as are referred to therein and that it does not purport to prohibit a denial of such right of entry. The section purports to be a mere grant of the right of entry to the officials mentioned, when necessary in the performance of duty and it purports to tell the official what to do if such right of entry be denied. It does not make the act of denial an offense, nor impose such a duty upon anyone to grant permission so as to make such a denial a violation of this particular section. . . .

The defendant, however, was found guilty of violating section 36 of the ordinance, which made it a misdemeanor to "hinder, obstruct, resist or otherwise interfere with any city officer in the discharge of his official duties."

In *District of Columbia* v. *Little* (*15*), the Supreme Court of the United States held that the mere refusal to unlock a door without any threat or use of force did not constitute a violation of a District of Columbia regulation prohibiting any person from "interfering with or preventing any inspection." As the Court observed, the regulation did not impose any duty on homeowners to assist health officers to enter and inspect their homes. It does not even prohibit 'hindering' or 'refusing to permit any lawful inspection' . . ."

An enforceable inspection provision, however, presents the question whether the sanitation inspections of a private dwelling without a warrant is prohibited as an "unreasonable search" within the 4th amendment and by the due process clause of the 14th amendment.

The Supreme Court of the United States, in a closely divided decision, held in *Frank* v. *Maryland* (*16*) that a sanitation inspection that is not intended to obtain evidence for a criminal prosecution does not constitute an "unreasonable search" within the constitutional prohibition. (Four justices dissented. Mr. Justice Whittaker joined the opinion of the Court upholding the ordinance in a separate concurring opinion.) The conviction of the householder, who refused to permit inspection of his home by a health inspector who demanded entry with-

out a warrant pursuant to the power of entry provision in a Baltimore ordinance, was therefore upheld.

The facts in the case indicated that a neighbor of the appellant Frank complained of rats in the area. The inspector, after knocking on the appellant's door and receiving no answer, searched the exterior of the premises and found a large pile of rotting matter containing rodent feces. During this inspection, the appellant came out of the house and refused to let the inspector enter. A similar refusal was made the next day, whereupon appellant was arrested, tried, and convicted.

Mr. Justice Frankfurter, speaking for the Court, held that from the historical background of the fourth amendment, two protections emerged. 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 the law."

The Court rejected this claim of constitutional right to privacy, declaring that Frank "cannot properly resist" being required "to act in a manner consistent with the maintenance of minimum community standards of health and well being, including his own. The constitutional 'liberty' that is asserted in the absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place" (*16a*).

The second, and immediately related protection, is self-protection, described by Mr. Justice Frankfurter as 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, liberty or property." Thus, reasoned the Court, it is only the search for evidence of criminal action, designed for use in a criminal prosecution which is "unreasonable" if made without a warrant.

The purpose of the inspection was merely to determine whether Frank was violating the city code, and, if so, to notify him to remedy the conditions. Although the failure to remove the hazards would give rise to a criminal prosecution, the Court emphasized that at the time of the preliminary inspection, "[n]o evidence for a criminal prosecution is sought to be seized." The Court was silent as to when and how such evidence could be obtained.

In *Ohio ex rel. Eaton* v. *Price* (*17*), which came before the Supreme Court in the following year, the homeowner had been convicted and sentenced to jail for his refusal to permit inspection of his home by housing inspectors without a warrant pursuant to the Dayton, Ohio, ordinance. (Section 806–30(a) Code of General Ordinances. Under section 805–83, violations were punishable by fine of up to $200 or up to 30 days in jail or both.) The judgment of the Supreme Court of Ohio upholding the ordinance was sustained by a 4-to-4 decision of the U.S. Supreme Court, Mr. Justice Stewart abstaining.

The four Justices who voted for reversal pointed out that in *Frank* there had been considerable grounds to believe that a nuisance existed, while here the inspectors had not even a suspicion of a violation.

Left unresolved by these decisions was the question whether evidence necessary for a criminal prosecution for failing to remedy violations could be obtained on an inspection made without a warrant. A year later, in *Mapp* v. *Ohio* (*18*), this question was answered—evidence so obtained could not be used. Mr. Justice Clark, speaking for the majority of the Court, held that the exclusionary rule, prohibiting the introduction into evidence in Federal courts of evidence seized in a search made without a warrant in violation of the 4th amendment was applicable to the States under the due process clause of the 14th amendment.

Accordingly, where it is intended to make an inspection of a dwelling as the basis for a criminal prosecution, entry cannot lawfully be required without a warrant and evidence obtained on a search made without a warrant may not constitutionally be used in a criminal prosecution. Clear authority for the issuance of search warrants in health matters exists in only three States: Louisiana (La. Revised Statutes; sections 40:6, 40:51, 40:68); New Jersey (N.J. Statutes Annotated; section 26:3–59); New Mexico (N. Mex. Statutes 1953 Annotated; section 12–3–1).

If search warrants are to be used as a necessary weapon in health programs, legislative action will be required in other States. (Apparently spurred by the *Frank* decision, Texas, on July 16, 1959, passed article 782b of the Texas Penal Law prohibiting the entry of a private dwelling for a health inspection without permission from an adult resident or under a court order issued upon a showing of probable violation of a State or local health law. Evidence obtained in violation of the provision is declared inadmissible in any criminal prosecution.) In this area, England has proceeded on the basis that where the citizen denies entrance to a health inspector, a search warrant is needed to compel entry (*19*).

In addition to inspections, an effective means of maintaining sanitation standards in commercial establishments is the use of business records as the basis for enforcement activity. The following brief discussion of the cases on this subject indicates the broad potential of this approach.

It has long been held that the word "person" in the fifth amendment does not include corporations for the purpose of self-incrimination, so that a corporation cannot resist the production of its records on the ground of self-incrimination (*20*). Neither does the privilege against self-incrimination apply to records which a statute or valid regulation requires to be kept, the theory being that such records are "public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public and for public inspection" (*21*). In this case, the privilege against self-incrimination was denied a druggist, who was required by statute to record all sales of intoxicating liquors.

The fundamental, the Supreme Court said, is that the custodian of "books and papers . . . held subject to examination by the demanding authority . . . has no privilege to refuse production although their contents tend to criminate him" (*22*).

The key modern case on this question is *Shapiro* v. *United States* (*23*) where the Supreme Court, in 1948, held by a 5-to-4 decision that records required to be kept by an individual were not within the protection of the privilege. The defendant was convicted of a violation of the Price Control Act on the basis of records he was required to keep under Office of Price Stabilization regulation. In denying any privilege, the Court declared (*23a*): " . . . the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" (The concept that a business must be affected with a public interest before its regulation can be justified has disappeared from Federal constitutional law. "Every business is affected with a public interest to whatever extent Congress or a State legislature chooses to make it so" *24*.)

The Court had noted (*23b*): "It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself."

Mr. Justice Jackson's dissent, however, saw no such finite bounds to the decision of the majority and he declared (*23c*): "It would, no doubt, simplify law enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, what he was up to. The decision of today . . . invites that eventuality."

Apparently influenced by this dissent, section 81.39 of the New York City Health Code (1959), entitled "Food Establishments; self-inspection and self-inspection records; cleaning schedule," provides in part:

> (a) The owner or person in charge of a food establishment shall either himself be qualified or shall employ a qualified person to make sanitary and food inspection. . . . Such qualified person shall inspect the establishment at least once a month and shall record his findings on a form acceptable to the Department. The record of self-inspection shall be retained at the premises for at least one year and shall be available for inspection by the Department, *but shall not be subject to inspection by others or to subpoena, and shall not be used in, or as the basis for, prosecution.* [Emphasis added.]

Conclusion

This summary discussion emphasizes the basic constitutional principles involved in sanitation programs in order to point out that effective and vigorous enforcement activities can be developed and carried out without offending constitutional protections. An understanding of these limitations is essential, however, in the basic concepts of such activities if the goal of an ordered healthy society is to be achieved without the destruction of individual rights. I think it well, therefore, in this connection to bear in mind the words of Mr. Justice Brandeis (*25*):

> Experience should teach us to be most on our guard when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

REFERENCES

(*1*) Werner, R.: Tammany Hall. Doubleday, Doran, New York, 1928, p. xx.

(*2*) *Boyd* v. *United States*, 116 U.S. 616 (1886); *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Ker* v. *California*, 374 U.S. 23 (1963).

(*3*) *Slaughterhouse Cases*, 83 U.S. 36, 62 (1873).

(*4*) *Hadacheck* v. *Los Angeles*, 239 U.S. 394, 410 (1915).

(*5*) U.S. Bureau of the Census: Summary of governmental finances. 1958, p. 30.

(*6*) *Reduction Company* v. *Sanitary Works*, 199 U.S. 306 (1905); (*a*) 323. To the same effect, *Gardener* v. *Michigan*, 199 U.S. 325 (1905).

(*7*) *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894).

(*8*) *North American Storage Co.* v. *Chicago*, 211 U.S. 306 (1908); (*a*) 315.

(*9*) *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594 (1950).

(*10*) *Queenside Hills Realty Co., Inc.* v. *Saxl*, 328 U.S. 80 (1945); (*a*) 82.

(*11*) *City of Louisville* v. *Thompson*, 339 S.W. 2d 869 (Ky. 1960); (*a*) 872.

(*12*) *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

(*13*) *Early Estates Inc.* v. *Housing Board of Review*, 174 A. 2d 117 (1961).

(*14*) *City of St. Louis* v. *Evans*, 337 S.W. 2d 948 (Mo. 1960); (*a*) 953.

(*15*) *District of Columbia* v. *Little*, 339 U.S. 1, 6 (1950).

(*16*) *Frank* v. *Maryland*, 359 U.S. 360 (1959); (*a*) 360, 366.

(*17*) *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960).

(*18*) *Mapp* v. *Ohio*, 367 U.S. 634 (1961).

(*19*) Waters: Rights of entry in administrative officers. University of Chicago Law Rev 27: 79 (1959). [Discusses the English rule.]

(*20*) *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911).

(*21*) *McClory* v. *Donovan*, 10 N.D. 203, 209, 86 N.W. 709, 711 (1901).

(*22*) *Wilson* v. *United States*, 221 U.S. 361, 382 (1911).

(*23*) *Shapiro* v. *United States*, 335 U.S. 1, (1948); (*a*) 33, (*b*) 32, (*c*) 71.

(*24*) Davis: Administrative law treatise. 1958, sec. 3.09, p. 205. To the same effect, *Olsen* v. *Nebraska*, 313 U.S. 236 (1941); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

(*25*) *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928).